The Public Competition Enforcement Review

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PREFACE

Fittingly, this first edition of *The Public Competition Enforcement Review* coincides with the fifth anniversary of Regulation 1/2003, which overhauled the procedural rules for enforcement of the EU competition rules, abolishing the practice of notifying business agreements to the European Commission, and empowering national competition authorities and courts to apply EC competition rules in their entirety.

The success of the modernised regime is demonstrated by the vast increase in enforcement that it has facilitated: over the past five years, more than 1,000 cases have been pursued on the basis of EC competition rules; while the Commission has adopted 34 decisions imposing fines in cartel cases, and a further 27 decisions enforcing Articles 81 and 82 EC outside the cartel field, the national competition authorities have informed the Commission of more than 300 further envisaged decisions.

This huge increase in enforcement by the national competition authorities has allowed the Commission to prioritise its resource allocation and identify industry sectors for large-scale inquiries. Since the entry into force of Regulation 1/2003, the Commission has undertaken inquiries in the media, gas and electricity, retail banking, business insurance, and pharmaceutical sectors, collecting a wealth of information that has subsequently supported its more detailed assessments in individual cases.

As is apparent from the national chapters of this Review, this redistribution of enforcement jurisdiction between the Commission and the national competition authorities has been largely successful, with a remarkable consistency of approach and decision-making – in only three cases has the Commission needed to submit *amicus* observations in national proceedings to ensure the coherent application of the EC rules. At least some of the credit for this consistency must be attributed to the success of the European Competition Network as a forum for discussion of cases and policy between national authorities. As the number of competition regimes increases, this model might usefully be extended to facilitate international coordination and convergence.

I would like to thank all of the contributors for their support and cooperation in preparing this Review, and the publishing team at Law Business Research for their tireless encouragement and enthusiasm.

Shaun Goodman
Cleary Gottlieb Steen & Hamilton LLP
London, May 2009

Chapter 1

ARGENTINA

*Alfredo O'Farrell & Miguel del Pino**

I OVERVIEW

Over the last century, Argentina has lacked a proper antitrust regime. While the Argentine Congress passed over those years four laws related to antitrust matters, the first three were focused solely upon infringing conduct but did not establish a merger control procedure. This changed with the enactment of Law No. 25,156 ('the Antitrust Law') in 1999, and the case law that has been issued over the last 10 years.

The Antitrust Law prohibits certain acts relating to the production and exchange of goods and services if they restrict, falsify or distort competition, or if they constitute an abuse of dominant position, and provided that in either case they cause or may cause harm to the general economic interest.

Such behaviour or conduct is not unlawful as such, nor must it cause actual damages; it is sufficient that the conduct is likely to, or has the potential to, cause harm to the general economic interest.

The provisions of the Antitrust Law apply to all individuals and entities which carry out business activities within Argentina, and those which carry out business activities abroad to the extent that their acts, activities or agreements may affect the Argentine market (known as the 'effects theory').

There is also a merger control proceeding set out by the Antitrust Law by means of which the companies that meet certain requirements (jurisdictional thresholds) must seek the approval of the economic concentration.

The Antitrust Law created the National Tribunal for the Defence of Competition ('the Antitrust Tribunal') within the scope of the Ministry of Economy, which will be the ultimate antitrust regulator in Argentina. This Antitrust Tribunal will comprise seven members, with a minimum of two attorneys and two accounting professionals in its staff.

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* Alfredo O'Farrell and Miguel del Pino are partners at Marval, O'Farrell & Mairal. The authors would like to thank Matías Giaccardi and Santiago del Río for their assistance in preparing this chapter.

However, 10 years later, the Antitrust Tribunal has not been created. After several diverging precedents, the Argentine Supreme Court ultimately set out a double tier regulator structure in two cases, leaving no room for doubt regarding the enforcement agencies that will analyse antitrust cases until the Antitrust Tribunal is created.[1] This double tier regulator structure follows the prior Antitrust Law.

Under this new interpretation, the regulator that had been created by the former antitrust regulations, that is, the National Commission for the Defence of Competition performs a technical review of the mergers and investigations and issues a recommendation to the Secretary of Domestic Trade of the Ministry of Economy, which is the body that ultimately decides upon antitrust matters. For the purposes of this chapter, this double tier regulator structure will be referred to as the Antitrust Commission.

i Prioritisation and resource allocation of enforcement authorities

In order to perform its purpose, the Antitrust Law provides the Antitrust Commission with several enforcement powers, such as the possibility of summoning witnesses for hearings, examinations of books and documents, the issuance of requests for information to other regulators, the initiation of investigations *ex professo* and the execution of dawn raids with a court order.[2]

The Antitrust Commission is also empowered to reach agreements regarding mergers so as to set out a certain conduct or divestments to be performed by the involved parties, or to mitigate the fine in certain antitrust infringement cases.

In the later years, the lack of resources and efficient manpower has considerably diminished the output of the Antitrust Commission. These budget restraints have forced the Antitrust Commission to reduce its staff, with a subsequent drop in the output of its work. This has resulted in the creation of certain 'stop-the-clock' interpretations by the Antitrust Commission so as to delay the issuance of its resolutions.

ii Enforcement agenda

One of the first steps that must be taken is the long-delayed creation of the Antitrust Tribunal. Ten years have passed and the proper regulator set out by the Antitrust Law has not even been created. While the Supreme Court has provided a solution to the matter of jurisdiction, it must be noted that it is an interim solution, until the Antitrust Tribunal is appointed.

In order to counteract the current lack of staff and funds that the Antitrust Commission is experiencing, a fee for mergers could be implemented in order to provide the regulator with its own income source, which could be well spent on the hiring of more professionals.

Regarding the Antitrust Commission's investigations, the enforcement of a leniency programme could help in the analysis of antitrust infringement cases. Under

1 Sentences issued by the Supreme Court, in r*e Credit Suisse First Boston Private Equity Argentina II and Recreativos Franco s/ apel. resol. CNDC.*

2 Section 24 of the Antitrust Law.

the current Antitrust Law, there would be no benefit for a member of a cartel to come forward and denounce that activity, other than to stop the accrual of the fine.

Should there be a leniency programme by means of which these informants were rewarded with a reduction of their fine or their acquittal, the Antitrust Commission would be able to gather information from inside sources, instead of using dubious evidence, as has happened in other cases.[3]

II CARTELS

i Significant cases

Cartel cases in Argentina have generally involved the following conduct: (1) the fixing of prices or production quotas; (2) the distribution of market shares; (3) the agreement between different bidding parties in public bids or (4) the transfer of competitive sensitive information with the sole purpose of restricting competition.

According to the Antitrust Law, in the event that an infringement is proved, the cessation of the infringing conduct will be ordered and a fine could be imposed on the perpetrators, which can range from AR$10,000 to AR$150 million.

The value of the fine is calculated taking into account the loss incurred by the affected parties, the benefit that was obtained by the cartel members and the value of the assets involved by the members of the cartel. The fine can be doubled in the event of a repeat offence.

Cement case[4]

The most renowned case regarding cartels in Argentina is the *Cement* case, in which six major cement producing companies were accused of staging a nationwide market allocation framework for almost 20 years. The Antitrust Commission's investigation began in 1999, when a disgruntled employee supposedly revealed to a newspaper that the cement companies were exchanging information and dividing their market shares in agreement. While the source of the article was never revealed, it was used as a starting point for the Antitrust Commission's investigation.

According to the findings of the Antitrust Commission, the alleged exchange of confidential detailed market information was performed via the Association of Portland Cement Manufacturers ('APCM'). After a raid on the APCM premises, the Antitrust Commission found records of real time software that was used in order to exchange current commercial records of the cement companies.

This finding as well as the evidence of meetings between representatives of four of the companies in hotels led the Antitrust Commission to state the existence of a cartel which exchanged confidential and market sensitive information, as well as engaging in price fixing in certain areas.

3 Such as the *Cement case*. Please refer to Section II.1 for further information on this case.

4 Decision No. 513, issued by the Antitrust Commission on 25 July 2005. Available at www.mecon.gov.ar/cndc.

The fine was imposed on 25 July 2005 by the Antitrust Commission and the Secretary of Domestic Trade for a total amount of AR$309,729,289 and was confirmed by an appellate court on 26 August 2008. Four cement companies and the APCM were fined.

These proceedings are currently under review by the Supreme Court.

Liquid Oxygen case[5]

This investigation was initiated in 2001 by the Antitrust Commission due to certain complaints that hospitals had filed, in which they stated that they were unable to acquire liquid oxygen for medical purposes from other suppliers than those that they had already contracted with via public biddings. The remaining competitors in the market would always submit worse offers than the company that the hospitals had hired.

After performing several raids on the liquid oxygen companies and obtaining documentary evidence, the Antitrust Commission unveiled an alleged cartel that had been coordinating bidding prices in public biddings for liquid oxygen.[6]

The four members of this alleged cartel had, allegedly, actively arranged between themselves the amounts and conditions of their offers in each bidding, so as to determine who would be the supplier for each public hospital. This was considered to be a division of the market among competitors, which had lasted for five years.[7]

On 8 July 2005, the companies that were involved in the cartel were fined a total of AR$70.3 million.

This case is currently under review by the Court of Appeals.

Sand Producers case[8]

The *Sand Producers* case was one of the first cartel investigations sanctioned in Argentina, back in 1986. A sand producer filed an accusation against some of its competitors claiming the existence of a cartel in the sand market in Buenos Aires. According to the accusation, it consisted of a scheme among sand producers in the Buenos Aires area that had the backing of naval sand transport unions.

The cartel imposed production quotas that were agreed by the sand producers and the above mentioned unions. If one of the competitors in that market decided not be a part of the cartel, the transport unions would block their transportation.

The Antitrust Commission was able to prove that there had been an increase in prices during the period of operation of the cartel and considered that this was sufficient to prove harm to the general economic interest. The sand producers and the transport unions were both fined.

5 Decision No. 510, issued by the Antitrust Commission on 8 July 2005. Available at www.mecon.gov.ar/cndc.

6 Section 2, Subsection d) of the Antitrust Law specifically prohibits the coordination or agreements between competitors in public biddings.

7 Section 2, Subsection c) of the Antitrust Law sets out that the division of zones, markets, clients and suppliers constitutes an infringement of the law.

8 Secretary of Domestic Trade Resolution No. 442, 27 October 1986.

YPF San Nicolás case[9]

The *YPF San Nicolás* case was initiated by a claim filed before the Antitrust Commission by means of which a gas distributor, Baro Gas, stated that YPF Gas refused to continue the provision of liquid gas ('GLP'). It explained that after the acquisition of YPF Gas by Repsol YPF, Mr Cosentino was appointed by YPF Gas as its exclusive distributor in the city of San Nicolás. Mr Cosentino was a competitor of Baro Gas.

The other producer of liquid gas that performed sales in the city of San Nicolás was Total Gaz Argentina SA ('Total'). The distributor of Total within the city of San Nicolás was Riva Gas SRL ('Riva').

Baro Gas further claimed that YPF Gas offered to sell liquid gas through Mr Cosentino and not directly as it used to do. Baro Gas stated that it did not accept to buy from Mr Cosentino and that YPF Gas, by exercising its dominant position, prevented Baro Gas from buying liquid gas from other companies (e.g. Total).

However, the Antitrust Commission concluded that Baro Gas had access to the liquid gas market in the city of San Nicolás. It stated that the alleged cartel was not evidenced since there were convincing elements to state that the claimant was able to buy liquid gas after it was removed by YPF Gas as its distributor. The cartel accusation was dismissed.

Shell Totalgaz case[10]

In the *Shell Totalgaz* case, the Antitrust Commission stated that a 'hard cartel' was harmful to the general economic interest without the necessity of proving any harm. It applied a 'per se rule', while the Antitrust Law provides for a 'rule of reason'.

These proceedings originated from a claim filed by a distributor of liquid gas who stated that after switching suppliers, the new supplier refused to sell to him due to an agreement with its competitor in order to divide the clients in the city of Posadas.

Although the Antitrust Law specifically states that antitrust conduct is not illegal per se, as the harm to the general economic interest must be evidenced; in this case the Antitrust Commission did not apply a rule or reason and interpreted that the conduct was prejudicial to competition. A fine of AR$250,000 each was imposed on Shell Gas SA and Totalgaz Argentina SA.

The Federal Court of Appeals for the City of Posadas revoked the decision for the reasons detailed in the following subsection.

ii Trends, developments and strategies

In the *Shell Totalgaz* case, the Federal Court of Appeals for the city of Posadas ('the Court of Appeals')[11] decided that the procedure for deciding the sanction had not been duly performed and further detailed that the Antitrust Commission did not follow a real competitive analysis in order to evaluate whether illegal conduct had been committed. It

9 Decision No. 603, issued by the Antitrust Commission on 21 October 2008..

10 Decision No. 529, issued by the Antitrust Commission on 2 October 2006.

11 Sentence issued by the Federal Court of Appeals of Posadas in docket *Shell Gas SA, Totalgaz Argentina S.A. s/ recurso de Apelación*, 30 May 2008.

first stated that the Antitrust Commission did not detail the relevant market in which the participants offered their products and therefore it failed to analyse the real competitive effect of the conduct. Additionally, it pointed out that the evidence gathered by the Antitrust Commission was not sufficient to decide the imposition of a sanction.

The lack of general analysis of the testimonies, according to the Court of Appeals, showed that there was not enough evidence to demonstrate the existence of a collusive agreement that may have harmed competition.

Based on the misuse of the evidence by the Antitrust Commission, the Court of Appeals decided that it was not necessary to review the possible and potential harm to the general economic interest. It decided to overrule the decision of the Antitrust Commission.

This case created a challenge for the Antitrust Commission in analysing information correctly. The Antitrust Commission's staff has to improve the way in which the procedural rules of the criminal procedure code are applied.

Additionally, there is currently no leniency programme in Argentina. Section 36 of the Antitrust Law sets out that until the issuance of the final resolution in an antitrust infringement case, the alleged perpetrator can reach an agreement in order to immediately cease or modify its infringing conduct. While this is not a specific leniency provision, it could serve as grounds for a lessening of the fine.

However, this is only a midway solution. The only benefit that an infringing party could obtain would be to stop the accrual of the fine. However, this would not have retroactive effects, meaning the party which comes forward would inevitably have to pay a fine.

This impossibility of avoiding the payment of the fine for the informant is an important deterrent that is seriously reducing the Antitrust Commission's chances of obtaining inside information on this type of conduct.

The Antitrust Law sets out a five-year statute of limitations term for the initiation of the procedures regarding antitrust infringement cases.

iii Outlook

The lack of a leniency programme is seriously undermining the Antitrust Commission's ability to discover and punish cartel activities. There is no incentive for any of the involved parties to come forward and denounce the other perpetrators, since there would be no reduction in the setting of the fine.

A leniency programme could grant infringing companies the possibility of supplying information to the Antitrust Commission with the outcome of better results in its investigations, since it would not only have at its disposal the resources already set out by the Antitrust Law (such as witness testimonies or dawn raids), but also insider information from co-conspirators.

A leniency programme could also grant certain companies a way out of cartels into which they are drawn, not because of financial reasons, but for survival itself, since there are situations in which the companies with the greater market share force their smaller competitors into these kind of activities.

Another issue to take into account is that following the enactment of the Antitrust Law, the competence of the Court of Appeals of the City of Buenos Aires to resolve antitrust matters was not clear as the Executive Power originally rejected the competence of the Commercial Courts and granted competence to the Federal Courts. Decree-law No. 89/01 grants competence to the Federal Court of Appeals on Civil and Commercial Matters for cases that take place in the city of Buenos Aires.

Currently, there is uncertainty as to who is the competent Court of Appeals to resolve decisions of the Antitrust Commission and the Secretary of Domestic Trade. The competence has been accepted by both the National Court of Appeals on Criminal Economic Matters ('the Criminal Court') and two of the three Divisions of the Federal Court of Appeals on Civil and Commercial Matters ('the Federal Court'), as one Division has ruled against its competence.

Finally, the outcome of the *Liquid Oxygen* and *Cement* cases, which are being reviewed by the Supreme Court and the Federal Court of Appeals on Civil and Commercial Matters, could provide a greater degree of definition regarding the setting of fees in cartel cases.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Section 4 of the Antitrust Law sets forth that a person has a dominant position when: it is the only buyer or supplier of a given product within the market; when, without being the only supplier or buyer, it lacks of substantial competition; or it is able to determine the economic feasibility of competitors because of a certain vertical or horizontal degree of integration.

Section 5 establishes three relevant factors to determine the existence of a dominant position: the degree of substitution for a product or service; the existence of regulatory barriers; and the extent to which a company can unilaterally set prices or restrict output.

The Antitrust Commission also considers the market share to be an important factor in determining whether there is dominant position or not.

Section 1 of the Antitrust Law prohibits the abuse of a dominant position. Section 2, on the other hand describes some vertical and exclusionary practices that could violate Section 1, but that are not unlawful per se; they must have the likelihood to cause harm to the general economic interest.

Since the beginning of the 1980s, antitrust authorities have been investigating different types of abuse of dominant position. Additionally, in the view of antitrust authorities, the dominant position may be abused by engaging in anti-competitive conduct such as predatory pricing, fixing retail prices, tied-in sales, blocking access to essential facilities and discriminatory pricing. However, no significant sanctions were imposed until 1995 when a local petroleum company received a significant sanction for abuse of its dominant position by discriminating prices in the liquid gas market.

Please find below an explanation of the different cases that have been reviewed in the past.

i *Significant cases*

YPF case[12]

The investigation was initiated due to increases in the price of liquid petroleum gas ('LPG'), an essential source of energy for many residences in Argentina. The relevant market was determined to be the bulk supply of LPG. The Antitrust Commission determined that Yacimientos Petroliferos Fiscales ('YPF'), a local petroleum company, had a dominant position in all phases of LPG production and supply. It also found that market entry barriers were high and that imports were not a constraint on domestic producers.

The conduct assessed by the Antitrust Commission was YPF's practice of exporting a high amount of LPG at prices that were lower than in Argentina. Further, YPF's export contracts prohibited the re-importing of LPG to Argentina. The Antitrust Commission concluded that this conduct was harmful to the general economic interest and ordered YPF to cease its price discrimination between the domestic and export markets and to eliminate the prohibition of re-importing LPG. Additionally, it imposed YPF a fine of AR$109,644,000. The decision was upheld by the Supreme Court of Argentina.[13]

Monsanto case[14]

The National Court of Appeals for Civil and Commercial Federal Matters ('the Court of Appeals') revoked a decision by the Antitrust Commission that decided to investigate Monsanto Technology LLC and Monsanto Argentina SAIC ('Monsanto') for the potential infringement of the Antitrust Law in Argentina due to the enforcement by Monsanto of certain patent rights outside Argentina. According to the Antitrust Commission, Monsanto abused its dominant position in the market of soya beans as it owned, outside Argentina, the 'Round Up Ready' patent. On 30 September 2008, the Court of Appeals accepted that Monsanto had a constitutional right to petition before judicial authorities and that said action could not be considered as anti-competitive conduct in Argentina.

The Court of Appeals decided that there were no elements that would evidence that Monsanto's legal actions had been baseless. The Court of Appeals expressly mentioned the 'Noerr-Pennington' doctrine developed in the United States[15]. Further, the Court of Appeals stated that there was no evidence that Monsanto had abused its right to petition before foreign judicial authorities.[16]

12 Decision No. 314, issued by the Antitrust Commission, 19 March 1999.

13 Fallos 325:1702.

14 Sentence issued by Chamber III of the National Court of Appeals for Civil and Commercial Federal Matters on 30 September 2008, in r*e Monsanto Company s/ Apel. Resol. Comisión Nac. de Defensa de la Competencia. Acumulada:* case No. 638/08*, Monsanto Argentina SAIC s/ Apel. Resol. Comisión Nacional de Defensa de la Competencia, case* No. 13.676/07. Published in elDial - AA4D7A.

15 *Noerr v. Eastern Railroads*, 365 US 127 and *Pennington v. United Mine Workers*, 381 US 657.

16 This case is still under the analysis of the Supreme Court. The Antitrust Commission requested the review of the decision from the Court of Appeals.

Movicom Bellsouth case[17]

The plaintiff was a company that offered mobile phone services. The defendant provided basic telephone services and had a licence for offering mobile phone services and telecommunications services in certain areas of Argentina.

The plaintiff argued that the defendant had launched a programme that infringed the Antitrust Regulations which consisted of a 50 per cent discount for certain phone calls, only when the clients owned or were willing to acquire a fix line provided by the defendant; were subscribed or were willing to subscribe to the long distance call services provided by the defendant; and owned or were willing to acquire two mobile phone lines of a company controlled by the defendant.

The Antitrust Commission considered that the case involved a practice known as 'package of products'. It dismissed the claim as it considered that the practice did not show any predatory pricing practice from the plaintiff, although it held a dominant position in the market.

Impsat case[18]

In this case the Antitrust Commission investigated conduct that involved allegations of predatory pricing. The plaintiff was a provider of data transmission services and alleged that one of the incumbent's land line services was pricing its competitive services below cost. The main issue that was assessed in this case was the calculation of the relevant cost. The Antitrust Commission had to decide if the cost of operating the incumbent's land line network should be attributed to the cost of the data transmission service. The Antitrust Commission took a conservative view and excluded those network costs from the calculation of the relevant cost. It concluded that the incumbent's prices were not predatory and dismissed the case.

ii *Trends, developments and strategies*

Although the Antitrust Commission has dealt with a lot of dominance cases in the past, very few resulted in sanctions. As the Antitrust Law allows private parties to file complaints before the Antitrust Commission, the agency is obliged to consider them. Most of the claims filed before the Antitrust Commission alleging abuse of dominance did not evidence a potential harm to the general economic interest as provided in Section 1 of the Antitrust Law and, therefore, were not considered as infringement of the antitrust regime.[19]

From a practical point of view, it is advisable to terminate any practice that abuses a dominant position immediately after comes to light. One of the elements that the

17 Decision No. 470, issued by the Antitrust Commission on 27 October 2004.

18 Decision No. 442, issued by the Antitrust Commission on 20 February 2004.

19 Several cases have set a precedent in this regard before the Antitrust Commission, e.g., *La Casa del Gráfico S.R..L. c. Rich Klinger* (20 February 1986), *HE Reynal c. Cervecería y Maltería Quilmes SA* (12 June 1987), *Diario Los Andes Hermanos Calle SA c. Prensa del Oeste SA* (12 July 1988), *Tejeduría del Chubut SA c. Sniafa SA* (4 May 1999), *SADIT c. Massalin Particulares SA y otra* (4 December 2000), *Odima SA c. Repsol YPF* (4 January 2001).

Antitrust Commission takes into account for the accrual of the fine is the 'illegal' profits obtained, therefore the sooner this conduct is terminated the lower the fine.

In case an infringement proceeding has already been initiated, Section 36 of the Antitrust Law could provide the company with a bit of leverage by means of which it can negotiate with the Antitrust Commission the termination of the conduct.

The Antitrust Law sets out a five-year statute of limitations on these kinds of conduct.

iii Outlook

The Antitrust Commission should increase efficiency in conducting investigations and it must consider implementing fast-track procedures regarding complaints that clearly do not imply an abuse of dominant position in violation of the Antitrust Law. This will benefit private parties by giving them legal certainty when they face an infringement proceeding.

The Antitrust Commission has been contradictory in analysing cases that imply or do not imply abuse of a dominant position and has often used the concept of market power to sanction conduct that also meant an abuse of dominant position. In the near future it should have to clarify its decisions and the differences between the two concepts.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Before the enactment of the Antitrust Law in 1999, interaction between the Antitrust Commission and the sectorial regulators was scarce. That changed with the enactment of the Antitrust Law since the law expressly made all sectors subject to its rules.

Section 16 of the Antitrust Law is a specific rule that applies to mergers in regulated sectors. Said rule states that the Antitrust Commission must require from the relevant regulator an opinion on the transaction concerning its impact on competition or its compliance with the applicable regulatory framework.

Further, according to Section 24 of the Antitrust Law, the Antitrust Commission is empowered to: conduct market investigations; promote the study of competition; provide an opinion on competition in respect to laws and regulations; and issue general or specific recommendations.

Over recent years, the Antitrust Commission has focused on several markets, initiating preliminary investigations and ordering injunctions in those cases in which it has considered that there could be a distortion in competition.

i Significant cases

The Antitrust Commission has conducted several market investigations and has also issued some pro-competitive recommendations. However, it is important to highlight that many market investigations started more than 10 years ago and have not yet been finalised.

Telecom and Telefónica preliminary diligence[20]

The most recent preliminary diligence was initiated over the highly publicised acquisition of a participation over the controlling shareholder of the Telecom Italia by the Telefonica Group. Both groups are the main telecommunication operators in Argentina, with a significant market share, since for many years they were the only competing operators in Argentina.

The Antitrust Commission opened an investigation in 2007 and appointed official representatives of the body in the companies under analysis in order to determine if the transaction resulted in an economic concentration.

After a series of reports from these official representatives and the analysis of the Board of Directors of Olimpia (controller of Telecom Italia), the Antitrust Commission considered that the transaction was an economic concentration that should have been notified pursuant the settings of the Antitrust Law. The Antitrust Commission based this decision on a new interpretation of control, based on the potential knowledge of a competitor of its rival's activities. This resolution is currently under appeal.

The timing of the resolution was almost simultaneous to the issuance of an injunction against Telecom Italia ordering that company not to exercise certain calls that would have increased its shareholdings in the local Telecom subsidiary (the other significant shareholder is a local Argentine group).[21]

Distribution of TV programmes market investigation[22]

In February 2007, the Antitrust Commission issued its report on the market of distribution of TV programmes, which focused on the vertical integration between the suppliers of content suppliers and television system operators. The provision of football related content was considered a key issue of the investigation, due to the audience that is lured by that sport and was therefore considered as a market on its own.

The Antitrust Commission indicated that agreements to lessen competition among television system operators that operate in the same relevant market are particularly harmful to competition, since they increase the monopoly power of those operators and this can lead to an increase in the price that they charge their users or to a reduction in the variety of their content.

The Antitrust Commission mentioned that vertical agreements between television content suppliers and television system operators are in principle harmless from a competition point of view but, however, it explained that their potential anti-competitive effects appear in those situations in which there is a restriction to competition in one of the industry segments. The Antitrust Commission further expressed that another potentially anti-competitive effect of vertical agreements between TV content suppliers

20 Resolution on the Preliminary Diligence No. 29, issued by the Antitrust Commission on 9 January 2009.

21 Injunction issued on the Preliminary Diligence No. 29 by the Antitrust Commission on 29 December 2008.

22 Antitrust Commission, 'Competition Problems in the Distribution of Television Programmes in Argentina', February 2007.

and television system operators appears when those agreements help to extend the supplier's market power from the wholesale market to the retail market.

The Antitrust Commission also pointed out some regulatory implications. It stated that the problems brought about by the existence of natural monopolies in the provision of television content and services cannot be solved by means of the Antitrust Law since their solution generally involves the need to regulate prices and provision terms directly. However, the Antitrust Commission also stressed that certain interventions by the Antitrust Authority can be useful; for example, the prohibition to discriminate price among customers, the obligation to give access to essential facilities, the prohibition to sell certain television content in block, and the prohibition to fix resale prices regarding certain television content.

ii Meat market investigation

After the initial investigation, it was found that the offer and demand of meat was being distorted as a result of the behaviour of the intermediaries (consignees). Furthermore, possible collusive behaviour among consignees was detected, by means of possible agreements, and the fixing and manipulation of price. One of the specific practices referred to by the authorities were the so-called 'ear sales', 'particular sales' or 'direct sales'.

The Antitrust Commission issued a preliminary injunction[23] and ordered Mercado de Liniers SA, on its role of responsiblity for the administration of the meat market, to refrain the consignees from performing the so-called 'ear sales' or 'particular sales' or 'direct sales' or any other particular agreement or consented practice in order to sell the product or coordinate the market's demand and offer.

iii Rounded iron market investigation[24]

The Antitrust Commission initiated a market investigation due to the increase in the price of rounded iron. It explained that the factors that determined the iron price increase were the increase of the inputs, the increase in China's demand and the high rate of use regarding industry's capacity.

It was also identified that Acindar (the main producer) was developing a distribution network for its products that increased the vertical integration in this market and would result in vertical restrictions. Considering the high entry barriers and low number of competitors, the Antitrust Commission stated that the development of said distribution network could create competition concerns.

The Antitrust Commission decided to initiate separate proceedings in order to perform a price follow-up in the round iron local market and monitor the reorganisation process of Acindar's distribution channels.

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23 Preliminary injunction issued by the Antitrust Commission on 17 March 2006 in *re Mercado de Hacienda de Liniers s/ Investigación de Mercado* (C. 1087).

24 Opinion No. 511, issued by the Antitrust Commission on 8 July 2005, in *re Production and distribution of rounded iron for construction* (C. 1014).

iv Pro-competitive recommendation retail petrol price

The study was focused on the vertical relationships between the refiners and retailers. The majority of the petrol retailers were independent but were parties to long term supply agreements (more than 11 years in most cases). This fact, actually, effectively integrated the retailers with their supplier.

The Antitrust Commission found that this integration comprised a barrier to entry. Its recommendation was to limit the duration of new supply agreements to five years. Further, it also recommended limiting the producers to owning only 40 per cent of their retail network.

v Pro-competitive recommendation compressed natural gas

The recommendation involved the sale of compressed natural gas ('CNG') for cars; the use of CNG for cars is common in Argentina.

In its report to the gas regulator, the Antitrust Commission indicated that YPF and Petrobras operated a significant number of retail stores for CNG and controlled 40 per cent of natural gas production in Argentina and an equal percentage of retail sales.

The Antitrust Commission indicated that these vertically integrated companies could be engaged in various anti-competitive practices: discrimination in prices or service against non-integrated retailers; refusal to supply independent retailers; and the imposition of minimum resale prices, limiting intra-brand competition.

vi Interaction with regulators and intervened markets

The Antitrust Law sets out that in merger control cases in which there are companies that perform activities that are regulated by a governmental body, the Antitrust Commission must request the opinion of that regulator prior to the issuance of its own resolution on the merger.[25]

On 9 February 2007, the Antitrust Commission rejected[26] the proposal of Petrobras Energía SA ('Petrobras') to divest its participation in Transener SA ('Transener') to EP Primrose Spain SL ('EP'). Transener is a utility company devoted to energy transmission across Argentina.

The Antitrust Commission requested ENRE's opinion and the regulator pointed out that: the participation in Transener of an investment fund with the 50 per cent of the capital stock required that the remaining 50 per cent of the capital stock must be held by a shareholder with certain technical and operative characteristics that were not met by EP; and that at least part of the shareholders of Transener must have certain know-how and experience in the activity and must also have the prospect of staying in the business for terms compatible with the maturing periods of the public services involved.

The Antitrust Commission stated that although the opinions of the regulatory agencies are not binding, the opinion of the regulatory agency prevailed as the transaction

25 Section 16 of the Antitrust Law.

26 Decision No. 588 issued by the Antitrust Commission on 9 February 2007.

involved a public service. The Antitrust Commission's decision was upheld by the Court of Appeals.[27]

In another important case, the Antitrust Commission rejected the claim from the Confederation of Rural Associations from Buenos Aires and La Plata ('CARBAP') against wheat exporters. CARBAP accused the main seed export companies of fixing the buying price of wheat.

According to the Antitrust Commission, the government is heavily involved in the wheat market due to the economic crisis that Argentina experienced during 2001. The federal government intervened through several rules and regulations that restricted the commercialisation of wheat and aimed to prevent an increase of the price of flour in the Argentine market. 'The intervention in the wheat chain of value by the federal government was framed within the price stability policies performed by the federal government', the Antitrust Commission pointed out.

The Antitrust Commission claimed that it cannot sanction anti-competitive practices that are generated as a consequence of federal government regulations that have the specific target of protecting the general economic interest.

vii Trends, developments and strategies

The trend of the Antitrust Commission in infringement cases in regulated industries is not to investigate so vigorously. Although parties that perform activities in regulated sectors must comply with both the regulatory and antitrust rules, it seems that the Antitrust Commission is not attracted to act in regulated markets.

It is important to note that the Antitrust Law provides the Antitrust Commission with complete jurisdiction in regulated sectors. This is an advantage that the Antitrust Commission has and it should be used to fulfil its duties.

viii Outlook

The Antitrust Commission should consider to deeply investigate infringement cases in regulated sectors, using all the tools provided by the Antitrust Law.

The mechanism of communication and interaction with regulatory agencies should be further developed and strengthened. Although communication seems to be working in mergers, there is relatively little interaction in infringement cases.

Finally, regulated sectors could be a successful source of important dominance cases and cartel cases.

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27 Sentence issued by Chamber III of the National Court of Appeals for Civil and Commercial Federal Matters on 21 June 2007, in *re Petrobras Energía S.A. y otro s/ apel. resol. Comisión Nac. Defensa de la Compet.*, case No. 2.341/07.

V CONCLUSIONS

i Pending cases and legislation

As mentioned before, case law regarding antitrust issues in Argentina is very recent and several matters are still to be analysed by the courts.

The resolution of the *Cement* case and the *Liquid Oxygen* case will provide a guideline for the setting of fines in cartel cases, as well as the manner in which the investigations will have to be performed. However, the Antitrust Commission must improve the application of procedural rules.

The resolution of the *Monsanto* case will also be useful in order to determine the limits of government investigations and accusations. Should the Supreme Court uphold the Court of Appeals' ruling, this would be a landmark case regarding the right to petition under the 'Noerr-Perrington' doctrine and the impossibility of the government to use the antitrust regulator as a political wedge.

Leniency rules are the key element that Argentine legislation lacks. There are rumours that during 2009 the Antitrust Commission will work on a draft proposal of leniency procedures that will be sent to congress.

ii Analysis

The lack of proper resource allocation to the Antitrust Commission has led to a practical downgrade in its functions. A significant decrease of resolutions can be appreciated over the last few years, which has seriously undermined the Antitrust Commission's ability to analyse proceedings within the terms set out in the Antitrust Law.

While this situation might be temporary, it has led to a series of 'stop the clock' interpretations of the Antitrust Law which could be potentially harmful to the analysis of cases and mergers, since it would provide a limitless period of time for the regulator to issue its resolution.

This 'stop the clock' practice has started to be challenged by the parties and said challenges were upheld by courts in different occasions, none of which is the final judgment due to appeals.[28]

If this is the way of things to come, it could lead to the changeover of a once highly regarded technical body into a bureaucratic governmental office. Proper funding and adequate staff would steer the Antitrust Commission away from that course.

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28 Sentence issued by Chamber A of the National Court of Appeals on Criminal Economic Matters on 18 February 2009 in *re Monsanto Arg. SAIC y otro s/ infracción Art. 50 Ley 25.156 (Inc. Conc. 649)* case No. 58,737; sentence issued by Chamber I of the National Court of Appeals for Civil and Commercial Federal Matters on 23 December 2008 in *re JP Morgan Overseas Capital Corporation y otros s/ Apel. Resol. Comisión Nac. Defensa de la Competencia*, case No. 6,279/08.

Chapter 2

AUSTRIA

Franz Urlesberger and Anastasios Xeniadis[*]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

The authorities responsible for competition law enforcement in Austria are the Federal Competition Authority ('FCA'), the Federal Cartel Prosecutor ('FCP', jointly referred to with the FCA as 'the Official Parties') and the Cartel Court. In antitrust proceedings, the Official Parties have no decision-making power. They can only bring antitrust cases before the Cartel Court (as can individuals and other statutory parties). The Cartel Court is the sole body that can impose fines, although not on its own initiative, i.e., an application by at least one of Official Parties is necessary and the fine may not be higher than requested. Decisions by the Cartel Court may be appealed before the Supreme Cartel Court.

Undertakings may also bring cases before the Cartel Court, if they can demonstrate an economic or legal interest in the outcome of the proceedings. In addition, certain public authorities (i.e., the Federal Chamber of Commerce, Regulators, the Federal Chamber of Labour as well as the Presidency of the Austrian Chamber of Agriculture) may initiate antitrust proceedings. As noted, only the Official Parties may apply for fines. Undertakings harmed by the behaviour as well as the authorities mentioned above may only apply to the court to order an (allegedly) illicit behaviour to be terminated or, if already terminated, to declare that a behaviour in the past infringed the cartel prohibition or constituted an abuse of market dominance. Unlike in the US, for example, there are no discovery rules in Austria that enable a private claimant to force a defendant to disclose, either orally or in writing, information he deems necessary in the pursuit of his case. Accordingly, pursuant to the Competition Act, only the FCA and FCP have the authority to demand the production of specific documents and information and the power to perform house searches.

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Currently, the FCA's headcount is 27. This comprises 17 case handlers, of which five are economists. The FCA has stated several times that its resources are limited and that more staff is urgently needed if the authority is to achieve its goals. At the moment, each case handler is responsible for all practise areas of competition law (cartels, abuses of dominance and mergers), though the cases are usually allocated to the individual case handler based on his or her industry specialisation. Thus the FCA lacks the specialisation that characterises, for example, the European Commission. It has to be seen if and when more personnel will be allocated to the FCA.

ii Enforcement agenda

The enforcement agenda of the Official Parties is to a certain extent swayed by public opinion and political pressure. The FCA, in particular, has been very active in the wider energy sector and identified several competition concerns with regard to the pricing policies of major mineral oil companies where a sector inquiry is still ongoing. In its latest annual report (published in February 2009), the FCA concluded that the pricing behaviour of oil companies in Austria raises several questions and requires further examination. Judging from recent press releases and its past focus, it is apparent that the FCA wants to concentrate its attention on anti-competitive behaviour in which end-consumers are harmed. In this respect, the FCA's resource allocation in its ongoing investigation into the gasoline retail market and the sector inquiry on buyer power of supermarkets is indicative of its determination to use its limited resources to further consumer welfare, in particular of end-consumers (in the course of the investigation into the gasoline retail sector, the FCA built up an extensive data base covering some 1,700 gasoline stations). A number of other high-profile cases of the FCA (e.g., elevator cartel case, driving school cartel, etc.) underlines this determination – a sea change with regard to this focus is not to be expected in the foreseeable future.

II CARTELS

i Preliminary remarks

The main sources of Austrian competition law are the Cartel Act 2005 ('the Cartel Act') and the Austrian Competition Act ('the Competition Act'). Competition law provisions are also set out in the Neighbourhood Supply Act (see also Section III (i), *infra*). Though the Cartel Act itself does not contain any criminal law provisions, Section 168b of the Austrian Criminal Code qualifies bid-rigging as a criminal offence.

The cartel prohibition (Sections 1 and 2 Cartel Act) virtually copies Article 81(1) EC Treaty, prohibiting all agreements between undertakings, decisions of associations of undertakings and concerted practices that have as their object or effect the restriction of competition unless they create countervailing efficiencies. However, unlike EC law, no block exemption regulations have been adopted yet under the Cartel Act, though the Act provides for such block exemption regulations to be adopted. Currently, the Austrian authorities apply the respective EC regulations by analogy.

Nevertheless, there are a few differences from EC rules. For instance, the Cartel Act is more stringent when stipulating that recommendations for the observance of specific prices, price limits, calculation guidelines or discounts, with the object or effect of a restriction of competition are deemed anti-competitive agreements. On the other hand, in contrast with the *de minimis* notice of the European Commission, the Austrian *de minimis* provision applies irrespective of whether or not 'hard-core' restrictions are at stake. Agreements – be they horizontal or vertical – are generally exempted if the combined market share of the undertakings involved does not exceed 5 per cent on the national market and, where applicable, does not exceed 25 per cent on the relevant regional or local market.

The Austrian leniency programme includes some peculiarities. Its scarce statutory rules are set forth in the Competition Act and are completed by a handbook published on the FCA's homepage. Though the programme follows its EC counterpart closely, it deviates from the EC leniency notice insofar as (1) vertical agreements may also be subject to a leniency application and (2) no marker system (whereby an undertaking can mark its 'ranking' in the race for leniency for a distinct period of time before submitting a formal leniency application) is in place in Austria. In addition, in contrast to the EC level, neither the Austrian competition law nor the FCA has introduced a formal settlement procedure for cartel cases. However, there is a possibility under certain circumstances to enter into talks with the FCA and settle cartel proceedings by accepting commitments.

ii Significant cases

Elevators

In November 2008 the Supreme Court confirmed a decision by the Cartel Court on the imposition of a total fine of €75.4 million on four elevator and escalator manufacturers for rigging bids and fixing prices.

The FCA's investigations, which were an aftermath to the investigations by the European Commission into a cartel of elevator and escalator manufacturers at European level, where the Austrian market was left out, were initiated upon information provided by a leniency applicant (in late 2006). The cartel related to the allocation of projects and involved the exchange of other confidential market information. The cartel agreements concerned essential parts of the undertakings' business activities: new equipment installations, service and modernisation of elevators and escalators.

The elevator cartel case is undoubtedly the most prominent FCA case and the first one that led to double digit, million-euro fines. The case was also the first successful leniency application in Austria. Additional information was provided by Otis, a second cartel member, who as the second leniency applicant received a fine reduction of 55 per cent. More importantly, the Supreme Court recently confirmed the legal conformity of the application of the leniency regime by the FCA and the Cartel Court in this landmark case.

Industrial chemicals

It did not take long until the second major leniency case was brought before the Cartel Court. It concerned a cartel in the chemicals wholesale sector. The FCA applied for a fine to the Cartel Court after an investigation, which had started in 2007 and had been triggered by a leniency application of one of the two major Austrian wholesalers who had taken part in the cartel. Based on the information provided by the leniency applicant and the results of the FCA's investigation, the Cartel Court was able to uncover a cartel in which the members of the cartel agreed on prices and even simulated delivery shortages in order to extract higher prices from their customers. However, the FCA reportedly also applied for a declaratory judgment against the leniency applicant, against which it had abstained – in accordance with its leniency handbook – from applying for a fine. In May 2009 the Supreme Court confirmed the cartel fines which had been imposed on the chemicals wholesalers.

Negotiations with the FCA with regard to Professional Fee Structures

The FCA does not always move for a fine but, if feasible, strives to find consensual solutions with companies involved in alleged anti-competitive behaviour. In December 2008 the Austrian Chamber of Tax Consultants and Tax Accountants withdrew their recommendation concerning its fee calculation, thereby avoiding legal proceedings before the Cartel Court. The recommendations at issue included the calculation of a base amount and surcharges which could be charged to a client. The FCA took the view that the recommendation of the chamber to its members constituted an infringement, of both European and Austrian competition laws as it had to be qualified as a decision by an organisation of undertakings which was capable of leading to a restriction of competition. Concerning this matter the FCA built its line of argument on the relatively recent strict interpretation of the term decision by the Supreme Court in a similar case (*Honorarverordnung der Baumeister*) where a trade association of builders which had issued non-binding tariff structures for its members was found in breach of the antitrust laws, despite the purely voluntary nature of the recommendations and the fact that the recommendations were hardly followed by the association's members who would mostly agree on prices below the recommended tariff structure with their customers.

Driving school – semi-public and private enforcement by the same institution

The driving school cartel case was the first successful enforcement case initiated by the Arbeiterkammer ('AK', a public institution that is entrusted with furthering the interests of employees) after the AK became convinced that there was parallel behaviour in the pricing of six driving schools in Graz. The AK filed a lawsuit against the driving schools before the Cartel Court, which levied a fine of €75,000 on the driving schools. Thereafter, a number of private claimants transferred their damage claims against the driving schools to the AK, which commenced a claim for damages against the driving schools at a civil court. The court endorsed the AK's position pursuant to which the damage consisted of the difference of prices (approximately 20 per cent) paid for driving courses before and after the break-up of the cartel.

iii Trends, developments and strategies

One leading antitrust attorney observed that – compared with other jurisdictions where comparable programmes were introduced – the introduction of the leniency program did not initiate a wave of applications. Nonetheless, the recent history of cartel investigations by the FCA is characterised by cases that have been triggered by leniency applicants. It is fair to say that the Austrian competition authorities would not be as successful in prosecuting cartels if there were no leniency programme.

iv Outlook

It remains to be seen whether leniency applications will pick up in the near future, which would also boost public enforcement and prompt more interesting anti-trust cases to be initiated before the Cartel Court by the FCA. Please see also Section VI (i) *infra* on the unresolved issue of legal privilege in Austria.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Preliminary remarks

The Cartel Act mirrors Article 82 EC Treaty in that undertakings are dominant if they can act on the market largely independently of other market participants. However, the Austrian Cartel Act contains very broad (refutable) presumptions of market dominance if certain market share thresholds are met. An undertaking is deemed to be dominant if (1) its market share exceeds 30 per cent; or (2) its market share exceeds 5 per cent and if it is exposed to competition of no more than two competitors on the market; or (3) its market share exceeds 5 per cent and if it is one of the four largest undertakings on the relevant market, which together account for a market share exceeding 80 per cent. Thus low market shares may suffice for the market dominance presumption to apply.

In addition to the Cartel Act, the Neighbourhood Supply Act ('NSA') imposes an obligation of orderly market conduct on wholesalers and retailers that applies irrespective of their market position. Examples of improper behaviour are discriminating customers or imposing unjustified prices or terms of trade. Unlike the Cartel Act, infringements of the NSA do not result in the imposition of cartel fines, but may lead to discontinuation orders against the illegal behaviour. Only recently, the Cartel Court held (in a case involving Bavarian State Forests) that the notion of 'wholesaler and retailer' is not restricted to grocery retailers (the German title of the law is thus misleading) but to all 'commercial resellers'.

ii Significant cases

Essential Facilities at Vienna Airport

In 2007 the FCA initiated proceedings before the Cartel Court against OMV, the Austrian oil and gas incumbent, after Austrian Airlines (AUA) complained that OMV, was charging excessive prices for jet fuel. OMV owns the only refinery near Vienna Airport and jointly controlled FSH, the owner of hydrant installations under the airfield, enabling OMV to closely monitor supply of jet fuel to other oil undertakings operating at Vienna Airport. The FCA arrived at the preliminary conclusion that the FSH's hydrant pool is (1) an 'essential facility' and (2) that the hydrant fees invoiced by FSH were excessively high so as to qualify as an abuse of a dominant position. In April 2008, the proceedings were brought to an end when OMV agreed *vis-à-vis* the Cartel Court to several commitments aimed at enhancing competition on the market for jet fuel provision at the Vienna Airport. The commitments referred, in the first place, to the supply by the OMV refinery Schwechat (opening of the logistics supply chain; and in particular access commitments to storages and transportation to VIE) and, secondly, to the underground fuelling facility at the airport. Furthermore OMV undertook to implement Chinese walls within OMV between its logistics and the jet fuel supply divisions. This and a regulatory determination of the hydrant fees by the Austrian state, assured the FCA that effective competition would be restored at the market for jet fuel supply and the proceedings before the Cartel Court were consequently terminated, though the FCA has reserved its right to revisit the case if further concerns are raised.

Europay – the interface between public and private competition enforcement

The FCA sought the imposition of substantial fines against Paylife (formerly Europay), a subsidiary of Austrian banks and a major Austrian provider of payment cards and payment systems for various infringements of the cartel laws. In particular, a provision in the payment card contract between Europay and the Austrian banks, according to which the envisaged acquisition of a stake in one of Europay's competitors by a bank required prior approval by Europay, was found to be anti-competitive. In addition, the interchange fees charged by Europay were deemed to be excessive and thus abusive of its market position of dominance. Consequently, the Cartel Court imposed a fine of €5 million on Europay. The appeal by Europay to the Supreme Cartel Court was dismissed, while the appeal lodged by the Federal Cartel Prosecutor lead to the fine being increased to €7 million. A very interesting point was the Supreme Court's exact estimate of the unlawfully gained enrichment of Europay at €41 million for 2003. The FCA noted that private claimants may use this direct statement of the Supreme Cartel Court in subsequent lawsuits for damages before civil courts.

Proceedings against Telekom Austria – margin squeeze revisited

In 2007, a telecoms company commenced proceedings against Austria's former monopolist in the telecoms sector, Telekom Austria, alleging abuse of dominance through margin squeeze. A dominant operator's margin squeeze is usually defined as a reduction of the margin between prices on the upstream market and the retail market in order to render a new competitor's entry difficult or to encourage exit. This can be done by raising upstream prices, lowering downstream prices, or doing both. Pursuant to the complaint, the price demanded by Telekom Austria for its services on the upstream market, did not afford competitors of Telekom Austria on the downstream market enough margin to compete effectively.

The Cartel Court rejected the arguments of the complainant, finding that a discontinuance order is not appropriate, because the behaviour had been terminated prior to its ruling. In addition, the application for a declaratory judgement against the behaviour was also denied by the Cartel Court which ruled that the applicant had no legal interest in the outcome of the proceedings. In March 2009, the Supreme Cartel Court quashed the decision on appeal, deciding that a discontinuance order against the terminated behaviour was possible since, due to the long-term contracts with end-consumers, the behaviour still had a palpable effect on competition. Furthermore, the Supreme Cartel Court held that a declaratory judgement against Telekom Austria is possible, because the resumption of the terminated behaviour was conceivable. The court, therefore, referred the case back to the Cartel Court, which has now to assess whether a margin squeeze indeed occurred. In this context, the Supreme Court affirmed that the approval of tariffs by a regulatory authority does not necessary mean that the tariffs do not infringe cartel laws.

In addition, also in March 2009, Telekom Austria was fined €1.5 million for abusing its significant market power. The claim was filed by the FCA and the verdict is final, as both parties refrained from appealing. Furthermore, the FCA and Telekom Austria agreed not to disclose for which infringement of the cartel law the operator received the fine exactly. The publicly available information suggests that this fine is not related to the above described proceedings against Telekom Austria.

iii Trends, developments and strategies

Three trends can be observed from the decisional practice mentioned above: first there is a not be underestimated interface between public competition enforcement and successive private competition enforcement. In a number of cases the FCA even explicitly encouraged private parties to proceed with private antitrust litigation. Second, there has been a considerable rise in the total amount of fines over the past two years. And finally, the majority of the major antitrust proceedings was initiated in the aftermath of complaints and not after leniency applications.

iv Outlook

It will be interesting to see whether the trends set out above will prevail in future decisions.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

In addition to these cartel cases, several sector inquiries were carried out or are still ongoing. All of these relate to sectors that are under intense public and political scrutiny. As mentioned above, the FCA clearly focuses its activities in the wider area of energy (e.g. inquiries into gas, electricity and oil) and food retailing (e.g. inquiries into buyer power, milk prices and pricing of supermarket chains).

Sector inquiry into the gasoline retail market

In spring 2008 the FCA started an investigation into the Austrian gasoline retail market after years of discussions in the public about the pricing behaviour of Austria's oil companies. The FCA has already published an interim report in which the FCA notes that the pricing behaviour of oil companies in Austria raises several questions, in particular with regard to the finding that all oil companies simultaneously raise petrol and fuel prices the day that there is a hike in crude oil prices, whereas passing on crude oil price drops takes several days (and is then carried out jointly by the oil undertakings again). This raises questions as to the compliance of these practices with the cartel prohibition and in relation to the claims by oil undertakings that all price moves only reflect price moves of crude oil. In reaction to the interim report, the FCA has received statements of the oil companies alongside an expert opinion. The investigation is still pending, though the drastic decline of oil prices in the last months may have alleviated the problem to a certain extent for the moment.

Sector inquiry into the food retail sector

Another sector enquiry that was dragging on for years and was only finalised at the end of 2007 was the investigation into buyer power in the food retail sector. The inquiry had been triggered by anonymous complaints and media reports about allegedly abusive supply chain practices. To gather the necessary information the FCA sent questionnaires to 180 market participants, both on the supply and demand side. The main reason why the sector enquiry took overly long was the reluctance of market participants to comply with information requests. As a result, one company was fined €120,000 by the Supreme Court. The FCA found that smaller retailers may suffer a loss in competitiveness in relation to their suppliers and that market entries are hampered by buyer power and are therefore low in number. The FCA found that there was evidence of strong economic dependence of suppliers, mainly because of the high quantities procured by the leading supermarkets and the lack of alternative large-scale distribution channels. The FCA summed up by stating that the grocery sector will certainly stay under strict scrutiny by the FCA – accordingly, it will thoroughly assess any well-founded evidence on allegedly abusive conduct in the sector.

ii Trends, developments and strategies

Notably, the FCA's market investigations are often swayed by public opinion, i.e., are triggered by press articles or statements of special interest groups and concern industries in which there is public outcry over the price level or the pricing behaviour of leading suppliers. Companies active in the sale of products or the provision of services to end-consumers should be aware that their behaviour is closely monitored for any indication of illegal behaviour.

iii Outlook

Judging from the FCA's recent press releases, it would come as little surprise if the focus of its future investigations will mirror the authorities' previous very end-consumer orientated approach. On this note the Commission has started an investigation into the price difference between supermarkets in Germany and Austria. In particular, the FCA wants to know why there is such remarkable price difference in the sale of comparable products by chains operating in both countries. In view of the industry knowledge gained through the extensive sector inquiry into buying power in the food retailing sector, it is expected that the FCA will continue to work in this area. Furthermore, the FCA started an investigation into a possible price cartel in the area of dairy products after a person present at a meeting of major Austrian retailers told the public that major retailing chains agreed not to lower milk prices and work towards an increase in the future. Additionally, the FCA continues to be very active in the gas sector and aims to improve access of consumers to competing gas providers and necessary information about different gas providers.

V STATE AID

i Significant cases

Due to the financial crisis the European Commission eased its assessment criteria for guarantees and other state measures meant to support financial institutions in a notice last year. The Commission acknowledges that recapitalisation schemes to support financial institutions that experience distress because of extreme conditions may be necessary in response to the ongoing financial crisis. This current measure of the Commission is however strictly limited to the duration of the crisis. Also, the Commission urged member states not to overshoot the target.

Valuation in cases of privatisation revisited

In the case of the acquisition of Bank Burgenland by Grazer Wechselseitige Versicherung (GRAWE), which paid a lower purchase price than a Ukrainian consortium of bidders, the Commission, in April 2008, ordered the restitution of the state aid equivalent (whose valuation was left to the member state). The case of Bank Burgenland shows how difficult the valuation is as no less than three independent expert valuation opinions were commissioned prior to the sale. All three opinions left no doubt that the price offered by GRAWE was significantly higher than the market value of the bank. The Commission, however, did not take this fact into account, given that the Ukrainian consortium had offered an even higher price for GRAWE in the bidding contest. The argument of Bank Burgenland, that the consortium should have been excluded from the bidding contest as it did not meet certain conditions, was refused by the Commission. The Commission's decision has been appealed to the CFI. Also, the Ukrainian consortium has lodged a suit before an Austrian Civil Court, demanding the rescission of the transaction pursuant to the Austrian Act against Unfair Competition (UWG).

Sufficient information as a Pprerequisite

The current privatisation procedure of Austrian Airlines (AUA) is currently assessed by the Commission with regard to its conformity with state aid rules. In particular the question seems to be whether the tender procedure was sufficiently fair and transparent so that (outside) bidders such as Air France/KLM received sufficient information. This issue is especially problematic if one of the bidders already cooperates with the target in an Aviation Alliance (AUA and Lufthansa are Star Alliance members) and thus has more information than the outside bidder. Also, public interest considerations such as the maintenance of Vienna as a linchpin in (eastern) European civil aviation will be assessed by the Commission. In addition to the issue of information, the focal point of state aid concerns lies with the massive assumption of debt by the state prior to the sale. The Commission hence voiced its misgivings and is set to investigate the planned transaction in more detail.

Austrian support package for the banking sector

Only shortly before the Commission's clearance in late December 2008, the Austrian Government had released a package of measures for strengthening the Austrian financial system, which provides for an overall package of €100 billion (reduced to €90 billion due to the Commission's concerns). This overall package is in particular based on the Financial Market Stability Act and the Interbank Market Support Act and allows for a wide array of measures to shore up Austria's financial system. Many of the measures that Austria will now implement are similar to those taken by other EU states, including a direct injection of capital into banks. The guarantees will be provided by a state agency – Clearingbank – that will also raise money on the market and allocate it to financial institutions. The European Commission also approved what it described as an 'innovative' feature, a guarantee on bank assets and Neelie Kroes, the EU's Commissioner for Competition, called Austria's package of guarantees, loans and capital 'a comprehensive tool for stabilising the financial sector'.

It is evident that the Commission insisted on a number of restrictions to the current system of financial stabilisations. Therefore, state guarantees (for liabilities and assets) and related measures should only last for three years, or five years in exceptional cases. Correspondingly, in the case of a direct injection of capital, 'step-up' clauses should make sure that, owing to the rising costs of the capital after the fifth year, state capital will be repaid after five years. The costs of the capital relate to the current market rates Austria needs to demand for its capital injections and which are, according to the notice, based on the equity ratio of the banks.

Furthermore, a bank accepting state capital is subject to considerable limitations in that it is not allowed to devote the obtained state capital to acquisitions and other forms of 'aggressive competition'. Further limitations concern the distribution of dividends, which are generally not possible before the repayment of state capital ('healthy banks' may distribute a very restricted amount of dividends to their shareholders). Finally, though individual measures pursuant to this support package need no prior approval as the whole Austrian package has already been approved as a state aid measure by the Commission, extensive obligations to report remain. This should, among other things, make sure that no bank uses the obtained capital for aggressive growth and a permissive dividend policy. If a report indicates shortcomings on the part of a bank, it may be subjected to subsequent stricter measures called for by the Commission.

ii Trends, developments and strategies

One of the first banks to announce an agreement to accept a capital injection was ERSTE Bank in February 2009. As it is part and parcel of the banking package to provide capital for the real economy, ERSTE will provide credit of around €4.4 billion to Austrian companies. Since the shares are non-voting and a conversion into normal shares is excluded, the capital injection will not lead to a nationalisation of ERSTE. We assume that further banks will follow ERSTE and accept capital injunctions in the following months since a number of other banks have exposed themselves to a considerable extent in their eastern European credit business.

iii Outlook

Regarding the ongoing banking restructuring, Austria has to be careful not to impose price-related measures on the banks. For instance, it would be highly problematic if Austria demands that the banks only lend at current market rates to their customers (the interest rates of the state capital injections into the banking system, on the other hand, have to be at current market rates). It may be remembered that the infamous Lombard

Club (resulting in fines of €124 million for price fixing) had its beginning in the advice by the Austrian National Bank to the Austrian banks to price at a level that allowed for a 'reasonable equity capitalisation'.

VI CONCLUSIONS

i Pending cases and legislation

A few months ago, there were discussions about a draft aiming at the reorganisation of the Austrian competition authorities in which the FCA would have been established as an independent decision-making body, while the FCP as the second Official Party would have been abolished. This amendment of the laws would have brought the FCA in line with the structure of public competition law enforcement in other countries where the competition authorities have decision-making powers. Currently it seems unlikely that such profound changes will happen in the foreseeable future.

As at European level, in-house legal advice is not covered by the attorney-client privilege. However, in Austria the FCA is generally unwilling to recognise the rules of privilege even if correspondence between a client and an outside attorney is at issue. The FCA justifies this questionable approach with the absence of any direct reference to the attorney-client privilege in Austrian antitrust legislation. Since there is no clear ruling of the Supreme Court on this practically very important issue, it is to be hoped that a case will sooner or later reach the Court and afford it the opportunity to provide the much-needed clarification.

ii Analysis

With regard to the interface between public and private competition enforcement, the Supreme Court recently put a damper on the recent practice of some claimants who first initiated less costly public competition law proceedings before the Cartel Court in order to obtain a decision confirming the past existence of a cartel and then used this decision in private litigation for damages. In short, the Supreme Court ruled that private claimants have no legitimate interest and thus no standing to request the Cartel Court to investigate cartel violations that happened in the past if the only objective of such an application is to prepare private cartel litigation for damages in a civil court.

The FCA is keen to stress that the official parties will pursue alleged breaches of obligations to provide information to the fullest extent possible by the laws. In the course of its comprehensive grocery sector inquiry, the FCA initiated proceedings before the Cartel Court against companies which had refused to disclose the requested information to the FCA. In this context, in 2008, the Supreme Cartel Court confirmed a fine which had been levied on a party for the breach of the obligation to provide full information and raised the amount of the fine to €120,000. In doing this, the Court was adamant in rejecting the argument of the company that the obligation to provide information would not apply to information containing business secrets. The Supreme Cartel Court emphasised the importance the Cartel Act attributes to the obligation to provide the requested information towards the efficient public enforcement of competition rules.

Chapter 3

BELGIUM

*Dirk Vandermeersch and Violetta Bourt**

I OVERVIEW[1]

Until recently, the Belgian competition authority allocated most of its resources to merger review proceedings, to which strict deadlines apply. However, since the increase of the thresholds for Belgian merger control and the entry into force of the new APEC on 1 October 2006, more resources have become available for the investigation of restrictive practices, in particular cartels. The Competition Council's capacity has also been reinforced considerably by the appointment of more full-time members and auditors, which has allowed the Council to handle more cases and render more decisions.

In 2008, anti-cartel enforcement remained the competition authority's priority, as evidenced by a number of fines imposed and several dawn raids carried out throughout the year. In this context, there has also been an increase in the number of leniency applications filed with the Council. Since the launch of the first leniency notice in 2004, which has in the meantime been replaced by a new notice published on 22 October 2007, the Council has received more than twenty leniency applications. Furthermore, in April 2008, the Council adopted its first decision in a cartel case based on the Belgian leniency programme.

II CARTELS

In Belgium, cartels are prohibited by Article 2 of the APEC, which is substantively similar to Article 81 of the EC Treaty. In 2008, the Competition Council adopted five

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

cartel decisions finding an infringement of Article 81 of the EC Treaty/ Article 2 of the APEC. Three of these decisions imposed fines on cartel participants.

i Significant cases

Flemish Bakers' Association[2]

On 25 January 2008, the Competition Council imposed a fine of €29,121 on the Flemish Bakers' Association ('VEBIC') for fixing bread prices between 1 July 2004 and 8 June 2007. This was the first fine imposed under the new 2006 APEC. This was also the first fine imposed under Belgian law for cartel activity since 1991, the year Belgian competition law was first introduced.

Following liberalisation of Belgian bread prices on 1 July 2004, VEBIC had begun advising its members of detailed changes to the costs of bread production (including labour, raw materials, energy and overhead costs) and published a bread price index that applied cost increases to the last bread price fixed by law.

The Minister of Economic Affairs requested the competition authority to initiate an investigation into these practices. In issuing its decision, the Council held that, as a result of the association's practices, VEBIC's members no longer needed to calculate their own costs, but could (and did) simply apply the published price index. The price index was also specifically intended to influence VEBIC members' pricing decisions, as well as competition on the Belgian bread market more generally.

Following this decision, VEBIC lodged an appeal with the Brussels Court of Appeals. On 30 September 2008, the Brussels Court of Appeals issued a preliminary judgment seeking clarification from the European Court of Justice on the compatibility of Belgian procedural rules governing appeals with EC Regulation 1/2003.[3] In particular, under the old APEC, following the appeal of a Competition Council decision, the Council had the right to submit written comments to the Brussels Court of Appeals. As this provision no longer exists in the current APEC, the Court of Appeals requested the European Court of Justice to clarify whether the removal of the provision is compatible with Regulation 1/2003. Specifically, the Court of Appeals requested the European Court of Justice to confirm whether, in excluding national competition authorities from submitting written remarks in such circumstances, Member States might be violating Regulation 1/2003. The Court also asked whether, under Regulation 1/2003, national competition authorities have the right (and the duty) to participate in appellate proceedings.

Although the provisions of the new APEC have been in place for over two years, there has been little occasion to interpret them to date since appeals are rare. According to Article 72 of the APEC, lower courts may turn to the Court of Cassation – the highest court in Belgium – to clarify points of law. In this case, however, the

2 Decision of the Competition Council: No. 2008-I/O-04, 25 January 2008.

3 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, pp1–25.

Court of Appeals called directly on the European Court of Justice, on the ground that an issue of compatibility of Belgian law with EU law was raised.

Bayer AG/Ferro Belgium/Lonza[4]

On 4 April 2008, the Competition Council imposed a fine of €487,755 on the leading manufacturers and distributors of butyl benzyl phthalate ('BBP'), including Bayer, Ferro, Solutia Europe and Lonza, for their participation in a national BBP cartel.[5] It is the first time the Council has imposed a fine following an investigation triggered through its leniency programme. It is also the second largest fine ever imposed by the Competition Council, the highest being a fine of €1,135,352 in a parallel import case in 1999.[6]

Under the cartel, which lasted from 1994 to 2002, the parties sought to freeze their European market shares by fixing sales prices, allocating customers, agreeing on sales quotas to particular customers or in specific regions, limiting production, and exchanging sensitive commercial information. The parties met on a regular and structured basis, and also communicated via telephone and email.

The competition authority launched its investigation after receiving a leniency application from Bayer. Ferro, Solutia Europe and Lonza filed follow-on applications after the authority had made public its investigation. In its decision, the Council confirmed that the cartel had as its object and effect the restriction of competition and that the parties had infringed both Article 81 of the EC Treaty and Article 2 of the APEC. Bayer, as the first leniency applicant, received full immunity from fines. Ferro and Solutia Europe each received a 35 per cent reduction in fines as second and third applicants. Lonza was granted a 12 per cent reduction in fines as fourth applicant. While Lonza did provide the Council with information on meetings about which the competition authority had no previous knowledge, the Council found that Lonza's evidence was not sufficiently determinative or detailed to fully prove its (and others') involvement in the cartel. Lonza did receive an additional 10 per cent reduction in fines given its status as a mere distributor, and not manufacturer of BBP.

Federation of Professional Driving Schools of Belgium[7]

On 7 July 2008, the Competition Council imposed a fine of €6,990 on the Federation of Professional Driving Schools of Belgium for having enacted rules designed to limit price competition between its members.

The Federation's rules forbid members from enticing customers to switch driving schools through 'destabilising pricing practices' – defined as the setting of prices demonstrably below those charged for an analogous service by a competing school. The Council concluded that this provision was designed to prevent price

4 Decision of the Competition Council: No. 2008-I/O-13, 4 April 2008.

5 Ferro was fined €175,594, Solutia Europe €197,543, and Lonza €114,618.

6 Decision of the Competition Council: No. 99-RPR-1, 21 January 1999.

7 Decision of the Competition Council: No. 2008-P/K-43, 7 July 2008.

competition between members of the Federation, the effect of which was to increase driving school prices in Belgium. The Council considered this equivalent to price fixing, and thus a breach of Article 2 of the APEC. The Federation was found to be in further breach of Article 2 of the APEC for having recommended price increases to its members through a system of 'price studies'. The Council accepted that associations may provide their members with information on the evolution of the market, but that such information could not be employed (directly or indirectly) to influence competition between members. The Council held that the 'price studies' were not produced solely for the informational benefit of members, but were aimed at coordinating and harmonising members' price increases.

ii Trends, developments and strategies

2008 was characterised by increased anti-cartel enforcement in Belgium. The number of cartel decisions increased from 16 to 26, with five infringement decisions being adopted (compared to three in 2007). Beyond intensifying investigative actions, the Competition Council imposed more than €500,000 in fines on undertakings engaged in cartel activity, including a €487,755 fine on participants of a hard-core cartel in the chemical industry (*Bayer AG/Ferro Belgium/Lonza*). Although cartel decisions establishing an infringement and imposing a fine are still rare, anti-cartel enforcement remains at the centre of the Council's activities and accounts for an increasing proportion of the Council's efforts.

The Council's guidelines on the calculation on fines, adopted in 2004, no longer apply since the entry into force of the 2006 APEC, except in the context of the new leniency notice, which contains explicit rules of transition. New guidelines on the calculation on fines, replacing the 2004 guidelines, are expected to be adopted in the near future. In the meantime, the Competition Council confirmed that it will continue to apply the principles expressed in the old 2004 guidelines (which are similar to the former European guidelines). Thus, the basic amount of the fine depends upon the gravity and duration of the infringement, and may be increased or decreased if the existence of aggravating or attenuating circumstances is established. Moreover, the Council calculates the fine in the light of the principle of proportionality and of the fact that the fine should have a sufficiently deterrent effect.

Finally, the Belgian leniency programme, which is closely modelled on the European Commission's leniency notice, has continued playing a role in cartel detection. In 2008, the Council received seven new leniency applications.

III ABUSE OF DOMINANT POSITION

In Belgium, abuse of dominant position is prohibited by Article 3 of the APEC, which is very similar to Article 82 of the EC Treaty. The Council has so far only handled a few complaints each year regarding infringements of Article 3 of the APEC. This provision is most frequently invoked before national courts, often as part of an action for infringement of the Trade Practices Act.

i *Significant cases*

In the *Electrabel* case of 3 July 2008,[8] the Auditorate investigated whether Electrabel had abused its dominant position on the markets for supply of electricity and gas by charging excessive prices after it had increased its prices for electricity and gas owing to price increases on international markets. The investigation was conducted at the request of the Minister of Economic Affairs.

The Auditorate found that Electrabel had a dominant position on the markets for the supply of gas to household customers and the supply of gas to small industrial and commercial customers as it had a market share above 60 per cent and the closest competitors had a significantly lower market share. Furthermore, the Auditorate concluded that Electrabel benefited from strong vertical integration, the recent liberalisation of the market and high barriers to entry. However, the Auditorate concluded that Electrabel had not abused its dominant position (within the meaning of Article 3 of the APEC and Article 82 of the EC Treaty) both for the period from 1 January to 30 September 2007 (when the company allegedly charged low prices) and from 1 October 2007 onwards (when it increased its gas prices).

In conducting its analysis of the excessive pricing charge, the Auditorate adopted an effects-based approach, considering in particular whether prices charged from 1 October 2007 were greater than prices set by rival operators; prices set by CREG, the Belgian Energy regulator; and prices charged by providers in other Member States. Based on this comparison, the Auditorate concluded there was insufficient evidence to consider Electrabel's price increases as excessive.

On the predatory pricing charge, the Auditorate similarly concluded that there was insufficient evidence to find that Electrabel had engaged in predatory pricing. Specifically it considered that (1) the period under review was too short to be effective anti-competitively; (2) no competitor was forced to exit the market; (3) the price increase on 1 October 2007 did not cause any new entry into the Belgian gas market; and (4) despite lowering its prices, Electrabel actually lost 5 per cent of its market share to competitors during the period under review.

On this basis, the Auditorate closed the file. This triggered a reaction from CREG, which believed that the Auditorate was mistaken in its analysis.

ii *Trends, developments and strategies*

In 2008, the Council continued to give priority to cases that are likely to have a substantial impact on the functioning of markets in Belgium and that impact consumers. The importance for the functioning of markets can be related to the precedent value of a case as well as to the direct quantitative impact of a decision. The Council also takes into account the availability of evidence. This strategy reflects an intention on the part of the Council to utilise resources effectively. Thus, the *Electrabel* case discussed above demonstrates that the Council will not hesitate to drop investigations within a relatively short time frame where it finds that there is little substantive proof of evidence of anti-competitive practices.

8 Decision of the Auditorate: No. 2008-I/O-41-AUD, 3 July 2008.

The Auditorate and the Competition Council are also more prompt in dealing with abuse of dominance cases, especially in sensitive sectors such as energy and pharmaceuticals. In *Electrabel*, for instance, the complaint was lodged in July 2007 and the case was closed by the Auditorate in July 2008. Similarly, in *Bofar*,[9] a complaint, which also included a request for interim measures, was lodged in December 2007 and the Auditorate refused to grant interim measures in March 2008. As the authority was able to deal with both dominance cases within a year, this illustrates the general shift in allocation of resources from merger control to restrictive practices.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The Auditorate may, on its own initiative or at the request of the Minister of a specific economic sector, carry out general enquiries or sector-specific enquiries where there are serious indications that practices prohibited by Articles 2 and 3 of the APEC or by Articles 81 and 82 of the EC Treaty are being carried out.[10]

In 2008, the Minister of Economic Affairs requested the Council to initiate a number of investigations, in particular in relation to the building sector and Electrabel's gas price increase. In May 2008, the Minister also prompted the establishment of a 'price observatory' to increase price transparency and competition. This observatory, tasked with monitoring price evolution in Belgium, was created within the Institute for National Accounts and is intended to be an effective tool to quickly activate the Competition Council if required.

V CONCLUSIONS

Anti-cartel enforcement may be expected to continue to be at the centre of the Council's activities in 2009. The Auditorate announced that approximately eight statements of objections in cartel cases are expected in 2009. Moreover, new guidelines on the calculation of fines are expected to be adopted in the near future.

On 3 February 2009, the government tabled a bill in Parliament proposing several amendments to the APEC. While most of the proposed amendments concern minor procedural matters and do not introduce substantive changes to the APEC, some of the amendments could have considerable practical consequences. For example, the bill proposes an amendment that would allow the Auditorate to dismiss a complaint or request for interim measures by a reasoned decision on the basis of 'policy priorities and available means'. Under the current APEC, the Auditorate can dismiss a complaint or request only if it is found to be inadmissible or unfounded. The bill also proposes to enable the Competition Council to impose periodic penalty payments for violations of the prohibition to implement notifiable concentrations

9 Decision of the Auditorate: No. 2008-V/M-12-AUD, 26 March 2008.

10 Article 47 of the APEC.

prior to obtaining clearance (i.e., the standstill period). Under the current APEC, infringements of the standstill period can only be penalised with fines, not periodic penalty payments. The bill was adopted by the Chamber of Representatives on 26 March 2009 and forwarded to the Senate.

Chapter 4

BRAZIL

André Marques Gilberto and Natália Oliveira Felix *

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

Since 2003 the priority for Brazilian competition enforcers has been the prosecution of cartels; new investigative methods (such as unannounced inspections, wire taps and joint investigations carried out with criminal authorities), available since 2000, have begun to be commonly used by local authorities, and the Brazilian leniency programme is now a reality.

Indeed, according to official information from the SDE, 75 per cent of its resources are devoted to cartel prosecution at present. As further discussed in Section III, this means the repression of dominance conduct has not been a priority in Brazil, and this can be verified by the lack of relevant decisions from CADE (the Administrative Council for Economic Defence, the Brazilian Competition Agency) in this matter since 2007.

On the other hand, it is no surprise that the amount of the fines imposed for cartel violations has increased drastically since 2005; as set forth by the Brazilian competition law (Law No. 8884/94), fines for anti-competitive behaviour range from 1 to 30 per cent of the corporation's gross turnover in Brazil. After several decisions punishing companies accused of hard-core cartel violations with the minimum fine, in 2005 CADE imposed fines ranging from 15 to 20 per cent to companies that allegedly took part in the 'crushed rock' cartel.

Similar fines appeared again in the decision concerning the vitamins and the surveillance case (2007), and in December 2008 one of the companies punished in the 'sand cartel' received a fine equivalent to 22.5 per cent of its gross turnover – a record.

Resources made available to Brazilian competition authorities have not increased significantly in recent years; in order to accommodate priorities, a number of formal

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and informal arrangements have been made by and between the SDE, CADE and the SEAE (the Secretariat of Economic Supervision of the Ministry of Finance). For instance, the SDE has basically no actual role nowadays in the analysis of merger control filings reviewed under the 'fast-track regime'; while the market analysis in those cases is developed by the SEAE, the Office of CADE Attorney General is now in charge of the verification of the formal issues concerning transaction.

Also, in December 2008, an official agreement was signed between CADE and the Brazilian Ministry of Justice, with the purpose of the latter allocating to CADE some of its technical and administrative resources. Finally, with the main purpose of sparing the resources available to local competition authorities, since May 2007 it has been possible to settle cartel investigations in Brazil.

ii Enforcement agenda

In addition to cartel prosecution, Brazilian enforcers devoted a significant amount of effort in 2008 to defend the modification of the local competition system at the Brazilian Congress. Bill No. 3937 has been under analysis in Congress since 2005 and, when and if it passes, it will dramatically change the local competition regime. Pre-merger notification, for instance, will be introduced, and an improvement of the merger notification criteria is expected (establishing thresholds with materiality criteria), as well as the introduction of early termination for simple cases. More importantly, CADE and the SDE would merge into a single competition agency. The bill was approved by the Congress at the end of 2008, and is now being reviewed by the Brazilian Senate.

An attempt to approximate competition and regulatory agencies is also expected. CADE and SDE, on one side, and agencies like the ANATEL (the Brazilian Telecommunications Agency), the ANP (the Brazilian Petroleum Agency) and the ANEEL (the Brazilian Electric Energy Agency) have been following different directions over the years (sometimes reaching opposite conclusions in a single case); enforcers are now trying to coordinate between the agencies the review of cases involving both competition and regulatory issues.

II CARTELS

i Significant cases

Between 2007 and 2008 seven relevant decisions were issued by CADE in cartel investigations.

The surveillance services decision[1] referred to a local matter inside one single city (Porto Alegre), but it was the first investigation launched after the signing of a leniency agreement in Brazil; more than 30 companies and individuals were fined by CADE for price fixing and allocation of markets. In addition, CADE granted the leniency applicant full administrative and criminal immunity. Fines ranged from 15 to 20 per cent of the respective gross turnovers.

1 *SDE v. ASSEVIRGS and others*; 2007.

The pharmaceuticals case[2] was initiated against 20 laboratories in 1999 based on the allegation that such companies would have attempted to block the entry into the Brazilian market of generic drugs; after a seven-year investigation, in 2007 20 laboratories were fined by CADE and received a fine of the minimum legal amount.

The vitamins case[3] was decided by CADE in April 2007; three major international players were punished for market allocation performed abroad with impacts on the Brazilian market. In the vote by the reporting commissioner, it was stressed that although there was no direct evidence indicating that such companies had actually perpetrated or attempted to perpetrate conducts with impacts in Brazil, there were at least signs, from evidence used in the decisions by the European Commission in the same case, that it was likely that conducts taken abroad affected the Brazilian market for vitamins. Fines ranged from 10 to 20 per cent of the turnovers concerning the exportation of vitamins to Brazil (this is one of the few CADE precedents in which the fine was not calculated based on the entire gross turnover of the punished corporation).

The 'car haulers'[4] case was decided by CADE in November 2007; the national association for automotive transportation was investigated by local competition authorities for allegedly having entered into an agreement with the national union for car transportation drivers in order to foreclose both markets. CADE ruled that, despite opinions from the SDE, the Office of the Federal Public Attorney and the Office of CADE Attorney General recommending the defendants to be convicted, there was no proper evidence to justify such a decision. This was the first time since 2004 that CADE overruled a recommendation from the SDE.

CADE also resolved the 'meat industry' investigation in November 2007;[5] although the case was shelved in respect of some of the defendants for lack of direct evidence, four companies and six individuals were punished by CADE. Two different types of evidence were considered by CADE in this case: a number of tables disclosed by some of the defendants with updated price information about meat products and the realisation of a meeting between the defendants on the day that preceded the disclosure of said tables. The fines imposed on the corporations were 5 per cent of their respective gross turnovers.

In July 2008, CADE decided the 'gas distribution' case,[6] punishing six companies and five individuals for cartel practices. This is one of CADE's strongest precedents concerning the possibility of utilisation, in administrative investigations, of the contents of phone wire taps placed by criminal authorities; although the Brazilian constitution only allows the use of this type of evidence in criminal investigations, over the years CADE (based on precedents from Brazilian high courts) has been admitting this evidence in

2 *Conselho Regional de Farmácia/DF v. Janssen-Cilag and others*; 2007.

3 *SDE v. Roche and others*; 2007.

4 *Office of the Federal Public Attorney in Rio Grande do Sul v. ANTV and others*; 2007.

5 *Confederação Nacional da Agricultura and Comissão de Agricultura, Pecuária, Abastecimento e Desenvolvimento Rural da Câmara dos Deputados v. Indústria de Carne Minerva and others*, 2007.

6 *Antônio Jade Lopes v. Agip do Brasil S/A and others*, 2008.

administrative competition cases. Fines imposed in this decision were 1 per cent of the companies' respective turnovers.

Finally, the 'sand' case[7] was decided by CADE in December 2008; although this was an investigation that concerned one single Brazilian state (Rio Grande do Sul), it produced the highest fine ever imposed by CADE on a single company – 22.5 per cent. Other fines imposed in this case ranged from 10 to 20 per cent of the defendants' respective gross turnovers; to punish the companies, CADE has relied on direct evidence such as wire taps.

ii Trends, developments and strategies

Cartel prosecution is a priority in Brazil, and most of the existing resources available to local enforcers have been re-deployed against cartels.

For instance, in order to announce details about the Brazilian leniency programme among the international competition community, in 2008 the top management of the SDE (the Secretariat of Economic Law of the Ministry of Justice, which is in charge of administrative investigations in Brazil concerning anti-competitive behaviour) embarked to Brussels and Washington, DC to present a number of 'roadshows' for some of the most respected competition law firms.

The leniency programme has been the most important tool available to Brazilian competition enforcement. According to the Ministry of Justice website, leniency and antitrust dawn raids 'walk hand in hand', as the first one provides for the level of evidence needed for a judge to authorise a given dawn raid. Ten leniency agreements were entered into from 2003 to October 2008.

A leniency agreement in Brazil can either void any administrative or criminal punitive action or reduce one to two thirds of the applicable penalty, provided that the interested party cooperates with the investigations and that such collaboration results in the identification of the co-authors of the infringement and the gathering of information and documents attesting the existence of the competition breach.

Leniency agreements cannot be signed with the ringleader of the cartel, although there has been no proper discussion in Brazil as regards to what one should understand by 'ringleader'; although the leniency agreement is signed with the SDE, it is CADE, when issuing its final decision on the investigation, that grants the leniency applicant full or partial immunity. Current or former employees of a company applying for leniency can only benefit from it in case they sign the application along the respective corporation.

Since the beginning of 2006 the SDE has been adopting the 'marker' system, by means of which a marker is granted to the first company to report the existence of a cartel. The interested party is then granted 30 days within which to submit additional information and documents; negotiations with the SDE may last for six months and this deadline may be renewed for a further six months.

A number of additional steps were recently taken by the SDE in order to reallocate its resources to cartel prosecution; a department of quantitative and econometric techniques was created to undertake analysis in conduct investigations, and

7 *SDE v. Sociedade dos Mineradores do Rio Jacuí and others*, 2008.

an 'intelligence centre' was formed by the SDE, the Federal Police, state level police and federal and state Public Prosecutors.

The fight against bid-rigging has also been a top priority at the SDE; in 2008, a mechanism for online reporting of suspicious behaviour by procurement agents who use 'ComprasNet', the federal government's electronic bid platform was introduced, and manuals about bid rigging were prepared and distributed to procurement agents.

In October 2008, the first Anti-Cartel Specialised Unit at the Office of São Paulo Public Prosecutors was created; it is expected that the SDE will transfer resources for a joint forensics laboratory to be built.

Cartel practices are criminalised in Brazil and may result in imprisonment for two to five years or the imposition of unlimited fines. There are more than 20 criminal proceedings against key executives of companies involved in cartel conducts in Brazil; to date, the vast majority of the criminal proceedings have been settled with the payment of criminal fines. In a 2006 case, three executives were sentenced to 35 years of jail time in connection with their participation in the 'car haulers' case; there are appeals pending review by the Fourth Circuit Regional Court of Appeals (second instance) against this first-instance decision.

Moreover, it has been common for individuals to be arrested during criminal dawn raids conducted by the SDE, the Federal Police and Public Prosecutors; between January and October 2008, 57 warrants were served, and 32 were temporarily arrested without charges.

Finally, 8 October 2008 marked the celebration of the first 'Anti-Cartel Enforcement Day', to be celebrated on an annual basis. Between 8 and 10 October, 450,000 brochures on the Brazilian leniency programme were handled out in seven airports, in the cities of São Paulo, Rio de Janeiro, Brasília, Belo Horizonte, Salvador and Porto Alegre.

According to the SDE, the campaign has targeted 650,000 people, most of them mid-level and high-level executives, with the purpose of destabilising cartels (by bringing new candidates to the local leniency programme) and attracting media coverage to cartel prosecution in Brazil. Also in October 2008, the SDE sent around 1,000 letters to presidents of corporations in Brazil, enclosing a leniency programme brochure and detailing the local leniency programme.

iii Outlook

There is an overall perception among the competition community in Brazil that at some point in the foreseeable future the first fine of the maximum legal amount will be imposed by CADE. As discussed in Section II (ii) *supra*, since 2005 the fines for cartel practices in Brazil have been increasing from 1 to 22.5 per cent, and it would not be a surprise if a fine at the maximum amount was imposed in 2009. In the 'industrial gases' investigation, the SDE recommended that the maximum fine be imposed on the defendants; the case is currently under review by CADE.

Cooperation between Brazilian enforcement and foreign competition agencies (especially in Europe and the US) is expected to play an important role in the repression of international cartels in Brazil. Local authorities have been deeply involved at the ICN, and official and unofficial mechanisms for information exchange between enforcers should impact the prosecution of anti-competitive conducts in Brazil.

A constant complaint about cartel investigations in Brazil is that they usually take too long to be concluded; indeed, it is not common for a standard proceeding to be finished in less than two years, and sometimes cases may take twice that to be completed. If the bill under discussion in the Brazilian Congress passes, it is expected that the resources allocated to Brazilian enforcement will significantly increase, which could attenuate this major problem.

It is also expected that Brazilian authorities will be able to address in 2009 the repeated questions about the lack of certainty with regard to the settlement of cartel investigations. As mentioned in Section I (i) *supra*, Brazilian law does not state whether a guilty plea is necessary for one to settle a cartel proceeding, or the levels of possible payments to be made by the interested parties.

All of the four settlements that occurred since 2007 involved the payment of fines of 10 per cent, 2.25 per cent, 10 per cent and 13 per cent of the respective turnover of the applicants in the year preceding the beginning of the investigations. Only in the most recent case (July 2008) did the interested party agree to admit guilt.

To minimise uncertainties regarding cartel settlement, several measures have been taken. In September 2007 CADE amended its Administrative Rule No. 45 in respect of cartel settlements, to state that: (1) the applicant can only try to settle once during a cartel investigation; (2) the negotiation period should last 30 days, and it is renewable for another 30 days; (3) CADE may, at its own discretion, keep the negotiation confidential; (4) if the cartel investigation involves a leniency agreement, the case can only be settled if the interested party admits guilt (otherwise CADE will decide on a case-by-case basis whether the settlement must involve admission of guilt); (5) the amount to be 'voluntarily paid' by the interested party must be at least 1 per cent of the gross revenues of the company in the year before the beginning of the investigation; and (6) CADE will consider when calculating this payment the timing of the company coming forward.

Although CADE is the competent authority to settle a cartel investigation, it has sought the opinion of the SDE; in March 2008, the SDE issued its own guidelines in respect of the settlement of cartel cases. In the majority of the cases the SDE will only recommend CADE settles the case if the interested party: (1) admits guilt or at least the factual basis underlying the cartel conduct; (2) cooperates with the investigation regarding the defendants that decide to litigate; (3) collects a 'voluntary fine'; and (4) does not challenge criminal prosecution and private actions for damages.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

There have been few significant cases involving restrictive agreements and dominance in Brazil in recent years.

At the end of 2008, CADE issued a decision in a case involving Telesp[8], a telecommunications company in São Paulo accused of anti-competitive practices for directing its customers to its own broadband provider. Telesp, as the monopolist of the necessary infrastructure supply for this service, was privileging a broadband provider of its own economic group and allegedly jeopardising free competition in the market of broadband providers on a basic abuse of market power. The association of broadband providers filed a representation against Telesp, and CADE determined that Telesp should inform all its customers about the possibility of using other broadband providers.

Another relevant 2008 decision involved the market of beer bottles.[9] AmBev introduced a new product in the market, which was a 630ml bottle. As the beer market is identified by the exchange of bottles between the competitors (because the bottles are returnable), the competitors Kaiser and Cervejaria Imperial, and the associations of beverage and soda producers filed a complaint against AmBev, as they understood the introduction of the new bottle would jeopardize the interchange of regular 600ml bottles. SDE accepted these arguments and issued an injunction determining that AmBev should collect the 630ml bottles and stop their production. AmBev appealed to CADE and CADE, in 2008, partially granted AmBev's appeal.

Another dominance case involving AmBev is currently being investigated by SDE, concerning exclusivity agreements agreed with retailers and also its policy that establishes for retailers the exclusive use of its free refrigerators only for AmBev products.[10] There is no decision from CADE so far on this matter.

In 2008 CADE decided an investigation concerning predatory prices involving Petrobras, initiated by an accusation of two other refining companies.[11] The antitrust authority then defined five steps that should be followed to demonstrate the existence of predatory pricing: (1) the player under investigation shall have market power, (2) the price strategy shall be long-term sustainable, (3) the purpose shall be the exclusion of competitors, (4) the price strategy shall be long-term profitable, and (5) the strategy shall result in the reduction of consumer welfare. CADE could not find evidence of all five criteria, and the conduct was not considered illegal.

At the end of 2007, CADE issued a decision defining as anti-competitive a territorial exclusivity clause that Shopping Centre Iguatemi used to include in the lease agreements it agreed with stores.[12] Iguatemi, a de luxe shopping centre in São Paulo, which, according to CADE, had market power and was able to use this power, barred other malls located in the neighbourhood from competing under equal conditions. CADE did not accept Iguatemi's arguments about this clause having been included in the agreements to avoid opportunist conducts of the stores of using the mall's structure

8 *SDE / Telecomunicações de São Paulo SA – TELESP*, 2008.

9 *Companhia de Bebidas das Américas – AmBev / Cervejaria Kaiser Brasil SA, Associação dos Fabricantes de Refrigerantes do Brasil, Associação Brasileira de Bebidas*, 2008.

10 *Cervejaria Kaiser Brasil SA / Companhia de Bebidas das Américas – AmBev e Cervejarias and Reunidas Skol Caracu SA*, under analysis.

11 *Refinaria de Petróleo Manguinhos SA, Refinaria de Petróleo Ipiranga SA / Petróleo Brasileiro SA,*2008.

12 *Associação dos Lojistas do Estados de São Paulo, Shopping Eldorado / Shopping Iguatemi,* 2007.

and investment and understood this conduct was not reasonable nor licit and qualifies as foreclosure. Iguatemi was fined 2 per cent of its gross turnover.

ii Trends, developments and strategies

As mentioned *supra*, antitrust resources in Brazil are nowadays devoted to cartel prosecution, which means that the repression of dominant conducts has not been a priority.

Notwithstanding the above, the same strategies used for cartels such as dawn raids and inspections inside the companies are also available to authorities in dominance investigations. However, if the analysis of direct evidence has been the most important step in a local cartel investigation, when a restrictive agreement or a case of dominance is under analysis, economics have been playing a much larger role.

iii Outlook

Antitrust enforcement is relatively recent in Brazil and the main efforts are directed against cartel prevention, but it is expected that in the near future Brazil will be able to develop more solid experience with vertical violations and dominance cases.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

In the telecommunications sector it is worth mentioning the acquisition of Brasil Telecom SA by Telemar Norte Leste SA (known as 'Oi') in 2008.[13] The transaction caused some polemic in Brazil because local telecommunications legislation used to establish restrictions concerning control transfers, mergers and acquisitions, forbidding a landline company to buy another one which owned granting of landline in a different region.

At the beginning of the year, ABRAFIX (Brazilian Association of Concession Holding Companies of Landline) requested the Ministry of Communications to review the General Granting Plan (Plano Geral de Outorgas – 'PGO'), and the Ministry remitted a document to ANATEL (Brazilian Telecommunications Agency) requesting this review. After several discussions, the board of the regulatory agency approved a new General Granting Plan, which was forwarded to the Ministry of Communications, received some changes and was remitted to the President of the Republic. The President's decree, that changed the General Granting Plan, was made official on 21 November and by this decree it became legal for a landline company to buy another one in a different area, which, in practice, gives legal basis to the Brasil Telecom/Oi transaction.

After the legislation modification, ANATEL was finally able to start the analysis of the mentioned merger from a technical point of view. By an antitrust perspective, ANATEL will also analyse the case and issue a non binding opinion, as the final decision will be made by CADE. Considering that the notification in Brazil can be made after the transaction is signed, and that the analysis by ANATEL and CADE will take some

13 *Brasil Telecom SA/Telemar Norte Leste SA*, under analysis.

time, an Agreement to Preserve the Reversibility of the Transaction was signed by CADE, Brasil Telecom SA and Telemar Norte Leste SA. This is an important case of supplementary performance between the regulatory agency and the antitrust authority, but still under analysis.

In the energy sector, the constitution of a consortium for the construction of a hydro-electric power station in the Rio Madeira (the Santo Antonio Hydro-Electric Power Station) was decided by CADE in 2008.[14] The companies joined in a consortium to compete in a public bid for a concession granting for implementation and operation of the hydro-electric power station, which was organised by ANEEL – the Brazilian Electric Energy Agency. During the public bid one of the parties of the consortium was committed by the antitrust authority, by a consent order, to remove exclusivity agreements it used to maintain with suppliers of turbines and generators. This consent order resulted from an administrative process filed by SDE in 2007. The antitrust aspects of the case were not analysed by ANEEL; the case was reviewed by SEAE, SDE and the General Attorney of CADE, and CADE issued the final decision. However, CADE based its decision on numbers and market information obtained through ANEEL, which demonstrates that even when the regulatory agency and the antitrust body do not work properly together, there is some kind of cooperation.

As far as the petroleum sector is concerned, in 2008 Brazilian antitrust authorities and the Brazilian Petroleum Agency (ANP) worked together in the reorganisation of the Brazilian petrochemical industry.[15] This reorganisation resulted in two main groups; Petrobras (a company where the Brazilian government still holds a significant stake) holds, after the reorganisation, 30 per cent and 40 per cent of these two main groups and it is, at the same time, the only supplier of raw materials for the petrochemical industry. CADE was concerned about the possibility of anti-competitive conducts taking place as a result of this scenario, such as exchange of information, but concluded that the management rules established at that time were sufficient to prevent it.

ii *Trends, developments and strategies*

The approximation of antitrust authorities and the regulatory agencies is very topical in Brazil and the so called convergence between these bodies is expected to increase competition in the regulated sectors.

Technical cooperation covenants and the development of systems for information and task sharing between antitrust authorities and regulatory agencies have been regarded as absolutely essential to achieve efficiency, but the Brazilian reality does not reflect this scenario yet.

Discussions have been held in the past few years, and as an example it is possible to mention a 2005 covenant between CADE and the Brazilian Central Bank (BACEN) concerning technical cooperation, information sharing and the preparation of studies. About review of merger filings concerning banking sector, in December 2008 CADE

14 *Odebrecht / Andrade Gutierrez / CEMIG / Furnas / Fundo de Investimento em Participações Amazônia Energia*, 2008.

15 *Petróleo Brasileiro SA/ UNIPAR*, 2008.

and the BACEN entered into an agreement defining that transactions not offering risks to the financial system should be analysed first by the BACEN and afterwards by CADE, and that transactions that do offer such a risk should be analysed by the BACEN only.

iii *Outlook*

Brazil's regulation and antitrust policies are considered recent if compared with other countries. Before 1990, the Brazilian economy was basically controlled by state-owned companies, and the state, as an economic player, regulated the economy, controlled prices, quantity and quality in the direct operation of the infrastructure sectors. However, in the 1980s, the increase of too many protectionist measures and non-discerning public financing for industrial activities resulted in a huge governmental deficit. The State capacity for investment also came to an end with the increase of international interests and the retreat of international investment.

All these factors resulted in the state's inability to finance its own activities and in the 1990s Brazil began to assume a market-oriented model. The first step was the opening up of trade and then came privatisations. At this stage, the regulatory function of the state had to be reviewed and the public administration had to define what would be its control over private activity in the market economy, and the market logic lead to a process of less regulation in order to provide more space to free enterprise. By this logic, the state companies that turned private would be managed by private players and would be connected to the administrative policy by the antitrust authority, and in public services cases a regulatory reform took place and independent agencies were created so that the services could be provided on a market-oriented model, but regulated by a specialised agency, as each sector has it owns peculiarities and market failures.

As this complete change of scenario is very recent, it is difficult to say that the market-oriented model is already developed in Brazil and that free competition is the main rule. This has not yet happened, especially in the regulated sectors, on account of their own characteristics and the state, through its regulatory agencies, is still very decisive. From now on, however, with a growing convergence between antitrust bodies and regulatory agencies, it is expected that the market-oriented model will become more mature and that the economy is governed each day more by competition and less by regulation, resulting in efficiency and welfare.

V STATE AID

State aid control is not a current antitrust subject in Brazil. In any event, it should be stressed that to attract resources and development, there are some states in Brazil that offer tax advantages to enterprises, and this also happens at the municipal level. Some sectors of the economy are also granted tax subsidies in order to encourage the country's development. CADE has sporadically stated that the concession of such tax benefits may affect competition in Brazil.

VI CONCLUSIONS

i Pending cases and legislation

As mentioned in Section I *supra*, one of the Brazilian enforcers' priorities in 2008 was the fight for the modification of the local competition system at the Brazilian Congress. If a new law is introduced, it will change drastically the local competition regime. Bill No. 3937 has been under analysis in Congress since 2005, was approved by Congress at the end of 2008 and is being reviewed by the Brazilian Senate.

There are some important cases under analysis at present. For instance, cartel investigations such as the aforementioned 'industrial gases' case and the 'hydrogen peroxide' case are expected to be decided by CADE in 2009. A decision concerning the merger filing between Brasil Telecom and Telemar Norte Leste is also expected.

ii Analysis

The announced priority for Brazilian competition enforcers is the prosecution of cartels and in this scenario the Brazilian leniency programme became a reality.

It is no surprise, then, that the amount of the fines imposed for cartel violations has increased drastically since 2005; after several decisions punishing companies accused of hard-core cartel violations with the minimum fine, in 2006 CADE imposed fines ranging from 15 to 20 per cent on companies that allegedly took part in the 'crushed rock' cartel and in December 2008 one of the companies punished in the 'sand' cartel received a fine equivalent to 22.5 per cent of its gross turnover.

On the other hand, as discussed in Section III *supra*, this 'cartel prioritisation' means that the investigation of dominant conduct is an undeveloped subject in Brazil.

Finally, there are several discussions and efforts aiming towards a closer relationship between antitrust authorities and regulatory agencies (especially telecommunications, energy and petroleum) and the real convergence between those bodies is expected to be seen in the near future.

Chapter 5

BULGARIA

*Franz Urlesberger and Mariya Papazova**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

The new Bulgarian Law for the Protection of Competition ('LPC') entered into force in December 2008. It proposes to bring the Bulgarian competition law regime in line with the recent developments at EU level. It formally qualifies the Bulgarian Commission for Competition Protection ('CPC') as a national competition authority in the meaning of Article 35 of Regulation No. 1/2003. Hence, the CPC must apply Articles 81 and 82 of the EC Treaty directly. To this end, the LPC also vests the CPC with the competencies necessary for the application of European Competition Law.

As of 1 January 2009, the CPC's headcount amounted to 130 officials. The authority is organised into seven directorates (for restrictive agreements, public procurement and concessions, concentrations and sector analyses, competition policy, abuse and unfair competition, financial-economic activities and property management, and administrative-legal and information services) and its decision-making body is a seven-man council.

According to the LPC and the latest CPC enforcement practice, the CPC will combat all types of prohibited and abusive practices within Bulgaria and the Common Market.

ii Enforcement agenda

Cartel cases have played a prominent role in the CPC's practice in the past two years. Many investigations were initiated by the CPC on the basis of media articles. In light of the latest legal and enforcement developments, one may expect that the CPC will remain

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very active in investigating cartels and other restrictive practices. It is expected that the CPC will make increased use of sector inquiries to detect anti-competitive practices and to improve the market environment. For the time being the CPC has not made any announcement on which economic sector it may focus in the near future.

II CARTELS

i Preliminary remarks – legislative developments

The cartel prohibition pursuant to the LPC differs from Article 81 of the EC Treaty insofar as it also contains – for the first time – an explicit definition of the notion of cartel as any agreement or coordination between competitors involving price fixing and market or customer allocation. Undertakings that infringe the cartel prohibition may be fined up to 10 per cent of their worldwide turnover. The former act provided for a maximum fine of 300,000 levs. However, as the LPC only entered into force at the end of 2008, no fining decisions based on the new maximum fine have yet been adopted. The law also provides for periodical sanctions: in the case of non-conformity with a decision of the CPC obliging an undertaking to cease an infringement, fines of up to 5 per cent of the average daily turnover of the respective undertaking in the previous financial year may be imposed.

In addition, the CPC has been vested broader investigative powers which correspond with the powers of the European Commission under Regulation No. 1/2003: the CPC may request information and all types of (both electronic and hard-copy) documents, conduct dawn raids (with the prior permission of the Administrative Court of Sofia) and request information and assistance from the European Commission or other NCAs.

The CPC may now also issue provisional injunctions and can impose all types of measures that are necessary to prevent serious and irremediable damage (this also applies to other restrictive and abusive practices). These measures can be imposed for three months and may be extended thereafter.

The new maximum fine prompted the CPC to adopt a new notice on the method of settings fines. In line with the competition authorities in other EU Member States, the CPC also introduced a leniency programme (see below).

ii Method of setting fines

In February 2009, the CPC adopted a Notice on the Method of Settings Fines for Infringements of the LPC. The notice follows the notices of the European Commission and contains elements of both the current and the old notices of the European Commission. From the old notice, the CPC copied the distinction between minor, serious and very serious infringements. From the current notice, it copied the system of calculating fines on the basis of the relevant turnover, namely, the turnover from sales of the products, which are directly or indirectly affected or can be affected by the cartel in the territory of Bulgaria during the last financial year of the undertaking's participation in the cartel. The base amount of the fine (which will be multiplied by a time coefficient for the number of years the respective undertakings participated in the cartel) will amount to 10 per cent of the relevant turnover for very serious infringements, 8 per cent for serious infringements and 5 per cent for minor infringements (whereas under the European Commission's notice, the maximum base amount may amount to 30 per cent of the relevant turnover). Finally, the fine is increased or decreased taking into account aggravating and mitigating factors.

For associations that have not gained any income, the fine may amount to 150,000 levs. The CPC may impose fines on individuals that cooperated with the cartel. The maximum fine is 50,000 levs and depends on the seriousness and the duration of the violation, the individual's role, property status, and mitigating and aggravating circumstances.

iii Leniency programme

At the beginning of 2009 a formal leniency programme was adopted in Bulgaria. It largely follows the programme of the European Commission and undertakings may benefit from immunity from fines if they are the first to report a cartel that the CPC has been unaware of, whereas they are granted reductions from the fine if they concede their participation in a cartel and cooperate fully with the CPC during the investigation.

iv Significant cases

In the second half of 2007, the CPC commenced six investigations of suspected price cartels, five of which also saw the undertakings being raided by CPC officials. The investigations concerned the following sectors: (1) milk and milk products, (2) vegetable cooking oil, (3) poultry and eggs, (4) bread and confectionery, (5) taxi services, and (6) insurance. In all these cases, the CPC's investigations unveiled cartel agreements. The latest cartel proceedings were instigated owing to suspected anti-competitive practices in the petrol sector.

Five of these investigations have ended with fines being imposed. It is noteworthy that the CPC has not shied away from fining market leaders. For example, 14 Bulgarian insurance companies were fined a total of 2.5 million levs for agreeing on minimum insurance premiums and maximum insurance compensations. The CPC issued fines for the infringement of the national competition rules as well as Article 81 of the EC Treaty. Furthermore, fines of 293,000 levs were imposed on 28 egg and poultry manufacturers for price fixing and the exchange of sensitive business information, and a trade association was fined 1.9 million levs for fixing the purchase price of sunflowers and the selling price of sunflower oil between 2005 and 2007.

The CPC issued its most recent decision against an alleged cartel on the market of construction and maintenance equipment for spas and wellness centres. Several competitors within an association fixed minimum prices and other trade conditions, corrupted public procurement procedures and allocated markets as well as exchanged sensitive information and boycotted competitors. The competitors and the association were fined in total 340,000 levs.

The decisions mentioned above were issued pursuant to the old LPC. The amount of the sanctions is therefore not indicative for the future sanction policy of the CPC.

v Trends, developments and strategies

After 17 years of virtual dormancy, the CPC became very active in the second half of 2007 when it started *ex officio* an array of investigations into suspected cartel behaviour in various industries. This surge in cartel law enforcement will be corroborated by the LPC, which affords the CPC stricter means of cartel law enforcement.

The CPC is determined to become even more active in public enforcement by using dawn raids to gather the necessary evidence. It will be interesting to see how the CPC will make use of the new maximum fine and its notice on the method of settings fines in the pending cases. It will also be interesting to see how often companies will use the leniency programme.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Preliminary remarks – legislative developments

Restrictive agreements

The new LPC has abolished the notification system for restrictive agreements. Now, anti-competitive agreements that create countervailing efficiencies are exempt from the cartel prohibition and automatically enforceable with no prior decision to this effect needed. Hence, the cartel prohibition pursuant to the LPC is fully harmonised with Article 81 of the EC Treaty.

Legal certainty is safeguarded by various block exemption regulations. Such regulations exist for specialisation agreements, vertical agreements, agreements for research and development, and agreements in the motor vehicle sector.

The CPC has also adopted rules on networks of vertical agreements with negligible effect on competition. In line with the European Commission's block exemption regulation for vertical agreements, a network of distribution agreements has negligible effects on competition if the parties to an agreement do not have an individual market share of more than 5 per cent and the network does not cover more than 30 per cent of the relevant market.

Furthermore, the market share thresholds for *de minimis* (horizontal and vertical) agreements have been brought in line with the *de minimis* notice of the European Commission. Now, restrictive agreements are deemed not to create an appreciable adverse impact on competition if in case of horizontal agreements the combined share in the relevant market of the parties to the agreement does not exceed 10 per cent, or in vertical agreements the individual share does not exceed 15 per cent in any relevant market.

Abuse of a market dominant position

The presumption of market dominance was removed in the LPC. Under the old act, market dominance was presumed when an undertaking had a market share of 35 per cent. Now, the existence of market dominance is assessed based on an undertaking's market share, financial resources, sources of supply, technological level and relations with other undertakings.

Procedural rules

The new LPC has also introduced a possibility to bring investigations of alleged anti-competitive practices to a speedy end by offering commitments. Pursuant to the LPC, infringement proceedings are divided into two phases. At the end of phase I (fact finding phase), the respective undertaking will receive a statement of objections from the CPC if the compiled facts indicate an illicit behaviour.

An undertaking may then offer commitments to allay competition concerns, which the CPC can make binding. However, commitments are not a viable solution if the behaviour in question has a significant and lasting negative impact on competition within a major part of the national market. If the remedies are approved, the CPC will terminate the proceedings without adopting a formal decision that establishes whether an infringement has occurred.

The CPC may resume proceedings if the undertaking fails to adhere to the commitments; the circumstances on which the decision was based change; or the decision was based on incomplete, incorrect or misleading information. The commitments can also be accepted for a specific period only. The CPC may also impose periodical fines for not adhering to commitments of up to 5 per cent of the average daily turnorver of the respective undertaking in the previous financial year.

ii Significant cases

Restrictive agreements

In 2008, the Bulgarian Supreme Administrative Court confirmed a decision of the CPC in favour of parallel importers of high quality alcohol brands. The decision of the CPC was issued in 2006 upon the complaint of Be Ge In Ltd against three companies belonging to Diageo Group, which were subsequently fined a total of 600,000 levs for restrictive practices against parallel importers. The three companies entered into agreements with importers that made the import of products with Diageo's trademarks conditional on their explicit permission.

Abuse of market dominance

In 2008, the CPC quickly responded to press articles on alleged abuses of market dominance in the regional retail markets for energy distribution and initiated investigations of the respective energy companies. The investigations led to the implicated group of undertakings being fined 1.1 million levs.

In May 2008, the CPC fined Bulgarian Post EAD, the state-owned postal services monopoly, for the abuse of its dominant position on the market for home delivery services of periodical newspapers and magazines. The CPC established that Bulgarian Post EAD had engaged in predatory pricing between 2005 and 2008 by providing home delivery services to customers at price levels below costs with the aim of forcing competitors to exit the market. Bulgarian Post EAD was fined 50,000 levs and was instructed to terminate the infringement.

Following the privatisation of the Bulgarian Telecommunication Company AD ('BTC') in 2004, the CPC has instigated several investigations against BTC over the years and fined BTC for various forms of abusive behaviour in different segments of the market for telecommunications services, including internet ADSL access, access to fixed subscriber lines and fixed-line telephony services. The abusive behaviour of BTC included the imposition of unjustified high access fees, refusal to grant access and bundling. The highest fine came in November 2007 when BTC was fined 250,000 levs for bundling – without objective justification – its ADSL internet access and voice telephone services.

Also the last two months of 2008 saw other undertakings being fined for abusing a dominant market position. In the beverages sector a total fine of 500,000 levs was imposed for restricting intra-brand competition. Also, in the regional heating sector a total fine of 400,000 levs was imposed for, *inter alia*, foreclosing a competitor.

iii *Trends, developments and strategies*

The CPC commenced a number of investigations into abusive practices lately on the basis of media reports and information from other market participants. It is expected that the CPC will make use of its broadened investigative powers and continue to react to complaints by market participants and press articles on alleged prohibited behaviour swiftly.

Given that public enforcement in Bulgaria only picked up in 2007, no real trends and strategies can be observed so far other than the surge in public enforcement. An interesting aspect, though, is that recent sector inquiries prompted the CPC to open infringement proceedings against undertakings (please see Section IV, *infra*).

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The new LPC regulates the power of the CPC to conduct sector inquiries in more detail. It affords the CPC the competence to investigate the status of the competitive environment, to indentify the reasons which cause restrictions of competition and to adopt measures to undo these restrictions.

i *Significant cases*

Since 2003, the CPC has completed five sector inquiries. The latest investigations related to:

a the production and distribution of drugs (which was initiated in 2006 owing to the consolidation process in the sector, and concerns over unfair practices); and

b retail banking (which was instigated in 2008 due to economic and social importance of the sector, and the increased credit activity of the market players).

In all of these inquiries the CPC scrutinised (1) practices, to find out whether any of these appreciably restricted competition; (2) possible defects in the legal framework; and (3) administrative activities that might have affected competition in the respective sector.

The findings in each inquiry prompted the CPC to issue recommendations to restore effective competition. The CPC also warned the market participants that it will observe their behaviour closely, and that if the CPC finds sufficient evidence of competition law infringements, it will initiate individual proceedings.

ii Consequences of the investigation into the market for drugs

On the basis of the findings in the drugs inquiry, the CPC opened two investigations for restrictive and abusive practices. In one of the cases, the investigation was opened against three wholesale companies (Sting AD, Sanita Trading AD and Trade League AD) for suspected abuses of a market dominant position by refusing to supply and offering products to distributors under discriminatory conditions. In the second case, the wholesale company Higia EAD was investigated over the alleged imposition of vertical restraints on retailer Pharma Expert. However, neither investigation revealed any violation of competition rules.

In addition, the CPC found that effective competition on the market was hampered by the legal framework. According to the CPC, the statutory price formation mechanism and a number of other restrictions (i.e., the number of pharmacies owned by one person or entity) restricted competition. The CPC recommended amendments to the respective act so that all natural persons or legal entities may open pharmacies. Additionally, horizontal integration of pharmacies should be allowed. In the same decision, the CPC stated, though, that restrictions of vertical integration (of drug producers, distributors and retailers) in the sector do not adversely affect competition.

iii Retail banking

According to the investigation into retail banking, the market is characterised by a high level of competition, although consolidation has been strong in the recent years. However, the CPC made several recommendations to financial institutions (including, the introduction of a uniform criterion by announcement of the deposits' interests and providing costumers with information about all credit costs before signing the contracts).

iv Trends, developments and strategies

Pursuant to the new LPC, the CPC may commence sector investigations if it has serious doubts whether there is effective competition in a particular economic sector or region but lacks sufficient information why this is so. The CPC may start such inquiries also on the basis of statements from consumers or market partcipants or media information.

v Outlook

Sector investigations are expected to become an important tool for improvements of market structures and the increase of competition in sectors that currently suffer from restrictions of competition. For the time being the CPC has given no indications which sector might be the subject of the next inquiry.

V STATE AID

As Bulgaria became a Member State of the European Union in 2007, the European Commission is competent to control the state aid granted by the Bulgarian Authority. However, the Bulgarian State Aid Act and the Regulation for Implementation of the

State Aid Act provide for powers and obligations of the Bulgarian state authorities as regards granting, notification and monitoring of state aid.

i *Significant cases*

In 2005 and 2006 Bulgaria submitted a series of measures to the European Commission which Bulgaria wished to be regarded as existing state aid after the accession of Bulgaria to the European Union. As such, the following measures were analysed by the European Commission:

a Amendments to the financial scheme for supporting innovative undertakings through the National Innovation Fund approved by the CPC with Decision 142/2005. The measure is a scheme in the form of direct subsidy for research and development, promotion of small and medium enterprises and cooperation with research institutions. The scheme is approved until 2009 with a yearly budget as follows: 2006 – €3.6 million; 2007 – €7 million; 2008 – €11.15 million; 2009 – €21.15 million.

b A further financial scheme for supporting innovative undertakings through the National Innovation Fund, which is a scheme directed at research and development aid for enterprises, in particular for SMEs. The scheme was approved until the end of 2008 with the following budget: 2005 – €2.5 million; 2006 – €4 million; 2007 – €6.5 million; 2008 – €10.6million.

Furthermore, according to the Bulgarian Regional Aid Map No. 1/2007 (approved by the European Commission on 24 January 2007), the whole territory of Bulgaria is divided into six regions which were considered to be eligible for regional aid under Article 87(3)(a) of the EC Treaty. The intensity of the regional aid for all six regions is 50 per cent. For the time being, the European Commission has approved one regional aid scheme under the Corporate Income Tax Act as compatible with the Common Market. The scheme is multi-sectoral and opened with a yearly budget of €11 million for the period 2007 to 2013. Besides, the European Commission was informed by the Bulgarian authorities about a regional investment state aid scheme incorporated in the Law for Investments Stimulation for all economic sectors in a total amount of €72 million for six years which falls within the scope of the group exemption regulation for regional investment aid.

In 2007, the European Commission approved an aid scheme for compensation of losses incurred by agricultural producers for totally devastated areas as a result of natural disasters or adverse weather conditions. The budget of the scheme is some €307 million for a period from October 2007 to October 2012. The beneficiaries of the aid are agricultural manufacturers.

ii *Trends, developments and strategies*

In general, any Bulgarian state authority (at national or regional level) may grant state aid via legal and individual administrative acts. These authorities are responsible for the conformity of all measures with the EC state aid rules. When an authority intends to grant state aid, the aid must be compatible with the substantive provisions of the EC state aid rules.

The institutions responsible for the administration of the state aid granting process in Bulgaria, its coordination and compliance with the EC State Aid rules are the Minister of Finance and the Minister of Agriculture and Food Supply. The Ministry of finance has general competences for all economic sectors, while the Ministry of Agriculture and Food Supply is authorised only with respect to state aid in two specific sectors: agriculture and fisheries. Both institutions may control the granted aids with regard to their expedience and effectiveness.

State aid measures that fall outside the scope of the EC group exemption and the *de minimis* regulation must be notified to the European Commission to be assessed for their compatibility with the Common Market.

iii Outlook

Bulgarian authorities tend to strictly follow the substantive EC state aid provisions, as well as the enforcement practice of the European Commission. With regard to state aid reform, the authorities react relatively fast and take the respective necessary amendments in the national legal framework on state aid. For the time being, Bulgaria has not notified state aid measures in connection with financial crises to the European Commission.

VI CONCLUSIONS

i Pending cases and legislation

The CPC became very active in the second half of 2007 when it started *ex officio* an array of investigations into suspected cartel behaviour in various industries. The increased focus on competition law enforcement by the CPC is also underpinned by the fact that the authority has responded quickly to press articles on alleged abuses of market dominance at the regional retail markets for energy distribution and initiated investigations at the end of September 2008 against the respective energy companies. The CPC also reacted quickly to media coverage on abusive behaviour by a local water supply undertaking.

This surge in cartel law enforcement will be corroborated by the new Competition Protection Act, which entered into force in December 2008 and which affords the CPC stricter means of cartel law enforcement, including significantly higher maximum fines and broader investigative powers. It remains to be seen whether the CPC can maintain the impressive track record of cartel investigations and decisions that we have witnessed over the past two years.

Chapter 6

CANADA

*Randal T Hughes, Donald B Houston, Oliver J Borgers, and Jeanne L Pratt**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

On 12 March 2009, the most significant amendments to Canada's Competition Act[1] ('the Act') in 25 years became law with the passage of Bill C-10[2]. The amendments fundamentally change Canada's cartel laws and merger review process, moving Canada's competition laws much closer to those of the United States. They also significantly increase potential penalties for cartels, abuse of dominance and misleading marketing practices.

Some of the changes were included in the Conservative Party platform during the autumn 2008 Canadian federal election.[3] Other changes stem from the recommendations of the government-appointed Competition Policy Review Panel which released its final report in July 2008.[4] The amendments were passed very quickly because they were

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1 R.S.C. 1985, c. C-34, as amended.

2 An Act to implement certain provisions of the budget tabled in Parliament on 27 January 2009 and related fiscal measures, 2nd Session, 40th Parliament, 2009 (as assented to 12 March 2009), S.C. 2009, c.2.

3 For more information on the Conservative Party Election Platform, see the McCarthy Tetrault LLP publication entitled: 'Re-Elected Canadian Government Promises Significant Amendments to Canada's Competition Act and Investment Canada Act' (www.mccarthy.ca/article_detail.aspx?id=4260).

4 For more information on the Panel's Recommendations, please see the McCarthy Tetrault LLP publication entitled: 'Competition Policy Review Panel Recommends Significant Changes to Canada's Competition, Investment and Immigration Laws' (www.mccarthy.ca/article_detail.aspx?id=4071).

included in the legislation required to implement the Canadian government's economic stimulus package announced in the budget in January 2009.

Other significant developments in Canadian public competition enforcement and policy over the past year include judicial scrutiny of the Competition Bureau's approach to subpoenas and interim orders, and the introduction of a draft Leniency Program.

ii Enforcement agenda

The Competition Bureau's ('the Bureau') stated intention of vigorous enforcement of the Competition Act ('the Act') has not been matched by enforcement activity. Over the past year, the Bureau has brought very few cases to the Competition Tribunal ('the Tribunal') or the courts in significant contested matters. 2009 may bring significant changes with the amendments to the Act as well as the appointment of a new Commissioner of Competition ('the Commissioner') in Canada. Sheridan Scott, the past Commissioner, stepped down at the end of December 2008, and her successor has not yet been appointed. Melanie Aitken, formerly Deputy Commissioner – Mergers, is the Acting Commissioner.

II CARTELS AND CRIMINAL CONDUCT

i Significant cases

The former Commissioner declared domestic conspiracies and bid-rigging a top enforcement priority. While there was news of several charges or pleas in relation to retail gas price-fixing[5] in Quebec and bid-rigging[6], as well as searches and other investigative activity (notably in the chocolate industry), no significant contested domestic or international cartel prosecutions took place in Canada over the past year. Fines as a result of negotiated pleas were imposed against participants in international

5 In June 2008, charges were laid against 13 individuals and 11 companies concerning retail operations in four local Quebec markets. To date, six individuals have pleaded guilty. For more information, please see the Competition Bureau website: www.competitionbureau.gc.ca.

6 For further information, please see the following Competition Bureau announcements: 'Competition Bureau Announces Charges Against Companies Accused of Rigging Bids for Government of Canada Contracts' (19 February 2009); 'Competition Bureau Obtains Prohibition Orders Against School Bus Operators' (19 February 2009); and 'Quebec Construction Companies Charged with Bid-rigging Following Competition Bureau Investigation' (10 November 2008). Available online: www.competitionbureau.gc.ca.

price-fixing cartels related to various rubber and rubber chemical products[7], isostatic graphite[8], graphite electrodes[9] and hydrogen peroxide.[10]

Deceptive marketing and telemarketing continued to be an area of focus by the Bureau and the Director of Public Prosecutions ('DPP') with numerous pleas and convictions registered. In October 2008, the Ontario Court of Appeal heard the DPP's appeal from David Stucky's acquittal on charges of misleading advertising pursuant to Section 52 of the Act. Mr Stucky mailed promotional materials from Canada to many countries in the world, but not Canada. The trial judge determined that the phrase 'the public' in Section 52 means 'persons in Canada' rather than 'persons anywhere'. The Court of Appeal allowed the DPP's appeal, holding that the phrase 'to the public' is not restricted to the Canadian public and ordered a new trial.[11] In the meantime, the amendments to the Act remove any uncertainty surrounding the geographical boundary of the phrase 'to the public' in Section 52. The amendments provide that it is not necessary to show that any member of the public to whom the representation was made, was within Canada in order to secure a conviction.

ii Trends, developments and strategies

Changes to Canada's Cartel Law

Anti-competitive agreements among competitors have been subject to criminal prosecution since Canada's first anti-combines legislation was introduced over a century ago. Throughout that time, the Crown has had to prove beyond a reasonable doubt that agreements among competitors have negative competitive effects in that they 'unduly' lessen or prevent competition.

Amendments to Canada's cartel provisions, which come into force in March 2010, will make three significant changes:

a the burden of proving anti-competitive effects for 'hard core' competitor agreements to fix prices, allocate markets or restrict supply will be removed;

b the maximum penalties for criminal conspiracy will increase to $25 million or 14 years in prison or both, from the current $10 million or five years in prison, or both; and

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7 For further information, please see the following Competition Bureau Announcement: 'Bayer Group Fined $3.645 million for its Role in Three International Cartels' (30 October 2007). Available online: www.competitionbureau.gc.ca.

8 For further information, please see the following Competition Bureau Announcement: 'Japanese Company Pleads Guilty to Price Fixing' (19 September 2007). Available online: www.competitionbureau.gc.ca.

9 For further information, please see the following Competition Bureau Announcement: 'SEC Carbon Pleads Guilty to Conspiracy' (9 November 2007). Available online: www.competitionbureau.gc.ca.

10 For further information, please see the following Competition Bureau Announcement: 'Akzo Nobel Chemicals International BV Fined $3.15 million for its Role in an International Cartel' (21 November 2008). Available online: www.competitionbureau.gc.ca.

11 *R. v. Stucky,* 2009 ONCA 151 (Ont. C.A).

c the prospect of criminal prosecution for competitor agreements which are not within the hard core categories will be removed and replaced by a new civil mechanism permitting the Commissioner to challenge competitor agreements which result in a substantial prevention or lessening of competition.

The removal of the requirement to demonstrate anti-competitive effects for hard core cartel conduct will move Canada's law much closer to the approach in the US, where such categories of agreements are per se illegal. Once the amendments come into force, the Crown will have to prove an agreement among competitors that is within the three impugned categories, which it may do based on circumstantial evidence, but it will not have to prove adverse competitive effects in order to secure a conviction. Further, no conviction will be registered where the parties to an agreement can establish, on a balance of probabilities: that the agreement is ancillary to a broader or separate agreement by the parties; that the ancillary agreement is directly related to, and reasonably necessary for giving effect to, the objective of the broader agreement; and that the broader or separate agreement does not, on its own, violate the new per se provision.

A dramatic increase in potential penalties available against those convicted of criminal conspiracy will also come into force in March 2010. In the case of bid-rigging, the amendments are already in force, increasing the potential prison sentence to 14 years while maintaining the unlimited maximum fine. In Canada, unlike in the US, there are no formal sentencing guidelines in cartel and bid-rigging cases. The Bureau recently released a Draft Information Bulletin on Sentencing and Leniency in Cartel Cases[12] which largely reflects the current approach whereby the fine calculation is a product of an ad hoc formula based on a percentage of affected sales, modified to reflect aggravating and mitigating factors applicable to each individual case. In prior cases, the Crown has multiplied the number of counts to correlate with the calculation based on affected sales, generating fines totalling up to $49 million. It will be interesting to see if the DPP's approach to sentencing in conspiracy cases will change as a result of the increased fines available. The need for 14-year prison sentences is especially curious considering that individuals in Canada rarely go to jail for criminal anti-competitive conduct, and never for a period as long as five years (the current maximum).

Once the new civil review mechanism for competitor agreements that substantially prevent or lessen competition comes into force next year, the Commissioner will be able to commence an inquiry and bring a civil application to the Tribunal for an order to cease the agreement or the offending portion of the agreement. Parties to an agreement will be able to defend their agreements by demonstrating that the efficiency gains brought about by the agreement outweigh its anti-competitive effects. The new civil provision will also limit the definition of potentially anti-competitive agreements to those between persons 'two or more of whom are competitors' or potential competitors.

Until the changes to Canada's cartel provisions come into force next March, parties who entered into agreements before March 2009 may seek 'free' advisory opinions with respect to the application of the new per se conspiracy and civil competitor agreement

12 Available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html.

provisions. Normally, advisory opinions cost $15,000 and take up to 10 weeks. It is anticipated that the Bureau may receive a number of requests leading up to March 2010 which may strain existing resources and the 10-week response service standard, particularly for complex competitor arrangements. The free advisory opinions are only available for agreements which were entered into prior to the passage of the amendments in March 2009.

A new indictable offence for obstruction

The changes to Canada's criminal competition laws now in force include a new indictable obstruction offence and increase the potential fines for a summary conviction obstruction offence. Until March 2009, the Act provided for a summary conviction (less serious) offence for obstructing an inquiry which was punishable by a maximum penalty of $5,000 or up to two years imprisonment. Now, the maximum summary conviction fine has been increased to $100,000 and an indictable obstruction offence has been added, punishable by an unlimited fine or imprisonment for up to 10 years. In past cases, the DPP has indicted parties for obstruction of competition investigations using the provisions of the Criminal Code of Canada in order to justify the imposition of fines greatly in excess of the old $5,000 maximum fine available under the Act.[13]

Decriminalisation of price discrimination, price maintenance and predatory pricing

The price discrimination and predatory pricing offences in the Act have been repealed and price maintenance has moved to the civil enforcement track. These changes, for the most part, reflect the enforcement priorities of the Bureau and DPP.

Price discrimination has seldom been enforced by the Bureau and predatory pricing has not been a high criminal enforcement priority. These practices may continue to be a concern to the Bureau where they are engaged in by those who possess market power. In those cases, the Bureau could commence proceedings under the abuse of dominant position provisions of the Act. As discussed in further detail below, while this removes the prospect of criminal sanction, it may also make it easier for the Commissioner to enforce and will increase the potential financial penalty for those found to have engaged in the activity.

Price maintenance has been moved from criminal to civil enforcement. Price maintenance has been enforced by the Bureau as a criminal offence in the past, and its movement to the civil enforcement regime marks a significant change. It removes the prospect of criminal sanction and of civil actions for damages pursuant to the Act[14] for price maintenance in Canada. The changes will, however, permit private parties to seek

13 In June 2004, Morgan Crucible Company plc pleaded guilty pursuant to s. 139(2) to obstructing an inquiry of the Commissioner of Competition and paid a fine of $550,000. For more information, please see the following Competition Bureau Announcement: 'Morgan companies fined $1 million for obstruction and price-fixing Cite Morgan Crucible' (1 June 2004). Available online: www.competitionbureau.gc.ca.

14 Section 36 of the Competition Act permits parties to sue for loss or damage suffered as a result of conduct which is contrary to the criminal offences set out in Part VI of the Act.

leave from the Tribunal to bring an application to regain supply on usual trade terms or other remedial orders (and costs) where the party can demonstrate that it is 'directly affected' by the conduct. This is a lower threshold than under existing provisions for private applications for refusal to deal, exclusive dealing, market restriction and tied selling, where private parties must demonstrate that they are 'directly and substantially' affected by the alleged conduct.

Under the old criminal price maintenance provisions, it was a criminal offence to 'attempt' to influence the price upwards or discourage price reduction, and there was no requirement to demonstrate a negative effect on competition to secure a conviction. The new civil price maintenance provisions do not apply to an 'attempt,' and require parties to demonstrate an 'adverse' effect on competition stemming from the conduct. The Commissioner or a private party granted leave by the Tribunal will therefore have to demonstrate that the action taken has actually led to higher prices, and that the conduct has had an adverse effect on competition in a market. The new provision allows businesses greater flexibility to influence downstream pricing.

Competition Bureau policy statements

In March 2009, the Bureau released an updated draft Sentencing and Leniency Bulletin[15] (originally released in April 2008)[16]. The draft Bulletin sets out the factors and approach by the Bureau (which investigates the conduct) when formulating its recommendation to the DPP (which prosecutes the conduct) for leniency in cartel cases. It also sets out the Bureau's approach to various aggravating and mitigating factors to be considered in sentencing for criminal anti-competitive conduct. With respect to sentencing principles, the draft Bulletin indicates that the Commissioner will 'typically' recommend that the DPP consider applying for a prohibition order in addition to a guilty plea. This has not been 'typical' in most recent cartel pleas and is rare for international conspiracies. In the past, prohibition orders have been used as an alternative to a guilty plea, not in addition to a guilty plea. The draft Bulletin indicates that the Bureau will only consider resolving a matter solely with a prohibition order (i.e., without a guilty plea) in 'exceptional circumstances'.

The draft Bulletin also sets out a declining scale of discounts for those who do not qualify for immunity but wish to co-operate fully with authorities. Under the draft Leniency Bulletin, the second-in party would be eligible for a reduction of up to 50 per cent of the fine that otherwise would have been recommended, with subsequent parties eligible for discounts of up to 30 per cent. In all cases, the amount of the discount is conditional on a number of factors, including full, timely and continuing cooperation. The draft Bulletin notes that the full amount of the discount will only be available in 'exemplary' circumstances.[17]

15 Available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html.

16 Available online: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02663e.html.

17 Competition Bureau, draft Sentencing and Leniency Bulletin, page 26. Available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03027.html.

The draft Bulletin followed the release of a significantly revised Immunity Bulletin and Frequently Asked Questions[18] (the key policy documents that form Canada's Immunity Program)[19] in October 2007. The revised Immunity Program includes the following key changes:

a the standard for exclusion from theImmunity Program has been changed from an instigation or sole beneficiary test to a coercion test (similar to the test applied by the European Commission);

b immunity applicants will no longer have to provide restitution to qualify. The Bureau will leave that function to plaintiffs in civil suits;

c revocation of immunity for non-disclosure of offences will be limited to intentional non-disclosure or lack of due diligence; and

d theBureau will not pursue proactive immunity (i.e., contacting individuals who may have useful information with an offer of immunity in exchange for co-operation), an approach followed by the authorities in the United States.

The Bureau also released revised policies on corporate compliance programmes and search warrants;[20] and draft bulletins on trade associations and multi-level marketing.[21]

Impact of amendments on private actions

Section 36 of the Act permits parties to sue for loss or damages suffered as a result of conduct that is contrary to the criminal provisions set out in Part VI of the Act. The changes to the Act's criminal provisions therefore also impact civil actions in the following ways:

a The removal of the requirement to prove anti-competitive effects of a price fixing, market allocation or supply restriction conspiracy should make it easier for civil plaintiffs to prove liability in follow-on class actions. At present, in the absence of a conviction, plaintiffs have to demonstrate, on a balance of probabilities, that a price fixing agreement 'unduly' lessened competition, namely, led to higher prices. Once the changes to the cartel laws come into force in March 2010, plaintiffs will have to prove the agreement but will not have to show that the agreement had anti-competitive effects.

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18 Available online: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02483e.html.

19 For further information, please see the McCarthy Tétrault LLP publications entitled: 'Competition Bureau Releases New Guidelines on Immunity and Confidentiality', available online: www.mccarthy.ca/article_detail.aspx?id=3715, and 'Competition Bureau to Introduce Formal Leniency Program for Criminal Offences', available online: www.mccarthy.ca/article_detail.aspx?id=3927.

20 For further information, please see the McCarthy Tétrault publication entitled: 'Competition Bureau Releases New Guidelines on Immunity and Confidentiality', available online: www.mccarthy.ca/article_detail.aspx?id=3715.

21 All draft and final Competition Bureau guidelines and bulletins are available online: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/h_00170e.html.

b The changes will make it more difficult for private plaintiffs to sue to recover damages for competitor agreements which involve conduct other than price fixing, market allocation or supply restriction, since these types of agreements will no longer be covered by the criminal provisions of the Act.

c Private plaintiffs can no longer sue for damages for price discrimination, predatory pricing or price maintenance under the Act, although they may seek leave to bring an application before the Tribunal in the case of price maintenance.[22] In those cases, the applicant will not be able to recover damages, but will be able to seek injunctive relief, an order to cease the offending conduct or other remedial orders and its costs of the application.

iii Outlook

In addition to the new significant amendments, the next year will bring changes to the enforcement team with the appointment of a new Commissioner. The past Commissioner's stated criminal enforcement priorities of domestic cartels and bid-rigging was not matched by enforcement activity. It will be interesting to see if a new Commissioner, coupled with per se liability for price fixing, market allocation and supply restriction agreements, will lead to greater criminal enforcement activity.

III ANTITRUST: DOMINANCE, REVIEWABLE CONDUCT AND MERGER REVIEW

i Significant cases

There were no significant contested abuse of dominance cases, or any other substantive cases under the Act's civil provisions brought by the Commissioner during the past year. The only recent significant contested matters occurred in the context of the Commissioner's review of the acquisition of discount brewer Lakeport by Labatt. They involved procedural issues regarding the exercise of the Commissioner's powers to seek interim orders to extend a merger review period and to seek court orders for the production of information and documents.

With respect to interim orders, the Federal Court of Appeal ('FCA') dismissed the Commissioner's appeal of a Tribunal order that denied the Commissioner an interim order to delay closing of Labatt's acquisition of Lakeport Brewing for 30 days (to permit the Commissioner to complete her review).[23] Section 100 of the Competition Act provides a mechanism for the Commissioner to seek an interim order where, 'in the Commissioner's opinion, more time is required to complete the inquiry,' and where, in the absence of an order, an action could be taken that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger.

22 This does not affect the ability of plaintiffs to sue under other common law causes of action such as intentional interference with economic relations.

23 *Canada (Commissioner of Competition) v. Labatt Brewing Co.* [2007] C.C.T.D. No. 5 (Comp. Trib.), appeal dismissed (2008), 289 D.L.R. (4th) 500 (Fed. C.A.).

While the Commissioner lost her appeal, the FCA expressly confirmed that the Commissioner need not demonstrate that the proposed transaction will lead to a substantial lessening of competition in order to be granted an interim order to delay closing under Section 100 of the Competition Act. Rather, the Commissioner need only demonstrate that, without an interim order, the Tribunal's remedial powers would be substantially impaired. The FCA's decision did not preclude a substantive merger challenge of the *Labatt/Lakeport* transaction by the Commissioner at any time within three years of the completion of the transaction.[24] Merging parties that proceed to close despite the Bureau's expression of substantive concerns assume a significant risk that the Bureau may challenge the transaction.[25]

The Commissioner's second loss came when the Federal Court struck down orders for the production of documents and information issued under Section 11 of the Act against Moosehead and *Labatt/Lakeport*, finding that representations made by the Commissioner in her e*x parte* application had been 'misleading, inaccurate and incomplete in several material respects'.[26]

While the Federal Court's decision is limited to the particular facts of the *Labatt/Lakeport case*, its strongly worded message encouraged the Commissioner to take a closer look at Section 11 orders. The Commissioner and the Deputy Minister of Justice appointed a special advisor to review the standard of disclosure required in *ex parte* applications and the Bureau's Section 11 process. However, the special advisor's report, released in August 2008[27], is unlikely to change the Commissioner's use of *ex parte* process to obtain Section 11 orders. The report largely commends the Commissioner's approach to Section 11 orders. It also says the Court's findings in Labatt were unwarranted, even though the Commissioner did not appeal the Court's findings or include a review of the decision as part of the special advisor's terms of reference.[28] A joint Competition Bureau/Canadian Bar Association task force is currently reviewing the Bureau's approach to Section 11 orders. In the meantime, the Bureau closed its inquiry into the *Labatt/Lakeport* merger in January 2009.[29]

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24 The Competition Bureau announced the closure of its inquiry in January 2009.

25 For more information on the Federal Court of Appeal's reasons, please see the McCarthy Tétrault publications entitled: 'Warm Beer from the Federal Court of Appeal: The Labatt/Lakeport Section 100 Decision', available online: www.mccarthy.ca/article_detail.aspx?id=3829.

26 *Canada (Commissioner of Competition) v. Labatt Brewing Co.* [2008] F.C.J. No. 127 (F.C.T.D.) at paragraph 36.

27 Brian Gover, 'Review of Section 11 of the Competition Act', report commissioned by the Commissioner of Competition and Deputy Minister of Justice. Available online: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02709e.html.

28 For further information on the Special Advisor's Report, please see the following McCarthy Tétrault publication: 'Gover Report Unlikely to Change Competition Bureau's use of Ex Parte Section 11 Orders', available online: www.mccarthy.ca/article_detail.aspx?id=4112.

29 For further information, please see the following Competition Bureau Announcement: 'Competition Bureau Completes Review of Labatt's Acquisition of Lakeport' (16 January 2009). Available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02951.html.

ii Trends, developments and strategies

New and increased administrative monetary penalties for abuse of dominant position and deceptive marketing practices

Until March 2009, those found by the Tribunal to have abused their dominant position were subject to orders to cease the offending practice of anti-competitive acts or where that would not be adequate to address the anti-competitive effects, other potentially broad remedial orders (including the divestiture of assets). As a result of amendments to the Act in 2002, domestic airlines were also potentially subject to penalties (known as 'administrative monetary penalties' or 'AMPs') of up to $15 million for abuse of dominant position.

Amendments to the act in 2002 also introduced AMPs for deceptive marketing practices under the civil provisions of the Act. Corporations found to have engaged in civil deceptive marketing practices were subject to orders to cease the offending conduct, publish notices and pay AMP's of up to $100,000 for the first order and thereafter up to $200,000. Individuals were subject to AMP's of $50,000 and $100,000 for each subsequent order.

The 2009 amendments introduced significant AMPs for those found to have abused their dominant position and dramatically increased the potential AMPs under the deceptive marketing provisions of the Act. AMPs of up to $10 million for a first finding of abuse of dominant position and thereafter up to $15 million will now be available to the Competition Tribunal. Further, the potential AMPs also increased to these levels for corporations found to have engaged in deceptive marketing practices (from $100,000 and $200,000 respectively). For individuals, the maximum AMPs also increased dramatically from $50,000 and $100,000 to $750,000 and $1 million respectively.

The constitutional validity of AMPs of this magnitude is questionable, in that they are akin to the imposition of criminal sanction (fines) without the protection of a stronger burden of proof and important procedural rights. The AMP's are greater in magnitude than the current $10 million maximum fine under the Act's criminal cartel provisions. At a minimum, respondents should be in a position to argue for greater procedural fairness in abuse and deceptive marketing cases.

Overhaul of merger provisions

The amendments to the Act include significant changes to the pre-notification procedures applicable to the Canadian merger review process. The changes include:

a Increased thresholds for pre-notification: the $400 million 'size of the parties' threshold did not change, but the 'size of the transaction' threshold increased from $50 million to $70 million for the remainder of 2009. After that, the 'size of the transaction' threshold will be revised upward annually using a formula based on the increase of nominal gross domestic products.

b Changes to statutory waiting periods and compulsory powers: until the amendments came into force in March 2009, parties to a proposed transaction that triggered the thresholds noted above were subject to a maximum statutory waiting period of 42 days, with the majority of uncomplicated transactions subject to a 14 day waiting period. The amendments more than double the old initial 14 day waiting period to 30 days and, in complicated transactions, could increase the waiting period by several months.[30] For the small minority of transactions that may raise substantive competition concerns, Canada's merger review process is now similar to that of the US. This is not a change that is likely to benefit merging parties. It will likely make the process longer and more expensive for transactions that raise substantive competition issues. Under the old merger review regime, if the Commissioner wanted more than 42 days to review proposed transactions which raised substantive issues, she had to seek a 30-day interim order from the Tribunal and could only seek one additional extension of that order. If the Commissioner required information to supplement the parties' pre-notification filings to complete the review, she also had to seek a court order pursuant to Section 11 of the Act for the production of information (in the absence of voluntary agreement with the parties). In practice, these orders requested extensive information and production of documents within a short time period. However, the statutory waiting period continued to run while the parties responded to the order, i.e. there was no suspension of the 42-day statutory waiting period (absent an interim order). Further, in the event of a dispute regarding the information requested or other terms of the order, it remained subject to court supervision. The amendments remove judicial oversight of the information gathering process with respect to the merging parties.[31] Under the new regime, the Bureau can issue a request for information that is 'relevant to the Commissioner's assessment of the proposed transaction' to the merging parties within 30 days after the parties have filed their pre-notification filings. Once the parties' response is complete, and only then, a second 30-day period begins to run. A similar 'second request' procedure has been used for the past 30 years in the US. Second requests in the US usually seek voluminous information, and can take months and millions of dollars to respond to. Unlike the current use of Section 11 orders in Canada, there will be little judicial oversight of the second request process and the waiting period will be suspended until the response is complete.

c One year post-closing challenge window: the amendments decreased the post-closing time period during which the Commissioner may bring an application challenging a transaction from three years to one year. In practice, the Bureau has continued merger inquiries long after closing in certain cases. This provision will ensure that parties to a transaction face a shorter period of uncertainty.

d Changes toInvestment Canada Act: the Investment Canada Act ('ICA') provides a mechanism for review of proposed investments in Canadian businesses by non-Canadians which are above certain prescribed thresholds in order to ensure that they are 'of net benefit to Canada,' so as to encourage economic growth and

30 Parties in uncomplicated proposed transactions where there is no or little overlap between the parties may continue to apply for an Advance Ruling Certificate ('ARC') to be exempted from the pre-notification filing requirements. ARC applications are not subject to a statutory waiting period.

31 The Commissioner must still seek court orders for the production of information and documents from third party industry participants.

employment in Canada. In practice, many mergers which are subject to pre-notification under the Competition Act also require approval under the ICA. The same legislation which amended the Competition Act also made significant changes to the ICA. The amendments increase the scope of government review to encompass concerns of national security in respect of acquisitions of control and minority investments in Canadian businesses by non-Canadians, regardless of whether the investment exceeds the applicable financial thresholds. Where the responsible Minister has 'reasonable grounds to believe that an investment by a non-Canadian could be injurious to national security,' the Minister may deny the investment, ask for undertakings, or impose terms or conditions for the investment or, where the investment has already been made, require divestiture. There is no additional guidance provided on the scope of 'national security'.

Investments by non-Canadians are subject to review if they are above certain prescribed thresholds. The amount of the applicable threshold depends on whether the investor or vendor is controlled by a resident of a World Trade Organization ('WTO') member state, whether control of the Canadian business is directly or indirectly acquired, and the sector in which the investment is proposed. Currently, the prescribed threshold for pre-closing review of direct investments in relation to WTO investors in all sectors except cultural businesses is $312 million (based on the assets on the balance sheet for the most recently completed fiscal year). For cultural businesses and investments that do not involve WTO investors, the threshold is $5 million. Once the amendments to the ICA are proclaimed in force, the thresholds for WTO investments will be determined by 'enterprise value' rather than the book value of the assets, and the threshold will increase to $600 million in the first two years, and to $800 million and $1 billion in the next two bi-annual periods. After that, the applicable threshold will be determined on an annual basis using a prescribed formula. The definition of 'enterprise value' will be determined by regulations which have yet to be released. The thresholds for non-WTO investments and investments in cultural businesses will continue to be made on the basis of the book value of the assets of the Canadian business.

Other changes to civil provisions of the Competition Act

Other changes to the civil provisions of the Act include:

a Permitting the Commissioner to seek interim injunctions, potentially without notice, where the Commissioner can demonstrate a 'strong *prima facie* case' that a person has made a misleading representation for business promotion purposes and the disposal of articles would substantially impair the ability of the Tribunal or court to order a remedy.

b Repeal of the consignment selling provisions, which made it a reviewable practice for a supplier who ordinarily sells a product for resale to introduce a practice of consignment selling for the purpose of controlling the resellers' prices or discriminating between consignees.

c Private parties will be able to seek leave from the Tribunal to bring price maintenance applications, in addition to refusal to deal, exclusive dealing, tied selling and market restriction.

Competition Bureau policies

In January 2009, the Bureau released new draft enforcement guidelines on the abuse of dominance provisions of the Act. The draft is intended to update the 2001 version of the guidelines. The draft guidelines maintain the current 35 per cent individual market share safe harbour, and increase the joint market share safe harbour from 60 per cent to 65 per cent. They also provide additional guidance on the Bureau's approach to such issues as the role of intent and valid business justifications in abuse of dominance cases, as well as providing examples of conduct which it views as crossing the line. In March 2009, the Bureau released the final version of its information bulletin on efficiencies in merger review.[32] The release of the bulletin followed a consultation process and comes several years after the last litigated case in Canada which dealt with the treatment of efficiencies.[33] The Bureau also released draft enforcement guidelines on the revised merger review process.[34]

iii Outlook

The next year will bring challenges to the Bureau and merging parties as they grapple with the unknown of the new merger review regime. Important regulations outlining the new pre-notification filing requirements[35] as well as draft guidelines setting out the Bureau's approach to the merger review process[36] have recently been released for public consultation. It will be interesting to see the breadth of the Bureau's first 'second requests' under the new regime (although such requests will not be made public). The new AMPs for abuse of dominant position and increased AMPs for deceptive marketing practices are also anticipated to bring challenges for both the Commissioner and market participants. For the Commissioner, AMPs in the magnitude of $10 million to $15 million increase the likelihood of a constitutional challenge. For market participants, the line between fierce competition and anti-competitive acts is not always well defined. The risk of significant fines may discourage large competitors from competing as vigorously as they otherwise might for the benefit of competition.

32 www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02942.html.

33 *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2001), 199 D.L.R. (4th) 130 (F.C.A.); leave to appeal refused (2001) (S.C.C.), redetermination decision at (2002), 18 C.P.R. (4th) 417 (Comp. Trib.); affirmed (2003), 23 C.P.R. (4th) 316 (Fed. C.A.).

34 www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02986.html.

35 Regulations Amending the Notifiable Transactions Regulations, Canada Gazette, Part I, Vol. 143, No. 14 (4 April 2009).

36 Competition Bureau Announcement, 'Draft Merger Review Process Guidelines Issued for Comment' (24 March 2009). Available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03029.html.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Canada's competition authorities do not have the legislative authority to undertake industry examinations of the type undertaken by the European Commission in relation to competition in the pharmaceutical industry. Canadian authorities may not compel information from or the participation of industry participants unless inquiring into specific activity which may be contrary to the Act, and cannot compel parties to adopt recommendations made in a general study. The Bureau has, however, conducted general industry studies based on voluntarily provided information resulting in non-binding recommendations.

In late 2008, the Competition Bureau released its second report[37] on competition in the generic drug sector, following its first report released in October 2007.[38] Both Bureau reports found that healthy competition exists in the generic drug sector in Canada. The Bureau's first report found that there was healthy competition among generic drug manufacturers, but that the benefits of this competition were not being passed on to consumers in the form of lower prices by pharmacies. The second report provided recommendations to private and public drug plans so that Canadians can fully benefit from generic drug competition.

37 Competition Bureau Report: 'Benefiting from Generic Drug Competition in Canada: The Way Forward' (November 2008). Available online: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03026.html.

38 Competition Bureau Report: 'Canadian Generic Drug Sector Study' (October 2007). Available online: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02495e.html.

Chapter 7

CHILE

*Sander van der Voorde and Benjamín Mordoj**

I OVERVIEW

A specific emphasis on collusion and telecommunications.

i *Prioritisation and resource allocation of enforcement authorities.*

In 2003, in an effort to intensify competition policy, the Chilean antitrust system was substantially modified, creating the Tribunal de Defensa de la Libre Competencia ('TDLC'), a specialised antitrust court, and introducing an administrative sanctioning system thereby eliminating the criminal sanctions for anti-competitive behaviour. Since then the TDLC has ruled on various cases, initiated by the Fiscalía Nacional Económica ('FNE'), the competent agency to investigate and prosecute anti-competitive conduct, regarding alleged abuses of dominant positions, cases of collusion and cases of unfair competition. At the moment, however, there is a clear emphasis on cartels and concerted practices. The FNE has publicly stated that the investigation and prosecution of cartels will be its priority for the coming years. This focus can be explained by the fact that various industries in Chile, due to the size of its economy, are rather concentrated, which increases the risk of cartelism and Chile's efforts to become part of the OECD. In this respect the FNE has signalled that its aim is to match the standards of investigation and sanctioning as established by the OECD.

ii *Enforcement agenda*

The investigation and prosecution of cartels will clearly dominate the FNE's enforcement agenda for the coming years. This is especially true as its investigation powers are likely to be strengthened in the near future. The Congress agreed on a law in April this year, introducing more faculties to discover and prosecute cartels. In line with international

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developments, the law provides for the authority to enter and search premises, including private homes, to seize documents and to intercept electronic communications. In addition, a leniency programme is being introduced giving those who submit evidence regarding the existence of a cartel total immunity from fines or a significant fine reduction, depending whether or not the entity concerned was the first or not to come forward and provided that the entity had not coerced other undertakings to engage in the anti-competitive conduct. The maximum fines for cartels will be increased from $15 million to $23 million. The law is expected to come into force later this year.

II CARTELS

i The year of collusion

Significant cases[1]

The two most relevant cases regarding cartels are both related to the retail sector. The first case, known as the *Guerra del Plasma* case (the war on plasma screens), concerned an injunction by the FNE against the two major department stores in Chile for obstructing a bank from offering electronic products by way of promotion to its clients.[2] The stores had pressured, in a coordinated way, the main providers of electronics to refrain from supplying the bank concerned. The second case, which is currently pending before the TDLC, relates to an investigation by the FNE into alleged price fixing by the three main pharmacy chains in Chile, which jointly account for approximately 92 per cent of the market.[3] The three parties, who were involved in a price war at the end of 2007 which lead to prices below costs, are accused of jointly raising the prices of 222 medicines in coordination with certain pharmaceutical companies in order to end the price war and subsequent losses. Both cases are relevant precedents for the Chilean antitrust practice for distinctive reasons.

In the plasma case, the TDLC in fact established the elements of an infringement of the cartel prohibition. It held that, in order for such infringement to exist, the following requirements should be fulfilled: (1) an agreement between competitors; (2) that such agreement affects a relevant competitive parameter; and (3) that the agreement has the objective ability to produce an anti-competitive result.[4] The case is further relevant in relation to the method of setting a fine. Until now, any guidance as to the method used

1 Information on both ongoing cases and cases decided upon by the TDLC can be found on the FNE's website (www.fne.cl) and the TDLC's website (www.tdlc.cl). The information is mainly published in Spanish only.

2 Sentence 63/2008 TDLC, of 10 April 2008, in appeal Supreme Court 2339/2008, of 13 August 2008.

3 TDLC, Case No. 184-08 (pending).

4 These requirements were developed in two earlier decisions of the TDLC, but these decisions were revoked by the Supreme Court, the second and ultimate instance to hear on competition cases, basically due to insufficient evidence on the existence of an agreement. The plasma case was therefore in fact the first time where the Supreme Court upheld the TDLC's decision on collusive agreements under the new antitrust system.

by the competent authorities to establish the level of an appropriate amount is absent. The law only stipulates the maximum amount and the relevant criteria to be taken into account; i.e. the economic benefit, the seriousness of the conduct and the recidivist attitude of the violator. In the appeal case, the Supreme Court accepted the arguments of the parties concerned that the *ad hoc* policy adopted by the TDLC so far violated their rights of defence. The court lowered the fines imposed but, remarkably, refrained from explaining in more detail the elements taken into account when establishing these final amounts. As any guideline or clear precedent is absent, this issue will likely remain one of the discussion points in upcoming cases and a reason to appeal to the Supreme Court any decision rendering a fine by the TDLC.

Although the pharmacies case is still pending, it has certain aspects that have attracted significant public and political attention and may change the way the Chilean legal practice faces and evaluates cartel cases and cases of concerted practices. In March 2009, while the remaining two chains filed their respective objections, thereby denying any form of anti-competitive cooperation, the FNE and Fasa, the third party accused, presented a settlement agreement before the TDLC. The settlement included recognition by Fasa of the facts mentioned in the injunction and the agreement to submit information in support of the accusations, to implement a compliance program as well as the payment of the equivalent of approximately $1 million in Chilean pesos, in exchange for immunity from further prosecution by the FNE. It is the first time a company has negotiated a settlement in a pending cartel case and, although the law does not provide for such form of plea bargaining in competition cases, the TDLC accepted the settlement as a consequence of which Fasa will no longer be part of the trial.[5]

ii Trends, developments and strategies

One of the main issues in relation to the enforcement of cartel cases has been the burden of proof. As the FNE lacked the faculties to obtain actual proof by dawn raids on the offices of the companies concerned, it is – at least until the new law comes into force – merely depending to a large part on indirect evidence and presumptions derived from it. However, in an earlier case involving the producers of industrial gases, the Supreme Court had held that, in line with the international doctrine, the FNE could not rely on merely parallel behaviour in order to establish an infringement of the applicable cartel prohibition.

In the plasma case, where direct evidence of collusion between the department stores was absent, the TDLC accepted as 'plus factor' the unusual increase in telephone traffic between the competent executives of each of the companies concerned previous to the day the promotion was planned, even though the content of the calls remained unknown, as the law does not yet allow the FNE to intercept those communications. The TDLC's position was upheld in appeal. In the pharmacies case, on the other hand, the FNE's injunction is merely based on parallelism in the price increases, for which, in the opinion of the FNE, there is no alternative economic explanation. The legal debate

5 Cruz Verde, one of the other companies involved, has appealed the TDLC's decision and, consequently, the outcome is uncertain at this moment.

on whether or not in the case concerned the FNE could indeed rely on indirect evidence alone, without providing any plus factors, seems however less relevant now given that one of the parties involved will, under the settlement agreement, submit evidence in support of the accusations.

Another issue of interest is the actual effect a restrictive agreement or act may have on competition. As indicated, the criterion developed by the courts is whether or not the agreement has the objective ability to restrict competition. The courts seem to link this criterion with the possibility of the parties concerned exerting market power as a result of the agreement or collusive act. In a recent case regarding coordinated tariffs by medical specialists, the TDLC held for instance that only the specialists who held jointly a market share of over 50 per cent in their respective specialism infringed the law, whereas the charges against those who represented a lower percentage were dismissed.[6] The court refrained however from any further explanation on this point. As the courts have not yet ruled on the applicability of per se rules, the rule of reason or equivalent doctrines, it is unknown whether the 'market power' doctrine applies to all restrictive agreements, regardless of its object and or whether it concerns hard-core restrictions or not.

iii Outlook

It can be anticipated that the specific focus on cartels, the new investigation powers and the increased possibilities for leniency and settlements will attract an increased amount of investigations and cases in the near future. Whether the competent authority is sufficiently equipped to handle all these cases remains to be seen. The injunctions issued by the FNE up to now have not been free from criticism as to their legal and economic standard. The option that companies may want to settle and submit supporting evidence following an injunction is not necessarily an incentive for the investigative authority to improve its practice in this respect.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Vertical restraints in Chilean competition law

Significant cases

Apart from horizontal cartels, the FNE has shown interest in establishing jurisprudence regarding exclusivity clauses in distribution contracts, especially in those cases where such clauses were imposed by a dominant market player. These cases have been judged under the general prohibition of Article 3 DL 211 which – among others – sanctions exclusionary conduct by economic entities that seek to obtain, keep or increase a dominant position.

The most recent cases are, for one part, the injunction issued by the FNE against CCU, the main brewer and distributor of beer in Chile, with an market share of approximately 80 per cent and, on the other hand, the injunction against the Compañía Chilena de Fósforos, a quasi-monopolist in the production and distribution of matches.

6 Sentence, 74/2008 TDLC, of 2 September 2008, in appeal at the Supreme Court.

Both cases relate to exclusivity clauses in these companies respective distribution contracts and the foreclosing effects resulting from these clauses.

In the case of CCU, the exclusivity related only to certain hotels, bars, pubs and restaurants, and did not cover all points of sales distributed by CCU. Although there were therefore alternative points of sale that were not bound by exclusivity, the FNE argued that the effects of the exclusivity clauses in combination with discounts related to the length of the exclusivity and financial support as to the infrastructure had the object of restricting the capacity of smaller producers of speciality beers to enter the market. The second case has comparable features in the sense that the exclusivity related to certain – high volume – points of sales, like supermarket chains. Moreover, the company is accused of other restrictive conduct, like abuse of legal and administrative procedures and specific incentives to distributors, all directed at hindering the entry of foreign competitors on the Chilean market.

Even though CCU submitted its defence, it negotiated an agreement with the FNE in the course of the court's procedings. The company would refrain from exclusivity clauses, even where it financed a part of the infrastructure or inventory, but kept certain rights as to the exclusivity in publication. To date, the case against Compañía Chilena de Fósforos is still pending. The difference in legal strategy may be explained by the fact that CCU is under joint control of Heineken, the Dutch multinational, which in recent years has been subject to various cartel investigations in Europe and as such has more experience with negotiated outcomes.

ii Trends, developments and strategies

There are no guidelines or clear precedents regarding vertical restraints in Chile. On occasion, officials of the FNE have expressed their preoccupation with vertical restraints, especially exclusivity clauses, without further specification as to the boundaries of such clauses. Whether and to what extent the legitimacy of such restrictions depends on the actual degree of market power at the level of the supplier or the reseller, and the actual effects on inter- and intra-brand competition, will therefore remain subject to debate. However, given the requirement established in Article 3 DL 211, as mentioned above, it is rather clear that only companies with significant market power are in the danger zone as far as vertical restraints are concerned.

iii Outlook

By means of the above-mentioned cases, the FNE has given a signal to companies with a substantial market position to refrain from restrictive clauses in their distribution contracts that may impede or hinder effective competition from alternative or potential suppliers. As to the prosecution of other forms of possible abusive conduct, the FNE does not seem to take a very proactive approach, leaving it for the entities affected by such conduct to take start proceedings or file a complaint.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Allocation of essential inputs; the Chilean approach

Significant cases

The relation between sector-specific regulation and competition law, more specifically the question as to whether and to what extent general competition law is sufficient to regulate a certain industry, is subject to a long-running debate. One of the central themes in question has been the approach the different legal systems take regarding the need to establish *ex ante* rules on the allocation of essential inputs. Two recent cases illustrate that in Chile the courts competent in competition matters, rather than the legislature or the administrative authority, set the regulatory objectives and principles in this respect.

The first case concerned the upcoming public contest for the award of 90MHz in the radio electric spectrum of the 1700-2100MHz bands for the supply of third-generation mobile services.[7] The Office of the Undersecretary of Telecommunications, the competent regulator of the telecommunications sector, submitted a request to the TDLC as to whether or not the participation of the three incumbent operators should be limited in the upcoming public contest for the third-generation mobile telephony concessions.

The TDLC recognised that the radio spectrum was an essential input for the supply of mobile telephone services and that the incumbent operators were likely willing to pay a surplus for such input as the acquisition has the effect, apart from the profits inherent to the use thereof, of preventing the entry of new competitors. Nonetheless, it considered that any reservation of portions of the radio spectrum to the benefit of new operators was unlawful as it would contradict the incumbents' right of free and non-discriminatory access to such input as provided for, in its view, in the Chilean General Telecommunications Act.[8] This decision was reversed by the Supreme Court. In its judgment the Supreme Court established the need to impose limits on the participation of incumbent mobile telephone operator's in the future public 3G service contest through a cap on the total number of spectrum that could be assigned to a single market participant. One of the essential aspects identified by the Supreme Court was precisely the need to keep incumbent operators from monopolising an essential input to the detriment of potential entrants, who would have no chance of effectively competing on this market. The Court held that the conditions under which rights to the radio spectrum are assigned must be consistent with a pro-competitive object to keep such assignment from becoming an effective barrier for potential entrants; and therefore, in contrast to the TDLC, concluded that a restriction on the quantity of radio spectrum in possession of each individual incumbent was fully justified for the purpose of stimulating the efficient use of that spectrum and effectively guaranteeing free and equal access to telecommunications.

The second case concerned a claim filed by the FNE against the Civil Aviation Board (CAB) the authority responsible for the aviation market. The FNE alleged that

7 Supreme Court, Decision dated 27 January 2009, Case 4797-2008.

8 TDLC, Resolution 27 of 17 July 2008, Case 198-07.

the bidding terms and conditions for the flight slots (referred to as flight frequencies) on the international Santiago-Lima route, as drafted by the CAB, restricted effective competition and, in the long term, allowed the dominant operator to monopolise those frequency rights and prevent competition on that market or any related markets.

The competition authority argued that where an essential input is auctioned, such auction should be designed in such a way as to ensure effective competition, particularly when there is a dominant operator who has incentives to acquire those additional inputs and use them to block successful new entry. Bidding terms and conditions, like in the case concerned, whereby the rights were awarded to the highest bidder, clearly benefited the existing dominant operator and – as such – were insufficient to safeguard effective competition on the market. The FNE requested the court to modify the bidding terms and conditions by adding, as a criterion, the 'competition generated by the assignment of the flight frequencies, thereby taking into account the need to limit the quantity of flight frequencies of each of the airlines on the route, the number of airlines operating that route and the entry of new companies.'

The arguments were accepted by the TDLC. It ordered that, in a first bidding round, the regulator could not award a maximum of 75 per cent of all flight frequencies on the Santiago-Lima route to one and the same economic group. It also ordered CAB to ensure that it's bidding terms and conditions would 'guarantee the creation of the best conditions for competition between all companies interested in providing air transport services on the route concerned.'[9] Of the many reasons provided by the Court for its decision, most notable is the analysis of the flight frequencies as a potential entry barrier (avoiding, however, any qualification to the corresponding rights as essential inputs) and the incentives of the existing operators, particular the dominant one, to monopolise those inputs with anti-competitive purposes. The Court reasoned that a bidding structure, where frequencies were awarded on the basis of the highest bid, was inadequate as it favoured the dominant operator, who valued the award of the input more highly and had objectives that were not necessarily consistent with the commercial exploitation of such frequencies, all with the ultimate goal of protecting monopolistic revenues. The Court took also into account the increased risk of collusion due to a higher level of concentration of the market.

ii Trends, developments and strategies

It is generally accepted that regulatory obligations should only be imposed where, as a result of market imperfections, there is no effective competition and general competition law remedies are not sufficient to address the problem. As the US Supreme Court ruled in *Trinko*, where there is a regulatory structure in place that is intended to avoid or remedy any damage resulting from anti-competitive practices, there will be little additional benefit to competition by enforcing competition law.[10] On the other hand, when no such purpose seeking a competitive end is found, the enforcement of

9 TDLC, Decision 81 dated 16 January 2009.

10 *US Supreme Court. Verizon Communications Inc v. Law Office of Curtis V Trinko, LLP.* 540 U.S. 398 (2004) 305 F.3d 89.

competition law will have an intrinsic value beyond the costs of its enforcement. The US Supreme Court added, in this regard, that the benefits and costs of enforcing antitrust law when there is a regulation that has a pro-competitive objective, at least in its finality, must be weighed. And in the analysis of the several costs implied in any competition law scrutiny, it held, there will generally be a preference for the benefit of the regulation over competition law.

Trinko teaches us, according to some commentators, that 'in regulated industries, a sector-specific regulator should do both antitrust and regulation, rather than leave the former to a separate body of law and enforcement agency'.[11] Only where sector-specific rules are silent in respect to competition, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. This depends on the regulation concerned, the relation between general competition policy and the regulatory program of the regulatory statute concerned as well as the relation of the specific conduct at issue to both sets of laws.

The Chilean competition courts are in the unique position to 'do both antitrust and regulation'. The Chilean legislators have failed to provide for a system that gives the various regulatory authorities any guidance as to if and how to apply a pro-competitive objective in their regulatory policy. Given the particular Chilean institutional structure, where decisions of such agencies can be challenged before the TDLC and – in some cases – regulators are obligated to obtain the Court's position before taking a decision, this task is left to the courts competent in competition matters.

The overall balance of such system is open to debate. Leaving aside the issue of whether or not it is desirable that a court takes in fact a legislative role, there are more practical disadvantages like the lack of sector-specific expertise at the courts, the fact that regulatory policy is made on a case-by-case basis, the social costs involved and the delay in the allocation process. Moreover, in those cases where there is no obligation to present an inquiry before the TDLC, and therefore certainty as to whether the courts will indeed be heard on the matter lacks, the regulatory authorities are not encouraged to be concerned about promoting increased competition in the sector concerned.

On the other hand, there are certain advantages to a system where competition policy is concentrated in one and the same institution. The courts are in the position to provide objective parameters for the application of regulation and competition, which serves legal security for both the regulator and the regulated entities. It is then up to the regulators to implement these parameters, taking into account the specific characteristics of the sector, the regulatory program concerned, etc.

The recent cases show that the courts, as well as the competition authority, strongly prefer the allocation of scarce inputs with a pro-competitive object over *ex post* solutions. As such, the courts have given a strong signal in favour of a regulatory policy with a pro-competitive objective. Unfortunately, they failed to give more specific guidance as to the implementation of such objectives. Instead, the TDLC choose for that leaves considerable room for interpretation ('guarantee the creation of the best conditions for

11 Brennan, Timothy. 'Essential Facilities and *Trinko*: Should Antitrust and Regulation Be Combined?' *Federal Communications Law Journal*, Vol. 61, Number 1, 2008; pp. 134-140.

competition [...]'), a solution that may result in future litigation as to the implementation by the regulator concerned (the CAB) as well as other regulatory authorities.

iii Outlook

The most recent decisions rendered by the TDLC and Supreme Court in cases relating to the allocation, by the regulatory authority, of scarce inputs demonstrate that, given the particular legal system in Chilean, the Courts have been the ones to establish guidance for regulatory authorities in the allocation of such essential inputs. The chosen solutions that promote, *ex ante*, more dynamic competition in the sectors concerned, giving a clear signal that a preventive policy is to be preferred over *ex post* enforcement in markets where bottlenecks affect fair and effective competition. They thereby recognised the need to restrict the incumbents as to their 'ownership' of such input, indicating, among others, (1) the natural incentives of the pre-existent operators to value such inputs beyond their social optimum and may use them as barriers to entry or entry deterrence; and (2) the comparative advantages incumbents have over new entrants in allocating those scarce inputs.

Preventive regulation, as advocated by the courts, has clear advantages given the fact that, given the structural imperfections in certain market sectors, *ex post* sanctioning of anti-competitive practices is not necessarily adequate. Moreover, the approach taken by the courts, whereby competition will be taken into account in the regulatory policy will leave – in the words of *Trinko* – little additional benefit to competition by *ex post* enforcement.

However, in a situation where, in absence of decisive action by regulatory agencies – because of a lack of power resulting from a statutory decision or simply because of other reasons- it is recommendable for the antitrust courts to establish clear parameters that indeed guide the government agencies as well as private parties subject to any type of regulation. If not, there will still be ample room for future cases on the interpretation of the regulator's decision regarding the allocation of scarce inputs or, once allocated, abuse cases relating to the ownership of such scarce inputs.

V STATE AID

Considering that the Chilean Constitution establishes a rather restricted regime as to the participation of the state in the economy, be it through participation in private companies or through state subsidies to economic agents, there are no rules on state aid similar to those under the EC Treaty and the implementing legislation. As such, relevant cases and developments are absent.

VI CONCLUSIONS

i Pending cases and legislation

The upcoming modification of the competition law and pending cases will lead to some major changes in Chilean cartel enforcement. As indicated, the new law will introduce a leniency programme and provide the enforcement agency with far-reaching investigative powers. The pending case against the pharmacies, including the appeal filed against the

TDLC's decision to agree on the settlement reached between one of the companies accused and the FNE, will give further clarity on the possibilities of plea bargaining once a case has been laid before the court as well as the consequences of such settlement for the remaining companies accused. Finally, the government has announced it will study the possibility of re-introducing criminal sanctions for certain infringements of the competition rules.

ii Analysis

Chilean competition practice is in fact at the dawn of a new era. As a result of the new powers of investigation and the possibility of leniency, we will see an increasing amount of investigations and cases on cartels and concerted practices in particular. Moreover, as injunctions and judgments will be based on actual and direct evidence rather than on presumptions, the legal debate may shift to more procedural matters as well as material matters on the evaluation of evidence and counter evidence and the actual effect on competition resulting from an act or agreement. These changes and the option to settle in pending cases, as shown by the recent precedent in the pharmacy case, will also change the approach of companies and their legal advisers as to the best defence.

It remains to be seen whether the government will indeed present a bill introducing criminal sanctions for those responsible for anti-competitive conduct. It seems that the idea is a response to public concern expressed in relation to the current pharmacies case and is not so much the result of a belief as to the best strategy to prevent cartels. It should be borne in mind that between 1973 and 2003, previous to the modification of the Chilean competition system, the law already provided for such faculty (which, however, was never applied). Moreover, the law already provides for the possibility of fines for the executives involved and criminal sanctions may therefore have little extra deterrent effect.

Chapter 8

CROATIA

*Christoph Haid**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

A modern competition law regime was introduced in Croatia about 10 years ago. Competition law in Croatia is (predominantly) enforced by the Croatian Competition Agency ('CCA') which was established in 1997 and whose managing body is the (five-man) Competition Council. The prime source of competition law in Croatia is the Croatian Competition Act, which became effective on 1 October 2003.

The CCA currently has some 29 case handlers, of which 14 are economists. It is organised into four divisions (for competition, state aid, international cooperation as well as legal affairs and economic analysis).

One of the main goals of the CCA is to change the current competition law regime by introducing the legislative reforms necessary to ensure an effective enforcement regime. Therefore, amendments to the Competition Act have been proposed and are expected to be adopted during 2009.

ii Enforcement agenda

The activities of the CCA over the past three years were influenced by the negotiations for the accession of Croatia to the EU. The CCA gears to the case law at EU level in its decisions.

The CCA mainly deals with antitrust and merger control cases as well as the authorisation, monitoring, implementation and recovery of state aid. Under the Stabilisation and Association Agreement between Croatia and the European Community and its Member States, Croatian competition rules are to be applied and interpreted in accordance with the rules and principles of EU competition law. In essence, Croatian

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competition rules mirror EC competition rules. This approach was confirmed by decisions of the administrative courts and recently by the Croatian Constitutional court.

A major priority of the CCA is to expand its workforce and further invest in the training of case handlers in order to be equipped with sufficient resources required for an effective enforcement of competition rules.

II CARTELS

i Preliminary remarks

The cartel prohibition pursuant to the Competition Act copies Article 81 of the EC Treaty. What differs is that the Croatian competition regime allows, but not requires, that anti-competitive agreements that fall outside the cartel prohibition are notified to the CCA for individual exemption. If the respective agreement creates overriding efficiencies, it will be exempted for a limited period of time, which, generally, does not exceed five years (see also section III below).

Similar to EC rules, infringements of the cartel prohibition may entail fines of up to 10 per cent of the infringing party's worldwide turnover. In addition, the natural person responsible for the infringement may be fined up to 200,000 kuna. Unlike the European Commission, the CCA is, however, not empowered to impose fines but has to apply to a court for the infringing undertaking to be fined.

ii Significant cases

Bus operators

Cartel cases in Croatia are scarce. In 2007, the CCA, on its own initiative, exposed a cartel between 14 bus operators. These undertakings were found to have fixed bus fares on the routes between Zagreb and Split and Zagreb and Šibenik. The CCA consequently applied for fines to be imposed on the implicated undertakings. The court, however, only imposed a fine of 10,000 kuna on Cazmatrans prijevoz d.o.o, one of the undertakings involved, and 6,000 kuna on the person in charge.

Croatian Financial Services Supervisory Agency

The CCA also dismissed an anonymous request for investigating the alleged existence of a cartel agreement fixing prices of compulsory motor insurance concluded between insurance companies. After having consulted the specific regulator in this area the Croatian Financial Services Supervisory Agency ('HANFA'), which denied the existence of any pricing cartel between the insurance companies and explained that the maintenance of uniform prices of compulsory motor insurance was not the result of a cartel but of HANFA's temporary decision to maintain the price level of compulsory motor insurance as long as insurance companies are compliant and update their databases and ensure necessary technical and financial conditions for the price liberalisation and insurance market reform.

iii Trends, developments and strategies

In detecting and prosecuting cartel agreements, Croatia is far from matching the track record of competition authorities of other EU Member States. Public enforcement lacks any deterrent effect and is ineffective. This is due the following reasons:

a the CCA is not empowered to impose fines. Instead it must apply to misdemeanour courts for fines to be imposed on infringing undertakings. Not only are proceedings before these courts very time consuming (which is why many proceedings are terminated because the infringement is time-barred meanwhile), but the courts have a reputation of imposing inappropriately low fines which lack any deterrent effects. Examples of such low fines in 2008 include the cartel between bus operators that were only fined a maximum of approximately €1,800. Currently, the only means for the CCA to fight these low fines is by appealing the respective decision before the High Minor Offence Court in Zagreb;

b the CCA may only conduct dawn raids after requests for information have been not answered (fully) by the respective undertaking and only on the basis of a court order; and

c finally, no leniency programme is currently in place. This fact, plus the limited investigative powers of the CCA, are major factors as to why the prosecution of hard-core infringements in Croatia is underdeveloped.

iv Outlook

From the above it can be inferred that procedural changes are much-needed in order to foster public enforcement. Amendments to the Competition Act have been proposed and are expected to be adopted during 2009. To our knowledge, none of the draft proposals are publicly available yet. Expected major amendments include, *inter alia*:

a empowering the CCA to impose fines on undertakings that have infringed competition rules (currently, the CCA has to apply for fines before misdemeanour courts);

b establishing a single court protection regime in respect of the legality of the decisions of the CCA and the level of imposed fines (currently, the injured party may file an administrative dispute before the administrative court); and

c introducing a leniency programme similar to the one of the European Commission.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Preliminary remarks

As mentioned in section II above, the cartel prohibition pursuant to the Competition Act copies Article 81 of the EC Treaty. The Croatian competition law regime has also transposed secondary EU competition rules into national law. As a consequence, there are two exemptions from the cartel prohibition: first, so-called *de minimis* agreements (anti-competitive agreements are permissible unless they contain hard-core restrictions or if certain market share thresholds are met, i.e., the combined market share held by competing undertakings does not exceed 10 per cent on any of the relevant markets affected or in case of agreements between non-competing undertakings, the individual market share of one of the implicated undertakings does not exceed 15 per cent on any of the relevant markets) are permissible; second, anti-competitive agreements are exempted if they generate countervailing efficiency gains.

In order to enhance legal certainty, regulations have been adopted that exempt certain types of agreements from the cartel prohibition. These are comparable to the regulations at EU level. If no block exemption is applicable, parties may apply for the respective agreement to be exempted individually. The CCA exempts the respective agreement for a limited period of time, which generally will not exceed five years (which may be prolonged by another five years) if the requirements for an exemption are met.

The Competition Act prohibits any exploitative or exclusionary practice by an undertaking that has a market dominant position. When defining market dominance, the CCA takes recourse to the case law of the Community Courts and considers dominant any undertaking that is largely independent of other market participants when determining its market conduct.

As with cartels, abuse of market dominance may not only entail fines of up to 10 per cent of the infringing undertaking's worldwide turnover, but also fines of up to 200,000 kuna to be imposed on the responsible individual. In addition, the Croatian Criminal Code also covers abuse of market dominance and the responsible director can face imprisonment of up to five years.

ii Significant cases

Restrictive agreements

In *Viro and Pfeifer & Langen* in early 2008, the CCA exempted a cooperation agreement between undertakings on the market for sugar. The CCA concluded that the envisaged non, full-function joint-venture between Viro d.d. and Pfeifer & Langen, Germany, would not infringe the cartel prohibition if certain provisions in the joint-venture were deleted. The provisions in question were thought to lead to market sharing and price fixing between the parties to the agreement.

In *Proplin* in the first half of 2008, the CCA conducted a preliminary investigation of the gas market which led to the respective undertaking accepting commitments to restore effective competition in the relevant markets. The investigation concerned the assessment of lease agreements for gas containers and exclusive agreements on the sale of gas concluded between Proplin d.o.o and various other undertakings and natural persons for a period of 10 years. The CCA concluded that the duration of these agreements could foreclose competitors of Proplin d.o.o and thus constitute a barrier to the entry for new suppliers by tying buyers to Proplin d.o.o. Proplin d.o.o has a strong position in the market for the supply of gas and it is linked to the biggest oil company, INA. According to publicly available information there were more than 3,000 agreements.

The CCA requested that all existing and new agreements on the leasing of gas containers be changed, so that their duration would not exceed five years. With regard to agreements on the sale of gas, the CCA requested those agreements to be concluded for a period of one year instead of 10 years. Proplin d.o.o. undertook to implement these changes. If these changes were not implemented, the CCA would have initiated proceedings against Proplin d.o.o to formally establish whether the agreements infringed the cartel prohibition or whether Proplin d.o.o. had abused its market dominant position.

In *Kolnoa* the highest known fine to-date was imposed by the Misdemeanour Court of Zagreb in November 2007 when Kolnoa d.o.o. was fined 534,232 kuna for the conclusion of an anti-competitive distribution agreement with P.Z. Auto d.o.o. The agreement contained non-compete obligations which excluded the only competitor of Kolnoa from the relevant market from December 2003 to May 2005.

In *VIPnet* on 30 December 2008, the CCA found VIPnet d.o.o. to have breached the cartel prohibition. The proceedings, which had been initiated *ex officio,* unveiled that VIPnet had concluded 94 agreements with its distributors on the sales of VIPme and Tomato prepaid vouchers, VIPme and Tomato prepaid boxes, packages and mobile phones which contained a number of hard-core restrictions. The respective provisions related to fixing maximum rebates for the resale of the above listed products. At the same time, VIPnet made the conclusion of contracts subject to the acceptance of supplementary obligations which, by their nature or according to commercial usage, had no connection with the subject of such contracts.

Abuse of market dominance

There was a high profile case involving HT-Hrvatske telekomunikacije and its affiliate T-Mobile Hrvatska. In a decision in July 2007, the CCA decided that these two undertakings had abused their market dominant position. Members of the HT group had made the conclusion of contracts subject to the acceptance by their key accounts of supplementary obligations which, by their nature or according to commercial usage, had no connection with the subject of such contracts, and thus are considered as hard-core restrictions of competition. The Frame Contracts on the provision of telecom services in question had been entered into by the members of HT group and 23 different key accounts. As a consequence, the CCA ordered HT-Hrvatske telekomunikacije and its affiliated company T-Mobile Hrvatska to remove the impermissible provisions.

In *Kamen Ingrad* in January 2008 the CCA decided to appeal the decision of a Minor Offence Court because the court terminated proceedings against Kamen Ingrad d.d. and their directors, Vlado Zec and Dren Jozić. The CCA found Kamen Ingrad d.d. to have abused its market dominant position on the market for the supply of construction stones by refusing other undertakings access to its quarry for more than a year.

In *Microsoft*, the CCA also approached Microsoft Hrvatska d.o.o at the end of 2007 and requested it to comply with the conditions and obligations imposed by the European Commission in its decision 2007/53 EC of 24 March 2004 (which was upheld by the Court of First Instance on 17 September 2007) in Croatia. Microsoft Hrvatska d.o.o. undertook to perform its business practices within the meaning of the above mentioned decisions and to respect the key principles of competition law in effect in Croatia.

In Composers' Collecting Society on 13 February 2009, the CCA initiated proceedings against the Croatian Composers' Collecting Society ('HDS-ZAMP') following complaints by several providers of cable distribution services. HDS-ZAMP is accused of abusing its dominant position by applying dissimilar conditions when charging copyrights fees to certain service providers. Parallel proceedings against HDS-ZAMP are pending in which the company is accused of applying unjustified discounts in respect to standard copyright fees for the reproduction of audiovisual and other content.

In March 2009, the CCA rendered a decision that found that Zračna luka Zagreb ('Zagreb Airport Ltd') and its subsidiary Zračna luka Zagreb – Ugostiteljstvo

('Zagreb Airport Catering Ltd') had abused their dominant position in the markets for groundhandling and catering services at Zagreb Pleso Airport. They abused their dominant position in two ways. First, between 1 March 2007 and 25 May 2007 they refused to provide services to Croatia Airlines. Furthermore, they made resuming the provision of services dependent on Croatia Airlines accepting additional services by Zagreb Airport Catering Ltd. The refusal of services to Croatia Airlines occurred after the company had started also purchasing sandwiches from other providers. Second, from 1 September 2007 onwards, Zagreb Airport Ltd and its subsidiary charged prices for their services which were excessive and discriminatory, i.e., they increased their service fees by some 300 per cent and charged different prices depending on the location of the storage without objective justification – the prices depended on whether Zagreb Airport Ltd delivered goods from its own storage or from the aircraft's storage. In addition, Croatia Airlines, in contrast to other airlines, was offered a considerable rebate (which did not reflect real cost savings).

The CCA found Zagreb Airport Ltd to have abused its dominant position and ordered it to adopt, within three months, a new price-list for the respective services which is fair, transparent and non-discriminatory and takes into account real expenses.

iii *Trends, developments and strategies*

According to the CCA, the implementation of block exemption regulations and of secondary law governing individual exemptions will be pushed. Furthermore, in 2009 it is expected that a further block exemption regulation for agreements in the transport sector will be adopted.

In its rendering of decisions, one can observe that the CCA is a sophisticated competition authority which applies the latest legal trends and frequently refers to rulings of the European Commission and the Community courts in its decisional practice. In addition, the mentioned case law demonstrates that the CCA is also willing to expedite proceedings by accepting commitments to remedy competition concerns. Thereby, the CCA prevents having to adopt a formal decision on whether the respective undertaking has infringed the cartel prohibition. This is a trend that can also be observed in the decisional practice of the European competition authorities.

iv *Outlook*

In the future, the CCA intends to pay more attention to vertical agreements than it does currently. In the long run, the possibility to notify restrictive agreements should be abolished to allow the CCA to focus its resources on the detection and prosecution of hard-core infringements.

Overall, legislative reforms, such as empowering the CCA to impose fines and granting it broader investigative powers, are urgently needed to foster competition law enforcement in Croatia.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Preliminary remarks

Additional competition rules are contained, *inter alia*, in the Media Act and the Electronic Communications Act (which replaced the former Croatian Telecommunications Act). We note that the former Banking Act was replaced by the new Credit Institutions Act which entered into force on 1 January 2009. Pursuant to the provisions of this Act, competence over competition issues with regard to banking and financial services provided by credit institutions has been kept within the Croatian National Bank. While performing these tasks, the Croatian National Bank applies the Competition Act in the appropriate manner, and can request the expert opinion of the CCA, if needed. Likewise, the Croatian Post and Electronic Communications Agency is empowered to enforce competition rules, but cooperates with the CCA.

ii Significant cases

Food retail market

At the end of 2007, the CCA presented the outcome of its investigation into the food retail market. It revealed that Konzum is the market leader holding a market share of 30 per cent, followed by Rewe grupa, Kaufland Hrvatska, Getro, Mercator-H, Plodine and Kerum. Considering the concentration ratio and the Herfindahl-Hirschman Index ('HHI'), the market is considered to be moderately concentrated, dynamic and with relatively good market segmentation in terms of coverage.

Audit services

In April 2007, the CCA finished its investigation into the audit service market. It was instigated after the new Audit Act and Audit Service Fees had entered into force in 2007, over which the CCA had competition concerns. The investigation resulted in the CCA proposing that the act that governs the provision of audit services should be changed insofar as the setting of binding minimum fees to be charged by audit service providers should be abolished. The fees are set by an association of audit service providers with the assent of the Ministry for Finance. The CCA concluded that the minimum fees will create anti-competitive effects and force small audit service to exit the market. Further, the CCA feared that the lack of competition in the market might generate higher fees for audit services and thus higher costs for the service users, which is ultimately to the detriment of end consumers. The CCA suggested that the audit service fees should not impose restrictions on audit service providers and audit service users as to their ability to freely set prices in every particular case, but, if at all, only amount to recommended or maximum prices.

iii Trends, developments and strategies

It is expected that the CCA will further enhance the cooperation with regulators. However, it may become necessary to further align the sector specific rules in the banking and telecommunications sector with the application of general competition rules.

iv Outlook

To our knowledge, the CCA plans to focus on markets where the experience in other European jurisdictions has proven the likelihood of the existence of cartels (particularly in the construction industry).

V STATE AID

Croatia committed itself to an approximation of laws with the relevant EU rules also in the area of state aid by the time of its accession to the EU.

The new State Aid Act ('SAA') was adopted in 2005 and the Regulation on State Aid in 2006. The state aid legislative framework sets out general conditions and rules under which state aid may be granted, stipulates the monitoring of implementation and regulates the recovery of unlawfully granted state aid. The said Croatian state aid regime applies to all sectors apart from agriculture and fisheries. For the mentioned sectors the State Aid Act in Agriculture, Fisheries and Forestry is relevant.

In order to implement the commitments undertaken, Croatia transposed all state aid rules from the *acquis communautaire* directly into the legal system of Croatia by publishing them in the Official Gazette in the original version and translation into Croatian along with special provisions on implementation, all done in the form of a decision of the government of Croatia.

i Significant cases

The state aid case that currently attracts most public attention concerns the restructuring of five shipyards the state holds majority stakes in. In the second half of 2006, the CCA received from the Ministry of Economy four requests for approval of rescue aid for the shipyards concerned. In September 2006, the CCA authorised rescue aid in the form of state guarantees for shipyards in the amount of 4.2 billion kuna. At the end of February 2007, the restructuring plans were submitted pursuant to SAA and the Decision of the State Aid Rules for Rescuing and Restructuring. The plans were also presented to the European Commission for approval according to Croatia's respective obligation under the criteria set out for the opening of the EU accession negotiations. After comprehensive analyses of the plans, in February 2008 the CCA decided that the submitted plans needed to be revised, as based on the data and information contained therein, it was not possible to give a positive assessment of the shipyards' long-term viability without aid after the completion of the restructuring process was not guaranteed. As a consequence, the Croatian government decided to privatise the shipyards in the course of 2009. At the moment, the publishing of international bid tenders is expected. Once the privatisation process is finalised, new owners of the shipyards concerned will have an obligation to draft and submit the new restructuring (business) plans to the CCA.

Another recent case concerned the restructuring of sector undertakings in difficulties. Pursuant to the obligations under the Stabilisation and Association Agreement, Croatia undertook the obligation to draw up a restructuring programme for the Croatian steel industry whereby state aid for rescuing and restructuring of the steel industry could be granted until 1 March 2006. The respective case involved two steel mills (Zeljezara Split d.d. and Valjaonica cijevi Sisak d.o.o.) which, being categorised as firms in difficulties, had to prepare individual restructuring plans in order to receive state aid on the basis of the 'one time – last time' principle. In addition, the Croatian government decided to privatise both companies. On the basis of the criteria contained in public tenders, the new owners submitted their business plans to the CCA. In June 2008 the CCA assessed the granted state aid in the steel sector, in particular, for CMC Sisak d.o.o. (legal successor of Valjaonica cijevi Sisak d.o.o.) state aid in the period from 1 March until 28 February 2007 amounting to 19,117,527.36 kuna and for Zeljezara Split d.d. (bought by Zlomrex SA, Poraj, Poland) the amount of 221,693,825.38 kuna. State aid was mainly granted in the form of state guarantees, loans under favourable terms and debt write-offs.

The basic criteria under which state aid was granted to steel mills is as follows:

a after restructuring, the company must be able to carry out its operations under normal market conditions without state aid;

b the amount and intensity of aid is limited to the minimum needed for the restoration of the firm's long-term viability and is declining; and

c the restructuring plan involves the overall reorganisation and capacity reduction of the steel activities in Croatia.

Finally, the Croatian government, at the end of June 2008, adopted a revised National Restructuring Programme for the Steel Industry of the Republic of Croatia for the Period 2007 to 2011, which was subsequently approved by the CCA.

Furthermore, it should be noted that the Regional Aid Map Decision was adopted by the Croatian government in May 2008 in line with the Stabilisation and Association Agreement and the European Commission's Guidelines for National Regional Aid 2007 to 2013.

According to the data of the EUROSTAT and the Croatian Bureau of Statistics on per capita GDP measured in PPS for the period 2000 to 2002, all three NUTS II regions of Croatia are regions eligible for regional aid (see derogation under Article 87(3)(a)). In accordance with the Decision:

a Northwest Croatia has a per capita GDP of 53.15 per cent of the EU-25 average and thus the aid ceiling for regional aid must not exceed 40 per cent GGE (gross grant equivalent) for large companies.

b Central and Eastern (Panonia) Croatia has a per capita GDP of 31.37 per cent of the EU-25 average and thus the aid ceiling for regional aid in these region must not exceed 50 per cent GGE for large companies.

c The Croatian Adriatic coast has a per capita GDP of 39.49 per cent of the EU-25 average, thus the aid ceiling for regional aid must not exceed 50 per cent for large companies.

The aid ceiling may be raised by 10 percentage points for medium-sized enterprises and for small enterprises by 20 percentage points.

The existence of the regional aid map is a prerequisite for the implementation of the regional aid schemes, namely, fiscal aid laws such as the new Investment Promotion Act from 2006 and Free Zone Acts (most recently amended in June 2008) which contain state aid measures in the form of tax exemptions in line with the European Commission's Guidelines for National Regional Aid 2007 to 2013.

ii Trends, developments and strategies

Pursuant to the CCA's Annual Report on State Aid for 2007, which has been adopted in September 2008, state aid granted in Croatia in 2007 amounted to 8,947.4 million kuna, which is 13 per cent more than in 2006 due to a significant rise in rescue aid awarded to the shipyards, in aid to the transport sector (Croatian Railways), aid to the steel sector (privatisation of Zeljezara Split d.d. and Valjaonica cijevi Sisak d.o.o.), aid for rescue and restructuring, regional aid and aid to agriculture and fisheries. Total state accounted for 3.2 per cent of the GDP in 2006 and to 3.3 per cent in 2007. In respect of state aid instruments, in 2007, the majority of state aid was granted in form of grants (58 per cent), state guarantees (24.8 per cent) and tax exemptions (10 per cent).

iii Outlook

In the past few years, the activities of the CCA largely focused on harmonising state aid legislation, aid schemes and fiscal laws with the EU rules, addressing the issues in the sectors in difficulty (i.e., shipbuilding and the steel industry), adopting the regional aid map, etc. Upon the introduction of state aid control in Croatia and completion of sectoral reforms, state aid grantors will have to carefully choose the economic goals state resources will be dedicated to in the future.

In line with the EU principle 'less and better targeted aid' it will be necessary to focus more on horizontal aid, in particular, more on R&D&I, environmental, employment and regional aid. In order to achieve this, it will be necessary to continue to enhance the state aid regime in Croatia through close cooperation with aid grantors, particularly state authorities, in order to prepare state grantors and users for the implementation of the state rules.

VI CONCLUSIONS

i Pending cases and legislation

Amendments of the Competition Act are expected to be adopted in the course of 2009. The authority is believed to be granted broader investigative powers and the competence to impose fines on infringing undertakings.

These amendments will probably go hand-in-hand with changes to existing bylaws and the adoption of new ones. It is anticipated that all these changes will (finally) equip the CCA with the necessary tools to effectively enforce competition rules.

As regards the further alignment of the secondary state aid legislation with EU rules, in the course of 2009 the remaining state aid rules (new rules on state guarantees, addendum to rules applicable in the transport sector and GBER) are expected to be published.

ii Analysis

The CCA is a sophisticated competition authority but unfortunately public enforcement in Croatia could be more effective if the CCA had more resources and undertakings that infringe competition rules were fined more rigorously. Hence, the key goals as regards both competition and state aid law are not only to further align national rules with EU rules and to meet the obligations arising from the negotiations with the EU (i.e., restructuring of the sectors in difficulty), but also, and more importantly, to enhance the capacity of the CCA and raise the effectiveness of public enforcement in Croatia.

Chapter 9

CYPRUS

*Stephanos Mavrokefalos**

I OVERVIEW

The year 2008 was an important year for the Cyprus Commission for the Protection of Competition ('the Commission').

On the one hand, the Cypriot legislature finally approved an amendment to the applicable law in order to harmonise it with the provisions of Council Regulation (EC) No. 1/2003 and in the process did away with individual exemptions and negative clearance proceedings. Parliament went so far as to substitute the entire law, so in place of the Protection of Competition Law of 1989, a new Law on the Protection of Competition of 2008 ('the Law') was enacted.

On the basis of the new Law, the previous commission was abolished and simultaneously reconstituted. Local practitioners hope that this reconstitution will be the final chapter in a saga that has continued for more than three years, during which time three Chairmen of the Commission resigned in controversial circumstances. The continual resignations resulted in all cases and investigations pending before the Commission each time being re-examined, much to the dismay of both practitioners and the interested parties. The problems were compounded by a decision of the Supreme Court in 2007[1] during administrative recourse proceedings against a decision of the Commission, whereby the Supreme Court ruled that the participation of a Mayor (of one of the country's municipalities) as a member of the Commission was illegal on account of that member's dual official appointment and consequently the recourse was successful, overturning the decision of the Commission. As a result of the aforementioned decision a great number of administrative recourse actions pending before the Supreme Court

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1 *Cyprus Telecommunications Authority v.1. Republic of Cyprus through the Commission for the Protection of Competition and 2. Commission for the Protection of Competition*, Administrative Review Appeal No. 3902, dated 4 December 2007.

against decisions of the Commission were also decided in favour of the applicants, and several cases pending investigation or pending decision by the Commission were also prejudiced and re-examined. The current Commission, which took over in May 2008, inherited more than 300 pending cases, in addition to its ongoing current workload, an admittedly huge workload which cannot be tackled easily with the resources available to the five members of the Commission (plus four substitute members) and the 20-odd members of its secretariat, the Service of the Commission.

The Commission is the regulatory authority for the purposes of the Law, which regulates abuses of market power and prohibits any abuse of a dominant position by one or more enterprises in a market for a product or service, as well as for the purposes of merger control pursuant to the Law on the Control of Concentrations between the Enterprises of 1999. The Commission is a member of the European Competition Network and the International Competition Network. During 2008 the Commission issued its report for 2007. In 2007 the Commission issued decisions on the following: 21 complaints, three applications for interim measures and 24 merger notifications. In total for 2007 the Commission received 71 complaints, four applications for individual exemption or negative clearance and initiated seven ad hoc investigations.

II CARTELS

The Commission (both in its previous and current incarnations) attempted to tackle two major sectors of local industry, namely the import and distribution of fuel and oils at consumer level for vehicular and residential use, and the production, processing and distribution of fresh milk. The above two industries were traditionally and informally viewed as monopolies, or oligopolies, and have also entered as topics of the political speeches of politicians who wish to invoke the pro-consumer sentiment of the general public. Nevertheless, the current Commission, following in the footsteps of its predecessor, is carrying out ad hoc investigations of both industries. No results have been published as yet and no formal statements of violations were served upon the interested parties. The time frame for the investigations is measured in years rather than months and besides the increased workload, it is increasingly notable that the Commission lacks the personnel appropriate for undertaking and carrying out such investigations.

Cartels are, of course, inherently difficult to prove without direct evidence and the Commission's role is made even more difficult by the fact that investigations of this type are almost always started by the Commission itself and not following a specific complaint by an interested party. Cyprus also has no leniency or immunity policies, nor does it have any schemes for protecting or rewarding whistle-blowers. During the days of the now defunct Protection of Competition Law of 1989, the dismantled Commission issued an unofficial leniency policy, which, however, was not vested with the authority and credibility of legal enactment and so could not be relied on, and no lawyer could safely advise their clients to make use of it. The current Commission has yet to publish its views on the matter, but if it adopts a similar approach, the results would not be better than the previous failed attempt. Furthermore, one should not overlook the small and close-knit community in the Cyprus economy and its industries, whereby leniency schemes and whistle-blowing protection will not be easy to apply for obvious reasons.

III ANTITRUST

Last year saw a number of cases resolved both at the Supreme Court level and at the level of the Commission itself, most notable of which are the following:

In the case of *Areeba LTD v. 1. Republic of Cyprus through the Commission for the Protection of Competition and 2. Commission for the Protection of Competition*,[2] the Supreme Court applied its decision in Administrative Recourse Appeal No. 3902 (see footnote 1, *supra*), reversing the decision of the Commission that dismissed a complaint by Areeba against CYTA, its mobile telephony competitor and the national telecommunications carrier, for price squeezing. Areeba had complained that CYTA's consumer mobile telephony rates, combined with CYTA's refusal to lower national roaming rates that it charged Areeba, were sufficient to qualify as an abuse of CYTA's dominant position in the market.

In the case of *Union Federation of Cyprus Contractors and Builders of v. Commission for the Protection of Competition*,[3] the Supreme Court was called on to decide whether the decision of the Commission dated 27 July 2007, whereby the Commission approved, with conditions, the concentration of the two sole cement manufacturing companies in the country, was to be upheld. The Supreme Court eventually overturned the decision of the Commission because the Commission had not maintained proper records of its meetings during the examination of the concentration, and no record appears in the administrative file. The embarassing outcome of the case was compounded by the fact that the two companies that had benefited from the approval of the concentration had started implementing the concentration before the case was resolved by the Supreme Court, and even announced the approval of the concentration at the Cyprus Stock Exchange.

In the case of *Cyprus Telecommunications Authority v. 1. Republic of Cyprus through the Commission for the Protection of Competition and 2. Commission for the Protection of Competition*,[4] the Supreme Court overturned a decision by the Commission to fine the applicants, CYTA, approximately €42,700 plus €8,500 per day of non-compliance, for failure of its Managing Director to comply with a request of the investigative officers of the Commission to allow them access to his corporate computer. The Commission was carrying out an ad hoc investigation of television and broadband services, but the Managing Director of CYTA refused access to his corporate computer at his place of business unless he himself monitored the investigation by audio-visual means, and the Commission ensured that his email correspondence would not be accessed. The Commission did not acquiesce and fined CYTA for failing to comply with a lawful request. Although the matters under discussion in this case were novel, the Supreme Court followed the decision in Administrative Recourse Appeal No. 3902 (see footnote 1, *supra*) and overturned the decision of the Commission without considering the merits of the case. It would have been very interesting to learn what the reasoning of the Supreme Court would have been in light of the objections of the appellants, CYTA, who would

2 Administrative Review Case No. 634/2006, 8 February 2008.

3 Administrative Review Case No. 1373/07, 6 May 2008.

4 Administrative Review Case No. 542/2006, 19 May 2008.

have argued about privacy issues surrounding the use of electronic communications, especially under the ever growing use of electronic communications in the workplace.

By its decision of 21 November 2008, the Commission fined CYTA €75,000 for breach of Article 6(1)(b) of the Law (restricting production, supply or technological development) after a complaint of Thunderworx Ltd against CYTA for failure (of more than three years) to make available to its competitor Thunderworx necessary facilities in CYTA's telecommunications network, so that Thunderworx would be able to offer premium SMS services to consumers, in a similar manner such as CYTA was offering under its own brand 'Cybee'. It is notable that Thunderworx's complaint was filed with the previous commission on 6 April 2004, and while the investigative procedure was completed and a decision of the previous commission was pending, the Attorney General in Cyprus issued an opinion that the case should be re-examined in view of the Supreme Court's decision Administrative Recourse Appeal No. 3902 (see Part I, *supra*). Hence, the complaint was re-examined and a decision was issued four years and seven months after the original complaint. Another complaint was filed in an identical case by another competitor of CYTA in the same industry on very similar facts; Golden Telemedia Ltd filed a complaint on 1 September 2003 and a decision was issued on 19 December 2006 imposing a fine of approximately €37,500 on CYTA. One cannot fail to note the long intervals between the date of filing of the complaint and the date of decision of the Commission.

Last year the Commission stopped its ad hoc investigation into the cooperation agreement between CYTA and Vodafone Marketing Sarl ('Vodafone'). The two companies were investigated on account of an agreement they signed in February 2004 and an investigation by the previous commission had been pending since that time. The current Commission decided that although the two companies hold a significant share of the market, no adverse effect is foreseeable by their agreement on account of the award of a licence to a second mobile telecommunications company in Cyprus (Scancom, now MTN). In the agreement under investigation, the Commission noted that there is an exclusivity clause for only a number of products or services of VGPSL (subsidiary of Vodafone), as well as an undertaking of the parties not to enter into similar cooperation agreements with third parties dealing with advertising and marketing of similar products or services. The Commission also noted that the agreement provides that third parties may request access to some of the products under agreement. Additionally the Commission noted, among other things, that the agreement under examination advances the provision of mobile telephony services due to the introduction of new technologies in the Cyprus market and reduces costs, and that the agreement does not impose unnecessary restrictions.

It is currently not uncommon that complaints take more than two years to be initially examined. This time frame is a consequence of the workload inherited by the current Commission as explained in the introduction above, which cannot be met by the resources available. The Commission has thoughtfully addressed all complainants that have been long standing and pending before the previous commission and has requested an update so that it may filter those which are still high priority or of significant severity. During this exercise a great number of complaints for anti-competitive behaviour have been withdrawn or abandoned.

IV STATE AID

State Aid is regulated by a separate and distinct legislative framework and a separate and distinct independent authority. Pursuant to the State Aid Control Laws of 2001 until 2007 the Council of Ministers of the Republic of Cyprus appoints the Commissioner for State Aid Control who is competent and responsible mainly for the following:

- *a* to examine and issue legally binding decisions on the compatibility with state aid rules of draft aid measures;
- *b* to carry out a preliminary assessment and issue reasoned opinions on the compatibility with state aid rules of all other draft aid measures;
- *c* to apply the provisions of Council Regulation (EC) No. 659/1999 and the implementing of provisions adopted by the European Commission according to Article 27 of the Regulation;
- *d* to monitor the implementation and the final impact of all aid granted;
- *e* to collect progress reports from all aid granting authorities in order to monitor the implementation and the final impact of all aid granted;
- *f* to submit to the European Commission all information required including information regarding state aid granted in Cyprus;
- *g* to collect, compile and monitor all information concerning state aid;
- *h* to prepare and keep an up-to-date inventory of all state aid schemes;
- *i* to train all aid granting authorities and other parties involved on state aid matters; and
- *j* to represent the Republic of Cyprus in the EU Advisory Committee on State Aid as well as in any other committees and working groups dealing with the development or the implementation of state aid policy taking place in Cyprus or abroad.

The Office of the Commissioner for State Aid Control is staffed by a total of nine persons, of which six are 'scientific' staff members and three are 'administrative' staff members.

The Commissioner for State Aid Control has published only one reasoned opinion during the past year; in the matter of rental of cattle and sheep breeding grounds in state owned properties, granted by the Ministry of Agriculture before the accession of Cyprus to the EU, at rates below their market rates, the Commissioner in August 2008 held the practice to be contrary to applicable law and constitutes state aid through subsidies of rental income. The Commissioner imposed the fixing of the rental income at market rates and the execution of new agreements with the tenants of such properties. During 2008 the Commissioner issued a number of decisions for various government programmes and schemes, such as: research and technological advancement, the compensation of the agricultural industry for rainfall damage to crops, state aid for laboratory infrastructure, reforestation schemes, continuing education, compensation of cattle-breeders for losses due to cattle illness, etc. In April 2008 the Commissioner for State Aid Control published his report for 2007, which states that his office received a total of 50 communications of programmes or individual state aid for the issuance of a decision or of a reasoned opinion.

VI CONCLUSIONS

2008 was a year for initiating a process for recovery as far as the Competition Commission was concerned. The Commission now attempts to reconcile the need for speedy resolution of a pending caseload with the need to keep up with the needs of undertakings and consumers on a day to day basis. As explained above, the challenge will be in the manner by which the few members comprising the staff of the Commission and its supporting Service will cope with the pending caseload. The plea often heard by practitioners and directed towards the government, certainly in support of the Commission itself who expresses similar concerns, is for the enhancement of the Commission's staff both in numbers and in quality.

Also of interest is that pursuant to the Cyprus Concentrations Law of 1999, the financial threshold for triggering a notification of a concentration of undertakings to the Commission is considered now as too low (i.e., at least two participants have an aggregate turnover in excess of approximately €3,417,202; at least one of the participants engages in commercial activities in Cyprus; and at least approximately €3,417,202 of the aggregate turnover of all the participants relates to the provision of goods or the supply of services within Cyprus). As a result of the low thresholds, the Commission is engaged on a permanent basis, on the examination of numerous concentrations to the detriment of objectively more important potential areas of concern.

Chapter 10

CZECH REPUBLIC

Martin Nedelka and Jitka Linhartova[*]

I OVERVIEW

i Preliminary remarks

In order to maintain effective competition, the Office for the Protection of Competition ('the Office') may initiate administrative proceedings against companies suspected of anti-competitive behaviour. The Office uses its investigative powers and procedural tools for the enforcement of competition rules as set forth primarily in the Czech Competition Act (No. 143/2001). Generally, the Czech competition law regime is modelled closely after the EC competition law regime and follows the trends and legislative steps at EU level.

ii Prioritisation and resource allocation of enforcement authorities

The Office currently has a headcount of around 120 employees and is organised into four sections. The Competition Section (the others are the sections for state aid and administration, public procurement as well as legislation and international affairs) has several departments (for cartels, mergers, economic analysis, etc.). No information is publicly available on how these departments are staffed. An organisational chart with the names of directors of particular units can be found on the Office's website.

From its recent decisional practice, it becomes apparent that the Office aims at making use of instruments that allow for a speedy adoption of decisions in cases that do not relate to hard-core infringements. These instruments encompass settling cases and making commitments binding on undertakings. Thereby the Office wants to be able to use more personnel for unearthing cartels and other serious infringements of competition law.

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iii Enforcement agenda

Over the past two years, the Office has concentrated on detecting hard-core cartel agreements and resale price maintenance in distributorship agreements. Concerning the abuse of market dominance, the Office focused on exclusionary practices, utilising also the new paper of the European Commission on enforcement principles. As regards sectoral competition, the banking, energy, motor vehicle and telecommunication markets have been under scrutiny by the Office.

There is also a shift in competition law enforcement from public to private enforcement, as damage claims should become more attractive for parties that have been harmed by anti-competitive behaviour. Several cases have already been brought to the court; however, this instrument has so far not been as widely used as some have anticipated. The new package of rules should make the use of these enforcement tools more easily applicable in practice. Although the adoption process for this law has not yet been completed, private enforcement has already been included in the upcoming amendment to the Competition Act. It is highly likely, therefore, that in 2009 the Czech Republic will acquire modern private enforcement rules that conform to European standards, though the rules will probably enter into force at a later date.

In order to strengthen the general awareness of competition law, the Office has adopted guidelines that – while largely following the respective soft law at EU level – reflect the peculiarities of the Czech market as well as its legal approach to competition law issues. In 2008, compliance rules for sales cooperatives in the agriculture sector have been issued. The Office also recommended companies to adopt internal compliance programmes reflecting the specificities of the enterprise and its sector.

II CARTELS

i Preliminary remarks

The cartel prohibition pursuant to Sections 3 to 7 Czech Competition Act virtually mirrors Article 81 EC Treaty. Violations of cartel prohibition may entail penalties of up to 10 per cent of the respective undertaking's turnover. The respective agreements are also null and void.

The Office has adopted guidelines on the method of setting fines along the lines of the European Commission's model (although the base amount of the fine under the Czech notice may only amount to a maximum of 3 per cent of the relevant turnover whereas it may amount to 30 per cent under the European Commission's notice). The Office also runs a leniency programme similar to the one employed by the European Commission from which undertakings may benefit if they to notify the Office of a hitherto unknown cartel. The benefits – provided that the perquisites under the programme are met – range from total immunity (for the first undertaking to report an infringement) to a significant reduction of up to 30 per cent (for subsequent undertakings that successfully apply for leniency). Generally, these guidelines were an important step in improving the transparency of the Office's fining practice. However, the leniency programme (which was introduced in 2001 for the first time and amended in 2007) so far has not turned out to be an as successful tool for the enforcement of competition rules as expected: six leniency applications have been submitted to the Office so far.

In addition, two of them concerned vertical agreements (vertical agreements were also subject to a leniency application according to the previous leniency programme).

The Office has adopted three possible ways of ending infringement proceedings more speedily or not even having to initiate proceedings:

Settlement

Direct settlement was requested for the first time in summer 2008. It creates advantages for the Office by speeding up proceedings and for the offending parties by decreasing the amount of fine. It is not known whether in 2009 the Office plans to issue a notice on direct settlement or propose its inclusion in the Competition Act. In order to ensure transparency and consistency of the above-mentioned alternative solutions, this would be highly appreciated. Nevertheless, the Office is adamant that alternative solutions are not always possible as there are competition problems that cannot be remedied without a sanction. The Office believes that the system of adoption of sanctions and the prevention through commitments are interconnected: the authority of the competition office and the seriousness of the appeal to a 'non-sanction' solution in an individual case by the Office results directly from the reality of the threat that the imposition of a substantial fine is a credible scenario.

Competition advocacy

The Office issued a notice on competition advocacy in spring 2008. The notice sets out uniform conditions under which it is possible even to avoid proceedings before the Office and prevent the imposition of a fine despite a violation of competition rules. Competitors can benefit from competition advocacy if they cease the violation of competition rules prior to initiating formal proceedings and accept sufficient remedies. The intended corollary of the parties' cooperation is that the Office will not initiate proceedings and will not impose a fine. It must be borne in mind that the Office's uses competition advocacy only in cases of marginal impact to competition on the relevant market (it would not be applicable to cartel cases for example).

Commitments

Beside classic administrative proceedings that end with the Office imposing sanctions the Office increasingly uses commitments as an alternative solution to bring proceedings to a speedy end. Whether commitments are even available depends, among others, on the gravity of the infringement the undertakings are suspected to have committed. Beside restrictive agreements, commitments may also be accepted for not serious cartel agreements which have not been implemented yet. The Office holds the view that cooperation with undertakings which are suspected of anti-competitive infringements, may under certain circumstances lead to a fast and efficient restoration of (distorted) competition. In cases where the undertakings are prepared to remedy their action out of their own initiative, the Office is ready to offer a helping hand to these undertakings; if the anti-competitive situation is remedied, the Office is ready to terminate proceedings without adopting a decision that indicates that an administrative offence has been committed by the behaviour in question.

As a side remark, we note that the legal privilege of documents subject to dawn raids remains an unresolved issue. In practice, the legal privilege is respected by the Office; however, a proper legal basis for the protection of client-attorney communication is currently missing. The Office follows the approach of the EC, which was also recognised and confirmed in several ECJ judgments.

ii Significant cases

In February 2009, the Office fined three bakeries a total of approximately €1.8 million for price fixing. This decision actually reaffirmed a previous decision of the Office (of August 2006) in which the implicated undertakings were fined but which was overturned by the Supreme Administrative Court because the Office had not described the cartel behaviour in sufficient detail.

A landmark decision was adopted by the Czech Supreme Court in April 2009. It related to proceedings against manufacturers of gas insulated switchgears for participating in a long-standing worldwide cartel and concentrated on the question of whether the principle of *ne bis in idem* bars the Office from investigating worldwide cartel behaviour prior to the Czech's Republic accession to the EU when the European Commission investigated and fined the implicated undertakings for the same worldwide cartel. The Supreme Court has now ruled that the investigation and prosecution of the respective undertakings was in compliance with the principle of *ne bis in idem*. The Regional Court, that decided that the principle of *ne bis in idem* had been violated, now has to adopt a new decision on the appeal of the undertakings against the Office's decision (which imposed a fine totalling €35 million).

Two associations of undertakings were fined for decisions that regulated the competitive behaviour of their member undertakings:

a the Burial Services Association was fined approximately €19,000 for regulating the funeral market. The internal regulations made by the executive body of the Burial Association contained a mechanism for calculating the prices for respective services and included several price recommendation clauses for its members which were deemed anti-competitive; and

b similarly, the Czech Pharmaceutical Association was fined approximately €37,000 by the Office for anti-competitive clauses contained in a paper which bared pharmacies from granting cash payments or similar benefits to patients in connection with prescriptions. Thereby, pharmacies are restricted in their marketing practices, even though these practices would have led to a more effective supply of goods. This was deemed impermissible by the Office.

Other than that, no decisions have been issued since beginning of 2008 concerning cartels. Several cartel proceedings are pending (see also Section VI).

iii Trends, developments and strategies

From the recent practice of the Office, one can observe the following: the Office is more open to communication with market participants and is willing to consider alternative solutions in order to remove the anti-competitive effects of a particular strategy without having to go through all stages of formal fining proceedings. This does not mean a less strict approach on the part of the Office towards anti-competitive behaviour. In fact, the enforcement has become more effective and the sanctions imposed on offenders are substantial. Prioritisation enables the Office to focus on prosecuting the most serious horizontal cartels rather than sanctioning somewhat less serious vertical agreements. In this context, the Office focuses on the practices that are the most harmful for consumers, though prioritisation must not run against the principle of legality and the decision-making practice should not become selective justice.

iv Outlook

As in many other jurisdictions, public enforcement focuses on tackling serious infringement activities. Commitment decisions and case settlements should help freeing resources of the Office in order to deploy them in the effective fight against hard core cartels. The leniency programme should help the Office to uncover activities that seriously harm consumers.

We note that amendments to the Criminal Code were adopted recently according to which infringements of the cartel prohibition shall also entail criminal sanctions. The criminal liability of individuals in case of participation in cartel agreements has been implemented into the new Criminal Code, which shall become effective in 2010. Criminal sanctions for company managers include prison terms of up to three years, disqualification, criminal forfeiture or other form of value forfeiture. The provisions of the new Criminal Code shall apply only to horizontal cartels, i.e., price fixing, market or customer sharing and other anti-competitive agreements (without any specification). It remains to be seen whether this rigid approach against cartel offenders pays off and incentivises individuals to abstain from unlawful conduct.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANT POSITIONS

i Significant cases

Several decisions of the Office recently related to resale price maintenance ('RPM'). There has been broad discussion in the Czech Republic on the pro- and anti-competitive effects of this type of restriction. The Office generally disapproves of RPM, though it does not consider RPM per-se impermissible. In its opinion, the limited intra-brand competition which results from RPM may be one of the reasons for the higher retail prices in the Czech Republic and therefore it categorises such agreements as hard-core restrictions. In practice, the Office has never recognised justifications for RPM.

One example of RPM concerned Dellux CZ. Since 2002, Dellux CZ has entered into agreements with authorised distributors that contained a resale price maintenance clause. This led to the distortion of competition on the market for selective distribution of cosmetics. The distributors were obliged to maintain the prices determined by Dellux CZ. The majority of the distributors respected this anti-competitive provision contained in the agreement. The Office's decision against Dellux CZ (in which it fined Dellux CZ approximately €40,000) is not legally binding yet as Dellux CZ appealed it.

As outlined in Section II *supra*, the Office aims at bringing an expedited end to investigations into other than hard-core horizontal infringements. Investigations into vertical restrictions are apt to be settled to speed up the adoption of a decision. The first such settlement decision involved Kofola. Kofola is a large domestic producer of soft drinks. According to the Office's findings, Kofola entered into several agreements with wholesalers from 2001 to 2008 that contained RPM clauses. The Office decreased the intended fine by more than 50 per cent for the party's active cooperation while investigating the case. Although there were no official rules on direct settlement, the Office used this approach in the Kofola case. It has been noticed that the Office apparently combined certain elements of direct settlement with leniency.

More recently, the Office settled with the Czech publishing company Albatros. The proceedings related to illicit provisions in the distributorship agreements of the Czech version of the latest Harry Potter book. The agreements specified to whom distributors and retailers could resell the book. Vertical agreements concerning distribution of other books as well had been in force since 2001, but the majority of them had only a negligible impact on the market. The most serious infringement occurred at the occasion of distributing the novel *Harry Potter and the Deathly Hallows*, when Albatros tried to limit distribution of the book to retail chains and thus restrict price competition between supermarkets and small bookshops. Moreover, Albatros entered into several agreements with RPM clauses. The Office, also in acknowledgment of the continued cooperation of Albatros during the investigation, settled for a fine of 50 per cent of the amount. Albatros was fined approximately €11,000 for its anti-competitive practices.

Abuse of market dominance

Czech Railways (České dráhy) was fined approximately €10 million for an abuse of its dominant position in the domestic market for rail freight transport of large volume substrates. Czech Railways charged different prices for the rail freight transport of large-volume substrates and applied significantly different levels of rebates depending on the volume of the transported goods in order to retain customers that may have been approached by competitors of Czech Railways. As there was no objective justification for this practice, Czech Railways was found to have engaged in impermissible discriminatory pricing. The decision has been appealed by Czech Railways.

This case is one of the first in which economic analysis was applied in the field of abuse of a dominant position. Another interesting aspect of this case is that the Office found that Czech Railways infringed the Czech Competition Act as well as EC competition law. This approach became part of recognised case law as in 2008 the Supreme Administration Court of the Czech Republic overruled the jurisdiction of the regional courts and confirmed in its decision about another case RWE Transgas and Tupperware that this does not infringe the *ne bis in idem* principle.

Pursuant to Czech competition law, the provision of loyalty rebates by an undertaking in dominant position is generally deemed abusive, unless there is objective justification for such rebates. The authority assesses such behaviour based on the existing practice of the European Commission and European Court of Justice.

ii Trends, developments and strategies

Besides the mentioned focus on RPM, the implementation of economic analysis and econometrics in proceedings before the Office now appears to be more pertinent than ever. This is also a corollary of the more economic approach employed by the European Commission. The main problem is the credibility of data used for the analysis submitted by the parties to the Office as evidence in administrative proceedings. Economic analysis is mainly used for defining the relevant markets. Moreover, economic analysis enables parties to justify practices that formally fall foul of the cartel prohibition or fall under one of the exemplary categories of abusive behaviour.

The Office has created the new position of Chief Economist who should be an independent voice in the decision-making practice of the Office. The Chief Economist is directly subordinated to the Chairman. A new team of economic experts should be created to increase the Office's expertise in the application of the economic-based approach.

iii Outlook

Several decisions on exclusionary abuses of dominance are expected in the near future, as the Office has initiated several investigations in this respect. The Office takes into account the EU Guidance on Exclusionary practices for 2008; however, the national antitrust authorities (i.e., the Office and the courts) are not bound by this Guidance. The implementation of the Guidance on Exclusionary practices is not relevant for the Office on the national level; however, it is an important tool for harmonising the approaches of national jurisdictions across the EU.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

The Office continuously monitors the market situation in various network industries:

The motor vehicles market is under the Office's surveillance because of the significantly higher prices of motor vehicles in the Czech Republic and in connection with the approaching end of validity of the Block Exemption 1400/2002. Only one administrative proceeding, concerning distribution agreements between Skoda Auto a.s. and its distributors, has been initiated. The proceeding was terminated because of lack of anti-competitive effect of these distribution agreements.

There also have been several investigations into the banking market. One investigation in particular concerned bank fees in the retail sector. An administrative proceeding had been initiated but no prohibited behaviour between concerned banks had been proven by the Office.

Specific markets such as the energy and telecommunication sectors are also monitored by the Office and regulated together with the respective sector regulator. This is particularly pertinent for the natural gas market, where the gas trading company RWE Transgas owns almost all domestic storage capacities. The sector-wide regulation of the gas market has created a competence conflict between the specific regulator of the energy sector – the Energy Regulation Office ('the ERO') which safeguards the price policy of the market players and the Office which applies competition rules in order to prevent an abuse of market dominance.

In 2007, this competence conflict was finally resolved by the Czech Supreme Administrative Court. The Court held that both the Office and the specific regulator are entitled to enforce the competition rules separately, which should result in a synergy effect in competition. In this case, the Supreme Administrative Court decided on the question of which of the two authorities is entitled to regulate and control the prices of gas and the prices for storage charged to the customers in 2005 and to impose corresponding sanctions and remedies in this respect. As a result of this decision, each authority effectuates its regulation in a different manner: the ERO acts primarily as the supervisor of price regulation in the energy sector. As a price controller, the ERO is obliged to impose a fine if the seller abuses its market position with the intention of obtaining unfair profits. On the other hand, the Office's primary role is to create and enhance the conditions for fair competition. In this respect, the Office may impose a fine on undertakings that distort competition.

RWE Transgas has been under the constant scrutiny of the Office since 2000 as any kind of anti-competitive behaviour has serious consequences for both competitors and consumers. In 2007, RWE Transgas was fined approximately €8.9 million for an abuse of its dominant position. It refused to enter into a contract on gas storage and to supply gas outside of the balance zones to individual distributors thereby not allowing them to effectively compete with providers of regional distribution networks of the RWE Group. The Office took a particular grim view of the behaviour as the exclusionary practices were committed at the very beginning of the gas industry liberalisation in the Czech Republic and negatively influenced a market that was gradually opening to competition. The Office recently initiated new proceedings against RWE Transgas concerning the setting of advance payment for distribution of gas.

Finally, the Office has also been monitoring the markets for fuels on a long-term basis.

ii Trends, developments and strategies

The Office has focused recently on secondary legislation and comments on draft laws in cooperation with sector-specific regulators. The Office uses a soft law method, for example, in negotiations on the issue of gas supply storage, or in relation to access to underground gas supply storage facilities.

The Office also focuses on cooperation with other regulators. The intention behind this cooperation is to ensure full compliance with the competition rules. In this respect, a memorandum on cooperation has been adopted with the Czech Telecommunication Regulator and the Czech Consumer Association.

iii Outlook

The Office announced its objective to investigate the compliance with competition rules on the parti of television broadcasters in connection with the switch of broadcasting technology from analogue to digital. Among other things, the Office is keen to define the relevant markets in the electronic communications sector. The Czech Telecommunication Regulator should be in charge of this part of the agenda.

V STATE AID

i Significant cases

In 2008, the Office was involved in many cases concerning state aid in the transport and transport facility supplies sectors. In this context, the Office assisted with seven cases in the notification procedure before the European Commission.

The European Commission concluded in its investigation that state aid obtained in 2003 to 2005 by some of the transport providers on the basis of agreements on compensatory payments for provision of public transportation complied with competition rules. It has been proved that there was no overcompensation and the compensatory payments covered only losses relating to the provision of public services. The measures were compliant with Article 73 of the EC Treaty and the criteria set out in the landmark *Altmark* case of the ECJ.

Furthermore, the European Commission approved an aid scheme to lower carbon emissions as well as investment aid to lower emissions of industrial emissions into water. The environment operational programme complies with the common market and shall be opened to all enterprises in the Czech Republic regardless of their size. The maximum aid amount shall be 50 per cent of the costs.

ii Trends, developments and strategies

Based on the new European legislation, the block exemptions have been concentrated into one document of general block exemptions. This modification is of primary importance for small and medium-sized enterprises, as it will allow state aid to be obtained without a lengthy approval process.

iii Outlook

Since the accession of the Czech Republic to the EU, the competence to assess the compatibility of state aid with the common market was taken over by the European Commission. The State Aid Act (No. 215/2004) concerns the administration powers of the Office in the area of state aid, the rights and obligations of agencies granting state aid and state aid beneficiaries towards the Office, as well as some other relationships in the area of state aid. Currently an amendment of the State Aid Act is under discussion. The competence of the State Aid Act should be broadened to the agriculture and fishing sectors and the consolidated approach should be applied to all competitors.

The creation of a *de minimis* state aid register is also being discussed in the amendment of the State Aid Act. Pursuant to this amendment, the Office would maintain a register of all *de minimis* state aids granted in the Czech Republic.

VI CONCLUSIONS

i Pending cases and legislation

There are several cases pending before the Office, e.g., the *Student Agency* case relating to an alleged abuse of a dominant position by a bus company operating several main routes in the Czech Republic and proceedings against media agencies relating to suspected impermissible horizontal agreements between media agencies. It remains to be seen whether the Office will make use of settlement or commitments also in these cases, as these tools have proven to be an appropriate way in order to bring infringement proceedings to an expeditious end.

Overall, it is fair to say public enforcement in the Czech Republic is state-of-the-art and need not shy away from comparison with enforcement in other EC Member States.

The latest amendment of the Competition Act is currently being discussed by the Czech parliament. The following changes and additional rules have been proposed:

a More detailed rules for dawn raids shall be adopted and the Office shall be vested with broader investigative powers in sector inquiries, similar to those under Regulation 1/2003. The Office will continue to monitor markets where it suspects effective competition to be impeded by the existence of anti-competitive practices. Based on the findings of such a sector inquiry, the Office should then be able adopt a report on competition in the respective market which contains specific suggestions for improvement as well as the necessary remedies.

b The amendment of the Competition Act shall also specify the procedural rules applicable to commitment offers. It is envisaged that parties to antitrust proceedings may propose commitments to remedy competition concerns within fifteen days after receiving a statement of objections from the Office.

c In line with EU law, it will also be possible to impose sanctions to successors of the entity which infringed competition rules. The amendments will also enable the Office to set the amount of the fine to be imposed on an association of undertakings by taking into account the turnover of all members of the association.

d Finally, the application of EU competition rules to the agricultural sector shall be copied into Czech competition law regime, i.e., the cartel prohibition will generally be applicable to the agricultural sector with the exception as set out under Notice 26/62.

Chapter 11

DENMARK

*Henrik Peytz**

I OVERVIEW

Enforcement of the Danish Competition Act ('DCA')[1] and Articles 81/82 EC in Denmark is divided between the Danish Competition Authority and Competition Council,[2] which are responsible for the administration of the Competition Act and Article 81/82 EC, and the Public Prosecutor and the Danish courts, which are the only competent Danish authorities in matters of criminal enforcement (fines).

The Competition Authority has a staff of approximately 150 employees of which the majority are professionals (economists and lawyers). A significant part of its resources (25 per cent of staff) are devoted to supervision of the energy markets.

The Public Prosecutor has only a small group dealing with violations of the Competition Act, reflecting the fact that very few cases are referred to the Public Prosecutor by the Competition Authority or third parties.

The number of cases prosecuted by the Public Prosecutor before the courts remains low, as does the level of fines. The highest fines awarded to companies remain at 5 million kroner while the highest fines to individuals so far have been 100,000 kroner.

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1 Consolidated Act No. 1027 of 21 August 2007 as amended by Act No. 375 of 27 May 2008 and Act No. 1336 of 19 December 2008.

2 The Competition Council is composed of a Chairman and 17 members appointed by the Minister of Economic and Business Affairs on the basis of personal and professional qualifications. The Council rules in major cases, including cases of fundamental importance, and sets a precedent in other cases.

While dawn raids carried out by the Competition Authority – and occasionally by Commission officials – are quite common, the number of raids that lead to prosecution cases in Denmark are small.

No major cartels have been detected in recent years. Only a few Danish companies have been subject to decisions by the Commission under Regulation 1/2003/EC.

A Danish leniency programme introduced in 2007 appears to have had little, if any, effect. This may reflect that classic cartel activity is likely to be limited but may also reflect a view that as the level of fines in Denmark is fairly low the costs of compliance by way of leniency exceed the risk of fines.

The number of administrative decisions taken by the Danish Competition Authorities was relatively small in 2008.

The most important case was a merger case involving the first ever prohibition decision taken by the Competition Council on 14 May 2008.

The Competition Council decided to block a proposed merger between J.F. Lemvig-Müller Holding A/S and Brdr. A & O Johansen A/S, which were active in the Danish wholesale market for plumbing and heating materials and the Danish wholesale market for supplying electrical equipment to professional customers.

The Council found that the merger would impede competition significantly on both markets due to increased risk of coordinated effects. The merger would have reduced the number of nationwide wholesalers in plumbing and heating materials from four to three with a combined market share of more than 80 per cent. The three wholesalers in electricity equipment with a nationwide network of outlets would have been reduced to two with a combined market share that would have been even higher.

The Council assessed that the merger increased the likelihood that the few remaining companies with significant market strength would raise prices and compete less vigorously for the customers on both markets. In practice a test along the lines of the 'Airtours' criteria was used. A proposed set of undertakings was rejected as insufficient.

In 2008 and until 1 March 2009 a total of three decisions have been taken by the Competition Council attacking information exchange and various possibly anti-competitive behaviour in the context of trade associations under the cartel rules of DCA Section 6/Article 81 EC (one decision regarding local banks and two decisions regarding road transport).

In the same period no cases were decided under DCA Section 11/Article 82 EC prohibiting abuse of a dominant position but a major case on possible abuse was settled by way of the Council accepting undertakings offered by the company involved, thereby confirming a trend from recent years to settle behavioural cases in this matter.

Appeals against decisions taken by the Competition Council may be lodged with the Competition Appeals Tribunal. Also the Tribunal has had a quiet period with only two cases decided on the merits in 2008 and no cases decided in the first months of 2009.

Following a committee review of Danish merger control rules, a report was published in December 2008 proposing significant expansion of the scope of Danish merger control by way of lowering the applicable thresholds significantly.

At the same time it has been suggested to introduce (1) a 'simple procedure' in order to simplify the administrative handling of non-controversial mergers, and (2) an obligation upon the Competition Authority to issue a formal statement of objections in difficult cases in which the Authority shall give a detailed account of the concerns the merger might entail.

Finally the report proposes a change of deadlines applicable during the investigation procedure of a proposed merger. The deadlines are suggested changed from four weeks (phase one) and three months (phase two) to 25 working days from complete notification and 90 working days from the decision to commence phase 2.

Legislation is expected in 2010.

II CARTELS

In Denmark, cartels and other anti-competitive agreements are prohibited under DCA Section 6, which is equivalent to Article 81 EC and is interpreted and administrated in conformity with the practice of the Commission and the European Court of Justice.

Both undertakings and natural persons acting on behalf of undertakings can be held liable for infringement of the DCA. Infringement is punishable with a fine that varies according to the gravity of the infringement. The Danish Competition Authorities can also counter infringements by issuing administrative injunctions.

i Significant cases

The Professional Association of Local Banks

On 30 January 2008 the Danish Competition Council decided that Lokale Pengeinstitutter (the Association of Local Banks, Savings Banks and Cooperative Banks in Denmark; 'the Association'), had violated Section 6 of the DCA. First, the Association and its members were found to have entered into an illegal agreement by having a provision in the articles of association stating that members could be excluded for lack of 'collegiate behaviour'. The objective of the agreement was to make members abstain from disloyal behaviour towards other members, which, *inter alia*, included various marketing initiatives, as well as recruitment of employees from each other. Second, the Association had in three specific cases made objections against the behaviour of individual members in relation to recruiting employees from other members and marketing of service charges and high interest on specific accounts. Third, the Association had generally called upon its members to abstain from competitive behaviour in the form of headhunting other members' employees and, in the case of saving banks, in the form of advertising that the banks, being customer-owned, did not need to make profits.

Fine against local banks cartel

On 28 March 2007 the Competition Council adopted a decision whereby the cooperation between seven local Danish banks was found to constitute an illegal cartel. The banks had agreed, *inter alia*, not to establish themselves in cities where other banks have their headquarters, and not to actively seek customers from each other. This decision was appealed to the Competition Appeals Board, which confirmed the decision on 2 October 2007. On 15 April 2008 it was announced that the banks had voluntarily accepted to pay a fine of 4 million kroner.

Nautisk Udstyr

The association Nautisk Udstyr, whose members sell equipment for yachts, agreed to pay a fine of 400,000 kroner, thereby admitting that its members had entered into illegal agreements regarding prices and that the association had attempted to make suppliers stop supplying goods to shops selling at lower resale prices than the prices suggested by the association. The violation was classified as a hard-core infringement. The General Manager and the Chairman of the association each agreed on a personal fine of 25,000 kroner.

Dansk Transport og Logistik

Brancheforeningen Dansk Transport og Logistik, (the Danish Association of Transport and Logistics; 'the Association'), is the largest Danish transport association, having approximately 3,100 members. On 17 December 2008 the Competition Council decided that the Association had violated DCA Section 6 by, *inter alia*, making a pre-completed calculation instrument available to the members. The instrument enabled the members to calculate their prices solely by typing in the haulage distance. Furthermore, the Association had published calculation examples setting out a profit margin of 10 to 15 per cent, as well as the expected annual percentage cost increase for the haulage contractors in the Associations' cost prognosis. An electronic calculation model regarding the price development on diesel oil had been made available which was made in a way that the member's own price of diesel oil would remain unchanged even if the price level on diesel oil decreased. Finally, the Association had encouraged its members to pass the diesel oil price increase and the increased insurance costs on to the members' customers. The Competition Council found that the measures taken by the Association aimed at limiting competition and unifying the transport prices of the members.

Dansk Juletræsdyrkerforening

On 17 February 2009, the District Court of Frederiksberg fined Dansk Juletræsdyrkerforening (the Danish Christmas Tree Growers Association) 200,000 kroner and the manager of the association 15,000 kroner for violating DCA Section 6. The association had published calculation guidelines and held price meetings; thereby guiding the around 1,000 members as to how to determine their future prices, and how to avoid underselling one another. After two unsuccessful warnings from the Competition Authority, the case was handed over to the Public Prosecutor who decided to institute criminal proceedings. The District Court of Frederiksberg agreed that the Association's exchange of information was aimed at unifying members' prices and fixing minimum prices, thus limiting competition.

International Transport Danmark

On 25 February 2009, the Competition Council ordered International Transport Danmark (a trade association of cargo carriers with around 420 members) to abstain from exchanging information with its members in violation of the DCA. The Association had (1) encouraged its members to pass price increases on to their customers, (2) made a pre-completed calculation instrument available although the items of expense should be filled out individually, (3) made waiting time rates available to its members, and (4) published a cost prognosis with the association's expectations of the cost developments in the year ahead.

ii Trends, developments and strategies

There is no doubt that classic cartels that are detected will as a main rule be prosecuted but undertakings will, even in serious cartel cases, often be offered the possibility of settling the case by voluntary acceptance of a fine unless the case is dealt with by the Commission which will normally only be the case if the cartel covers several EU member states.

Further the level of Danish fines remains low.

The main concern to defendants in cartel cases investigated by Danish authorities therefore is more often likely to be the risk of negative PR and the risk of claims for damages from dissatisfied customers.

Group litigation

By Act No. 181 of 28 February 2007 the possibility of group litigation, which resembles class actions, was introduced with effect from 1 January 2008. These rules are currently being applied for the first time in a lawsuit initiated by a bank's minority shareholders concerning, *inter alia*, the terms of redemption of their shares in connection with a takeover of the bank (the '*Bank Trelleborg'* case).

One of the aims of the group litigation legislation is to facilitate the handling of groups of similar claims, which might on their own involve smaller amounts. These could be claims from consumers or traders who have suffered a loss as a result of violations of the competition rules in the form of cartels, other anti-competitive agreements or abuse of a dominant position, including the use of exploitative prices.

Leniency programme

With effect from 1 July 2007, a Danish leniency programme reflecting elements of the EU leniency programme was introduced on the basis of new Sections 23a and 23b in the DCA. The Danish leniency programme was launched in order to enhance the efficiency of actions against unlawful cartels.

The leniency programme allows undertakings or persons to obtain leniency (meaning *nolle prosequi* as well as a reduction of any fine that would otherwise have been imposed on a participant in a cartel) in exchange for the voluntary disclosure of information regarding the cartel.

As general conditions for leniency (here meaning *nolle prosequi*), the undertaking or person providing the relevant information must be the first one to do so, and the information must be unknown to the competition authorities by the time of the application for leniency.

If the application is filed before the commencement of an inspection, the information must lead the competition authorities to commence an inspection or a search, or to notify the police. If the application is filed after, the information must enable the competition authorities to establish the existence of an unlawful cartel.

Further three conditions must be met in order to obtain leniency: (1) the applicant must cooperate with the competition authorities at all times during the case, (2) the applicant must – before the application is filed – cease its participation in the cartel and (3) the applicant must not have coerced any other undertaking or person to participate in the cartel. If the applicant fails to meet the above-mentioned conditions, the application will be treated as one for reduction of fine instead of *nolle prosequi*.

iii Outlook

In spite of a trend towards higher fines, the level of Danish fines is still very low, compared to international standards. It remains to be seen whether the level will be increased by a revision of the Competition Act in 2010.

Until then it remains a matter of considerable practical importance whether a cartel is investigated by the Commission with the possibility of fines up to 10 per cent of turnover under Regulation 1/2003/EC, or whether prosecution is 'only' carried out by the Danish authorities with considerably lower fines as the likely outcome.

Furthermore, the risk of civil damages litigation remains high in the case of cartel infringements.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Restrictive agreements are subject to DCA Section 6 which corresponds to Article 81(1) and (2) EC with a possibility of exemption from the prohibition by virtue of DCA Section 8 which mirrors Article 81(3) EC. Abuse of a dominant position is prohibited by DCA Section 11, which mirrors Article 82 EC.

In general, practice from the European courts and the Commission interpreting Articles 81 and 82 EC are followed by the Competition Authority in the administration of DCA Sections 6 and 11.

i Significant cases

Post Danmark

In a judgment of 21 December 2007, the Eastern High Court confirmed that Post Danmark, the Danish universal service post carrier, in 2003 and 2004 had abused a dominant position in the market for unaddressed mail by offering selectively low prices to certain customers who were at the time buying this service from one of Post Danmark's competitors. The High Court thereby affirmed a decision of the Competition Council of 29 September 2004 and a decision of the Competition Appeals Board of 1 July 2005.

Schneider Electric Danmark

A landmark case was finally settled by the Danish Supreme Court by a judgment of 7 January 2008 where Schneider Electric Danmark A/S (formerly Lauritz Knudsen A/S), a manufacturer of electric switches, was found to have abused a dominant position by operating a complex and loyalty-inducing system of pre-booking and volume rebates. This behaviour was categorised as a violation of DCA Section 11. The loyalty-enhancing effect was reinforced by the fact that the size of the rebates was determined on the basis of the size of the advance orders and that wholesalers were obliged to buy the pre-ordered quantities.

Elsam
On 20 June 2007 the Competition Council had found that Elsam A/S, a large Danish electricity company that later merged into Dong A/S, had violated DCA Section 11 and Article 82 EC by abusing its dominant position in the wholesale market for electricity in western Denmark in 2005 and 2006. Elsam was found to have overcharged customers.

By a decision of 3 March 2008 the findings of the Competition Council were generally upheld by the Competition Appeals Tribunal on appeal. The part of the decision that concerned the second half of 2006 was remitted by the Tribunal since it did not find that the Council had had sufficient factual basis for establishing an abuse in this period.

Matas
On 23 April 2008 the Competition Council found that a general prohibition against internet selling issued by Matas, a Danish chain of perfumery and chemist shops, to all its dealers constituted an illegal restriction of competition and a violation of DCA Section 6. In accordance with Commission practice, the Council categorized the prohibition against internet sale as a 'serious' violation. Matas accepted to replace the prohibition with quality-standards applying to dealers using the internet for sale of Matas' products.

Udviklingsselskabet By & Havn
On 3 November 2008 the Competition Appeals Tribunal confirmed that Udviklingsselskabet By & Havn (Copenhagen City & Port Development) which had as statutory objective to develop new greenfield city areas, would not violate DCA Section 6 by entering into an agreement with a convenience store chain granting a 10-year exclusive right to operate a grocery store in a newly developed part of 'Ørestaden' (a greenfield area in South Copenhagen close to the Øresund bridge to Sweden). The purpose of the agreement was deemed not to be anti-competitive and the possible anti-competitive effects were not appreciable due to the high number of other grocery stores in neighbouring areas.

Valsemøllen
In December 2008, Valsemøllen A/S, a producer of flour products for industry, bakeries, catering and retail, accepted out of court to pay a fine of 1 million kroner for allegedly using resale price maintenance since 2004. The managing director of the company accepted a personal fine of 100,000 kroner, which was the largest fine imposed on a natural person in Denmark for violation of DCA. The resale price maintenance had been discovered by the Competition Authority at a dawn raid in January 2008. Valsemøllen had made an agreement with a wholesaler stating that all resale of flour products should follow Valsemøllen's 'current' bakery price list. Valsemøllen claimed that the correct title of the price list should have been 'guiding', not 'current', that the wholesaler had in fact interpreted the price list as guiding, and that the wholesaler had not followed the price list in practice. In addition the customer relationship was only one out of a very large number of relationships and similar clauses had not been applied in any other relationships. Nevertheless, the case gave rise to the above-mentioned comparatively high fines.

ii Trends, developments and strategies

Since the legal basis for accepting binding commitments as an alternative to Council decisions was provided some years ago, it has become relatively common that undertakings voluntarily commit to change or terminate a conduct that might be categorised as a violation, by submitting a set of commitments to comply with the concerns of the Competition Council related to DCA Sections 6 or 11 or Articles 81 and 82 EC. Hereby the undertaking may avoid a negative decision. The commitments are made binding by the Competition Council according to DCA Section 16a.

If an undertaking is interested in such a solution it is normally advisable to come clean at an early point. Proposals for commitments shall be sufficient to remove the relevant concerns as to the possible competition law problems identified. The Competition Authority naturally finds it helpful if the undertaking is willing to compromise its position of principle. This might lead to undertakings offering wider commitments than what would have followed from a regular decision according to DCA Sections 6 or 11 after a full investigation. The Competition Authority is of the view that a commitment solution shall be a real benefit also to the authority by relieving it from following a normal full-scale procedure.

Recent examples of a commitment solution include a decision of 29 October 2008 where the Danish Competition Council accepted commitments from Unimerco, a dominant company in the wholesale market for power fastening tools (nailers, sprigs and staplers) which were made legally binding according to DCA Section 16a. A competitor of Unimerco had filed a complaint stating that Unimerco was tying the sale of power fastening tools to the sale of 'original' fasteners supplied by Unimerco. In Unimerco's manuals, price lists, etc., the company offered free services for its fastening tools only if 'original' fasteners had been used. Moreover, Unimerco used various statements concerning safety risks in connection with the use of other fasteners and indicated that warranty and product liability would be lost if 'unoriginal' fasteners were used. The commitments that were offered and made binding concerned all kinds of fastening tools and Unimerco committed to refrain from demanding use of 'original' fasteners and instead approve use of all kind of tools which met the specifications required by the European Committee for Standardisation.

Further, on 28 May 2008 the Danish Competition Council adopted a four-year prolongation of a decision from 2005 that made various commitments from Carlsberg Denmark concerning Carlsberg's beer agreements with Danish restaurants, cafes, hotels etc., (the horeca-sector) legally binding. According to investigations made by the Competition Authority in 2008 the commitments had ensured that the foreclosure effect of Carlsberg's agreements had been reduced considerably. Moreover a large number of small beer suppliers had entered the market and the number of different beers had increased significantly over the past years. Therefore the Competition Council adopted the prolongation for four years.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The most significant sector-specific regulation concerns the telecommunications and energy markets. Mail distribution and port access are also subject to sector-specific regulation.

i *Significant cases*

DCA remains applicable alongside the sector-specific legislation, although most cases are solved on the basis of the latter alone. An example of the application of general (*ex post*) competition law on regulated markets is the above-mentioned case against Elsam, a Danish energy wholesaler regarding unfair pricing. The Competition Authority and the sector-specific authorities will often have overlapping competence on the same facts under the different regulatory regimes, but there may in specific situations be uncertainty as to the exact allocation of competence between the authorities. The most noteworthy example of this continues to be a case from 2006 before the Danish Competition Appeals Tribunal regarding apparent illegal bundling (under DCA Section 11). The Competition Authority had decided that the Danish incumbent operator TDC that held a dominant position on the market for interconnection services had unlawfully tied delivery of these services to the provision of transit capacity. This decision was annulled and the case remitted by the Danish Competition Appeals Tribunal as the delimitation of competence between the Competition Authority and the telecoms regulator (the National IT and Telecom Agency) had been insufficiently clarified.

ii *Trends, developments and strategies*

Since 2003 retail customers have been able to purchase electricity in the open market and choose the supplier they prefer. Customers who do not exercise their free choice receive electricity from companies with special supply obligations subject to prices controlled by the Danish Energy Regulatory Authority. Market investigations show that only 2 per cent of consumers actively chose their electricity supplier which means that the publicly controlled prices dominate the consumer market. The Danish Competition Authority argues that initiatives must be taken to make consumers more sensitive to prices and to lower entry barriers for suppliers which combined would make it possible to lift the price control of the companies with supply obligations. Political steps in this direction have been limited until now.

A strategic review of the Danish Telecommunication Act from 2003 was finalised in 2007.[3] Following the conclusions of the review, the Act was amended in January 2009 *inter alia* introducing fines for violation of the USO (Universal Service Obligations) and adverse inference (for not presenting sufficient documentation of pricing) and clarifying that information obtained when negotiating interconnection agreements is confidential, including in particular in regard to other departments, subsidiaries or partners.

3 Consolidated Act No. 780 of 28 June 2007 on Competitive Conditions and Consumer Interests in the Telecommunications Market as amended by Act No. 1412 of 27 December 2008.

The first 18 market analyses were ended in 2007 with numerous SMP (Significant Market Power) obligations laid down on several of the markets. The second round began recently. Following the new recommendation and guidelines from the European Commission, fewer relevant markets will most likely be identified. The second round may decrease the scope of SMP obligations, but most likely only to a limited extent.

iii Outlook

The expected adoption of the third European energy package in 2009 may have a significant effect on the regulation of the Danish electricity market.

On a commercial level, attention should be given to the future IPO of DONG Energy A/S where the Danish state currently is a majority shareholder. Apart from its leading position in Denmark DONG Energy is present in other Northern European energy markets. A broad political agreement was made in 2004 regarding the IPO, which was planned to be carried out in January/February 2008. The IPO was, however, postponed for an unlimited period due to the unfavourable market conditions.

The Danish telecommunication regulatory framework generally scores very highly in international reviews and no major reform of the Danish Telecommunication Act is under preparation. An area of priority, however, remains to be an increase in the bandwidth of broadband connections and a decrease in the price thereof.

V STATE AID

Following some high-profile cases involving Danish companies, European state aid law has become an area of increased awareness and attention in Denmark in recent years. This has only been aggravated by the current financial crisis.

DCA Section 11a regulates domestic state aid that is not subject to Articles 87 and 88 EC, i.e. intended to catch aid having no effect on trade between member states. The scope of the provision is thus very narrow and the rules have had limited relevance in practice.

i Significant cases

Since 2008 a number of important aid decisions have been taken as a consequence of the international financial crisis. The processing of these cases has set new standards as to expediency with important aid packages being approved over weekends. Three major cases have involved Denmark.

Rescue aid to Roskilde Bank

On 22 July 2008 Denmark notified the Commission of rescue aid granted to Roskilde Bank A/S, the eighth largest bank in Denmark, which, following the unrest on financial markets, was in serious financial trouble mainly due to its large exposure on the Danish market for real estate. The aid was approved on 31 July 2008.

The aid granted consisted of an unlimited liquidity facility provided by the Danish National Bank, with an expectation of a drawdown of up to 15 billion to 20 billion kroner. The liquidity facility was secured by two guarantees, one guarantee covering a potential loss for an amount of maximum 750 million kroner provided by the bank association 'Det Private Beredskab' (Danish Private Contingency Agency, see further below) set up in 2007 and comprising 137 banks in Denmark, and one for an unlimited amount above 750 million kroner provided for by the Danish state. The measures were all linked and as such constituted one single measure.

The Commission found that the guarantee provided by 'Det Private Beredskab' did not constitute state aid since all members were private banks and as all funds going into 'Det Private Beredskab' came from these private members. There were accordingly no state resources involved.

As regards the guarantee provided by the Danish state for any amount above 750 million kroner, the Commission found that this measure did constitute state aid but that it was set up in accordance with the requirements for rescue aid under Article 87(3)(c) EC.

'Bank Package I'

On 10 October 2008 the Commission decided, on the basis of a notification filed only two days before, not to raise objections against a two-year Danish guarantee scheme for banks in Denmark which entered into force immediately thereafter.

The scheme was based on an agreement between an association open to all banks in Denmark, 'Det Private Beredskab' (Danish Private Contingency Agency), and the Danish state.

The scheme had two main constituents being (1) a state guarantee covering depositors and ordinary creditors of all banks which are members of the scheme (bonds and subordinated debt were not covered by the guarantee) and (2) a winding-up company set up, owned and capitalised by the state to be available for facilitating the winding-up of failing banks which are members of the scheme.

The participation in the scheme was voluntary and was open to all solvent banks in Denmark with a banking licence that were members of 'Det Private Beredskab'. This included full coverage of subsidiaries of foreign banks, branches of Danish banks abroad (if not covered by similar schemes in other member states) as well as branches in Denmark of foreign banks (depositors only). Membership could only be acquired before 13 October 2008.

The participating banks undertook certain commitments (including a ban on dividend payments, ban on share repurchases as well as a ban on new stock options for the management etc.). Banks abusing the agreement could be excluded from the scheme. The Danish Financial Authority monitors the banks participating in the scheme.

The scheme was partially funded by a contribution by the participating banks, in that these banks will contribute up to 35 billion kroner (corresponding to 2 per cent of Danish GNP). Any loss incurred by the winding-up company exceeding this amount will be covered by the Danish state.

The Commission found that the guarantee constituted operating aid but that the scheme was appropriate, necessary and proportionate to remedy the serious disturbance of the Danish economy. As such the aid was compatible with the common market, in particular by virtue of Article 87(3)(b) EC, which foresees that the Commission may declare aid compatible with the common market in such a situation.

The Commission especially emphasised the self-payment of the banks participating in the scheme, the strong behavioural constraints combined with the coherence of the scheme with the overriding principles of the Commission's Rescue and Restructuring Guidelines.

As regards the winding up of insolvent banks, the Commission found that this measure in itself could constitute illegal state aid, part of which was, however, inherent in the guarantee scheme. Further, Denmark has undertaken to notify to the Commission all later cases where a bank of a not insignificant size is only partially liquidated. The Commission therefore deemed it unnecessary to assess that possibility further in the context of approval of the scheme as such.

'Bank Package II'

On 3 February 2009 the Commission decided not to raise objections against the second Danish bank scheme, a recapitalisation scheme for credit institutions in Denmark.

Whereas Bank Package I was intended to assure that banks would be able to obtain credits from each other, Bank Package II, also called 'the credit package' had the overall aim to stimulate the supply of credit to viable and healthy undertakings and households by increasing the capital and the solvency of credit institutions in Denmark, thus enhancing their possibility to offer finance to the real economy.

For this purpose the main element of Bank Package II introduced the possibility for all solvent credit institutions (i.e., banks and mortgage credit institutions fulfilling the solvency requirements fixed by the Danish Financial Supervisory Authority, including subsidiaries of foreign banks) to apply to receive from the Danish state injections of hybrid capital. The hybrid capital will have no final maturity date and no voting rights. The injection must be repaid in full with interest (the interest rate being based on the rating of the credit institution and ranging from 9 to 11.25 per cent).

As an alternative to direct capital injection by the state, the credit institutions have the possibility of receiving an underwriting guarantee in order for the institutions to raise funds from the capital market from private investors.

The possibility to apply for a capital injection is open until 30 June 2009 for all credit institutions in Denmark meeting the solvency requirements (i.e., also subsidiaries of foreign banks).

A credit institution applying for an injection of hybrid capital has to have a tier 1 (core) capital before the injection of 9 per cent or above, and the maximum increase in tier 1 capital due to the injection shall be 3 per cent. Credit institutions with a tier 1 capital between 6 per cent and 9 per cent will be offered a capital injection so as to reach 12 per cent, while credit institutions with a tier 1 capital below 6 per cent can only obtain a capital injection after individual negotiations with the Danish authorities.

As with Bank Package I the Commission found that the measure – which had an expected volume up to around 100 billion kroner constituted operating aid. The Commission, however, found that the measure was in line with the Commission's communications of 13 October 2008 and 5 December 2008 regarding state aid measures taken in relation to financial institutions in the context of the current global crisis.

The Commission noted that the level of the capital injections was related to the specific situations of Danish banks, which are already highly capitalised, and on this basis the Commission accepted that the recapitalisation was limited to the minimum necessary. Furthermore, the scheme is open only for less than six months, and the distortions of competition were minimised by various safeguards.

In the context of the decision certain prolongations of the guarantee scheme of Bank Package I was also approved.

TV2 Danmark

On 22 October 2008 the Court of First Instance (CFI) annulled a Commission decision of 19 May 2004 in which the Commission had found that un-notified state funding of the public television broadcaster TV2/Danmark during the years 1995 to 2002 in excess of what had been needed to cover the net cost of TV2's public service obligations constituted state aid incompatible with the EC Treaty which should be recovered. The Danish state had therefore been required to recover 628 million kroner together with interest from the broadcaster. This recovery took place simultaneously with a recapitalisation of TV2/Danmark in accordance with a second Commission decision approving the recapitalisation under the state aid rules. This latter decision has been brought before the CFI by commercial competitors, where the case is still pending.

In the judgment of 22 October 2008, the CFI upheld the Commission's acceptance of the broad Danish definition of public service television; rejecting commercial broadcasters' claims that the broad definition was unwarranted and disproportionate.

The Commission had further concluded that neither the market investor principle nor two of the four 'Altmark criteria' (conditions for state funding not constituting aid but payment for a service) were met, and that the Danish state payments to TV2 therefore constituted aid. The Commission had found that payments made in excess of the net cost of public service television operations constituted unlawful aid since TV2 thereby had been in a position to accumulate reserves which by far exceeded what had been necessary in order for TV2 to fulfil its public service obligations and which therefore could not be exempted under Article 86(2) EC.

The CFI annulled the decision for insufficient reasoning attributable mainly to the Commission's failure, in the CFI's view, to thoroughly examine the conditions which governed the setting of the amount of license fee income paid to TV2 during the period under investigation. The Commission is now contemplating a new decision in the matter.

In August 2008 the Commission approved, in the light of a financial crisis, the grant of a new loan facility to TV2 Danmark, applying the rescue and restructuring guidelines on aid for firms in financial difficulty. In early 2009 a new restructuring plan for TV2 has been notified to the Commission.

Ryanair

By letter of 30 January 2008 the Commission sent a letter of formal notice to the Danish state informing Denmark of the Commission's decision to initiate an Article 88(2) EC procedure.

The matter concerned an agreement between Ryanair and Aarhus Lufthavn A/S (Aarhus Airport), the latter being a 100 per cent publicly owned limited liability company. By the agreement which was entered into in 1999 Ryanair was granted preferential treatment for its operation in Aarhus airport. The preferential treatment consisted mainly of reduced airport and ground handling charges.

The Commission concluded that it had serious doubt as to whether the agreement between Ryanair and Aarhus Airport fulfilled the conditions for start-up aid for new airlines departing from regional airports to be declared compatible under Article 87(3)(c). These conditions had been laid down in the Commission's decision of 12 February 2004 in the matter of Ryanair and Charleroi (2004/393/EC – annulled by the CFI by judgment of 17 December 2008 in case T-196/04) and in the Commission's guidelines on financing of airports and start-up aid to airlines departing from regional airports (OJ 2005 C 312/1).

ii Trends, developments and strategies

Some of the cases quoted above have attracted wide attention. The necessity of the bank cases has been broadly accepted in the light of the meltdown on financial markets and there has been little public attention to the matters of state aid law involved.

The TV2 saga has given rise to a number of complex lawsuits, illustrating that also competitors on Danish markets are prepared to test the validity of Commission decisions in state aid decisions.

The above cases have altogether served to bring state aid law to the attention of a wider part of the legal community in Denmark.

VI CONCLUSIONS

The number of competition cases in Denmark is limited due to the small size of the market and a traditionally conciliatory approach to solving competition problems. Formal indictments are few and fines have so far been low.

In the medium term this may gradually be changing, following the 2004 reform of EC procedures and the increased international cooperation, also within the European Network of Competition Authorities, as well as following a better understanding of the need for effective enforcement.

The Danish Competition Act is likely to come up for review in 2010, leading to lower merger thresholds, both more formal and more simplified merger procedures and – possibly – higher fines.

Various damages cases currently pending before the Danish courts may result in important judgments in the meantime.

Undertakings operating in Denmark therefore continuously need to be aware of and adapt to the competition law regimes, and victims may benefit both from complaints and private action.

Chapter 12

ESTONIA

Vaido Põldoja[*]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

From the beginning of 2008, the former Estonian Competition Board was reformed to become the Competition Authority ('the Authority') with three main functional divisions: Competition (supervision of competition, 'the CD'); Railways and Energy (fuel and energy-related matters; complaints on division of railways infrastructure capacity and licensing) and Communications (market regulation, licensing and universal service). 2008 also marked the 15th anniversary of the Authority and was thus an important milestone in many respects.

After the institutional reform of the regulators, the CD is left with two departments instead of the previous four: supervision and merger control. The number of employees was cut from 33 to 17.

Due to somewhat fewer resources, the CD needs to focus on the most acute issues to be capable of being effective. The fact that the Authority consists of functional divisions can be of help to the CD, as in complex cases where sectoral competence is needed the CD can use the resources and knowledge of the other divisions. Such a possibility seems to us the most productive, since it would give further guarantees to consistent application of competition law and regulation (e.g., use of pricing methodologies in a particular sector).

ii Enforcement agenda

The Authority has not published a particular agenda for enforcement except for an area of antitrust: the fight against cartels. In the 15th anniversary seminar of the Authority in November 2008 a senior official of the Authority even proclaimed that the fight against cartels was a number one priority.

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Other than cartels, enforcement seems to be complaint-based and relates to abuse of dominant positions in various industries: port services, telecommunications, railways, electricity, district heating, retail trade, waste management, water supply, etc.

As of November 2008, there were 32 administrative, one misdemeanour and six criminal proceedings pending. The latter proceedings concern cartels.

II CARTELS

i Significant cases

Cartels are prohibited based on Article 4(1) of the Competition Act that prohibits agreements between undertakings, concerted practices, and decisions by associations of undertakings that have as their object or effect the restriction of competition.

Furthermore, Article 400(1) and (2) of the Penal Code foresees criminal sanctions for breaching the prohibition of cartels in the Competition Act. The prohibition of cartels and criminal sanctions for breaching the prohibition are applicable to both legal and natural persons. A legal person can be punished for breaching Article 400 of the Penal Code (cartels) with a fine from 50,000 to 250 million kroons. A natural person can be punished for breaching Article 400 of the Penal Code (cartels) with pecuniary punishment (from 30 to 500 daily units, calculated on the basis of the average daily income of the offender) or up to three years' imprisonment.

Currently there is no formal leniency programme. Article 202 of the Code of Criminal Procedure allows the Prosecutor's Office to request the court to end criminal proceedings with the consent of the suspect or accused. That option is available, if the guilt of the person is negligible, that person has remedied or commenced to remedy the damage caused by the offence, paid or committed to pay the expenses of the criminal proceedings and there is no public interest in the continuation of the criminal proceedings. There are also Guidelines from the State Chief Prosecutor that clarify the concept of public interest in pursuing Article 400 cases (cartels).

The Authority made in January 2008 an interesting decision that influences the principles that underpin applicability of the prohibition against anti-competitive agreements and consequently also criminal proceedings. The case was initiated in connection with a dispute between majority (Oiltanking group) and minority shareholders (Alexela Terminal, 'AT') of Oiltanking Tallinn ('OTT'), a company providing oil products storage services in Estonia. The Authority had to analyse whether an e-mail from a member of the supervisory board of AT to OTT proposing coordination of prices of certain products constituted a breach of Article 4(1) of the Act. The Authority was of the opinion that propositions made by AT to OTT were in principle anti-competitive and prohibited under Article 4 of the Act.

However, the Authority decided to end the case without finding a breach of the Act. The Authority claimed that since there was no response from OTT to the e-mail proposition of AT, the anti-competitive agreement in the meaning of Article 4(1) of the Act was not concluded. Such a reasoning seems to be controversial. The controversy lies in the fact that under the Penal Code, even an attempt to commit an offence is punished. Thus, if there is no active response from the other party, the decision of the Authority seems to suggest that there is no breach of Article 4 of the Act and consequently no criminal proceedings can be initiated (as the Authority ended the case without starting criminal proceedings under Article 400 of the Penal Code). On one hand, the decision can be used as a shield by other companies in a similar position. Due to the controversy of the decision and no court practice on the issue, it would not be surprising if the Authority changes its opinion.

As regards the 'unofficial leniency' (i.e., ending a case based on the Guidelines of the State Chief Prosecutor), the legal rules have not given enough certainty for the stakeholders to come forward with the information. The uncertainty that the current rules create in the market is well demonstrated by the fact that the rules were put into practice for the first time in December 2008 when the Prosecutor ended criminal proceedings against participants of a price-fixing case (a company and its manager). The case concerned alleged bid rigging in the road construction sector and the Prosecutor decided to continue to pursue the proceedings against the other participants.

ii Trends, developments and strategies

In practice, the Authority has not investigated many cartels. It could be explained by the generally secret nature of such activities and the lack of certainty that the market participants have in the current non-binding procedural rules. Even if the Authority and the Prosecutor's Office have promised they will not prosecute a case against a whistle-blower, the fact is that only one company has come forward with information about an alleged cartel.

iii Outlook

As explained *supra*, there is no formal leniency programme, which is a likely reason for the lack of cartel investigations. To make the system more efficient and give legal certainty to the companies that would consider applying for leniency, the Ministry of Justice in cooperation with the Authority have drafted what would implement the first formal leniency programme in Estonia.

The package consists of amendments to the Penal Code, CCP and the Act. As a major change, the amendments provide for a clear obligation to the Prosecutor's Office to end criminal proceedings against an applicant. Currently, such a decision is at the discretion of the prosecutor, which has created much uncertainty with the stakeholders. Besides the Prosecutor's Office, another important institution is the Authority. The leniency application has to be filed with the Authority, which is also the investigative body for cartel offences.

To qualify for leniency, the applicant has to be the first to notify, the information contained in the notification must allow the initiation of criminal proceedings, and the proceedings must not have already been started. If the proceedings have been started before the notification, the Prosecutor's Office has to stop proceedings against the applicant if the submitted evidence, in the opinion of the Prosecutor's Office, leads to a convicting verdict. If it is still not possible to stop proceedings, the sentence against a person otherwise fulfilling conditions for leniency would be diminished proportionally to the help received from the person during proceedings.

The amendments also provide for general conditions for leniency eligibility. The applicant must not be the ringleader, must grant full access to the evidence, must refrain from destroying evidence and must cooperate fully with the authorities. It is important to note that to qualify, an applicant may end participation in a cartel only after coordinating its withdrawal with the Prosecutor's Office.

The amendments also clarify the calculation of fines for cartels. Currently, the law only sets a general guideline from 50,000 to 250 million kroons. The amendments specify that within the limits for monetary punishment, the monetary punishment for cartel is within 10 per cent of the turnover of the last financial year of the convicted company (hence, consolidated group turnover is not used). In aggravating circumstances, no less than half of the 10 per cent turnover has to be applied.

The date of entry into force of the amendments is not clear yet.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Estonian competition rules are in principle based on Articles 81 and 82 EC. Article 4 discussed *supra* prohibits agreements between undertakings, concerted practices, and decisions by associations of undertakings which have as their object or effect the restriction of competition. That provision not only includes cartels but all kind of agreements between undertakings.

According to Article 13(1) of the Competition Act an undertaking in a dominant position is an undertaking or several undertakings operating in the same market whose position enables them to operate in the market to an appreciable extent independently of competitors, suppliers and buyers. Dominant position is presumed if an undertaking accounts for at least 40 per cent of the turnover in the market or several undertakings operating in the same market if they account for at least 40 per cent of the turnover in the market. Undertakings with special or exclusive rights or in control of essential facilities are also undertakings in a dominant position.

Article 16 of the Competition Act is a clause based on Article 82. The provision prohibits any direct or indirect abuse by an undertaking or several undertakings of the dominant position. The law also includes a list of examples of what constitutes an abuse that is similar to Article 82.

Article 18 of the Competition Act sets additional obligations for undertakings with special or exclusive rights or in control of essential facilities:

a access to network, infrastructure or other essential facility under reasonable and non-discriminatory conditions for the purposes of the supply or sale of goods; and

b maintenance of separate records on revenue and expenditure related to each product or service. The calculation of revenue and expenses must enable an investigator to assess whether the price of a product or service is at a reasonable ratio to the value of the product or service.

The Authority and courts generally refer to and analyse decisions taken by the Commission or the Community courts even when applying national competition law. Therefore, the practice of applying national antitrust rules conforms in principle with the EU rules and practice.

i Significant cases

In recent years one of the most notable cases has been the case concerning national post operator Eesti Post, where the Supreme Court gave its verdict in December 2007.[1]

The case concerned application of Article 16(3) (discrimination) and (4) (tying) to loyalty rebates implemented by Eesti Post (EP).

In February 2008 the Authority fined EP for breaching Article 16(3) of the Competition Act by applying different prices to its direct posting clients by grouping them artificially into two different price segments: postal sales (clients that purchased additional services besides direct posting) and advertising clients (customers that only purchased direct posting services). The Authority also found that EP had breached Article 16(4) of the Competition Act by setting a precondition for receiving discounts for direct posting of commercials that the client orders 100 per cent of the services needed by the client from EP (loyalty rebates).

The Supreme Court confirmed that the Authority had correctly found that EP breached Article 16(3) of the Competition Act by applying different prices for similar services ordered from EP in a similar capacity. The court was of the opinion that it was not important that one group of customers ordered additional services besides direct posting since it did not change the fact that EP used the same service (direct service) for both customer groups.

The Supreme Court also confirmed that EP had breached Article 16(4) by implementing loyalty rebates. EP was an undertaking with a dominant position in the direct posting market. Such an undertaking is not entitled to tie clients by requiring the clients to purchase all or the majority of their capacities from the dominant undertaking. It was not important that the customers had agreed to it by signing a contract with EP. The court also referred to CFI and ECJ decisions on loyalty rebates (*Hoffmann-LaRoche*, case 85/76 and *Michelin*, case T-203/01). The Court also agreed with the Authority that loyalty rebates are *per se* restricting competition and could have a market closure effect.

ii Trends, developments and strategies

The Authority has not set any particular objectives in the field of antitrust except for the fight against cartels.

Therefore, the likely development is that cases will develop on a complaint basis unless certain issues become acute enough to attract the attention of the Authority. One of the reasons for that could be that the lack of resources of the Authority does not enable the Authority to be proactive and input from market participants is necessary.

Since the proceedings might take several years to be finalised by the Authorities, possible claimants are also keen to look for informal settlements with the accused to have the situation improved and avoid time- and resource-consuming formal proceedings.

1 Decision of the Supreme Court of December 5, 2007 in misdemeanour proceedings No. 3-1-1-64-07 (Eesti Post).

iii Outlook

The majority of the cases handled by the Authority concern abuse of dominant position. In the future, it seems that similar practice will continue.

However, if the formal leniency programme is adopted and enters into force, it is anticipated that at least that side of antitrust could be more a part of the everyday practice of the Authority as well.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Telecoms

A regulated sector that has received much attention from the Authority and the sector-specific regulator is telecommunications. Much of the telecoms wholesale markets are under sector-specific regulation based on the 2002 EU regulatory framework. Therefore, crucial aspects such as access and pricing are on most occasions regulated by a sector-specific set of rules rather than general competition law. Access to ducts is, however, a core element of the telecoms network that in Estonia has caused constant access disputes and that is not covered by sector regulation. In 2008, the Authority issued an interesting decision concerning pricing of ducts (Decision of 7 May 2008 No. 5.1-5/08-019L, Elion Ettevõtted AS). The Authority started administrative investigation in 2006 after alternative operators filed a complaint concerning duct rental pricing by the incumbent Elion. The alternative operators considered that the new prices adopted by Elion were excessive and as such abusive. The case is interesting since ducts are used as a basic input for services that are regulated: termination and origination, leased lines, bitstream access, etc. At the time that the dispute arose, provision of leased lines and interconnection services by an operator with significant market power had an automatic price regulation obligation (FL LRAIC) based on the Telecommunications Act. However, no such obligation existed for the provision of duct access as an independent service. The Communications Board (currently merged with the Authority) also started to carry out market analysis as required under the new sector rules and imposed a different pricing methodology (historical costs) on Elion on a variety of wholesale markets and Elion dropped its duct access fees with a reference to new regulation (although the regulation did not concern duct access but services that use duct access as a core input). The Competition Act allows the Authority to end administrative proceedings if an undertaking has significantly improved competition in the market. Since Elion considerably dropped the fees, the Authority decided there was no need to pursue the case.

Electricity

Another interesting decision concerns electricity markets. In a decision concerning the duty to supply the Authority made some rather interesting comments on abuse of dominant position (Decision of 15 May 2008 No. 3.1-7/08-2, Narva Elektrijaamad AS). The case concerned provision of dedicated supplies (i.e., capacities predictable by the buyer) and open supplies (i.e., capacities for granting that purchased and sold capacities are equal) of electricity to two local grid operators that also sell electricity to their clients ('the Operators'). The Operators concluded agreements for dedicated supply with a subsidiary of the incumbent electricity operator Eesti Energia (Narva Elektrijaamad, NEJ) and purchased open supply from Baltic Energy Partners ('BEP'), an alternative provider of open supply electricity and balance holder services. NEJ considered that BEP was, under the Electricity Market Act, not entitled to provide open supply since BEP purchased the supplied electricity from a producer of electricity in a combined heat and power production regime. NEJ required the Operators to purchase open supply from an Eesti Energia group company and ultimately stopped dedicated supply to the Operators.

The Authority first of all considered whether NEJ had a dominant position and whether it was necessary to define any submarkets within the general markets of production and wholesale of electricity. The Authority considered that it was not necessary to define dedicated and open supply as different submarkets since the already very large market share of NEJ (93 to 95 per cent) would have not decreased. Therefore, to assess the market power of NEJ no further delineation was necessary. In examining NEJ's dominance, the Authority referred to ECJ case-law (*Hoffmann-LaRoche*) and came to the conclusion that the very large market share held by NEJ in electricity production and wholesale is by itself a proof of dominance. The Authority also referred to the fact that the Estonian market was not to be fully liberalised until 2013 and a quick decrease of market share of NEJ was not realistic.

In analysing substantial grounds for the demand to purchase open supply from NEJ, the Authority considered that dispute between NEJ and the Operators arose from the question of whether BEP was, in accordance with the Electricity Market Act ('the EMA'), entitled to resell electricity under open supply arrangement. However, the Authority was of the opinion that the provisions of the EMA were not to be analysed in more detail, since none of the provisions linked dedicated supplies to open supply nor did the EMA allow a dominant undertaking to stop dedicated supply.

Furthermore, the main dispute between the undertakings concerned the right to provide open supply. The Authority stressed that under the EMA the legality of open supply is supervised by the Authority itself and not by one of the market participants (such as NEJ). NEJ is obliged to provide dedicated supply and no provision in the EMA entitles NEJ to stop dedicated supply for an alleged breach of open supply regime by a market participant. Even if the EMA does not provide for a specific duty to supply, such a duty has to be assessed under general competition rules.

NEJ also claimed that the Operators abused their right under dedicated supply and purchased more electricity than necessary for them. When analysing that claim, the Authority was of the opinion that stopping all supplies would not be a proportionate reaction. NEJ would have other means for protecting its rights such as using more precise and thorough agreements or filing a complaint with the Authority or suing the Operators in court.

When considering the effects of an activity, the Authority claimed that it has the duty to prove the likelihood of negative effects rather than prove harmful consequences that already exist.

The Authority concluded that NEJ abused its dominant position by stopping dedicated supply to the Operators.

Furthermore, in ordering the Operators to purchase dedicated and open supply from Eesti Energia group companies, NEJ abused its dominant position by tying two products together. The Authority was of the opinion that in assessing a tying arrangement, it is necessary to look into the real effects of a particular activity. The fact that the electricity was sold under two different arrangements did not mean that tying would not exist (i.e., product similarity is not relevant).

ii Trends, developments and strategies

Certain regulated industries have been and are likely to continue to be among the 'top clients' of the Authority. These areas of activity are mainly telecommunications, ports, railways, electricity and water supply.

Since there is also sector-specific regulation in place in various industries (in particular telecommunications), the overlapping or controversial obligations are of course something that arises frequently in conducting proceedings under competition rules. The fact that the Authority now has the competencies of the former telecommunications, railways and energy regulator should help to settle such disputes and avoid problems with competencies.

The Authority has not been very active in conducting industry-wide analysis of the competitive situation. In 2007 the Authority finished an analysis of the situation in the gas market. The Authority concluded that the market is rapidly changing and there are newcomers and also operators leaving the market. However, the Authority had to watch the market closely due to the fact that the incumbent Eesti Gas holds a dominant position both in the wholesale and retail markets. Following the analysis, the Authority has, to our knowledge, not decided to initiate any proceedings concerning possible abuse of dominance.

iii Outlook

It could be that access disputes will continue to arise in the regulated markets. This is due to the fact that retail services are in general more profitable than wholesale products and the incumbents have no interest in losing their market share and profitability.

In is interesting to note that the Authority has not refrained from applying antitrust regulation in areas where heavy regulation otherwise applies, for instance in the telecommunications and electricity markets. We are therefore hopeful that the Authority will continue to act in all areas of business where sector regulation has not proven to be effective and the competitive situation is declining. However, as explained above, the market participants have to be active in pointing out problems to the Authority.

V STATE AID

In the European Union, state aid is regulated at the Union level where Articles 87-88 of the EC Treaty are the core provisions.

The European Commission has on many occasions dealt with state aid schemes related to Estonia. On the national level however, there are no decisions that concern application of the EC Treaty Articles.

The lack of national-level case law might be due to various reasons. Estonia has, until 2008, seen good growth and until recently there has not been much need for nor concern over state aid. The politics in general have also been rather liberal and the aim has been to reduce state participation in the economy to a minimum. Furthermore, both the public and private sector are generally not well informed about state aid regulation.

However, in times of recession the part that state support plays in the economy is likely to grow and therefore issues pertaining to state aid should also emerge more frequently.

VI CONCLUSIONS

i Pending cases and legislation

Except for the current leniency regime, the law as such seems to be adequate to address all competitive concerns.

Since the Authority and the courts rely on EU competition law even when applying Estonian national law, the market participants and advisers have to be fully aware of not only national developments but also developments taking place at the EU level.

With regard to the issues looked into by the Authority, the majority of such cases are likely to concern proceedings on abuse of dominance initiated by complainants. With the adoption of the formal leniency programme, anti-competitive agreements could come to the attention of the Authority more frequently.

Another area that we expect to develop is state aid. Currently there is no national case law on Articles 87-88 of the EC Treaty. However, with the financial crisis hitting even the most profitable companies state support and legal issues related to that are likely to start arising in Estonia.

ii Analysis

Currently the most significant regulatory issue seems to be the new leniency programme discussed *supra*.

From a practitioner's point of view, an important issue that does not seem to have been solved by the Authority is coordination of work by the NCAs of the Baltic countries. Many multinational companies tend to view all three Baltic countries (Estonia, Latvia and Lithuania) as a single pan-Baltic market. Therefore, it would not be surprising if an anti-competitive behaviour discovered in one market is also occurring in the other two national markets. The companies also need to have security in that if a certain activity is found to be complying with the competition rules in one market there is no breach in the other two countries.

Chapter 13

EUROPEAN UNION

*Shaun Goodman and Neil Rigby**

I OVERVIEW

i Prioritisation and resource allocation by enforcement authorities

The identification and prosecution of cartel activity has firmly established itself among the primary aspects of the European Commission's antitrust agenda. In 2008, around half of the Commission's decisions (excluding state aid) related to proceedings against cartels, with fines totalling €2.27 billion being imposed against 37 undertakings. These fines, which collectively represent the second-highest annual level of fines imposed by the Commission against cartels (2007 was higher), included the largest ever fines imposed against a single cartel participant and against a cartel as a whole. The Commission's new settlement procedure, which aims to free up additional resources by streamlining proceedings, further reflects the importance the Commission attaches to cartel enforcement.

The Commission has also published its enforcement priorities for the application of Article 82 EC to exclusionary abuses. The guidance provides important clarification of the Commission's approach to the most common types of abusive conduct under Article 82 EC and resolves many uncertainties that have persisted over the years.

ii Enforcement agenda

Following the completion of sector inquiries into financial services and energy in 2007, both sectors have become enforcement priorities for the Commission. Pharmaceuticals will also likely become a priority sector for the Commission following publication of the Final Report in the Pharmaceuticals Inquiry, expected in summer 2009. The potential application of Article 82 EC to abuses stemming from technology and patents also appears to be an emerging priority sector. Finally, the Commission has emphasised the

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importance it attaches to providing swift and effective guidance on the application of state aid rules in response to the current economic crisis.

II CARTELS

i Significant cases

Synthetic rubber

In January 2008, the Commission fined Bayer and Zeon €34.2 million for fixing prices for nitrile butadiene rubber between 2000 and 2002.[1] The Commission increased Bayer's fine by 50 per cent because of a prior antitrust violation. Interestingly, the Commission did not take account of Bayer's role in three other infringements in the synthetic rubber sector because, according to the press release, these infringements 'took place in a similar period of time and therefore are parallel infringements.' This case suggests that the Commission will increase fines for recidivism only with regard to infringements that pre-date the infringement under review. Both Bayer and Zeon cooperated with the Commission under the leniency programme: Bayer's fine was reduced by 30 per cent and Zeon's by 20 per cent. In addition, Zeon received an additional reduction since it was the first undertaking to disclose the initial period of the cartel to the Commission.

International removal services

In March 2008, the Commission imposed fines of €32.7 million on 10 undertakings involved in a cartel for international removal services in Belgium.[2] The undertakings fixed prices, rigged bids by providing cover quotes, and used a payment mechanism between competitors to compensate for lost bids. The level of fine imposed on Allied Arthur Pierre was reduced by 50 per cent under the leniency programme, although a former parent company of Allied Arthur Pierre (Exel Investments) did not benefit from this leniency because it failed to apply separately. The fine against Interdean was reduced by 70 per cent because of an inability to pay. The investigation was conducted by the Commission on its own initiative following detection by the Commission, highlighting the Commission's independent role in the hunt for cartels.

Sodium chlorate

In June 2008, the Commission imposed fines of €79 million against four groups of sodium chlorate paper bleach producers for allocating sales volumes and fixing prices.[3] The fine imposed against Arkema France was increased by 90 per cent because it had previously participated in three other cartels in the plastics sector. Akzo Nobel and its subsidiary, EKA Chemicals, received full immunity, while Finnish Chemicals/Erikem received a 50 per cent reduction in fine.

1 Commission press release IP/08/78 of 23 January 2008.

2 Commission press release IP/08/415 of 11 March 2008.

3 Commission press release IP/08/917 of 11 June 2008.

Aluminium fluoride

In June 2008, the Commission imposed fines of €4.97 million on producers of aluminium fluoride for engaging in a price-fixing cartel.[4] Boliden Odda received full immunity. The relatively modest level of fines reflects the fact that the cartel was of short duration (around six months) and involved a market with low turnover. However, for the first time the Commission applied a provision of its 2006 Fining Guidelines, which allows it to calculate the value of EEA sales for each cartel member on the basis of their worldwide shares. Since the market affected by the cartel was worldwide, the Commission considered that this more accurately reflected the relative weight of each participant.

Candle waxes

In October 2008, the Commission imposed fines of €676 million against nine groups of manufacturers of paraffin wax, four of which also participated in a cartel for the raw material used to make paraffin wax.[5] Shell received full immunity. The infringement entailed price fixing by all participants, and market sharing by six participants. The level of fine imposed on Sasol was increased by 50 per cent for being the leader of the cartel, although Sasol also received a 50 per cent reduction under the leniency programme. Repsol and ExxonMobil each received reductions for leniency, in the amounts of 25 per cent and 7 per cent respectively. The fine imposed on ENI was increased by 60 per cent for prior participation in a cartel.

Bananas

In October 2008, the Commission imposed fines of €45.6 million on Dole and €14.7 million on Del Monte/Weichert for participation in a price-fixing cartel for the importation of bananas into the EEA.[6] Chiquita received full immunity. The Commission has indicated that the fines imposed were reduced by 60 per cent to reflect the nature of the regulatory regime for the banana market that was in place at the time of the infringement.

Car glass

In November 2008, the Commission imposed fines of more than €1.3 billion on manufacturers of automotive glass for engaging in a cartel to share markets and exchange competitively sensitive information.[7] The investigation was launched by the Commission following a tip-off by an anonymous informant. Asahi received a 50 per cent reduction in fine under the leniency programme. The fine imposed on Saint Gobain, at €896 million, is the largest fine ever imposed on a single undertaking for participation in a cartel. The total fines are also the highest fines imposed by the Commission for an individual cartel.

4 Commission press release IP/08/1007 of 25 June 2008.

5 Commission press release IP/08/1434 of 1 October 2008.

6 Commission press release IP/08/1509 of 15 October 2008.

7 Commission press release IP/08/1685 of 12 November 2008.

ii Trends, developments and strategies

In 2008, around half of the antitrust decisions adopted by the Commission involved cartels, with seven infringement decisions being adopted. Significant steps (conducting surprise inspections or issuing a statement of objections) were taken in six further cartel investigations.

To further its efforts to tackle cartels, in June 2008 the Commission announced a new settlement procedure in cartel cases, which will enable it to achieve procedural efficiencies by adopting simplified procedures where parties are prepared to acknowledge their participation in the infringement, waive certain rights of defence and accept liability in exchange for a 10 per cent fine reduction (cumulative with any leniency discount).[8]

The Commission will retain broad discretion to determine which cases may be suitable for a settlement, as well as to decide whether to engage in settlement discussions, discontinue such discussions or finally settle a case. The process is intended primarily to reward firms that do not contest the Commission's view of the facts and application of the law. The Commission emphasises that, while the process will involve an exchange of views, it will not involve formal negotiations as to evidence, objections, infringement or fines. The main steps of the settlement procedure are as follows.

Settlement discussions may be initiated by the Commission after it has initiated proceedings (i.e., after the Commission has completed the core investigation stage, but before it has issued a statement of objections) by inviting the parties to indicate whether they envisage engaging in settlement discussions. The Commission will disclose information on its file to enable the parties to decide whether to settle. This will entail disclosing information to permit the parties to understand the essential elements of the case, e.g., alleged facts, gravity and duration, attribution of liability, estimate of likely range of fines, and the evidence supporting these elements.

If parties decide to settle, they will then need to provide a formal settlement submission within a specified period. The submission, which may be oral or written, must contain a clear admission of liability and an indication of the maximum fine that the party would accept as part of a settlement. The submission must also contain confirmation that the party has been informed of the objections against it and has had the opportunity to make its views known, that the party will not seek access to the file or an oral hearing, and that the party agrees to receive the statement of objections in a specified EU official language. The submission cannot be unilaterally revoked by the party although, should the Commission subsequently abandon the settlement process, the party is no longer bound by it and any admissions made are deemed to be withdrawn.

Upon receipt of the statement of objections, the party will confirm that it reflects the settlement submission. The Commission may then adopt a final decision in respect

8 Commission Regulation (EC) No. 622/2008 of 30 June 2008 amending Regulation (EC) No. 773/2004 as regards the conduct of settlement procedures in cartel cases, OJ L 171/3, 2 July 2008. Commission Notice on the conduct of settlement procedures in view of the adoption of decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No. 1/2003 in cartel cases, OJ C 167/1, 2 July 2008.

of the settling parties, in which the Commission will reduce by 10 per cent the fine that it would have imposed.

iii Outlook

Enforcement of antitrust rules against cartels will remain a Commission priority. Recent speeches by the Competition Commissioner have confirmed that this policy will continue during the economic downturn; for example, the Commissioner has explained that 'if we went easy on cartels, a culture of "anything goes" would quickly develop [...] and that's the same sort of risky, complacent culture that fostered this wider crisis.'[9] There are a number of ongoing investigations and there are additional cases which have not yet been made public. It will be interesting to see whether the Commission's new settlement procedure will prove to offer a sufficient incentive (additional 10 per cent reduction) to encourage undertakings to take up the offer, having regard to the fact that they will be admitting liability – and thereby creating a private litigation risk – and will be unable to challenge the statement of objections setting out the Commission's case.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

E.ON

In January 2008, the Commission imposed a fine of €38 million on E.ON for breaching a Commission seal at E.ON's premises, which had been affixed during an unannounced inspection into alleged anti-competitive practices in the German electricity sector.

The Commission had affixed a seal to prevent access to a room in which were stored all the documents previously collected by the Commission. When the Commission's case team returned to E.ON's premises the next day, the seal showed 'void' signs on its surface[10] and, according to the Commission, also showed traces of glue as if attempts had been made to reattach the seal after it had been removed. As no index of these documents had yet been drawn up, the Commission was unable to ascertain whether and which documents had been removed by E.ON.

E.ON denied having tampered with the seal, but could offer no credible explanation for the appearance of the 'void' signs on the seal. The Commission held that E.ON was at least negligent, and did not address whether E.ON acted intentionally. This was because, in the Commission's view, breaking a seal either intentionally or through negligence would inevitably compromise the Commission's investigation and permit it to impose fines under Article 23(1) of Regulation 1/2003 of up to 1 per cent of the company's annual worldwide turnover for violation of the duty to cooperate with the Commission. The fine imposed on E.ON equated to 0.67 per cent of its turnover. The Commission claimed to have taken into account that this case is the first to impose a fine on an undertaking for breach of a seal, suggesting that future fines for similar

9 'The Crisis and the Road to Recovery', speech by Neelie Kroes, 30 March 2009.

10 The Commission's seals are made of plastic film. If they are removed, they do not tear, but show irreversible 'void' signs on their surface.

conduct might potentially be higher as a proportion of turnover. E.ON has appealed the decision.

Microsoft

In February 2008, the Commission fined Microsoft €899 million for failure to comply with a 2004 infringement decision, which had fined Microsoft €497.2 million for abusing its near-monopoly position by, among other things, deliberately restricting interoperability between Windows PCs and non-Microsoft work group servers. The 2004 decision[11] (upheld by the Court of First Instance in 2007)[12] had directed Microsoft to grant third parties access to complete and accurate interface information within 120 days to allow non-Microsoft work group servers to achieve full interoperability with Windows PCs and servers. This is the largest fine ever imposed on a company by the Commission for a breach of competition law, and is the first time it has fined a company for failure to comply with an antitrust decision.

The Commission first imposed fines of €280.5 million for non-compliance in July 2006 because Microsoft had failed to disclose complete and accurate information. The fine was imposed for the period 16 December 2005 to 20 June 2006, and was set at €1.5 million per day (75 per cent of the €2 million maximum daily fine), reflecting Microsoft's large size and its failure to heed repeated warnings. Microsoft was also warned that the maximum potential daily fine would increase to €3 million in future. The 2008 fine for non-compliance relates to the period 21 July 2006 to 21 October 2007, during which time the Commission found that Microsoft had continued to frustrate interoperability by setting its royalty rates for access to interoperability information too high. The Commission also found that Microsoft should not have demanded royalties for technology that was either publicly available, not state-of-the-art or lacking innovative input. The Commission found that Microsoft was in compliance only after it had made two reductions in royalty rates, the second of which was made on 22 October 2007. The €899 million fine represented 61 per cent of the maximum potential fine that could have been imposed and equates to around €1.8 million per day.

Case T-271/03 Deutsche Telekom v. Commission

In April 2008, the Court of First Instance confirmed a Commission decision[13] that had fined Deutsche Telekom for engaging in abusive margin squeezing in the German telecommunications markets. Deutsche Telekom has appealed to the European Court of Justice.

The Commission found that Deutsche Telekom provided wholesale access services to its competitors by renting connections to its telecommunications infrastructure (local loop) – charges which were approved by the National Regulatory Authority ('NRA'); and retail access services to its customers that use Deutsche Telekom infrastructure for narrowband (analogue and ISDN) and broadband connections – charges which were

11 Case COMP/C-3/37.792 *Microsoft*.

12 Case T-201/04 *Microsoft v Commission*.

13 OJ 2003 L 263/9.

subject to a lighter form of regulation (in the case of narrowband connection) or no *ex ante* regulation (in the case of broadband connection). The Commission found that, from 1998 to 2001, Deutsche Telekom had infringed Article 82 EC through imposition of a margin squeeze by charging its competitors wholesale access charges that were higher than retail charges.

The Court held that Deutsche Telekom could not argue as a defence under Article 82 EC that its wholesale charges had been approved by the NRA. The Court found that Deutsche Telekom could have raised its retail prices, or applied to the NRA to alter its prices to eliminate the margin squeeze. Thus the intervention of the NRA did not remove from Deutsche Telekom its pricing freedom and, as such, its conduct remained subject to Article 82 EC. The Court further confirmed the applicable test for a margin squeeze, namely, whether the dominant firm, or an equally efficient competitor, would have been able to operate the services at issue without making a loss. While the Commission had focused entirely on Deutsche Telekom's costs and prices (and had thereby disregarded those of competitors), the Court upheld the Commission's analysis. The Court also rejected Deutsche Telekom's argument that the Commission should have taken into account revenues that its competitors could have made from other services which could compensate for the losses. The Court also confirmed the importance of the Commission demonstrating the existence of anti-competitive effects following an abuse. In this instance, while the Court held that such effects derive 'in principle' from a margin squeeze, the Court nevertheless went on to assess the actual foreclosure effects in this case.

CISAC

In July 2008, the Commission prohibited 24 European collecting societies (members of the International Confederation of Societies of Authors and Composers, 'CISAC') from limiting their ability to offer their services to authors and commercial users outside their domestic territory. The Commission's decision, which is in line with established case law,[14] closes two sets of proceedings brought in 2003 (by Music Choice, concerning CISAC's model contract between members for public performance rights, and by RTL, concerning the refusal by GEMA, the German collecting society, to grant a pan-European licence to RTL for its broadcasting services).

Using the CISAC model contract, authors had to use their own national society, and could not therefore deal with the collection society of their choice. Further, a broadcaster wishing to broadcast in several countries had to negotiate with the collecting society in each individual country. The Commission required that the 24 EEA-based CISAC members remove or disapply the membership clause that prevented an author from choosing or relocating to another collecting society together with any territorial restrictions that prevented a collecting society from offering licences to commercial

14 *GEMA* (OJ 1971 L 314/15), Case 127/73 *BRT v. SABAM* ('BRT II') 1974 ECR 313, Case 7/82 *GVL v. Commission* 1983 ECR 483, Case 22/79 *Greenwich Film Production v. SACEM* 1979 ECR 3275, Case 395/87 *Ministère Public v. Tournier* 1989 ECR 2521, and Case 110/88-242/88 *Lucazeau v. SACEM* 1989 ECR 2811.

users outside their domestic territory. The decision is under appeal before the Court of First Instance.

Joined Cases C-468/06 to C-478/06 Sot. Lélos Kai Sia EE (and Others) v. GlaxoSmithKline AEVE

In September 2008, the European Court of Justice clarified the application of Article 82 EC to a dominant company's reduction of customary supplies to wholesalers aimed at restricting parallel trade.

GlaxoSmithKline ('GSK'), through its Greek subsidiary, sought to restrict pharmaceutical exports from Greece to Germany and the United Kingdom being made by Greek wholesalers. GSK initially suspended supplies, then subsequently resumed them in quantities sufficient to satisfy only domestic demand. Following commencement of civil actions, the Court held that refusal by a dominant company to meet the orders of an existing customer is abusive where, without any objective justification, that conduct is liable to eliminate a trading party as a competitor.

The Court rejected the argument that restrictions to parallel trade in pharmaceuticals should be treated differently in light of the extent of government intervention in these markets. Restrictions to the parallel trading of pharmaceuticals are liable to impede competition, and the fact that national price regulations may generate incentives for parallel trade in pharmaceuticals does not as a general matter justify measures to curb such parallel trade. Rather, the Court highlighted the benefits of parallel trade in terms of increased price pressure and additional choice, both of which would benefit public procurement entities and, indirectly, consumers. A dominant company cannot therefore refuse to satisfy ordinary orders of existing wholesalers 'for the sole reason' that these wholesalers export part of their purchases to other Member States.

However, the Court recognised, in light of government intervention creating opportunities for parallel trade, that a dominant company should be allowed 'to take steps that are reasonable and in proportion to the need to protect its own commercial interests' against orders 'of significant quantities of products that are essentially destined for parallel export'. In particular, it may be legitimate to refuse to supply wholesalers involved in parallel exports where their orders are 'out of the ordinary', by reference to 'the previous business relations between the pharmaceutical company and the wholesalers concerned'; and 'the requirements of the [national market] concerned'. Orders could be considered out of the ordinary if they involve 'quantities which are out of all proportion to those previously sold by the same wholesalers to meet the needs of the market in [the Member State concerned]'.[15]

15 The Greek and French versions of the judgment use a slightly different wording, which is closer to 'out of proportion' than 'out of all proportion'; our reading of the Greek and French versions would suggest a lower standard for the assessment of the 'out of the ordinary' character of an order.

E.ON

In November 2008, the Commission issued a decision under Article 9 of Regulation 1/2003 accepting a number of commitments offered by the German electricity company E.ON and closing its investigation of suspected abusive conduct.

The investigation started in 2006 as a result of the Commission's inquiry into the energy sector. In the course of its investigation, and following surprise inspections in December 2006, the Commission came to the preliminary view that E.ON might have infringed Article 82 EC in two ways. First, the Commission contended that E.ON, as a wholesaler on the electricity market, had been withholding available electricity generation capacities that it would have been economically rational to sell in order to raise prices. The Commission also had concerns that E.ON had devised and implemented a strategy to deter third parties from investing in electricity generation. Second, the Commission contended that E.ON, as a transmission system operator, raised prices and thwarted competition on the market for electricity balancing (i.e., the last minute supply of electricity to maintain the frequency of the electrical current in the network) by favouring purchases from its own affiliate even if at a higher price.

The commitments offered by E.ON include the divestiture of about 5,000MW of generation capacity in German power plants (around 20 per cent of E.ON's capacity) to prevent E.ON from being able to withdraw capacity to raise prices, and to provide capacity to competitors and new entrants on the German market. The second part of the remedy package involves the divestiture of E.ON's transmission system business, consisting of an extra-high-voltage line network and system operations currently run by E.ON Netz, to remove the operator's incentive to favour a particular supplier of balancing energy.

MasterCard

In December 2007, the Commission found that MasterCard's network rules and multilateral interchange fees ('MIF') for cross-border payment card transactions within the EEA violated Article 81 EC and had to be repealed within six months.[16] The decision follows the Commission's 2006 sector inquiry into retail banking, which found that MIF agreements might stand in the way of a more cost-efficient payment card industry and of the creation of a Single Euro Payment Area.[17] In April 2009, the Commission accepted commitments from MasterCard to establish a new MIF that complies with the Commission decision.

Interchange fees are paid by the merchant's acquiring bank to the cardholder's issuing bank for each payment card transaction. Multilateral interchange fees are based on a collective agreement among a card system's member banks. The Commission held that, notwithstanding MasterCard's 2006 listing as a publicly quoted company, decisions as to the structure and level of the MIF were not unilateral actions of MasterCard Inc. Rather, they should be regarded as decisions of an association of undertakings because

16 Cases COMP/34.579 - *MasterCard*, COMP/36.518 - *EuroCommerce* and COMP/38.580 - *Commercial Cards*.

17 http://ec.europa.eu/comm/competition/sectors/financial_services/inquiries/retail.html.

the member banks had agreed to the listing and new governance structure with a view to perpetuating the intra-EEA MIF in a form which they perceived to be less exposed to antitrust scrutiny.

The Commission found that the intra-EEA MIF restricted competition between acquiring banks by inflating the base on which these banks set charges to merchants, thereby setting a floor under the merchant fee. In the Commission's view, in the absence of the MIF the merchant fee set by acquiring banks would have been lower. Interestingly, the Commission found that MasterCard's MIF rates were not constrained by competitive pressure from other payment card brands, such as Visa. To the contrary, it concluded that competition between Visa and MasterCard created upward pressure on MIF rates since most banks were members of both Visa and MasterCard and were likely to prefer issuing the brand with the higher MIF rates. The Commission held that the arrangements could not benefit from an exemption under Article 81(3) EC, holding that the existence of other schemes without a MIF implied that the MasterCard MIF, in its present form, was not objectively necessary for the operation of MasterCard's card system. The Commission further pointed to unrealistic assumptions underlying the conceptual underpinnings of MasterCard's MIF and the lack of evidence for a causal link between the MIF and any claimed efficiencies.

Morgan Stanley / Visa International and Visa Europe

In October 2007, the Commission imposed a fine of €10.2 million on Visa International and Visa Europe for having refused to admit Morgan Stanley Bank as a member of Visa Europe for more than six years, from March 2000 to September 2006. Visa's behaviour was found to constitute a serious infringement of Article 81 EC.

In 2000, following the establishment of a commercial bank in the United Kingdom, Morgan Stanley sought to become a member of the Visa organisation. Visa refused because Morgan Stanley owns the Discover card payment system and Visa operates an internal rule that denies membership to any company that Visa's Board of Directors considers to be a competitor. Visa eventually admitted Morgan Stanley in 2004 following a complaint to the Commission and a statement of objections having been issued. Despite Morgan Stanley having withdrawn its complaint, the Commission considered the infringement sufficiently serious to justify the issue of a formal decision imposing a fine.

The Commission found that Visa's membership refusal effectively excluded Morgan Stanley from the UK market for the provision of credit and deferred debit/charge card acquiring services to merchants. This was so not only because of Visa's market power (Visa transactions represented 60 per cent of the relevant market), but also because merchants expect banks to offer a package of card acceptance contracts including both Visa and MasterCard. Visa's refusal therefore prevented Morgan Stanley from providing services not only as regards Visa transactions, but also as regards MasterCard and other less prevalent payment card transactions. The exclusion from Visa of Morgan Stanley (the only potential entrant that could be expected to be able to operate on an efficient scale) deprived consumers of increased intra-brand competition in a highly concentrated market with scope for further rivalry.

Visa argued that the rule falls outside the scope of Article 81(1) EC because it aims to prevent free-riding by competing card payment networks and serves to maintain and enhance inter-system competition. However, the Commission rejected this argument, holding that Morgan Stanley was not an actual competitor of Visa in the EU (as Discover operated only in North America) and could not realistically enter the EU by expanding its Discover network because of high entry barriers. The Commission also noted that Visa had admitted both Citigroup (which owns the Diners Club network) and shareholders of JCB (a Japanese card payment system). There were also less restrictive firewall arrangements that could have addressed concerns about access to confidential information. In those circumstances, the Commission found that the prohibition on membership was disproportionate and discriminatory. The Commission also concluded that no pro-competitive effects resulted.

Groupement des Cartes Bancaires

In October 2007, the Commission ordered Groupement des Cartes Bancaires ('GCB') to abolish certain card issuance fees that were found to restrict competition in the French payment card issuing market in violation of Article 81 EC.

GCB is an association of banks that manages the Carte Bleue card payment system, which accounts for over 70 per cent of card payments in France. GCB members comprise a large number of banks that issue cards, acquire merchants to accept card payments, or install automated teller machines; however, the decision-making body comprises a small number of major banks. GCB had notified the Commission of three new fees that members would be required to pay to GCB: (1) a fee intended to encourage merchant acquisition, as it would be payable by member banks that were focused principally on card issuing rather than merchant acquisition or installation of teller machines; (2) a fee payable by new entrants for the first three years, intended to compensate existing members for their contribution to the card network; and (3) a fee payable by existing members that were regarded as having made little contribution to the development of the card system.

The Commission found that the real purpose of the fees, as evidenced by internal documents, was to raise the costs to new entrants – mostly internet banks and banks affiliated with large retailers, which were expected to offer cards at low cost and without engaging in merchant acquisition or teller machine installation – and enabling the major banks to receive the bulk of the new fees. On this basis, the fees were anti-competitive by object and contrary to Article 81(1) EC. The Commission also found an anti-competitive effect, notwithstanding that payment of the fees had never been requested, because several banks had adjusted their conduct (issuing fewer cards and at higher prices) in anticipation that the fees ultimately would be collected. The Commission found that the fees were not eligible for an exemption under Article 81(3) EC because they were not indispensable for the functioning of the card system and, by raising prices and restricting the supply of cards, could not be expected to benefit consumers.

ii Trends, developments and strategies

Enforcement priorities

In recent years, the nature of the Commission's antitrust enforcement efforts appears to have shifted towards certain identifiable substantive priority areas. Following the publication in 2007 of the results of sector inquiries into energy and financial services (retail banking and business insurance), application of Articles 81 and 82 EC to these two sectors has been a priority for the Commission. The Commission adopted three decisions in late 2007 concerning payment cards, and is continuing to investigate Visa's payment card system. The Commission also settled two investigations against E.ON and is continuing to focus on energy cases as a means of promoting the development of a single market in energy. Pharmaceuticals are also an area of increasing interest. The application of Article 82 EC to parallel trade in pharmaceuticals remains a difficult issue, although the Court of Justice has sought to provide some guidance on this during 2008. The Commission is also exploring this industry with a sector inquiry, as noted below.

The Commission has also indicated a hardening of its stance on non-compliance with its decisions. In 2008, the Commission imposed the largest-ever antitrust fine on a single undertaking (€899 million) for Microsoft's failure to comply with the Commission's 2004 infringement decision. The Commission also imposed the first-ever fine for breaking a Commission seal, with the €38 million fine being very significant and the Commission making remarks in its decision to suggest that the fine could have been higher had it not been the first such fine it had imposed.

Article 82 guidance

A significant and much-welcomed development in 2008 is the publication in December of the Commission's Guidance on Article 82 EC. The Guidance, which identifies enforcement priorities for the Commission and is not a binding statement of the law, sets out an 'economic and effects-based approach to exclusionary conduct' and provides insight into how the Commission will approach the application of Article 82 EC to determine whether an undertaking is dominant, and how the Commission will determine whether the conduct in question has or is likely to result in anti-competitive foreclosure in respect of four types of exclusionary conduct (i.e., exclusive dealing, tying and bundling, predation, and refusals to supply and margin squeezes). The Guidance does not address 'exploitative' abuses, such as excessive pricing and discriminatory conduct, nor does it address collective dominance.

As regards dominance, the Guidance clarifies that the Commission will look to market shares as a first indication – taking into account market conditions, in particular market dynamics, product differentiation and market share trends over time – and confirms the 'soft' safe harbour of 40 per cent, below which a company is unlikely to be considered dominant. Other relevant factors to be considered include barriers to entry or expansion in the relevant market and countervailing buyer power.

As regards anti-competitive foreclosure, the Guidance emphasises that the Commission will examine whether the conduct in question has resulted or is likely to result in 'anti-competitive foreclosure' in which actual or potential competitors' access to suppliers or markets is hampered or eliminated and the dominant company is likely to be in a position profitably to increase prices to the detriment of consumers. Price-based exclusionary conduct (in particular rebates, predatory pricing and margin squeezes) will be analysed according to the 'equally efficient competitor' test to evaluate the foreclosure effect.

Otherwise abusive conduct will not violate Article 82 EC where the dominant company can show that its conduct results in efficiencies that outweigh the competitive harm, or that its conduct is justified by objective necessity. However, an efficiency defence is unlikely to be accepted for predatory conduct or conduct that creates or strengthens a monopoly or near monopoly, and certain conduct will be considered to give rise to a virtual per se abuse, in respect of which the Commission will not need to conduct a detailed assessment of anti-competitive effect and will be unlikely to accept a defence.

Maritime Transport Services Guidelines

The Commission has also updated its approach to the application of Article 81 EC to maritime transport services: in July 2008 the Commission published a new set of Guidelines on how it will apply Article 81 EC in this sector,[18] and in October 2008 it repealed the liner conference block exemption under Council Regulation 4056/86,[19] which had allowed shipping lines meeting in liner conferences to fix rates and other conditions of carriage. Liner companies will now be required to assess whether such conferences are compatible with EC competition rules, having regard to the Guidelines.

The Guidelines identify the principles the Commission will follow when defining markets and assessing various horizontal agreements between competing liner shipping (typically regularly scheduled trade on a route), tramp vessel services (typically chartered, non-regularly scheduled services of a single commodity), and cabotage (transport services within a single Member State). The Guidelines largely confirm the approach of prior cases in respect of market definition, except in relation to tramp shipping where relevant principles are instead identified because of a lack of precedent.

To assess whether an agreement has the effect of restricting competition, the Guidelines identify the following factors: prices; costs; quality; frequency; differentiation of the service provided; innovation; and marketing and commercialisation of the service. On this basis, the Guidelines further examine three types of information exchange of particular relevance to maritime transport services, i.e., technical agreements, exchanges of information and pools. Technical agreements which have the sole object and effect to implement technical innovation or cooperation, or to implement environmental standards, will not fall foul of Article 81 EC. As regards other types of information exchange, the Guidelines identify the types of exchange most likely to constitute an infringement of Article 81 EC, for example, exchanges of commercially sensitive information such as prices or capacity, exchanges of non-aggregated data, and exchanges of recent or future data, especially concerning prices or output. The frequency of the exchanges is also likely to be significant. As regards pool agreements in tramp shipping (by which a pool of similar vessels under different ownership are brought together and operated under a single administration), certain pool agreements will not fall under the prohibition of Article 81 EC, including pools between non-competitors and pools whose activity is of minor importance. However, pool agreements limited to joint selling will fall under Article 81 EC to the extent that they generally have the object and effect of coordinating the pricing policy of participants.

18 Commission Guidelines on the application of Article 81 of the EC Treaty to maritime transport services SEC (2008) 2151 final, 1 July 2008.

19 Council Regulation (EEC) No 4056/86 of December 22, 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, [1986] OJ L 378/4.

iii Outlook

There are three broad areas in which the Commission is pursuing further cases. First, the Commission is conducting a number of investigations concerning the application of Article 82 EC to industries in which technology and patents play an important role. The investigation into Rambus is concerned with an alleged patent ambush in relation to standard setting; the Qualcomm investigation has identified issues as to whether licensing terms for an industry-standard technology are fair, reasonable and non-discriminatory; and the Commission has opened two new investigations into Microsoft, i.e., whether it has refused to disclose interoperability information across a range of products, and whether it has engaged in tying of Internet Explorer to Windows.

Second, the Commission remains focused on the application of antitrust rules to the financial services sector. In March 2008 the Commission opened proceedings in respect of Visa's multilateral interchange fee, and in April 2009 the Commission agreed undertakings with MasterCard regarding changes to its multilateral interchange fee to bring it into compliance with the Commission's 2007 prohibition decision.

Third, the energy sector remains a Commission priority. In March 2009, the Commission accepted undertakings from RWE to divest its Western German high-pressure gas transmission network in response to a Commission investigation into an alleged abuse of dominance by a refusal to supply and a margin squeeze in order to restrict access by competitors to the gas network. The Commission is also investigating EdF in respect of alleged abuses of its dominant position in respect of long-term supply contracts with industrial customers that may impair switching, and restrictions on resale of electricity.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Preliminary report in the pharmaceutical sector inquiry

In November 2008, the Commission released its preliminary report on its inquiry into competition in the EU pharmaceutical sector.[20] The inquiry was started on 15 January 2008,[21] to establish the reasons for the launch of fewer innovative pharmaceutical products and the apparent delayed entry of generic products. The inquiry began with unannounced inspections at a range of pharmaceutical companies and continued with a long series of detailed questionnaires addressed to pharmaceutical companies, public authorities, and other stakeholders since March 2008. The publication of the final report is expected in the summer of 2009.

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20 The preliminary report is available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf.

21 Commission Decision of 15 January 2008 initiating an inquiry into the pharmaceutical sector pursuant to Article 17 of Council Regulation (EC) No 1/2003 (Case No COMP/D2/39.514) available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/decision_en.pdf.

The preliminary report focuses on competition between originator and generic companies, and identifies a number of practices (referred to collectively as 'the toolbox') that originator companies may use to try to restrict access by generic companies to the market.

Filing numerous patent applications across the EU in relation to a single medicine ('patent clustering'). The preliminary report notes that the number of pharmaceutical-related patent applications before the European Patent Office almost doubled during the relevant period (2000 to 2007), with the patent portfolios in relation to a blockbuster product often increasing throughout the product's lifecycle. In addition, there are 'divisional patent' applications, which allow an originator company to split an initial application. These applications continue to be examined even if the original application is withdrawn or revoked. The preliminary report suggests that such patent clusters may delay generic entry by making it more difficult for generic companies to challenge weak patents to clear the path for entry.

Engaging in high volumes of disputes and litigation with generic companies. The Commission obtained information on at least 1,300 patent-related disputes and litigation procedures between originator and generic companies during the relevant period, and found that generic companies were successful in 62 per cent of the 149 cases in which a final judgment was obtained. The preliminary report observes that patent litigation is lengthy (an average duration of 2.8 years) and expensive (the total cost of reported pharmaceutical litigation in the EU between 2000 and 2007 is estimated to have exceeded €420 million). The preliminary report considered that the cost and duration of litigation may make it difficult for generic companies to clarify the patent situation of potential generic products in a timely manner and might thus delay their entry to the market or even deter them from entering the market altogether.

Concluding settlement agreements with generics that may delay generic entry to the market. The preliminary report states that originators and generic companies concluded more than 200 settlement agreements during the relevant period. The preliminary report's main concern was with agreements that restrict generic entry in some way in return for value in some form, such as a direct monetary payment or a royalty-free licence. The preliminary report notes that the US Federal Trade Commission has assessed such agreements as potentially anti-competitive. The implication of the report is that these agreements may require further scrutiny.

Intervening in national procedures for the approval of generic medicines. The preliminary report notes that originator companies intervene at a national level in respect of generic applications for marketing authorisation and pricing or reimbursement status. Originators typically claim that generic products are not as safe or effective as the branded product. Sometimes originators invoke their patent rights even though, according to the Commission's interpretation of EU legislation, marketing authorisation bodies may not take into account such arguments. The preliminary report also observes that, when originator companies challenged decisions of the regulatory bodies, their claims were upheld in only 2 per cent of cases. The preliminary report considers that interventions before and litigation with regulatory bodies lead to further delays in generic entry.

Launching 'second-generation' medicines. The preliminary report suggests that originator companies launched second-generation medicines close to the date when the original product lost exclusivity with a view to converting patients to the new medicine prior to the entry of a generic version of the first-generation product. According to the preliminary report the launch of second-generation products can help delay generic entry if patients are successfully switched to the second-generation product prior to patent expiration and additional patents protect the second-generation product.

The preliminary report also discusses competition between originator companies, noting that originator companies employed 'defensive patent strategies' to block the development of new and competing medicines by other originator companies, referring to situations in which originator companies file patent applications without intending to bring their own new or improved products to the market. Finally, the preliminary report makes a few observations on the regulatory framework noting the general support in the industry for a single European patent and patent judiciary and the criticism directed towards the bottlenecks in marketing authorisation and pricing or reimbursement procedures.

ii Trends, developments and strategies

The current sector inquiry into pharmaceuticals represents the next phase in the Commission's antitrust scrutiny of the pharmaceutical industry and, in particular, the conduct of originator companies.

To date, antitrust enforcement has largely focused on single market objectives such as dual pricing or quotas at the national level that are intended to divide the common market along national lines, and has been rebuffed to some extent by the European Courts. For example, as regards quotas, the Court of Justice held in Joined Cases C-2/01 P and C-3/01 P *BAI v. Bayer* that the unilateral imposition of quotas to deter parallel trade fell outside the scope of Article 81(1) EC, while in Joined Cases C-468/06 to C-478/06 *Sot. Lélos Kai Sia EE (and Others) v. GlaxoSmithKline AEVE* (as noted above), the Court identified certain circumstances in which quotas aimed at restricting parallel trade might also escape prohibition under Article 82 EC. As regards dual pricing (different pricing systems according to whether government pricing restrictions apply), in Case T-168/01 *GlaxoSmithKline v. Commission* (under appeal to the Court of Justice) the Commission's decision prohibiting dual pricing was annulled on the basis that the Commission had failed to consider arguments under Article 81(3) EC as to the impact of parallel trade on the originator company's incentives to fund research and development of new products.

More recently, the Commission has shifted its focus to the use of patents and the impact of competition from generics manufacturers, adopting a prohibition decision in 2005 (currently under appeal) against AstraZeneca for breach of Article 82 EC for providing misleading information to patent offices to obtain extended patent protection, and for deregistering market authorisations to block entry by generics manufacturers. With the sector inquiry, the Commission has sought to build on this approach by focusing on a 'tool-box' of practices allegedly used to delay the entry of generic medicines. It is also notable that the Commission devoted very considerable resources to the inquiry and, in a highly unusual move, adopted a very adversarial approach by commencing the inquiry with surprise inspections and conducting additional raids later in the process. This suggests that the sector is likely to remain an enforcement priority for the foreseeable future.

iii Outlook

The concerns identified in the Commission's pharmaceutical sector inquiry preliminary report raise complex and largely untested questions about the relationship between intellectual property rights and competition law, and appear to be premised on novel theories of competitive harm. Past experience of sector inquiries suggests that the Commission's Final Report, due to be published in the summer of 2009, will largely confirm the preliminary findings, but will be unlikely to reach any conclusions on potential competition law infringements in the pharmaceutical sector. The Commission is likely to adopt an approach similar to that pursued in the wake of its energy sector inquiry by focusing on investigations of potential infringements of Articles 81 and 82 EC, and the Commission's decisional practice is thus likely to witness significant developments in the next few years.

V STATE AID

i Significant cases

Case C-199/06 Centre d'Exportation du livre français (CELF), Ministre de la Culture et de la Communication v. Société internationale de diffusion et d'édition (SIDE)

In February 2008, the European Court of Justice clarified the scope of Article 88(3) EC, which requires Member States to refrain from granting state aid until it has been notified to and authorised by the Commission. Where the Commission has already decided to authorise unlawful state aid, namely, state aid granted to its recipient prior to notification and authorisation, the Court held that national courts faced with an action requesting the repayment to the Member State of that unlawful state aid must require the beneficiary to pay back interest on the aid received for the period during which the aid was granted in breach of Article 88(3) EC, but not to return the entire amount of the aid to the Member State.

The Court reasoned that, as a matter of European law, to require the repayment of the interest which the aid recipient would have had to have paid to borrow on the market an amount equal to the aid granted to it (i.e., the amount of aid for the period between the implementation of the aid and the Commission's authorisation decision) would be sufficient to eliminate any undue advantage enjoyed by the aid recipient as a result of the unlawfulness of the aid. However, the court also noted that, as a matter of national law, a national court may also, as appropriate, order the recovery of the unlawful aid (without prejudice to the Member State's right to re-implement it), uphold claims for damages deriving from the unlawfulness of the aid, or do both.

In this case, CELF had received non-notified operating subsidies from the French State from 1980 to 2002. Following a complaint lodged by CELF's competitor SIDE, the Commission concluded that the relevant measures constituted state aid, but were compatible with the common market. Litigation followed, both at the Community level and at the national level. In France, SIDE brought an action before the Paris Administrative Court for the annulment of the decision of the French Minister for Culture rejecting SIDE's request to stop the payment of the aid to CELF and to order the repayment of the aid already granted. When the controversy reached the Council of State, the national court referred the matter to the European Court of Justice.

Case T-442/03 SIC – Sociedade Independente de Comunicaçao v. Commission

On 26 June 2008, following an action for annulment brought by private television broadcaster SIC, the Court of First Instance partly annulled a Commission decision declaring that certain measures adopted by the Portuguese State in favour of public television broadcaster RTP did not constitute state aid, and that other measures, while constituting state aid, were compatible with the EC Treaty.

The Court found that the Commission erred in finding that the following did not constitute state aid: the one-time exemption from the payment of registration charges and notary fees in relation to the necessary acts for the transformation of RTP from a public undertaking into a public limited company; and the permanent exemption from any future payment of such charges and fees with respect to any acts for which they would otherwise be required, granted by the Portuguese government to RTP. In particular, the Court found that the Commission did not prove to the requisite legal standard that such exemptions were consistent with the logic of the Portuguese legal system and did not confer any specific advantage on RTP.

The Court also found that the Commission failed to fulfil its obligation to undertake a diligent and impartial investigation by not requiring the Portuguese Republic to disclose during the administrative procedure the necessary information (i.e., reports of RTP's public activities verified by an external auditor) to fully assess whether the costs incurred by RTP to supply the public services it provides are proportionate to the type and quality of the relevant services. The Court thus held that the Commission wrongfully concluded that the state aid granted to RTP did not lead to any overcompensation of the net costs for the public service tasks entrusted to the TV operator.

Case T-266/02 Deutsche Post v. Commission

On 1 July 2008, the Court of First Instance annulled a Commission decision finding that certain transfers of financial resources from the Federal Republic of Germany to Deutsche Post amounted to unlawful state aid.

On 2 July 1994, private parcel delivery company UPS Europe lodged a complaint before the Commission against Deutsche Post arguing that Deutsche Post: was abusing its dominant position on the market for door-to-door parcel delivery services in breach of Article 82 EC by charging below-cost prices; and financed such loss-making predatory activity, inter alia, via public resources granted to it by the German Federal Government in breach of Article 87 EC.

On 19 June 2002, the Commission adopted a decision finding that Deutsche Post used state resources originally granted to it to finance its public service obligations in the door-to-door parcel delivery service sector to cover the costs deriving from its below cost pricing policy in the sector. The Commission concluded that Deutsche Post derived an unjustified advantage within the meaning of Article 87 EC from the transfer of such resources (approximately €570 million) and that such transfer constituted unlawful state aid, since all other conditions provided for by Article 87 EC were met.

The Court upheld Deutsche Post's claim that the Commission had erred in finding that the state resources transferred to the company conferred upon its recipient an unjustified advantage and constituted unlawful state aid, because it had not checked whether the relevant state resources transferred to Deutsche Post actually exceeded the costs incurred by the company to meet its public service obligations.

Case C-521/06 Athinaiki Techniki v. Commission

On 17 July 2008, the European Court of Justice rejected an order by which the Court of First Instance dismissed as inadmissible an action seeking the annulment of a Commission decision of 2 June 2004 to take no further action on a complaint concerning an alleged incompatible state aid granted by the Greek state to the successful bidder (the Hyatt Regency consortium) in the context of a procedure initiated by the Greek government for the award of a public contract with a view to disposing of 49 per cent of the capital of the Mont Parnès Casino. The Court of Justice referred the case back to the Court of First Instance.

After a preliminary review of the complaint, the Commission concluded that there were insufficient grounds for continuing to examine the case and decided to close the file. The Commission informed the applicant, which brought an action for annulment before the Court of First Instance against the Commission's decision to refrain from further investigating its complaint, arguing that it had not been offered the opportunity to submit comments in its capacity as an interested party pursuant to Article 6 of Regulation 659/1999 EC. The Court ruled the application inadmissible, reasoning that the Commission did not adopt any decision within the meaning of the Regulation, since the letter addressed to the applicant did not define the Commission's final position on the compatibility with the common market of the measure forming the subject matter of the complaint. According to the Court, the letter simply informed the applicant that the Commission considered that it had insufficient information to pursue the case.

On appeal, the European Court of Justice noted that an action for annulment pursuant to Article 230 EC must be available against all measures adopted by the Community institutions, whatever their nature or form, which are intended to have legal effects capable of affecting the interests of the applicant by bringing about a distinct change in its legal position. The Court considered that, by deciding not to further pursue the investigation and to close the file, the Commission did establish its position on the applicant's request seeking a finding of infringement of Articles 87 EC and 88 EC, since it prevented the applicant from submitting its comments in the context of a formal investigation procedure pursuant to Article 88(2) EC. The Commission's decision thus produced legal effects that were capable of affecting the company's interests. The Court therefore concluded that the contested act constituted a Commission decision open to challenge by the applicant under Article 230 EC.

Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 TV2/Danmark A/S v. Commission

On 22 October 2008, the Court of First Instance annulled a Commission decision ordering the Danish state to seek repayment from Danish public broadcaster TV2 of approximately €84.4 million plus interest of unlawfully granted state aid.

Following complaints by commercial broadcasters, the Commission conducted an investigation into the financing of the Danish state broadcaster TV2, which was based partly on state resources and partly on advertising revenues. The Commission found that TV2 was the beneficiary of state aid, but that such aid was in principle compatible with the common market since it was aimed at covering TV2's cost of fulfilling its public service obligations, with the exception of an amount of €84.4 million, which, according to the Commission, was unnecessary to accomplish TV2's public service mission and which therefore constituted unlawful state aid.[22]

The Court found that the Commission infringed an essential procedural requirement by not providing adequate reasons in its decision as to why, when carrying out its assessment, *inter alia*: it did not distinguish adequately between advertising revenues and licence fee revenues and, thus, *de facto*, considered advertising revenues as state resources; and it concluded that the overcompensation that TV2 was found to have received was the result of an uncontrolled accumulation of capital, rather than the result of a build-up of reserves carried out in a transparent and careful manner with the specific aim of guaranteeing the provision of the public service despite fluctuations in advertising revenue.

Case C-334/07 P Commission v. Freistaat Sachsen

On 11 December 2008, the European Court of Justice set aside a judgment of the Court of First Instance in which the Commission was held to have breached the principle of non-retroactivity by applying Commission Regulation 70/2001 on the application of state aid rules to small and medium-sized enterprises[23] to aid measures notified before the Regulation came into force.

Between 1992 and 2000, the State of Saxony in Germany granted non-refundable subsidies to SMEs established in its territory in accordance with an aid scheme that had been notified to, and authorised by, the Commission. In 2000, Germany notified to the Commission a new version of the aid scheme. Shortly thereafter, at the beginning of 2001, the Commission adopted the Regulation. After the Regulation came into force, the Commission adopted a decision stating that some parts of the amended aid scheme exceeded the scope of the Regulation and constituted unlawful aid.

The Court held that the notification by a Member State of a proposed aid scheme does not require the Commission to rule on the aid scheme's compatibility with the common market by applying the rules in force at the date on which that notification took place. On the contrary, according to the Court, the Commission must assess the legality of the aid based on the rules in force at the time when it adopts its final decision on the compatibility of such aid with the common market.

Case T-196/04 Ryanair v. Commission

On 17 December 2008, the Court of First Instance set aside a Commission decision ordering the recovery of illegal state aid granted by the Walloon region to Ryanair in its bid to persuade the airline to establish a base at Charleroi Airport.

On 12 February 2004, the Commission decided that a set of agreements entered into in 2000 between Ryanair, the Charleroi Airport, and the Walloon region, providing, inter alia, for the granting to Ryanair of a 50 per cent landing charge reduction at the

22 Commission decision of 19 May 2004 (OJ 2006 L 85, Paragraph 1).

23 Commission Regulation (EC) No. 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises, (OJ 2001 L 10/33).

Charleroi airport, constituted unlawful state aid within the meaning of Article 87 EC and ordered the Belgian state to recover the aid.[24] The Commission took the view that the Walloon region, when granting Ryanair the above landing charges reduction, acted in its public authority capacity, and not as a private investor, and, consequently, refused to apply the 'private investor principle' to assess the compatibility of such measures with state aid rules.

On appeal, the Court noted that, while the Walloon region is a state authority, it could also carry out activities of an economic nature and assessed whether its activities in relation to levying landing charges constituted economic activities. The Court held that the mere fact that an activity is carried out in the public sector does not mean that it must be categorised as the exercise of public authority powers. Equally, according to the Court, the fact that the Walloon region has regulatory powers in relation to the fixing of airport charges does not mean that a scheme reducing those charges ought not to be examined by reference to the principle of a private investor in a market economy.

Against this background, the Court concluded that the fixing of the amount of landing charges is an activity directly connected to the management of the airport infrastructure, which constitutes, by reason of its nature, its purpose, and the rules to which it is subject, an economic activity. The Commission therefore erred in law in failing to apply the private investor principle to assess the compatibility with EU state aid rules of the landing charges reduction granted to Ryanair.

ii Trends, developments and strategies

New state aid block exemption regulation

In August 2008, the Commission adopted Regulation (EC) No. 800/2008 providing for a new General Block Exemption for State Aid. The new Regulation consolidates for the first time all existing sector-specific state aid instruments adopted by the Commission (regional aid, aid for small and medium-sized enterprises, research & development aid in favour of SMEs, training and employment aid), while also including five new categories of aid, namely: environmental aid, innovation aid, research and development aid for large companies, aid in the form of risk capital, and aid for enterprises newly created by female entrepreneurs. Pursuant to the new Regulation, Member States may implement state aid measures falling within the scope of the block exemption without prior notification to the Commission.

The key substantive changes introduced by the Regulation can be summarised as follows:

a the increase in the notification threshold for investment and employment aid for SMEs up to €7.5 million, as well as for training aid up to €2 million, below which Member States need not notify aid grants;

b the inclusion of environmental aid within the scope of the block exemption, which may be granted without notifying the Commission;

24 Commission decision of 12 February 2004 (OJ 2004 L 137, Paragraph 1).

c the inclusion of aid in the form of risk capital within the scope of the block exemption, with a view to encouraging Member States to use this type of aid more intensively;

d the extension of the scope of the Regulation to encompass research and development aid for large companies and no longer only for SMEs, as well as the inclusion of innovation aid for both large companies and SMEs within the scope of the block exemption; and

e the clarification and simplification of the existing rules on employment aid, as well as the introduction of substantially increased aid possibilities in favour of disabled workers, with higher aid intensities and a higher notification ceiling.

New state aid guidelines

In its ongoing effort to clarify the interpretation and application of EC state aid rules, the Commission adopted the following three interpretative guidelines:

a *Commission Guidelines for State Aid to Rail Undertakings*. In April 2008, the Commission adopted a set of guidelines for state aid to railway undertakings, where it clarifies the rules governing public funding of these companies. In particular, with a view to promoting the modernisation of rail transport, the guidelines provide, *inter alia*, that, under certain conditions, it will now be possible to grant regional aid for the purchase and renewal of passenger rolling stock, which was previously prohibited by the regional aid guidelines.

b *Commission Notice on State Aid in the Form of Guarantees*. In May 2008, the Commission adopted a new notice on state aid in the form of guarantees, which sets out the methodology to calculate the aid element in a guarantee, as well as simplified rules applicable to small and medium enterprises. The notice confirms that the assessment of the 'aid element' in the context of a state guarantee is still based on the 'market economy investor' principle, according to which investments or other funding undertaken by public authorities in companies can be considered to be compatible with EU state aid rules when they are made under conditions that a private market investor would have accepted.

c *Commission Guidelines on State Aid for Environmental Protection*. In April 2008, the Commission adopted new guidelines on state aid for environmental protection as part of its Energy Policy for Europe and of the State Aid Action Plan. The guidelines note that undertakings often do not bear the full cost of the environmental harm arising from their economic activities, which is borne by society as a whole (negative externalities), and that government regulation may not be sufficient to eliminate such externalities. The guidelines thus aim at establishing a clear legal framework within which Member States can provide financial incentives for undertakings to carry out activities or make investments, which are not mandatory and would otherwise not be undertaken by profit-seeking companies, with a view to reducing the environmental impact of their economic activities.

iii *Outlook*

The current economic downturn has required the Commission to quickly and flexibly adapt and develop its state aid policies in response to market events. In particular, the

Commission has issued four sets of guidelines explaining how it will apply state aid rules to measures taken by Member States to tackle the current crisis.

First, in October 2008 the Commission issued guidance on measures to support financial institutions, such as guarantee schemes to protect liabilities, recapitalisation schemes to support fundamentally sound institutions that are experiencing temporary difficulties, controlled winding-up of failing financial institutions, and other forms of liquidity assistance. The guidance recognises that such measures may be justified by the need to remedy a serious disturbance in the economy of a Member State within the meaning of Article 87(3)(b) EC, and aims to ensure that any measures to stabilise financial markets will be proportionate, non-discriminatory, limited in duration, clearly defined and targeted, premised on the private sector making an appropriate contribution to the cost of the assistance provided, and accompanied by any necessary restructuring. The Commission also indicates that it will respond rapidly (within 24 hours if needed) to adopt decisions authorising aid in the current crisis.

Second, in December 2008, the Commission supplemented its earlier guidelines by providing more detailed guidance on recapitalisation schemes to ensure that banks are sufficiently capitalised to provide adequate levels of lending to the wider economy. The supplementary guidance is based on the general principle that recapitalisation should reflect the market situation of each institution in terms of its risk profile, solvency, etc, and that the pricing of recapitalisation should provide an incentive for banks to redeem the aid as soon as possible once the crisis has passed. Guidance is therefore provided in respect of pricing methodologies and mechanisms to incentivise capital redemption.

Third, also in December 2008, the Commission adopted a temporary framework for state aid measures designed to support access to finance. The framework, adopted as part of the Commission's wider European Economic Recovery Plan, is intended to facilitate measures taken by Member States to improve access to commercial lending. Until 2010, the Commission will permit Member States to offer, without individual notification, direct aid of up to €500,000, loan guarantees at reduced premiums, loans at subsidised interest rates, loans for the production of environmentally friendly products, and risk capital to SMEs on more flexible terms.

Fourth, in February 2009, the Commission published guidance on measures taken in respect of the treatment of impaired assets to improve transparency and valuation of potential risks, thereby better enabling capital to be used for lending rather than as a provision against potential losses. The guidance aims to provide a uniform framework for the assessment of asset relief measures (e.g., asset purchase, asset insurance, swap, guarantees) adopted by Member States, based on the following principles: transparency and disclosure of potential liabilities; identification of eligible assets and methodologies for valuation; allocation of costs between shareholders, creditors and state, guaranteeing the state adequate remuneration; and the need to submit viability assessments and restructuring plans for institutions benefiting from any aid.

Chapter 14

FRANCE

*Stéphanie Hallouët**

I OVERVIEW

2009 saw the creation in France of a new Competition Authority with extended powers and resources (French Competition Authority, 'the FCA'). The law providing for the creation of the FCA was adopted in August 2008, and the authority held its first meeting and officially succeeded the Competition Council in March 2009. Although 10 of the 17 FCA members are new, the fact that the Competition Council's Chairman since 2004, Bruno Lasserre, was appointed Chairman of the FCA, should facilitate the establishment of the FCA and ensure continuity in its enforcement priorities. Among these priorities is the fight against cartels by the use of severe fines. In 2008, the sum of fines imposed by the Council exceeded €600 million, and in the first months of 2009 it has already imposed a €94.4 million fine on four companies for collusion.

II CREATION OF A NEW COMPETITION AUTHORITY

On 4 August 2008, Law No. 2008-776 for the Modernisation of the Economy[1] provided for the creation of a new Competition Authority. The FCA held its first meeting in March 2009.

In particular, the aim of the reform was to concentrate within the FCA the powers and resources formerly shared between the Competition Council and the Ministry of Economy, and its administration in charge of protecting competition (Competition Directorate). However, the reform does not entirely put an end to this duality of functions, since it gives the Minister of the Economy the ability to review

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1 References to legislation are to the French Commerce Code unless otherwise indicated.

certain concentrations and investigate and pursue settlement of certain anti-competitive practices considered to be of lesser significance.

i Status and composition

The FCA has independent decision-making powers and is not subject to the government's authority, except in the few cases outlined below. The composition of the FCA is broadly similar to that of the Council (i.e., 17 members, appointed for five years instead of six, among which four Vice-Presidents instead of three for the Council); however, there are slightly more members chosen based on their economic or competition qualifications or their professional experience compared to those chosen based on their judiciary background. Although 10 of the 17 FCA members are new members, the Council's Chairman since 2004, Bruno Lasserre, a member of France's highest administrative court, has been appointed Chairman of the FCA.

ii Powers of the Chairman

Like the Chairman of the Council, the Chairman of the FCA is appointed by the Minister of the Economy. The new law, however, introduces the consultation of Parliament Committees on this appointment, with the possibility of a hearing.[2]

In addition to leading and directing the effort of the Authority, the Chairman may make certain important decisions alone:

a decisions declaring a claim inadmissible or unfounded (however the Authority may not reject a claim for lack of a sufficient competition law interest);

b in merger control matters, decisions relating to stage I (initial investigation), including conditional or unconditional authorisation decisions, or decisions to initiate stage II (in-depth investigation); and

c decisions concerning anti-competitive practices in cases referred to the Authority by the Minister.

iii No discretion to reject complaints for lack of interest

Unlike the European Commission, the FCA or its Chairman has no discretion to reject a claim for lack of legal interest of the issue raised. The Council's Chairman, Bruno Lasserre, had called for such a discretion to be granted to the FCA in order to allow it to prioritise its tasks and focus on the most important issues. The new law did not provide for this possibility, and the FCA technically remains obliged to examine all claims from claimants with a legal standing. In practice, the FCA may be spared smaller matters through the newly-created powers of the Minister of the Economy to investigate and settle restrictive practices of a lesser importance, that is, involving companies with an individual turnover not exceeding €50 million and a combined turnover not exceeding €100 million (all in France).

2 Committees of economic affairs of the National Assembly and of the Senate. These committees may also hear the Chairman of the Authority during his or her term of office.

iv Merger control attributions

Although the FCA now receives, instead of the Ministry of Economy, notifications and investigates proposed mergers both in stage I and in stage II, the law reserves two significant means of intervention to the Minister:

First, the Minister may request the FCA to carry out an in-depth investigation with respect to a merger transaction authorised by the FCA in stage I; this option must be exercised within five business days from the notification to the Minister of the stage I decision; the FCA may accept or reject the Minister's request;

Second, the Minister may review, for general interest purposes, a transaction that has already been subject to an in-depth investigation and authorised or prohibited by the FCA. The law provides that the Minister may exercise this option 'for general interest purposes other than the protection of competition and which may, if applicable, compensate the harm to competition resulting from the transaction'. The law includes the following non-limitative list of 'general interest purposes':

a industrial development;

b the competitiveness of the relevant companies with respect to international competition; and

c the creation or maintenance of employment.

In the case of a review for general interest purposes, the Minister investigates the proposed merger, including by inviting the parties to submit their observations, and rules on the case. This review option may be exercised within 25 business days of the notification to the Minister of the Authority's stage II decision, irrespective of whether this decision prohibited or authorised the transaction.

v Lower merger control thresholds in the retail sector and overseas territories

The new law does not modify the general turnover thresholds that trigger merger control filing obligations (€150 and €50 million in France), but introduces lower turnover thresholds (€75 and €15 million instead of €150 and €50 million) that may apply when the parties to the merger are active in the retail sector or in French overseas territories. The FCA is working on new merger guidelines, which should give guidance on the application of these lower thresholds.

vi Reinforcement of the resources of the FCA's investigation services

The concentration of investigative and decision-making functions within the same authority required the implementation of safeguards intended to reinforce the operational separation between the two functions.[3] Thus, the FCA's investigation service is supervised by a Chief Case-Handler (rapporteur general) appointed by the Minister and not by the

3 Such a separation had been implemented by the Competition Council since 2001 and has important practical consequences, as illustrated by the number of cases in which the Competition Council expressly rejects part of the conclusions of the investigation led by the case-handler (e.g., the Council may decide that certain objections raised by the case-handler are unfounded, or adopt a fine different from that recommended by the case-handler).

Chairman of the Authority. The new FCA Chief Case-Handler is Virginie Beaumeunier, a former deputy-director of the Ministry's Competition Directorate.

The FCA has its own investigators, unlike the Council, which had to request the assistance of the Competition Directorate's inspection services. Many investigators from the Competition Directorate were transferred to the FCA and now act under the direction of the Chief Case-Handler. In total, the FCA staff should be 190 persons, approximately twice the number of agents of the former Competition Council. According to the FCA's President, this is, however, still less than most EU national competition authorities.

vii Designation of a hearing officer

The law created the position of a hearing officer within the Authority, whose task is to collect, 'as the case may be, the comments of the challenged and filing parties concerning the manner in which the procedures affecting them are carried out once the statement of objections is sent' [and to] 'transmit a report to the chairman evaluating these comments and proposing, if necessary, any measure that will enhance the ability of the parties to exercise their rights.'[4] However, the hearing officer is not expected to participate in the Authority's hearings, unlike the hearing officers of the European Commission. The Hearing Officer has not yet been designated.

viii Other aspects

The law designates a court with special jurisdiction over appeals of judicial decisions authorising visits and seizures during the investigation of alleged anti-competitive practices: these disputes may be brought before the chief justice (premier president) of the Court of Appeals, with the possibility of appealing the decision to the supreme court (formerly, the order authorising such visits and seizures could only be appealed to the supreme court, with the review limited to questions of law).

The FCA, like the Council, has a Chief Economist who with his team can provide expert advice in mergers and antitrust cases.

III CARTELS

i Tools

The Competition Council adopted its first leniency programme in April 2006. In 2006, the Council also co-chaired with the UK OFT a working group of the European Model Leniency Programme, subsequent to which it modified its own leniency programme in line with the new European Model. The current French leniency programme, based on the Council's April 2007 procedural notice, includes a 'marker' procedure under which an applicant may benefit from a time period to complete its application, while maintaining its ranking as of the date of its initial request. It is also possible to enter into prior and anonymous contact with the FCA, including through outside counsel. Up to

4 Article L. 461-4 of the Commerce Code.

March 2009, the Council has granted full immunity in three cases and partial immunity in one case.[5]

Other tools recently introduced into French procedural competition law include a 'no challenge' procedure whereby companies that do not challenge objections may be granted a fine reduction, and a 'commitments' procedure whereby fines may be reduced or even set aside in consideration for the adoption of certain commitments by undertakings.

ii *Fines*

2008 and the first months of 2009 have confirmed the increasingly hard line taken by national competition authorities against anti-competitive practices, especially cartels, in line with the European Commission's approach.

In 2006, the Council had imposed fines totalling €128 million, and had almost doubled this amount in 2007 to €221 million. In 2008, the sum of fines imposed exceeded €600 million, due in particular to a fine of €575.4 million imposed on 12 companies in the *Steel Cartel* case in December 2008.[6] In the first months of 2009, the Council has already imposed a €94.4 million fine on four employment services companies for collusion.[7]

Under French competition law, the maximum fine is the same as under EU law, that is, 10 per cent of the worldwide turnover of the group of companies to which the infringer belongs. The law provides that financial penalties must be motivated for each company and are proportionate to the seriousness of the charges brought, the importance of the damage caused to the economy, the financial situation of the infringer, and, if applicable, the repetition of anti-competitive practices. However, beyond these general indications, the FCA has not issued detailed guidelines for the calculation of fines, and has rejected the suggestion that the EU guidelines could be invoked to challenge a fine determination in national proceedings.[8]

The FCA thus retains a significant discretion to adapt the fines to the specific circumstances of each case. It is unclear whether the FCA intends to issue guidelines on the calculation of fines mirroring the EC guidelines. Based on the FCA's decisional practice, including its most recent decisions, the following factors are relevant for the calculation of fines under French competition law:

a nature of infringement: horizontal agreements on prices and market allocation are among the most serious infringements;

b characteristics of infringement: duration and sophistication (e.g., existence of a detailed monitoring and compensation mechanism within a cartel). The existence of a previous sanction for 'practices with a similar object or effect' may lead to a 25 per cent increase in the fine, provided these previous sanctions are not so old that taking them into account would amount to a breach of the proportionality

5 Cases 06-D-09, 07-D-48, 08-D-12 and 08-D-32.

6 Case 08-D-32.

7 Case 09-D-05, currently under appeal.

8 Case 08-D-32, paras. 322-323.

principle (for example, practices sanctioned 20 years before would generally not be taken into account);[9]

c position of infringers: the FCA considers on the one hand that infringements committed by companies with a pre-eminent market position or which belong to large groups are particularly serious, due to the bad example their behaviour displays for smaller market participants; on the other hand, the financial situation of the companies at the time the fine is imposed may also lead to a reduction of the fine in exceptional circumstances, such as a severe economic or structural crisis;

d size of affected market; and

e impact of practices.

Finally, companies may seek a fine reduction by choosing not to challenge the statement of objections, in which case the maximum fine is automatically reduced to 5 per cent of the worldwide turnover of the group of companies to which the infringer belongs, and the FCA generally reduces the actual fine; and taking certain commitments, such as the creation of wide-ranging competition law compliance programmes and whistleblowing procedures. In order to be taken into account, such commitments must be substantial, credible and susceptible of monitoring.[10]

iii Period of limitations

The standard period of limitations, which as under EU law, is five years after the infringement ceases, is maintained, but the new law also introduces an absolute time bar if the FCA has not ruled on a practice 10 years after it has ceased.

iv Criminal sanctions

There is no change to the provision concerning criminal sanctions, which may be imposed on natural persons who took a fraudulent, personal and determining part in an infringement of competition law. Criminal sanctions are not applied by the FCA but by criminal courts following proceedings initiated by the general prosecutor. The FCA may however transmit to the general prosecutor elements of a case suggesting individuals took an active part in an infringement of competition law. In practice, criminal sanctions have rarely been imposed and almost exclusively on the basis of a combination of antitrust and anti-corruption infringements in bid-rigging cases were the buyers were public entities. It remains to be seen whether the FCA will seek a more frequent imposition of criminal sanctions.

9 Case 08-D-32, Paragraph 445 and Decision 09-D-05, Para. 148.

10 Case 09-D-05, paras. 156-157.

IV ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Commitments procedure

The commitments procedure has been widely used by the Council since 2005 and often represents a useful way for companies to end proceedings without a condemnation decision, while allowing the Council to save time and resources by avoiding the need to draft a full statement of objections. A recent ruling of the Court of Appeals however, criticised the Council for not organising an extended access to the file in commitments proceedings, which, if the ruling is confirmed by the Supreme Court, may undermine the interest of these proceedings. The Council issued in April 2008 a procedural notice summarising its practice and expectations for the submission of commitments by companies investigated for alleged restrictive practices.

ii Increased flexibility in negotiation of commercial agreements

The new law considerably increases the possibility of suppliers and purchasers to negotiate sales terms:

a general sales terms may be distinguished depending upon the categories of purchasers; the law no longer includes a regulatory definition of the criteria justifying a distinction, and suppliers may thus make distinctions based on their own criteria (within certain limits, see below);

b terms specific to certain individual customers may be agreed upon, without having to provide a justification; and

c the general liability attached to discriminatory practices 'unjustified by actual consideration' has been repealed.[11]

Suppliers can now apply different sales terms, including prices, to different purchasers without having to provide a justification, provided they remain within certain limits (see below).

iii New liability provisions and reinforcement of financial sanctions

The new law repealed provisions dealing with practices such as discriminations 'unjustified by actual consideration' or liability for abuse of dependency or abuse of purchasing power or sale resulting in 'unjustified commercial terms or obligations'. Nevertheless, the ability to negotiate sales terms and conditions on a case-by-case basis remains subject to certain limitations, including two new grounds for liability:

a the creation of a significant imbalance in commercial relations, that is, 'to impose or attempt to impose obligations on a commercial partner that create a significant imbalance in the rights and obligations of the parties'; and

b the imposition of obviously abusive terms, that is, 'to obtain or attempt to obtain, under a threat of a total or partial termination of commercial relations, obviously abusive terms concerning the prices, payment deadlines, sales terms or services not arising from the obligations to purchase and sell'.

11 Deletion of Article L. 442-6, I, 1° of the Commerce Code.

Thus, suppliers may vary their sales terms depending upon the purchasers without having to provide a justification provided that, first, such a variation does not result in a 'significant imbalance' in the rights and obligations of the parties and, second, that the resulting terms are not 'obviously abusive'. The content of these notions will need to be determined by case law.

iv Prohibited restrictions

The new law prohibits, subject to cancellation, provisions that automatically grant a contractual partner the benefit of more favourable terms granted to a competitor and the imposition of exclusive supply contracts with terms of more than two years to an independent reseller (who is not the beneficiary of a licence) conducting a retail business in a surface area of less than 300 square metres.

V SECTORAL COMPETITION: MARKET INVESTIGATIONS

Under the previous law, the Competition Council did not have the power to initiate sector-wide inquiries of the type conducted by the European Commission pursuant to Article 17 of Council Regulation 1/2003. The new law provides that the FCA may upon its own initiative, give an opinion 'on any question regarding competition', including recommending measures intended to 'improve the competitive functioning of markets' to the Minister of the Economy. It seems that the FCA may in this context use its newly-extended investigative resources, including on-site inspections.

VI CONCLUSIONS

The FCA has indicated that it will soon issue guidelines concerning the use of the no-challenge procedure in restrictive practices cases, as well as guidelines for the analysis of concentrations.

Chapter 15

GERMANY

Silke Heinz[*]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

2008 marked the 50th anniversary of the German competition law (Act Against Restraints of Competition, 'the ARC') and of the Federal Cartel Office ('the FCO'). The FCO is a sector-based organisation with dedicated divisions for specific industries, cartel units and a few general divisions (including a special cartel task force responsible *inter alia* for leniency applications). While the FCO started out with 53 employees in 1958, in 2008 it counted around 300. In 2008 the FCO created two additional divisions: a second specialised cartel enforcement division and a new division dedicated to abuse cases in the energy sector. The latter was triggered by the newly introduced Section 29 ARC, which established a stricter enforcement tool against excessive pricing in the gas and electricity markets. The new divisions illustrate the FCO's priorities in 2008 and beyond: general cartel prosecution and abuse control in energy sectors.

Already in July 2007, the FCO had created a general economic unit to provide support across the different divisions. With this step, the FCO paid tribute to the 'more economic approach' trend at EC level (and national level in various other Member States).[1] The impact of the economic unit is only slowly becoming visible in the areas of public enforcement covered here,[2] and the FCO is generally still believed to lag behind the Commission standard in terms of economic analysis.

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1 However, the FCO has always consisted of lawyers and economists.

2 See for instance on the question of how to determine the additional proceeds of a cartel under the old FCO fining guidelines, Barth/Bongard 'Gesamtwirtschaftliche Analyse: Die große Unbekannte der Mehrerlösermittlung', *WuW 2009*, p. 30 *et seq.*

ii Enforcement agenda in 2008

Cartels

The FCO carried out 20 national inspections at 78 companies (including dawn raids at 16 private premises) concerning the consumer goods sector, including confectionary, chocolate and coffee, and mill trade. It imposed total fines of approximately €300 million, which related to sectors such as clay roof tiles, luxury cosmetics, toiletry products, decorative paper and road salt. The FCO increasingly aims at settling cases, often in leniency cases.

Leniency

The FCO reports 35 applications in 21 cases (compared to 41 applications in 12 cases in 2007).

Horizontal restrictive agreements

The FCO scrutinised central selling arrangements (soccer TV rights), and completed investigations into the cooperation among providers of packaging disposal systems with commitment decisions.

Vertical restrictive agreements

The FCO imposed fines for parallel rebate agreements with network foreclosure effects (TV advertising); the FCO further pursued resale price maintenance in different sectors.

Sector inquiries

The FCO launched sector inquiries into the milk production and the petrol sector. In 2009, the FCO launched another inquiry into electricity markets.

Boycott/sales below cost/dominance

The FCO pursued an illicit boycott (Section 21 ARC) initiated by the association of dairy farmers in the milk production sector. The FCO found that a food discounter abused its superior market power by selling below cost. In addition, the FCO made a trademark owner untie the use of its trademark from the provision of other services.

Abuse cases in the energy sector

The FCO initiated several proceedings against gas suppliers for excessive pricing under the new Section 29 ARC, and completed proceedings regarding long-term supply agreements (gas) and other excessive pricing (electricity).

II CARTELS

i Significant cases

In December 2008 and February 2009, the FCO imposed high fines (totalling €188 million) on companies and individuals in the clay roof tiles cartel case for the coordinated imposition of an energy cost surcharge.[3] In Germany, cartels are treated as administrative offences, which means that both individuals (typically managing directors) and companies may be and are subject to fines. (Criminal sanctions only apply in the case of bid rigging, Section 298 Criminal Code.) In the *clay roof tiles* case, the FCO applied its 'new' 2005 fining guidelines[4], which are similar to the current Commission guidelines[5], and could thus increase the level of fines[6]. For deterrence purposes, the FCO significantly increased the fines for companies belonging to groups with total worldwide group turnover exceeding €2 billion. The case involved two leniency applicants, which cooperated under the FCO's 2006 leniency programme. The FCO also fined the parent company of two participants in the cartel with a double-digit million euro fine, on the ground that one of its board members was aware of the cost surcharge agreements, but failed to stop their implementation. The FCO sanctioned this failure to supervise as a separate infringement.[7] The parent company's appeal is still pending.

Two cartel cases regarding toiletries[8] and luxury cosmetics[9] are noteworthy because the FCO imposed separate or, in the case of luxury cosmetics, even stand-alone fines for illicit information exchange. Total fines for the information exchange in toiletry products amounted to €18 million,[10] and in luxury cosmetics products to almost €10 million. In the toiletry products case, the information exchange took place among manufacturers of non-competing products (personal care products and detergents) and concerned the status of annual negotiations with retailers as well as rebates requested by the latter. In the luxury cosmetics case, participants exchanged quarterly turnover data which could be traced to individual members, information on advertising expenditure (which is a significant factor in these industries), returned goods, planned product launches and price increases, conduct *vis-à-vis* selected perfumeries and other market strategy aspects.

The FCO further fined companies and individuals in the *decorative paper cartel* case, in total €62 million.[11] The case was settled[12], which explains the proceedings' very short duration (inspections took place in November 2007 and the fines were imposed in February 2008). The FCO commented that settlements are possible within the existing

3 See press release of 22 December 2008 and the case summary of Case B1 – 200/06 (available on the FCO's website).

4 Available also in English and French on the FCO's website.

5 They are in essence based on the relevant product-related turnover for the period of the infringement, provide for a basic amount, aggravating and mitigating factors, with a maximum cap of 10 per cent of the group worldwide turnover.

6 Under the old regime, the maximum fines were limited to three times the additional proceeds gained through the cartel, which involved complex calculations.

7 Section 130 Administrative Offence Law.

8 See press release of 20 February 2008.

9 See press release of 10 July 2008.

10 A further fine of €19 million was imposed for a price increase agreement.

11 See press release of 5 February 2008.

12 See article in FAZ on 6 February 2008 ('Kartellbußen gegen drei Papierhersteller').

procedural rules in Germany, and that in contrast to the EC level, there is no need for establishing new rules.

The FCO also fined several regional pharmacy associations for cartel agreements in the area of prescription-free over-the-counter ('OTC') pharmaceuticals, as well as the federal pharmaceutical manufacturers' association and individual manufacturers.[13] The pharmacists' associations had agreed to organise conferences, in the context of which association and industry speakers suggested that pharmacists refrain from price competition and instead observe the manufacturers' (non-binding) resale price recommendations. The FCO found that the decisions to organise these events had the object to restrict competition. The federal pharmaceutical manufacturers' association was fined for its supporting role in implementing and organising the conferences, as were the participating manufacturers.[14]

In June 2007, the Federal Court of Justice ruled on the methodology to be used to determine the 'additional proceeds' gained through a cartel, which was the basis for setting cartel fines under the old law applicable until July 2005.[15] The additional proceeds are defined as the difference between the 'actual cartel price' and the 'hypothetical competitive price', which would have been charged under competitive conditions. There are different ways to determine the hypothetical competitive price: the first is to compare the market concerned with other geographic or product markets. If that is not feasible, the judge needs to pursue the other alternative and carry out an economic (cost) analysis that also takes into account macro-economic factors. The ruling is important despite the fact that the law and the new fining guidelines are no longer based on the additional proceeds concept, because (1) there are still appeals pending against fines imposed under the old rules, and (2) the additional proceeds calculation may be useful for the calculation of damages in private cartel litigation.

ii Trends, developments and strategies

In 2008 the FCO confirmed its image as a tough anti-cartel enforcer through imposing higher fines and sanctions for types of information exchange that would not necessarily be investigated at European Commission level. In contrast to the Commission, which publishes full decisions, the FCO has only recently started publishing cartel cases on its website, and only short case summaries instead of a full (non-confidential) version.

There is interaction between the FCO and the European Commission within the ECN, which means that the FCO may pick up certain parts of cartel cases that the Commission is not willing to pursue (to be kept in mind by leniency applicants). Sometimes the work allocation may not be that clear: the Commission circulated requests

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13 See press release of 8 January 2008. Regarding the fine for the national pharmaceutical manufacturers' association see Case B6 – 3/05.

14 The fines were rather low (in total close to €0.5 million), which the FCO explained with the fact that the infringements took place some years ago and at a time when price competition in the sector was just about to be created. However, it clarified that the decisions should be seen as clear warning signals for the future.

15 Decision of 19 June 2007, WuW/E DE-R 2225 *et seq.*

for information to confectionary and chocolate companies in January 2008 and two weeks later the FCO carried out dawn raids at national level.[16]

The FCO increasingly aims at settling cartel cases. While this is generally a positive development for the companies concerned, unlike at the EC level, the FCO's settlements are not based on published guidelines (let alone on a public discussion on draft guidelines). The rules are thus not very transparent, and it would be desirable to establish a clear system of checks and balances in this area.

The FCO's leniency programme has continued to play a major role in cartel detection. The programme is similar to that of the Commission, albeit with a major difference: the FCO does not only exclude immunity for coercers, but also for the single ringleader of a cartel.[17] The FCO has accepted oral leniency applications from the beginning. Since the FCO signed up to the ECN Model Leniency Programme, it is also possible to set a marker which at the same time serves as a summary application in cases where the main leniency application is filed with the Commission. In practice, the procedure of setting a marker or making a summary application is user-friendly and can even be done via telephone with the FCO's 'special cartel task force' (in contrast to the Commission programme, which requires oral markers to be made in person in Brussels). However, if full immunity is no longer available, the FCO marker only ensures that the applicant's evidence will be considered prior to that of subsequent marker candidates. But in such a case, the marker ranking does not define the possible (final) maximum reduction available, which is up to 50 per cent for all applicants. In practice, that means a marker applicant ranking second may still be 'overtaken' and obtain less reduction than subsequent candidates, if these provide more added value.

iii *Outlook*

The FCO's 2005 fining guidelines and related amendments to the ARC were aimed at harmonisation with the EC rules. These changes are expected to further increase the level of fines in the coming years. Initially, it was unclear whether the newly introduced 10 per cent worldwide turnover cap for the maximum fine would be limited to the legal entity involved in the infringement. Arguably, this would have been the case under applicable administrative offence law.[18] An amendment to the ARC that came into force

16 Some view this case as a potential example for a lack of meaningful cooperation, meaning the FCO was forced to carry out inspections due to the information requests in order to preserve evidence.

17 See Section B.3 of the FCO's leniency programme. However, both can still benefit from reductions under the programme.

18 Unlike the EC rules, applicable German administrative offence law is based on the principle that company liability can only be created through the infringement committed by an individual authorised to act for the specific legal entity (Section 30(1) Administrative Offence Law), meaning that the infringement of a managing director of a subsidiary cannot create (direct) liability for the parent company. The parent company could become liable, however, if an individual authorised to act for the latter violated the duty to properly supervise the managing director of the subsidiary (Section 130 Administrative Offence Law).

in December 2007, however, clarified that the 10 per cent cap applies to the worldwide group turnover. For the notion of group, the legislative materials refer to the EC law principle of a single economic entity. This concept has so far not been used in German administrative offence law and may therefore become an issue in judicial review (in particular with increasing fines).[19]

While the FCO's leniency programme has in principle been accepted by the Düsseldorf Court of Appeal,[20] there are voices that criticise the fact that the programme is only based on administrative guidelines and has not been established by law.[21] Accordingly, there may be further litigation in this field, including on details of the programme.[22] Further, the FCO's 2005 fining guidelines have not yet been tested before the courts.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Horizontal restrictions

In July 2008, the FCO found that the central selling arrangement for soccer TV rights as proposed by German soccer league DFL was incompatible with Article 81 EC.[23] The previous selling arrangements had been examined by the Commission in 2005[24] and 2003[25], respectively. Both the Commission and the FCO found that central selling of TV rights falls within the scope of Article 81(1) EC, as it would restrict (price) competition between soccer clubs in marketing their broadcasting rights. The Commission accepted the previous selling arrangements, subject to modifications,[26] because they would likely generate sufficient advantages to merit exemption under Article 81(3) EC.[27] The FCO had already voiced concerns in 2003, and was the sole authority to review the 2008

19 See for an overview Achenbach, 'Die Kappungsgrenze und die Folgen – Zweifelsfragen des § 81 Abs. 4 GWB', ZWeR 2009, p. 3 *et seq*.

20 Judgment of 27 March 2006, WuW DE-R 1733 *et seq*.

21 See for example an overview in Immenga/Mestmäcker, GWB, Section 81, Para. 440.

22 For example, there was litigation regarding access to the FCO file by third parties. In one case, the court admitted partial access to the file, but recognised that, as stipulated in its leniency programme, the FCO would not grant access to the leniency applications. See decision of the district court of Bonn of 24 September 2008, WuW/E DE-R 2503 *et seq*.

23 See statement of the FCO's president at the press conference of 24 July 2008.

24 See Commission decision of 19 January 2005, (EC) 2005/396, OJ 2005, L 134/46.

25 See the summary published under Article 19(3) of Reg. 17 in Case COMP/C.2/37.214, OJ 2003 C 261/13.

26 The tender procedure was required to be carried out in transparent, non-discriminatory procedures with different broadcasting rights packages that would only cover a maximum of three seasons. In addition, the arrangement left a limited possibility for parallel individual marketing by the clubs.

27 In particular, in 2005 the Commission expected the arrangement to facilitate access to content for the suppliers of TV, radio and new media in the downstream media markets, to foster

model. Without opening an official investigation, the FCO announced that it would scrutinise whether the alleged benefits of the previous arrangements had indeed occurred, and to evaluate the new concept.[28] Ultimately, the FCO rejected the model because it lacked sufficient benefits for consumers and might have eliminated substantial competition (making an exemption pursuant to Article 81(3) EC unavailable). The FCO found that the concept would not offer consumers an adequate choice between pay-TV live coverage and speedy highlight coverage on free-TV. The latter was considered to be a major benefit of central selling, as it enhances product diversity and limits the ability of the acquirer of the live pay-TV rights to set excessive prices. In the FCO's view, this has been one of the reasons for the relatively low pay-TV subscription prices in Germany. The FCO required that highlight coverage on free-TV should be available before 8pm, not only after 10pm as envisaged by DFL[29]. In the end, DFL changed its model[30], but announced it would seek judicial review of the FCO's action, even if the FCO never rendered an official decision.

Vertical restrictions

In November 2007, the FCO imposed fines totalling €216 million on the marketing subsidiaries of the two major private broadcasters in Germany, RTL and ProSiebenSat.1.[31] Each of them practised a rebate system including rebates based on the share of sales achieved by a media agency with the broadcasting group in question. These rebates were granted retroactively, i.e., over the entire budget of the year. The FCO found that the two parallel vertical agreements created a strong incentive for the media agencies to place large proportions of their budgets with the two major broadcasters. This, together with the fact that the two broadcasters held a joint market share of approximately 80 per cent in TV advertising in Germany, was considered to lead to foreclosure effects to the detriment of smaller broadcasters and to render market entry more difficult. It is noteworthy that the FCO based the case on vertical restrictions rather than on a dominance analysis (despite the fact that it had previously found the two broadcasters to form a dominant duopoly).[32]

innovation and to reduce concentration of the media markets, which would ultimately benefit consumers, in particular through a broader media offer.

28 See FCO press release of 1 February 2008. Under the new model, DFL had transferred the auction to an intermediary agency that guaranteed minimum revenues of €500 million per season.

29 DFL/the intermediary agency aimed at achieving a higher price for the combined live coverage pay-TV broadcasting rights than in the previous auctions (in order to obtain the minimum revenues guaranteed), which probably would have resulted in no highlight coverage on free-TV on Saturdays prior to 10pm.

30 With the result that the deal with the intermediary agency collapsed.

31 See press release of 30 November 2007.

32 In the merger prohibition of *Axel Springer/ProSiebenSat.1*, decision of 19 January 2006, Case B6 – 92202 – Fa – 103/05.

The FCO conducted several investigations into resale price maintenance. In May 2008 the FCO imposed a fine of €10.34 million on Bayer's German distribution subsidiary, for resale price maintenance in OTC products.[33] Even though the leniency programme does not apply to vertical infringements, the fine was significantly reduced because Bayer cooperated with the FCO following the inspections and provided significant added value. In March 2009, the FCO ended proceedings against manufacturers of (spectacle) lenses.[34] The manufacturers had recommended resale prices, including for the optician's services, and the FCO found that because many small and medium-sized opticians adhered to the recommendations in practice, these had the effect of fixed or minimum prices. Most manufacturers agreed to cease this practice. One manufacturer apparently refused to do so and the FCO opened formal proceedings. In April 2009, the FCO fined Microsoft's German subsidiary €9 million for agreeing on the resale price of a software package, which had been heavily advertised in autumn 2008 with financial support from Microsoft. The FCO clarified that not every contact between supplier and retailer on retail prices constitutes a concerted practice, but that the line is crossed if the supplier actively attempts to coordinate its retailer's pricing and if both agree on the retailer's future promotional actions.[35]

Sector inquiries

The FCO opened two sector inquiries pursuant to Section 23e ARC in 2008. In May, the FCO announced an inquiry into the petrol and diesel fuel sector in Germany, following complaints by consumers and information provided by independent fuel stations.[36] In particular, the latter had complained about large fuel companies operating cost margin squeezes by charging wholesalers prices that exceed the retail prices at fuel stations. The FCO noted that the inquiry would focus on the wholesale trade markets and on pricing, but would also cover the effects on competition of fuel purchase cards and branded reseller agreements.[37] The FCO reported in April 2009, that as a preliminary result of its inquiry, it prohibited the acquisition of OMV fuel stations by Total. It further promised to publish the preliminary inquiry results in the near future.[38]

The second inquiry was launched into the dairy industry in order to examine conditions of competition in the supply of milk from 'the farm to the shop counter'.[39] The triggering event was the 'milk-strike' discussed above.

In March 2009, the FCO launched another inquiry into the electricity sector.

33 See press release of 28 May 2008.

34 See press release dated 25 March 2009.

35 Press release of 8 April 2009.

36 See press release of 28 May 2008.

37 The sector inquiry followed the FCO's merger clearance decision in Shell/HPV, in which the FCO had found a dominant oligopoly in the fuel stations market consisting of the top five integrated mineral oil companies; see decision of 7 March 2008, B8-134/07, available on the FCO's website.

38 See press release of 29 April 2009.

39 See press release of 18 December 2008.

Boycott

In November 2008 the FCO rendered a declaratory decision pursuant to Section 32(3) ARC (without imposing a fine) that the German association of dairy farmers (BDM) had initiated an illicit boycott in the milk production sector[40]. Initiating a boycott is prohibited by Section 21(1) ARC[41]. BDM had organised a 'milk strike', requesting dairy farmers to cease supplying dairies in order to achieve a standard minimum price and to reduce the overall milk supply volume. In addition, BDM wanted to negotiate with the dairies' industry association with the aim to enforce the requisite minimum price vis-à-vis food retailers. The FCO decided that the intended cooperation would have infringed Article 81 EC/Section 1 ARC both at the dairy farmers' level and at the dairies level. The minimum price would have further led to a price cartel in Germany throughout the milk chain (dairy farmers, dairies and retail), to the detriment of consumers. The FCO stressed that structural industry problems must not be resolved through anti-competitive means.

Dominance

In October 2007, the FCO rendered a declaratory decision pursuant to Section 32(3) ARC that food discounter Netto abused its superior market power by having offered food products below cost.[42] German law contains a specific 'sales below cost' prohibition for companies with superior market power.[43] It is aimed less at manufacturers than at trading companies/retailers. The analysis takes the actual cost as a reference (meaning the net/net price at which the company has sourced the relevant product). Sales below cost are prohibited if they do not occur on a merely occasional basis.[44] The *Netto* case, even though in the meantime overtaken by a food-specific amendment to the ARC,[45] is of interest for general sales below cost cases and illustrates a peculiarity of German law. Even if companies are not dominant,[46] they may still be subject to dominance rules (including the specific provision on sales below cost), provided they have a 'paramount

40 Decision of 12 November 2008, Case B2 – 100/08.

41 The provision stipulates that undertakings and associations of undertakings shall not request another undertaking or other associations of undertakings to refuse to sell or purchase, with the intention of unfairly harming other undertakings.

42 Decision of 25 October 2007, Case B9 – 77/07.

43 Section 20(4) No. 1 ARC.

44 Unless objectively justified.

45 In December 2007, the provision has been amended with a special rule for food products, below cost price sales of which are now prohibited, unless justified because such offer is suitable to prevent the deterioration or the imminent failure to sell the goods at the dealer's premises, as well as in similarly severe cases. The food-specific rule is of temporary nature and limited to the end of 2012.

46 The ARC establishes presumptions of dominance if certain market share levels are exceeded: 33 per cent for single dominance; for collective dominance, a combined share of three or less companies of 50 per cent, or a combined share of five or less companies of 66 per cent (Section 19(3) ARC).

market position' *vis-à-vis* competitors[47] or 'superior market power' in comparison to their small and medium-sized competitors.[48] Netto was considered to have such market power in the food retail market in Germany, as Netto belongs to the Edeka group of companies and benefits from the group's financial strength, purchasing power and product range. The fact that other discounters like Aldi and Lidl may have similar (or even stronger) positions did not alter the assessment. The FCO stated that 'not merely occasionally' selling below cost does not require that the same product is repeatedly sold below cost,[49] and is met if the offers cover a period of more than three weeks.[50] The Federal Court of Justice had already decided in 2006 that the sales below cost provision does not require any appreciable effect on the markets in question.

In March 2008, the Federal Court of Justice confirmed the FCO's order prohibiting Soda Club's cartridge rental system under Article 82 EC and the equivalent German provisions.[51] Soda Club sells systems for carbonising tap water and rents out the CO_2 cartridges. It explicitly prohibited third-party cartridge refilling and pursued any contravening action as an infringement of its property right. The Federal Court of Justice confirmed that refilling CO_2 cartridges constitutes a separate market. It clarified that the SSNIP test is merely an auxiliary method to determine the relevant product market, and may notably not be meaningful in dominance cases, in which it is unclear whether the price of the product concerned has been subject to competition. The Federal Court confirmed that Soda Club held a dominant position and that its rental system constituted an abuse both under Article 82 EC as well as under the relevant German provision, given that it was aimed at systematically foreclosing competitors and ultimately congested the market with Soda Club cartridges. Soda Club's argument that its fundamental property right should have been given more weight within the balancing of interests[52] was not successful. The Federal Court of Justice clarified that the FCO's order did not affect the core of the right and noted (by reference to the ECJ's cases in

47 See Section 19(2) No. 2 ARC.

48 Criteria to be taken into account in the comparison include the company's market share, financial power, access to (upstream) supplies or (downstream) selling markets, links with other enterprises, the company's ability to switch its offer to other products or services, the possibility of customers to source from competing suppliers, barriers to market entry, as well as actual or potential competition (Section 19(2) No.2 ARC).

49 The FCO issued guidelines on abuse of dominance through sales below costs (Section 20(4) ARC), which are available on the FCO's website. They do not reflect the most recent changes regarding food products, but still apply to other products.

50 Even in case of separate one-week-promotions for different products.

51 Section 19(1), (4) No. 1 ARC, see judgment of 4 March 2008, Case KVR 21/07.

52 Section 19(4) ARC provides regulatory examples for abusive conduct, one of which is met if the dominant company 'impairs other undertakings' ability to compete, in a manner affecting competition in the market and without any objective justification'. The test thus involves the balancing of interests of the companies concerned as well as of the ARC's overall purpose to uphold free competition.

the area of IP rights) that limitations to the exercise of the right may be justified if the exercise of exclusivity is abusive.

In August 2008, the FCO announced that as of 2009 Duales System Deutschland (DSD) would no longer tie the use of its trademark, the green dot (Der Grüne Punkt), by packaging manufacturers to sourcing at least part of their packaging disposal services from DSD.[53] The FCO reviewed the matter without opening official proceedings. As trademark owner, DSD was considered dominant in providing the right to use its green dot trademark. DSD apparently assured the FCO (without giving commitments) that it would offer to the customers of its competitors the use of its trademark at the same conditions as to its own customers, and that it would no longer require its own customers to print the green dot logo on their packaging. In addition, the FCO clarified that DSD could not charge excessive prices for the use of its trademark and would make its price list publicly available in an appropriate form.

ii Trends, developments and strategies

Since 2005, German law has in substance been fully harmonised with Article 81 EC,[54] a reform which has been broadly welcomed. In March 2007, the FCO issued a new *de minimis* notice,[55] which is in line with the European Commission's *de minimis* notice. However, the past few years have also shown that the application of Article 81 EC in Germany is not fully in line with the approach taken by the Commission. This may be illustrated by the following statement from the FCO's President, Mr Heitzer: 'It seems to me that the different cars of competition law enforcement driving around Europe in fact already use very similar 'maps' to find their way. […] But using the same or very similar 'maps' does not necessarily imply that competition authorities take identical routes in assessing similar cases.'[56] (While he referred to the use of economics in the context of collective dominance and vertical mergers, the quote seems of more general application.) The FCO is indeed sometimes perceived to follow a different (and stricter) approach than the Commission. On the other hand, the FCO has always been very open to providing informal guidance, and taking advantage of this possibility is often a useful strategy in practice.

The differences to the Commission's practice are even more apparent in the context of dominance/unilateral conduct, an area in which German law deviates from EC law. As seen above, companies with a paramount market position may need to consider and abide by dominance rules in Germany even though they would not qualify as dominant under EC law. While the discussion about a more economic approach in

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53 See press release of 25 August 2008.

54 Section 1 ARC is equivalent to Article 81(1) EC, Section 2 ARC with Article 81(3) and even renders the EC group exemptions applicable *mutatis mutandis*.

55 Notice No. 18/2007 on the Non-Prosecution of Cooperation Agreements of Minor Importance of 13 March 2007; the notice replaces the FCO's Notice No. 57/80 of 8 July 1980.

56 Economic assessment in competition enforcement: developments in France and Germany, CRA International Annual Conference Economic Developments in European Competition Policy, 3 December 2008, p. 5, available at the FCO's website.

dominance cases has also been on the agenda,[57] the recent developments, notably the Commission's Guidance,[58] cannot necessarily be relied upon in Germany. The FCO and the courts are not bound by these guidelines. It should further be borne in mind that the FCO has been and continues to be sceptical towards the Commission's more economic approach, as can be seen from its 2006 comments on the Commission's original Staff Discussion Paper[59] and subsequent statements.[60]

While the FCO welcomes the use of economics in general and has established an economic unit, the FCO typically points out that German law (as well as in its view EC law)[61] aims at protecting free competition rather than consumer welfare, the latter being a test on which the Commission increasingly focuses.[62] One of the possible differences between the two approaches may relate to the issue of protecting competitors. As seen above, the German dominance rules even explicitly provide for the protection of small and medium-sized competitors. The FCO also keeps stressing the point that dominance rules need to be manageable in practice, which in its view speaks against a standard of proof that is too demanding for the agency.[63] Based on this and because they increase legal certainty for companies, the FCO sees benefits in *per se* rules.

The differences between the FCO and the Commission were also illustrated on the occasion of a conference on buyer power and competition law, including dominance rules, in September 2008.[64] Commission representatives expressed the view that the main concern of buyer power relates to possible spill-over effects on downstream selling markets, and that concerns could typically be resolved by commitments on these selling markets. In contrast, the FCO seemed more willing to challenge buyer power as such: 'Detriment to consumer welfare is not a compelling precondition for this, least of all evidence of such harm.'[65]

57 See for example the FCO's working paper 'The future of abuse control in a more economic approach to competition law', 20 September 2007.

58 See Communication from the Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Brussels, 9 February 2009, OJ 2009 C45/7.

59 See the FCO's written statement on the DG Competition discussion paper on the Application of Article 82 of the Treaty to exclusionary abuses, Bonn 2006.

60 See for instance Mr Heitzer's speech at the European Competition Day, 18-19 November 2008, Paris, p. 5.

61 The FCO often refers to the ECJ in the *British Airways* case this regard, where the Court confirmed that the CFI did not have to examine whether the conduct in question caused harm to consumers directly but could without error limit its review to whether the bonus scheme at issue had a restrictive effect on competition, C-95/04, judgment of 15 April 2007, paragraph 106.

62 See for instance the speech of Mr Heitzer at the European Competition Day, *idem*, p.3.

63 See the FCO's written statement on the DG Competition discussion paper on the Application of Article 82 of the Treaty to exclusionary abuses, Bonn 2006, p. 1 and 2.

64 The discussion paper materials 'Buyer Power in Competition Law – Status and Perspectives', Meeting of the Working Group on Competition Law on 18 September 2008.

65 See p. 13 of the discussion paper.

iii Outlook

The sector inquiries may lead to additional FCO activities if the FCO were to find competition concerns. Inversely, competition cases may trigger more sector inquiries, in particular if merger activity were to decrease in times of economic downturn (thereby freeing resources at the FCO). In addition, dawn raids in the sugar industry in March 2009 illustrate that even merger filings may trigger antitrust investigations.[66]

The FCO's president gave a speech on innovation and competition in early 2009[67], in which he said that while the relation between patent protection and competition law (notably dominance) does not play a prominent role in the FCO's recent practice, this could change. He referred to the possible detrimental effects of broad patent portfolios primarily acquired for litigation or settlements with competitors on the one hand, and patent pools and networks of bilateral cross-licensing on the other hand, which may ultimately impair innovation and facilitate collusive behaviour.

Finally, it remains to be seen whether and for how long the FCO and the courts in Germany will withstand the pressure that the Commission Guidance will likely exert in dominance cases in practice and which may result in a kind of soft law harmonisation. The balancing of interests that is typically done in German dominance cases could serve as the point of entry for a more economic approach in German law.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The focus in this area over the past two years related to the gas and electricity industries.

i Significant cases

In September 2007, the FCO terminated proceedings against RWE for abusive electricity prices charged to industrial customers.[68] In 2005, the FCO had initiated proceedings regarding Article 82 EC and the relevant national provisions. The investigation was triggered by various complaints that RWE had passed on costs related to trading in CO_2 emission permits (which it had received free of charge). RWE and E.ON Ruhrgas were considered to hold a collective dominant position in national electricity markets in Germany. The FCO regarded the costs associated with CO_2 emission permits trading as possible opportunity costs, but determined that passing on more than 25 per cent of such costs was abusive. Other European industries participating in emission permit trading were not in a position to pass on such costs, and the FCO concluded that RWE could only do so due to its dominant position. The FCO accepted RWE's commitments to sell significant amounts of electricity capacity, totalling 6,300MW, in the four years to come to industrial customers, through a neutral third party in several transparent auctions, in

66 See article in Börsen-Zeitung 'Kartellamt besucht Zuckerhersteller' of 31 March 2009.

67 'Innovation und Wettbewerb aus kartellrechtlicher Sicht' at the FIW Symposium Innovation und Wettbewerb, 25-27 February 2009, Innsbruck.

68 Decision of 26 September 2007, Case B8 – 88/05.

which customers would be credited with the value of the free CO2 allowances allocated to the capacities sold.

In the course of 2007, the FCO concluded several proceedings against gas providers for long-term gas supply agreements with commitments.[69] The FCO found that the supply agreements infringed Article 81 and 82 EC due to a combination of long duration (partly up to 20 years), a high share of requirement purchase obligation and the fact that the providers typically had a network of similar contracts in place with all of their distributors in the territory. The providers agreed to cease operating these contracts and to limit future supply agreements to four years if the distributor's actual share of requirement reaches 50 to 80 per cent, and to two years if the share of requirement exceeds 80 per cent. The FCO had started several proceedings in 2003, pursued pilot proceedings against E.ON Ruhrgas (as the largest gas provider in Germany) and prohibited the E.ON Ruhrgas supply agreements in 2006.[70] After the Düsseldorf Court of Appeal had confirmed the FCO's approach in 2007,[71] the remaining proceedings were settled. In 2009, the Federal Court of Justice rejected E.ON Ruhrgas' further appeal.[72]

In March 2008 the FCO initiated proceedings against 35 gas suppliers for excessive pricing *vis-à-vis* end customers in 2007 and 2008.[73] The majority of cases were settled in December 2008, based on commitments providing for consumer compensation totalling €127 million, through bonus payments and credits to be granted to customers, through price reductions or the postponement of price increases.[74] The proceedings were *inter alia* based on the newly introduced Section 29 ARC, which prohibits prices of electricity or gas providers which (1) significantly exceed those of other providers, unless the provider concerned can prove that the differences are objectively justified, or (2) which unreasonably exceed the costs. Section 29 ARC has a sun-set clause and will cease to be applicable by the end of 2012.[75] The FCO considered the providers to be dominant in the supply of gas to end consumers in their territory. In its analysis, the FCO compared their tariffs with those of suppliers in other regions offering lower prices.[76] The FCO deducted network fees, taxes and licence fees. The FCO then added a surcharge to the result, to be on the safe side, and found the resulting price differences were not justified. The companies concerned mainly defended themselves by referring to their individual purchasing costs, which the FCO, however, equally compared to those of other suppliers under the objective justification test within the meaning of Section

69 See press release of 4 October 2007.

70 Decision of January 2006, WuW/E DE-V 1147 *et seq.*

71 Decision of 4 October 2007, WuW/E DER 2197 *et seq.*

72 Decision of February 10, 2009, KVR 67/07.

73 See press release of 5 March 2008. The FCO had previously carried out a gas price survey on a nationwide basis, which apparently triggered the subsequent proceedings.

74 See press release of 1 December 2008. As an example, we refer to the termination decision in Case B 10 – 18/08.

75 It does not cover network fees, which together with network access issues are subject to energy sector-specific regulation in Germany.

76 The FCO limited its comparison to five exemplary standard consumption cases/customers.

29 ARC. In the end, the FCO accepted commitments because in its view the resulting benefits for customers came very close to those achievable if it took formal decisions. In addition, the FCO recognised that the economic situation of most of the companies did not allow for further concessions.

ii Trends, developments and strategies

Like the Commission, the FCO focused on electricity and gas suppliers. While the Commission targeted transmission networks and capacity limitation, the FCO mainly dealt with pricing towards industrial or private customers in Germany. In the political debate regarding 'ownership unbundling' (i.e., the separation of ownership of transmission networks from that of energy generation and distribution activities), Germany (and the FCO) took a more cautious approach than the Commission and advocated a softer 'corporate unbundling' initiative, as the FCO feared constitutional problems with enforcing ownership unbundling.[77] This debate may have been resolved somewhat by the commitments the Commission accepted from E.ON[78] and RWE[79] to divest their respective electricity and gas transmission networks.

The introduction of Section 29 ARC was a major development in the energy sector. While the reform had triggered many critical reactions,[80] the FCO immediately used the new tool to challenge gas prices throughout Germany. In addition to reversing the burden of proof, Section 29 ARC stipulates that decisions based on it are immediately enforceable. In practice, this will increase the chance that companies concerned offer commitments, because they can no longer defer the implementation of a decision by appealing it. In substance, it may prove an uphill battle for companies to justify different prices based on costs, as the FCO seems to scrutinise the actual costs by comparing them to those of (possibly more efficient) competitors.

iii Outlook

In February 2008, the FCO's president explained that in the electricity and gas sector in Germany, there was still the need for more cross-border transport capacity, the extension of border interconnection points and additional generation capacity. It remains to be seen whether the recent developments at Commission level (see above) will alter his view. In any event, with the new price abuse tool in Section 29 ARC the FCO may

77 See e.g., Stellungnahme des Bundeskartellamts zum Vorschlag der EU-Kommission für ein drittes Binnenmarktpaket Strom und Gas. Öffentliche Anhörung, 9 April 2008, p.9.

78 Decision of 26 November 2008, Case COMP/39.388.

79 Decision of 19 March 2009, Case COMP/39.402.

80 For instance, the Monopolies Commission, an independent state antitrust advisory body, criticised the reform as setting the wrong incentives and increasing the risk of coordinated effects in terms of high prices, see 'Sondergutachten der Monopolkommission, Preiskontrollen inn Energiewirtschaft und Handel?', 2007, p. 12 *et seq.* For an overview see also Lotze/Thomale, 'Neues zur Kontrolle von Energiepreisen: Preismissbrauchsaufsicht und Anreizregulierung', *WuW* 2008, 257, 259.

pay more attention to regional and local providers in the gas and electricity sector in Germany in the future.

V CONCLUSIONS

i Pending cases and legislation

In the area of cartels, further clarification on how fines are determined under the new rules can be expected in the future. In addition, there are still cases pending with respect to the former law (fines based on the additional proceeds gained through the cartel).

After the general overhaul of the ARC in 2005 and further minor adaptations, it is unlikely that the legislator will further reform the area of Article 81 EC in substance. However, there could be legislative moves to establish the leniency guidelines and related procedural provisions as formal law. With respect to dominance rules it seems rather unlikely that the German law will be changed, as the FCO is not enthusiastic about the new Commission approach and given that Article 3(2) of Reg. 1/2003 allows stricter national laws governing unilateral conduct.

ii Analysis

The real impact of the new cartel fining guidelines is yet to come. The FCO also needs to show that the new maximum fine concept is compatible with applicable administrative offence law.

The FCO may sometimes follow a somewhat stricter approach in the application of Article 81 EC than the European Commission, notably in pursuing illicit information exchange, but also in the substantive analysis. In addition, the FCO seems to have increasingly focused on vertical infringements of Article 81 EC (mostly resale price maintenance), and this trend may well continue.

For the FCO's practice in dominance cases it will be critical to see whether a more economic approach can be implemented. So far, the FCO has not been perceived as a frontrunner, but rather as an advocate of conventional analysis. This is a challenge for the FCO's newly established economic unit.

Chapter 16

HUNGARY

Kinga Hetényi and Christoph Haid[*]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

The authority that is mainly in charge of public enforcement in Hungary is the Hungarian Competition Authority (Gazdasági Versenyhivatal; 'GVH'), an independent authority that reports only to the Parliament. The GVH started its operation in January 1991. As bid rigging in public tenders is caught by the Criminal Act, criminal courts are also involved in the enforcement of competition law.

The GVH is headed by the President, who is assisted by two Vice Presidents. One of these two Vice Presidents chairs the (decision-making) Competition Council, whereas the other supervises the investigative sections. These sections are organised by industries and case types.

Currently, the GVH has a staff of around 110, of which approximately 30 are economists. When deciding which cases to address and how to allocate resources the GVH will take the following criteria into account (see 'Fundamental Principles of Competition Policy as applied by the Hungarian Competition Authority'[1]): How strong is the likely effect on competition? Is it likely to have spill-over effects damaging the competitiveness of other sectors? How large is the likely group of affected consumers? Is the GVH likely to be able to remedy potential problems with the instruments available? Is it an important issue with regard to the development of jurisprudence? Could the GVH's proceedings be considered as exemplary or indicative? Does the issue require the GVH's intervention or is it likely to be solved in its absence?

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1 This is available at the GVH's website at www.gvh.hu/domain2/files/modules/module25/pdf/elemzesek_alapelvek_antitrosztpolicy_2007_05_a_pdf.pdf.

Unlike in other (central and eastern European) jurisdictions, the Hungarian Competition Act provides for relatively high turnover thresholds that trigger a filing obligation for concentrations. In turn, the GVH's resources are not predominantly absorbed by standard merger control proceedings but can be deployed for detecting anti-competitive practices.

ii Enforcement agenda

Besides the protection of competition, the other two main substantial tasks of the GVH are competition advocacy (e.g., commenting on legislative initiatives that may affect competition) and the promotion of a competition culture (i.e., dissemination of knowledge about competition policy in order to raise public awareness of competition issues, and the development of competition-related legal and economic activities of public interest).

The general role of the GVH in competition law enforcement is to enhance long-term (domestic) consumer welfare. The GVH does not prioritise any industry sectors in its enforcement activities. The Annual Report 2008 is not published yet. However, from the GVH's website it can be inferred that the GVH dealt with some 25 antitrust proceedings in 2008, relating to both hard-core cartels and vertical restrictive agreements. It also had to assess suspected abuses of market dominance. The most prominent cases, however, concern the construction sector, where the GVH has been able over recent years to unearth an array of hard-core infringements (see also Section II *infra*).

II CARTELS

i Preliminary remarks

The main source of competition law in Hungary is Act No. LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition ('the Competition Act').

The cartel prohibition pursuant to the Competition Act follows Article 81 EC Treaty and prohibits all anti-competitive agreements and concerted practices of undertakings as well as decisions of associations of undertakings. Like Article 81(3) EC Treaty, the Competition Act exempts restrictive agreements that create countervailing efficiencies. This exemption applies automatically with no prior decision to this effect needed. To increase legal certainty, several notices have been adopted that mirror the notices and regulations at EU level. Such notices exist, for example, for *de minimis* agreements (i.e., agreements that do not have an appreciable adverse effect on competition) and block exemptions for vertical agreements, technology transfer agreements and motor vehicle distribution.

Infringements of the cartel prohibition may entail fines of 10 per cent of the respective undertaking's worldwide turnover. In addition, individuals found to have engaged in bid rigging in public procurement proceedings or tenders in connection with activities bound to concessions may face criminal prosecution and imprisonment of up to five years.

Finally, the GVH has also adopted a leniency programme that virtually copies the one of the European Commission, i.e., companies may benefit from immunity from fines if they are the first to notify the GVH of a hitherto unknown cartel (and meet the other requirements set forth in the programme) or from a significant reduction of a fine if they produce value-added evidence that corroborates the findings of the GVH.

Recently, the Hungarian parliament adopted amendments to the Hungarian Competition Act. Most amendments relate to merger control proceedings and private enforcement. In addition, the amended act will also contain provisions on leniency and transpose the GVH's leniency programme into primary law. The amendments will enter into force on 1 June 2009 (see also Section III *infra*).

ii Significant cases

Construction industry

In recent years, a number of construction companies have been fined for their participation in cartels.

The leading case concerns an investigation by the GVH in which five undertakings were held liable for having formed a cartel in relation to a public procurement for a highway construction project. The GVH established that the five undertakings that participated in the public procurement procedure breached the cartel prohibition by allocating to each the construction works for the particular motorway sections and rigging bids. The total amount of the fines imposed by the GVH amounted to 7 billion forints . Years after the GVH had adopted its original decision, it eventually became final in December 2008 when the Supreme Court dismissed the appeals of the implicated undertakings. By dismissing the appeals, the Court also confirmed that the GVH was allowed to use evidence that it discovered in investigations that were originally instigated for another purpose.

Recently, the Appeal Court of Budapest confirmed the GVH's decision in another construction cartel. The GVH (in September 2005) imposed a fine of more than 1.3 billion forints on undertakings that rigged bids for road construction works that were tendered between 2001 and 2002.

In January 2009, the GVH imposed a fine of 3 billion forints on three members of another road construction cartel. In its decision of 29 January 2009, the GVH found that Strabag, Egut (a member of the Colas group) and He-Do had rigged bids for different tenders for road and bridge constructions in Hungary. The GVH imposed a fine of 1.7 billion forints on Strabag and 1.2 billion forints on Egut. In its decision the authority pointed out that the extent of the fines was influenced by the fact that Strabag and Egut were repeat offenders. This practice of the GVH was confirmed by the courts. Additionally, the GVH stated that the fines are always imposed taking into account the 'financial potentials' of the given undertakings. As He-Do Kft acted as whistle-blower, it received immunity from fines.

Gas insulated switchgears

In 2007, the European Commission fined manufacturers of gas insulated switchgears for the participation in a long-standing worldwide cartel over €750 million. This worldwide cartel was in parallel investigated by the GVH (upon a leniency application by one of the cartelists) which concentrated on infringements prior to Hungary's accession to the EU (infringements after the accession were covered by the investigation of the European

Commission). The investigation by the GVH unveiled that the implicated undertakings had also coordinated their activities in relation to Hungary. The GVH imposed a total fine of 702 million forints.

The Municipal Court of Budapest amended the decision of the GVH by decreasing the amount of the fines imposed significantly to a total of 204 million forints. The Appeal Court of Budapest upheld the decision of the Municipal Court of Budapest in September 2008. Thereby, it confirmed that the GVH did not infringe the *ne bis in idem* principle by fining the implicated undertakings, even though the European Commission fined the same undertakings for their participation in the same, worldwide cartel between the late eighties and 2004.

Hungarian Real Estate Association

The Hungarian Real Estate Association ('MAISZ') set recommended fees for its members. The recommendations were contained in two documents that the association posted on its website and related, *inter alia*, to minimum and maximum fees of estate agents, minimum, average and maximum expert fees, and four categories of overhead prices.

The GVH found these recommendations to fall foul of the cartel prohibition and ordered MAISZ (1) to remove the documents, (2) post the GVH's decision on its homepage, (3) inform all the members of MAISZ by letter that they may not use the recommended fees and may not make references to the removed documents and (4) publish in a professional periodical relevant parts of the decision.

However, no fines were imposed on MAISZ as legal provisions still allow associations to recommend prices and MAISZ did not penalise members that had not adhered to the recommended fees.

Hungarian newspapers

Two Hungarian newspaper distributors, Hungarian Wholesale Newsagent Co Ltd and Hungarian Post Co Ltd, were each fined approximately €1.9 million for agreeing not to enter the market where the counterparty was active, i.e. the market for single copy sale of periodicals and the market for distribution of newspapers based on subscription. As the two undertakings are virtual monopolists on the respective markets, the agreement aimed at excluding competition in any form on the two markets.

Budapest Stock Exchange

Also, the Budapest Stock Exchange ('BSE'; alongside several broker companies) was subject of an investigation by the GVH. The investigation was triggered by the radical increase by broker companies of premium fees gained after transactions by 200 to 300 per cent. Brokers followed a resolution of the Budapest Stock Exchange in this regard. However, the GVH's investigation did not unveil sufficient evidence for an infringement, and the proceedings against the broker companies were terminated. The investigation against BSE was closed after it offered several commitments.

iii Trends, developments and strategies

The construction industry was hit by an array of investigations (and is subject to a further investigation into an alleged hard-core cartel; see below). An interesting aspect of this is that some of the investigations were instigated *ex officio* on the basis of evidence found during other investigations that were carried out for another purpose. The amount of fines imposed by the GVH underpins that public enforcement in Hungary is on a par with that of Western European jurisdictions as infringements are prosecuted and penalised rigorously and heavily.

iv Outlook

Leniency

The relationship between leniency and private enforcement has been debated by experts since these approaches have come into existence. Recently, undertakings have been more willing to submit themselves to the leniency policy of the GVH. However, the effectiveness of this institution remains questionable as long as undertakings face significant private enforcement claims in spite of obtaining leniency from the authority. As mentioned above, amendments to the Competition Act have been adopted recently and will enter into force on 1 June 2009. Beside transposing the leniency programme of the GVH into primary law, the amendments will also provide that undertakings that are exempt from being fined will also be exempt from liability for damages to the extent that the damages may be recovered from another member of the cartel that is not subject to the leniency policy.

Pending cases

The GVH has accused several important manufacturers of cathode-ray tubes of engaging in price-fixing and market sharing, customer allocation, limiting output and coordinating production in Europe between 1995 and 2007. The proceedings initiated by the GVH relate to alleged infringements prior to Hungary's EU accession, as infringements thereafter are covered by parallel investigations by the European Commission (which relieved the GVH of its competence to investigate this cartel behaviour).

The GVH is investigating an alleged cartel in the market for building materials. Several prominent manufacturers of concrete are accused of having fixed prices and allocated markets since 2002. An interesting side aspect of the investigation is that the GVH is currently assessing a proposed concentration involving one of the implicated undertakings, Strabag. The GVH suspects Strabag to have entered into an agreement with other concrete manufactures about the shutdown of the target following clearance by the GVH and the allocation of its assets among other cartelists.

Other pending proceedings relate to the renovation of heating centres (several construction undertakings are accused of rigging bids for reconstruction works tendered by the Hungarian Main Heating stock exchange) and taxi companies (which are accused of rigging bids in public tenders).

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Preliminary remarks

The Competition Act is fully harmonised with the respective EU legislation. In fact, restrictive agreements and abuse of market dominance were regulated in Hungary became it became an EU Member State. Compared to the list in Article 82, the Competition Act provides a more detailed enumeration of prohibited conduct. For example, the removal of products from the market with the (only) aim of escalating prices (and without any other business reason), or the application of extremely low prices in order to squeeze out competitors are listed expressly.

ii Significant cases

Supplier contracts

Most recently the GVH has closed its proceedings against Tesco without imposing a fine as Tesco agreed to amend its agreements with suppliers. The amendment of the agreements should end Tesco's alleged abuse of market power.

In February 2008, the GVH commenced an investigation into the market practices of Tesco. In this context, the authority focused on the provisions in the supply agreements which related to penalties and the return of products. According to a provision in the general terms and conditions of the supply agreements, Tesco had 'the right to return any amount of goods supplied by the Supplier (regardless of the quality, quantity, state or time of the supply of the goods)'.

In light of the GVH's above findings, Tesco undertook to comply with the following changes in its negotiations with suppliers starting in March 2009: (1) the general terms and conditions of 2007 will apply to agreements concluded before 2007; (2) the terms and conditions sheet will be printed in a font size that corresponds to the font size generally applied in case of other agreements; and (3) all reasonable costs relating to quality maintenance will be charged after the service has been actually provided. The GVH accepted these commitments.

Three other retail chains were forced to alter their supplier contracts as well following investigations by the GVH. The GVH examined in all three cases whether the undertakings had abused their market power in the course of entering into the supplier contracts. All the undertakings concerned offered commitments to modify their respective supplier contracts. Provera Beszerzési committed itself to refrain from including provisions on exclusive promotion campaigns and to use a uniform font size. Auchan undertook to set out how to keep in touch with suppliers so that they could obtain information, on their request, on the stock and the volume of sales of their respective products. Metro committed to remove clauses on exclusive promotion campaigns, on its unlimited right to return goods, and on its right to reimbursement for discount losses stemming from the change of supplier or supplier programmes.

DÉMÁSZ Kft

Another notable case was initiated by the GVH against DÉMÁSZ Kft (a south Hungarian electricity provider) and against DHE Kft (an electricity network distributor). The investigation related to the question of whether the companies did commit an abuse of dominance by not giving their consent to the transformation of the public electricity network into a dual-system network in 2007. In 2008, the GVH stated that this refusal was not anti-competitive.

However, DÉMÁSZ Kft was fined 45 million forints for other practices in the context of overhauling public lighting. DÉMÁSZ Kft, *inter alia*, entered into all-inclusive long-term agreements on the provision of public lighting services that contained penalty clauses that prevented the respective municipalities from, or at least restricted them in, purchasing electricity for public lighting from other undertakings. The decision of the GVH was confirmed by the Appeal Court of Budapest at the end of 2008.

Microsoft

In October 2008 the GVH adopted a decision that cleared Microsoft of an allegation to have abused its market dominant position. The GVH initiated proceedings in July 2007 as Microsoft was suspected to have engaged in predatory conduct when it provided marketing support to certain distributors. The investigation, however, unveiled that Microsoft did not abuse its dominant position as it neither imposed exclusivity terms nor conditions for refusing competing products in return for rewards. On average, the value of marketing support by Microsoft did not even reach 1 per cent of Microsoft's (domestic) turnover in 2006 or 2007. Contracts with distributors also did not impose a non-compete obligation on distributors or minimum purchase obligations.

iii Trends, developments and strategies

The above-mentioned cases illustrate the GVH's recent approach: instead of establishing an abuse of dominance and impose fines, the GVH chooses to allow the undertakings to submit commitments to allay competition concerns. In the GVH's view, voluntary commitments that bring proceedings to an expedite end are more effective and useful than formal decisions. This allows the GVH to deploy resources more efficiently and use more resources for the detection of hard-core infringements of the Competition Act.

iv Outlook

The GVH initiated proceedings in relation to an alleged abuse of dominance against Magyar Telekom Nyrt in February 2009. According to the GVH, the company abused its dominant position on the market for fixed-line broadband internet services through offering preferred conditions in internet packages, i.e., combo offerings for fixed-line and mobile internet services. This behaviour is apt to prevent competitors from entering the market. As the investigated behaviour is likely to affect trade between the Member States, the GVH also suspects Magyar Telekom Nyrt of having infringed Article 82 EC Treaty.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Since 2001, the GVH has been able to conduct sector enquiries. The mobile phone sector was the first to undergo an industry-wide investigation in 2002. Since then mortgage loan companies and the entire electric power industry have been investigated.

i Significant cases

Banking sector

Most recently, the GVH finalised its investigation into the banking sector. The investigation was triggered by the suspicion that competition in the markets for retail banking and banking services for SMEs is distorted due to very high switching costs.

This suspicion was confirmed by the investigation. According to the report released in February 2009, switching banks on loan markets is rare and difficult for customers because of an information asymmetry that favours banks. Four factors were identified that distort competition and proposals to remedy these problems submitted:

a no proper possibility is provided for the clients to react appropriately in the case of unacceptable changes by the bank. The GVH recommends, therefore, the establishment of a regulation that requires an objectively justified reason for a unilateral amendment of contracts that is based on an necessity outside the bank's sphere;

b the GVH also alluded to the fact that switching between banks on the credit market is very expensive (as high as 4 to 10 per cent of the loan value). This ties clients to their unfavourable credit conditions and leads to unusually high profit margins (compared with a competitive market). The GVH proposed to regulate early repayment charges in accordance with European regulatory initiations;

c the GVH also criticises that it is difficult to compare the prices of services of different banks. To solve this issue the GVH established an independent website, where the conditions for various products and services may be compared; and

d the GVH is critical of the fact that in the case of refinancing the subventions given by the state are not portable. The GVH, therefore, suggested changing this practice.

Sour cherries

The GVH received two complaints about anomalies found on the sour cherry market, relating to sour cherry purchase prices. In order to clarify the situation, the GVH conducted a market analysis in which it established the low purchase prices were not a result of a cartel between certain buyers, but the result of market processes. The investigation also rebutted the assertion that purchasers do enjoy a market dominant position. Rather, there are several market players that purchase sour cherries.

ii Trends, developments and strategies

According to the GVH, it will instigate a market whenever it suspects a considerable dysfunction of proper competition in an industry that merits an investigation. This was demonstrated, for example, in the investigations into banking services and the sour cherry market, where the GVH reacted quickly to suspected distortions of competition.

iii Outlook

The results of the investigation into the media market were about to be published when this publication went to press. It is expected that the GVH has focused in its investigation on advertisement marketing practices, access to movie licences and the right to broadcast sporting events. Other than that, the GVH has not given any indications of anticipated sector inquires.

As regards legislation the GVH's report on its banking sector enquiry prompted a new bill to be adopted by parliament which partly tackles the identified problems (i.e., price comparability, reducing the costs of bank switching and unilateral amendments to contracts). The GVH expects that after the amendment enters into force, there will be more products available to customers with flexible interest rates. It is also convinced that the amendment will stimulate competition in the banking sector, that clients will profit from the changes and, consequently, that consumer welfare will be enhanced.

V STATE AID

The Hungarian State Aid regulation is applied mostly by the Office Supervising State Aid ('TVI') which was set up in 1999 by the Hungarian Ministry of Finance. Drafts of all state aid-related laws must be submitted to the TVI for prior review.

The GVH does not have the authority to act in state aid matters. It may, however, submit notifications and letters to other administrative authorities, such as the TVI, if the GVH assumes that competition may be affected in any way. An example for the above-mentioned right of the GVH was a notification to the TVI regarding state aid to a small regional cable TV programme.

i Significant cases

In February 2009 the European Commission approved two state aid schemes submitted by the Hungarian government. The schemes aim at helping out undertakings dealing with serious financial issues.

The first scheme is based on the provisions of the Commission's temporary framework (IP/08/1993) that deal with compatible aid of a limited amount. In particular, the maximum amount of aid must not exceed €500,000 per company and the scheme applies only to businesses that were not in difficulty on 1 July 2008.

The second scheme complies with the rules in the temporary framework that deal with aid in the form of subsidised interest rates. The low rates will be available for loans contracted no later than 31 December 2010, but only on interest payments up to 31 December 2012. After that date, firms will have to pay market rates. The scheme does not apply to firms that were already in difficulty on 1 July 2008.

ii Trends, developments and strategies

Also with regard to Hungary, state aid policy in 2009 will be overshadowed by the ongoing financial and economic crisis. The support package for the Hungarian financial institutions has been authorised by the European Commission and will now be introduced to the market. It remains to be seen how the market reacts to it and in particular, whether the package will bring back sufficient financing to the real economy.

Finally, Hungary has committed to notify restructuring or liquidation plans for companies that have either failed under the guarantee scheme for banks that can no longer be considered as fundamentally sound. It is to be expected that the second half of 2009 will bring a number of notifications of this sort to the European Commission.

iii Outlook

In 2009, an important state aid decision for the Hungarian oil and gas sector is to be expected from the European Commission. After it opened an in-depth enquiry into the mining fee exemption for Hungarian oil and gas company MOL in January 2009, it is to be seen whether the European Commission finds the agreement between the Hungarian government and MOL to be in violation of the EC state aid rules. The agreement exempts MOL from the recent increase in mining fees due on revenues from hydrocarbons exploitation. The European Commission is concerned that the combined effect of a fixed fee for MOL and the subsequent modification of the Mining Act leads to exempt MOL from taxes that its competitors have to pay, thereby conferring it an unfair competitive advantage. In its preliminary assessment, the European Commission found no grounds on which the agreement could be compatible with the state aid rules.

In another investigation that started at the end of April 2009, the European Commission will look into measures in favour of Hungarian fertiliser producer Péti Nitrogénmuvek. The European Commission will investigates whether, inter alia, loans granted by the Hungarian Development Bank of some €85 million, covered by state guarantees, breach EU state aid rules.

VI CONCLUSIONS

i Pending cases and legislation

The focus of competition enforcement in EU Member States in recent years has been, in particular, on more deterrent fines and leniency programmes. Hungary has followed suit. At present, the most infamous infringements of the competition laws in Hungary relate to the road construction cartels. The revelation of these cartels led to a considerable amount in imposed fines and resulted in criminal charges against the cartel offenders.

Several high-profile cases are currently pending. These relate to investigations into alleged cartels (cathode-ray tubes and concrete production) an abuse of market dominance (in the market for provision of broadband internet services) and the media market inquiry. In view of the track record of the GVH, high fines can be expected should the allegations be proven. All of this underlines the standing of the GVH as one of the most sophisticated competition authorities and one of the most rigid public enforcers of competition rules in central and eastern Europe.

The entering into force of the long awaited amendments to the Competition Act on 1 June 2009 is highly anticipated. Beside changes to the merger control regime, the amendments will incorporate the Hungarian leniency programme into primary legislation and will introduce an important assumption in relation to supra-competitive profits that will significantly lower the burden of proof in compensation claims for damages suffered from anti-competitive practices. Until proven otherwise, it will be assumed that anti-competitive infringements have affected the price by 10 per cent, i.e., that 10 per cent of the revenues stemming from the impermissible behaviour amount to supra-competitive profits. Hence, the onus of proof will shift; it will be down to the infringing undertaking to prove that its infringements did not result in any extra profit.

Chapter 17

IRELAND

*Patrick O'Brien and Fiona McKeever**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

The Irish Competition Authority ('the Authority') is responsible for enforcing Irish and EC competition law within the Irish state. To carry out its enforcement function, the Authority currently has a dedicated staff of 59 people, who are organised along six divisional lines, which correspond to the Authority's areas of activity. The Cartels Division is the most resourced division within the Authority, reflecting the priority given to detecting, investigating and prosecuting cartels.[1] It is headed by Ms Carolyn Galbreath, who has a team of 13 staff, including one detective sergeant on secondment from the Garda Bureau of Fraud Investigation ('GBFI'). The Division's staff is generally made up of former members of other law enforcement agencies experienced in investigating white-collar crimes. This division is responsible for the initial investigation of an alleged cartel and the preparation of a file to be sent to the Director of Public Prosecutions ('DPP') if the Authority recommends a trial prosecution. The DPP is ultimately responsible for bringing criminal proceedings on indictment against individuals and companies.

The second largest division within the Authority is the Monopolies Division, which investigates non-hard-core infringements of the competition rules such as non-cartel agreements (e.g., resale price maintenance and other vertical agreements) and abuse of dominance cases. The Chairman of the Authority, Mr William Prasifka, heads up this division with a team of 10 members of staff. If an investigation results in obtaining evidence

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1 Enforcement against cartels is one of the Authority's 'Strategic goals' which is set out in its Strategy Statement for 2009-2011. The Competition Authority's mission statement is '[t]o ensure that competition works well for consumers and the Irish economy'. To fulfil this, the Competition Authority has identified five 'Strategic Goals': raising awareness, enforcement, merger review, compliance and advocacy.

of an infringement, it may initiate civil proceedings before the court seeking declaratory or interlocutory relief. The Authority has also in the past entered into settlement agreements with companies to close investigations without having recourse to civil litigation.

The remaining staff are positioned in four other divisions, responsible for mergers, corporate services, advocacy and policy.

ii Enforcement agenda

The Authority's enforcement regime is primarily focused on deterring hard-core price-fixing, bid-rigging and market-sharing cartels, which the Authority considers to be serious crimes against the public. 2008 resulted in success for the Authority in securing four criminal convictions for cartel activity. It is anticipated that enforcement of competition law through the criminal courts will intensify in the coming year. Civil enforcement of non-cartel activity, particularly abuse of dominance cases, is also a priority for the Authority.

II CARTELS

i Significant cases

Introduction

The campaign against cartels activity has developed significantly since domestic competition legislation was first introduced into Ireland with the enactment of the Competition Act 1991. At that stage, although cartel activity was considered a civil wrong, the original legislation did not criminalise cartel activity. This position dramatically changed with the enactment of the Competition (Amendment) Act 1996, which introduced criminal sanctions, including the possibility of a two-year term of imprisonment for individuals convicted of engaging in cartel activity.[2] The introduction of criminal sanctions gave an impetus to the campaign to stamp out cartel activity in Ireland. The penalties were further increased with the introduction of the Competition Act 2002 ('the Competition Act'), which provided for the imprisonment of individuals for up to five years.

Legislative framework

As noted above, Irish competition law is contained in the Competition Act. Although it is modelled on the competition provisions of the EC Treaty, there are some differences between the two regimes in terms of substance, burden of proof and penalties. These are briefly described below.

Section 4(1) of the Competition Act ('Section 4'), which is based on Article 81(1) of the EC Treaty (Article 81), prohibits and renders void agreements, decisions of associations of undertakings and concerted practices that have, as their object or effect, the prevention, restriction or distortion of competition in trade in any goods or services in Ireland or any part of Ireland. Arrangements that infringe Section 4(1) of the Competition Act will not be unlawful where they satisfy the efficiency conditions listed

2 The Competition Act 1991 and the Competition (Amendment) Act 1996 are collectively known as the Competition Acts 1991 and 1996.

in Section 4(5), which are the same criteria as those listed in Article 81(3). Section 5(1) of the Competition Act ('Section 5') prohibits the abuse of a dominant position in Ireland, or any part of Ireland and is modelled on Article 82 of the EC Treaty ('Article 82').

All infringements of Sections 4 and 5 are criminal offences and can be tried either summarily, that is in the lower criminal courts, or on indictment. All convictions on indictment carry a penalty of a fine not exceeding the greater of €4 million or 10 per cent of the turnover of undertaking in the previous completed financial year. Any person convicted of an indictable offence is deemed disqualified from being a director for five years from the date of conviction.[3] An important feature of the Irish legislative framework is enforcement through the courts system. Unlike the European Commission ('the Commission'), the Authority may not issue an infringement decision, or fine individuals or companies.

Irish legislation distinguishes cartel offences as described in Section 6(2) of the Competition Act[4] and other anti-competitive behaviour in two manners: first, the evidential burden on the prosecutor is lessened in relation to the first category, and second, cartel activity is punished more harshly than non-cartel activity.

In particular, when prosecuting cartel offences, the court must presume that those activities have as their 'object' the prevention, restriction or distortion of competition, unless the defendant can prove otherwise. The prosecution thus has to prove less of the constituent elements of the crime when prosecuting cartel offences. Second, on conviction of a cartel offence, in addition to being fined, an individual can be sentenced to five years' imprisonment. No other competition offence carries a custodial sentence. The reversal of the burden of proof, and the tougher sentencing regime reflect the fact that cartels are generally considered to have no consumer welfare enhancing attributes, therefore the prosecution of such offences should be made easier and the penalty should be sufficiently harsh so as to promote deterrence.

Criminal conviction successes

Since 2002, 23 criminal convictions have been secured against companies and individuals involved in cartel activities. The sectors affected by the cartel activity include petrol retailing, home heating and motor vehicles. Two of the convictions were European firsts. In October 2005, Mr J P Lambe pleaded guilty to aiding and abetting Corrib Oil Company in the commission of a criminal offence in the Dublin Circuit Court, and was subsequently sentenced to six months' imprisonment, suspended for one year. This was the first custodial sentence to be imposed on an individual for a cartel offence in Europe.

3 Section 160(1) of the Companies Act, 1990.

4 Cartel activities are not defined as 'cartels' as such but are covered by Section 6(2) of the Competition Act as: 'an agreement between competing undertakings, a decision made by an association of competing undertakings, a decision made by an association of competing undertakings or a concerted practice engaged in by competing undertakings the purpose of which is to – (a) directly or indirectly fix prices with respect to the provision of goods or services to persons not party to the agreement, decision or concerted practice, (b) limit output or sales, or (c) share markets or customers'.

Another first followed in March 2007 when the DPP secured its first conviction following a jury trial, the case of *DPP v Denis Manning*.[5] This is now the most important competition case brought before the Irish criminal courts. This case was brought against Mr Manning, who was the Head of the Irish Ford Dealers Association. Mr Manning was charged with aiding and abetting the association and its members to implement an agreement which had as its object the prevention, restriction or distortion of competition in the trade of motor vehicles in Ireland by directly or indirectly fixing the selling price of motor vehicles.

Judge McKechnie sentenced the defendant to a 12-month custodial sentence, suspended for five years, in addition to a fine of €30,000. More important than that the actual sentence imposed in the case, is the clear signal from the Judge that custodial sentences should become commonplace, rather than exceptional, on conviction of cartel activities. For these reasons, the Judge's comments merit reproduction here.

> *In my view, there are good reasons as to why a court should consider the imposition of a custodial sentence in such cases.*
>
> *Firstly, such a sentence can operate as an effective deterrent in particular where if fines were to have the same effect they would have to be pitched at an impossibly high figure.*
>
> *Secondly, fines on companies may not always guarantee an adequate incentive for individuals within those firms to act responsibly. This particular point may not, in some circumstances, have the same force where individuals are concerned.*
>
> *Thirdly, a knowledge within undertakings that courts will regularly make use of a custodial sentence may act as an incentive to people to offer greater cooperation in cartel investigations, and quite frequently, against their employers.*
>
> *Fourthly, prison, in particular for those with unblemished pasts, for those who are respected within the community, and for those who are unlikely to re-offend can be a very powerful deterrent [...] Finally, the imposition of the sentence for the type or category of persons above described can carry a uniquely strong moral message. Accordingly there are, in my view, some very powerful reasons to custodise an individual who has been found guilty under the 2002 Act. In this context I would like to state clearly and categorically that I see no room for a lengthy lead-in period before jailing convicted persons becomes commonplace under this legislation.*

This case was important not only from the perspective of sentencing, but also from a policy perspective. The Judge reiterated that cartels were not simply esoteric economic concepts, but serious crimes against the public at large. He stated:

> *This type of crime is a crime against a consumer and is not simply against one or more individuals. To that extent, it is different from other types of crime and while society has an interest in preventing, detecting and prosecuting all crimes, those which involve a breach of the Competition Act are particularly pernicious. In effect every individual who wished to purchase for cash a vehicle from these dealers over the period which I've mentioned were liable to be defrauded, and many surely were, by the scheme and by the practices which unashamedly this cartel operated. These activities, in my view, have done a shocking disservice to the public at large.*

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5 *DPP v Denis Manning*, unreported judgment, 9 February 2007.

Convictions in 2008

2008 did not provide such a landmark judgment as Judge McKechnie's, however, it did produce further criminal convictions for cartel activity. These convictions were obtained in connection with a cartel case involving the sale of Citröen cars in Ireland. Two individuals were each sentenced to three months imprisonment, suspended for two years in one case and five years in the other.[6] More recently, in a judgment delivered on 23 March 2009, Mr Patrick Duffy was sentenced to six months and nine months imprisonment, suspended for five years. Nine prosecutions remain to be heard by both the Circuit Court and Central Criminal Court in relation to that cartel.

In 2008, the DPP also commenced new criminal proceedings against 11 defendants in two separate cases of alleged bid rigging. The sectors affected are the provision of the domestic waste collection services in the west of Ireland, and vegetation services to be provided to Iarnrod Eireann (Irish Rail). Six defendants have been sent forward to the Central Criminal Court in respect of the alleged bid rigging in the waste collection sector, with the trial due to be heard in June 2009.

ii Trends, developments and strategies

To improve the effectiveness of the enforcement of the cartel provisions of the Competition Act, the Authority has proposed 13 amendments to the legislation.[7] The Authority has categorised its proposals into three sets: investigative powers, protection of sources, and penalties and deterrents.

The majority of the proposals are technical in nature four, however, merit individual attention as they point to the Authority's key policy objectives.

First, the Authority wants to protect the sources, such as whistle-blowers, of information it receives. With this policy objective in mind, the Authority has proposed that the Competition Act be amended so that those who retaliate against whistle-blowers will face punishment.

Second, the Authority wants to deter witnesses, who are summoned to appear before it, from falsely testifying. According to the Authority's submission, it has experienced cases of witnesses deliberately lying to Authority officials, leading to delays and increased costs in investigations. The Authority has proposed that the Competition Act contains a specific statutory offence of perjury, or suborning perjury for witnesses, which would carry a penalty of a substantial fine and a maximum sentence of five years imprisonment.

Third, the Authority has encountered obstruction by companies and individuals during the course of investigations into alleged infringements. To deter such activity, which delays investigations and adds to enforcement costs, the Authority has proposed that obstruction during the course of an investigation amounts to an offence that can be fined following either summary prosecution or trial on indictment. The Authority has also called for the arrest of any individual who obstructs such an investigation.

6 *DPP v. Mr James Durrigan*, 8 May 2008 and *DPP v. Mr Jack Doran*, 8 May 2008.

7 S/07/008 Competition Authority submission to the Department of Enterprise, Trade and Employment, December 2007.

Finally, the Authority has called for the legislation to include factors that a court should take into account when fixing the penalty to apply to an individual or company on conviction. In particular, the Authority has indicated that penalties are increased proportionate to the length of time the cartel operates in line with European Commission 2006 guidelines on the method of selling fines.

One of the strategies adopted by the Authority to increase the effectiveness of its enforcement is to encourage individuals or companies that may have been involved in cartel activity to come forward to the Authority and 'blow the whistle' on the cartel. In return for being the first to provide evidence to the Authority, the individual or company (provided that person is not the ringleader in the cartel) can avail of the cartel immunity programme jointly operated by the DPP and the Authority. This programme offers immunity from prosecution to the first person only who comes forward with evidence of cartel activity. It is unclear how effective the programme is in practice as the Authority does not publish statistics regarding its operation. There are a number of difficulties with the design of the programme, for example, the fact that it is an 'all or nothing' reward and the need for full disclosure of all offences under the Competition Act, however, there is probably a more serious non-legal problem associated with operating a whistle-blowing programme in Ireland: a deep-seated cultural aversion displayed towards informants, which would appear to operate against the effectiveness of an immunity programme. Confession evidence may well become more popular if and when custodial sentences, which are not suspended, become more prevalent.

The Authority has also indicated that its campaign against cartels includes a campaign against collusive tendering in public procurement as it often leads to increased prices to governments and state entities, which are subsequently borne by the taxpayer. This priority is also reflected in the bid-rigging cases that the DPP is now bringing before the criminal courts.

iii Outlook

During the prosecution of these cartel offences, the Authority encountered significant challenges, which were more formidable than those normally encountered in prosecuting other crimes. As a consequence, the Authority has called for changes to the current legislative framework that will improve its investigative tools and the protection of sources, and enhance the penalties and deterrents that apply under Irish legislation. Although a Draft Heads of Bill has not yet been published at the time of going to press, it is anticipated that draft legislation will be put before Irish parliament by the end of 2009. If the Authority is successful in having its proposals signed into law, the outlook for public enforcement of competition law is one of a strengthening regime that will inevitably result in individuals serving jail time.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i *Significant cases*

The Authority may investigate suspected infringements of Sections 4 and 5 and Articles 81 and 82 EC Treaty but cannot reach a binding administrative decision establishing the infringement nor can it impose a civil fine. As explained above, for non-hard-core competition infringements, the Authority brings civil proceedings in which economic evidence normally plays an important part. In the two significant civil cases instituted by the Authority to date both parties relied on expert economic evidence and the High Court appointed its own economic assessor.

There have been two significant Irish civil competition cases brought by the Authority in relation to restrictive agreements and abuse of dominance, namely, the *ILCU* case (Section 5/Article 82) and the *BIDS* case (Section 4/Article 81). Both of these cases, outlined below, started off in the High Court applying Irish competition law but the pleadings were changed to apply the equivalent EC competition law as both cases involved the possibility of trade between Member States and so the court by virtue of EC Regulation 1/2003 had to apply EC competition law.

On 27 July 2006, the High Court rejected a challenge brought by the Authority in respect of a scheme to rationalise the beef-processing industry in Ireland. The Authority initiated proceedings against the Beef Industry Development Society Limited ('BIDS') and Barry Brothers (Carrigmore) Limited in June 2003 seeking a declaration that the rationalisation scheme infringed Section 4(1) and Article 81(1).

The background to the case is that in 2002, the majority of Irish beef processors formed the Beef Industry Development Society Ltd. The object of BIDS is to reduce the total capacity of the processing industry by up to 25 per cent according to a scheme ('BIDS arrangements') agreed between the BIDS members. Previous market studies sponsored by the Irish government had found that long-term structural overcapacity in the Irish beef-processing industry had led to significant inefficiencies and that significant cost savings could be gained by an industry-led rationalisation scheme. Under the BIDS arrangements some of the BIDS members would leave the processing industry, decommission their processing plants and agree to certain limited non-compete obligations. In return, they would be compensated by the remaining members of BIDS.

The Authority challenged the BIDS arrangements in the High Court on the grounds that it infringed Article 81(1) and in the alternative did not satisfy the condition of Article 81(3).The BIDS defence was that the BIDS arrangements did not infringe Article 81(1) but in the alternative, if Article 81(1) were held to apply, that the conditions of Article 81(3) were satisfied.

The High Court held in July 2007 that Article 81(1) did not apply to the BIDS arrangements but went on to state that, as the action failed on Article 81(1), it was not strictly necessary to proceed and consider the arguments advanced by the parties in relation to Article 81(3). However, the High Court nevertheless set out its conclusions on Article 81(3) deciding that three of the conditions were satisfied but the 'consumer benefits' condition was not. The Authority appealed this decision to the Supreme Court in September, 2006, which referred a question of the interpretation of Article 81(1) to the ECJ in March 2007. BIDS also lodged a cross-appeal in the Supreme Court seeking to overturn that part of the High Court finding that the consumer benefits test in Article 81(3) was not satisfied.

In summary, BIDS argued before the European Court of Justice ('ECJ') in written and oral submissions[8] that the BIDS arrangements do not come within the narrow category of infringements by object, but should, on the contrary, be analysed in light of their actual effects on the market in considering the application of Article 81(1). BIDS submitted that the object of the BIDS arrangements was not adversely to affect competition or the welfare of consumers, but to rationalise the beef industry to make it more competitive by reducing, but not eliminating, production overcapacity.

The ECJ did not accept the BIDS arguments but concluded, agreeing with the Opinion of the Advocate General on 4 September 2008, that 'the object of the BIDS Arrangements is to change, appreciably, the structure of the market through a mechanism intended to encourage the withdrawal of competitors' and that the BIDS arrangements as described by the Supreme Court have as their object the prevention, restriction or distortion of competition within the meaning of Article 81(1) and that an assessment of the actual effects of the BIDS arrangements is not necessary for Article 81(1) to apply. A commentary on the resumption of the case in the Supreme Court is set out in the conclusion to this chapter.

On 22 October 2004, the High Court decided in favour of the Authority in its claim against the Irish League of Credit Unions ('ILCU') for abuse of a dominant position in the distinct product markets for credit union representation services and savings protection schemes in contravention of Section 5 of the Competition Act and Article 82 of the EC Treaty. The High Court also found a breach by the ILCU of Section 4(1) of the Competition Act and Article 81(1) of the EC Treaty in respect of the conduct at issue. The ILCU appealed the High Court decision to the Supreme Court.

In 1968, the ILCU launched a savings protection scheme ('SPS'). Section 46(2) of the Credit Union Act, 1997 defines an SPS as: 'a scheme established to protect, in whole or in part, the savings of members of a credit union in the event of insolvency or other financial default on the part of the credit union'.

The SPS allows the ILCU to monitor and advise individual credit unions on how to improve efficiency. To fulfil this role and preserve public confidence, a fund was put in place so that the ILCU could assist any credit unions in financial difficulties. No single credit union has a right to financial assistance or a proprietary interest in the SPS. The ILCU only offers discretionary assistance. If any member credit union refused to obtain loan protection/life-savings insurance ('LP/LS') insurance from the ECCU Assurance Company Limited ('ECCU'), the ILCU could disaffiliate them, meaning they would lose access to the SPS fund, which is only open to ILCU members.

In the High Court, Kearns J found that tying had occurred on the basis that representation services and SPS should be deemed to be distinct products offered in distinct product markets. He preferred to use the 'innate-characteristics' test put forward on behalf of the Authority rather than the SSNIP test put forward on behalf of the ILCU to reach this conclusion, stating that the ILCU enjoyed a presumption of dominance on

8 Oral hearing of June 2008.

the basis that it held 80 per cent of the market share for credit representation services and 100 per cent of the market for SPS services. He held that it was therefore: 'common sense that as the sole supplier of SPS, ILCU would be immune from a 5 to 10 per cent increase given the absence of any alternative product'.

He also accepted that the ILCU rules constituted an abuse of dominance since the arrangement in place tied the purchase of SPS services to the purchase of representation services.

The ILCU appealed to the Supreme Court. In its judgment of 8 May 2007 Fennelly J stated that for the Authority's case to succeed, credit union representation services and SPS would have to be considered distinct products and in different relevant product markets.

Based on academic authorities and evidence given during the case illustrating that no other insurance company on the market was prepared to provide a stabilisation service such as the SPS, Fennelly J held that SPS could not be viewed as a distinct product in its own product market. The service was provided as part of a bundle of services provided by the ILCU and not as an individual product.

Fennelly J stated that it was unnecessary for the purposes of the case to consider whether representation services formed an independent product. However, he found the Authority's claim that potentially any and every association of business undertakings should be held automatically to be engaged in a business consisting of the provision of services for reward to be troubling. If this were the case, any trade association representing a substantial percentage of a particular trade could be deemed to hold a dominant position in a market for representation services in the trade or profession in question.

The Supreme Court concluded that since the Authority had failed to establish that SPS and representation services could be regarded as distinct products in distinct product markets, the case for alleged abuse of a dominant position by tying failed. As the action failed under Section 5 of the Competition Act, it also failed under Section 4(1) of the Competition Act.

ii Trends, developments and strategies

As a result of Ireland's 2009 Budget, the National Consumer Agency will be amalgamated with the Authority, although the time frame for the amalgamation is not year clear. The National Consumer Agency, a statutory body, currently promotes consumer protection and enforces consumer law. Although the Authority and the National Consumer Agency currently operate in accordance with a cooperation agreement, the Authority acknowledges that competition policy and consumer policy, though complementary, are focused on different aspects of consumer welfare and that the two bodies will need to implement the two respective policies in a coordinated manner.

iii Outlook

In relation to civil public enforcement of Irish competition law, the current chairperson of the Authority stated in a radio interview on 5 March 2009 that statutorily Ireland has one of the weakest civil enforcement regimes in Europe. He again called on the government publicly to amend the legislation to allow the Authority to reach binding decisions and to impose civil fines. He did, however, acknowledge some constitutional difficulties under Irish law in allowing a state entity other than a court to impose fines.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i *Significant cases*

The Authority may carry out studies on competition in any market in the state and can make recommendations on the basis of its findings. That said, while it can use powers to compel the production of documentation, it may not implement reforms in the sectors examined as part of the studies. This is the role of government and the public and sometimes private authorities responsible for regulating the sectors concerned.

In general, public enforcement of competition law rests primarily with the Authority but there are independent sector specific regulators in areas such as communications, energy and aviation. In some cases it is appropriate for the Authority to liaise with the relevant regulator to decide who is best placed to deal with competition issues arising in a regulated sector. In this regard, the Authority has entered into cooperation agreements with a number of regulators such as the Broadcasting Commission of Ireland, the Commission for Energy Regulation, the Commission for Aviation Regulation, the Health Insurance Authority and the Commission for Communications Regulation ('ComReg').

ii *Trends, developments and strategies*

ComReg is the National Regulatory Authority for the purposes of the European regulatory framework for electronic communications. In relation to certain relevant markets ComReg may designate entities as having significant market power, a concept equivalent to that of dominance under the competition rules, and must following such designation impose on the entity concerned appropriate remedies. Since 2007, following the amendment of the Competition Act by the Communications Regulation (Amendment) Act, 2007, ComReg has enjoyed concurrent competition powers with the Authority in relation to the provision of electronic communications networks, services and associated facilities. To date ComReg has not used these powers.

iii *Outlook*

The Authority acknowledges that in some cases, the exercise of specific regulatory power by a regulator may have a better prospect of a satisfactory outcome in a quicker time frame than the Authority could achieve through legal proceedings.

V STATE AID

i *Significant cases*

One of the most significant state aid judgments of 2008 was the Court of First Instance's ('CFI') judgment in December 2008 annulling the Commission's 2004 decision concerning Charleroi airport and the financial package that Irish airline Ryanair had received to encourage it to base aircraft at the airport and to develop routes. The CFI's judgment will undoubtedly be of interest to the Authority, which has previously investigated incentive schemes that the Dublin Airport Authority, which manages Dublin airport, has offered to airlines to encourage them to develop airline routes out of Dublin.

ii Trends, developments and strategies

On 30 September 2008, the Irish government announced its decision to introduce a banking guarantee scheme ('the Guarantee Scheme') to safeguard all deposits, covered bonds, senior debt and dated subordinated debt (lower tier II), covering seven banking institutions and their subsidiaries. Under the Guarantee Scheme these institutions are subject to a charge payable to the Irish government and terms designed to protect taxpayers' interest. The Commission approved the Guarantee Scheme on 13 October 2008, deeming it an appropriate means of remedying a serious disturbance in the Irish economy, without unnecessarily distorting competition. The Commission also noted the Guarantee Scheme did not undermine the integrity of the Single Market in financial services and complied with EU state aid principles.

The Guarantee Scheme was followed by the Irish government's decision on 28 November 2008 to recapitalise Ireland's three largest financial institutions – Allied Irish Bank, Bank of Ireland and Anglo Irish Bank. This recapitalisation scheme was to be implemented following negotiations between the Irish government and the banking institutions concerned.

On 14 January 2009, the Commission approved an emergency recapitalisation of Anglo Irish Bank by the Irish government worth €1.5 billion. Ultimately, this recapitalisation did not proceed because of a weakening of Anglo Irish Bank's financial position. Instead the Irish government decided to take Anglo Irish Bank into public ownership. The Commission, upon notification, responded that it raised no objections to the change of ownership at the bank and did not regard the act of nationalisation as a state aid issue under EC Treaty provisions. On 11 February 2009, the Irish government announced it had reached agreement with the remaining two banking institutions regarding the terms of the recapitalisation of these institutions. The Commission approved the recapitalisation of Bank of Ireland on 26 March 2009 and Allied Irish Bank on 12 May 2009.

iii Outlook

Given the current economic climate, it is likely, as in other EU Member States, that the government will continue to come up with measures requiring approval from the Commission under state aid rules.

VI CONCLUSIONS

i Pending cases and legislation

The ECJ's decision in the *BIDS* case has now come back to the Supreme Court and the case is set to resume in the second quarter of 2009 and a final decision should be handed down before the end of 2009. The Supreme Court is bound to follow the ECJ on the finding that the BIDS arrangements infringe Article 81(1) so this means that the initial part of the High Court finding on the lack of applicability of Article 81(1) is overturned. The Supreme Court hearing will now be confined to the appeal by the Authority and the cross-appeal by BIDS in relation to Article 81(3). On this, to succeed, BIDS needs to convince the Supreme Court that the High Court was correct in finding that three of the efficiency conditions in Article 81(3) are satisfied and that the High Court erred in law in finding that the consumer benefits efficiency condition was not satisfied.

Some notable features arise from the civil *BIDS* case.[9] First, by taking this action, the Authority has demonstrated its independence by its willingness to challenge a government-backed policy initiative. Second, as referred to above, the case represents an example of where a national court has applied Article 3 of Regulation 1/2003 and found that it was unnecessary to conduct a separate evaluation under Irish competition law where EC competition law applies. Third, the court appointed an economic assessor to assist it in relation to economic evidence. Fourth, although the High Court judge had the benefit of a court-appointed economic assessor, the Supreme Court without the aid of an assessor has to rule on the application of the Article 81(3) test, which involves an assessment of mixed economic and legal issues. Fifth, the ECJ has confirmed that the class of cases that can be deemed to be restrictive of competition by object does not only apply to a narrow class of obvious cases. This makes the whole process of 'self-assessment' for compatibility with Article 81 more difficult because if an agreement is deemed to be restrictive of competition by object, there is no need to consider effects for the purposes or applying Article 81(1) and the burden of proof then switches to the defendant to demonstrate that all of the conditions of Article 81(3) are satisfied.

One noteworthy aspect of the criminal bid rigging cases referred to above involving services to be provided to Irish Rail, is that it was originally commenced in the district court (i.e., the lowest criminal court, which only hears cases of a minor nature) on a summary basis. The court, however, refused jurisdiction, claiming that the case was non-minor and that it would be inappropriate to be heard in the district court. The case will now also be heard before the Central Criminal Court. This is a further example of the seriousness with which the courts are now treating cartel activity.

The Authority has proposed 13 amendments to the current legislation, which are designed to improve the effectiveness of its enforcement agenda in the cartel arena. It is currently expected that draft legislation will come before Parliament during the course of 2009.

ii Analysis

As explained above, the Authority has prioritised the detection and prosecution of hard-core cartel activity, by recourse to the criminal courts. Notwithstanding this, the Authority continues to investigate alleged non-hard-core infringements of the Competition Act under the civil standard with a view to raising awareness of the requirements of

9 Pat O'Brien, one of the authors of this chapter, is the principal instructing lawyer representing BIDS in this ongoing case.

competition law and its consumer-welfare enhancing attributes. Its recent output shows that it will bring civil proceedings where appropriate, however, it has often been able to settle investigations on the basis of undertakings by companies and individuals to comply with competition law, or the issuing of enforcement decisions, where the case-team outlines in a public document the details of a case that it has investigated and the outcome of that case. As one of the strategic goals of the Authority's current strategy statement is raising awareness, this non-criminal output is likely to continue.

Chapter 18

ITALY

*Marco D'Ostuni and Kostandin Peçi**

I CARTELS

i Enforcement of Anti-Cartel Rules[1]

In 2008, the Italian Competition Authority ('AGCM') adopted three decisions under Article 81 EC. In one case only, the infringement was considered as very serious and fines were imposed; in the other two cases, AGCM accepted the commitments proposed by the parties involved. AGCM also issued four decisions pursuant to Article 2 of the Italian Competition Act: two decisions imposing fines, a non-infringement decision and a commitment decision[2].

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1 In Italy, hard-core cartels are prohibited pursuant to both Article 81 EC and Article 2 of Law No. 287/90 ('the Italian Competition Act'), which are substantially identical: the former applies to conduct likely to affect trade between Member States; the latter to anti-competitive practices with a local scope. The same considerations apply to the relationship between Article 82 EC and Article 3 of the Italian Competition Act.

2 Pursuant to Article 14ter of the Italian Competition Act, '[w]ithin three months from notification of the launch of an investigation into the possible violation of Sections 2 or 3 of this law or Articles 81 or 82 of the EC Treaty, companies may offer commitments that would correct the anti-competitive conduct which is the subject of the investigation'. Recently, the TAR Lazio has ruled that the three-month term is not mandatory (see decision of 7 April 2008, No. 2902, *Eutelia v. Autorità Garante della Concorrenza e del Mercato*). In the same decision, the TAR Lazio held that AGCM enjoys a large margin of discretion in choosing whether to close an investigation by adopting a commitment decision or to open a full infringement procedure. However, AGCM cannot accept commitments in hard-core cartel cases.

In *INAIL's Cashier Services*,[3] AGCM found that, between 1996 and 2006, four major Italian banks had rigged their bids for the provision of general cashier services to the Italian Workers Compensation Authority. In particular, AGCM held that the banks had formed a temporary joint venture with the aim of eliminating competitive constraints among them in relation to the tender. AGCM reaffirmed the principle that temporary joint ventures are neutral and legitimate instruments for participating in calls for bids, unless they are misused with the purpose of distorting competition.

In *Bread Prices in Rome*,[4] according to AGCM, the association of undertakings active in the production and sale of bread in the province of Rome had adopted, from 2003 to 2007, measures aimed at fixing the prices of bread within that province. During its meetings, the association had allegedly discussed price and cost trends of bread, in some cases concluding that its members should increase prices. Moreover, the association had issued a recommended minimum sales price list for two main kinds of bread and suggested price increases for other kinds of bread.

In *Pasta Prices*,[5] AGCM fined the main Italian producers of dry pasta and their trade association, Unipi, for entering into an anti-competitive agreement aimed at fixing wholesale price increases for dry pasta from 2006 to 2008. The alleged agreement was not a typical price-fixing cartel, as AGCM admitted that, after agreeing generally to increase prices, each company would autonomously decide the amount and timing of price increases in light of its own cost structure and commercial strategy. However, according to AGCM, this system eliminated any uncertainty on future price behaviour of the cartel members, thereby allowing for higher price increases than would otherwise have been the case.[6]

ii The Italian leniency notice

On 15 February 2007, AGCM adopted its first leniency programme, providing for the total or partial exemption from fines of cartel members reporting on the cartel.[7] The Italian programme is inspired by that of the European Commission, with a few differences.[8]

First, the Italian leniency notice applies to all information or documentary evidence allowing AGCM to carry out targeted inspections or to prove illegal practices.

3 See AGCM decision No. 19251 of 11 December 2008, Case I 686 – *INAIL/Affidamento Servizio di Cassa.*

4 See AGCM decision No. 18443 of 4 June 2008, Case I 695 – *Listino Prezzi del Pane.*

5 See AGCM decision No. 19562 of 25 February 2009, Case I 694 – *Listino Prezzi della Pasta.*

6 AGCM acknowledged that pasta price increases originated partially from a dramatic rise in the cost of durum wheat. However, AGCM did not justify the agreement, because pasta manufacturers reportedly intended to continue to collude regardless of possible decreases in the cost of raw materials.

7 See Comunicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'articolo 15 della legge 10 ottobre 1990, No. 287 (Bulletin No. 6/2007 of 26 February 2007, page 103).

8 Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2006, C 298/17).

Second, under the Italian rules, such information must be 'decisive' for ascertaining the infringement, rather than merely 'sufficient', as stated in the 2006 Commission's Notice. Third, the AGCM staff's transcript of a leniency applicant's oral statement is placed in the case-file and may be accessed by other parties to the investigation.[9]

In June 2008, AGCM was acting on 12 leniency applications.[10] However, the leniency notice has so far been applied in only one case concerning eight chipboard manufacturers who had allegedly agreed to fix prices and share the market for the production and commercialisation of chipboards.[11] According to the President of AGCM, the current leniency programme should be improved by reducing the applicant's exposure to damages claims in order to encourage submission of leniency applications.[12] However, a formal proposal in this direction has not yet been made.

iii AGCM's burden of proof in cartel cases

In June 2008, the Italian Regional Administrative Court for Lazio ('TAR Lazio') partially annulled a 2007 decision by AGCM fining autoclaved aerated concrete suppliers Xella International GmbH and RDB SpA for engaging in anti-competitive practices aimed at monopolising and sharing the Italian market.[13]

According to the court, AGCM had not proven to the requisite legal standard that Xella and RDB had entered into a restrictive agreement. The judges noted that the evidence relied upon by AGCM could, at most, demonstrate that Xella had proposed RDB to coordinate their commercial policies in Italy. However, the case-file showed no element indicating that Xella's proposal was eventually accepted by RDB. Nor did the parties' conduct qualify as a concerted practice under Article 81 EC since no parallel behaviour on the market was demonstrated.

II ABUSE OF DOMINANT POSITION

i The increasing importance of commitment decisions

During 2008, AGCM rendered five commitment decisions under Article 82 EC. In two further cases, it fined the investigated undertakings for abuse of a dominant position.

9 The Italian leniency notice provides that access to such transcripts is postponed to the date of notification of the statement of objections (see Paragraphs 8-10).

10 See AGCM President's presentation to the Government of the Annual Report of the AGCM for year 2007, p5.

11 See AGCM decision No. 16835 of 17 May 2007, Case I 649 – *Produttori di Pannelli Truciolari in Legno*. Recently, following a leniency application, AGCM opened an investigation on the existence of an alleged cartel in the cosmetic sector (see AGCM decision No. 18470 of 12 June 2008, Case I 701 – *Vendita al Dettaglio di Prodotti Cosmetici*).

12 See AGCM President's presentation to the Government of the Annual Report of the AGCM for year 2007, p5.

13 See Tar Lazio decision of 26 June 2008, No. 6213, *Xella International v. Autorità Garante della Concorrenza e del Mercato (Cellular Concrete decision)*. See also AGCM decision No. 17522 of 24 October 2007, Case A 372 – *Cellular Concrete Market*.

AGCM also closed by commitment decision three cases of abuse under Article 3 of the Italian Competition Act. Statistics reveal that, especially in abuse of dominance cases, commitment decisions are gaining high importance for both the undertakings and AGCM.

In 2008, the only two cases in which AGCM issued a full decision (*ADR* and *SEA*) concerned alleged pricing abuses carried out by exclusive concessionaires for the management of the Rome and Milan international airports.[14] In particular, AGCM found that fees imposed by the investigated companies for the access and use of several airport facilities were excessive. Moreover, AGCM maintained that ADR had also engaged in margin squeeze practices, as its tariff system made it more expensive for air freighters to choose ADR's competitors as handling providers, thereby foreclosing the latter from the market.

III SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Market investigations

In 2008, AGCM concluded two general investigations, namely with respect to the waste packaging sector[15] and corporate governance in the financial sector.[16]

In the former investigation, AGCM found that the waste-collecting sector in Italy is characterised by a low degree of competition, mainly due to excessive regulation and 'emergency-style management' by local authorities.

In the banking and financial sector, the investigation on corporate governance unveiled numerous cross-shareholdings and personal links between companies which, according to AGCM, could negatively impact competition.[17] The investigation also found evidence that banking foundations frequently operate as institutional investors without sufficient transparency. Therefore, AGCM maintained that banking foundations should become 'more like true institutional investors by adopting high standards of transparency and using adequate risk or return benchmarks so as to promote a virtuous cycle that will allow the banking system to regain its individual and collective reputation'.[18]

14 See AGCM decision No. 19189 of 26 November 2008, Case A 377 – *SEA Tariffe Aeroportuali*; decision No. 19020 of 23 October 2008, Case A 376 – *ADR Tariffe Aeroportuali*.

15 See AGCM decision No. 18585 of 3 July 2008, IC26 – *Mercato dei Rifiuti di Imballaggio*.

16 See AGCM decision No. 19386 of 23 December 2008, IC 36 – *La Corporate Governance di Banche e Assicurazioni*.

17 It is not the first time that AGCM has pointed to this peculiar feature of the Italian financial sector. Indeed, AGCM has made the clearance of recent mergers in the banking and insurance sector, subject to the adoption of measures directed at eliminating shareholdings links and interlocking directorships (see AGCM decision No. 17283 of 18 September 2007, Case C 8660 – *Unicredit Italiano/Capitalia*; decision No. 16249 of December 20/06, Case C 8027 – *Banca Intesa/San Paolo IMI*).

18 See AGCM's press release No. 3 of 10 January 2009.

ii Significant cases

Telecommunications

In *Exploitation of Privileged Commercial Information*,[19] AGCM accepted commitments offered by Telecom Italia SpA and closed the case without any findings of infringement. In its decision to initiate proceedings, AGCM had alleged that Telecom Italia, thanks to privileged commercial information in its possession, could address advantageous commercial offers to those customers that had migrated, or intended to migrate, to other operators (these practices are commonly referred to as win-back or retention strategies). AGCM was concerned that selective offers would be part of a general strategy to foreclose competitors from the markets for voice telephony provided to residential and non-residential clients, as well as from the market for retail broadband internet services.[20] In its final commitment decision, AGCM held that its concerns were fully addressed by the commitments.[21]

Open access

In order to address the concerns expressed in the market analysis on access to the fixed telephone network launched in 2007 by the national communications regulatory authority ('AgCom'), Telecom Italia, on 11 December 2008, undertook several commitments relating to the management of the access network and to equal treatment in the supply of access services to both competitors and internal commercial functions, through a new internal function called Open Access. Any amendment to the organisation of Open Access that could affect the compliance with the undertakings will be subject to approval by AgCom.[22] Moreover, Telecom Italia committed itself to establishing an independent

19 See AGCM decision No. 19249 of December 11, 2008, Case A 375 – *Sfruttamento di Informazioni Commerciali Privilegiate.*

20 AGCM was also concerned about Telecom Italia's bonus schemes, which stimulated sales agents to win customers back from competitors and about allegations that Telecom Italia's agents engaged in disparaging activities against competitors.

21 In particular, Telecom Italia undertook, among other things: (1) to appoint an independent entity in charge of supervising the creation of marketing lists of potential customers to be contacted for commercial promotions; (2) to refrain from activating fixed telephony services (and/or fixed network data services) to customers who have activated similar services with competitors within the previous four months, unless the customers so request in writing; (3) to avoid incentives (such as higher bonuses) for sales agents who win back; (4) to make available its promotional offers to all customers, without any distinction between its own and its competitors' customers; and (5) to set up a free telephone line for those customers wishing to complain against aggressive cold calls.

22 Telecom Italia also undertook to become part of a new system for the resolution of access disputes with competitors, similar to the British Office of the Telecoms Adjudicator. Furthermore, in order to facilitate third-party investments in alternative networks, Telecom Italia made commitments to to publish technical plans for the quality and development of fixed access network, and to facilitate co-location in its nodes. Telecom Italia also offered to publish a reference offer on access to passive infrastructures (e.g., horizontal ducts and vertical

supervisory board composed of five members (three of which are to be appointed by AgCom) with the aim of reporting any breaches of the commitments directly to AgCom and Telecom's senior management.

Postal services

In *Contracts with former concessionaires*,[23] AGCM accepted the commitments submitted by Poste Italiane SpA in order to meet concerns regarding a possible abuse of dominant position in the mail delivery markets. AGCM pointed out that Poste Italiane might have used its bargaining power to impose, in a series of contracts signed between 2000 and 2007, contractual provisions restricting the possibility for former local concessionaires to compete with Poste Italiane in the liberalised markets, thus pre-empting potential competition.[24] However, AGCM considered that its concerns were fully addressed by the commitments.[25]

IV STATE AID

On 12 November 2008, the EC Commission adopted two decisions assessing the compatibility with EC State Aid rules of: the €300 million loan granted by the Italian government to Alitalia – Linee Aeree Italiane SpA, and the procedures set up by the Italian government for the sale of certain of Alitalia's strategic assets.

In *Alitalia loan*, the EC Commission maintained that the €300 million loan granted by the Italian government, on 22 April 2008, to Alitalia, in order to face the latter's critical financial situation, was incompatible with the common market because it was

cables) ensuring a level playing field among operators in connection with the setting up of next generation access networks, and committed to share investments with competitors in the deployment of the new networks.

23 See AGCM decision No. 18069 of 27 February 2008, Case A 388 – *Poste Italiane/Concessionari Servizi Postali.*

24 Legislative Decree No. 261/99, which transposed in Italy the first postal services liberalisation directive, reserved to Poste Italiane the exclusive right to provide certain postal services formerly carried out by several local concessionaires. In many cases, Poste Italiane concluded with many former concessionaires sub-concession agreements relating to delivery services reserved by law to Poste Italiane.

25 Poste Italiane undertook to: (1) issue a new call for bids for the collection and distribution of correspondence and unaddressed mail, as well as the carrying out of auxiliary services in 18 new urban areas; (2) extend the contracts entered with delivery agencies until the end of the first quarter of 2008, by which time the new tendering procedure should be in place; (3) eliminate non-compete clauses from these contracts; and (4) guarantee that no less than 40 per cent of registered mail on average will be outsourced, with a minimum of 25 per cent for each individual business. See AGCM press release No. 5 of 28 February 2008.

allegedly delivered in violation of EC State Aid rules.[26] Accordingly, the EC Commission ordered the recovery of the loan.

Alitalia's assets selling process

In light of its critical financial situation, on 29 August 2008, Alitalia entered extraordinary administration proceedings in Italy. Consequently, the Italian government decided, after opening a public sale process, to award several of Alitalia's strategic assets to a new group of private investors gathered into a special purpose vehicle ('CAI').[27]

The whole selling process was notified to the EC Commission which held, by decision of 12 November 2008, that the notified selling plan would not constitute state aid within the meaning of Article 87(1) EC, provided that Alitalia's assets were sold at market conditions. In order to ensure this result, the Italian government committed itself to nominating a monitoring trustee to control the selling process. With respect to CAI's possible liability for the recovery of the above-mentioned unlawful €300 million loan granted to Alitalia by the Italian government, the Commission stated that, in the absence of any economic continuity between Alitalia and CAI, the acquisition of Alitalia's assets at market conditions would ensure that CAI does not acquire any advantage from the loan. Subject to this assumption, the Commission considered that CAI should not face any such liability.[28]

V PENDING LEGISLATION

On 2007, by means of Law No. 244/2007, the Italian legislator introduced a system for collective damage actions. After several postponements, the entry into force of the new rules is scheduled for 30 June 2009.

Under the new rules, only consumers' and users' associations, registered with the Ministry for Economic Development (as well as *ad hoc* associations found by the courts to be adequately representative of the collective interests they seek to protect), may bring collective claims.[29] The collective claims procedure envisages two steps. First, the judge establishes whether the defendant is liable. In the event that liability is ascertained,

26 See EC Commission Decision of 12 November 2008, on the loan of €300 million granted by Italy to Alitalia No. C 26/08 (ex NN 31/08), in OJ L 52/09, p3.

27 In addition to acquiring Alitalia's assets, CAI also combined operations with Italy's second-largest airline, Air One, with the post-merger entity reportedly controlling more than 60 per cent of the domestic air transport market. In order to allow for the merger of the two main competitors in the Italian air transport sector, Decree-Law No. 134/2008 (which modified the Italian insolvency rules) introduced an exemption from the clearance requirement pursuant to domestic merger control rules for undertakings active in the basic public service sector that have been admitted to the extraordinary administration proceedings.

28 See Commission's letter of 12 November 2008, addressed to the Italian government, C (2008) 6745, accessible at http://ec.europa.eu/community_law/state_aids/transports-2008/n510-08.pdf.

29 Collective claims may be triggered only in relation to certain actionable torts or contract liabilities, and to cases that affect the interests of a 'multitude of consumers or users'. In

a non-contentious phase then follows before a conciliation chamber in order to quantify the damages owing to individual consumers or users who have chosen to opt in to the collective action or have otherwise intervened in the proceedings.

VI CONCLUSIONS

In light of the above, the following trends are discernible in public competition enforcement in Italy:

a AGCM resources are increasingly under strain to cover additional enforcement areas recently assigned to it by the law, such as unfair commercial practices;

b AGCM is also frequently pursuing the opportunity to close cases by commitment decisions;

c Administrative courts have pointed to occasional shortcomings by AGCM in meeting its burden of proof in complex cartel cases;

d This is occurring at a time when potential development of private competition litigation calls, first and foremost, for a leading role by public enforcement, whose importance in providing indications as to the scope of the law, and in discovering infringements (which might later on give rise to class actions) cannot be denied; and

e National regulatory agencies are partially stepping in to fill the gap created by the frequent use of commitment decisions, which – though undoubtedly useful in freeing up AGCM resources that can be devoted to other areas of public enforcement – fail to provide much needed guidance as to the application of antitrust rules.

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particular, collective action may be brought to pursue allegations of, among others, antitrust infringements.

Chapter 19

JAPAN

*Kozo Kawai, Futaba Hirano and Kojiro Fujii**

I OVERVIEW

i Substantive Rules under Japan's Competition Laws

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade[1] (the 'Act') comprises four major categories of regulations: (1) the prohibition of unreasonable restraint of trade (latter clause of Article 3)[2], (2) the prohibition of private monopolisation (former clause of Article 3), (3) the prohibition of unfair trade practices (Article 19), and (4) regulations on business concentrations (e.g., mergers and acquisitions) (Chapter 4). The regulations concerning the unreasonable restraint of trade basically control horizontal anti-competitive activities, such as cartels and bid-rigging. The private monopolisation regulations prohibit excluding and controlling behaviour[3] that has the effect of substantially restraining competition. Unfair trade practices refer to certain business activities defined in Article 2, Paragraph 9 of the Act and designated under this definition as such by the Japan Fair Trade Commission ('the JFTC'), the primary regulatory authority governing Japanese competition law, which include activities such as 'abuse of superior bargaining position', 'trading on restrictive terms' and 'unjust low-price sales'. Violations under the unfair trade practices category of regulations require a lower standard of anti-competitive effect than those required under the unreasonable restraint

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1 Act No. 54 of 14 April 1947. The latest revision of the Act came into effect in 2006.

2 Unless described otherwise, articles in this chapter refer to articles of the Act.

3 'Control' refers to the conduct of one business that causes another business to follow its will (e.g., a corporate majority shareholder of a company controlling the company).

of trade and private monopolisation categories.[4] The JFTC also regulates business concentrations. The Act provides requirements for filing merger reports, shareholding reports, and other related documents. Even when a filing is not required, however, the JFTC may investigate the transaction if it is likely that the transaction substantially restrains competition in the relevant market. In this chapter, we focus primarily on the recent trend in Japanese competition law of increased enforcement against unreasonable restraint of trade, private monopolisation, and unfair trade practices.

The Act is normally enforced by the JFTC through administrative procedure, such as cease and desist orders and surcharge payment orders, but, in some cases, criminal and civil procedures in court may be instituted. Sanctions or procedures applicable to each violation of the Act vary depending on the category of the infraction, as is briefly summarised in the table below.

		Unreasonable restraint of trade	**Private monopolisation**	**Unfair trade practices**
Administrative sanctions by the JFTC*	Cease and desist order	Applicable	Applicable	Applicable
	Surcharge payment order	Applicable to price cartel and other types of cartels that affect price	Applicable to 'control' type private monopolisation pertaining to or affecting price	Not applicable
Criminal sanctions		Applicable	Theoretically applicable but unrealistic	Not applicable†
Civil procedure‡	Injunctive relief	Not stipulated in the Act	Not stipulated in the Act	Applicable
	No-fault compensation§	Applicable	Applicable	Applicable

* Instead of formal administrative orders, the JFTC sometimes issues administrative warnings. These warnings are normally made public in the JFTC's press release, which includes the names of the companies involved.

† Note that violators who do not follow cease and desist orders that require ceasing illegal conduct falling into any of the three categories of infractions including unfair trade practices may be subject to criminal sanctions.

‡ In addition to the procedures provided under the Act, plaintiffs can make other civil claims, such as tort claims, and ask for injunctive relief or compensation under Japan's Civil Code.

§ The no-fault compensation action (Article 25) is a private lawsuit specifically prescribed under the Act. This mechanism is not frequently used (e.g., only two cases were pending at the end of the 2007 fiscal year), mainly because of inconveniences for the plaintiff, such as the exclusive jurisdiction of the Tokyo High Court and the requirement that the JFTC's order against the violator needs to have become final and binding before filing suit (Article 85, Item 1 and Article 26).

4 An activity does not have to actually restrain competition in the market in order to be considered an unfair trade practice by the JFTC.

ii Prioritisation and resource allocation of enforcement authorities

The JFTC announced that it places a priority on its enforcement in the following areas:[5]

a hard-core cartels such as those involved in price fixing and bid rigging that have a significant effect on consumers;

b abuses of superior bargaining position, unjust low price sales and discriminatory pricing that are unfair and prejudicial to small- and medium-sized enterprises; and

c interference with new entry into the market for information technology, public works projects, intellectual property and other markets that are important for Japan's economic growth.

Most of the cases in which the JFTC has been undergoing formal proceedings and reaching formal decisions have been hard-core cartel or bid-rigging cases in accordance with priority *a*, *supra*. In accordance with priority *b*, the JFTC has investigated and issued a number of cease and desist orders in connection with cases involving abuses of superior bargaining position, unjust low price sales and resale price restrictions, such as in *Seven Eleven Japan* (at the investigation stage as of May 2009) and *Yamada-Denki*,[6] which are discussed more fully *infra*. Recent notable cases under priority *c* include *NTT East Japan*,[7] *JASRAC*[8] and *Microsoft*,[9] described more fully *infra*.

iii Enforcement agenda

Bill for Amendments to the Act (now pending at the Diet)

Amendments to the Act are now being discussed in the Diet. The pending bill includes several substantive changes, such as (1) expanding the categories of infractions that are subject to the surcharge, (2) improving and expanding the leniency programme, and (3) revising the filing requirements for mergers and share acquisitions.[10] The proposed amendments demonstrate the Japanese government's intent to step up enforcement of the Act and to follow the recent trend in the EU and the US, where authorities are increasingly exercising more stringent control over anti-competitive activities.

Extraterritorial application of the Act

The JFTC has announced its intent to actively exercise its powers against foreign companies, as well as in cross-border cases if the case has a large enough effect on

5 JFTC press release, 21 May 2008.

6 JFTC cease and desist order, 30 June 2008.

7 *Shinketsu* (JFTC definitive final decision through JFTC tribunal procedure) 26 March 2006. Now facing appeal before the Tokyo High Court.

8 JFTC cease and desist order, 27 February 2009.

9 *Shinketsu* (JFTC definitive final decision through JFTC tribunal procedure), 16 September 2008.

10 Summary of the bill can be found at www.jftc.go.jp/e-page/pressreleases/2009/March/090304.pdf.

competition in the Japanese market. The JFTC has been emphasising movement of Japan's competition law policy towards meeting the global standard and increased cooperation with foreign competition authorities.[11]

There are several recent examples of the JFTC taking a proactive approach in enforcing the Act against foreign companies. For example, in *Marine Hose*,[12] discussed in Section II *infra*, the JFTC, for the first time in its history, issued orders to foreign companies in an international cartel case. Also, the JFTC has conducted investigations into alleged international cartels in connection with TFT-LCD, CRT/CPT and High Voltage Power Cables simultaneously with US and EC authorities. The very first case where the JFTC initiated an investigation simultaneously with foreign authorities was in PVC Modifiers in 2003. This trend is a marked departure from the JFTC's attitude at the time of *Vitamin Cartel* in 2001, in which, despite the involvement of foreign companies, the JFTC was able to issue an administrative warning only to Japanese companies.[13]

Another example of the JFTC's proactive approach towards international cases can be seen in the area of merger regulations. In the *BHPB-Rio* case, the JFTC initiated an investigation into BHPB's plan to acquire shares of Rio-Tinto, despite the fact that the parties involved in the transaction were non-Japanese companies. The proposed amendments pending before the Diet include changes to the filing requirements in transactions involving foreign companies in order for the JFTC to exert its regulatory powers over more overseas transactions that impact the Japanese market.

II CARTELS

i Unreasonable restraint of trade; cartels

Definition

The regulations governing unreasonable restraints of trade basically cover agreements[14] between competitors designed to eliminate or restrict market competition (as well as activities following such agreements), e.g., bid rigging, price fixing, limits on production and market/customer allocation. Even without specific conduct, such an agreement itself would constitute a prohibited unreasonable restraint of trade.[15] In practice, such agreements between competitors can be proved by an accumulation of indirect evidence, most typically, by a showing of parallel conduct between competitors following certain contacts between them. Moreover, although the Act clearly stipulates that competition must be substantially restrained and be contrary to the public interest for the collusion

11 See statements of the Secretary General of the JFTC at a news conference on 14 January 2009, www.jftc.go.jp/teirei/h21/kaikenkiroku090114.html#k090114_1.

12 Cease and desist order and surcharge payment order, 22 February 2008, www.jftc.go.jp/e-page/pressreleases/2008/February/080222.pdf.

13 Administrative warning, 5 April 2001.

14 The regulations cover not only explicit agreements, but also implied mutual understandings. (*Toshiba Chemical Case*, Tokyo High Court, 25 September 1995.)

15 *Petroleum Cartel Case*, Supreme Court, 24 February 1984.

to be considered illegal, in reality, the JFTC is usually able to establish this requirement quite easily in the case of hard-core cartels.

The regulations governing unreasonable restraints of trade apply primarily to horizontal restraints and not to vertical restraints, which are normally regulated as unfair trade practices, as discussed more fully below.

Sanctions: cease and desist order

The JFTC has broad authority to order violating companies to cease and desist from prohibited acts, transfer a part of their business to a third party, or take any other measures necessary in order to restore competition in the market (Article 7). Recently, the JFTC has been increasingly ordering violating companies to conduct various types of activities such as (1) pass a board resolution, confirming the termination of the cartel activities, (2) notify customers in Japan of the termination of all cartel activities, (3) promote compliance of its officers and employees, including those of its subsidiaries and (4) exclude employees involved in the cartel activities from divisions in which contact with competitors is necessary.

Administrative surcharges

The JFTC has the authority to issue surcharge payment orders, requiring violators to pay a surcharge as penalty for violating the Act, provided that the cartel in question affects the consideration of subject goods or services. The surcharge amount is determined using a formula provided in the Act.[16] The violator must pay a certain percentage (generally 10 per cent)[17] of the turnover in the relevant market during the period in which the cartel is determined to have been active, which shall not exceed three years (Article 7-2, Paragraph 1). If a violator is subjected to another surcharge within 10 years, the applicable surcharge will be increased by 50 per cent.

Criminal penalties

In addition to a surcharge, a violating company may face criminal fines of not more than ¥500 million for a single violation (Article 95, Paragraph 1, Item 1).[18] If both a surcharge and a criminal fine are levied on a violator, half of the amount of the fine is, in principle, deducted from the administrative surcharge (Article 7-2, Paragraph 14). Individual violators, such as corporate executives and employees of the violating company, may also face criminal penalties of up to three years' imprisonment and/or fines totalling not more than ¥5 million (Article 89, Paragraph 1). A representative of a violating company who, despite knowing of the plan or the actual illegal activity, fails to

16 In Japan, unlike in other jurisdictions, the JFTC does not have discretion to determine the surcharge amount.

17 Reduced penalty percentages are applicable to retailers, wholesalers, and small and medium sized companies.

18 A violation (e.g., a cartel agreement) committed in one relevant market over a particular period of time can constitute a 'single' violation for purposes of criminal fines. (Iron Bridge bid-rigging case, Tokyo High Court, 21 September 2007).

take necessary measures to prevent it or rectify it is subject to the same penalties as the violator (natural person) (Article 95-2).

Civil liabilities and other penalties

In addition to criminal penalties and JFTC orders, a violating company may also be subject to civil liabilities as a result of private lawsuits filed by its customers. Corporate executives of a company engaged in a cartel may be required by the company or its shareholders (in the case of derivative suits) to compensate damages caused by their failure to prevent illegal acts of their employees. Moreover, in bid-rigging cases, the company is usually suspended from participating in public procurement for a certain period.

ii Japan's leniency programme

Overview

Under Japan's leniency programme, companies that may be in violation of the Act are encouraged to apply for leniency, thereby potentially being exempted from, or reducing, penalties they may face. For a single case, no more than three companies may apply for leniency. When companies file a leniency application before the official initiation of a JFTC investigation, the first applicant is eligible to receive 100 per cent immunity from any subsequent surcharge payment order, the second applicant is eligible to receive a 50 per cent reduction, and the third applicant can receive a 30 per cent reduction. Leniency may also be applied for after the start of a JFTC investigation. In that case, each applicant is only eligible to obtain a 30 per cent reduction in any subsequent surcharge payment order. The cap on the total number of companies that can apply for leniency includes all companies that apply, whether before an investigation or after. It is important to note that, unlike in other jurisdictions, the JFTC has no discretion in determining whether immunity from or a reduction in the surcharge payment is granted, other than accepting or declining an application based on its adequacy.[19] Therefore, the most important factor pertaining to Japan's leniency programme is the order of when the application is filed with the appropriate office.[20] During the leniency application process, if the JFTC deems it appropriate (especially in international cartel cases), the applicant may substitute an oral statement for certain entries in the application form, but it must still file the written application without meaningful entries and submit certain materials separately. Furthermore, in practice, the JFTC generally will not issue a cease and desist order to the first applicant that files for leniency voluntarily before the JFTC becomes aware of the violation.

19 The following are grounds for disqualifying a leniency applicant: (1) submission of a report containing false information; (2) failure to comply with the JFTC's request for additional information; and (3) coercion of other companies to engage in cartels or attempts to prevent other companies from ceasing illegal conduct. In addition, without a justifiable reason, a leniency applicant must not disclose the fact that it has filed to third parties (Article 7-2, Paragraph 12).

20 Leniency applications are filed by telefax to a number stipulated in the regulation under the Act.

No joint application

Japan's leniency programme does not accept joint applications by multiple companies in order to prevent collusion among companies in preparing and submitting the applications. Moreover, the JFTC defines a 'company' strictly as a single legal entity. As a result, an entire corporate group would not be able to file one leniency application with the JFTC; the leniency applicant must be the specific company within that group that actually committed the violation. The scope of any leniency granted, therefore, would extend only to that company and not to its parent or other affiliates. A particular difficulty arises when several companies within the same corporate group have violated the Act. As discussed below, the JFTC now proposes an amendment to the Act that would allow entities belonging to the same corporate group to file a joint application.

iii Criminal prosecution and leniency

Criminal prosecutions can only be brought against a violator by the public prosecutor on referral from the JFTC. The JFTC has announced that it will not refer the first qualified leniency applicant (including its cooperative executives and employees) to the public prosecutor, and the Ministry of Justice has declared that it will give full regard to the JFTC's decision. In effect, this means that the first leniency applicant (which filed an application prior to a JFTC investigation) is exempted, not only from surcharge payment orders but also from any criminal penalties. For second and third leniency applicants (and their employees), the JFTC will make a referral decision on a case-by-case basis.

iv Significant cases

The Marine Hose case involved a cartel participating in international market allocation and bid rigging. The JFTC, however, focused only on customers located in Japan when defining the relevant market and calculated the surcharges based only on the turnover regarding these customers. Thus, in this case, no surcharges were levied on foreign undertakings that had no sales in Japan. Although this trend is consistent with the widely supported theory in Japan that the Act is violated basically when anti-competitive activity has a negative effect on consumers in Japan, this approach is criticised for failing to deter foreign companies from international market allocation activities.[21] Some insist on the need for new legislation that would enable the JFTC to impose surcharges on foreign undertakings that have no sales in Japan. Despite *Marine Hose*, it is worthwhile noting that, although there are difficulties in enforcement, there remains the possibility that criminal charges may be brought against a foreign company or its employees who participate in an international market allocation cartel.

In the price-fixing case of *International Air Cargo Forwarders*,[22] the JFTC calculated the amount of surcharges based on fuel surcharges and other additional charges, and excluded the basic rates from the calculation, thereby reducing the surcharges ultimately levied by a significant amount. It is clear from this case that, although the formula for calculating the surcharge is firmly set by law, the JFTC exercises some discretion in

21 The JFTC has, however, issued cease and desist orders to foreign companies.

22 Cease and desist order and surcharge payment order, 18 March 2009.

deciding the basis of the surcharge calculation. This suggests that there is some room for a company to discuss with the JFTC the appropriate basis of the surcharge,[23] which could provide a significant difference in the ultimate surcharge amount.

In the price-fixing case of *TFT-LCD modules for the Nintendo-DS*,[24] the JFTC defined the relevant market extremely narrowly as the specific TFT-LCD module supplied for the Nintendo-DS in Japan, and found that competition in that market was substantially restrained, even though the investigation was launched simultanuousely with foreign competition authorities, acknowledging the international nature of the cartel, based on the application for leniency by a Korean producer.[25]

In the bid-rigging case of *Molten Metal sold by local public entities*,[26] the JFTC issued a surcharge payment order for the buy-side companies in a collusion case for the first time since surcharge payment orders were first introduced with regard to purchase-cartels on 4 January 2006.

For more than a decade, criminal accusations by the JFTC were limited to bid-rigging cases, but on 11 November 2008, the JFTC filed a criminal charge with Japan's Prosecutor General against a price-fixing cartel among manufacturers and distributors of galvanised steel sheets, which was the first criminal allegation made against a price cartel in the past 17 years.[27] The first leniency applicant in this case was exempted from any criminal charges in accordance with the policy announced by the JFTC and Ministry of Justice.[28] The subsequent leniency applicants in this case, who applied after the start of the JFTC investigation, however, were not exempted. This case confirmed the JFTC's policy that, as long as the JFTC considers business activities to have a significant negative effect on consumers, it will not hesitate to take action, regardless of the type of activity involved. Since the JFTC was given the authority to initiate investigations that involve criminal charges under the Act in 2006, it is likely that the JFTC will use its new power more aggressively going forward to seek criminal sanctions in serious cases.

v Trends, developments and strategies

Although there is no corresponding or similar system to the US leniency-plus or leniency-minus in Japan, Japan's leniency system has been widely used[29] by major

23 The basis of the surcharge calculation to be determined by the JFTC is directly correlated to its definition and scope of the relevant market.

24 Cease and desist order and surcharge payment order, 18 December 2008.

25 It was reported that Sharp Corporation, the manufacturer of the TFT-LCD module, was going to challenge the JFTC order before the JFTC's review process.

26 Cease and desist order and surcharge payment order issued on 17 October 2008.

27 The last criminal accusation by the JFTC regarding a price cartel case before this case was in November 1991 in a case involving stretch film for business use.

28 See Section II(iii), *supra*.

29 There have been more than 200 leniency filings made, and the JFTC has given immunity and a reduction in surcharges in more than 27 cases since the leniency programme was introduced in 2006 (Takahide Matsuyama, 2009 *nen no kyososeisaku wo tenbo suru* (Perspective of Competition Policy in 2009), *Kosei Torihiki*, Vol. 699, p.4-5 (15 January 2009)).

Japanese companies, as well as foreign-based companies. One significant consequence of the leniency system is that there appears to be a knock-on effect around the start of the JFTC's investigations. This highlights the advantage of filing a leniency application when there is suspicion that a cartel exists. However, in exchange for immunity, the leniency applicant would be required to cooperate extensively with the JFTC, including submitting all relevant materials, answering all questions posed by JFTC officials, and having its executives and employees participate in lengthy interviews. Unlike in the US, civil litigation against a company that has committed an antitrust violation is not very common in Japan to date. Still, a company faces the risk of US civil liability if consumers of its products or services are located in the US.

When representing an alleged violator in a cartel investigation initiated by the JFTC or public prosecutors, there are two crucial matters to note. First, it is important to bear in mind that since attorney-client privilege is not recognised in Japan, communications between the alleged violator and its attorney can be seized (in investigations under warrants) or are required to be submitted under threat of criminal sanctions (in the case of ordinary JFTC administrative investigations) during the investigation, although attorneys may generally refuse any search of their law offices. Second, individual violators do not generally have the right to have their attorneys present during investigative interviews conducted by JFTC officials or public prosecutors, although they will have access to their attorneys if they are retained under warrants.

vi *Outlook*

The following are key proposed legislative amendments related to cartel regulations, now submitted before the Diet:

a the introduction of a 50 per cent increase in the surcharge for leading enterprises of a cartel;
b raising the statutory imprisonment for convicted individuals engaged in cartel activities from three years to five years;
c extending the statute of limitations of the administrative orders from three years to five years;
d allowing joint applications for leniency by companies in the same corporate group;
e expanding the total number of companies that may apply for the leniency programme from three to five (but with regard to applicants after the start of the investigation, the total number of such applicants is no more than three); and
f providing grounds and conditions for the exchange of information between the JFTC and overseas competition authorities.

III ANTITRUST: DOMINANCE AND RESTRICTIVE AGREEMENTS

i *Private monopolisation*

The Act prohibits private monopolisation, which is defined as business activities 'by which any entrepreneur, individually or by combination or conspiracy with other entrepreneurs, or by any other manner, excludes or controls the business activities of other entrepreneurs, thereby causing, contrary to the public interest, a substantial restraint of competition in the relevant market'. Generally, this prohibition only applies to a business entity with dominant market power in the relevant market. The JFTC has issued only 16 cease and desist orders with regard to the regulations concerning private monopolisation since the Act was first introduced in 1947. The reason for this small number is mainly because (1) in order to establish private monopolisation, the JFTC has to prove dominant market power in the relevant market, and the substantial restraint of competition in the relevant market caused by the exclusion or control of other business entities and (2) private monopolisation was not subject to surcharge payment orders at all prior to the amendment of the Act in 2005. Therefore, since differences in the outcomes were negligible, the JFTC preferred to bring formal proceedings under the unfair trade practices regulations, under which the JFTC could issue cease and desist orders and avoid the meaningless burden of proof described in (1) *supra*. However, there are some landmark cases in which the JFTC brought charges under private monopolisation regulations against companies with dominant positions and argued that they substantially restrained competition.

In *NTT East Japan*, the JFTC alleged that NTT East, having a majority share of the optical fibre broadband market, excluded competitors through its introduction of the new service with lower prices, with which its competitors could not compete; NTT East thereby substantially restrained competition in its market. NTT East is currently challenging the JFTC's findings before the court, arguing that, among other things, (1) the JFTC's market definition is incorrect, (2) there is no 'exclusion' because NTT East's network has been freely accessible by its competitors and, in reality, other entities could enter into the market within a short period of time, (3) there is no causal relationship between the acts of NTT East and the alleged adverse effect on the relevant market, and (4) the Japanese government effectively permitted NTT East to introduce its new service with lower prices.

In *JASRAC*, the JFTC recently issued a cease and desist order to JASRAC, a dominant copyright management organisation, based on its finding that JASRAC excluded other copyright management entities from the market by entering into 'comprehensive contracts' with broadcasting companies. JASRAC manages the overwhelming majority of music copyrights in Japan, and under its 'comprehensive contract', broadcasting companies only need to pay a fixed fee to JASRAC, regardless of the number of times they use music managed by JASRAC. The JFTC found that JASRAC's market dominance, coupled with its 'comprehensive contract' system provided little incentive for the broadcasting companies to use music under the control of other entities. As a result, it was prohibitively difficult for JASRAC's competitors to obtain rights to manage music that broadcasting companies tend to use, which amounted to the JASRAC's violative exclusion of its competitors. JASRAC has announced its intent to challenge the JFTC's order.

ii Unfair trade practices

The JFTC has designated 16 categories of unfair trade practices ('the General Designation')[30] within the orbit of its definition of unfair trade practices in Article 2, Paragraph 9 of the Act in 1982. They cover a wide range of, more or less, anti-competitive like conduct, and it is said that the requirements under the regulations governing unfair trade practices (i.e., a 'tendency to impede fair competition') can be established more easily than those under the regulations governing unreasonable restraints of trade or private monopolisation (i.e., a 'substantial restraint of trade'). In practice, establishing a violation under the unfair trade practices regulations does not require the JFTC to unequivocally define the relevant market. Also, these regulations are broad enough that they clearly apply to vertical restraints, which are not normally covered by the unreasonable restraint of trade regulations. Thus, these unfair trade practices regulations are able to cover a broader range of conduct, including those that do not fall within the realms of unreasonable restraint of trade or private monopolisation. Within the General Designation, the JFTC places a priority on regulating 'abuses of superior bargaining position' and 'unjust low price sales' as discussed in Section I *supra*. Other categories include 'tie-ins', 'resale price restrictions', 'discriminatory treatment', 'boycotts' and 'trading on restrictive terms.'

Abuse of superior bargaining position

In a practical sense, the purpose of this restriction is not necessarily to prohibit anti-competitive activity as much as it is to protect small- and medium-sized companies from pressures from business entities that have superior bargaining position and with which they may have entered into long-term contractual and non-contractual relationships.

In *Yamada-Denki*, the JFTC issued a cease and desist order to Yamada-Denki Co, Ltd, one of the giants among large electronic retail stores in Japan, finding that Yamada-Denki, based on its superior bargaining position, unfairly required suppliers to dispatch to it their employees without making the necessary payments or forming any contracts, although some of the suppliers in this case are major electrical manufacturers. According to the JFTC, the size of the company, in terms of sales, is large, and it required more than 160 thousand man-persons in total to be dispatched; therefore, the JFTC determined that the scale of the illegal activity was equally large. This case will likely continue to serve as a warning that the JFTC will come down hard on large retailers that abuse their bargaining position *vis-à-vis* suppliers that rely heavily on the power of these major retailers to attract customers.

In *Seven Eleven Japan*, the JFTC launched a dawn raid in October 2008 based on suspicion that Seven Eleven Japan, a giant among convenience store franchises, was unfairly restricting discount sales of fresh food products by its franchisees by taking advantage of its superior bargaining position. This case symbolises the JFTC's policy of prioritising the protection of small- and medium-sized enterprises because maintaining

30 The JFTC public notice containing the categories of unfair trade practices can be found at http://www.jftc.go.jp/e-page/legislation/ama/unfairtradepractices.pdf

the price of fresh food products seemingly has some positive effect, at least in terms of inter-brand competition.

Unjust low price sales

In *Yamato v. Japan Post,*[31] a private parcels delivery company (Yamato) brought a civil suit against a public postal service company, Japan Post (after privatisation in 2007, Japan Post Service Co, Ltd), which handles both dominant public services (e.g., postal mail services) and non-dominant services (e.g., parcel services), alleging that Japan Post's low prices for its parcel service (Yu-Pack) violated the Act because such low pricing would not be possible without cross-subsidising the parcel service with Japan Post's profit obtained from its dominant mail services. The court decided that, in order to constitute 'unjust low price sales,' the price at issue should be below the aggregate total cost, and found that Japan Post's pricing for its parcel service did not constitute 'unjust low price sales' because the plaintiff did not establish that Japan Post's sales price was below the aggregate total cost. In addition, the court did not accept Yamato's argument that the cost should be calculated using a 'stand-alone' method (in which the cost is calculated on the assumption that the relevant business is independently conducted) instead of an 'activity-based costing' method (in which the common-fixed cost is allocated in proportion to several businesses being conducted), despite the fact that the JFTC has issued a report saying that, with regard to the application of the Act, the stand-alone method should generally be used to calculate the costs of the non-dominant business of a company that has a separate dominant business.[32]

Under the Act (Article 24), a business whose interests are seriously injured by conduct violating the unfair trade practices regulations of the Act may seek injunctive relief in court. Since this injunctive relief mechanism was introduced in 2001, only 38 cases have been filed, and the court has not once granted injunctive relief to the plaintiff,[33] although, prior to the introduction of this mechanism, a district court had accepted a claim for injunctive relief by a retailer, arguing that the cosmetic product manufacturer's restriction on the manner of sales was in violation of the Act and thus null and void under the Civil Code.[34] The plaintiffs' success rate has been so low mainly because of the difficulty of presenting enough evidence to establish the requirements under Article 24, which include proving a 'violation of the rule of unfair trade practices' and a 'serious injury.' Compared to US civil procedure, Japanese civil procedure gives plaintiffs limited means to collect evidence (e.g., Japan does not have a discovery process like in the US). Such limitations are clearly evident in *Yamato v. Japan Post*.

31 The Supreme Court of Japan dismissed Yamato's appeal on 17 February 2009.

32 The JFTC report is entitled *Yusei Mineika Kanren Horitu no Seko ni Tomonau Yubin Jigyo to Kyoso Seisaku jyo no Kadai ni Tsuite* (regarding the postal services and issues of competition policies along with the enactment of the privatisation of postal services) and was issued on 21 July 2006.

33 This data is based on available statistics up to the end of 2007.

34 This judgment was later vacated by the higher courts.

Other categories of unfair trade practices

In the *Microsoft* case, the JFTC found that Microsoft was violating the provision of the Act concerning 'trading on restrictive terms' by including a 'non-assertion of patent' provision ('NAP') in its contracts with computer manufacturers, and impairing their incentives to promote innovative AV technology. Although Microsoft strongly argued that its NAP provisions do not have such negative competitive effect, the JFTC found against Microsoft. It might be able to say that this case shows the relaxed burden of proof on the JFTC in establishing violations under the regulations governing unfair trade practices.

iii Outlook

Currently, private monopolisation by 'controlling conduct' is subject to a surcharge. One proposed change in the pending bill for amending the Act is that all private monopolisation activities be subject to a surcharge, and the surcharge rate will be higher than that for unfair trade practices. This may provide the JFTC with more incentive to make use of the private monopolisation regulations.

Recently, the global economic crisis, which has also impacted the Japanese economy, has heightened political concerns of protecting small- and medium-sized enterprises, thus strengthening the regulations regarding 'unjust low price sales' and 'abuse of superior bargaining position'. Reflecting this trend, the bill pending before the Diet includes a revision to include these two categories of unfair trade practices (i.e., 'repetitive unjust low price sales' and 'abuse of superior bargaining position') into the types of conduct that are subject to a surcharge. Another proposal is to strengthen the system by which plaintiffs can collect evidence (via court order) in proceedings seeking injunctive relief with regard to unfair trade practices, allowing plaintiffs greater access to evidence, including some business secrets.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases, trends and developments

Regarding the airline industry, although the JFTC has been aware of the EC and US authorities' move to investigate and impose sanctions on the airline industry with regard to airlines' fuel surcharge cartel, it did not initiate an investigation with regard to this matter. Under the current Japanese Aviation Act, certain but not all arrangements between airlines under the multilateral and bilateral aviation treaties are categorically exempted from the application of the Act. A proposal to revise this exemption was published by Seifu Kisei tou to Kyoso Seisaku Ni Kansuru Kenkyu-kai (Study Group regarding the Government Regulations, etc., and the Competition Policy), which is sponsored by the JFTC, on 5 December 2007. This move is in line with the JFTC's policy to minimise the categorical exemption and to be in line with the movement occurring in other jurisdictions like the EU, the US and Australia, which do not have such an exemption.

V CONCLUSIONS

i Pending cases and legislation

Currently, in order to challenge a JFTC order, the alleged violator must first file its complaint with the JFTC tribunal before it can bring it to court. The court's review of the case is limited only to legal issues (substantive evidence rules) because it is bound by the factual findings of the JFTC; the court, thus, can only examine whether the findings by the JFTC are supported by 'substantive evidence,' and whether there is any illegality in the JFTC's decision. Statistics show that it is very difficult to have a court reverse the decision made by the JFTC through its tribunal procedure. This JFTC's review process continues to be strongly criticised and is likely to be reformed in the near future (even abolishment is under consideration), although no such change is anticipated by the enactment of the pending bill mentioned *supra*.

ii Analysis

Since the amendments to the Act went into effect in 2006, Japanese competition law has been rigorously enforced not only in Japan but also overseas, in line with the enforcement efforts of foreign authorities. The current proposed bill pending before the Diet, if passed, will further the JFTC's effort in this regard. As a result, foreign companies that have heretofore paid little attention to Japan's rapidly evolving competition law will now need to monitor its development in order to avoid finding themselves the subject of a JFTC investigation.

Chapter 20

KOREA

*Young Chul Yim and John H Choi**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authority

The nation's competition law, the Monopoly Regulation and Fair Trade Act ('MRFTA'), was enacted on 31 December 1980, followed by the establishment on 30 April 1981 of the Korea Fair Trade Commission, the sole competition agency empowered to enforce the MRFTA ('KFTC').

The KFTC is an independent administrative agency with quasi-judicial characteristics, solely empowered to enforce the MRFTA and to set competition policy in Korea. As such, the KFTC has the power to investigate suspected anti-competitive behaviour on its own initiative or based on a complaint.

Despite its limited enforcement resources, the KFTC has a policy of processing each case reported to it. This has often proved to be overly burdensome, as the number of reported cases in any given year can sometimes amount to several thousand.

Early each year, the KFTC establishes its annual enforcement targets by designating the industries most vulnerable to competitive injuries due to structural problems and could significantly impact the economic lives of citizens. For example, in early 2008, the KFTC designated the oil (petroleum), automobile, private education, wireless telephony and mobile communication, and medical industries as its annual enforcement targets due to the oligopolistic or monopolistic conditions of these sectors.

ii Enforcement agenda

The KFTC has set its 2009 enforcement agenda on: (1) protecting medium and small businesses and low-income citizens; (2) seeking amendments of corporate regulations to achieve necessary deregulation to fight the economic slowdown; (3) promoting consumer

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welfare through, among other things, investigating the unfair business practices of monopolistic and oligopolistic public companies; and (4) proactively responding to the global convergence of competition laws by preventing domestic companies violating the competition laws of foreign jurisdictions, and by closely cooperating with foreign competition agencies to prevent occurrences of international cartel offences.

II CARTELS

i *Significant cases*

A case of a price-fixing conspiracy among eight petrochemical companies[1]

In 2008, the KFTC issued correctional orders against eight petrochemical companies for conspiring to fix the selling prices of six petrochemical products after collusion among their working level personnel and an agreement on the pricing formula for each of those products. These companies were fined 12.7 billion Korean won and were ordered to cease and desist from further participation in the scheme. This decision is significant as it is the successful conclusion of the KFTC's investigation, which began in 2007, on collusive practices within the petrochemical industry.

A case of a price-fixing conspiracy among insurance companies[2]

In the case where 24 life insurance and liability insurance companies were found to have engaged in an ongoing, long-term collusive scheme to fix their insurance premiums and to engage in certain bid rigging, the KFTC issued correctional orders and imposed a fine of 26.5 billion Korean won. This decision has made clear that a price-fixing scheme, even when compliant with an administrative guidance of a regulatory agency, will not be condoned without evidence of special circumstances. This decision is expected to promote effective competition in the insurance industry by correcting customary collusive practices.

ii *Trends, developments and strategies*

Since its establishment in 1981, cartel regulation has been the primary objective of the KFTC. Recent years have seen a trend towards further intensification of this regulatory objective. For example, an amendment was made in 2005 to raise the ceiling on the administrative fine from 5 per cent of the relevant revenue to 10 per cent. Moreover, a total of 44 cartel offences were condemned in 2007 alone. Of all the administrative fines imposed for MRFTA violations, 72.6 per cent were for cartel offences.

Section 1 of Article 19 of the MRFTA states that 'any enterprise is prohibited from entering into an agreement to engage in a conduct, jointly with other enterprises, to unreasonably restrict competition by way of contract, resolution, or through any other means, or causing any other enterprise to so restrict competition.' However, the practical difficulty of establishing an 'agreement' (explicit or implicit) led to an amendment in

1 KFTC Resolution, 18 June 2008.

2 KFTC Resolution, 13 August 2008.

1986 to add a statutory basis (i.e., Section 5 of Article 19 of the MRFTA) to provide for legal presumption.

The language of Section 5 of Article 19 of the MRFTA after the 1986 amendment provided for the legal presumption of an 'unreasonable collusive conduct' so long as there was an 'appearance of uniformity in conduct' that created a 'substantial adverse effect on competition'. However, this language has been sharply criticised for two reasons. First, the wording 'unreasonable collusive conduct' seemed much broader than an 'agreement' and therefore could potentially be misconstrued to mean that presumption is created on both the existence of 'agreement' and its unreasonableness. Secondly, under the language of the amendment, the presumption of an 'agreement' can be triggered if, among other things, the conduct is proven to be anti-competitive ('substantial adverse effect on competition'). This created a logical problem in that one must prove the anti-competitive effect of an 'agreement' in order to prove the agreement's existence. In addition, there was controversy as to whether the existence of an 'agreement' can be presumed merely based on 'appearance of uniformity in conduct' or whether further factors should be shown.

These criticisms have led to a subsequent amendment to Section 5 of Article 19 of the MRFTA in August 2007 so as to provide for the presumption of an 'agreement' where there is uniformity in the appearance of conduct and additionally there is a substantial probability that the conduct in question was collusive in light of the circumstantial facts (e.g., the characteristics of the relevant market or the product or service, the economic rationale and implications of the conduct in question, and the number of contacts made among the participants and the manner in which such contacts were made). This amendment limited the scope of the presumption to the existence of an 'agreement,' removed the element of 'anti-competitiveness' from the requirements necessary to trigger the presumption, and required the showing of a further factor to trigger the presumption.

The leniency programme of the KFTC was adopted in 1997 as a result of an amendment in 1996, and later took on a more detailed form through a series of subsequent amendments and modifications. Today, a cartel participant who is first to 'report' the scheme to the KFTC prior to the commencement of the investigation to proffer evidence to establish a case against the scheme, cooperates diligently throughout the investigation and ceases its participation in the scheme would be entitled to a full exemption from both the correctional order and administrative fine. On the other hand, the first to 'aid' the KFTC after the commencement of the investigation would be entitled to a full exemption from the administrative fine and a partial reduction or full exemption from the correctional order. The second person to 'report' the scheme and the second person to 'aid' the KFTC in the investigation will be entitled to a partial reduction or full exemption from the administrative fine and additionally may enjoy a partial reduction or full exemption from the correctional order.

The leniency programme of the KFTC was later modified in 2007 to bolster its efficacy in terminating cartel activities. Under the amendment, the second participant to 'report' or 'aid' the investigation will be entitled to a 50 per cent reduction in the administrative fine (an increase from a 30 per cent reduction). Also under the modified leniency programme, the hard-core participant or participants who coerced the scheme upon other participants enjoys no exemption. Lastly, the participant who aids the investigation must do so 'with diligence'.

Also under the KFTC's amnesty plus programme, a participant already subject to a sanction for its involvement in a collusive conduct will be entitled to a reduction of or exemption from the administrative fine and also may enjoy a reduction in the degree of the correctional order for the first collusive conduct, if it confesses its involvement in another, provided such confession be made in a way that satisfies all requirements applicable to the first participant to 'report' or the first participant to 'aid'.

iii Outlook

The globalisation of the world's economy has led to increasing occurrences of international cartels and the corresponding need to regulate them. Especially in the context of a global economic downturn, it is anticipated that global corporate players will be even more tempted to engage in cartel activities. To counter this, the KFTC has recently announced its plan to strengthen its enforcement resources and toughen its monitoring and regulatory activities.

Moreover, as part of internationally coordinated efforts to regulate international cartels, the KFTC has so far fined 12 foreign enterprises a total of 12.2 billion Korean won for cartel offences. Particularly in 2006, the KFTC actively cooperated with the US and EU competition agencies to investigate various conspiracies to fix the prices of cathode ray tubes, LCD monitors and international air freight rates.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Microsoft's abuse of dominance

In its decision on tie-in sales by Microsoft (December 2005), the KFTC found that Microsoft foreclosed competition and restricted consumer choice by tying its Media Player and MSN Messenger applications with its operating system. Consequently, Microsoft was subjected to a correctional order to separate its Windows media service programme from its Windows operating system and was additionally fined 32.5 billion Korean won. The KFTC stated that the tie-in sale foreclosed the market for the tied product to create Microsoft's monopoly in that market.

Posco's abuse of dominance[3]

The judgment of the Korean Supreme Court in *Posco* (November 2007) is illustrative of the concept of 'unreasonableness' as a required element in establishing an abuse of dominance case. Under the facts of the case, Posco refused to supply its hot-rolled steel coils to Hyundai Hysco that needed them to produce cold-rolled carbon steel sheets. In this context, the KFTC found that Posco abused its dominant position when it refused to supply Hyundai Hysco. Quashing the KFTC's decision, the Korean Supreme Court stated that the analysis of 'unreasonableness' in the context of a dominance

3 Korean Supreme Court (judgment on 22 November 2007; Case No. 2002 Du 8626 decision).

abuse case should focus on the injury to competition as opposed to the unfairness to trading counter-parties. Furthermore, this injury to competition should be assessed by examining both whether the dominant enterprise in question had the subjective intent or purpose to injure competition, and whether the conduct in question has created or is capable of creating anti-competitive injury such as a price increase, output restriction, stifled innovation, reduction in number of competitors, and reduction in diversity of products or services.

As all of the foregoing elements must be proven by the KFTC, the judgment in *Posco* is viewed as imposing a greater burden of proof on the KFTC in establishing a dominance abuse case.

ii Trends, developments and strategies

Although government-led economic growth in Korea has been immensely successful, the downside of the strategy has been that many of the industries have become oligopolistic or monopolistic. Despite this reality, until recent years, the dominance abuse provision of the MRFTA has rarely been used in the KFTC's enforcement practice. Since 2006, in light of a growing need to monitor and regulate industries of problematic structures, the KFTC has been more watchful of dominant enterprises and their behaviour in the market. As a result, in 2007 alone, a total of 36 cases of abuse of dominance have been found and subjected to correctional order. This is a sharp increase from the seven dominance abuse cases cited from 2000 to 2006.

Article 3-2 of the MRFTA lists six forms of dominance abuse, namely: (1) interfering with the business of another enterprise; (2) restricting market entry of another enterprise; (3) foreclosure of competitors; (4) price abuse; (5) output restriction; and (6) harming consumer welfare. The first three actions are characterised as exclusionary, while the other three are exploitative in nature. In connection with this, the price abuses in Subsection 1 of Section 1 of Article 3-2 of the MRFTA has initiated much debate as to the issues of whether an exercise of monopolistic power acquired after competing fairly on merits should be prohibited, whether it is possible to determine when a price becomes monopolistic, and whether the government is capable of determining what is a 'proper' price. There have been many conflicting views. For instance, while there are those who advocate the justification of the present provision citing the need to protect consumers and trading counter parties, there are others who advocate abolishing the prohibition citing the impropriety of government intervention to set prices, as well as the practical enforceability problem and the costs associated with it. Also, there are others who say that although the provision should be abolished eventually, it is necessary to maintain the provision for the time being but limit its application, considering the peculiar nature of the domestic market. Although the KFTC has taken the view that the provision should be maintained to protect the consumers and trading counter parties, the actual enforcement of the provision has rarely occurred in recent years.

iii Outlook

The abuse of dominance provision is not the only provision regulating the conduct of a single enterprise in the MRFTA. Article 23 of the MRFTA, a proscriptive provision on unfair business practices, prohibits *inter alia* refusal to deal, discriminatory practices, exclusionary conduct, exclusive dealing, unreasonable customer inducement, abuse of trading position, business interference, discrimination favouring affiliates, tie-in sale, and unreasonable support.

This significant overlap between the conduct proscribed under the abuse of dominance provision and the conduct prohibited under the unfair business practice provision has created confusion in the application of these provisions to specific behaviour occurring in the market. The prevailing view, however, says that when conduct falls within the ambit of both provisions, the dominance abuse provision should be applied first. Eventually, however, a more permanent solution would have to come through amendment of law. Specifically, because some of the proscribed conduct under Article 23 (e.g., refusal to deal, foreclosure of competitors, and exclusive dealing) are better suited for proscription under the dominance abuse provision due to the requirement of anti-competitiveness, suggestions have been made for moving these proscriptions to the dominance abuse section of the MRFTA and, as for the proscribed conduct remaining in the unfair business practice section of the MRFTA, enacting separate legislation for them, or at least grouping them in a separate provision within the MRFTA.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Industry-specific competition policy report issued by the KFTC

In addition to punishing individual cases of competition law violations, the KFTC plays a more proactive role of analysing the competitive conditions of each industry, establishing appropriate industry policies as well as other changes for the efficient working of the industries. To that end, the KFTC publishes an industry report on competition policy that discusses, among others, the structure, competitive condition and other pertinent topics of particular industries (designated for their oligopolistic or monopolistic structure and direct implication on economic lives of the citizens) and their markets, as well as the systematic aspects of the market posing potential competition concerns, competitive behaviour likely to surface in the market, and occurrences of harm to consumers. In 2008, the competition report was published twice on the designated industries, i.e., air cargo, liability insurance, movie, and internet portal industries, all of which had similar problems of high entry-barriers and market concentration and therefore posed concerns for consumer protection.

Collusive conduct of KT

In a case where KT Corp agreed to transfer each year 1.2 per cent of its share of the local call market to Hanaro Telecom under the condition that KT Corp maintains its prices while Hanaro Telecom raises its prices, the KFTC found this commercial practice to be collusive and imposed a correctional order as well as an order to publish the violation in newspapers. KT was also fined 111.3 billion Korean won, which was at the time the largest administrative fine to be imposed against a single enterprise. In addition, KT Corp was found to have engaged in other illicit price-fixing schemes in other markets for exclusive internet lines, long distance and international calls.

KT Corp's appeal of the decision to the Seoul High Court was unsuccessful, as the Seoul High Court affirmed substantial portions of the decision of the KFTC. This case shows that a collusive scheme made pursuant to administrative guidance from a governmental body (in this case, the Ministry of Information and Communication) is not exempt from antitrust liability at the levels of both the KFTC and the courts. However, the administrative fine imposed on KT Corp's collusion in the local phone market was reduced after its amount was found to have been miscalculated.

ii Trends, developments and strategies

With the globalisation of economies, there has been a continuing trend towards repealing regulations that are unnecessarily burdensome on the workings of free markets in order to confer greater freedom for companies to engage in vigorous competition. This trend is exhibited in the domestic market of Korea and the position taken by the KFTC.

Industries such as telecommunications, broadcasting, finance, energy, medicine, and distribution have for a variety of policy reasons been subject to various regulations in many countries around the world. This regulatory trend has been widely noticed in Korea, due to the government-led economic growth in the past. Specifically, government intervention in these regulated industries in Korea has taken the form of price regulation, restricting entry, granting special rights to incumbents but denying them to new or potential entrants, and condoning commercial practices violating the MRFTA. However, the changing economy created the need to introduce competition in the industries that once required government protection and intervention. To that end, there has been a trend toward privatisation of state enterprises and deregulation.

iii Outlook

Korea's government-led economic development has led to the customary practice by which governmental agencies would, without legal authority, issue administrative guidelines that restrict competition and the players in the market would comply with them. This custom is widely embedded in many of the traditionally regulated industries. Against this reality, the controversy has been whether competition law violations that result from complying with these administrative guidelines would enjoy exemption from competition law scrutiny. To this, the KFTC's resounding answer has consistently been in the negative. For example, a defence based on compliance with an administrative guideline issued by a competent sector regulator was rejected by the KFTC in one of its decisions in 2005 and in many other decisions thereafter where similar defences have been raised, on the grounds that compliance with an administrative guideline is not a conduct justified under law within the meaning of Article 58 of the MRFTA. This position taken by the KFTC has been supported by the courts.

V MERGERS AND ACQUISITIONS

i *Significant cases*

Owens Corning's acquisition of Saint-Gobain[4]

In the case where Owens Corning's global acquisition of Saint-Gobain's reinforcements and composite fabrics businesses resulted in a horizontal merger between Owens Corning Korea and R&C Korea, a subsidiary wholly owned by Saint-Gobain through its affiliate, the KFTC issued a decision in October 2007 by which it ordered the sale of the entire shareholding of R&C Korea or alternatively a sale of R&C Korea's basic production facility for reinforcements and composite fabrics. After Owens Corning tried and failed to comply with the order four times, the KFTC modified the divestiture remedy to the effect that the prices of all reinforcements and composite fabrics products to be supplied to the Korean market, whether directly by Owens Corning or indirectly through its domestic or foreign affiliates or subsidiaries, should not be increased by more than the producer price index and additionally that the supply of reinforcements and composite fabrics products to Korean medium and small companies in any given year should be maintained at or above 90 per cent of the supply in the preceding year. This correctional order is the first to be issued by the KFTC on a merger occurring between foreign companies and clearly shows that a merger of that type can still be subject to the MRFTA so long as it creates anti-competitive effects in the Korean market. This case is also noteworthy in that the structural remedy initially imposed was later changed to a behavioural remedy of price control.

eBay's acquisition of G Market

In the case involving eBay's contemplated acquisition of G Market through share acquisition – a combined market share of which amounted to 87.2 per cent – the KFTC granted clearance under the condition of imposing a post-merger price cap on sales commissions and registration commissions. Despite the first impression of a possible anti-competitive effect from a very high combined market share, the KFTC found that the anti-competitive harm, if any, will be transient considering the low entry cost and therefore there is the possibility of competition by competitors. The significance of this decision is that it marks the first case in which the KFTC considered the dynamic nature of competition between internet-based businesses – contrary to its past enforcement habit of imposing structural remedies based almost exclusively on market share figures.

ii *Trends, developments and strategies*

Business combination report

A business combination between a company whose total asset or turnover (including those of its affiliates) meets or exceeds 200 billion Korean won, on the one hand, and a company whose total assets or turnover (including those of its affiliates) meets or exceeds 20 billion Korean won should be reported to the KFTC for clearance. Unlike in the US and EU, the MRFTA stipulates five types of transactions that are to be viewed as

4 KFTC Resolution No. 2007-548.

reportable business combinations, namely, share acquisition, merger, business transfer, establishment of a company, and interlocking directorate.

Caution should be exercised in deciding whether a business combination is subject to a pre- or post-closing filing requirement. To ease the burden on the companies in legal compliance, the MRFTA provides for post-closing filing (i.e., reporting of a transaction after its closing) for those business combinations that have a modest impact on the market. On the other hand, a business combination involving a company whose total asset or turnover meets or exceeds 2 trillion Korean won is to be reported prior to its closing.

From July 2003, the extraterritorial business combination provision was added to the MRFTA to regulate business combinations occurring outside Korea between foreign companies, under the legislative intent recognising the need for assessing their competitive impact on the domestic market of Korea, as domestic impact could be had by the combining foreign companies through their local subsidiaries and affiliates, etc. The corollary of this amendment was a steady increase in the number of business combinations reported. The Enforcement Decree of the MRFTA provides that such extraterritorial business combinations should be reported if the combining parties meet the reporting thresholds generally applicable (i.e., the reporting party has total assets or turnover satisfying or exceeding 200 billion Korean won, and the other party has total assets or turnover satisfying or exceeding 20 billion Korean won) and, additionally, each of the combining parties has Korean turnover of 20 billion Korean won.

Business combination review (assessment of substantial anti-competitive effects)

Section 1 of Article 7 of the MRFTA proscribes a conduct of consummating a business combination, either directly or using one's specially related person, and thereby substantially restricting competition in a particular field of trade. The assessment of potential anti-competitive effects is the core element in a business combination review, for which a relevant market should first be defined.

The business combination review guideline published by the KFTC adopted the 'SSNIP' test as the tool for defining relevant markets. Under this test, a relevant product (or geographic) market is to be defined as the group of products (or geographic region) to which a substantial number of consumers can switch their purchases in response to a small but significant and non-transitory increase in the price of the product in question (or within the geographic region in question).

In the competitive assessment of a horizontal business combination, the KFTC first analyses the market concentration to define the structure of the market, and then assesses the anti-competitive effect of the business combination by comprehensively considering a variety of factors including, among others, the possibility of each combining party's unilateral conduct to restrict competition on the market, the possibility of joint conduct among competitors, the level of competition flowing from outside Korea and the relevant international trend, the possibility of new competitors entering the market, and the existence of similar products and adjacent market. A proposed business combination that meets each of the following elements will be presumed anti-competitive, unless rebutted by the combining parties: the combined market share satisfies the threshold for a legal presumption of dominance in the market; the combined market share is the highest in the market; and there is a difference of 25 per cent or more between the combined market share and that of the second largest player. The competitive analysis of a vertical business combination focuses on whether the transaction is likely create a foreclosure effect and thereby create an entry barrier to the market. The business combination review guideline provides that comprehensive consideration should be given to the potential foreclosure effect and the possibility of joint conduct among competitors in the assessment of anti-competitive effects. A conglomerate business combination will be assessed primarily by considering whether it will likely restrict potential competition. The business combination guideline of the KFTC also provides for a comprehensive consideration of other factors such as the foreclosure of competitors and the increase in the entry barriers in the assessment of anti-competitive effects.

Sanctions on violations

Once a proposed business combination is found to be anti-competitive and therefore violates or is likely to violate the MRFTA, the KFTC will issue either a structural remedy (e.g., sale of acquired shares, transfer of acquired business, termination of a director) or a behavioural remedy (e.g., order to cease and desist from the conduct in question, publication of violation, restriction on method or scope of business). Detailed rules or guidelines as to which of these two remedies will be treated as the primary legal tool in the enforcement practice has not been firmly established; accordingly, the decisional practice of the KFTC in the choice between these remedies has been somewhat arbitrary. Moreover, some large-scale business combinations posing anti-competitive concerns have been granted clearance subject to behavioural remedies, most of which consisted of restrictions on pricing or market shares that have been criticised as being inappropriate and ineffective.

iii Outlook

As discussed above, criticisms have been voiced against the correctional measures that have been taken by the KFTC in its clearances of anti-competitive business combinations. These criticisms have mainly been that structural remedies should be the primary tool of choice, as anti-competitive harm resulting from a business combination is due to the market's structural changes and also that imposition of a behavioural remedy requires large costs in supervising compliance and therefore may not be an effective remedy of the problem.

The KFTC has announced the shift in its enforcement policy to more frequently utilising structural remedies in business combinations likely to aggravate the oligopolistic or monopolistic structure of the market in order to prevent injury to consumer welfare. The recent KFTC decisions exemplifying this change include a share sale order in the case of a business combination between Samick and Young Chang (2004); an order to sell certain steel manufacturing facilities in the case of a business combination between INI Steel and Hanbo Steel (2004); and an order to sell some of the retail stores in the cases of E-Land Retail's stock acquisition in Carrefour Korea and Shinsegae's stock acquisition in Walmart Korea (2006). It is still necessary to be watchful of the future enforcement policy of the KFTC; however, in any case, regulation of anti-competitive business combinations will need to use structural remedies as the primary enforcement tool.

VI CONCLUSIONS

i Pending cases and legislation

Presently, the KFTC is investigating suspected price fixing among certain air cargo carriers and is also engaging in a coordinated investigation with the US and the EU competition authorities in an international cartel case involving CRT, LCD and high voltage cable products. The KFTC has also issued a violation decision in the *Intel* case, which has recently been appealed and is currently pending before the Seoul High Court.

Although the consent order programme, a mechanism by which an MRFTA violator can negotiate a voluntary correctional measure with the KFTC, has been actively discussed and debated for adoption in Korea, it was excluded from the draft amendment bill recently proposed before the National Assembly. Accordingly, its adoption has been postponed for the time being.

ii Analysis

Although the Korean competition law regime has undergone a steady pattern of modification and improvement in the past, there still remains some room for further improvement in both its substantive and procedural aspects.

Specifically, the substantive aspect of the regime has its own set of problems. Some of the examples include confusing relationships between certain provisions in the MRFTA, and promotion of certain non-essential competition law provisions such as protection of trading partners, consumers and competitors, as well as special regulation of large conglomerates. The result was confusion in the application of these provisions during enforcement practices. Modifications may be needed in order for the MRFTA to carry out the most fundamental provisions of competition law.

As to the procedural aspect of the regime, modifications to improve the transparency and objectivity of the proceeding as well as granting an adequate right to defence will be needed to ensure the defendants' right to due process. Owing to the nature of the KFTC being a quasi-judiciary equivalent to a court of first instance, this would be especially important.

Chapter 21

MEXICO

Octavio Olivo Villa[*]

I OVERVIEW

Article 28 of the Political Constitution of the United Mexican States ('the Mexican Constitution'), the Federal Economic Competition Law ('the Competition Law') and the Regulations to the Competition Law ('the Regulations') are the main substantive statutes governing competition rules in Mexico.

By way of background, the Mexican Constitution was published on 5 February 1917 and Article 28 has been amended five times since, most recently in 1995.

Article 28 of the Mexican Constitution sets out the general framework for the prohibition of monopolies and monopolistic practices and for the punishment of practices affecting the freedom of trade and competition, and expressly provides certain exceptions to the anti-monopoly rule. Article 28 delegates to the legislative authority of the Mexican Congress the detailed regulation of its general provisions.

The Competition Law was published on 24 December 1992 to regulate Article 28 of the Mexican Constitution in the matters of economic competition, monopolies and freedom of commerce, as a single piece of legislation. Prior to the Competition Law, Article 28 was regulated by various pieces of outdated legislation that proved inefficient to safeguard economic competition and freedom of trade and prevent monopolies, monopolistic practices and other restrictions on the efficient function of markets of goods and services in Mexico.

The main body of the federal government of Mexico having jurisdiction and authority over competition matters is the Mexican Federal Competition Commission ('the Commission'), created in 1992 with the enactment of the Competition Law, as an

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administrative body of the Ministry of the Economy with technical and operational autonomy, and with independent authority to issue its own resolutions.

The Commission has a range of functions, which include preventing, investigating and combating illegal monopolies, monopolistic practices and concentrations. The Commission also has statutory authority to issue opinions over economic competition matters, on its own initiative or in response to a petition, in respect of draft laws, rulings, regulations, decrees and other provisions of general application, which may have anticompetitive effects. Opinions issued to government agencies and entities of the federal public administration are binding, but the President of Mexico may object to the same. The Commission enjoys powers to impose economic sanctions against individuals and legal entities that are found to incur violations of the Competition Law. The Commission also has statutory authority to lodge accusations with the public prosecutor's office if it becomes aware of criminal conduct in the field of competition and freedom of trade. Once an accusation is filed, the investigation of the criminal offence is carried out directly by the prosecutor's office, but the Commission remains engaged and cooperates in the criminal investigation and prosecution, to help secure a conviction.

The Commission has the power to commence investigations of suspected anti-competitive activity both on its own initiative and in response to complaints. Any party may file a complaint with the Commission if he or she believes an 'absolute monopolistic practice' in violation of Competition Law has occurred or is about to occur, but only the affected party can make a complaint against 'relative monopolistic practices' or concentrations that are alleged to be illegal.

The stages of an own-initiative investigation are no different from those of an investigation started on the basis of complaints. However certain procedural aspects of the investigations are different. For example, in an investigation started on the basis of complaints, normally the party making the complaint has legal standing to be engaged and actively participate in the investigation and to appeal against the formal decision concerning the case. In an investigation commenced by the Commission on its own initiative, as a general rule, third parties have no legal standing to be engaged in the investigation or to appeal the decision.

A party filing a complaint with the Commission must do so in writing. Complaints cannot be anonymous. The complaint must include the full name and address of the complainant and of each person that is alleged to have committed a violation of the Competition Law and must also provide a description of the alleged violations and submit anything that can be used to determine or demonstrate the truth of the assertions. Complaints against illegal 'relative monopolistic practices' or concentrations must include additional information defining the relevant products or services and geographic markets affected.

The Commission reviews each complaint to determine whether the information is complete to enable it to commence the investigation. If the complaint does not meet the requirements, the Commission notifies the complainant of the deficiencies. The complainant is given 15 working days to submit any additional information and documents requested by the Commission. In cases when extension is duly justified, the period can be extended by an additional period of 15 working days.

Once a complaint is deemed sufficient, the Commission issues a resolution confirming the admission of the complaint and publishes and extract of the resolution in the Official Daily of the Federation without revealing the names of the parties involved. The purpose of the publication in the Official Daily is to put everyone on notice that the Commission has started an investigation in a particular market and to give parties having information pertinent to the complaint an opportunity to submit such information.

The period for completing an investigation is between 30 to 120 working days from the Commission's admission of the complaint. In some situations, completing an investigation may require an extension. In cases when extension is duly justified, the period can be extended by up to four periods of 120 working days each.

During the investigation, the Commission has extensive information gathering powers, including the power to summon any person it believes may be able to furnish information or documents in relation to an investigation. The Commission may also apply to a judge for a warrant to enter and search premises to verify Competition Law compliance; however, when a search warrant is obtained notice must be given to the suspected offender prior to the search, which reduces the effectiveness of the measure. When the Commission has authority to search premises, it normally has no right to seize documents or other property, but it does have the right to obtain copies of any documents in relation to the investigation.

In general, information and documentary materials on the file of the case being investigated may not be accessed by third parties during the investigation.

Once the Commission concludes its investigation, if it finds there is probable cause to believe a violation has occurred, then administrative proceedings are initiated and the Commission has 60 working days to issue a communication explaining the factual and legal issues and laying out the evidence and other elements of proof of the case. The respondent is sent a copy of the communication and has 30 working days to file a response explaining the respondent's position and to present evidence to determine or demonstrate its assertions. The Commission reviews the evidence presented by the respondent and decides whether it is admissible and calls for an evidence hearing for the purpose of reviewing the evidence and providing any testimony from witnesses. Depending on the degree of certitude of proof produced by the evidence, the Commission may order the gathering of additional evidence. The parties are then given 10 working days to present final written arguments, after which the file of the case is considered closed and the Commission is required to issue a final resolution within 40 working days. The final resolution by the Commission will either dismiss the complaint and its initial finding of 'probable cause to believe' or confirm that a violation has occurred and punish the illegal conduct.

During the administrative proceedings, any party having standing in the procedure may gain access to the information and documentary materials on the file of the case that are not considered confidential.

Any party that can demonstrate to the Commission sufficient connection with the procedure and harm from the final resolution has legal standing to appeal against the final resolution of the Commission. The competition authorities have appellate jurisdiction and appellate review is carried out by the Commission itself. In order for the appeal to succeed, the appellant must either prove, strictly on the basis of documents on the file of the case, that the Commission committed a reversible error that caused a result that was unjust, or prove that on the basis of evidence recently discovered the Commission's resolution would have been different if such new evidence would have been considered in the administrative proceedings.

The Commission's decision in the appellate review may be subject to further appeal before federal courts on the grounds of infringement of constitutional rights.

i Prioritisation and resource allocation of enforcement authorities

The maximum authority within the Commission is the Board of Commissioners, comprised of five Commissioners, including its President. The imposition of sanctions for violations of the Competition Law is a prerogative within the exclusive authority of the Board of Commissioners.

Investigations and enforcement procedures are conducted by the Commission primarily through two Investigation Divisions. The General Division for the Investigation of Absolute Monopolistic Practices and Inter-State Commerce Restrictions is empowered to commence investigations regarding violations of the Competition Law that may constitute absolute monopolistic practices or inter-state commerce restrictions, while the General Divisions for the Investigation of Relative Monopolistic Practices is empowered to commence investigations regarding violations of the Competition Law that may constitute relative monopolistic practices. Investigations and enforcement procedures regarding violations of the Competition Law in certain specific regulated markets are carried out by the General Division of Regulated Markets.

The Board of Commissioners and the Investigation Divisions are regularly assisted by other Divisions of the Commission in the performance of their duties, such as the General Division of Economic Studies and the General Division of Legal Matters.

The President of the Commission, Mr Eduardo Pérez Motta, oversees a team of approximately 166 professionals and support staff, including approximately 16 individuals working at the Investigation Divisions.

The annual budget of the Commission is determined by the Ministry of Finance and Public Credit and is included as a sub-budget within the budget of the Ministry of Economy as part of the general budget for the federal government of Mexico. The general budget is presented each year to the Mexican Congress for approval. The Ministry of Economy may not allocate any part of the Commission's budget to other areas of the Ministry of Economy. The budget of the Commission in 2009 is 182 million pesos. The Commission has been able to avoid budget reductions, generally maintaining its budget from year to year in real terms. However, the Commission remains underfunded, with a relatively modest budget to combat illegal antitrust activity.

In its most recent annual report, the Commission reported that it commenced 39 investigations of alleged illegal antitrust activity, 37 of which were investigations started on the basis of complaints and only two were own-initiative investigations. The Commission has a legal obligation to respond promptly to all complaints filed, irrespective of the severity of the complaint or the Commission's assessment of the merits of the complaint. This has resulted in an increased workload for the Commission, which has outgrown its resources and impaired the Commission's ability to combat illegal antitrust activity and enforce competition law on its own initiative.

The Commission also reported that during the year covered by the report, it concluded 46 cases relating to alleged illegal antitrust activity. Such cases were resolved by the Commission as follows:

a four cases resulted in the imposition of economic sanctions or in the issuing of recommendations to the economic agents involved;

b 17 cases were dismissed on the basis that the activities reported in the complaints were not classified as illegal or punishable under the Competition Law;

c 10 cases were considered as not filed on the basis of not meeting the minimum legal requirements; and

d 15 cases were resolved without the Commission finding sufficient elements to sustain the existence of illegal antitrust activity.

ii *Enforcement agenda*

Since assuming the Presidency of the Commission, Eduardo Pérez Motta has actively worked towards improving the competition legal framework in Mexico. The 2006 reform to the Competition Law, aimed to improve certain of its provisions to reduce legal challenges against the Commission's resolutions, is an example of these efforts. The President of the Commission has recently called for a widespread discussion within the Mexican Congress to breathe life into an initiative to further amend the Competition Law to strengthen the powers of the Commission and make meaningful progress in antitrust enforcement in Mexico, in particular in the financial, transport, energy and telecommunication sectors of the economy where greater competition and increased efficiencies are needed. One of the top priorities of the Commission has been to work closely with Congress and other areas of government to amend the Competition Law to increase fines for violations and introduce in the Law a catalogue of conducts defined as criminal offences punishable with incarceration, to discourage market abuse. The enforcement tools and powers of the Commission under the current Competition Law have proved insufficient in certain important respects to effectively safeguard economic competition and freedom of trade and prevent monopolies, monopolistic practices and other restrictions on the efficient function of markets of goods and services in Mexico.

The initiative to amend the Competition Law that is currently being discussed in Congress involves strengthening the powers of the Commission to conduct inspection visits known as dawn raids, using the element of surprise to collect evidence pointing to illegal antitrust activity. Under current law, the Commission must give advance notice of its inspection visits, which enables parties under investigation to cover up incriminating evidence.

II CARTELS

Article 9 of the Competition Law provides that an absolute monopolistic practice is an agreement, arrangement or other combination between or among competing economic agents that have as a purpose or effect to:

a fix, elevate or otherwise manipulate the purchase or sale price of goods or services;

b impose the obligation not to manufacture, process, distribute, trade or purchase goods or services;

c divide, assign or distribute a specific market share of a particular product or industry; or

d establish, concentrate or coordinate the submission of public bids.

Absolute monopolistic practices are considered illegal and in violation of Competition Law. An agreement, arrangement or other combination that is considered an absolute monopolistic practice is null and void by operation of law and the parties to the agreement are subject to economic sanctions and also may be subject to criminal liability.

The Commission may impose economic sanctions against those engaging in absolute monopolistic practices, up to an amount equal to 1.5 million times the general minimum wage in the Federal District (approximately US$5.8 million dollars). The Commission can impose a fine of twice the above amount if the parties are repeat offenders. If the repeat offence is particularly serious, the Commission can impose a fine up to the higher of 10 per cent of the annual sales of the offender in the prior fiscal year; and 10 per cent of the value of its assets, instead of the fines referred to above. The definition of what constitutes a repeat offence is pretty narrow under current law, and the Commission is very rarely able to impose the increased fines for repeat violations.

Individuals may also be subject to criminal fines and imprisonment for antitrust violations when their actions or omissions have a material adverse effect in the domestic consumption of goods or services. The maximum prison sentence is 10 years. In practice, given the vague language used in the Federal Criminal Code ('the Criminal Code') to describe illegal antitrust activity, imprisonment of antitrust offenders is rarely sought.

The Commission has been working closely with Congress to amend the Criminal Code to significantly increase the range of conduct against which the Commission can seek an indictment, as an effective deterrent for illegal antitrust activity. These efforts have so far failed to move forward as consensus within Congress has not been reached. It has been reported that key members of Congress have sought to introduce a market dominance element to the definition of criminal antitrust conduct in the proposed amendment to the Criminal Code, which, if introduced, would significantly dilute the Commission's efforts to combat illegal antitrust activity in this front.

The Competition Law accords leniency to an economic agent reporting its illegal antitrust activity to the Commission provided that the economic agent (1) is the first one to come forward and to provide sufficient elements to prove the illegal antitrust activity, (2) provides full and continuing cooperation that advances the Commission in the investigation and prosecution of the illegal conduct, and (3) takes prompt and effective action to terminate its part in the activity. Economic sanctions are nonetheless still imposed against an economic agent that qualifies for leniency, but in such instance sanctions are imposed at the lowest level.

An economic agent that fails to meet the requirement of being the first one to come forward as described in (1) *supra* but meets the other requirements described in (2) and (3) and provides the Commission additional elements to prove the illegal antitrust activity, would normally qualify for leniency in the form of a reduction of 50 per cent, 30 per cent or 20 per cent of the maximum penalty, depending on a number of factors, including the promptness of a decision to come forward and the completeness of the information provided.

The leniency programme has contributed, to some extent, to strengthening the Commission's investigatory activities, however it is anticipated that this programme could play a more central role in the Commission's enforcement efforts if penalties against illegal antitrust activity are increased.

There are no other programmes in operation aimed at detecting absolute monopolistic practices, such as rewards for whistle-blowing.

i Trends, developments and strategies

Given that absolute monopolistic practices have a clear negative impact on well-being, the Commission has announced increased efforts to combat cartel activity both before and when it happens. The Commission is increasing its efforts and working closely with members of Congress to amend the Competition Law to step up economic sanctions against both corporations and individuals involved in illegal antitrust activity and simplify the procedures to impose sanctions and amend the Criminal Code to clarify the language describing illegal antitrust conduct that leads to imprisonment, to provide fair warning to the potential lawbreaker and effectively become a general deterrent.

ii Significant cases

Own-initiative investigation of absolute monopolistic practices in the market of notarial services

In September 2007, the Commission opened an investigation of suspected absolute monopolistic practices in the market of notarial services in Mexico, which was prompted by the publication in a newspaper of a public announcement by the National Association of Notaries of Mexico announcing an agreement reached among notaries to fix the fees payable for notarial services in relation to the incorporation of new companies.

The newspaper publication was viewed by the Commission as a *prima facie* indication of a situation that could result in the illegal manipulation of the market, possibly involving an absolute monopolistic practice prohibited by Article 9 of the Competition Law, to the extent that the announcement published were to be found to constitute an agreement among competing economic agents having the purpose or effect of fixing, elevating or otherwise manipulating the purchase or sale price of goods or services.

Precisely one year later, in September 2008, the Commission resolved, in a divided vote, that it had not found sufficient evidence to determine a probable cause to believe that a violation of Article 9 had occurred and decided to close the investigation. Unfortunately, in its final resolution the Commission did not elaborate on its evaluation of the evidence that supported the split decision not to bring administrative proceedings against the National Association of Notaries of Mexico. The vote of the dissenting Commissioner that decided in favour of commencing administrative proceedings cited the provisions of Article 9 and based its reasoning on the Commission's lack of discretion to decide whether or not to commence proceedings in cases when the Commission has *prima facie* evidence of the existence of an agreement among competitors fixing the prices of their services.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Competition Law regulates 'relative monopolistic practices' in Article 10. Monopolistic practices are relative when such practices involve an act, contract, agreement, proceeding or combination, the purpose or effect of which is, or may be, to unduly displace other agents from, or substantially preclude their access to, the relevant market or to create undue advantages in favour of one or more persons. Examples of 'relative monopolistic practices' specifically contemplated in Article 10 include:

a exclusive distributorship arrangements among non-competitors, defined by a geographical area, type of customer or specific duration, including covenants not to manufacture or distribute goods or render services;
b agreements regulating the distributor's resale price levels or other resale conditions;
c tie-in sales or discounts;
d exclusive dealing arrangements;
e refusal to sell;
f boycotts;
g dumping;
h tied discounts;
i cross-subsidising of goods or services;
j price discrimination; and
k actions aimed at increasing costs, hindering the productive process or reducing demand for goods sold by competitors.

Relative monopolistic practices are not illegal *per se*. To declare the illegality of a relative monopolistic practice, the Commission is required to prove that the economic agents involved have substantial power over the relevant market and the prohibited activities relate to goods or services that correspond to the relevant market.

The Competition Law establishes that to assess whether a relative monopolistic practice is objectionable or otherwise subject to sanctions, the Commission is also required to take into account its effects on market efficiency.

To determine the relevant market, the Commission must consider (1) the possibility of consumers switching from one product or service to another, including switching to products or services available in Mexico or abroad, (2) distribution costs and costs of raw materials, including transport and insurance costs, import duties and other customs restrictions and the existence of entry barriers, (3) costs of accessing alternative markets and the probability that consumers will access such markets, and (4) legal restrictions limiting consumer access to alternative supply sources or supplier access to alternative consumers.

In defining market dominance, the Commission must consider:

a the economic agent's market share, taking into account sales information, client base, installed capacity, and any other factors deemed relevant by the Commission to determine market share;
b to what extent the economic agent can unilaterally fix prices or restrict supply in the relevant market without its competitors being able to counteract or mitigate this power;

c the existence of entry barriers;
d to what extent there is competition in the relevant market and the level of power of the competitors;
e the possibility to access alternative sources of supply; and
f the recent conduct of the economic agent.

The Commission may impose economic sanctions against those engaging in relative monopolistic practices that are found to be illegal, up to an amount equal to 900 thousand times the general minimum wage in the Federal District (approximately US$3.5 million dollars). The Commission can impose a fine of twice the above amount if the parties are repeat offenders. If the repeat offence is particularly serious, the Commission can impose a fine up to the higher of 10 per cent of the annual sales of the offender in the prior fiscal year; and 10 per cent of the value of its assets, instead of the fines referred to above. As noted above, given the narrow definition of what constitutes a repeat offence, imposition of increased fines against a repeat violator are very rare.

An economic agent under investigation for illegal relative monopolistic practices may opt to voluntarily stop and correct the violations to the Competition Law at any time before the Commission completes its investigation, by undertaking to stop the illegal activity and implement adequate corrective measures within a specific time frame to effectively restore competition. Economic sanctions are nonetheless still imposed against the economic agent, but in such instance sanctions are imposed at the lowest level. This benefit is only available to an economic agent once every five years.

i *Significant cases*

Complaint by Líneas Aéreas Azteca against Volaris and Avolar

Líneas Aéreas Azteca, a Mexican airline currently under administration, filed a complaint before the Commission against two of its competitors, Volaris and Avolar, claiming that they were selling tickets below cost. During the investigation, the Commission determined that Volaris and Avolar were indeed selling tickets below cost but found that they did not have a dominant position in the relevant market and resolved that the discounted prices offered by Volaris and Avolar did not displace competition and did not limit the access of other airlines to the relevant market.

Complaint by Telefónica against Telcel and Moviltel

Telefónica México, a local mobile telephone services provider, filed a complaint before the Commission against its main competitor, Telcel, and against Moviltel, Telcel's authorised distributor in the City of León, Guanajuato, claiming illegal antitrust activity.

In its complaint, Telefónica alleged that Telcel's exclusivity agreements with certain of its mobile content providers constituted an illegal tie-in arrangement. Telefónica also claimed that Telcel's reduced tariff for calls to other Telcel customers in contrast with Telcel's higher tariff for calls to customers of other networks constituted illegal tariff discrimination. Finally, Telefónica also alleged that Moviltel's offer to Telefónica's customers to exchange their mobile phones free of charge when switching to Telcel was illegal.

During the investigation, the Commission determined that Telcel and Moviltel had a dominant position in the relevant market, found that there was probable cause to believe a violation had occurred, and resolved to initiate administrative proceedings.

During the proceedings, the Commission resolved that the exclusivity agreements with the mobile content providers constituted an illegal relative monopolistic practice and ordered Telcel to immediately stop such practice.

With respect to the tariff discrimination claim, the Commission resolved that there was insufficient evidence to prove that all Telcel customers were in equal conditions and could benefit from the reduced tariff, and decided to dismiss the complaint and the initial finding of 'probable cause to believe'.

Finally, with respect to the claim against Moviltel's conduct regarding mobile exchange, the Commission resolved that the complainant did not prove that such conduct had the purpose or effect of increasing Telefónica's costs, and that the conduct was a promotion similar to other promotions offered by other mobile companies. As a result, the Commission decided to dismiss this complaint also.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Article 33 bis of the Competition Law grants the Commission authority to investigate and determine if effective competition exists in specific regulated industries, such as air, maritime and ground transportation, including rail transportation, telecommunications, airports and seaports, energy and financial services, including investigating and assessing whether or not one or more economic agents have substantial power in such industries. The Commission may start a regulated industry investigation pursuant to Article 33 bis solely to the extent that the laws or regulations in the relevant industry expressly provide for it and only on the basis of a formal request made by the industry regulator or by an affected party, which can be a consumer or user or a competitor in that industry.

A regulated industry investigation pursuant to Article 33 bis starts with a formal written petition made by the industry regulator or an affected party. The petition must include sufficient information to enable the Commission to determine the relevant market and to assess the level of competition and dominance in that market. The way in which the Commission determines the relevant market and the level of competition and market dominance in a regulated industry investigation pursuant to Article 33 bis is no different from that in an investigation of relative monopolistic practices pursuant to Article 10 of the Competition Law.

The Commission reviews each petition for a regulated industry investigation to determine whether the information is complete to enable it to commence the investigation. If the petition does not meet the requirements, the Commission notifies the petitioner of the deficiencies. The petitioner is given 15 working days to submit any additional information and documents requested by the Commission. In cases when extension is duly justified, the period can be extended by an additional period of 15working days.

Once a petition for a regulated industry investigation is deemed complete, the Commission confirms the start of the investigation and publishes and extract of its confirmation in the Official Daily of the Federation. The purpose of the publication in the Official Daily is to put everyone on notice that the Commission has started an investigation of a regulated industry and to give parties having information pertinent to the investigation an opportunity to submit such information.

The period for completing the investigation is between 15 and 45 working days.

Once the Commission concludes the investigation, if it finds there are sufficient elements to determine market dominance or absence of effective competition, the Commission issues a preliminary finding and publishes an extract of the same in the Official Daily of the Federation.

Any party that can demonstrate to the Commission sufficient connection with the case may furnish additional evidence and other elements of proof within 20 working days of the publication of the Commission's preliminary finding, after which the file of the case is considered closed.

Once the file of the case is considered closed, the Board of Commissioners has 30 working days to issue a final resolution, which is then notified to the industry regulator and published in the Official Daily of the Federation. The Commission's resolution may be subject to appellate review and the decision in the appellate review may be subject to further appeal before federal courts on the grounds of infringement of constitutional rights.

In general, if the Commission's final resolution confirms market dominance or absence of effective competition in a particular industry, the industry regulator may impose on the entities affected by the Commission's final resolution, specific obligations concerning, for example, maximum tariffs, quality of service, information and other reporting requirements.

If circumstances change, the affected entities may, at any time, request the Commission to reassess the level of competition and market dominance to seek to revert the specific obligations imposed by the regulator as a result of the Commission's final resolution in the initial investigation.

The Commission reported that during the year covered by its most recent annual report, the Commission commenced eight regulated industry investigations, none of which were completed during that year.

Chapter 22

NEW ZEALAND

*Peter Hinton, Anne Callinan and Elisabeth Welson**

I OVERVIEW

The Commerce Commission ('the Commission') is the authority responsible for enforcement of competition (antitrust) and economic regulation law in New Zealand. General market regulation and some sector regulation (electricity lines, gas pipelines and airports) are provided for by the Commerce Act 1986 ('the Commerce Act'). Sector-specific regulation is provided by the Telecommunications Act 2001, Dairy Industry Restructuring Act 2001 and Electricity Industry Reform Act 1998.

i Prioritisation and resource allocation of enforcement authorities

The Commission's portfolio of statutory responsibilities continues to grow, particularly in relation to sector-specific regulation. Enforcement has also been an increasing focus, with considerable investment in major litigation. As a consequence, the Commission's size, both in terms of staff (now in excess of 170) and expenditure (the 2008-2011 Statement of Intent provides that the operating expenditure budget of the Commission is NZ$42.765 million) continues to grow.

Figures provided in the Commission's latest Statement of Intent illustrate how its operating budget is allocated between each of the Commission's areas of responsibility, while also providing an insight into areas of focus and priority for the Commission.

Commerce	General market regulation	$15.495 million
	Dairy sector regulation	$0.300 million
Communications	Telecommunications sector regulation	$8.040 million
Energy	Electricity sector regulation	$5.630 million
	Gas sector regulation	$0.300 million
	Input methodologies	$3 million
Other	Major litigation	$10 million

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The Commission's responsibility for general market regulation encompasses restrictive trade practices, merger and acquisition activity and fair trading, and is the biggest area of Commission expenditure. General market regulation also represents the biggest aspect of litigation expenditure. The activities of the Commission in 2008, as well as public comment on the part of the Commission and its members, give an insight into the enforcement priorities of the Commission in the coming year. A high-level overview of these priorities is noted below.

ii Enforcement agenda

Cartel behaviour continues to be a key focus area for the Commission, with a number of cartel prosecutions on foot and other investigations under way. As part of this focus, the Commission has announced a review of its Leniency Policy under which immunity from Commission initiated proceedings can be granted to the first person involved in a cartel to come forward with information about the cartel and cooperate fully with the Commission in its investigation and prosecution of the cartel. It is also developing sentencing submission guidelines for cartel cases. Cartel enforcement is discussed in more detail in Section II, *infra*.

2008 also saw the Commission announce a review of issues around misuse of market power, indicating that it sees these issues as a priority for 2009. In announcing the review, the Commission noted that it has to date found addressing, and proving in a court of law, breaches of the misuse of market power provisions (particularly in relation to allegations of predatory pricing) difficult. Recent developments in this area of the law in a number of other jurisdictions (including Australia) and the expert panel review that has been announced will no doubt inform the Commission's review. We discuss this and other recent developments in Section III, *infra*.

In the area of mergers and acquisitions, it is expected that as the effects of the current global economic crisis are increasingly felt in New Zealand, more and more firms will seek to rely on the 'failing firm' argument, claiming that the target is failing and that the only option is to sell to a competitor that already has a substantial degree of market power. The Commission has already issued a failing firm decision and has indicated it will prepare guidelines regarding failing companies to assist with the expected increase in these applications.

Enforcement of consumer protections against misleading and deceptive conduct is a significant part of the Commission's general market regulation activities. The emerging 'green' market has been identified as an area of particular concern and priority. We will not comment further on 'fair trading' matters.

Sector-specific regulation is expected to again absorb a significant amount of the Commission's time and resources in 2009. Competitive issues in the broadband and mobile markets are an ongoing priority, as is implementation of the new price regulation framework introduced in 2008 by the Commerce Amendment Act 2008. The latter has an immediate impact on electricity lines businesses, gas pipeline services and airport services, but has the potential to affect all sectors where there is scope for the exercise of a substantial degree of market power.

II CARTELS

Cartel conduct has been a particular focus of the Commission in recent times, following the increasing trend in cartel litigation internationally.

i Significant cases

Few cartel conduct cases proceed to a full defended hearing in New Zealand, with alternative solutions often being reached (such as a settlement, followed by a court hearing on penalty). In 2008, the Commission acknowledged that it had set itself 'the task of reviewing our major litigation portfolio to assess what further action we can take to ensure that cases proceed to full trial, only where no alternative forms of resolution are available'. Nevertheless, the Commission issued civil proceedings against 13 airlines in relation to alleged cartel conduct in the air cargo industry. The Commission also has proceedings on foot against 11 defendants for alleged anti-competitive conduct (including price fixing) relating to interchange fees in the New Zealand credit card industry. That case is due to be heard in the second half of 2009.

The Commission's current litigation portfolio also includes a claim against two groups of pathologists for discussions that allegedly amounted to price fixing in the context of merger discussions. Proceedings have also been launched against Visy in the New Zealand 'chapter' of the Australian price fixing case where Visy paid A$36 million in penalties.

In December 2008, the Auckland High Court imposed a NZ$1.05 million penalty on Schneider Electric SA following a lengthy investigation into the gas insulation switchgear market. A cartel agreement had been in place worldwide (including New Zealand) with a written agreement to share pricing information, rig prices and avoid competing, both generally and on price. The cartel conduct was considered to be at the most serious end of the spectrum as it was a highly organised cartel that had avoided detection for 15 years. *Schneider* was the first case in New Zealand to come before the court as a result of a leniency application. High Court proceedings are continuing against the other corporate defendants in the case, Alstom and Seimens.

ii Trends, developments and strategies

The number of cartel investigations and High Court claims in New Zealand has increased dramatically in recent years. The Commission stated in November 2008 that it had 11 cartel investigations under way. The increasing number of cartel investigations in New Zealand may be attributed to a rise in international cartel behaviour being found to affect New Zealand and the effectiveness of the Commission's Leniency Policy.

While some of the cartels under investigation are domestic in origin, the majority of the cartels brought to the Commission's attention recently are the New Zealand 'end' of international cartels. The Commission has become increasingly active in investigating international cartels as New Zealand's small, open economy is especially susceptible to the effects of international cartels.

The Commission first launched a Leniency Policy in 2000, although this was updated in 2004 and specifically targeted cartel conduct. This focused approach has been successful in bringing cartel conduct to the Commission's attention. The Commission has maintained its 'first in, first served' policy, in contrast to other jurisdictions which have a 'marker' system for reserving places in the leniency queue. Seven of the 11 investigations which the Commission states are currently on foot were initiated through the Leniency Policy.

Notwithstanding the success of the Leniency Policy, the Commission is currently undertaking a review of both its Leniency Policy and its Co-operation Policy, taking account of equivalent programmes of New Zealand's major trading partners and the recommendations of the International Competition Network. A draft policy is expected for public comment in early 2009.

The Commission has taken several opportunities in the past year to remind the public that compliance with its investigatory powers is an important aspect in the detection and prosecution of cartel conduct, which the Commission takes seriously. Under the Commerce Act, the Commission has powers to compulsorily require an individual or company to provide information and documents where the Commission considers it necessary or desirable for the purposes of carrying out its functions and exercising its powers under the Act. This is done through the issue of a 'Section 98 notice'. Two recent cases illustrate the importance that the Commission places on Section 98 notices as an investigative tool and the need for companies to take compliance with Section 98 notices seriously – particularly as non-compliance is a criminal offence.

AstraZeneca Ltd v Commerce Commission [2008] NZCA 479

AstraZeneca Limited unsuccessfully attempted to resist a Section 98 notice arguing that the Commission had no power to issue such a notice as the company had a statutory exemption for its allegedly anti-competitive conduct. Both the High Court and the Court of Appeal of New Zealand ruled in this case that an investigative body such as the Commerce Commission should not be prevented from investigating potential breaches of the Commerce Act purely because an alleged defence or statutory exemption is raised at the outset. A final determination in this case will be made by the Supreme Court which granted leave on 25 February 2009 to hear an appeal against the Court of Appeal's decision.

Investigation into the air-cargo industry

As part of its investigation into allegations of cartel conduct in the air-cargo services industry, the Commission issued a Section 98 notice to Aerolineas Argentinas requiring certain information to be provided by mid-November 2007. The documents were eventually provided to the Commission in April 2008. Aerolineas Argentinas was criminally prosecuted and fined NZ$11,000 for failing to supply the information requested. This case has emphasised the importance of responding to requests for information fully and on time, or at least seeking an extension of time prior to the deadline for compliance expiring.

iii Outlook

Cartel behaviour has long been criminalised in the United States and Canada. Recently, Australia has taken steps towards criminalisation with the introduction in December 2008 of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008. The Bill proposes to make it a criminal offence for a corporation to make or give effect to a contract, arrangement or understanding between competitors (or persons that would otherwise be competitors) that contains a cartel provision. In New Zealand, significant monetary penalties may be imposed for cartel conduct in breach of the Commerce Act and individuals involved may be excluded from future management of a company. However, criminalisation in Australia may be expected to increase the likelihood of criminalisation being considered in a New Zealand context, and developments in this area are awaited with interest.

The Commerce Commission (International Co-operation and Fees) Bill was introduced into Parliament in September 2008, but had not had its first reading before Parliament was dissolved for the November general election. The Bill provides for greater cooperation between the Commission and its overseas counterparts. The Bill would, if passed, enable the Commission to share information acquired from its investigations with other regulatory bodies, even where that information would otherwise be confidential. It also permits the Commission to exercise statutory information gathering powers to assist its overseas counterparts.

Ties with Australia are set to become even closer under proposed reforms permitting civil pecuniary penalties issued by a court in one country to be enforceable by courts within the other country. Currently, civil pecuniary penalty orders (orders a court makes where a person has contravened a civil penalty provision, for example, under the Commerce Act) are not enforceable in Australia. While there is a long-standing practice against enforcing the penalties of another country, Australia and New Zealand have a strong mutual interest in the integrity of trans-Tasman markets and the effective enforcement of both Australian and New Zealand regulatory regimes. It is anticipated that these fines will be enforceable in the same way as civil judgment debts.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

With the exception of cartel investigations and prosecutions and merger regulation, 2008 was more a year of clarification and reinforcement than a watershed year.

i Taking advantage of market power

Consistently with international experience the precise bounds of Section 36 of the Commerce Act, the New Zealand equivalent of EC Article 82, have been tested but the predictability that many think is critical in this area remains illusory. The search for the 'holy grail' of 'dominance abuse' continues. Indeed the Commission has as recently as 26 February 2009 announced the appointment of an expert panel to review the enforcement framework relating to single-firm conduct. This reflects a number of similar initiatives overseas.

Section 36 specifically prohibits entities with substantial market power from taking advantage of that power for certain proscribed exclusionary purposes. Its scope extends beyond mere monopolists but the time at which substantial market power is achieved is, as everywhere, unclear. It is, however, probably unlikely that entities with less than a 30-40 per cent market share would be found to have substantial market power although even this is possible in a market that is otherwise widely fragmented.

Section 36 is not intended to deter legitimate competitive conduct, even if it causes harm to others or forces them from the market.

To test whether advantage has been taken of market power the Commission and the courts inquire into whether the conduct in question is consistent with that which can be expected in competitive markets. If it is so consistent then it is considered almost axiomatic that there is no taking advantage of market power.

This approach is supported by case law including Privy Council authority, yet it is generally considered not to be a satisfactory test. Indeed, it has tended to make it virtually impossible to prosecute or otherwise litigate an 'abuse of power' case. Some have observed that virtually any conduct, however heinous it may be in reality, can be undertaken by participants in a fiercely competitive market. It is reasonably widely accepted that there is something missing either in the test or in its application.

The Commission's challenge of our incumbent telephone network provider's decision to re-route internet access calls through an 0867 prefix and to deny them the free-calling rights that they had previously enjoyed was determined in 2008. Many had expected the Commission to succeed but the High Court found that Telecom had acted in the same manner as any firm in Telecom's position but otherwise in a competitive market would have. The Commission has appealed this decision and it will be heard in the Court of Appeal in March 2009. As an indication of process flaws, the relevant conduct occurred in 2000.

It is not appropriate to question the correctness of the eventual outcome here but it may be appropriate to observe that the application of the test appears fraught with judgement calls and to be lacking in precision. Indeed, is it ever possible to strip away the hallmarks of power and, even if so, should it be a complete defence that the conduct in question could equally have been undertaken in a competitive market or must that conduct have been that which would have been so undertaken? Can the English language begin to address these issues? Can the courts?

The fine line is particularly evident in the context of predatory pricing. Even leaving to one side whether relevant pricing must be below marginal cost or some other benchmark, is it a sufficient defence for an incumbent to say that its pricing was only instituted to 'match a new entrant' when such pricing: has never been undertaken before and therefore induced new entry; and is implemented only in those market segments where new entry is occurring?

The issues are exacerbated by the fact that pricing may or may not be above cost because the integrated nature of the incumbent's operations makes it impossible to discern its costs.

The Commission, in December 2008, closed its investigations into a complaint that Fonterra (the largest New Zealand dairy cooperative by an immense margin) was contravening Section 36 by introducing a 'tactical pricing' regime. Under this, Fonterra offered extraordinary prices to farmer suppliers who it considered might otherwise sell elsewhere. This is the other side of the predatory pricing coin in that the net potential effect was to preclude access to those customers by smaller cooperatives. The Commission found that the offered prices were a legitimate response to vigorous competition.

Similarly, the Commission found in 2007 that Intercity (assuming it had market power) was not taking advantage of such power by reducing its bus fares to match those offered by a new low-cost entrant, Nakedbus, even though Intercity had only lowered its fares on the routes also serviced by Nakedbus. The Commission concluded that Intercity was simply utilising excess seat capacity, and, since the alternative was empty seats, Intercity was actually increasing its profit rather than providing services at below cost.

The Commission has also recently validated a NZ$10 bundled discount offered by Telecom where the bundle comprised a non-contestable product and two contestable products. Validation resulted from the conclusion that, even if the NZ$10 discount was deducted solely from the contestable products, the offering was still above relevant measures of cost. This is consistent with recent developments in the US.

The Commission went to trial against Telecom again in 2008 alleging that Telecom had misused its market power to prevent or deter competition in markets involving high speed data transmission. The essential complaint was that the prices charged prevented other competitors from being competitive. Judgment is awaited.

It is clear that the present approach to Section 36 is extremely favourable to those with market power. This may well be appropriate if only because any alternatives would have even higher cost but this is very much under review.

ii Restrictive agreements

Section 27 of the Commerce Act prohibits arrangements that have the purpose, effect or likely effect of substantially lessening competition. It conforms to international standards including Article 81 of the EC Treaty. Price fixing arrangements are deemed to contravene Section 27 but like all restrictive arrangements are able to be authorised if there are sufficient public benefits to outweigh any perceived prejudice.

Section 27 has frustrated various proposed alliance arrangements between Air New Zealand and other international carriers. Such arrangements inherently seek to justify the allocation of markets or the fixing of prices on the basis of overarching rationalisation and other efficiency justifications. However, where substantial market shares are involved, both the Commission and the courts have been consistent in rejecting applications for authorisation. Notably, Air New Zealand recently suffered a similar rejection in Australia when it sought approval for its proposed joint promotion of flights to Canada with Air Canada.

The Commission was also successful in obtaining an undertaking from Auckland International Airport that it will not proceed with its announced decision to reduce the number of on-airport duty free outlets from two to one because of concerns that the inherent assurance of exclusivity to the selected operator would contravene Section 27.

Interchange fee litigation continues; the Commission's principal contention being that fixing the interchange fee is anti-competitive because associated rules prevent retailers from negotiating the merchant service fees or charging credit card users extra to cover such fees.

Conduct in the health sector also remains under the Section 27 spotlight. While exclusively private sector collusive activity is non-exceptional, where the public health system becomes involved or is affected, analysis struggles. Enforcement proceedings have been commenced against private sector pathology providers where they had agreed a 'moratorium on competition' after the government funder expressed concern that such competition was inappropriately incentivising doctors to request unnecessary pathology tests.

iii Merger analysis and process

We will not comment extensively upon merger matters. Despite a complete loss in the High Court, the Commission successfully defended its refusal to clear a three to two merger in the supermarket industry even though the third participant was a fledgling with only a few outlets and a very uncertain future.

As a sign of the times, the Commission has very recently cleared a two to one merger on a 'failing firm' basis. The Commission was satisfied that no other person was likely to acquire the relevant assets and that they would likely exit the market.

The Commission has also updated the Merger Guidelines and issued Clearance Process Guidelines with a view to providing greater clarity. These, although not revolutionary, have been well received.

The Commission has also successfully attributed 'accessory liability' to vendor interests in an attempted 'merger without clearance' context where such interests had 'dishonestly participated' or had 'knowledge of a real risk of contravention'.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Trends and developments

The past decade has seen a significant move away from the light-handed information disclosure model of the previous decade. Increasingly, more heavy-handed economic regulation has been implemented for sectors demonstrating strong monopoly characteristics. Electricity, gas and telecommunications have borne the brunt of this change but the dairy industry and airports have not been immune.

In telecommunications, a Telecommunications Commissioner operating within the broader ambit of the Commission is charged with responsibility for a range of regulation under the Telecommunications Act 2001, which establishes a regime for regulating the supply of telecommunication services in New Zealand. Provisions of the Commerce Act with implications for the Commission's role include, *inter alia*, classification of the telecommunications services to be regulated and provisions concerning determinations by the Commission in respect of those regulated telecommunications services. In addition, the Commerce Act continues to apply to the telecommunications industry.

In the electricity sector, an innovative threshold regime for regulation of electricity lines activities was established in 2001. Growing concerns that this model was backward rather than forward-looking and discouraged necessary investment, together with calls for greater flexibility in the implementation and operation of the general controlled goods and services provisions of the Commerce Act, saw a comprehensive review initiated in late 2006. The result of that review is the Commerce Amendment Act 2008 ('the 2008 Amendment') which introduces a new framework for economic regulation in markets for goods or services where there is scope for the exercise of substantial market power, with sector specific application for each of electricity lines, gas pipelines and airports.

Under the 2008 Amendment, a range of input methodologies are to be developed by the Commission, with the aim of improving certainty and predictability. Described by the Commission as 'setting upfront regulatory methodologies, rules, processes, requirements and evaluation criteria that are directly (or indirectly) relevant for applying the regulatory instruments', the input methodologies will apply to all regulated parties. In December 2008, the Commission published indicative time frames for the development of, and consultation relating to, input methodologies. A final determination of input methodologies for each type of regulated service is to occur by 30 June 2010.

ii Electricity markets

Following reforms in the 1990s that saw the electricity sector move away from 100 per cent public ownership and control, the sector has moved through a range of specific economic regulation. Initially the focus of regulation in this sector relied on light-handed information disclosure alongside general competition law. Enacted in 1998, the Electricity Industry Reform Act required full ownership separation of distribution (lines) businesses from supply (retail and generation) businesses. This enforced separation was to encourage competition in generation and retailing and to prevent cross-subsidisation of generation and retailing from lines customers. The absolute prohibition was ameliorated by the ability of the Commission to grant an exemption if satisfied that the purposes of the Act would not be defeated by a particular cross-involvement. The Commission's enforcement and exemption granting roles are ongoing but now have a decreased focus with the implementation of a number of statutory exemptions, particularly as regards investment in renewable energy.

Until 2008, economic regulation of electricity lines businesses was by way of a threshold regime. Under the Commerce Act, the Commission was required to set thresholds for control and had an obligation to assess performance against these thresholds. Price control was targeted at those lines businesses who breached their thresholds. An additional requirement was that control would meet the purposes of the Act, which were focused on the efficient operation of markets. The Commission also had responsibility for administering an information disclosure regime, auditing valuations of the fixed assets of lines businesses and reviewing the valuation methodologies.

The threshold regime has now been replaced by the 2008 Amendment. All electricity lines businesses are subject to information disclosure but only those that are not community owned are subject to more heavy-handed price-quality regulation, which is by way of either a customised or default price-quality path.

This form of regulation, while more heavy-handed than the threshold regime, still seeks a relatively low-cost approach to setting price-quality paths, while allowing the opportunity for individual businesses to propose an alternative path which better meets their particular circumstances.

Although not the subject of sector-specific economic regulation, the supply side of the electricity market is still subject to general economic regulation under the Commerce Act. In 2005, the Commission initiated an investigation into whether breaches of the Commerce Act had occurred in the wholesale and retail electricity markets, amid debate over whether electricity prices in New Zealand have been set at competitive levels and complaints about pricing levels and various industry practices. The investigation is ongoing at the time of publication, with a final report expected shortly. The Commission has indicated that, as part of the investigation, it has analysed the workings of the local electricity market in considerable detail, and (as a result of gathering substantial amounts of information and market data) used a comprehensive data set in conducting a thorough analysis of the competition within the market. The outcome of this review process could herald wider changes within this sector as part of a review of overall market operation by the new government.

iii Airports

The geography and demographic spread of New Zealand mean that each of the major international airports in New Zealand – Auckland, Wellington and Christchurch – has strong natural monopoly characteristics. Airports have historically been the subject of a light-handed model of information disclosure under the Airport Authorities (Airport Companies Information Disclosure) Regulations 1999. Between 1999 and 2002, the Commission completed a comprehensive inquiry into whether airfield activities should be controlled at the three major international airports, and considered whether airfield services should be declared controlled services. The inquiry recommended that control be imposed over Auckland International Airport Limited (and also Wellington International Airport Limited, should airport charges be increased significantly). However, the Minister decided not to impose control on the basis that the benefits of regulation in terms of efficiency gains did not outweigh the costs, and associated benefits to customers were relatively low.

Following the 2002 inquiry, a number of issues were raised which highlighted the deficiencies in the information disclosure regime applying to airports, including concerns that the absence of guidelines or methodologies limited transparency about regulatory issues, and that disclosed information tended to be largely of the nature of general purpose financial statements and did not provide a robust basis for assessing whether there was in fact monopoly pricing.

The 2008 Amendment extends the Commission's sector-specific responsibilities to include services supplied by operators of Auckland, Wellington and Christchurch international airports. This is aimed at improving information disclosure required of airport companies at the time of setting their prices. The new regulatory regime will require disclosure of a full range of relevant information in accordance with rules that are to be prepared in advance by the Commission. These disclosure requirements are to be finalised by 1 July 2010 (the same date that input methodologies are to be confirmed). At the start of the next pricing period in 2012, the Commission is to report to the Minister of Commerce on the success of the disclosure requirements in limiting excessive profits, encouraging investment and promoting innovation. The government has, for the moment at least, stepped back from a review which was to investigate extending the disclosure requirements to regional airports, to allow for an assessment of the disclosure regime as it applies to the three international airports.

iv Telecommunications – next generation networks

In March 2008, the Commission announced a next generation networks (NGN) study, with the aim of establishing a common understanding of the issues and opportunities arising from NGN that may impact on the commercial and competitive environment for telecommunication services in New Zealand. NGN is the term used to describe the replacement of legacy telecommunications networks (such as, in New Zealand, Telecom's Public Switched Telephone Network) with new packet-based internet protocol networks, together with the replacement of the copper access network with fibre. The first stage in the NGN study is a discussion paper which provides an overview of the drivers and implications of NGN deployment internationally, as well as their relevance to the New Zealand market, released in late December 2008. The final report of the study is intended for release in mid-2009.

v Dairy

The Commission is also charged with regulatory oversight and enforcement in the dairy sector. This role arose consequent upon legislative authorisation for the amalgamation of New Zealand's two largest diary cooperatives and is aimed at ensuring the amalgamated entity does not misuse its market power. A key purpose is to ensure access to raw milk by independent processors is available at an appropriate regulated price. A Commission announcement in May 2008 indicated that it had received a number of complaints about pricing in the dairy retail sector and the Commission would be making preliminary enquiries to determine whether to open an investigation under any of the acts for which the Commission has jurisdiction. These enquiries are ongoing.

V STATE AID

The government has guaranteed retail and wholesale bank and other finance institution deposits and has indicated that, in the current global environment, it will consider other forms of state aid.

However, state aid issues have not to date been legally problematic in New Zealand. New Zealand is not part of any 'common market' with stipulations akin to Articles 87 to 89 of the EC Treaty.

New Zealand's most formal market alliance is with Australia under a set of trade and economic arrangements collectively known as Closer Economic Relations (CER), notably, the Cooperation Agreement between the Commission and the Australian Competition and Consumer Commission. These regulations seek to regulate state aid that might distort trans-Tasman trade but no action to date in either Australia or New Zealand has been depicted as being inconsistent with them.

Chapter 23

PARAGUAY

*Fernando Gadea and Sebastian Olmedo**

I OVERVIEW

Paraguay is currently in the process of adopting an inaugural competition law. Congress is studying a bill, which has utilised as references, the Model Law of the United Nations, and also those of other South American countries including Argentina, Brazil and Colombia.

Abuse of the market is currently regulated by Law No. 1034 of the Merchant and Law No. 1294 of Brands, through judicial actions of disloyal competition and actions for compensation of damages.

The following analyses the draft competition bill, comparing it with other legislation in the region, as well as the United Nations Model Law and US competition laws.

The policy of competition includes a variety of areas and aspects relative to the functioning of a market economy. Among them we can cite as the most important, that of promotion of competition and the regulation of anti-competition conduct, the control of horizontal and vertical mergers, the promotion of the cooperation with other regulatory agencies and international competition agencies, institutional maturity for development of international agreements and more active policies of competition.

Analysing certain laws of the hemisphere, it is important to mention that the primary aim of Brazilian Law No. 8884/94, which deals with competition, is to 'establish with simplicity, rigorousness, precision, sufficient detail and adequate clarity the rules of the game of the competition'.

The Uruguayan bill has clear definitions in reference to horizontal, vertical and conglomerate concentrations; definitions which aid in understanding what it means to have concerted agreements, associations and practices so as to limit competition.

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The right to competition is no more than an assurance of efficient productivity so as to maximise social wellbeing, avoiding abuse of superiority and restrictive practices. The anti-monopoly and antitrust laws should aim at safeguarding the legal interests protected – free competition – which should be classified and limited so as to allow the development of activities in industry and commerce.

Similarly, an adequate law of defence of competition should focus on the creation of a market with perfect competition; it is important to ensure that no sector of the community represents a share of the overall market or is sufficiently large enough to influence prices, causing upward or downward effects.

Below we look at the Bill in greater detail.

II THE COMPETITION DEFENCE BILL

i Objectives

The primary objective of the Bill is to defend a market of free competition, avoid abuses and mergers which limit the freedom of the consumer.

Analysing Article 1 of the Bill, although it does not state the primary objective, it does, however, define what free competition is. On the other hand, the first article of the Model Law of the United Nations does state what the primary objectives of the law are. The Bills of Uruguay and Argentina also include the primary objectives, such as prohibited agreements and practices.

ii Definitions and scope

In Chapter I, the Bill describes the scope, including also definitions of company (Article 3) and market (Article 5). Having compared this Bill with other bodies of law, it can be seen that the definitions of the Bill are similar to those of other bodies of law of countries in the region, so as to have a similar foundation of the principal competition terminology such as 'company', 'market', 'horizontal' and 'vertical agreements'.

The concept of market is of subtle importance, considering that in order to determine whether or not a dominant position is held within the market, one must define or delimit the market in which the actors of the economy participate.

Within this delimitation, the governing authority will decide if a dominant position exists or not, always aiming to protect competition within the market, which shall act as an incentive for consumerism.

The definition of company in the Bill also includes those companies with foreign headquarters which engage in economic activities abroad to the extent that their actions produce effects in the national market, obviously through their representatives in the country.

This implementation is important, in order to avoid abuses from corporations such as the use of corporate veils to commit fraud in the market. Our jurisdictional body is still opposed to this implementation.

With this implementation, a legal void resilient by rigorous formalism shall be filled, corrected and promoted by the Competition Defence Law.

iii Exceptions

Many countries recognise the valid existence of federal monopolies, reserved sectors for strategic reasons and national security and the exclusive exploitation of the rights to intellectual property. However, it is also recognised that in spite of their nature, these monopolies are subject to the laws of competition to the extent that they cause situations of abuse of position or monopolist practices outside of the reserved or strategic areas.

Similarly some competition regimes in the region have established exceptions for specific sectors and economic activities such as agriculture, professional sports, labour organisations and exportation activities to the laws of competition.

From Article 2 of the Bill, we can infer that the present law will apply to all companies, public or private, which engage in economic activities in whole or in part in the national territory, and that are for profit or non-profit. We do not perceive precise exceptions for the laws of competition.

Currently, the transition towards a complete application of the aforementioned article in Paraguay is a complex task, owing to the existence of monopolies in the country, mainly because of the federal companies which provide public services and goods, such as the National Administration of Electricity ('ANDE'), Paraguayan Company of Communications ('COPACO') and the National Industry of Cement.

Said companies should be privatised or capitalised to create a real and perfect market to design an efficient economy where the companies can compete freely. This is, without a doubt, an opening of the market and presents the possibility of attracting private national, international and mixed capital.

III GENERAL PROHIBITIONS

The Bill prohibits, in general, all commercial conduct that limits, restricts or distorts competition.

In Chapter II the prohibited agreements, abusive conduct and concentrations are described. As a means of reference, we can describe the general prohibition of agreements between companies, the decisions of associations of companies and the concerted practices that aim to produce or can produce the effect of impeding, restricting or distorting the competition in whole or part of the national market.

i Prohibited conduct

The Bill prohibits the following conduct: (1) fixing or imposing, directly or indirectly, or collectively recommending, purchase or sale prices or other conditions for transactions; (2) limiting or controlling the market, the production, the distribution, the technical development or investments; (3) distributing shares of the market to sources of supply; (4) imposing unequal conditions to third parties regarding provisions causing these to have a competitive disadvantage; and (5) subordinating the conclusion of a contract to the acceptance, by other parties, of supplementary provisions which, due to their nature or agreement with their uses in commerce, do not have any relation to the purpose of these contracts.

Many competition laws of countries in the hemisphere specifically establish prohibited conduct, such as:

a the fixture of prices and other conditions for sale;
b the imposition of barriers for market entry;
c collusive bids;
d the limitation of production or sale by means of fixing or distribution of quotas;
e concerted refusals for the acquisition of products, provision of services or admission of new participants in the market;
f the distribution of shares of the market;
g discriminatory agreements and predatory practices;
h contracts subordinated to the acceptance of supplementary provisions;
i exclusive agreements;
j abuses of position of dominance or monopolisation; and
k boycotts.

In making the comparison between the bodies of law of the hemisphere and the Competition Defence Bill we have concluded that certain points such as 'collusive bids' or 'boycotts', whether among individuals or these and the state, are of great importance and merit a thorough study for posterior insertion in the future law.

ii *Exceptions to the prohibited practices*

Article 8 of the Bill includes the following exceptions:

a the prohibitions of Article 7 and Article 10 shall not be applied to the agreements between companies, the decisions of associations of companies and the concerted restrictive practices of the competition which result from the application of a law or the regulations enacted when a law is applied;
b the agreements between companies and the decisions of associations of companies are not included in the prohibition established in Article 7 when the market shares of the total of companies participating do not exceed, in any of the relevant markets:
    - the threshold of 5 per cent, when the agreement has taken place between competing companies which operate in the same phase of production or commercialisation (horizontal agreement);
    - the threshold of 10 per cent, when the agreement has taken place between non-competing companies which operate in different phases of the economy (vertical agreement); and
    - the threshold of 5 per cent, when problems arise during the attempt to classify the agreement as horizontal or vertical.

The Competition Defence Bill foresees that the authority responsible for the application of the law ('the competent authority') may authorise the aforementioned agreements, decisions and practices. It can also determine the period of time for which it is allowed.

It is important to mention that what is stated by the Model Law of the United Nations regarding competition is literally stated as:

> *Authorisation or exemption: The practices referred to by Paragraph I, when they are properly notified ahead of time and carried out by a company subject to an effective competition, can be authorised or declared exempt if, given the purpose of defence of competition, the agreement in general presents a benefit for all.*

The competent authority shall analyse prohibited conduct to determine whether it can be justified owing to its pro-competitive effects and economic efficiency on a case-by-case basis.

Among the practices admitted by this exception are economic concentrations, certain vertical agreements about conditions not relative to the prices such as territorial representations or exclusive agreements, agreements which contribute to improving the production, quality and commercialisation of goods and services, the development of the investigation and the utilisation of economies of scale.

It will be of utmost importance to submit each particular case of 'restrictive agreements' to the competent authority for review, for the purpose of clarifying the scope of the agreement.

IV ECONOMIC CONCENTRATIONS

Regarding concentrations, the Bill has a similar model to that of all the bodies of law of the region, which consist of defining concentration, evaluation of the concentrations, and notification and registration of the operations of concentration.

The Ministry of Industry and Trade, as the competent authority, may oppose concentrations that present a significant obstacle for effective competition, in order to prevent a group of companies from developing a dominant position within the market.

The laws of the region, with the exception of Argentina, Chile and Peru (control system for the electricity sector), contain regulations for the control of economic concentrations which derive from the merger, acquisition or constitution of a group of companies, when the effect is to diminish, harm or impede competition. In this fashion, Brazil, Canada, Colombia, Costa Rica, Jamaica, Mexico, Panama, the United States and Venezuela have established regulations for the control of economic concentrations based on mandatory notification systems, previous or voluntary, so as to evaluate the level of concentration and its effects on competition.

V THE COMPETENT AUTHORITY

Under Title II of the Bill, Article 21 states: 'The competent authority of the present law on a national level shall be the Ministry of Industry and Trade.' We can infer that the Ministry of Industry and Trade shall deal with all issues regarding the defence of competition.

In general, the laws of the region are applied by independent authorities in the form of a Commission (Argentina, Brazil, Canada, Costa Rica, Chile, Jamaica, Mexico, Peru and the United States) or a Superintendency (Colombia and Venezuela). This autonomy is understood in a technical and operational way regarding how investigations, procedures and the application of laws are conducted. The decisions are made collectively, as is the case of a commission, or by one person, as is the case of a superintendency; these authorities are assisted by units or technical secretariats.

This Bill depicts a trend (in opposition to the majority of the countries in the region and the Model Law of the United Nations) of leaving the task of regulating the issues of competition in the hands of the executive branch, in other words, an independent authority is not created but simply derived from the Ministry of Industry and Trade granting it the liberty to control its organisation.

Other bodies of law such as those of Brazil, Canada, Chile, Peru and the United States, provide other agencies with the responsibility of ensuring the application of the law.

In Brazil the Secretariat of Economic Law and Economic Monitoring is subordinate to the Ministry of Justice and Finance. In the United States there is the Department of Justice, which is derived from the executive branch. In Chile there is the National Economic Prosecution, which is independent. In Peru the Court for the Defense of the Competition of Intellectual Property is independent.

We have the example of Law 25156 of the Republic of Argentina, in which Article 18 literally states: 'The National Court for the Defence of Competition shall be composed of seven members with sufficient background and suitability to hold office, of which two, at least two, must be lawyers and another two professionals of economic sciences, all of which must have at least five years of practice in that area[…]'. Similarly, Article 19 states: 'The members of the Court shall be designated by the Executive Branch, having preceded a tender of backgrounds.'

We believe that the Ministry of Industry and Trade should similarly create a qualified body of members, each of which have a suitable background and technical ability, in order to provide diligence and clarity for the participants in the economy so as to guarantee free and healthy competition.

Unfortunately, we see that the Bill of Competition Defence does not create an independent authority that would have been composed of experienced persons from the public and the private sector that would have given greater credibility to the aforementioned authority.

i *Functions of the competent authority*

Among some of the functions of the Ministry of Industry and Trade shall be to:

- *a* make resolutions and issue orders regarding matters within the scope of the law;
- *b* authorise agreements, decisions, recommendations and economic practices;
- *c* prohibit and punish restrictive conduct; and
- *d* collect evidence.

All control is concentrated in the Ministry of Industry and Trade. It also fulfils its advisory function regarding the defence of competition for different administrative areas of the country.

In general terms, the competent authority ensures compliance with the dispositions regarding the competition, investigation and resolution of cases of prohibited conduct by law, pronouncing its position regarding mergers, acquisitions and joint ventures and authorising the aforementioned. For these functions, the Ministry has broad authority to dictate preventive measures, and request testimonies, documents or information relevant to the individuals or public entities.

VI ADMINISTRATIVE AND JUDICIAL PROCEDURES

Based on Article 24 of the Bill, mandatory secrecy is established for the controlling authority and for the persons who are part of the processing of the files, and that this task always takes place in the administrative headquarters. We believe this condition to be very important in order to protect the country's investments, whether they be national, international or mixed.

In all the countries, the procedures to carry out investigations and resolve cases of prohibited conduct are of an administrative nature and may be initiated by the authority or by petition of an interested party. The laws indicate the instances, form, evidence, sanctions and deadlines to resolve the cases or authorisations.

Similarly, the competent authority follows the laws of the region regarding the judicial procedures established in ordinary law for the judicial review of cases. In the case of Argentina, Canada, Jamaica and the United States the determination of sanctions of a criminal nature due to violation of the law takes place through tribunals and courts, after the competent authorities have passed a verdict (preliminary ruling) or decided to sue.

In this Bill the preliminary ruling foreseen in other countries is not established, since it authorises the initiation of civil actions such as annulments and compensation for damages independent of any declaration via the administrative procedure. This causes an administrative ruling to have less force, giving the parties involved the possibility to exercise independent actions, even in the judicial branch.

Another important omission of the Bill is that of establishing clear rules regarding the substantiation of the administrative summary, which must be substituted by the application authority by means of regulations.

i Administrative and judicial sanctions

The administrative sanctions of included in the Bill are as follows: (1) warnings (for cessation and termination of effects), (2) fines, (3) nullities, and (4) compensation for damages.

It is important to mention that this Bill, when referring to nullities and actions of civil liability, derive directly from the ordinary jurisdiction, keeping in mind the inability of the administration in passing jurisdictional verdicts, nullities of actions and actions of civil responsibility.

It does not foresee corporal penalties, in which case we will refer to a penal type of the ordinary penal jurisdiction.

The sanctions established in the laws of the region are of a pecuniary and penal nature, such as the administrative and judicial nature of the authorities which apply the law. The majority of the laws authorise the competent authorities to impose administrative fines on those who engage in prohibited conduct, as well as the imposition of obligations.

The maximum amount of a penalty varies depending on the type of infraction and the effects it produced on the affected market, taking into account the company's revenue and based on minimum wage.

In Argentina, Canada, Chile, Jamaica, Peru and the United States, apart from the imposition of fines, the imposition of a prison penalty is authorised for those who violate certain prohibited conducts. In these countries the determination and application of said penalties correspond to the jurisdictional authorities.

Failure to comply with orders and decisions of the competent authorities is punished in all countries with fines.

ii Resources and appeals

Once the administrative instance has been exhausted, judicial review of the actions and decisions of the competent authorities, including appeals by superior tribunals or the Supreme Court of Justice, is guaranteed.

In Brazil, Chile, Venezuela and in the Competition Defence Bill, the review of decisions is carried out directly before the tribunals.

In the Bill, there is no special chapter regarding resources for revision (as in other bodies of law); however, looking at the other legal regulations that rule on administrative issues, we understand that one can appeal directly to the Ordinary Justice by means of the Court of Exchequer and the Supreme Court of Justice.

VII CORPORATE DEVELOPMENT IN PARAGUAY AND THE GLOBAL CRISIS

Recently, as mentioned above, as a consequence of supermarket corporations doing well financially, Paraguay's economy is improving.

The principal supermarket corporations are Superseis and Stock, which currently have an array of productive units all around the country.

A few months ago, the Stock corporation acquired an important package of shares of the Superseis chain, and in doing so, converted itself in a Supermarket of Supermarkets considering that both of the aforementioned corporations have a dominant position in the market.

Without a doubt, in a competitive sense, this constitutes a horizontal agreement which should be regulated by competition law, so as to include clear and simple rules to create an incentive for investments and protect the consumer. Since Paraguay is a developing country, we cannot create legal regulations which jeopardise investments seeing that these (investments) aid in the economic development of the country and create jobs which, in times of crisis, are crucial.

These and other situations are taking place in the country owing to the rise in national and foreign investment, which should be regulated urgently with a clear and simple law, avoiding the loss of capital and restricting prohibited agreements that weaken the freedom of consumerism. Even more so considering the global crisis, consumerism is the foundation for the circulation of money, which will cause the economy to become more dynamic and overcome the crisis.

In addition, investments carried out by mobile telephone companies which were, and still are, very important, having undoubtedly improved the freedom of the consumers, oblige competitors to improve their services thereby providing better prices to the consumer. This economic activity represents circulation of money, which should necessarily be protected by a Competition Defence Law.

We believe that as a result of the economic crisis, Paraguay should prioritise the circulation of wealth by enacting rigorous and clear laws designed to protect investors. Paraguay is on the right track, trying, via Congress, to enact a simple law to motivate and protect investment and consumption.

The Competition Defence Law is becoming a reality in Paraguay, which shall impose clear and efficient rules to create a competitive market where the participants in the economy can transact freely and consumers have complete freedom regarding the selection of goods and services.

VIII CONCLUSION

In conclusion we have an antitrust bill that has been partly approved by Congress. This, without question, will strengthen the competitiveness of the market.

However, despite agreeing with many aspects in the Bill, we criticise the fact that control over competition in Paraguay is yet again being centralised under the executive branch.

We believe that the control over competition should be regulated by an independent body with specialised people, and if possible, by public and private persons, considering the technical requirements that the market demands and the interests at stake.

Paraguay is a developing country which must have clear and simple rules to ensure consumers and investors have enough confidence in the rules, and therefore are able to freely choose and to improve the quality of products and services, thereby avoiding abuses in the market.

Chapter 24

PORTUGAL

Frederico Pereira Coutinho and Rita Leandro Vasconcelos[*]

I OVERVIEW

The Portuguese competition law framework comprises a broad group of legislation. The main piece of legislation is Law No. 18/2003 of 11 June 2003 ('the Competition Act'), as amended by Decree Law No. 219/2006, of 2 November 2006, which introduced some changes with regard to merger control, by Decree-Law No. 18/2008 of 29 January 2008, which brought a new ancillary sanction for breaches of competition law carried out within, or in connection with, public procurement proceedings, and, most recently, by Law No. 52/2008, of 28 August 2008, which amends the rules establishing the courts that are competent to handle appeals from decisions adopted by the Portuguese Competition Authority ('the PCA'). The Portuguese competition regime includes Law No. 39/2006, of 25 August 2006 (the leniency regime) and the PCA has enforcement powers with regard to restrictive trade practices foreseen in Decree-Law No. 370/93 of 29 October 2009 (see further Section III, *infra*). The Portuguese competition law framework also comprises several regulations and guidelines from the PCA. In addition, Decree-Law No. 10/2003 of 18 January 2003 (the PCA's By-laws) provides the PCA with the power to secure the application of competition rules in Portugal as well as providing for the efficiency of the markets and consumer's interests, in respect of the principles of the market economy and free competition.

With regard to the past year, we should start by highlighting that it has been a year where the board of the PCA has changed, while maintaining the structure of three members (one president and two other members). We also note that the PCA was created in 2003 as an independent administrative authority, enjoying administrative and financial independence and replacing the former two-body structure. Therefore, the board that ceased its functions in 2008 was the first one ever in charge of the PCA

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and the one with the difficult task of creating a more effective competition culture in Portugal.

i *Prioritisation and resource allocation of enforcement authorities*

In the five years of its existence, the PCA has more than doubled its human resources. Interestingly, the ratio between administrative human resources and superior and technical resources has diminished from approximately 50 per cent administrative resources to almost 25 per cent.

In 2008, the PCA reorganised its structure. The PCA reduced the 'material' departments from four to three. The Department for Regulated Markets and State Aid has been dissolved and the human resources allocated to the remaining others: the Merger Department, Restrictive Practices Department and Legal and Dispute Resolution Department. The PCA has also created a department dedicated only to international relations.

ii *Enforcement agenda*

From the decisions adopted by the PCA in the past year, we conclude that the PCA is still vigorously fighting cartels, while showing willingness to accept more creative outcomes with regard to other restrictive practices, notably vertical agreements. In fact, although not expressly foreseen in the Competition Act, the PCA is accepting a certain 'settlement' of restrictive practices, which in fact amounts to a discharge of the case when the undertakings at stake accept certain commitments. We also believe that the PCA will continue to accompany certain economic activity sectors as described *infra* (Section IV).

II CARTELS

Article 4 of the Competition Act prohibits the existence of cartels. Under national law, these agreements are null and void. Similarly to Article 81 of the EC Treaty, Article 4 of the Competition Act applies only to undertakings. However, the responsibility for cartel offences may be placed on individuals and legal persons regardless of the regularity of their constitution, and companies and associations without legal personality (Article 47 of the Competition Act).

Legal persons and equivalent entities shall be held responsible when the infringing actions have been carried out on their behalf or on their account or in the exercise of duty by members of their corporate bodies, their representatives or their employees. The directors of legal persons and equivalent bodies shall be subject to the penalty foreseen for the instigator, especially attenuated when they know or should have known the infringement and yet failed to take the appropriate measures to terminate it immediately, unless a more serious penalty is applicable in pursuance of another legal provision. Undertakings that are part of an association of undertakings will be jointly and severally responsible for payment of the fine to which the latter is subject.

Despite any criminal liability that may apply to the instigators of competition law infringement for actions that constitute a crime, the Competition Act condemns the participation in a cartel only as a misdemeanour offence. The sanctions imposed are fines and other additional penalties. The main sanction for the practice of cartels is a fine of up to 10 per cent of the undertakings' turnover in the previous financial year. In the case of associations of undertakings this fine shall be up to 10 per cent of the aggregate annual turnover of the associated undertakings that have engaged in the prohibited behaviour. Although the Competition Act is not clear, the Lisbon Commerce Court has already stated that the 'previous year' corresponds to the last year where the breach was in force and not the year previous to the PCA's decision. When there is a case of non-compliance with a decision of the PCA this Authority may also impose a periodic penalty payment of up to 5 per cent of the average daily turnover in the last year, for each day of delay. Additionally, the PCA may, at the offender's expense, publish the decision taken in the official gazette, the *Diário da República*, or in a Portuguese newspaper with national, regional or local circulation, depending on the relevant geographical market in which the prohibited practice had its effects.

An exception to this rule is the case of bid rigging. According to Article 230 of the Portuguese Criminal Code, participation in bid rigging constitutes a crime and is punished with a prison sentence for a maximum of two years. Also, following a recent amendment to the Competition Act, in the case of competition law infringements carried out in public procurement proceedings, the PCA may further prohibit the concerned undertakings from participating, for a maximum of two years, in such proceedings.

i *Significant cases*

In December 2008, the PCA convicted the Lisbon Industrial Bread-makers Association ('Associação dos Industriais de Panificação de Lisboa', 'the AIPL'), comprising 14 undertakings, for price information exchange. The PCA has fined AIPL €1,177,429.30. The PCA had been conducting sectoral inquiries in the bread-making sector, and reached the conclusion that it observed the largest price increase within the food and non-alcoholic beverages field. The importance of this case lies in the significance of the market and in the fact that the PCA had been monitoring the milling and bread-making sector since 2002 and had also fined milling companies for alleged price fixing practices.

On 21 May 2008, the Lisbon Commerce Court has entirely reversed the PCA's decision regarding the Aeronorte/Helisul alleged cartel (case 48/08.7TYLSB). On October 2007, the PCA had convicted Aeronorte and Helisul, two air transport companies, for entering into a consortium agreement to bid on the public tender launched by the National Firemen and Civil Protection Service in 2005. In the PCA's opinion, such consortium agreement was restrictive since those companies had been the only ones bidding in similar tenders in the previous years and the practical effect of the agreement was to limit the sources of supply and thus fixing prices and other commercial conditions. The PCA imposed a fine of €179,933.38 and €128,539.77 on Aeronorte and Helisul, respectively.

Following an appeal by Helisul, the Lisbon Commerce Court considered that the PCA did not show thorough evidence of its position. The Court first considered that the relevant product and geographical market had been wrongly defined and instead considered the relevant product market as the supply of heavy helicopters and its additional and complementary services. The relevant geographical market, which the PCA considered national, was viewed by the Court as wider than the national territory on the grounds of the international nature of the public tender at stake, and in the Court's opinion, the PCA consequently failed to take into consideration that foreign companies could also have bid in the said public tender. In addition, the Lisbon Commerce Court considered that the PCA had not proven that the agreement had, as its object or effect, the prevention, restriction or distortion of competition. To sustain such position, the Court stated that the agreement entered into between those undertakings, under the terms of which they would present a joint bid to the public tender, was foreseen and authorised by the public tender's rules. The Court further stated that nothing prevented other national and international undertakings from participating in the public tender.

Despite having some controversial points, notably that the Court considered the history of past public tenders irrelevant, the ruling of the Lisbon Commerce Court highlights the necessity of considering the possibility of an agreement actually restricting competition in order to assess the effective infringement to competition rules. This shows that the PCA will have a harder time in pursuing cartel cases that are not so clear cut.

Important cases include some of the recent case law of the Lisbon Commerce Court and the Constitutional Court regarding certain procedural issues, notably the PCA investigative powers.

The Competition Act gives the PCA power to investigate an undertaking's premises. Many accused undertakings had challenged the PCA's powers, claiming the need for the latter to request a warrant from a judge rather than from a public prosecutor, stating that the head office of an undertaking should bear the same protection as a natural person's home. In December 2008, the Constitutional Court ruled in favour of the PCA's practice settling case law with regard to the sufficiency of a public prosecutor's warrant to search undertakings' premises.[1]

Another significant case is the one regarding the milling industry (case 1648/05.2TYLSB). This case involved an alleged cartel between certain milling undertakings that the PCA punished in 2005. In this case (although not the only one) the PCA adopted an unusual procedural strategy. After issuing the statement of objections and receiving the defences from the accused undertakings, the PCA sent them a more complete complementary statement of objections instead of directly issuing the final decision. On 12 February 2008, the Lisbon Commerce Court stated that according to the principle of fair process and effective defence, the PCA is not able to issue complementary statements of objections enlarging the accusations already established in the first statement of objections.

Finally we should highlight the *Unilever Jerónimo Martins/PCA* case (case 572/07.9TYLSB). Article 17 of the Competition Act gives the PCA the power to

1 Decision No. 593/2008, of 10/12/2008 published in the Portuguese Official Gazette Diário da República, II Série, No. 17, 26/01/2009.

carry out on-site inspections ('dawn raids') to companies that are being investigated, in order to secure evidence of practices contravening the prohibitions provided under competition law. In this context, the seizure of lawyer's correspondence assumes special importance, in particular when analysing the question of whether internal communications produced by in-house lawyers can benefit from the protection of confidentiality and legal privilege applicable to external lawyers. In 2008, the Lisbon Commerce Court, following an appeal of the PCA's decision, ruled out the possibility of seizing documents produced by an in-house lawyer in a company, thus departing from the European case law, notably, the *Akzo* case (T-125/03 and T-253/03), where the Court of First Instance upheld the European Commission's opinion that only independent lawyers or lawyers not bound to their clients by a relationship of employment could benefit from the protection of confidentiality of communications. Consequently, the Lisbon Commerce Court has secured the confidentiality and legal privilege protection of internal communications produced by in-house lawyers and has established equal protection for in-house and external lawyers as regards legal privilege.

ii Trends, developments and strategies

Since its inception, the PCA has been pursuing its fight against cartels. This is a developing trend, which has significant legislative landmarks, such as the entry into force of the leniency regime in 2006 (Law No. 39/2006, of 25 August 2006) and the amendment to the Competition Act according to which the PCA may impose on members of a bid-rigging cartel the ancillary sanction of not participating in public tenders (Decree-Law No. 18/2008 of 29 January 2008).

According to the provisions of the leniency regime, a member of a cartel may be granted immunity from a fine when it is the first firm to bring relevant evidence of an agreement or a concerted practice to the PCA, before the PCA has started the investigation. As of the beginning of an investigation, a member of a cartel can only qualify for a reduction of the amount of the fine of 50 per cent or above, if it is the first to come forward with added-value evidence to the PCA and up to 50 per cent, if it is the second to bring added value evidence to the PCA. The leniency regime also foresees an 'immunity plus' policy. A member of a cartel can be granted a special or an additional reduction of the amount of the fine regarding a certain practice when it is the first one to bring relevant evidence to the PCA regarding another agreement or concerted practice.

2008 brought about a significant amendment to the Competition Act concerning its enforcement as to bid-rigging cases. Decree-Law No. 18/2008 of 29 January, while implementing a new public procurement regime, introduced a new ancillary sanction for infringements of competition law carried out within, or in connection with, public procurement proceedings. According to new Article 45(1)(b) of the Competition Act, the PCA may impose on undertakings participating in bid-rigging cartels a prohibition from participating in public tenders for two years as of the PCA's decision.

iii Outlook

During 2009, we may expect a similar attitude from the PCA regarding fighting cartels. As further discussed in Section VI *infra*, we expect an amendment to the Competition Act (although there has not yet been published any official amendment proposal) with an impact on the enforcement of competition law, notably cartels.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Competition Act foresees provisions that are similar to the ones provided for in Articles 81 and 82 of the EC Treaty condemning restrictive agreements (Article 4) or justifying them (Article 5) and condemning abuses of dominant position (Article 6). The sanction for breaches of Article 4 and 6 of the Competition Act are equivalent to the ones described regarding cartels.

Departing from European law, the Competition Act also foresees the prohibition of abuse of economic dependence (Article 7). The abuse of economic dependence occurs when one or more undertakings engage in the abusive exploitation of the economic dependence on it or them of any supplier or client on account of the absence of an equivalent alternative. The maintenance of the abuse of economic dependence in the Competition Act has been criticised and it is possible that the foreseen amendment to the Competition Act will abolish the abuse of economic dependence prohibition since the practices that fall within its scope may also fall within the scope of the prohibition of the abuse of dominant position.

Another significant difference between Portuguese and European competition law is the remaining possibility (although not obligation) for the PCA to evaluate agreements prior to their entry into force upon request of the undertakings at stake (PCA Regulation 9/2005).

In this context it is noteworthy to mention Decree-Law No. 370/93 of 29 October 1993, which was subsequently amended by Decree-Law No. 140/98 of 16 May, which by prohibiting certain unfair trade practices regardless of the undertakings' position in the market, can hardly be considered an instrument of competition law. Nevertheless it is the PCA's competence to enforce it. The most significant practices that are prohibited by Decree-Law No. 370/93 are price and other commercial conditions discrimination, resale at a loss (i.e., under the effective purchase price, which is the invoice price after deduction of rebates directly related to the transaction and identified in the invoice), refusal to supply (which applies only between economic agents and includes tying and bundling) and abusive business practices (this provision aims at preventing the exercise of market power by larger distributors over producers by prohibiting the former to obtain from the latter prices, payment conditions, sales arrangements or commercial cooperation conditions that are 'exorbitant' compared to other distributors, meaning that they are not proportional to the volume of purchases or to the value of the services rendered on the supplier's request). The sanction for breaches of Decree-Law 370/93 is a fine between approximately €250 and approximately €15 million.

i Significant cases

On 1 September 2008, the PCA ruled against PT Comunicações ('PTC') for the second time for abusing its dominant position. This time the ruling referred to the wholesale markets for circuit leasing (wholesale markets for terminal sections and transit sections of leased circuits).

According to the PCA, PTC applied unequal conditions to companies for rendering the same service, benefiting the companies of its own group. PTC used a wholesale tariff discount system for the leased circuit service, which was in effect between 1 March 2003 and 7 March 2004, offering to the former greater discounts to the detriment of the latter. Being almost the exclusive supplier of the services in question, the PCA considered that the defendant limited production, distribution, technical development and investment in the relevant markets. The PCA imposed PTC a fine of €2.1 million. This decision is an important example of the intervention policy and activity of the PCA in the defence of effective competition in the market. It is also interesting because the PCA has accepted as mitigating circumstances that the National Regulatory Authority for Telecommunications had at the time decided not to oppose to the coming into force of the tariff system, and that the PTC ceased to apply the tariff scale in question after the sectoral regulation ruling of 10 February 2004.

On the other end, i.e. with regard to restrictive agreements, it is worthwhile to make reference to the PCA's decision of not pursuing with cases on the grounds of the undertakings at in question accepting certain commitments and obligations aimed at restoring competition in the market.

In July 2008, the PCA decided to discharge a misdemeanour proceeding against four coffee distributors while imposing amendments to their model contracts used for the supply of coffee to the HORECA channel (hotels, restaurants, cafés and similar entities). The PCA issued a decision to discharge the referred proceedings following the adoption by the undertakings concerned of certain commitments, *inter alia*, to alter standard contracts for the supply of coffee, in particular with regard to their period of validity and their exclusive purchase obligation and to refrain from suing or to drop legal action taken on the grounds of infringement of clauses foreseen in earlier contracts, which are not part of the modified contracts. The great interest of this case is that although not expressly foreseen in the Competition Act, the PCA is accepting the discharge of cases when the undertakings at stake accept certain commitments.

ii Trends, developments and strategies

The main development and trend with regard to antitrust is the willingness of the PCA to discharge cases subject to the acceptance of certain commitments by the undertakings at stake and thus reducing litigation. This is a trend towards the European Commission's practice of settlement.

iii Outlook

At the beginning of 2008 the PCA announced that it would pursue more cases of abuse of a dominant position (at present, the PCA has so far only issued two decisions, both of them convicting PTC), notably in the telecommunications, electricity and air transport sectors. During 2008, the only issued decision for abuse of a dominant position has been the one against PTC. Therefore it is expected that some more decisions on abuse of a dominant position will be issued.

Also, in 2009 we can expect an increase in the number of cases not being pursued on the grounds of the acceptance of commitments by the undertakings.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Pursuant to Article 28(2) of the Competition Act, any decision taken by the PCA, regarding either the existence of a restrictive practice, adoption of interim measures or authorisation of an agreement, affecting a market that is subject to sectoral regulation, must be preceded by an opinion of the respective sectoral regulatory authority.

Furthermore, the Competition Act provides for rules regarding the coordination with sectoral regulatory authorities (Article 29 of the Competition Act). This provision establishes a legal duty and regulates the communication of facts and decisions between the PCA and a sectoral regulatory authority.

i Significant cases

The most significant case of sectoral analysis in 2008 without relying on a specific infringement practice was the investigation into the liquid fuel market. Further to several fuel price increases in the Portuguese market, and the suspicion that these did not reflect the costs of production, the Minister of Economy and Innovation asked the PCA to report on the retail fuel price formation. On 2 June 2008, the PCA delivered the Report on the Fuel Markets. The PCA concluded that the fuel prices were substantially determined on the basis of international liquid fuel quotations. The PCA considered that there was no evidence of restrictive practices that could be imputed to one or more economic agents operating in the market of liquid fuels at the national level. The PCA nevertheless presented a package of recommendations to the government aiming at enhancing competition on the liquid fuels market and promoting assessments and debates on Portuguese energy policy.

On 16 December 2008, the PCA published another report on the fuels and bottled gas markets updating the information. On 21 April, the PCA released its final report generally maintaining its conclusions but issuing recommendations to ensure greater market contestability. The PCA also issues quarterly reports accompanying newsletters in the fuel market.

ii Trends, developments and strategies

In their presentation to Parliament on 12 March 2008, the previous board of the PCA identified the sectors of energy, telecommunications, liquid fuel, maritime ports and banking and insurance as the ones where there were more significant competition issues.

iii Outlook

It is expected that the sectors identified *supra* will be subject to a more detailed analysis by the PCA, in order to detect if there are practices that may affect competition.

V STATE AID

i Significant cases

Pursuant to Article 13(1) of the Competition Act, 'Aid granted to undertakings by a State or any other public body must not restrict or affect competition to a significant extent in all or part of the market'. According to Article 13(2) of the Competition Act, the PCA may analyse any aid or projected aid and address the government recommendations that it shall deem necessary to eliminate the negative effects of that aid.

It is clear from the wording of Article 13 of the Competition Act that the PCA does not have the power to impose measures on the State to stop any competition distortion originated by state aid, but only to recommend measures to be taken. To the best of our knowledge, the PCA has only expressly addressed recommendations to the Portuguese government under the terms of these provisions in two cases: Recommendation No. 1/2003 of 1 September 2003 on the provision of services by Higher Education Institutions in competition with economic operators, and Recommendation No. 4/2003 of 25 November 2003 on silo public infrastructures for cereal storage and drying.

At the European level, it is worth mentioning the two sets of aid measures planned by the Portuguese government to deal with the current financial and economic crisis, which have been authorised by the Commission.

On 29 October 2008, the Commission approved a Portuguese rescue package, with an overall budget of €20 billion, aimed at stabilising financial markets by providing guarantees to financing operations of eligible credit institutions, because it found that the scheme met the conditions set forth in its Communication of 13 October 2008 on the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis.

On 19 January 2009, the Commission further authorised a series of aid measures for businesses, with an overall budget of €750 million, planned by Portugal to deal with the current economic crisis. These measures enable aid of up to €500,000 to be granted until 31 December 2010 to businesses in difficulty as a consequence of the current economy crisis or facing funding problems because of the 'credit crunch'. The Commission found that the scheme met the conditions set forth in its Communication of 17 December 2008 on a temporary framework giving Member States additional possibilities for providing businesses with improved access to financing during the economic and financial crisis.

In addition to these two sets of aid measures, more recently, on 13 March 2009, the Commission decided to approve a Portuguese state guarantee underwriting a €450 million loan granted to Banco Privado Português by six Portuguese banks. The Commission found that the scheme met the conditions set forth in its Communication of 13 October 2008. In particular, the measure is necessary to remedy the severe liquidity problems of Banco Privado Português and to preserve confidence in the financial markets, and is limited to the minimum required to achieve this objective.

ii Trends, developments and strategies

In the context of the global financial and economic crisis, Portugal, similarly to other Member States, may be willing to adopt additional aid measures to dampen the effects of the crisis at the national level.

As a consequence, in the course of 2009, we may expect other state aid decisions from the Commission on new Portuguese support schemes.

iii Outlook

In the field of state aid, the most important regulatory evolution occurred in the context of the financial and economic crisis.

In late 2008, the Commission adopted three Communications to provide guidance to Member States regarding aid measures adopted in this context of crisis, namely, a Communication of 13 October 2008 on the application of state aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, a Communication of 5 December 2008 on the recapitalisation of financial institutions in the current financial crisis, limitation of aid to the minimum necessary and safeguards against undue distortions of competition, and a Communication of 17 December 2008 on a temporary framework for state aid measures to support access to finance in the current financial and economic crisis.

We may expect that, in a context of financial and economic crisis, Member States may be tempted to plan additional aid measures, with a view to secretly supporting national companies. The Commission may also be more willing to authorise such measures as a means of overcoming the crisis, thus adopting a less restrictive approach of the compatibility of the measures with EC Treaty state aid rules.

VI CONCLUSIONS

i Pending cases and legislation

At the end of 2008, the PCA commenced an investigation of a multimedia firm (ZON Multimédia), active in cable TV, telecoms and cinema, among other things. On 6 January 2009, and for the first time since its creation in 2003, the PCA imposed on the undertaking interim measures suspending a particular campaign concerning cable TV and cinema. Developments in this case are expected in the first half of 2009.

In 2008, the PCA announced that it would propose a review of the Competition Act. Although details of a formal amendment proposal are not yet known, we believe that the main changes regarding restrictive practices aim, on the one hand, at attaining a more effective enforcement of the Competition Act and, on the other hand, a more coherent application of European and Portuguese law. With regard to the former, the speech of the previous president of the board of the PCA when ceasing functions (on 12 March 2008) highlighted the need for a greater procedural specialisation and a reduction of the dispute incentives for the undertakings to appeal of its decisions by, notably, giving the courts the possibility of *reformatio in pejus* and by including a penalty for the payment of the fine only after the court's decision. With regard to the latter, we should expect the provision of a specific sanction for the breach of Article 81 and

Article 82 of the EC Treaty, so that the PCA may fully exert its competence attributed by Regulation 1/2003.

ii Analysis

2008 has been a very important year for the PCA and, generally, for competition law in Portugal. In the first place, the replacement of the board of the PCA may bring changes in competition policy. Secondly, there have been many judicial decisions that have settled some controversial aspects of the PCA's investigative powers. Thirdly, the PCA has established its practice of terminating restrictive practice proceedings subject to the acceptance by the undertakings at stake of commitments.

As a final remark, we call attention to Law No. 52/2008, of 28 August 2008, which amends the rules establishing the courts that are competent to handle appeals from decisions adopted by the PCA. The amendment brings the exclusive competence of the Lisbon Commerce Court to an end and establishes that any commercial court in the country may be competent to handle appeals from decisions adopted by the PCA.

Chapter 25

ROMANIA

Franz Urlesberger and Cristina Pana[*]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

The Romanian Competition Council ('the RCC') was established more than 10 years ago and is mainly responsible for:

a enforcing the prohibitions contained in the Romanian Competition Act and in Articles 81 and 82 EC Treaty;
b assessing the permissibility of concentrations;
c reviewing measures of state bodies which restrict competition; and
d acting as the national point of contact in state aid matters.

The RCC's current general enforcement priorities are (according to its budget request for the financial year 2009):

a raising the level of enforcement of competition legislation to European standards;
b active involvement in drafting and applying sectoral policies aimed at the liberalisation and enhancement of competition in sectoral markets;
c reviewing any legislative proposal that may impact the functioning of markets and the business environment or that may have an anti-competitive effect;
d promoting a culture of competition; and
e networking and cooperation both within the EU through the European Competition Network (ECN) and at international level.

In 2004, the RCC adopted a strategy on how to prioritise and allocate resources for its *ex officio* investigations. The detection and prosecution of 'hard-core restrictions' of

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competition having an effect at national level (as opposed to local level) and relating to sectors essential for the Romanian economy were given top priority. In 2005, the RCC identified the following 13 sectors as vital for the Romanian economy (while this is some time ago, we believe the RCC is still monitoring these sectors closely): energy, transportation, constructions, steel industry, information technology and communications, construction of motor vehicles, tourism, banking, insurance, pharmaceuticals, postal services, media and real estate. In 2008, for example, the RCC intervened in the areas of pharmaceuticals and health-care services (dental technicians association) – industries with significant impact on consumers. The RCC has departed from this prioritisation strategy at times over recent years: many of the RCC investigations are now targeted at local markets of (rather) limited economic significance, e.g. taxi services and driving schools.

The latest RCC budget request also sets out that in the past five years, one of the priorities was to increase capacities in order to apply the *acquis communautaire* in the field of competition and state aid rules. The aim was to consolidate legislation, to intensify prevention activities, to use all instruments for the detection of cartels, such as dawn raids and the leniency program, and to increase the number of *ex officio* investigations.

ii Enforcement agenda

Over the next three years, the RCC aims at increasing its effectiveness and employing the infrastructure and logistics necessary for an efficient enforcement of competition and state aid rules and to further increase the legal expertise of its case handlers. Further, the RCC strives to improve the structure and process of the analysis of anti-competitive practices, merger control filings, issuance of opinions on various legislative proposals and state aid matters.

According to its latest draft budget the RCC's goal is to carry out or close 15 dawn raids, 10 economic concentration inquiries, 15 anti-competitive practice investigations and 15 state aid audits *per annum*.

From the authority's website it can be inferred that the RCC has launched nine antitrust investigations *ex officio* in 2008. Most of these investigations target alleged collusions between undertakings active on local markets such as taxi services in the cities of Constanta, Timisoara or Targu-Mures, car repair services in Slobozia or driving schools in Bucharest. As there has been no leniency application it is hard to determine what prompted the RCC's actions. Around 20 other investigations into infringements launched in previous years are still pending and thus on the agenda of the RCC.

Investigations in 2008 also focused on the medical and food retail industries. Details on the respective investigations are set out in Sections II to IV *infra*. An interesting aspect is that some of the investigations and inquiries launched by the RCC aim at establishing whether certain decisions of local authorities restrict competition.

2008 was also the year with the highest number of dawn raids so far: around 80 undertakings were inspected by the RCC. In addition, for the first time an undertaking was fined for refusing to submit to a dawn raid. Finally, firms were sanctioned for providing false information or refusing to provide any information in response to requests for information.

All of the above corroborates that the RCC has become an attentive watchdog of competition rules.

II CARTELS

i Preliminary remarks

Article 5(1) Competition Act mirrors the cartel prohibition pursuant to Article 81 EC Treaty. The RCC has also adopted block exemption regulations that automatically exempt certain types of agreements under specific circumstances from the cartel prohibition. Such regulations exist in relation to specialisation and R&D agreements. The Romanian competition law regime, however, differs from EC competition rules in that anti-competitive agreements that are not caught by one of these block exemptions have to be notified to the RCC for individual exemption. The notification procedure has proven to be lengthy and burdensome as it requires the parties to produce a significant volume of information and documentation.

Infringements of the cartel prohibition may be sanctioned with fines of up to 10 per cent of the concerned undertaking's turnover. It is not clear, however, whether the group or individual turnover of the infringer is considered for the calculation of the maximum fine. In practice the RCC has applied fines taking into account the Romanian group turnover. The RCC has adopted Guidelines on the method of setting fines for anti-competitive practices that mirror the 1998 guidelines of the European Commission. In addition the decisive participation of individuals in the formation, organisation and implementation of anti-competitive practices constitutes a criminal offence. Criminal sanctions consist of imprisonment for up to four years or fines.

The Romanian leniency regulation of 2005, albeit being closely modelled on its counterpart at EU level of 2002, differs from the European Commission's notice insofar as the scope of application of the leniency programme is limited to illegal agreements or practices related to price fixing, production or sales quotas, allocation of markets and clients, bid rigging and the restriction of imports and exports.

To our knowledge there has been no leniency application so far.

ii Significant cases

The dialysis case

In March 2008, the RCC completed its long-standing investigation of the dialysis products and equipment market. The RCC imposed fines of 5.94 million lei on Fresenius Medical Care Romania, Alsifcom Intermed and Opremi Medfarm, for rigging bids at a tender organised in 2003 by the health authorities in relation to a nephrology-dialysis programme. The RCC also concluded that the Minister for Health infringed the Competition Act by not organising regular public tenders since 2003.

Association of Dental Technicians

In April 2008, the RCC completed its investigation into alleged price fixing by the National Association of Dental Technicians. The statutes of the Association provided that the aim of the Association was, among other matters, to maintain and promote minimum prices. The Association adopted on a regular basis a reference price list for dental prosthetic works. This list was published in a magazine. The reference prices were recommended to dental technicians as minimum prices. The RCC levied a fine of 20,000 lei (approximately 4 per cent of turnover) on the Association. Additionally, it requested the Association to amend its statute.

iii Trends, developments and strategies

Beside the general trend of imposing increasingly high fines on undertakings that have breached the cartel prohibition, another noteworthy trend is that undertakings were fined in 2008 for the first time for not submitting (fully) to investigations.

In 2008, the RCC fined SC TCE 3 Brazi Targu-Neamt SRL approximately 1.5 million lei for not submitting to a dawn raid at its premises. BRD – Goupe Societe Generale SA was fined 19,482,890 lei for its refusal to submit to a dawn raid. BRD apparently refused to allow competition inspectors access to its premises for several hours; the dawn raid was carried out in the context of an investigation launched on 29 October by the RCC on the Romanian market for banking and inter-banking services. The RCC suspects a possible collusion between several banks through exchange of sensitive information and other practices, after the Romanian National Bank received an e-mail from the treasury of one of the banks whereby other banks were allegedly guided on how to establish their exchange rate quotations. The fines have been challenged and appellate proceedings are currently pending.

The supply of inaccurate or incomplete information to an enquiry of the RCC has also been sanctioned for the first time. SC CD Laborator SRL was fined 1,047 lei in July 2008 in the context of an investigation into the Bucharest driving school market. The same investigation also saw AutoIntact SRL being fined 1,662 lei for failure to provide documents and data requested by RCC.

Another fine was imposed in the context of the sectoral enquiry of the RCC into the food retail market. In their replies to enquiries on the existence of the most favoured customer clause in their supply agreements, Billa Romania SRL, Pic SA and Spar SRL informed the RCC by stating that their supply agreements did not contain this provision. The information was apparently incorrect. The fines imposed on the undertakings concerned totalled 3,224,951 lei.

There is no indication on the strategies the RCC plans to pursue in the field of cartel enforcement. It can be expected that future strategies will largely depend on the practice of the European Commission. One notable trend, however, is that since the end of 2007, many of the RCC's investigations relate to infringements of both Article 5(1) Competition Act and Article 81(1) EC Treaty.

iv Outlook

Legislative loopholes

More detailed regulation is necessary regarding procedural aspects in relation to dawn raids and the parties' defence rights in investigations by the RCC. Currently the respective procedural framework is scarce. Furthermore, the current Romanian legislation does not provide for settlements or the possibility of undertakings to submit remedies in order to bring investigations by the RCC to a speedy end. We expect that the RCC will implement these possibilities in Romanian legislation soon.

Pending cases

In October 2008, the RCC has commenced an investigation concerning a possible breach of both Article 5 Competition Act and Article 81(1) EC Treaty in the field of pharmaceuticals. Members of the most important associations of pharmaceutical distributors are suspected to have tried to thwart the Ministry of Health's decision not to adjust quarterly reference prices for medicines in relation to exchange rate changes, by jointly ceasing deliveries to hospitals and pharmacies.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Except for the notification requirement, Romanian legislation on restrictive agreements is fully harmonised with EU legislation: the RCC has issued block exemption regulations for vertical agreements. It has also adopted block exemption regulations for technology transfer agreements and vertical agreements in the motor industry.

As regards the exemplary list of abuses of market dominance, the Competition Act goes 'one further than' Article 82 EC Treaty and also lists export at prices below production costs, whereby the behaviour is subsidised by increased prices on the domestic market. While there has been little case law of the RCC in the field of abuse of dominance, most of the (few) decisions have focused on excessive prices. In this context, we note that an undertaking may seek the RCC's guidance prior to implementing measures that may be deemed to be abusive.

i Significant cases

The insulin case (March 2008)

The RCC imposed substantial fines on Eli Lilly and three of its distributors for allocating Eli Lilly's insulin products between them at the tender procedures organised by public health authorities. The parties invoked, among other arguments, the benefit of the vertical block exemption. The RCC, however, argued that the block exemption's benefit does not extend to agreements that by their object are restrictive of competition, such as is the case for agreements related to tenders.

The fines totalled 83.7 million lei: Mediplus was fined 49.2 million lei, Relad 26.3 million lei and A&A Medical 4.3 million lei. Eli Lilly was hit with a fine of some 3.8 million lei. The decision is currently under appeal before the Bucharest Court of Appeals.

Individual exemptions

In 2008, the RCC exempted two networks of distribution agreements individually, one involving SC Cadbury România SA (formerly SC Kandia-Excelent SA Bucureşti), the other Kraft Foods Romania SA.

Kraft Foods (December 2008)

Kraft Foods applied to the RCC for individual exemption of 14 distribution agreements for its chocolate products. The agreements allocated exclusive territories to the respective distributor. The agreements also contained non-compete obligations in favour of Kraft Foods. The RCC found that Kraft Foods' distribution system did not significantly affect trade between Member States and consequently concluded it was competent to issue an exemption decision. Despite these restrictive elements, the agreements were found to produce countervailing efficiencies and therefore exempted from the cartel prohibition. The exemption decision was issued at the end of 2008 and is valid for the duration of the agreements, i.e. until 30 June 2010.

Cadbury Romania (March 2008)

SC Cadbury România SA, the second largest player on the Romanian market for confectionary products, concluded exclusive distribution agreements with a number of its distributors (around 33 in total). The exclusive distribution agreements were notified to the RCC in order to obtain individual exemption. Again, the RCC found that Cadbury's distribution agreements did not significantly affect trade between member states and granted an individual exemption until the expiry of the respective agreements. An interesting side-aspect was that beginning from 2007 when Cadbury România acquired assets of Kraft Food, the merger control clearance decision was conditioned upon the termination by Cadbury România of non-compete obligations imposed on its distributors.

Romtelecom (March 2008)

In November 2007, Romtelecom, the national fixed mobile operator requested a negative clearance by the RCC that its agency agreements, whereby Romtelecom's agents are entrusted to conclude on Romtelecom's name and account the standard agreement for supply of fixed telephone and internet services and sale and lease of communication equipment, fall outside the ambit of the cartel prohibition. The RCC found that the financial risks were borne by Romtelecom and consequently ruled that the agreements were outside the scope of Article 5(1) Competition Act, as the agents were deemed genuine agents in the meaning of rec 12 *et seq* of the EC Guidelines on Vertical Restraints.

ii Trends, developments and strategies

Two trends can be observed in the decisional practice of the RCC: one is an increased economic approach particularly in relation to individual exemptions, which were granted despite the respective agreements containing anti-competitive elements and covering the whole of the Romanian market.

Another observation is that the pharmaceutical industry continues to be on the RCC's radar: in April 2008, another investigation was launched in this field, this time focusing on distribution agreements of antibacterial medicines. The investigation aims at establishing whether SC Antibiotice SA Iasi and its distributors have infringed Article 5 Competition Act.

iii Outlook

De minimis agreements

The current legislation applicable to *de minimis* agreements is unclear and ineffective for two reasons:

a In order for an agreement to be deemed not to have an appreciable effect on competition, the implicated undertakings must (1) each have a combined market share not exceeding 10 per cent if the agreement is concluded between non competitors or 5 per cent if the parties to the agreement are competitors, and (2) a turnover not exceeding 4 million lei, provided that the respective agreement does not contain hard-core restrictions. The Competition Act provides that the turnover threshold of 4 million lei is subject to annual revision by the RCC. The last revision, however, occurred in 2005. This threshold is also not harmonised with legislation on small- and medium-sized enterprises (SMEs). For example, according to Law 346/2004 on stimulation of establishment and development of small- and medium-sized enterprises, micro-enterprises are defined as undertakings having a turnover not exceeding €2 million. Moreover, the average annual inflation rate has been around 6 per cent since 2005.

b Moreover, the Competition Act is also unclear on what turnover is to be taken into account for the calculation of the turnover threshold, i.e. whether the threshold refers to the parties' combined or individual turnover. Neither case law nor secondary legislation issued by the RCC contains any guidance in this respect.

In view of this, it can be expected that the RCC will amend the *de minimis* notice soon.

Notification and guidance

In practice, the notification system for restrictive agreements raises difficulties as this system was abolished at EU level. Agreements that affect trade between Member States and meet the requirements under Article 81(3) EC Treaty are automatically exempted with no prior decision of a competition authority needed. On the other hand, agreements that do not affect trade and do not fall within the ambit of a block exemption regulation have to be notified to the RCC in order to benefit from an individual exemption. The question of whether an agreement affects trade between Member States or not is a delicate one and sometimes very difficult to answer. It can be expected that the mandatory filing system for restrictive agreements will be abolished soon.

There is no secondary legislation on abuse of dominance, and it is likely that the RCC will either replicate the European Commission's Guidance on its enforcement priorities or will simply follow in its decisions the trends set by the Commission.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Preliminary remarks

Application of competition rules in regulated industries

The Competition Act does not apply to monetary and securities markets. The functioning of these markets is monitored by the National Bank of Romania and National Securities Commission.

In regulated industries such as gas and electricity, communications or broadcasting, the RCC shares responsibilities with other authorities such as the National Regulatory Authority for Energy ('ANRE') or the National Authority for Management and Regulation of Communications ('ANCOM') or the National Audiovisual Council.

These bodies are responsible, *inter alia*, for the promotion of competition in the respective sector. ANCOM is, for example, responsible to prevent behaviour that has the object or effect of distorting or restricting competition in the electronic communication sector, IT and postal services. ANCOM is competent to conduct investigations relating to infringements of competition rules in the communication sector and to provide the RCC with the information necessary for its duties. The RCC remains nevertheless the only authority that is empowered to establish whether there has been an infringement of the Competition Act.

Sector-specific legislation contains express provisions on the definition of a dominant position or significant market power and on measures that may amount to an abuse of a dominant position in the respective sectors. Such provisions prove helpful especially as general competition rules contain only scarce guidelines on this type of infringement.

ii Significant cases

There have been no decisions by the RCC that concern regulated sectors in 2008. The most recent such case dates back to 2006, when the RCC fined a number of companies in the telecommunications sector for market sharing and the abuse of dominance.

Sectoral investigations

In 2008, the RCC initiated market investigations into the following industries: wholesale of pharmaceuticals, public sanitisation services in Bucharest, real estate transactions and related services and, probably the most anticipated one, food retail. The results of the investigations that the RCC started in 2008 are yet to be published. According to the RCC, the enquires have been launched either due to the high importance of the respective sector to the welfare of consumers or due to the well-known dysfunction of the respective markets.

For example, in relation to its investigation into public sanitation services, the RCC stated that this was prompted by the particular market conditions. Competition in this sector takes place only within the context of procurement of these services. Local public authorities may therefore distort competition by long-term exclusive agreements or by prorogating existing agreements.

On the other hand in the wholesale of pharmaceutical industry, the investigation of the RCC was prompted by recent infringements discovered in this field (see Sections II and III *supra*).

Cereals

The results of the investigation into the market for cereals, which started in 2007, were published recently. The investigation focused on the markets for wheat and the services of wheat storage. The inquiry was opened subsequent to an *ex officio* investigation into the bakery market regarding suspected price agreements between producers. The report sets out several shortcomings that impact the competitive conditions on the market for wheat, *inter alia*, the existence of:

a state measures that distort competition by favouring certain players. It is required, for example, that the state lends wheat to selected operators through direct negotiation. Such lending process takes place usually at the end of the agricultural year when prices are higher while the return of wheat takes place at the beginning of the next agricultural year when prices tend to be at a low;

b a significant black market estimated to account for around 40 per cent of all transactions; and *c* considerable legal barriers to entry that foreclose the market for storage services for wheat.

iii Trends, developments and strategies

It can be observed that the RCC is making increased use of market investigations. As mentioned, four sector enquires have been launched since beginning of 2008.

There are several antitrust investigations pending in regulated sectors, some of which have been prompted by complaints of third parties. Private pension funds, accounting and banking services, production, supply and retail with gas and electricity, postal services, termination of national and international calls in mobile telephone networks and access to fixed telephone networks are industries currently investigated by the RCC.

Finally, we note that the RCC is currently involved in reviewing various regulatory proposals concerning regulated sectors, for example telecommunications.

iv Outlook

It is expected that the RCC will focus on finalising the sector enquires it started in 2008. The results, particularly the one into the food retail market, are much anticipated. Whether the RCC will kick off further investigations into other sectors, for example into the retail markets for petrol or electricity, remains to be seen. Maybe, results of one market investigation prompt the RCC to investigate the conditions in a neighbouring market.

V STATE AID

i Significant cases

Mittal Steel case

In 2004 in the context of the privatisation of Petrotub, the Romanian authorities agreed to waive certain debts against Petrotub such as outstanding debts to the social insurance budget, dividends, damages and restructuring funds owed to the Romanian Privatisation Authority ('APAPS') and to reschedule outstanding debts to the national health fund. Following Romania's accession to the EU, the European Commission requested information on debt waivers and rescheduling of debts granted in the context of the privatisation of the company.

While Romania claimed that the waivers granted in the context of the privatisation were in compliance with the private investor principle, the Commission came to the conclusion that the Romanian state did not act as a private investor and that the debt waivers and rescheduling constitute aid that did not fulfil the conditions to be compatible with the common market.

Ford Craiova case

The privatisation of SC Automobile Craiova, formerly Daewoo Romania, raised a similar issue. The Commission urged the Romanian authorities to abolish certain specific conditions attached to the privatisation contract of Automobile Craiova such as conditions concerning a minimum level of investments and production (minimum 200,000 cars in the fourth year). If the conditions were not fulfilled, the privatisation authority had the right to annul the privatisation contract or to claim penalty payments and damages. The Commission suspected that these conditions were not compliant with the market economy vendor principle and with the Commission's privatisation principles. In a nutshell, such principles imply that in order for the state to be able to sell at the highest bidder, no conditions may be attached that would potentially reduce the sales price and that would not be acceptable for a market economy operator. The Commission subsequently initiated the procedure laid down in Article 88(2) EC Treaty on unlawful aid and issued a suspension injunction. Following the ensuing investigation, the Commission ruled that Romanian granted state aid within the context of the privatisation process of Automobile Craiova, found the aid to be incompatible with the common market and ordered the recovery of the aid.

Subsequently, the Romanian authorities notified to the European Commission their intent to grant *ad hoc* regional aid to Ford Motor Company Inc for two investment projects in Craiova within the framework of regional investment aid. In April 2008, the Commission found that the regional aid in favour of Ford, with aid intensities of 21.28 per cent and 28.65 per cent, was compliant with the Regional Aid Guidelines 2007-2013.

However, on 10 September 2008, the European Commission launched a formal investigation into Romania's plans to grant public funding for a staff training programme at Ford Motor (formerly Automobile Craiova). The Commission has doubts as to whether the aid would give rise to additional training over and above what Ford would be likely to carry out in the absence of the aid.

Tractorul case

The privatisation of Tractorul has been made subject to certain conditions imposed on the acquirer such as maintaining the current activity for 10 years and favouring former employees of Tractorul in its (re)hiring policy. The Commission again suspected that these conditions were not compliant with the market economy vendor principle and with the Commission's privatisation principles. The aforementioned conditions attached to the Tractorul privatisation were found to possibly be in breach of these principles and the Commission subsequently opened an investigation. Following the investigation the Commission concluded that the conditions attached to the sale of Tractorul were 'mere formal requirements' not onerous obligations and there was no state aid element involved.

Another aspect investigated by the Commission was whether the voluntary liquidation involving the sale of the viable modules would be the most advantageous outcome for the state as a shareholder and the creditors as opposed to judicial liquidation or a piece-by-piece sale. A similar conclusion was reached in this respect too.

ii Trends, developments and strategies

Following EU accession, the RCC became the main contact authority between the Romanian authorities, public institutions and the European Commission. It also cooperates and provides assistance to authorities, grantors and beneficiaries of state aid and helps them implement EU state aid legislation accordingly. In practice, in contrast to competition proceedings, the Competition Council proves now to be a valuable and active adviser to state aid related matters.

Starting June 2008, following a request from the Competition Council, a mechanism of pre-consultation has been set up with experts in privatisation from the

European Commission. Within this mechanism, information regarding the undertakings which would be privatising by the Romanian privatisation authority, i.e., AVAS, is sent to the European Commission.

iii Outlook

Since the beginning of 2007 until now, 68 schemes for state aid and *de minimis* aid (24 schemes for state aid and 44 *de minimis* schemes) have been drawn up. Out of those, 22 schemes have been drawn up on the basis of the regulation concerning state aid excepted from notification to the European Commission. For the 22 schemes, the RCC has issued a favourable opinion and sent them to the European Commission for informative purposes.

VI CONCLUSIONS

i Pending cases and legislation

Generally, the level of enforcement of competition rules in Romania is almost on a par with that of more established European competition authorities. The RCC is doing its utmost to effectively enforce competition rules. This finding is corroborated by its track record in recent years and the list of pending cases and market investigations: some 20 investigations into alleged anti-competitive behaviour are pending before the RCC. In addition, several market investigations were kicked off in 2008 and will be finalised in the near future. The one where a result is anticipated the most probably concerns the investigation into food retail.

Romanian competition law is, for the most part, harmonised with EC competition rules. It is expected that the notification system for anti-competitive agreements with countervailing efficiencies will be abolished soon. Then we may expect even more effective enforcement as more resources will be available for the detection of hard-core infringements (this will probably also be fostered once the leniency programme is called upon more often). Other legislative amendments are expected to be adopted soon. These concern the amendment of the *de minimis* notice for restrictive agreements and the introduction of the possibility to settle cartel proceedings or to submit remedies in such proceedings in a more detailed regulation of procedural rights in investigations by the RCC.

Chapter 26

RUSSIA

*Murat N Akuyev and Maxim Izvekov**

I OVERVIEW

The new Russian Federal Law No. 135-FZ On Protection of Competition ('the Competition Law') became effective in late October 2006 and superseded both the old competition law adopted prior to the dissolution of the Soviet Union in 1991 and the special law on competition in financial services. The introduction of the Competition Law set the stage for the large scale reform of Russian competition law, which is still ongoing. The enforcement practice of the Russian regulator during the last two years highlights the attempts to bring these relatively new competition regulations into line with the current business environment. Nonetheless, many more opportunities exist to modernise the legislation and, primarily, to ensure its fair implementation. Although some of the steps described below may be considered standard for established markets, the continuing development of such practice represents a significant step forward for Russia.

Examples of important legal developments in the reform include:

a the introduction of turnover thresholds as a criteria for determining whether a transaction is subject to merger control (in addition to the previous assets only tests);

b the introduction and development of a previously unknown legal concept of 'concerted actions' (to combat price and market cartels); and

c detailing new types of competition offences that are now included in the Code of Administrative Offences, as well as establishing additional grounds for defining the rate of administrative fines (which now can be expressed as a percentage of revenues).

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The key role in this reform is vested with the Federal Antimonopoly Service ('the FAS'), the state body implementing competition regulations and monitoring antimonopoly activities. The FAS in recent years has become very active and influential, smoothly transitioning from a Soviet-type formal state body to a very active and thoughtful regulator. The FAS attempts to regulate competition in Russia not only by way of penalties, but also by creating effective mechanisms for competition through utilising market research, seminars and conferences with market participants, and the coordination and exchange of ideas with foreign regulators. As an example, the FAS now very often tries to settle its claims with the alleged violators of the Competition Law, by agreeing with the entities in question, certain behaviour that would eliminate any damage caused by prior misconduct, positively affect competition on the relevant product market and prevent further breaches of the Competition Law in the future. Likewise, the FAS is currently pursuing a new legislative initiative to introduce amendments to the competition and administrative regulations that, if enacted, would set forth explicit settlement procedures where the Competition Law had been breached or repeatedly ignored. Similarly, the FAS is seeking to develop law enforcement mechanisms in order to prevent, determine and investigate cases of concerted actions in the markets, abuse of a dominant position, or contravention of state aid regulations. Although certain regulatory actions may be new to the FAS, it has already gained significant importance in the Russian government. For example, the FAS was appointed as a responsible and coordinating body for implementation of a newly-established federal law on investments in strategic businesses and sectors, adopted in May 2008.

II MERGER CONTROL

Merger control rules in Russia generally apply to:

a the acquisition of a 25 per cent, 50 per cent and 75 per cent stake in a Russian joint stock company (or 33 per cent and 66 per cent in a limited liability company);

b the acquisition of fixed production and/or intangible assets of such entity if the balance sheet value of such assets exceeds 20 per cent of the total assets of such entity determined under Russian accounting rules;

c the acquisition of rights to determine the conditions of business activity of such entity or to exercise the powers of its executive body (which is interpreted to apply to non-Russian transactions resulting in a change of control over Russian subsidiaries);

d the statutory merger or consolidation of legal entities established in the Russian Federation; or

e the foundation of a Russian legal entity whose share capital consists of shares or assets referred to in *(a)* or *(b)* above, provided that, in all cases from *(a)* to *(e)* above, the transaction meets certain thresholds linked to:
   - the aggregate asset value of the acquirer (and its group) and the target (and its group);
   - total annual revenues of the acquirer (and its group) and the target (and its group); or

- in cases when the acquirer, the target or any entity within the acquirer's or the target's respective group is included in the register of entities with a market share on a particular product market in excess of 35 per cent, maintained by the FAS.

In limited cases, transactions may be subject to post-closing notification.

One of the interesting areas in determining whether a transaction triggers merger control requirements (for example, in situation *(c)* above) is whether the acquisition of negative control (i.e., veto rights) leads to the acquisition of rights to determine the conditions of business activity of a legal entity subject to the Competition Law. Traditionally, negative control rights were not considered by market participants as a triggering point for a merger filing. However, the FAS has become more attentive to this issue and reviews such transactions on a case-by-case basis with an emphasis on the nature of the given veto rights.

The Competition Law sets out detailed merger control rules, provides a general legal framework and authorises the FAS to use its own discretion in many instances when reviewing individual cases. In particular, the standard 30-day review period for a pre-closing approval may be extended for a further two months if the FAS believes the prospective transaction might restrict competition with respect to a particular product market. The FAS also has a significant discretion in deciding what comprises a particular product market, both in terms of the geographical boundaries and what products or services define a particular market. Where there is such an extended review, the existing regulatory practice is that information about the transaction will be posted on the official web site of the FAS. Any interested party may then provide the FAS with information regarding the effect of the proposed transaction on a particular product market. In addition, the FAS may directly request competitors to evaluate the proposed transaction and express any reasoned concerns. One of the first cases where the FAS implemented this practice was the filing in respect of the merger of the network businesses of Nokia Corporation and Siemens AG in 2007. Since that time, it has become common practice for the FAS to research any product market by way of such public investigations. Finally, the FAS has become very active in requesting and obtaining additional information and documents (which may not be technically prescribed by law for an initial application). Recent practice shows that the FAS is very interested in the beneficial owners of the parties to a transaction. In some cases, the FAS may even request the parties to evaluate the economic and social impact of the transaction on the relevant product market and competition and to assess the market shares of the main players on the relevant product market.

It is also worth mentioning that the application form for the merger control filing in Russia is very formalistic and technical, requiring various information (e.g., the FAS requires the submission of a significant amount of documents regarding the participants of the transaction to be specially certified (notarised or apostilled)). Recently, the Russian press speculated about certain examples where the FAS refused to approve a transaction owing to the improper presentation of required information in the filing.

It has also been reported that recent legislative initiatives aim to revise the thresholds triggering merger control filings because nowadays the FAS receives hundreds of technical filings which have no competition interest or substance, but are required as a formal matter. (Often in Russia formal clearance is even required when a foreign transaction may lead to a change of control over a minor Russian company without any assets and market share owing to the fact that Russian notification thresholds apply to the groups of an acquirer and a target on a global basis.) It seems that for greater efficiency and maximum use of the substantive regulatory powers of the FAS, it is necessary for the FAS to clarify its merger control criteria, and not allow the FAS specialists to waste significant amounts of time on unrelated issues.

III PROHIBITION OF CARTELS AND CONCERTED ACTIONS

Russian rules regarding price-fixing were significantly improved by the Competition Law when it introduced the concept of 'concerted actions'. The Competition Law defines concerted actions as actions taken by more than one entity with the prior knowledge of the other entity, the result of which promotes the interests of such entities, where such action has been instigated by one of the entities. In addition to the prohibition of cartels, the Competition Law generally prohibits any concerted action or agreement of entities on a product market that results or may in the future result in various consequences, including but not limited to the fixing or maintaining of prices (tariffs), the division of a product market by territory, volume of sales or purchases, types of goods or range of customers or suppliers, the refusal to enter into an agreement with certain buyers (customers) for reasons that are not economic or technological in nature, the dictating of terms unfavourable to a counterparty or irrelevant to the subject-matter of the agreement and the restriction of competition through other means. The Competition Law also prohibits coordination by a third party if this results in the consequences mentioned above, but does expressly permit a vertical agreement[1], if it relates to a commercial concession or as long as each party does not control more than 20 per cent of any product market.

Accordingly, since 2006, the FAS has been trying to develop a system of tracking and identifying concerted actions. In summer 2008, the FAS created a separate division to deal with investigations of prohibited concerted actions. Nonetheless, some argue that as a practical matter the FAS needs to be designated as a law enforcement body in order to be able to conduct such investigations. Related to that is a legislative initiative to amend the Criminal Code with a view to harden the penalty for abuse of competition and authorise the FAS to use necessary mechanisms to track and investigate such cases.

Despite the lack of experience and enforcement mechanisms, the FAS aggressively pursued investigations in 2007 and 2008 related to purported concerted actions connected with consumer products. Publicly available information indicates that the most common breaches relate to the fixing or maintaining of prices (tariffs). For example, the FAS reported a number of investigations in respect of sales of milk by LLC Unimilk (one of the main Russian milk producers) in various Russian regions. (According to the reports, the Company had arrangements with competitors and distributors in respect of the fixing or maintaining of milk prices.) Also in 2008, the FAS paid special attention to

1 An agreement between a customer or potential customer and a producer or potential producer who do not compete with each other.

oil and oil products markets. The FAS press service released information that, in 2008, the FAS investigated more than 50 cases of concerted action in the oil and oil products market (especially automobile and aviation fuel), most of which related to fixing of prices. In some cases the FAS imposed fines calculated as a percentage of revenues. One of the illustrative cases reported by the FAS was the alleged breach by subsidiaries of Gazprom Neft (ZAO Gazpromneft-Kuzbass) and Rosneft (OAO Tomsknefteprodukt VNK) of prohibitions on concerted actions that resulted in price-fixing. According to the FAS, both companies allegedly coordinated prices from January 2007 to January 2008 for various types of gasoline and diesel fuel. As a result, the FAS imposed revenue-based fines in the amount of 25 million roubles for ZAO Gazpromneft-Kuzbass and 31 million roubles for OAO Tomsknefteprodukt VNK.

One other significant reported investigation conducted by the FAS relates to credit insurance. The FAS tracked certain features in the operations of at least 60 banks and 70 insurance companies and declared them to be prohibited instances of concerted actions. Following in-depth research, the FAS concluded that in many cases, banks and insurance companies entered into agreements under which banks agreed to grant loans only to the borrowers who carried insurance in a particular insurance company under fixed tariffs (which were higher than the ordinary tariffs of the insurance company), while at the same time, insurance companies were obliged to reimburse the banks a portion of the insurance premiums. The FAS concluded that such operations restricted and eliminated competition and demanded that all such concerted actions be discontinued, while in other cases imposing fines. Finally, given the number of such cases, the FAS issued guidelines to the banks and insurance companies as to what extent they were legally able to coordinate their activities.

IV DOMINANT POSITION

The Competition Law sets out quantitative criteria to determine whether an entity, together with its group or several unrelated entities (together with their respective groups), have a dominant position on a particular product market. The triggering point is when the entity has a market share on a particular product market in excess of 35 per cent (subject to further detailed rules). In certain circumstances, several unrelated entities may also be categorised as having a dominant position. Any 'natural monopoly' of a particular product by definition has a dominant position on the relevant product market. Under the Competition Law, an entity with a dominant position on a particular product market shall not engage in a number of activities including, but not limited to, price-fixing, withdrawal of goods from circulation resulting in price increases, dictating terms unfavourable to a counterparty or irrelevant to the subject-matter of the agreement, the refusal to enter into an agreement with particular buyers or customers, the creation of barriers to enter or exit a particular product market, and certain other actions.

Traditionally, the FAS has paid a lot of attention to dominant position cases. The common breaches investigated by the FAS in 2008 related to the fixing of artificially inflated monopolistic prices and dictating terms unfavorable to counterparties. The Russian press reported on a widely-publicised investigation related to the oil and oil products markets where certain entities of LUKOIL, Gazprom Neft, TNK-BP and Rosneft allegedly abused their dominant position by fixing artificially inflated monopolistic prices for oil products, dictating terms unfavourable to customers and discriminating against them. As a result, the FAS reportedly undertook a difficult investigation, analysed a vast amount of material, and conducted a large number of serious negotiations with the companies involved with a view to decreasing prices and amending sales conditions. In November and December 2008, the FAS imposed the largest revenue fines in history on these four companies (ranging from 1.1 billion roubles to 1.5 billion roubles); however, according to press reports, these companies are in the process of challenging the FAS decisions in court. Another significant investigation reported by the Russian press concerned the coal market where the FAS fined certain companies of Mechel, Evraz and Raspadskaya for fixing artificially inflated monopolistic prices.

Developing business practice and the growing complexity of economic relations proves that setting out only quantitative criteria to determine whether an entity has a dominant position on a particular product market is not enough. The FAS aims to amend the competition legislation in order to introduce separate qualitative criteria that would allow the FAS to be more flexible and pay more substantive attention to various market participants and effectively to protect the competitive environment from the abuse of any dominant position.

V STATE SUPPORT

The Competition Law also provides for limitations of state support in order to eliminate unfair state influence on competition. The FAS admits challenges in implementation of the rules on state aid, especially as it relates to state credits and the privatisation of real estate. Current legislative initiatives would make regulations regarding state support more detailed, including the establishment of a special penalty that would disqualify state officials for breaching competition law.

VI CONCLUSION

The introduction of the Competition Law and subsequent further amendments, in conjunction with the active role of the FAS, demonstrates the growing maturity of competition regulation in Russia. The existing legislation is still not perfect, however, the practice of the FAS in recent years has been consistently moving towards substantive analysis of competition on various product markets. The main highlights in Russian competition law are as follows: further development of legislation, creation of enforcement mechanisms to track down and prosecute prohibited concerted actions, first attempts to regulate concerted actions on the relevant markets, further development of rules on dominant positions and the market reviews and investigations of the FAS to analyse the competitive situation on various product markets.

Chapter 27

SERBIA

*Christoph Haid and Srđana Petronijević**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

Competition law in Serbia is still in its infancy. A modern competition law regime was introduced in September 2005 only when the Law on Protection of Competition ('LPC') was adopted.

Given the infancy of competition law in Serbia, it is not surprising that the Serbian Commission for the Protection of Competition ('the Commission', www.kzk.org.yu) lacks experience compared with Western European competition authorities. Hence, a top priority of the Commission is to raise the standard of its decisional practice and its transparency in general to a level that is on a par with modern EU competition law regimes.

The vast majority of the Commission's resources are absorbed by merger control work. Case law in the fields of antitrust agreements and abuses of market dominance is scarce (see also immediately below).

ii Enforcement agenda

Pursuant to the Commission's 2008 annual report the Commission assessed 137 concentrations in 2008. This high figure stands in contrast to 20 notifications of restrictive agreements and 12 notifications of a dominant market position (it commenced proceedings only in respect of two dominant undertakings). The Commission adheres to the case law at EU level in its decisional practice. Still, neither the case law nor the legal provisions provide sufficient legal certainty. Issues that still await (more detailed) regulation, for example, relate to block and individual exemptions, the leniency programme, the method of setting fines and the abuse of dominance.

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The Commission is not vested with the power to impose fines for competition law infringements but has to apply to a court for the respective conduct to be penalised. In 2008, the Commission lodged a total of five such antitrust offence proceedings before Serbian courts:

a two proceedings were initiated for infringing the cartel prohibition (against the Belgrade Taxi Association and major Serbian drug producers and wholesalers);

b one for not providing requested data (against Despec Up International d.o.o.); and

c two for the abuse of a dominant position (againstBelgrade Bus Station and SBB – however the court dismissed the charges in both cases for different reasons).

II CARTELS

i Preliminary remarks

Article 7 LPC copies Article 81 of the EC Treaty in that it declares impermissible (and null and void) all anti-competitive agreements unless they create countervailing efficiencies. What differs from the EU level is that a notification system is still in place in Serbia and that failure to notify an anti-competitive agreement may entail fines. Such fines may amount to 10 per cent of the total turnover of the infringing undertaking. In addition, individuals responsible for the anti-competitive agreements may be fined up to 10 per cent of their annual income, and the Commission may impose behavioural remedies, including confiscation, if deemed necessary to restore effective competition.

The LPC provides that the Serbian government shall adopt regulations that set out the details of block and individual exemptions as well as the requirements under which an agreement is deemed not to have an appreciable effect on competition. However, only drafts of the respective by-laws exist. Hence, the Commission takes the view that until these by-laws have been adopted, all anti-competitive agreements shall be notified for individual exemption. The deadline for notification is 15 days upon signing. Restrictive agreements can be notified to the Commission even prior to signing for preliminary assessment. The Commission may grant individual exemption for a maximum period of five years, which can be extended. In practice, however, the Commission mostly grants individual exemptions for a three-year period only.

ii Significant cases

At the end of 2008, the Commission established that major players in the Serbian pharmaceutical sector (manufacturers as well wholesalers) had been involved in a hard-core cartel. The cartel members rigged bids and foreclosed the market by exclusive distributorship agreements. The proceedings were triggered by a complaint from a wholesaler who was 'left out' of the cartel agreements.

According to the Commission's findings, a number of major drug manufacturers (Hemofarm a.d., Galenika a.d., Zdravlje a.d., Jugoremedija a.d., Habitfarm a.d., Slaviamed d.o.o. and Srbolek a.d) had agreed in January 2008 to rig bids in the context of public procurement projects. A few weeks later major pharmaceutical wholesalers (Velefarm a.d., Vetfarm a.d., Farmalogist d.o.o., Jugohemija-Farmacija d.o.o., Vetprom Hemikalije a.d., Pharmanova Veleprodaja d.o.o. and Unihemkom d.o.o) agreed on a 'business terms proposal' that regulated the sale of pharmaceuticals outside the ambit of public procurement.

Further, the manufacturers entered into distributorship agreements with wholesalers, which imposed an obligation on the wholesaler to sell products only to pharmacies and medical institutions and not to other distributers. Wholesalers had to seek prior approval by the respective manufacturers if the wholesaler wanted to participate in a public tender. Moreover, the agreements contained RPM clauses as wholesalers were prohibited to resell products below their purchase price.

The Commission established that the objective of manufacturers and wholesalers was to foreclose other pharmaceutical wholesalers and to control supplies from wholesalers to their customers.

The cartel agreements and the restrictive provisions in the distributorship agreements were declared null and void. In addition, the Commission applied to the competent courts for fines to be imposed on the implicated undertakings. The companies concerned lodged an appeal to the Supreme Court. If the Commission succeeds in both proceedings, namely, the appellate proceedings before the Supreme Court and the fine proceedings before offence courts, this would be the first case in which undertakings are fined for infringements of competition law.

In addition to the pharmaceutical cartel, several investigations into alleged anti-competitive activities are currently pending before the Commission. Undertakings involved in these proceedings include, inter alia, Adidas, UNIQA, several domestic bus transport companies, outdoor advertising companies, McDonald's, Commercial Bank, and Henkel.

iii Trends, developments and strategies

Beside the fact that the pharmaceutical cartel is the first major cartel case in Serbia, it set a precedent insofar as the Commission expressly declared the restrictive agreement(s) null and void, even though nullity is a statutory legal consequence. The courts have also been asked to impose fines on undertakings and the individuals that are in charge of the wrongdoings.

A general observation is that the decisional practice of the Commission constantly betters, not only in quantity but also – and more importantly – in quality. The regular training by international authorities (including, first and foremost, the European Commission, but also the OECD, ICN and UNCTAD) apparently pays off. Still, there is some way to go for the Commission to become as developed as Western European authorities.

iv Outlook

A draft competition law ('Draft Law') was published by the Serbian Parliament on 20 March 2009. It followed a first draft amendment, which was withdrawn in the course of last year for reasons not known to the public. The current Draft Law is expected to be adopted by mid 2009. It can be found on the website of the Parliament[1]. It is available in Serbian language only.

Overall, the Draft Law aims at bringing Serbian competition law closer to the standard of modern competition law regimes. As regards restrictive agreements (the Draft Law, however, will also bring about significant changes in relation to merger control proceedings), a major step forward will be the abolishment of the notification system: anti-competitive agreements that create countervailing efficiencies will be automatically valid and enforceable with no prior decision to this effect required.

In addition, severe infringements of the cartel prohibition will be prosecuted more rigorously. The Draft Law bestows on the Commission the power to directly impose fines on undertakings that have infringed competition rules.

Hence, the Draft Law will undo the deficiencies of the current LPC which are primarily related to the lack of effective procedural instruments of the Commission. In order to vest the Commission with the appropriate tools for enforcement of competition rules, the Draft Law sets out explicitly that the Commission may conduct inspections of an undertaking's premises.

It has to be noted that the Commission has not carried out any market investigations and, until now, has not initiated any cartel proceeding *ex officio*. The Commission is still primarily dealing with applications for individual exemption of anti-competitive agreements by third parties. In the future, we expect that the removal of the notification system will free up resources that the Commission will use for detecting cartels.

We note that already the current version of the LPC, albeit in a very general manner, contains leniency provisions: it sets out that in case of a restrictive agreement, the Commission will not impose any sanction on the whistle-blower. However, no by-laws have been adopted yet that regulate the form of leniency applications and leniency proceedings. The Draft Law will set out some procedural provisions in this respect that copy the rules at EU level, namely an undertaking will not be penalised if it is the first to notify the Commission of a hitherto unknown anti-competitive practice. In case the Commission already has knowledge of the respective agreement, an undertaking providing detailed evidence may benefit from a considerably reduced fine. Immunity from or reduction of fines will not be available for companies that were the driving force behind the respective agreement.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Preliminary remarks

The concepts of 'market dominance' and 'abusive behaviour' under the LPC are similar to Article 82 of the EC Treaty. Article 16 LPC deviates from Article 82 EC Treaty in that it provides for a refutable presumption of single market dominance if the respective undertaking has a market share of more than 40 per cent. Joint market dominance is assumed if the respective undertakings have a combined market share of more than 50

1 http://www.parlament.sr.gov.yu/content/cir/akta/akta_detalji.asp?Id=863&t=P.

per cent. In addition to fines on undertakings for abusive behaviour of up to 10 per cent of the respective undertaking's turnover:

a individuals involved may be fined up to 10 per cent of their personal income;

b the Commission may declare provisions on abusive behaviour in an agreement unenforceable and it may enact protective measures in the form of 'confiscation of the object' and/or prohibition to perform certain business activities (unless they result in a spin-off of the company. It can not order the sale of a company's assets or shares or enforce the termination of an agreement which allows an undertaking to enjoy decisive influence over another undertaking;

c the Commission is empowered to impose behavioural measures in order to restore effective competition and to remedy damages caused by abusive dominant behaviour of an undertaking; and

d the abuse of dominance is also caught by the Criminal Code.

Similar to the notification system for anti-competitive agreements, the Commission can be asked for guidance on whether a certain behaviour constitutes an abuse. In 2008, the Commission received 20 applications for exemption of an anti-competitive agreement (of which it exempted seven, while two agreements were determined as not being restrictive and the investigation of eight agreements is still pending) and 12 requests for guidance on abusive behaviour (of which it only assessed two).

ii Significant cases

Restrictive agreements

In 2008, the Commission assessed a pricelist published by the Serbian Veterinary Chamber. The pricelist set out minimal prices for veterinary services and provided for the following sanctions for non-compliance:

a internal warning;

b public warning;

c pecuniary fine; and

d temporary licence suspension.

Following the initiation of proceedings, the Commission immediately issued a provisional injunction prohibiting the Veterinary Chamber to implement the pricelist. The Commission adopted a decision on 21 November 2008 establishing that the pricelist infringed the cartel prohibition and is null and void and also ordered the Chamber to announce on its website that there is no obligation for any member of the Veterinary Chamber to adhere to the pricelist.

Abuse of market dominance

The Commission found two market dominant undertakings to have engaged in abusive behaviour in 2008:

In December 2008, the Commission held that SBB had abused its dominant position in the market for the provision of television programme distribution services via DTH technology to broadcasters such as TV Pink, TV Avala, TV fox, TV Kosava and HEPI TV, Super TV, TV Metropolis, ENTER TV, SOS channel and TV Studio

B. TV stations were prohibited from entering into agreements with other competitors during the contract term as well as for some time after its termination. On the other hand, SBB retained the right to enter into agreements with TV stations that might contribute to the attractiveness of its package of services. Therefore, the Commission ordered SBB to amend its contracts with respect to the exclusivity provision as well as the termination clause.[2]

Another significant abuse of dominance case in 2008 concerned the milk industry. The Commission adopted a decision declaring that Mlekara a.d. and Imlek a.d., both controlled by Danube Foods Group BV, had abused their dominant position on the market for purchasing milk in Serbia by imposing unreasonable business conditions and by applying dissimilar conditions to identical transactions.

The standard agreement for the production, delivery and purchasing of milk prepared by Mlekara and Imlek provided, inter alia, for the following:

a the quality of raw milk could be only assessed in the laboratory of Mlekara and Imlek and the results would be considered final and binding;

b milk producers were obliged to immediately notify Mlekara and Imlek of other contacts;

c the right of unilateral termination of agreements by Mlekara and Imlek with an obligation of milk producers to compensate them for any damages in case the reason for termination lies in the milk producers' sphere; and

d the purchasing price of raw milk would be determined on the basis of the pricelist while the agreement failed to provide under which circumstances the pricelist may be altered.

In addition, the milk producers were not allowed to unilaterally terminate the agreements based on the changed pricelist. Therefore, the Commission ordered Mlekara and Imlek to alter the restrictive provisions in the agreements by providing for quality assessments by independent institutions, to advise the milk producers of their right to have the quality of milk assessed independently and to provide for unilateral termination of agreements under equal conditions for both parties. Also, Mlekara and Imlek are obliged to prepare a new pricelist and to distribute the pricelists to each milk producer.

iii Trends, developments and strategies

One general observation is that antitrust cases in Serbia so far, have virtually never been initiated *ex officio*. Rather, the Commission depends on complains by third parties, press articles or notifications by implicated undertakings. For the most part, this is due to the lack of sufficient personnel of the Commission, which causes a very 'reactive' enforcement of competition rules. It remains to be seen whether the Draft Law will lead

2 Already in 2007, SBB was found to have abused its market dominant position in the market for the provision of cable TV on the territory of several municipalities in Belgrade by offering favourable subscription conditions only to its competitors' subscribers.

to a more active approach of the Commission by utilising resources that are not tied to the assessment of notified agreements any longer.

iv Outlook

The Draft Law also contains a legal framework for block exemptions from the cartel prohibition for different types of agreements, namely, on specialisation, research and development, technology transfer and distribution. These types of agreements will be automatically exempted if certain requirements are met with no prior decision being required. The proposal also introduces a *de minimis* rule, which sets out the circumstances under which anti-competitive agreements are deemed not to restrict competition in Serbia appreciably. Both block exemptions and the *de minimis* rule, would significantly ease doing business in Serbia from a competition law point of view. Together with the changes outlined in Section II, *supra*, the Draft Law will bring the Serbian competition regime closer to modern competition law systems.

The Draft Law does not bring about any significant changes in respect of cases of abuse of dominance.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

The Commission did not interfere much in regulated industries and has not yet conducted any sectoral investigations. As stated in the Commission's 2008 Annual Report ('2008 Annual Report')[3], the Commission focused its work on cases where they received an application from interested parties. This is due to the Commission's limited resources that are focused on the assessment of notified agreements and concentrations as well as the lack of experience in relation to active enforcement and market investigations.

ii Trends, developments and strategies

The monitoring of the financial sector in the Republic of Serbia has increased starting from 11 February 2008 when the National Bank of Serbia ('NBS'), in its capacity as the supervisory body for financial institutions, and the Commission signed a protocol on exchanging information ('Protocol'). As stated in the Protocol, its aim is to enhance the development, stability and supervision of the Serbian financial market.

By means of the Protocol, the NBS and the Commission are obliged to inform each other of any infringement by the financial institutions of competition or banking laws on the Serbian market. In practice, such cooperation of the NBS and the Commission means that any prevention or limitation of competition or irregularities in financial business may consequently lead to penalties imposed by both the NBS and the Commission.

3 The Report can be downloaded at www.kzk.org.rs/download/Izvestaj%20KZK%202008.doc.

iii Outlook

It would come as a surprise if the Commission commenced sectoral investigations in the short term. Currently, it lacks the experience and particularly the resources to carry out such an investigation.

V STATE AID

i Significant cases

No law exists in the field of state aid that would set out the rules for granting of state aid or that establish a system of control in Serbia. Rather, in the Republic of Serbia, state aid still falls under the unregulated areas. By the end of 2008, the Ministry of Finance prepared a draft Law on State Aid Control providing for the application of a state aid legal framework starting from 1 September 2009.[4] Although the draft law was introduced to Parliament on 9 December 2008, it seems unrealistic that it will be adopted by the end of 2009 due to the heavy work load of Parliament.

According to the Ministry of Finance, the adoption of the state aid act would mean the establishment of a system of control, ensuring macroeconomic stability and sustainable economic development in Serbia. The draft law explicitly prohibits granting state aid that would lead to an infringement, limitation or distortion of competition on the market.

Currently, the only means of achieving transparency in state aid allocation is the Annual State Aid Reports published by the Ministry of Finance ('State Aid Report'[5]). Unfortunately, the State Aid Report for 2007 is not yet available proving the shortcomings of such forms of transparency as regards efficiency.

ii Trends, developments and strategies

As presented, the draft Law on State Aid Control relies on Articles 87 and 88 of the EU Treaty by setting the general conditions and procedures in respect of state aid and by aiming to protect competition on the market, ensuring transparency of state aid allocation and securing the performance of obligations assumed by international treaties. State aid is defined as any actual or potential public expenditure or reduction in achieved public revenues that places a user of state aid in a more favourable position comparing to its market competitors. As stated, the provisions of this law are not applicable to agricultural production and fishing. It also prescribes an obligation to register state aid and its strict control through previous and subsequent control conducted by – the yet to be established – Commission for State Aid Control.

Article 73 of the Agreement on Stabilisation and Association between the EU and Serbia ('the Agreement') provides that any state aid violation or threatening to violate competition by providing more favourable conditions to certain companies or products is 'contrary to the aim of the Agreement'. The Agreement also provides for an

4 http://www.mfin.sr.gov.yu/src/2681/.

5 http://www.mfin.sr.gov.yu.

obligation to establish an independent state aid control body within one year following the date of entry into force of the Agreement. This body will, among other things, have the authority to approve state aid schemes. It is still to be seen in 2009 how efficient such a body will be, given that the deadline for it to be establised, according to the Agreement, expires in September 2009.

iii Outlook

In 2006, the total of allocated state aid in Serbia amounted to 37,005 million dinars. Unfortunately, data on state aid granted in 2007 and 2008 is still not available.

According to the State Aid Report 2006, the horizontal and sectoral state aid amounted for 97.2 per cent, while the regional state aid represented only 2.8 per cent of the entire allocated state aid. In horizontal state aid, the major part was directed towards development of small and medium sized companies and social programmes alleviating social hardship for workers in companies undergoing restructuring processes. As reported, sectoral state aid was aimed mainly on the traffic sector, namely, railway traffic.

The State Aid Report 2006 stressed that state aid in Serbia could consist of: subsidies, tax incentives and favourable credits.

In 2006, direct subsidies were the instrument of state aid allocation most represented in Serbia, mostly granted by the Ministry of Economy and Regional Development, the Ministry of Trade and Services, the Agency for Foreign Investments and Promotion of Exports and AP Vojvodina.

Tax incentives were aimed at creating jobs, supporting small and medium sized companies, establishment of new companies, exports, trainings of employees and regional development. As stated in the State Aid Report 2006, three taxpayers were relieved from their obligations to pay overdue tax while the tax obligation of 13 companies that were in process of privatisation was written-off.

Favourable credits amounted to 10.5 per cent of the total of the allocated state aid in 2006. The Fund for Development of Serbia, the Fund for Development of Vojvodina as well as the Agency for Insurance and Financing of Exports were approving either short-term or long-term credits during 2006.

Unfortunately, information on the allocation of state aid in 2007 is not easily accessible. The State Aid Reports 2007 and 2008 are yet to be published. The draft Law on State Aid control is to be finalised, presented and passed before the Serbian Parliament hopefully within the time limits provided for in the Agreement.

VI CONCLUSIONS

i Pending cases and legislation

As alluded, the Draft Law was recently published by Parliament, following a first draft amendment, which was withdrawn in the course of last year. It will close three major loopholes that currently hamper effective public enforcement in Serbia. First, it will vest the Commission the power to carry out investigations of undertakings suspected of antitrust infringements. Second, it will empower the Commission to impose fines on undertakings instead of having to apply for fines to courts. Last, but by no means least, the Draft Law will abolish the notification system and declare restrictive agreements that create overriding efficiencies automatically exempted from the cartel prohibition. In addition, it is also expected that block exemption regulations will finally enter into force.

These three major chances should safeguard that the limited resources of the Commission are used for detecting or prosecuting and penalising the most severe infringements of competition more effectively. The current Draft Law is expected to be adopted by mid 2009.

In addition, the outcome of the pending investigations into alleged cartels is anticipated. If the Commission succeeds in the appellate proceedings before the Supreme Court in the pharmaceutical cartel, this would be a considerable boost for public enforcement in Serbia.

ii Analysis

The Commission has made significant progress since its establishment three years ago and is constantly gearing towards EU competition rules. The new Draft Law will eliminate major deficiencies of the current public enforcement which are primarily related to the fact that the Commission is not equipped with the necessary tools and its limited resources are tied with the assessment of standard notifications of agreements and concentrations.

Chapter 28

SLOVAKIA

*Martin Nedelka and Kateřina Mandulová**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

The competition authority that is predominantly in charge of public enforcement in Slovakia is the Antimonopoly Office of the Slovak Republic ('the SAO'). The SAO may initiate administrative proceedings against offenders in case of a breach of the rules set forth in the Slovak Competition Act. Additionally, the SAO is responsible for the application of Articles 81 and 82 of the EC Treaty. As infringements of the Slovak Competition Act are also caught by the Criminal Code, the Office of Public Prosecution is empowered to publicly enforce competition rules in Slovakia. Finally, the SAO is also responsible to review measures of state bodies which might restrict competition.

A decision issued by the SAO may be appealed within 15 days following the date of delivery of the decision. The Council of the SAO decides on appeals and its decisions may be challenged before the Regional Court of Bratislava.

The SAO is headquartered in Bratislava and numbers 80 officers, including the Chairwoman of the SAO. The SAO consists of 15 units. The most important units for public enforcement are the Cartel Unit (14 officers), the Antitrust Unit (16 officers), and the Merger Unit (13 officers). There is also a Unit of Legislative and European affairs (seven officers) and a Unit of Economists (six officers). The Unit of Second-Instance Proceedings (six officers) prepares materials and documents for the sessions of the Council of the SAO as the appeal body (eight members).

ii Enforcement agenda

The intention of the SAO was to use its leniency programme as an important tool for enforcing competition rules. In practice, the leniency programme is not used very often. In order to enhance the practical application of this tool, the SAO launched a process of

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public discussion which should reveal the limits and weak points of the current leniency programme. At present, the SAO does not apply settlement or plea bargaining which would allow the authority to expedite investigations.

II CARTELS

i Preliminary remarks

The Slovakian competition rules virtually copy Article 81 of the EC Treaty and respective regulations and notices. What differs, for example, is that vertical agreements are only deemed *de minimis* if neither party has a market share of 10 per cent (whereas the relevant threshold at EU level is 15 per cent).

Sanctions

Infringements of the cartel prohibition may lead to fines of up to 10 per cent of the competitor's turnover for the preceding accounting period or a fine of up to €300,000 if the company has no Slovakian turnover or a domestic turnover not exceeding €300,000.

Anti-competitive behaviour may also constitute a criminal offence. Individuals may be prosecuted if they are responsible for infringements of competition rules and this infringement led to damages of approximately €26,500 or more. Pursuant to the Criminal Code, the sanction for participating in anti-competitive behaviour is imprisonment between two to six years. Additional sanctions pursuant to the Criminal Code are disqualification for up to 10 years and a fine of up to €300,000.

To enhance transparency and safeguard legal certainty, the SAO issued guidelines on the method of setting fines. These guidelines virtually mirror the respective notice of the European Commission.

Leniency programme

The SAO has implemented a leniency programme that copies the one of the European Commission, meaning that, inter alia, a marker system is also available in Slovakia. As mentioned above, the leniency programme has not been called upon often so far.

ii Significant cases

The SAO did not issue any significant decisions in 2008. In December 2008 the SAO only imposed a fine of €1,600 (48,140 Slovak koruna) on the Association of University Hospitals in Slovakia. The SAO found that the Association had interfered with individual contract negotiations between the Association's members and the respective health insurance companies by imposing minimum prices. The decision of the SAO has not entered into force because the Association lodged an appeal.

The most important cartel cases so far concerned bid-rigging in relation to gas isolated switchgears ('GIS') and motorway construction works:

GIS

In 2007, the European Commission fined manufacturers of gas insulated switchgears for participating in a long-standing worldwide cartel over €750 million. The SAO also commenced proceedings (upon a leniency application by one of the cartelists) which concentrated on infringements prior to Slovakia's accession to the EU (infringements after the accession were covered by the investigation of the European Commission). The investigation unveiled that the implicated undertakings had also coordinated their activities in relation to Slovakia. The SAO did not impose a fine on three participants (these three undertakings were part of the same group) because they fulfilled the conditions for immunity from fines under the leniency programme. The infringements of another undertaking were already time-barred. The SAO imposed fines totalling 350 million Slovak koruna (approximately €10.5 million) on the other parties. The decision was issued on 28 December 2007 but is not final as the implicated undertakings have lodged an appeal against the decision.

The GIS case is the first and so far the only one where the leniency programme has been called upon.

Motorway construction

The SAO imposed a fine of 1,349,290,000 Slovak koruna (approximately €44.8 million) on six building companies, which allegedly coordinated their bids in relation to a public tender for constructions works in relation to the Mengusovce – Janovce motorway. At the end of 2008, the Regional Court for Bratislava quashed this decision because the SAO failed to identify the exact time and place of the infringement. The SAO appealed this decision of the court on the ground that the Regional Court for Bratislava diverged from the EC case law by asking the SAO to prove facts which were not relevant for the establishment of the anti-competitive agreement's existence. It has to be seen whether the appellate court will provide an authoritative answer as to the required standard of proof.

iii Trends, developments and strategies

The SAO is trying to enhance the application of the leniency programme. This should enable the SAO to expose horizontal cartels, which are commonly thought to be the most serious anti-competitive behaviour, more frequently.

We note that the SAO also had a number of its major decisions overturned in the last years. In some cases, the imposed fine was significantly reduced. For example, Zeleznicna spolocnost/Cargo was originally fined 37 million Slovak koruna, but the SAO saw this fine being reduced to 5 million Slovak koruna. Another fine against Zeleznicna spolocnost/Cargo was reduced from 75 million Slovak koruna to 9 million Slovak koruna.

iv Outlook

Pending cases

SAO Officials raided premises of three banks recently. SAO is investigating an alleged cartel agreement whereby the banks agreed to terminate the current accounts of a customer. The background of this is, that during 2008, the SAO initiated administrative proceedings against Slovenska sporitelna, a.s., Ceskoslovenska obchodna banka, a.s., and Vseobecna uverova banka, a.s. following a complaint by Akcenta CZ, a Czech based financial institution, over an (alleged) attempt by the three banks to foreclose it from the foreign exchange market.

Akcenta CZ claims that, during these raids, the Antimonopoly SAO secured e-mail correspondence evidencing that the banks communicated internally in order to terminate Akcenta CZ's current accounts.

At the end of 2008, the SAO opened proceedings against ENVI PAK, a.s. over a suspected abuse of dominance in relation to its packaging waste collection, recovery and recycling activities as well as the provision of 'green dot' licences.

As regards the *GIS* case that is currently pending before the appeal body of the SAO, it will be interesting to see whether proceedings take a similar route as in the Czech Republic. The critical question is whether a 'new' Member State's authority may investigate cartel behaviour pre-accession while the Commission is investigating the same European-wide cartel. In parallel proceedings in the Czech Republic, a national court ordered the Czech competition authority to pay back fines imposed on manufactures of gas insulated switchgears for their participation in a European-wide cartel prior to the EU accession of the Czech Republic. As the same manufacturers were fined by the Commission for the European-wide cartel, the court ruled that fining them for the same cartel again, though restricted to the area of the Czech Republic prior to its EU accession, would amount to double jeopardy. This decision of the national court, however, was overturned by the Supreme Administrative Court.

Legislation

The SAO plans to focus on more serious infringement activities. There are a number of enforcement tools of which the authority could avail itself in its future enforcement of the Slovakian competition law to bring less significant cases to a speedy end and focus resources on the detection and prosecution of serious competition law infringements. These tools encompass settlement proceedings, commitments and 'competition advocacy'. 'Competition advocacy' has been deployed quite successfully in the Czech Republic. It sets out conditions under which it is possible to even avoid proceedings before the Czech competition authority ('the Office') and prevent the imposition of a fine despite a violation of competition rules. Undertakings can benefit from competition advocacy if they cease the violation of competition rules prior to initiating formal proceedings and accept sufficient remedies. The intended corollary of the parties' cooperation is that the Office will not initiate proceedings and will not impose a fine. It must be borne in mind that the Office uses competition advocacy only in cases of marginal impact on competition on the relevant market (it would not be applicable to cartel cases for example).

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANT POSITIONS

i Significant cases

Restrictive agreements

In *VAS and N-ADOVA* the SAO fined VAS s.r.o. and N-ADOVA, spol. s r.o approximately €1.2 million in 2008. The two companies operate the only two carcass disposal plants on the market of veterinary sanitation services in Slovakia. At the beginning of 2007, VAS s.r.o. and N-ADOVA, spol. s r.o. created a joint venture, VAS–ADOVA, s.r.o. This joint venture was responsible for negotiations with suppliers of animal by-products. VAS–ADOVA was the only provider of sanitation services for certain categories of by-products and was able to increase service prices by 100 per cent. The establishment of VAS–ADOVA also led to an allocation of the market, as it could decide which of the two carcass disposal plants to be used for which supplier and in what volume. The decision against VAS s.r.o. and N-ADOVA is not final as the companies filed an appeal.

In *Geodesists and Cartographers Chamber*, the Chamber of Geodesists and Cartographers was fined 50,000 Slovak koruna at the beginning of 2008 for adopting a list of recommended prices for geodetic and cartographic works in 1999, 2001 and 2003. The Chamber monitored adherence to the price list and sanctioned members in case of non-compliance.

Abuse of market dominance

In *SPP – preprava* the SAO levied a significant fine of approximately €3 million for an abuse of dominance on SPP – preprava (also called eustream), a company with substantial gas transmission activities in Slovakia. According to the SAO, SPP – preprava abused its dominant position by enforcing unfair trade conditions. SPP – preprava made the conclusion of agreements concerning the connection and interconnection of the distribution network of GasTrading – the operator of a newly established natural gas network in the premises of the Industrial Park Levice (Géňa) – dependent on GasTrading selling off its connection infrastructure to SPP – preprava. SPP – preprava submitted that this is required in order to ensure the safe and reliable operation of the transmission system. The SAO concluded that the justification was ill-founded. In practice, this provision should only reinsure that no other distribution network operator connected to the transmission system would own the connection infrastructure. In addition, the provision was found to be harmful to end consumers, as it might result in GasTrading's customers not receiving the necessary supply of natural gas for their business activities.

In *Slovnaft*, Slovnaft, a.s. was fined at the end of 2007 approximately €300,000 for employing discriminatory rebates. Slovnaft did not even inform customers, even at their request, about the criteria applied for calculating rebates. Slovnaft enjoys a dominant position in the wholesale market for motor petrol. Employing different rebates without objective justification was found to be abusive.

In *Marianum*, Marianum was fined some €100,000 for abusive behaviour in relation to cemetery and cremation services in Bratislava. Marianum tied the provision of funeral services (i.e., provision of bearers and lease of catafalques) automatically to the lease of halls. Additionally, it was found that Marianum charged excessive fees. The SAO therefore fined Marianum, which the latter appealed. Interestingly, Marianum's fine was increased by the appellate authority to 7,160,000 Slovak koruna (€237,668).

ii Trends, developments and strategies

The SAO regularly scrutinises restrictive agreements and abuses of dominance (see above). These practices are assessed against Slovakian competition rules as well as Articles 81 and 82 of the EC Treaty. What can be observed, however, is that the SAO, in its decisional practice, does not sufficiently take into account new trends in the enforcement of competition law at EU level, which may be helpful to free resources and deploy them in the detection and prosecution of hard-core infringements.

As mentioned above, the SAO had to deal with appellate courts that amended decisions of the SAO. Two decisions on abusive behaviour were quashed as well. Both decisions concerned Slovak Telecom, where a fine over 885 million Slovak koruna was originally imposed for non-provision of access to local lines and another fine of 80 million Slovak koruna for margin squeeze. In turn, in the case of *Marianum*, the original fine by the SAO was increased significantly by the Council.

iii Outlook

Several cases are currently pending. These concern distributorship agreements between Elcom, spol. s.r.o and its distributors as well as between FM Group World Andrzej Trawinski Komanditna Spolocnost and its Slovak distributor. The SAO is currently also looking into the activities of Natur-Pack, A.S.A. Slovensko, Kosit and OLO in the waste packaging industry.

IV SECTOR COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Preliminary remarks

The competition laws are based on the principle of *ex post* interventions. The power to make *ex ante* interventions in sectors where competition problems occur, falls within the competence of the numerous sector regulators. The prohibitions set out in the Act do not apply to competition restrictions by companies which provide services in the public interest pursuant to special legislation (e.g., Article 7 of the Postal Services Act), if the application of the Act would prevent the company from effectively fulfilling their tasks.

ii Significant cases

Based on the decision of the Regional Court of Bratislava, the SAO recently reviewed a case concerning Slovak Telekom. The former monopolist, as the owner of Slovakia's most extensive fixed line telecommunications network, was fined for abusing its dominant position by creating entry barriers to the market which restricted access by competitors and final customers to the fixed line network in the territory of the Slovak Republic. Slovak Telekom controlled the local loops required for the provision of telecommunication services. The fine imposed for these infringements of the law amounted to €29.4 million.

In April 2009, the Council of the Antimonopoly SAO confirmed a decision, in which the SAO had imposed a fine of 73,000,000 Slovak koruna (approximately €2.4 million) on Slovak Telekom for the abuse of dominance. The SAO had accused Slovak Telekom of a margin squeeze in relation to its pricing for access to local loops. The SAO is adamant that it cannot allow a dominant firm, which is vertically integrated, to preclude its rivals from competing with it by pricing an essential input at a supra-competitive level. The decision is final and may not be appealed.

iii Trends, developments and strategies

Competition in the network industry markets (i.e., electricity sector, gas industry, heating supply sector or water service sector) is supervised by the Regulatory Office of Network Industries ('URSO'). The URSO oversees the complex price regulation and public control of the liberalisation process. This independent authority focuses on passive legislation and sets forth the methods, procedures and conditions necessary to ensure effective competition within the respective sector.

iv Outlook

Slovakia is in the process of amending the Competition Act insofar as the Act does not apply to sectors that fall within the competence of a regulator authority. This has prompted the European Commission to send a reasoned opinion to the Slovak Republic requesting that it amends the provision, which is the second step in EU infringement procedures. Slovakia has two months to make the changes, or the Commission may take it to the European Court of Justice. The Slovak Republic informed the Commission that the consultation procedure on a draft amendment to the Competition Act has been launched, but has not since informed the Commission of any such amendment entering into force.

Despite the entry of strategic partners into the Slovak energy market, full liberalisation has not yet been achieved. Slovakia needs to make progress in establishing the framework for equal and fair application of the *acquis communautaire*. Both the electricity and the gas markets have been only partly opened to competition. Competition shall be enhanced and the SAO has announced that it will monitor the newly liberalised sectors closely.

V STATE AID

i Significant cases

In 2008, the SAO assisted in many state aid cases. In order to be in compliance with Article 73 of the EC Treaty, the SAO also provided its assistance in several notification procedures before the European Commission.

In January 2008, the new Act on Investment Aid (No. 561/2007) became effective. It sets forth the rules for regional investment aid and aid for investment projects, namely, investment projects focusing on the expansion of industrial production, technological centres, centres of strategic services and complex tourism services.

ii Trends, developments and strategies

Based on the new European legislation, the block exemptions for state-aid have been transformed into national law. The various exemptions have been transformed into one act that covers all block exemptions. This modification is of substantial importance for small and medium enterprises, as it enables such companies to obtain state aid without the lengthy approval process.

iii Outlook

Since the accession of Slovakia to the EU, the competence to assess the compatibility of state aid with the common market was taken over by the European Commission. The State Aid Act (No. 231/2001) sets forth the rules for the SAO in the area of state aid, rights and duties of providers and beneficiaries of state aid towards the SAO and other interrelations in connection with the provision of state aid.

VI CONCLUSIONS

i Pending cases and legislation

Cases

There are several cases pending before the SAO, the Council and the Court concerning possible violations of competition rules. Most of the proceedings before the SAO concern the conclusion of restrictive agreements, but are of minor importance. However, it will be interesting to see how the investigations into the alleged infringements by the three banks evolve. Equally, the outcome of the appellate proceedings in the GIS cartel is highly anticipated.

Legislation

As regards legislation, it would not come as a surprise if Slovakia follows the Czech example and adopts a notice on competition advocacy in the near future. Thereby, uniform conditions would be set out under which it is possible to even avoid proceedings before the Office and prevent the imposition of a fine despite a violation of competition rules.

It will also be interesting to see whether Slovakia will be able to bring the controversy with the European Commission over the application of the Competition Act to sectors that fall within the competence of a regulatory authority to an end. Slovakia is currently in the process of amending the respective provisions.

ii Analysis

Slovak competition rules provide for the necessary legal framework for an effective public enforcement. Still, the SAO trails Western European competition authorities in its 'track record'. It is expected that public enforcement will pick up significantly in the near future, in terms of quantity and quality.

As mentioned above, the SAO is also competent to review measures of state bodies which might restrict competition. In this context, a number of cartel proceedings were aimed at municipalities last year. Selected cases dealt with by the SAO include fines against the municipality of the city district of Bratislava (provision of parking services; fine amounted to approximately €1,700), the municipality of Bratislava (two cases relating to funeral services by Marianum; fine in each case of approximately €5,300) and the municipality of Stara Lubovna (preferential heat supply; fine amounted to approximately €300). The SAO is adamant that it will be vigilant in this area and make sure that state administration and self-administration authorities do not infringe Article 39 of the Act by providing evident support or advantage to certain undertakings.

Chapter 29

SLOVENIA

*Franz Urlesberger and Vid Kobe**

I OVERVIEW

i Preliminary remarks

Public competition enforcement in Slovenia has picked up significantly in the past year-and-a-half in terms of quality and intensity. The reasons for this are twofold: first, a new General Director of the Slovenian Competition Protection Office ('CPO') was appointed – former competition lawyer Jani Soršak – who assumed the position in December 2007; and second the entry into force of the new Act on the Prevention of Restriction of Competition ('PRCA') in April 2008, replacing the Competition Act of 1999 ('the Old Competition Act').

The new General Director triggered a notable intensification of competition law enforcement, in particular by opening several investigations into alleged anti-competitive practices and market conditions. On the other hand, the PRCA – in contrast to the Old Competition Act (which was criticised mainly over its impracticability) – introduced several changes in relation to the definition of anti-competitive behaviour and, above all, procedural rules and the penalties for infringements of competition law. It also sets out clear competencies of the CPO to carry out investigations into alleged anti-competitive activities (for the first time, thereby ending the uncertainty about its competency under the General Administrative Procedure Act and Misdemeanour Act). Generally, the PRCA aims at further aligning national competition rules with the European competition law standard and implementing the obligations of the Slovenian competition authorities under Council Regulation (EC) No 1/2003. It is therefore only consequent that the new PRCA obliges the CPO explicitly to apply Articles 81 and 82 of the EC Treaty when assessing practices that may affect trade between Member States.

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ii Prioritisation and resource allocation of enforcement authorities

The CPO is the principle Slovenian public authority entrusted with the supervision and enforcement of the rules on competition in Slovenia (incorporated in the PRCA). The CPO is an administrative body under the supervision of the Ministry for Economic Affairs. It is headed by a General Director and currently employs some 20 officials – mainly economists and lawyers. The CPO is internally organised into two divisions: first, the division for economic analysis and second, the section for legal and investigative operations, which, in turn, consists of an internal sub-division for investigative actions. Overall, the CPO has a headcount of some 20 employees, half of which are economists.

Anti-competitive behaviour (e.g., cartels and abuses of market dominance) are also covered by the Slovenian Criminal Code and thus (also) enforced by the Slovenian Public Prosecution Service and the criminal courts.

While, in certain sectors (e.g., telecommunications, natural gas, electricity) regulators (e.g., the Telecommunications Agency, the Energy Agency, etc.) conduct inquiries, supervise the adherence to sector-specific competition rules and, in certain cases, even have the power to decide on certain (general) substantive issues of competition law (e.g., the Telecommunications Agency is empowered to determine relevant markets; see also section IV), the primary competence over matters of competition law lies with the CPO.

iii Enforcement agenda

The main tasks of the CPO include conducting inquiries and investigations into cartels, other restrictive agreements and abuses of dominance (all instigated *ex officio*), as well as processing merger control notifications.

No details on its enforcement agenda are publicly known. Pursuant to publicly available data, the CPO has issued some 50 to 60 decisions per year, whereby the vast majority (around 95 per cent) of the decisions concerned merger control. We note, though, that the CPO's overall activity – also with regard to cartels and abuses of dominance – has increased notably since December 2007. Unfortunately, no official figures for 2008 to 2009 are publicly available. Also no press release or other document hints at the enforcement priorities of the CPO.

The CPO's decisions determining antitrust infringements can be appealed to the Supreme Court in an administrative proceeding. In contrast, the CPO's decisions on the penalty may – pursuant to the Misdemeanour Act – be appealed to a District Court.

II CARTELS

i Preliminary remarks

Article 6, PRCA virtually copies Article 81 of the EC Treaty: it prohibits agreements between undertakings, decisions of associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in Slovenia (and it declares such agreements and acts null and void), unless they create overriding efficiencies. Further, block exemption regulations as well as the *de minimis* notice of the European Commission have been transposed into national law.

One of the main points of criticism of the Old Competition Act was that the fines for infringements of competition law clearly lacked any deterrent effect. The Old Competition Act provided for a maximum fine of €375,000 for legal entities and €12,500 for the director in charge. The highest fine imposed under the Old Competition Act, which was imposed for bid rigging – one of the most severe infringements of competition law – amounted to €260,000. This moderate level of fines was in sharp contrast to the development at the European level to fine infringing companies more and more severely for their misbehaviour.

In order for the CPO to be 'better equipped' to enforce cartel rules, the PRCA significantly increased the fines for breaches of competition law. The PRCA follows Regulation 1/2003 and foresees maximum fines of up to 10 per cent of the infringing undertaking's turnover; the responsible person with the infringing undertaking (e.g., the general manager) may be fined up to €10,000 (€30,000 in case of severe damages caused by the infringement). Additionally, the new Slovenian Criminal Code (which entered into force on 1 November 2008) provides criminal sanctions for infringements of the cartel prohibition, i.e., imprisonment for a minimum of six months and up to five years for individuals participating in cartel activities.

In addition, the PRCA introduced a general leniency framework into Slovenian competition law for the first time. Pursuant to Article 76 PRCA, a participant in a cartel may benefit from immunity from fines if he discloses his involvement in a cartel, is the first to provide evidence which the CPO deems adequate and sufficient, collaborates with the CPO throughout the procedure and ceases to participate in the alleged cartel immediately after beginning to collaborate with the CPO.

However, the CPO has not yet introduced a formal leniency programme. The new leniency provisions have been the target of criticism in academic literature. One of the main points of criticism is the vague formulation of conditions for the application for leniency as well as too wide a margin of discretion of the CPO when assessing if and to what extent to approve leniency applications, namely, when deciding on whether or not to release the applicant from the fine. This, plus the prospect of leniency applications being subject to private damage claims are likely to be the reasons why, to date, no (publicly known) application for leniency has been submitted.

This legal loophole shall be filled soon. Amendments to the Competition Act have been proposed, that – beside changes to merger control rules and the investigative powers of the CPO – also provide for more detailed regulation in relation to leniency. It has been proposed that the leniency programme be closely modelled on the EU leniency notice, providing for immunity from penalties if an undertaking: (1) discloses its participation in a cartel; (2) is first to provide evidence which the CPO deems to be sufficient in order to open an investigation; (3) cooperates throughout the proceeding; (4) ceases to participate in the cartel (unless this is contrary to the interests of investigation); and (5) did not force the others into the participation in the cartel. Subsequent leniency applicants may receive reductions of 50 per cent or less if they provide valuable evidence with regard to their participation in the cartel, cooperate and cease to participate in the cartel (unless this is contrary to the interests of investigation).

ii Significant cases

Retail chains

The CPO's intention to intensify the enforcement of competition law was demonstrated soon after the new Director had resumed his post when an investigation was opened (and dawn raids were carried out) into an alleged cartel between the three most important retail chains in Slovenia: Mercator, Spar and Engrotus. According to public sources, they are accused of colluding on prices and forcing national suppliers (by threatening delistings) to refrain from supplying other retail chains.

Apart from being one of the first 'big-scale' projects (which invoked unprecedented public attention) undertaken by the CPO under the new leadership, the said proceeding has proven to be a testing ground for some of the CPO's new competencies introduced by the PRCA, above all, the power to conduct house searches ('dawn raids'). A fierce public debate ensued on the scope and nature of documents or data which may be inspected by the CPO, when the Slovenian Information Commissioner (the public authority entrusted with the supervision of data privacy regulations) ordered that a bulk of evidence obtained from the retailers in the course of dawn raids – namely data contained in e-mail correspondence via company mail accounts – be sealed and that the CPO be prohibited from relying on such data as evidence in the proceedings. The Information Commissioner's reasoning was that business e-mails may contain personal information (i.e., can also be used for private communication), and therefore e-mails cannot be scanned without violating the employee's rights to personal data privacy. Following a brief administrative dispute between the two authorities, the CPO remained prevented from using the sealed data as evidence in the proceeding. It was, however, established that the law, as it currently stands, does not clearly enough define the scope of the competencies of the two public authorities and that amendments are needed in order to remedy the situation.

Electricity distribution

Very recently, the CPO issued a decree finding that five electricity distribution companies (Elektro Primorska, Elektro Maribor, Elektro Ljubljana, Elektro Gorenjska and Elektro Celje) had colluded in fixing electricity prices by way of a simultaneous price rise. The case has attracted considerable public attention as the distributors are the first undertakings to face the new turnover-based penalties under the PRCA. The CPO has issued a penalty decision, which the parties have contested before the District Court in Ljubljana; at the time of writing, the respective proceeding was still pending. Consequently, the actual amount of the penalty has not been made public yet, but is believed to be a low, single-digit million euro figure for each participant.

iii Trends, developments and strategies

The most notable trend in the field of cartel investigation is undoubtedly the CPO's aggressive approach towards alleged cartel practices and the utilisation of the full scope of new investigative powers introduced by the PRCA. Since the entry into force of the new PRCA, the CPO has conducted numerous dawn raids. Furthermore, the CPO has frequently employed forensic scientists (in the field of computers or digital data recovery), which was also unprecedented.

Apart from increasing the fines for anti-competitive practices and abuses of market dominance, the PRCA has also established an explicit obligation of parties subject to an investigation to cooperate with the CPO (in terms of providing information as to e.g., sales figures, supply prices, rebates and disclosing documents – even if such data may contain business secrets), be it an investigation into alleged anti-competitive practices or the appraisal of a notified concentration. Failure to cooperate may invoke fines of up to €50,000, which can be increased in case of ongoing failure to cooperate to up to 1 per cent of annual worldwide turnover. Moreover, Article 27 PRCA (establishing the said cooperation obligation) enables the CPO to request cooperation (under the threat of the same fine) from any undertaking (even from undertakings which are not the subject of an investigation and even prior to having issued a formal decree on the opening of an investigation). Ever since the entry into force of the PRCA this provision has been frequently used by the CPO as a successful means of obtaining valuable information with respect to the cartel investigations it had opened – much to the dismay of Slovenian market participants.

iv *Outlook*

We note that the method of setting fines – and thereby their deterrent effect or incentive for 'whistle-blowing' – is yet to be adopted (and subsequently confirmed by Slovenian courts). It is likely that the CPO will follow the European Commission method in this regard.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i *Preliminary remarks*

As mentioned above, the PRCA virtually mirrors Article 81 of the EC Treaty and relevant secondary law. Hence, an undertaking may rely on any of the block exemptions adopted by the European Commission in proceedings before the CPO, even if the agreement at stake has no impact on trade between Member States.

The national rules on market dominance are, for the most part, similar to those at European level, i.e., an undertaking is dominant if it can act independently of its competitors and customers. Also the exemplary list of possible abuses of a market dominant position (e.g., applying unfair sale or purchase prices or conditions and exclusionary practices) follows Article 82 of the EC Treaty. Unlike EC law, however, the PRCA provides for a (refutable) presumption of market dominance when certain market share thresholds are met, i.e., 40 per cent on the relevant Slovenian market for single dominance and a combined market share of 60 per cent for collective market dominance.

When assessing cases of alleged restrictive agreements and dominance, the CPO often relies on econometric methods or other types of economic analyses – especially in relation to the definition of the relevant market as well as the appraisal of actual and potential competition and barriers to market entry. Even though the CPO employs a team of capable economists, it is not unusual for an outside expert to be contracted when an investigation is led into a wider section of a certain market or in 'big-scale' proceedings against infringing undertakings.

ii Significant cases

Cinema exhibition

One of the few decisions on abusive behaviour was rendered in mid 2007 when the CPA found Kolosej kinematografi d.o.o. ('Kolosej'), the virtual monopolist in the market for cinema exhibition, to have abused its market dominant position in Slovenia by refusing to exhibit certain film titles distributed by Blitz Film & Video Distribution d.o.o (and thus discriminating Blitz against other film and video distributors) or requesting Blitz to enter into a sub-distribution agreement with Kolosej's mother undertaking. Finally, Kolosej was found to have abused its dominant market position by confirming exhibition times unreasonably late.

Waste collection and recycling

In 2007, another decision on the abuse of dominance was rendered relating to Slopak d.o.o. ('Slopak'). Slopak was found to have abused its dominant position on the market for organising systems for collecting and recycling commercial packaging waste by preventing its customers from joining a competitor's system. The competitor lodged a complaint to the CPO that subsequently investigated the behaviour and ultimately fined Slopak some €125,000 for the breach of competition law.

Telecommunications

In 2008, the CPO further issued a decision finding that Telekom Slovenije d.d. was abusing its dominance by conditioning the provision of ADSL internet access service with the simultaneous obligation to purchase ISDN packages (see also section IV).

Slovenian Post

A further interesting investigation concerned Posta Slovenije d.o.o. ('Slovenian Post'), a state-owned undertaking accused of having abused its dominant position by requiring from clients ordering unaddressed direct mail services to commit to exclusivity *vis-à-vis* the Slovenian Post and by having installed an non-transparent system of authorisation for the granting of rebates. The proceedings were brought to an end in June 2008 as the commitments offered by Posta Slovenije were accepted by the CPO.

iii Trends, developments and strategies

As mentioned above, the CPO's new intensive approach to enforcement of competition rules is also reflected in the field of restrictive agreements and abuse of dominance, as the number of newly opened investigations has increased considerably since December 2007. In addition, not only has the PRCA replaced the former maximum fine of €375,000 for restrictive agreements and abuse of market dominance by a new maximum fine of up to 10 per cent of the respective undertaking's turnover, but also the Slovenian Criminal Code has been changed. As of 1 November 2008, the Code explicitly includes the abuse of market dominance and provides for imprisonment of up to five years (with a minimum sentence of six months) for individuals participating in such anti-competitive behaviour.

iv Outlook

Similar to cartels, it remains to be seen whether the CPO will make use of the increased maximum fines in the fields of restrictive agreements and abuse of market dominance. If so, this would also raise the awareness of market participants regarding the cartel prohibition and the abuse of market dominance and consequently also increase compliance with competition rules.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Among the regulated industries in Slovenia, the telecommunications sector has been under the most scrutiny with respect to the rules on competition so far. The competent regulator, the Agency for Post and Electronic Communications ('APEK'), *inter alia* entrusted with the implementation and supervision of the rules set out by the EU Commission's Telecommunication Directives, is bi-annually conducting investigations into the status of the Slovenian telecommunications market and submitting reports to the European Commission. APEK is further entrusted with the determination of relevant markets within the telecommunications sector, issuing decisions on the identification of operators with significant market power and imposing certain pro-competitive obligations on such operators (in line with the Directive 2002/19/EC of the European Parliament and Council).

Other markets falling into the so-called infrastructure sector, such as the natural gas and electricity markets – although subject to sector-specific rules on competition (e.g., unbundling requirements and regulated third party access – in line with the corresponding European legislation) – enjoy less attention by the regulators and the CPO. The Slovenian Energy Agency ('AE') is obliged to issue yearly reports on the status of the electricity and natural gas markets, including the level of competition in the relevant markets, when deciding on third party access requests or motions for the temporary non-application of the regulated third party access regime (e.g., in cases of private investments into new infrastructure), the AE is empowered to assess whether or not such an act is necessary or permissible from a competition law point of view. It should be reiterated that, even in the mentioned regulated industries, the CPO is solely empowered to investigate and sanction infringements of competition law.

In other regulated industries (not governed by sector-specific competition rules, such as the banking sector, insurance, etc.), the development and adherence to the rules on competition are monitored solely by the CPO.

i Significant cases

As already indicated, the telecommunications sector has received the most attention in terms of public competition enforcement – both by the CPO (who mainly focused on the abuses of dominance by Telekom, Slovenia's largest telecommunications operator) as well as by APEK. It may be mentioned that, at the time of writing, a discussion as to the status of the Slovenian mobile telecommunications market is ongoing between APEK and the European Commission. APEK believes that the two largest Slovenian operators, namely Mobitel and Si.mobil, enjoy a joint market dominant position on the

Slovenian wholesale mobile market and use their market power to prevent market entry of other mobile operators by way of restricting access to existing mobile networks. The reason for such common interest to keep the market closed is that further competition in the downstream retail mobile market could lead to price cuts and a decrease in profits for the two established operators. On the basis of such assessment, APEK proposed to impose access obligations in the form of national roaming agreements on Mobitel and Si.mobil. The Commission underlined serious doubts in its letter that a finding of joint dominance of two operators requires a number of criteria to be met, *inter alia,* that competitive checks from other sources are not effective, that both operators pursue a common policy and that they can retaliate if one of them should deviate from the joint policy. At the time of writing, APEK has not yet adopted an official position with respect to the matter at hand, but has promised to abide by the Commission's instructions.

Other industries in the infrastructure sector – apart from the collusion on the price rise by the electricity distributors mentioned above (see section II) – have not been the focus of competition law enforcement.

In the finance sector, a few of the CPO's decisions adopted in 2006 and 2007 are worth mentioning. The first decision (adopted on 15 November 2006) found restrictions on instalment payments at the point of sale by the Banking Association of Slovenia (to which all Slovenian banks are members) to be in breach of the cartel prohibition. In detail, the Supervisory Board's decision to introduce a joint banking product was deemed a decision by which it appeals to its member banks to denounce the contracts on standing orders or direct debits for purchases payable by instalments at the point of sale provided by merchants.

The second decision related to the introduction of an ATM fee by four banks and was adopted on 26 February 2007. It involved four of Slovenia's major banks which account for a combined market share of some 80 per cent in Slovenia. They have set up a joint undertaking for their ATM and payment cards activities and all bank withdrawal machines are operated by this joint undertaking. The four banks were found to have colluded on the introduction of a cash withdrawal fee, which was the same amount for each bank and announced on the same day. Interestingly, the fifth major Slovenian bank, which is also a mother undertaking of the joint venture operating the ATM network was not found in breach of the cartel prohibition even though it had also introduced the same cash withdrawal fee. The investigation revealed that this bank was not part of the collusion but had learnt from its counterpart's intention through the media, i.e., it did not collude but adopted parallel pricing behaviour.

The CPO is also becoming increasingly active in market investigations. For example, for most of 2008 the CPO was conducting a general investigation into the food and beverage retail sector (deemed to have been one of the major factors contributing to Slovenia's record inflation rate in 2007 to 2008), with a special focus on the role of suppliers and retailers (and the interplay between the two groups) in the determination of consumer prices.

Results of this investigation were published by the Faculty of Biotechnical Studies of the University of Ljubljana in October 2008. The main findings of the investigation were that the Slovenian retail market is dominated by four large players (Mercator, Spar, Tus, Leclerc) and that the large players are abusing their power in their relationship by imposing on their suppliers unfair or burdensome contractual terms (relating to, *inter* *alia*, rebates and deferred payments); making long-term agreements dependent on extra rebates; and generally shifting a substantial part of their costs onto suppliers. It was also observed that the large retailers often insist that a supplier may not offer better supply terms to competitors and that retailers threaten to delist suppliers in case they supply to foreign retail chains.

The study urged the competent authorities to continue monitoring this market closely.

ii Trends, developments and strategies

As is the case with the enforcement of competition rules in general, regulated industries are subject to increasingly closer scrutiny by enforcement authorities. However, although the undertakings belonging to such sectors have, from time-to-time, been investigated and even fined by the CPO for anti-competitive behaviour, no signs of a 'systematic approach' to the identification and tackling of anti-competitive practices in such industries can be observed as yet.

iii Outlook

Although the CPO's general investigative activity and the inquiries conducted by the regulators do provide some insight into the status of the respective markets and even indications of anti-competitive behaviour, and in spite of the '*ex officio* principle' brought about by the PRCA (see section III, subsection iii, above), actual proceedings against individual undertakings – especially in cases of restrictive agreements and abuse of dominance – are still largely initiated on the basis of (informal) complaints by competitors (who are also able to furnish the CPO with evidence which is normally not encountered in the course of general investigations into individual sectors). Consequently, the level of development and the intensity of competition enforcement in the Slovenian regulated industries, to an extent, mirrors the level of actual competition in the respective sectors; in other words, sectors which have opened for competition and in which at least some competition *de facto* exists (such as the telecommunications sector) are – due to such 'private initiative' – scrutinised more closely by the regulators. Inversely, sectors which, although formally opened for competition, are still – more or less – dominated by state-owned (or state-controlled) entities (for example, the natural gas and electricity sectors) have, with minor exceptions, not yet been on the radar of the enforcement authorities.

It may therefore be estimated that the entry of new market players into the respective markets will also cause public authorities to approach such sectors in a more systematic and intense manner.

V STATE AID

It should first be stressed that, in Slovenia, no public authority is entrusted with the substantive assessment of state aid within the meaning of Article 87 EC Treaty as the latter is reserved for the European Commission. The Slovenian Ministry of Finance is entrusted with the collection and processing of state aid notifications.

The general framework regarding the notification procedure with respect to aid granted by entities falling into the statistical definition of the state sector is set out in the

Slovenian Monitoring of State Aid ('ZSDrP'): any aid falling into the scope of Article 87(1) EC Treaty shall be notified to the Slovenian Ministry of Finance which, in turn, is obliged to notify such aid to the European Commission pursuant to the Article 88(3) EC Treaty. If an aid falls under the block exemptions regime or the *de minimis* rule, the Ministry is empowered to assess and approve such aid, informing the Commission of any such decision. The definitions of *de minimis* aid and block exemptions provided in the ZSDrP are fully in line with the applicable EC legislation.

The possibility for the Slovenian government to offer restructuring aid to undertakings in financial distress (in the form of loans or guarantees) is regulated in the Restructuring Aid for Companies in Distress Act, which implements the Community guidelines on state aid for rescuing and restructuring firms in difficulty (2004/C 244/02).

Since the accession of Slovenia to the EU in 2004, the majority of state aid notified to the Commission have been schemes granted by various ministries of the Slovenian government, most frequently the Ministry for Economic Affairs (restructuring aid, risk capital measures, SMEs), Ministry of Finance (regional aid, employment aid, agriculture) and the Ministry of Culture.

i Significant cases

Among the recently introduced aid schemes, the following case may be pointed out. In response to the ongoing turbulence in the world financial markets, the Slovenian Parliament, with a view to restoring stability to the financial system and remedying disturbances to the Slovenian economy, adopted the Act amending the Public Finance Act on 11 November 2008. Said amendment gives the Slovenian government broad powers to grant various forms of urgent aid to financial institutions – predominantly in the form of guarantees for the issuance of short and medium term debt instruments, in the aggregate amount of up to €12 billion. The scheme – by far the largest to date – was notified to the Commission which, however, decided not to raise objections.

ii Trends, developments and strategies

So far, none of the aid granted by the Slovenian state or other public authorities have raised notable concerns by the competition enforcement authorities. Consequently, no developments or trends have yet been identified with respect to the impact of state aid measures on the enforcement of competition.

iii Outlook

It may be expected that, in view of the fact that the world financial crisis seems to be deepening (and thereby notably affecting the small and export-oriented Slovenian economy), the intervention of the state into the market – above all, by way of state aid schemes in favour of financial institutions – will intensify and, in all likelihood, spread to other sectors. It remains to be seen if and to what extent such intensification of state aid will impact the enforcement of (national) rules on competition; in any event, the Slovenian authorities will almost certainly follow the trends and examples set forth by the European Commission in this regard.

VI CONCLUSIONS

It is evident that the field of public competition enforcement in Slovenia has entered a new chapter – the new directorship of the CPO, the widening of its investigative powers and the turnover-based fines have definitely put the (previously somewhat dormant) authority into the focus of both the market participants and the general public. However, public enforcement in Slovenia – in terms of development, sophistication and effectiveness – has not reached the level of Western European jurisdictions yet; this may, *inter alia*, be partially attributed to the fact that a significant part of the Slovenian market (especially the regulated industries) is not yet enjoying fully-functional competition.

i Pending cases and legislation

Undoubtedly, the most anticipated pending decision is the one to be issued in case of the alleged cartel between the three food retailers (see section II) as it is expected to set the scale for the CPO's future decisions (including the decisions on fines) in similar 'big-scale' cases.

As mentioned in section II, amendments to the competition act have been proposed recently. These amendments relate to more detailed regulation of the leniency regime and clarifying the CPO's investigative powers, namely, bringing it in line with the principles of private data protection.

Sometime soon, we may even see the CPO being reorganised into an agency (thereby gaining full formal independence). The idea, which is publicly expressed every now and then, is advocated both by academic legal circles as well as practitioners; however, such a step would also require adequate political will, which, for the time being, seems to be lacking.

In relation to competition law enforcement, the further progress of the current antitrust proceedings and market investigations is much anticipated. It will be up to the CPO to make its mark as a rigid enforcer of competition law that does not give in to national champions and political pressure alike.

Chapter 30

SOUTH AFRICA

*Andile M Nikani**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

South African competition law is enforced by the Competition Commission ('the Commission'), the Competition Tribunal ('the Tribunal') and the Competition Appeal Court ('the CAC'), collectively, ('the competition authorities'). The Supreme Court of Appeals ('SCA') is the highest court in the land in respect of non-constitutional matters. This means that the highest court in South Africa, on matters of strictly competition, is the SCA. However, should the constitutionality of the Competition Act, Act 89 of 1998 ('the Act'), its regulations or a decision taken by the competition authorities be at issue, the Constitutional Court will have the final say on such issue as it is the highest court in the land in respect of all constitutional matters.

The functions and powers of the competition authorities are set out in the Act. The purpose of the Act, as set out in Section 2 thereof, is to promote and maintain competition in South Africa in order:

a to promote the efficiency, adaptability and development of the economy;

b to provide consumers with competitive prices and product choices;

c to promote employment and advance the social and economic welfare of South Africans;

d to expand opportunities for South African participation in world markets and recognise the role of foreign competition in South Africa;

e to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

f to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged black South Africans.

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Although the Act has such wide objectives that range from seeking to protect competition to public interest considerations, its application is only limited to all economic activity within, or having an effect within, South Africa, and does not apply to collective bargaining and collective agreements within the context of South African labour or employment law.

ii *Enforcement agenda*

In order to achieve the aforesaid objectives, the competition authorities are empowered to fulfil specific roles.

The Commission fulfils an investigative and enforcement role. It is independent and is subject only to the Constitution of South Africa and the law. It is mandated to be impartial and to perform its functions without fear, favour, or prejudice. Its functions, in terms of Section 21 of the Act, include, inter alia, to:

a implement measures to increase market transparency;
b implement measures to develop public awareness of the provisions of the Act;
c investigate and evaluate alleged contraventions of horizontal and vertical restrictive places;
d grant or refuse applications for exemption;
e authorise, with or without conditions, prohibit or refer mergers;
f negotiate and conclude settlements; and
g refer matters to the Tribunal, and appear before the Tribunal, as required by the Act.

The Tribunal fulfils an adjudicative function. It is a court of first instance on competition matters in South Africa. Its functions, in terms of Section 27 of the Act, include, inter alia, to:

a adjudicate on any conduct relating to a restrictive horizontal practice, a restrictive vertical practice and abuse of dominance, and determine whether prohibited conduct has occurred, and if so, impose any remedy provided for in the Act;
b adjudicate on any other matter that may, in terms of the Act, be considered by it, and make any order provided for in the Act;
c hear appeals from, or review any decision of, the Commission that may, in terms of the Act, be referred to it; and
d make any ruling or order necessary or incidental to the performance of its functions in terms of the Act.

The CAC is an appeal court. Its functions, in terms of Section 37 of the Act, include, inter alia:

a reviewing any decision of the Tribunal; or
b considering an appeal arising from the Tribunal in respect of:
- any of its final decisions, other than settlements; or
- any of its interim or interlocutory decisions that may, in terms of the Act, be taken on appeal.

Further, the CAC may give any judgment or make any order, including an order to confirm, amend or set aside a decision or order of the Tribunal; or remit a matter to the Tribunal for a further hearing on any appropriate terms.

II CARTELS

i Significant cases

In South Africa, the Act does not prohibit all agreements between competitors.[1] It only prohibits agreements that are deemed to offend competition such as the agreements between competitors to fix prices or divide markets, and those agreements proven to have the effect of substantially lessening or preventing competition in a relevant market. Cartel activity refers to those agreements that are outright prohibited. The relevant section of the Act in this regard is Section 4(1)(b), which states:

> *an agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if [...] it involves any of the following restrictive horizontal practices –*
> *i directly or indirectly fixing a purchase or selling price or any other trading condition;*
> *ii dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or*
> *iii collusive tendering.*

The approach adopted by the competition authorities when dealing with Section 4(1)(b) finds its roots in foreign antitrust regimes. It is therefore not surprising that cartel activities are per se prohibited.

A per se prohibition refers to a prohibition that does not allow for a justification of a particular conduct. This means that reasons advanced by an offending party to justify such contravention would be irrelevant in law however compelling they may be.

The leading case in South Arica on the approach to be taken in dealing with Section 4(1)(b) is the *American Natural Soda Ash Corp v. Botswana Ash (Proprietary) Limited* case (*Ansac/Botach*). The CAC heard an appeal in respect of an allegation of a contravention of Section 4(1)(b) by an association of North American soda-ash producers that sold soda ash in South Africa. The CAC had no difficulty in concluding that 'there is no basis for importing a 'rule of reason' analysis in construing Section 4(1)(b). The words of the legislature are clear and unambiguous'.

Price fixing

The leading case in South Africa on the definition of horizontal price fixing is the *Ansach/Botach* case where the SCA held that the act of fixing prices 'necessarily contemplates collusion in some form between competitors for the supply into the market of their

1 This is according to the Tribunal in *Patensie v. Competition Commission Sitrus Beherend Bpk* 37/CR/Jun01/ paras 34-35.

respective goods with the design of eliminating competition in regard to price. This is achieved by the competitors collusively 'fixing' their respective prices in some form'.[2]

Market division

In December 2005, the Tribunal heard an application regarding the validity of a restraint of trade (non-compete) clause that was contained in a sale agreement. The case was between two firms, Nedschroef (Proprietary) Limited ('Nedschroef') and CBC Fasteners (Proprietary) Limited ('CBC')[3].

Nedschroef, a manufacturer and distributor of nuts and bolts ('fasteners') used in the automotive industry, concluded a sale agreement with Teamcor (Proprietary) Limited ("Teamcor'), which at the time was also a manufacturer and distributor of fasteners. In terms of the sale agreement, Teamcor sold a machine that produced fasteners to Nedschroef. As part of the sale, Nedschroef undertook to Teamcor, to be restrained from manufacturing only fasteners listed in annexure F of the sale agreement for a period of 10 years.

In return, Teamcor undertook not to manufacture any of the fasteners listed in annexure F. In addition, Nedschroef also undertook to extend the benefit of the restraint to CBC. This meant that Nedschroef undertook to CBC to manufacture only the fasteners listed in annexure F. CBC accepted the benefits of the restraint.

A few years into the restraint, Nedschroef approached the Tribunal requesting that the Tribunal declare the restraint clauses contained in the sale agreement void in law on the basis that such clauses amounted to unlawful market division in contravention of Section 4(1)(b)(ii) of the Act. CBC defended the application advancing mainly two arguments.

Firstly, that Nedschroef was not its competitor at the time of the restraint, a requirement, it alleged, necessary to sustain a market division allegation.

Secondly, CBC argued that market division required that there be reciprocity between competitors. It argued that although Nedschroef had given a restraint in its favour, it (CBC) had not given a reciprocal restraint in favour of Nedschroef.

The Tribunal dismissed both arguments and found that market division does not require that both firms be competitors prior to the act of division. It held that it was sufficient that firms were potential competitors, namely, that Nedschroef was 'willing and able to compete'.[4] The Tribunal noted that firms frequently divide markets before they become *de facto* competitors.

Regarding reciprocity, the Tribunal found that the lack of reciprocity does not detract from the fact that there had been market division. Thus it found the restraint void in law.

In December 2007, the Tribunal decided on the validity of the restraint of trade in a matter between Replication Technology Group (Proprietary) Limited ('Replication')

2 *American Natural Soda Ash Corporation v. Competition Commission* 2005 6 SA 158 (SCA) at para 48.

3 *Nedschroef Johannesburg (Pty) Ltd v. CBC Fasteners (Pty) Ltd*, Case No: 95/IR/Oct05.

4 *Nedschroef Johannesburg (Pty) Ltd v. CBC Fasteners (Pty) Ltd*, Case No: 95/IR/Oct05 para 49.

and Gallo Africa Limited ('Gallo').[5] The restraint of trade in question was contained in the sale agreement in terms of which Replication sold 40 per cent of the shares it held in a company called Compact Disc Technologies (Proprietary) Limited ('CDT') to Gallo. At the time of the sale Gallo owned the remaining 60 per cent shares in CDT. However, CDT was at the time managed by its minority shareholder, Replication.

The restraint in question was undertaken by Replication (the seller of the 40 per cent shares) in favour of Gallo (the purchaser of same) that Replication would not compete with CDT in the DVDs and CDs markets for a period of two years.

In its application to the Tribunal, Replication sought relief in the form of an order interdicting Gallo from enforcing the restraint contained in the sale agreement on the basis that the restraint was bad in law as it contravened Section 4(1)(b)(ii) of the Act.

In dismissing the application, the Tribunal highlighted the differences between the *Gallo* case and the *Nedschroef* case. It stated, inter alia, that[6] –

a the restraint in *Nedschroef* was to be operative for 10 years whereas the restraint in the *Gallo* matter was operative for two years;

b the restraint in the *Gallo* matter was subject to other limitations regarding its scope, and it could be avoided with the prior written consent of Gallo;

c the restraint in *Nedschroef* was precisely a prime example of an attempt to present a hard core market allocating cartel as an ordinary restraint of trade which derives from a sale agreement;

d that in the *Nedschroef* case the sale was of machinery to which no semblance of goodwill or any other such commercial value attached and which required no protection in order for the sale to be concluded;

e most pertinently, in *Nedschroef*, the agreement to restrain trade was concluded between two purchasers of machinery who agreed to divide the market between themselves as purchasers by each undertaking to the other to utilise the machinery for distinct specified purposes; and

f the application in *Nedschroef* was brought by the one purchaser against the other purchaser and, in stark contrast with the *Gallo* case not by the seller against the purchaser.

Collusive tendering

Currently, there is no leading case in South Africa on collusive tendering as the majority of which were settled before they could be taken to trial.[7] Collusive tendering is also

5 Case No 92/IR/Sep2007.

6 *Replication v. Gallo* supra at para 28.

7 *Competition Commission and Thusanong Healthcare* case 20/CR/Feb08 – the Tribunal confirmed the consent orders (or settlement agreement) between the Commission and Thusanong Healthcare. Thusanong admitted that it has contravened the Competition Act by engaging in collusive tendering; *Competition Commission and Dismed* case 20/CR/Feb08 – the Competition Tribunal has confirmed the consent order between the Competition Commission and Dismed Criticare. Dismed has admitted that it has contravened the Competition Act by engaging in collusive tendering; *Competition Commission and Aveng* case 24/CR/Feb09 – the Competition

known, in other jurisdictions, as bid-rigging. There is little doubt that South Africa will more or less follow the well established legal principles on bid-rigging. In fact, Section 1(3) of the Act entitles the competition authorities to consider appropriate foreign and international law when interpreting the Act. When considering foreign law, the CAC warned however, that the importation of foreign principles will require 'more than a ritual incantation of dicta gleaned from a particular decision(s)[…] It demands an examination of the jurisprudential underpinning of the particular judgment cited […] and dominant economic thinking when the judgment was delivered, its congruence with the broad policy and socio-economic objectives of the Act and, consideration as to whether the cited dicta fit the express wording of the Act'.[8]

ii Trends, developments and strategies

At present the Act does not impose personal liability on the directors of a company that have contravened its provisions. However, the Department of Trade Industry has proposed amendments which have already been passed by both houses of parliament and now await the signature of the President of the Republic which will see them coming into effect.

The proposed amendment makes it a criminal offence to breach Section 4(1)(b) of the Act, and directors or persons with management authority of a firm that contravene this section could be criminally liable and, upon conviction, face up to 10 years imprisonment or to a fine not exceeding 500,000 rand or both.

Currently, the Tribunal is empowered in terms of Section 59 of the Act only to impose an administrative penalty for a contravention of Section 4(1)(b). An administrative penalty that can be imposed by the Tribunal may not exceed 10 per cent of the firm's annual turnover in South Africa and its exports from South Africa in the firm's preceding financial year.

In terms of Section 10 of the Act, parties that find themselves in contravention of Sections 4 (horizontal restraints), 5 (vertical restraints), 8 (abuse of dominance) and 9 (price discrimination) (collectively, 'Chapter 2') may, on application to the Commission, be granted an exemption if an agreement or practice in question constituting a prohibited practice is found to contribute to the following objectives:

a the maintenance or promotion of exports;

b the promotion of the competitiveness of small businesses or firms controlled or owned by historically disadvantaged persons;

c changing the productive capacity to stop decline in an industry; or

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Tribunal has confirmed the following consent order between the Competition Commission and Aveng (Africa). Aveng has admitted that Infraset a division of Aveng Manufacturing and a subsidiary of Aveng (Africa) has contravened Section 4(1)(b)(i), 4(1)(b)(ii) and 4(1)(b)(iii) of the Competition Act by engaging in price fixing, dividing and allocating the markets, and collusive tendering in the markets for concrete pipes and culverts.

8 *Federal Mogul Aftermarket Southern Africa v. Competition Commission* Case No. 33/CAC/Sep03 page 5.

d maintaining economic stability in an industry designated by the Minister of Trade and Industry after consulting the Minister responsible for that industry.

In addition, exemptions from Chapter 2 may be granted for an agreement or practice that relates to the exercise of a rights relating, inter alia, to patents, trade marks, copyrights and designs. Further, professional associations may, on application to the Commission, be granted an exemption from Chapter 2 provided that their rules are not found to be anti-competitive in nature, or, if they are anti-competitive, such rules could be justified as being reasonably required to maintain professional standards or the ordinary function of the profession.

The Commission has set in place a Corporate Leniency Policy in respect of cartel activity which sets out the benefits, procedure and requirements for cooperation with the Commission in exchange for immunity. The immunity is intended to become an incentive for a firm that participates in a cartel activity to terminate its engagement, and inform on others to the Commission. The Commission can grant either complete immunity, conditional immunity or reject the application. Immunity means that the Commission would not subject the successful whistleblower to prosecution before the Tribunal for its involvement in a cartel activity or impose a fine on such whistle-blower. To qualify for immunity under the Corporate Leniency Policy, the following minimum requirements must be met:

a the applicant must honestly provide the Commission with complete and truthful disclosure of all evidence under its control relating to the cartel activity;

b the applicant must thereafter offer full and expeditious cooperation to the Commission;

c the applicant must immediately stop the cartel activity or act as directed by the Commission;

d the applicant must not have been the instigator of, or coerced other firm(s) to be part of the cartel activity; and

e the applicant must not alert other cartel members that it has applied for leniency.

iii Outlook

The proposed amendments of the Act include introducing a new Section; 73A. This decidedly controversial section makes it a criminal transgression for a director or person in a position of management authority, to cause or to knowingly acquiesce to a company's participation in cartel activity.

The proposed amendment defines 'knowingly acquiesced' to mean having consented while:

a having actual knowledge of the cartel conduct by the company; or

b being in a position in which the person ought reasonably to have:
   - had actual knowledge of the facts relating to cartel behaviour;
   - investigated the matter to an extent that could have provided such person with actual knowledge of the cartel behaviour; or
   - taken other measures which, if taken, could reasonably be expected to have provided such person with actual knowledge of the cartel behaviour.

While such directors or management authority figures can only be prosecuted for an offence once the company in question has either admitted to its liability (as part of the settlement with the Commission) or has been found by the Tribunal or the CAC to have engaged in cartel activity, it stands to be said that the personal liability of directors is closely attached to the contravention of the company.

Should they be found guilty, these individuals will be held personally liable to a fine of up to half a million rand or imprisonment for a period of up to 10 years or both.

There are undoubtedly questions of constitutionality inherent within this proposed amendment but I am confident that constitutional hurdles would not prevent the proposed amendment from entering our law books. In fact, it is most likely that the constitutional challenges will only affect the manner in which the amendment is enforced and, once the dust has settled, prove to have been a storm in a teacup.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

The Act distinguishes between two types of restrictive practices, horizontal and vertical. Cartel activities fall within horizontal activities and are regulated by Section 4(1)(b) discussed above. Non-cartel horizontal activities are regulated by Section 4(1)(a). This section differs from 4(1)(b) as agreements prohibited under it are subject to the rule of reason approach. Unlike a per se approach, this approach permits parties to an anti-competitive conduct or agreement to justify same by proving that the pro-competitive gains that flow from such conduct or agreement outweigh the anti-competitiveness thereof. Section 4(1)(a) states:

> *An agreement between, or concerted practice by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if it has the effect of substantially preventing or lessening competition, unless a party to the agreement, concerted practice or decision can prove that any technological, efficiency or other pro-competitive gain resulting from it outweighs that effect.*

Vertical agreements are regulated by Section 5 of the Act which states:

> *(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.*
>
> *(2) The practice of minimum resale price maintenance is prohibited.*
>
> *(3) Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided:*
>
> *(a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and*
>
> *(b) if the product has its price stated on it, the words "recommended price" appear next to the stated price.*

As it can be seen, Section 5(1) is a rule of reason provision while Section 5(2) is a per se provision subject to Section 5(3).

The leading case in South Africa on Section 5(2) is the *Competition Commission v. Federal Mogul Aftermarket Southern Africa*.[9] Erasmus (the complainant) approached the Commission alleging that he had been effectively forced out of business as a result of Federal Mogul's decision to reduce the rebate (or, what is the same thing, increase the price) at which they supplied him with Ferodo brake products.

The Commission referred the matter to the Tribunal alleging that Federal Mogul contravened Section 5(2) of the Act which is the section that prohibits the practice of minimum resale price maintenance. The question that the Tribunal sort to resolve was '[w]hy did Federal Mogul reduce the rebate at which it supplied Pee Dee', the business of the complainant.

Federal Mogul argued that the reason for the reduction of the rebate was due to Pee Dee's poor credit record. The Tribunal did not accept this reason as evidence before it suggested otherwise. The Tribunal found that a pricing convention existed that set a minimum resale price. Further evidence led the Tribunal to believe that the participants in the convention met, at the very least, to complain about infringement of the convention.

That said however, the Tribunal stated that in order to successfully sustain a prosecution under Section 5(2), the applicant must still establish that a minimum resale price was enforced by the respondent against the complainant. In this regard, the Tribunal concluded that the reduction in the rebate was an enforcement mechanism aimed at keeping in line those firms that refused to adhere to the minimum resale price.

Based on the case above, in order for a firm to be found to have contravened Section 5(2) of the Act, the following will have to be established:

a the parties must be in a vertical relationship;

b the party operating in the upstream market must impose a minimum price at which the goods or services it supplies downstream are to be sold; and

c there must be a sanction or enforcement mechanism aimed at punishing those that break rank by failing to adhere to the minimum resale price.

Each of the above requirements are discussed below.

Vertical relationship

In Section 1, the Act defines vertical relationship to mean the relationship between a firm and its suppliers, its customers, or both.

Minimum resale price maintenance

The Act prohibits the practice of minimum resale price maintenance. The key word is 'practice'. In this regard, the Tribunal held that Section 5(2) can be breached without an

9 Case Number: 08/CR/Mar01.

agreement as it prohibits the practice of minimum resale price maintenance without the necessity of establishing that an agreement exists to maintain minimum resale prices.[10]

The Tribunal did not offer the meaning of a 'practice' but rather made reference to the word 'convention' which, from the reading of its judgment appears to carry more or less the same meaning as the one given by the CAC in respect of the word 'practice'. It may even be said that the word 'convention' is probably more preferable than the meaning given by the CAC to the word 'practice'.

According to the CAC, '[a] "practice" connotes a form of repetitious or habitual conduct of a kind which can be discerned from the evidence as being known and recognised to the interested parties'.[11] This definition seems to indicate that a singular minimum resale price will not violate Section 5(2) as it refers to repetitious or habitual conduct. It is unclear whether this was the intention of the CAC. In my view, it could not have been. It certainly could not have been that of the legislature that minimum resale price maintenance is good in law if it happens once and that the law is only offended by its repetition. In my view, the CAC should have defined a 'practice' to mean a conduct that is known or recognised. This is the same meaning that I attach to the word 'convention'. In my view, the word convention simply means a known standard or a principle.

Sanction or enforcement mechanism

Although it is not clear from the decision of the Tribunal in *Federal Mogul*, the requirement of a sanction for a finding of a contravention under Section 5(2) is due to the fact that Section 5(2) requires that the practice of minimum pricing be maintained. Therefore, in my view, any sanction or threat of a sanction that has the effect of maintaining the minimum resale price should suffice. That said however, the sanction or the threat of a sanction must be connected or linked to the minimum resale price.

In my view, a distinction must be made between the nature and the type of a sanction. The nature of a sanction becomes relevant only in circumstances where the sanction is imposed but not enforced while the type of a sanction becomes relevant where the sanction is enforced. The nature of a sanction refers to whether the sanction imposed (but not enforced) is credible or not, and the type refers to the form of a sanction such as the reduction in rebate, increase in price, change of payment terms, namely, change from credit to cash, reduction in discount, refusal to supply, imposing unreasonable terms and so on. Clearly, when the sanction has been enforced, its nature is irrelevant while its type becomes of importance.

The Tribunal does not seem to make this distinction as it simply held that to contravene Section 5(2) what is needed is an 'understanding regarding the pricing conventions governing the activities at issue; and a credible sanction in place to enforce it'.[12] Clearly this cannot be correct in all circumstances. In fact, this is only correct where the sanction is imposed but not enforced as the credibility of a sanction would be irrelevant in circumstances where it is enforced. In *Federal Mogul*, the nature (or the

10 *Competition Commission v. Federal Mogul Aftermarket Southern Africa supra.*

11 *Federal Mogul Aftermarket Southern Africa v. Competition Commission* Case No. 33/CAC/Sep03 page 9.

12 *Competition Commission v. Federal Mogul Aftermarket Southern Africa supra* para 70.

credibility) of the sanction was not at issue as the only question that the Tribunal needed to answer was '[w]hy did Federal Mogul reduce the rebate at which it supplied Pee Dee'. The Tribunal was concerned with the legal nexus between the type of a sanction enforced (reduced rebate) and the minimum resale price. Therefore, the Tribunal should not have concerned itself with the credibility of the sanction.

In my view, although this distinction would not have led to a different conclusion by the Tribunal in *Federal Mogul*, it would have nonetheless helped clarify Section 5(2). Accordingly, I am of the view that when dealing with a sanction under 5(2) the following principles should apply:

a the sanction must be legally connected to the minimum resale price;

b in circumstances where the sanction is imposed but not enforced, it is critical to determine the credibility of the sanction or the threat (as it would then be); and

c in circumstances where the sanction is enforced, its nature or credibility would be irrelevant; however its form would become significant.

Dominance

In terms of South African law the use of a dominant position is regulated by Sections 8 and 9 of the Act. Section 7 of the Act states that a firm is presumed to be dominant if it has at least 35 per cent of the market-share. However, if a firm has less than 45 per cent but more than 35 per cent of the market-share, it could rebut the presumption of dominance by showing that it lacks market power. The presumption of dominance is however, irrebutable in respect of firms that have 45 per cent or more of the market-share. A firm that has less than 35 per cent of the market-share is only dominant if the party alleging its abuse of dominance shows that such firm has market power. The Act in Section 1 defines market power to mean 'the power of a firm to control prices, or to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers'.

In terms of Section 8 of the Act, it is prohibited for a dominant firm:

(a) to charge an excessive price to the detriment of consumers;

(b) to refuse to give a competitor access to an essential facility when it is economically feasible to do so;

(c) to engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain; or

(d) to engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act:

i) requiring or inducing a supplier or customer to not deal with a competitor;

ii) refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;

iii) selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;

iv) selling goods or services below their marginal or average variable cost; or

v) buying-up a scarce supply of intermediate goods or resources required by a competitor.

Excessive pricing

In terms of Section 1 of the Act, a price is excessive if 'a price for a good or service […]

(aa) bears no reasonable relation to the economic value of that good or service; and

(bb) is higher than the value referred to in subparagraph (aa)'.

The leading case in South Africa is that of *Harmony Gold Mining Company Limited* *(*'Harmony') *v. Mittal Steel South Africa Limited* ('Mittal SA').[13] Harmony alleged that Mittal SA is a dominant firm in the domestic market for primary steel products and that it has abused its dominance by charging, in contravention of Section 8(a) of the Act, excessive prices for its flat steel products.

Mittal SA used import parity pricing when setting the price of flat steel. Through this pricing regime Mittal SA set its base prices for flat steel products in the domestic market by calculating the notional cost of importing those products from some arbitrary place somewhere outside South Africa. It then added a 5 per cent 'hassle factor', essentially a reflection of the additional costs or hassle entailed in importing over the advantage of utilising a domestic supplier. The import parity price was determined monthly by Mittal SA and was conveyed to customers as a discount or surcharge off a list price that was published every three months. The complaint before the Tribunal was that the pricing regime employed by Mittal SA resulted in an artificially established price rather than a price determined through competition in South Africa.

The Tribunal agreed that the pricing regime adopted by Mittal was a peculiar way of settling on a price in the South African market, which, in order to be non-excessive, needed to be set by reference to competitive conditions in the South African market for flat steel products. The Tribunal further stated that the cumulative effect of setting a price that is not influenced by any competition considerations whatsoever led it to conclude that the price set was excessive. Accordingly, the legal position in our law is that:

> *we emphasise again, where the price appears to have no explanation other than the pure exercise of monopoly power, then the price is not reasonable in relation to economic value. In other words what is relevant in our enquiry is not the arithmetic relationship between the price and some or other conception of cost. What is relevant are the underlying considerations that underpin the price level. Are these considerations founded in competition in its many degrees and guises or are they founded in pure monopoly?*[14]

Essential facilities

In terms of the Act, an essential facility means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers. Currently, there are no cases that have been decided under the Act relating to the essential facilities doctrine.

13 Case No. I3/CR/FEBO4

14 *Harmony v Mittal supra* at para 151

Exclusionary act

An exclusionary act is defined in Section 1 of the Act as 'an act that impedes or prevents a firm entering into, or expanding within, a market'. The conducts listed in Section 8(d) are presumed to be exclusionary whereas under Section 8(c) it must be proved that the conduct in question is exclusionary. It has been held that the definition of an exclusionary act does not imply that such an act is necessarily anti-competitive in effect, and that the latter must be proved as a separate and distinct requirement.[15] Furthermore, in order to show an anti-competitive act, it must be demonstrated that the conduct in question 'extends or creates' market power in the relevant market. In the words of the Tribunal: 'It is not enough to show that a given practice is a product of market power. It must also be shown that the act complained of actually extends that power or creates new sites of power'.

In a more recent formulation, the Tribunal stated that an exclusionary act has an anti-competitive effect if:

a there is 'evidence of actual harm to consumer welfare'; or

b 'the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals'.[16]

Price discrimination

Price discrimination by dominant suppliers of goods or services is prohibited by Section 9 of the Act, if it is likely to have the effect of substantially preventing or lessening competition; it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and it involves discriminating between those purchasers in terms of any of the following: the price charged; discounts, allowance, rebate or credit given or allowed in relation to the supply of goods or services; the provision of services in respect of the goods or services; or payment for services provided in respect of the goods or services.

The Tribunal heard a complaint lodged by Nationwide Poles CC ('Nationwide'), a small producer of treated wooden poles based in the Eastern Cape province, that sourced a wood preservative ('creosote') from Sasol Oil (Proprietary) Limited ('Sasol'), for use in the treatment of pine wood.

Sasol made use of a price list for the sale of creosote to its customers. The price list made allowance for discounts based on purchased volumes of creosote, in terms of which larger customers that purchased large volumes of creosote received higher discounts compared to smaller customers.

The manner in which Sasol formulated its pricing system was by assessing the volumes of creosote a customer had bought in the preceding three months and then determined a price to charge a customer by making reference to volumes of creosote purchased by that customer in the three month period. The three-month purchasing

15 *York Timbers Limited v. SA Forestry Company Limited (1)* [2001-202] CPLR 408 (CT) at paras 93 - 97, *York Timbers Limited v. SA Forestry Limited (2)* [2001-2002] CPLR 94 (CAC) at paras 6.6 - 6.10.

16 *Competition Commission v. South African Airways (Pty) Limited* [2005] 2 CPLR 303 (CT) at para 132.

pattern was then annualised. The volume of creosote purchased by a customer was also used to determine the size of the customer and the category in which it belonged in the classification of customers by Sasol. Sasol classified its customers as small, medium and large. Evidence at trial indicated that larger customers enjoyed discounted prices of between 10 per cent and 15 per cent.

Nationwide brought a complaint to the Tribunal alleging that Sasol was contravening the Act, in particular Section 9 that prohibits price discrimination by a dominant firm. Nationwide argued that the differentiation in volume discounts given by Sasol to large rivals of Nationwide lessened competition in the treated poles market. In essence, Nationwide argued that the effect of price discrimination impaired its ability to compete with its large rivals.

The Tribunal agreed with Nationwide and held that Sasol's discount structure for the supply of creosote showed a material differentiation as between small and larger customers of creosote. Further, the Tribunal stated that creosote was a significant input cost to firms such as Nationwide that competed in the treated poles market against rivals that benefited from the price discrimination. Finally, the Tribunal stated that the market for creosote was where small firms such as Nationwide would be able to compete with large firms if large suppliers such as Sasol were not to discriminate against them on price.[17]

Sasol appealed the decision of the Tribunal to the CAC. The CAC upheld the appeal on the basis that there was not sufficient evidence before the Tribunal to support a finding of a contravention of Section 9 by Sasol. According to the CAC, Nationwide failed to prove that Sasol's conduct substantially harmed competition.

ii Trends, developments and strategies

An amendment is proposed to the Act to introduce a new section, Section 10A that will deal with complex monopolies. This decidedly contentious proposed amendment states:

> *(1) a complex monopoly subsists within the market for any particular goods or services if:*
> > *(a) at least 45 per cent of the goods or services in that market are supplied to or by two or more firms; and*
> >
> > *(b) the firms referred to in paragraph (a) conduct their respective business affairs in a coordinated manner, irrespective of whether such firms do so voluntarily or not, or with or without agreement between or amongst themselves, or as a concerted practice.*
>
> *(2) Participation of a firm within a complex monopoly is prohibited if:*
> > *(a) the market within which the complex monopoly subsists is characterised by:*
> > > *(i) restriction on supply;*
> > >
> > > *(ii) a lack of innovation;*

17 Despite the prohibition of price discrimination in the Act, price discrimination can be justified on a number of bases. For example, if the price differential makes reasonable allowance for differences in cost or likely cost of production, quantity of goods, different methods of supply, or delivery resulting from the differing places and so on. See Section 9 of the Act.

> *(iii) exploitative pricing;*
> *(iv) exclusionary acts;*
> *(v) high entry barriers;*
> *(vi) uniform pricing, similar trading conditions or other indicators of parallel conscious conduct; or*
> *(vii) other similar characteristics; and*
>
> *(b) the complex monopoly has the effect of substantially preventing or lessening competition in that market.*

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Currently the Act applies to any conduct arising within an industry or sector of an industry. In fact, the proposed amendment to the Act extends or at the very least clarifies the application of the Act. Should the proposed amendment to the Act be promulgated in its current form, the Act will apply to any conduct arising within an industry or sector of an industry that is subject to the jurisdiction of another regulatory authority in terms of any other legislation. In such circumstances the Act and the other legislation will be construed as establishing concurrent jurisdiction in respect of any such conduct. The manner in which the concurrent jurisdiction is to be exercised, would be determined by an agreement between the Commission and that other regulatory authority. To the extent that there is no relevant agreement or such an agreement does not resolve any conflict or inconsistency between the Act and other legislation, the Act shall prevail to the extent of the conflict or inconsistency.

Further, the proposed amendment seeks to empower the Commission to conduct an industry wide investigation. Should Sections 43A, 43B and 43C be promulgated in their current proposed form, the Commission will have the power to conduct a market inquiry in any manner subject to certain provisions of the Act. After completing a market enquiry, the Commission may report the results of the market enquiry to the Minister of Trade and Industry with or without recommendations. On the basis of information obtained during a market enquiry, the Commission may initiate a complaint and enter into a consent order (settlement) with any respondent, with or without conducting any further investigation. In addition, the Commission can initiate a complaint against any firm for further investigation, refer the matter for prosecution at the Tribunal or take any action within its power.

Finally, as is the case with most jurisdictions, the Act allows for the investigation of certain mergers in terms of its merger control provisions. In terms of the merger control provisions, a transaction is required to be notified to the Commission and approved by the competition authorities prior to its implementation if it constitutes a merger as defined in Section 12 of the Act, meets the financial thresholds of assets and turnover as determined by the Minister of Trade and Industry from time to time and constitutes an 'economic activity within, or having an effect within, the Republic' as contemplated in Section 3 of the Act. All three qualifications set out herein must be present in order for a transaction to be notifiable. The competition authorities are mandated to investigate whether a notified merger will not result in a substantial lessening or prevention of competition in a relevant market by, inter alia, considering the effect the transaction will have on public interest, the actual and potential level of import competition in the market; the ease of entry into the market, including tariff and regulatory barriers; the level and trends of concentration, and history of collusion in the market; the degree of countervailing power in the market; the dynamic characteristics of the market, including growth, innovation, and product differentiation; the nature and extent of vertical integration in the market; whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and whether the merger will result in the removal of an effective competitor from the relevant market.

VI CONCLUSIONS

South African competition law is still developing. There are a number of areas where the law still needs clarification. That said however, practising competition law in a developing economy presents numerous opportunities for influencing and shaping competition law jurisprudence.

Chapter 31

SPAIN

*Juan Jiménez Laiglesia, Arantzazu Ruiz, Luis Sotelo and Samuel Rivero**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

It has been more than a year since the implementation of the new Spanish Competition Act ('SCA') by Law 15/2007 of 3 July, which came into force on 1 September 2007. The SCA brought the Spanish competition rules in line with the European Competition Law after the modernisation process that took place in 2003 to 2004.

The main elements introduced by the new SCA are:

a The creation of the National Competition Commission: the SCA created a sole competition body ('the National Competition Commission' or 'NCC'), that replaced the former Service for the Defence of Competition and the Court for the Defence of Competition. The SCA entrusts the NCC with the mission to preserve, guarantee and promote the maintenance of effective competition in markets at national level, as well as to ensure consistent application of the SCA by exercising the functions attributed to it.

b The participation of the Commercial Courts: the new regulation finally resolves one of the biggest obstacles to the enforcement of Competition Law in Spain, allowing the Commercial Courts to directly apply the provisions relating to prohibited conducts and abuse of dominant position contained in the SCA in addition to Articles 81 and 82 of the EC Treaty.

c Prohibited conduct: in line with the European regulation, the legal exemption system has been replaced by a self-assessment procedure to be carried out by companies. It is also important to highlight the introduction of the concept 'agreements of minor importance' (*de minimis*), applicable to those practices

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which, due to their scant importance, are not capable of significantly affecting competition.

d Leniency programme: the introduction of a leniency programme (Royal Decree 261/2008, of 22 February 2008 -RD 261/2008) is one of the most relevant elements of the SCA.

e Powers of inspection: according to the SCA, the NCC will be entitled to carry out unannounced investigations not only at the companies' and associations' premises, but also at the domiciles of directors, managers and other members of the staff of the companies and associations concerned (investigations of private homes will require judicial authorisation).

f Penalty system: regarding pecuniary penalties, the maximum penalty remains at 10 per cent of the total turnover, even though a gradual system of penalties has been introduced depending on the type of infringement: up to 1 per cent for slight infringements; up to 5 per cent for serious infringements (vertical agreements – abuse of dominant position not considered to be very serious and the distortion of competition through unfair competition acts); and up to 10 percent for very serious infringements (horizontal agreements – abuse of dominant position when it is committed by an undertaking that operates in a recently liberalised market, has a maket share near monopoly or has special or exclusive rights and non-fulfilment or infringement of a decision issued in application of the SCA).

ii *Enforcement agenda*

According to the NCC's Launch Plan for 2007 to 2009, the actions to be developed by the Competition Authorities in order to improve the enforcement of Competition Law are mainly focused on the following issues:

a to analyse, bearing in mind the sectorial priorities and the impact on general interest, the current legislation and the acts of public authorities in order to determine whether they produce or might produce adverse effects on competition. In this regard, the NCC is entitled to elaborate on relevant reports, to submit recommendations and to exercise the power to challenge such acts through the Administrative Appeal Courts;

b to prepare, pursuant to the SCA, a report regarding the public aid granted by Spanish public entities that may give rise to competition concerns;

c to encourage the development of genuine competition culture amongst companies, consumers, public administration and society; and

d to share the NCC's knowledge and expertise at an international level, starting with the publication of relevant information on the activities and decisions of the NCC in English on its web page.

II CARTELS

i *Significant cases*

No cartel case has been decided yet under the new SCA. Since the creation of the NCC as the sole competition body, although applying the previous SCA (Law 16/1989), it is important to mention the following cartel cases.

Cartel of container transport in the Barcelona Port[1]

The NCC recently imposed a fine of €14.96 million on certain transport associations ('the Associations') for their participation in the cartel of container transport in the Barcelona Port.

It has been proved that the Associations' behaviour impeded access to container road-transport with its origin or destination in the Barcelona Port.

Transport companies were obliged to obtain previous authorisation from the Associations to continue with their fleet expansion plans in Barcelona. Thus, all new undertakings intending to be active in Barcelona had to be affiliated to one of the Associations in order to get a badge or sticker that identified them as members, facilitating their operations in the Port. On the contrary, non-member companies faced barriers in their daily operations.

Additionally, the fees that autonomous transporters received when they were hired by members of the Associations were annually revised and modified, according to the Associations' rules, as well as the tariffs that had to be applied to final customers, consignees and forwarding agents. In fact, the Associations were responsible for communicating the applicable tariffs to final customers.

Finally, in order to effectively control the tariffs imposed by the cartel, the Associations set up a new company, the purpose of which was to act as a platform where autonomous transporters had to invoice the services provided to the members of the Associations.

The behaviour of the Associations was considered to be a very serious infringement.

Cartel of public saving banks located in the Autonomous Community of the Basque Country and the Foral Community of Navarra[2]

The NCC imposed a fine of €24 million on four public saving banks (BBK, Kutxa, Caja Vital and Caja de Ahorros de Navarra) for maintaining a non-compete agreement as well as an agreement on the coordination of their competitive behaviour before third parties over 15 years.

The NCC found written records of the Federation of Public Saving Banks of Basque-Navarra including data regarding the collusive agreement. The records included commitments to respect 'territorial status quo' implying that during 15 years none of the infringing parties had opened any offices in the territories of their rivals. These commitments were not applied in other territories where the infringing parties were competing intensively through the opening of offices.

These agreements restricted competition since they coordinated the commercial activities of the four entities by eliminating competition among them and, at the same time, they limited the possibility of other competitors becoming active in the geographic area affected by the cartel, eliminating competition and damaging customers welfare.

1 Decision in Case 623/07 *Transportes Barcelona* available at: www.cncompetencia.es.

2 Decision in Case 617/06 *Cajas Vascas y Navarra* available at: www.cncompetencia.es.

The NCC considered those agreements as a clear evidence of cartelisation, which is a very serious infringement under the SCA.

ii Trends, developments and strategies

According to SCA, a 'cartel'[3] is 'any secret agreement between two or more competitors which has as their object price fixing, production or sales quotas, market sharing, including bid rigging, or import or export restrictions'.

Cartel practices are considered very serious infringements under Article 62.4(a) of the SCA. Therefore companies, associations, unions or groups may be sanctioned with fines of up to 10 per cent of the total turnover of the infringing company in the preceding year. Additionally, a fine of €60,000 may be imposed on directors or other legal representatives of the fined company.

Besides, it is important to consider that Article 81 of the EC Treaty could also be applied if the collusvie practices substantially affect the Community market. Otherwise the SCA would be the only applicable regulation.

As previously stated, the most significant modification introduced by the SCA is the new leniency policy.[4] According to this policy, an undertaking or natural person may be exempted from the payment of any fine in return for the cooperation of these agents in the identification of cartels.

Similarly to what is provided at EU level, the NCC can grant exemptions in certain circumstances. It can grant total immunity from fines when the undertaking is the first one to provide relevant evidence in the NCC's view, that enables it – through a dawn raid or an inspection – to determine the existence of a cartel, provided that at the time of its submission there is not enough evidence enabling the NCC to initiate such inspection; or when the investigation has been already initiated, the undertaking is the first one to provide relevant evidence that allows the NCC to verify the existence of a cartel, considering that at the time of the provision of evidence the NCC did not have enough evidence to demonstrate the existence of a cartel and that there has not been any exemptions previously granted. However, the NCC shall automatically refuse any exemption application submitted once the statement of objections has been issued and notified to the undertakings concerned.

Additionally, the undertakings concerned must cooperate with the NCC[5] by immediately ending their participation in the cartel (unless indicated otherwise by the NCC).

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3 Definition included in Paragraph 2 of the Fourth Additional Provision of the SCA.

4 The leniency policy is regulated by Articles 65 and 66 of the SCA and Articles 46 to 53 of the RD 261/2008. In addition, in 2008 the NCC published specific guidelines for the handling of leniency applications.

5 The cooperation with the NCC may involve requirements such as: the immediate provision of all relevant evidence regarding the existence of the cartel; the immediate response to information or further explanation regarding the cartel, requested by the NCC; the facilitation of oral interviews between the NCC and current (and, if feasible, former) executives and employees of the company; the avoiding of actions of destruction, hiding, and counterfeiting

The fine exemption granted by the NCC to an undertaking shall also benefit its legal representatives or the members of the management bodies who have participated in the cartel agreement or practice, when they have fully cooperated with the NCC's investigations.

A reduction of fines of up to 50 per cent is available for affected undertakings that provide the NCC with evidence on the alleged infringement with significant added value[6]. Applications for reduction of fines can be submitted even after the statement of objections is notified by the NCC to the affected undertaking.

Fine reductions are based on the order that the significant information is provided, according to the following ranges: 30 per cent to 50 per cent for the first undertaking or natural person that provides significant added value information; 20 per cent to 30 per cent for the second undertaking or natural person that provides significant added value information; and up to 20 per cent for successive undertakings or natural persons that provide significant added value information. This is also applicable, at the same rates, to fines imposed on representatives or members of the management bodies who participated in the cartel, when they have fully cooperated with the NCC investigation.

Any applicant for leniency shall submit, in a sealed envelope, its application[7] to the Cartels and Leniency Unit ('CLU') of the Directorate of Investigation ('DI') of the NCC. The application will only be registered after it is received at the Registry of the NCC. Applications will be assessed on a chronological basis, according to their exact time of registration. The only authorised personnel to open the applications are the CLU officials.

After the CLU receives the application for the exemption and analyses it, the CLU can inform the applicant of whether the exemption may be granted. However, the Council of the NCC – at the end of the investigation procedure and only if the applicant complies with all the required cooperation conditions – is the only one entitled to finally confirm whether the exemption may be granted or not. In case the exemption is not admissible, the CLU shall allow any applicant to withdraw its leniency application or to submit an application for a reduction in the fine.

Regarding applications for fine reductions, these will only be assessed once the exemption applications (in relation to the same cartel) have been reviewed. Then,

of documents or evidence regarding the cartel; the prohibition to disclose to any third parties the content of the leniency application before the Statement of Objections is notified by the NCC to the affected companies, unless the disclosure has been previously agreed with the NCC.

6 The NCC shall assess, in each particular case, the added value of any evidence provided by the applicant; in this assessment, the submission of evidence that enables it to establish additional facts with direct repercussions on the amount of the fine shall be taken into account when determining the amount of the fine corresponding to such undertaking or natural person.

7 Applications shall be submitted in two versions: an original (to be kept by the NCC) and a copy (to be kept by the applicant). Both versions should be marked with an adhesive receipt seal by the NCC Registry, displaying the exact date and hour of the receipt. The NCC can also, if requested by the applicant, provide a document confirming receipt of its leniency application.

applicants for reduction will be informed by the DI of the NCC's intention to grant any reduction of the fine prior to the end of the infringement procedure.[8] The Council of the NCC shall only confirm the exact level of reduction in its final decision, provided that the applicant complies with the cooperation requirements.

All leniency applications and their content (including the identity of the applicant) shall be treated as confidential information by the NCC.

Additionally, RD 261/2008 provides the rules to coordinate leniency applications which have been submitted before regional competition authorities in Spain in cases where these are the competent authorities.[9]

iii Outlook

The Spanish leniency policy was implemented only one year ago and it will take some time before it is possible to assess the impact of this new approach in terms of proceedings initiated or sanctions imposed on companies.

However, as it happened at European level, it is foreseeable that the leniency policy will become a useful tool to detect and sanction Spanish cartels. In this regard, this policy would lead to the initiation of new proceedings and control of these kind of practices by the Spanish competition authorities.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

The NCC has initiated proceedings related to the acquisition and exploitation of football media rights agreements.

The NCC has opened formal proceedings against a number of audiovisual operators and football clubs[10] for alleged practices forbidden under Article 1 of the SCA and Article 81 of the EC Treaty, which involved the acquisition and exploitation of nationwide media rights for football events held on a regular basis.[11]

The initiation of the proceedings was based on evidence found during the assessment by the NCC of the acquisition by Sogecable of sole control of AVS.

8 Depending on the case, applicants shall be informed by the NCC in this respect when receiving the Statement of Objections or the Proposal of Final Decision on the case.

9 Article 53 of RD 261/2008.

10 Sogecable SA, Audiovisual Sport SL, Mediaproducción SL, Televisió de Catalunya SA, TVC Multimedia SL, Televisión Autonómica Valenciana SA, Televisión Autonómica de Madrid SA, Caja de Ahororos y Monte de Piedad de Madrid and 38 first and second division football clubs.

11 It must be recalled that the conditions imposed by the Resolution of the Council of Ministers of 29 November 2002 (*Sogecable/Via Digital* case) expired in 2007. In addition, it is not clear whether or not the conditions imposed by the Resolution of the Council of Ministers of 23 March 2007 are enforceable, due to the uncertainty about whether the acquisition by Sogecable of the sole control of AVS has been carried out.

While the transaction was cleared subject to certain conditions,[12] the NCC noticed the existence of a cooperative agreement between Mediapro and Sogecable with regard to the acquisition and exploitation of media rights over the Spanish football league and the King's Cup.[13] The contents and duration of said agreement could restrain competition in the audiovisual markets regarding the exploitation of those rights.[14] Additionally, evidence was discovered of several agreements between football clubs and audiovisual operators and brokers. As a consequence of the clauses included in such agreements, the NCC considers that there could be a foreclosure effect on the market for the acquisition of broadcasting rights for nationwide football events held on a regular basis.

A conventional termination process (settlement) has been recently initiated to solve this case, although it has not yet come to an end.

The NCC releases its report on football broadcasting rights

On 11 June 2008, the NCC published a comprehensive report on the football broadcasting rights market,[15] analysing the existing models for acquisition and exploitation of such rights in Spain from a competition perspective. While the report has nothing to do with the proceedings previously mentioned, it is expected to grant operators a higher degree of legal certainty when self-assessing agreements or practices related to football broadcasting rights.

The main conclusions of this report are:

a In the acquisition of football broadcasting rights, the NCC states that the Spanish system, which requires the consent of both clubs playing every match, constitutes an important advantage for any buyer holding the majority of the rights over the clubs.[16] This fact, together with other elements such as the long duration of the contracts and their exclusivity clauses, increases the risk of market foreclosure situations.

b The system favours the existence of a single pool managing most or all of the broadcasting rights (AVS). The fact that this pool is vertically integrated in a leading audiovisual group leads to potential difficulties for third parties to access this important content.

c The NCC reflects the existence of alternative systems, such as: those organised on a match-per-match basis, giving preference to the rights of the hosting club

12 Resolution of the Council of Ministers of 23 March 2007.

13 It must be stressed that there are quite a number of legal conflicts between the parties to the agreement regarding its interpretation and even its validity.

14 In fact, the former Court of Competition (currently, the Council of the NCC) requested the Service of Defence of Competition (currently, the Directorate of Investigation) to initiate proceedings to determine the extent of such an agreement and its potential effects on the concerned markets.

15 The report was published on 11 June 2008 on the NCC's webpage: www.cncompetencia.es.

16 In this regard, it must be stressed that the Council of the NCC considers that the broadcasting rights belong to the football club organising the match, i.e., the home team.

(arena rights); or the 'centralised management' of the rights by a specific entity with no interests in the downstream audiovisual markets.

d The applicable laws do not state an obligatory system. According to the NCC, private operators in the affected markets (mainly football clubs and audiovisual players) are entitled to organise the acquisition of rights and the system for broadcasting them. They shall therefore assess the compatibility of their agreements with corresponding competition laws.

e The report finds that neither the current model prevailing in Spain nor the alternatives models assessed resolve all competition concerns, mainly because they do not avoid the risks deriving from the creation of dominance, coordination between operators and vertical integration.

f In any event, should the existing system remain unchanged in the future, the NCC recommends that certain rules need to be followed to ensure that competition is not restricted. These recommendations cover, among others, the duration of the acquisition contracts, conditions for renewal of these contracts and minimum requirements for reasonable exploitation of the rights by any managing pool (either under auction mechanisms or under direct sale relationships with end-users).[17]

ii Trends, developments and strategies

The NCC currently intends to provide more certainty and transparency to its decisions, as well as to improve the enforcement of Competition Law.

In this respect, the NCC (following EC Guidelines of setting fines[18]) has recently published a 'Guidance regarding the method of setting fines for the infringements of Articles 1, 2 and 3 of the SCA, and Articles 81 and 82 of the EC Treaty' ('the Communication'), to act as a guide for the calculation of fines.

The Communication is the first document that the NCC has published regarding this matter, to achieve the following purposes: (1) to provide a more transparent and objective framework in the application of fines; (2) to enhance its deterrence effect; (3) to reinforce legal guarantees; and (4) to guarantee the proportionality of infringements with fines imposed.

Fines shall be fixed up following three phases: determination of the basic amount; adjustment of the basic amount based on aggravating and mitigating circumstances; and adjustments of the fine depending on the legal fine cap authorised and the benefit illegally obtained as a result of the infringement.

The determination of the basic amount involves the application of Article 64.1(a) to (e) of the SCA, considering the following criteria: dimension and characteristics of the affected market; market share of the infringing undertaking; and the range of the infringement, its duration and effects. In that order, the basic amount shall be calculated as a proportion of the sales affected by the infringing undertaking, which is the average

17 The specific recommendations are contained in Section 5.2.2 of the NCC Report.

18 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003.

amount of the sales obtained by this company in the relevant product and geographic market where the infringement has been implemented (before taxes), multiplied by the period of time of the infringement. Additionally, this sum will include a base amount of 10 per cent of the volume of sales, which could be increased up to 10 per cent in cases of major infringements, and also up to 10 per cent in cases where an input can produce a cascade effect in related markets (the basic amount will range between 10 per cent and 30 per cent of the value of sales affected by the infringement).

Article 64.1(g) of the SCA states that the adjustment of the basic amount shall be increased or reduced in function of the aggravating[19] and mitigating[20] circumstances related to the infringement. In this regard, variations in the basic amount – from 5 per cent to 15 per cent – shall be made according to concurring circumstances.

Additionally, fines shall be limited according to the legal fine cap authorised by Article 63 of the SCA and the illegal benefit obtained. Consequently, the fine cannot be in any circumstances below the illegal benefit obtained, but also it cannot exceed the cap level stated by law. Regarding natural persons participating in the infringement, the fine imposed ranges from 1 per cent to 5 per cent of the affected value of sales not exceeding the limit of €60,000.

It is also important to mention that the Communication has set up a specific provision regarding 'markets of recent liberalisation', considering as a very serious infringement the abuse of dominant position committed by undertakings operating in these markets.

Conventional termination

The SCA[21] states the possibility of terminating proceedings in matters of agreements and prohibited practices when the infringing companies propose commitments that may resolve the anti-competitive effects of their practices and sufficiently guarantee public interest (the commitments must be submitted before the notification of the Proposal Report to the parties).

The NCC will send the proposed commitments to the interested parties so that they can submit their pleadings. These commitments shall be binding and shall have full effect once incorporated into the resolution that brings an end to the proceedings.

19 Aggravating circumstances include when an undertaking: continues or repeats an infringement typified in the SCA; participates as a leader or instigator of an infringement; adopts measures that encourage infringement; or refuses to cooperate with or obstructs the NCC from carrying out its investigations.

20 Mitigating circumstances include when the concerned undertaking provides evidence of: termination of the infringement; the effective non-application of forbidden conduct; the performance of acts that tend to repair the damage caused by the infringement; and the active and effective collaboration with the NCC outside the scope of the Leniency Notice and beyond its legal obligation to do so.

21 Article 52 of the SCA and Article 39 of RD 261/2008.

iii *Outlook*

Since its creation, the NCC has adopted several measures in order to achieve full compliance with the new SCA and to penalise anti-competitive practices. These actions could be understood as a sign of a more active attitude of the NCC.

In this regard, as shown in the chart below, the NCC has initiated a significant number of proceedings, many of which were opened on its own initiative (*ex officio*).

NCC Antitrust Proceedings					
Year	2005	2006	2007	2008	2009
Total proceedings	35	27	92	26	3
Proceedings *ex officio*	5	1	13	18	0
Per cent *ex officio*	14.3 per cent	3.7 per cent	14.1 per cent	69.2 per cent	0 per cent

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i *Significant cases*

The NCC has imposed several fines on a number of electricity generators, such as Iberdrola, Gas Natural and Viesgo, as a result of their involvement in anti-competitive practices, consisting of the abuse of their respective dominant positions in the electricity generation markets (which have regional scope) in a situation of 'technical restrictions' during specific periods of the year.

According to the NCC, which issued several decisions in respect of these practices,[22] each of these players intentionally raised the price of the electricity generated during specific periods of the year. These companies carried out these price increases with knowledge of the fact that: (1) such an increase of the electricity price would lead to the refusal of its purchase in the national electricity pool, where the market price of electricity was substantially lower in that period; (2) this situation would generate a problem of technical restrictions in specific areas of the country, resulting from the imbalance between the national electricity supply and the local demand of electricity; (3) this would result in the need to generate an additional amount of energy from power plants located inside the affected areas in order to physically guarantee the supply of electricity in these zones; and (4) these companies, which held a dominant position as electricity generators in those specific areas, would be asked to generate such additional amount of energy, being able to sell the electricity at a price higher than the one which would have been obtained had the electricity been sold to the national electricity pool under ordinary market conditions.

Some of these decisions have been quite controversial, with some members of the NCC board voting against the declaration of an infringement by the affected companies.

22 Two decisions were issued in 2008 in Cases 624/07 (*Iberdrola)* and 625/07 (*Gas Natural*). Previously, similar decisions were issued in respect of these practices in 2006 (Case 602/05, *Viesgo*) and 2007 (Case 601/05, *Iberdrola Castellón*).

In most cases, the main grounds of these contrary opinions were related to the difficulty of identifying a real dominant position of these companies in the markets of electricity generation in specific local or regional areas affected by technical restrictions during specific periods of the year. According to these contrary opinions, there was no clear evidence that these companies had total certainty that they would be asked to solve the technical restriction problems affecting the areas where their power plants were located. Such total certainty would be the essential element of a possible dominant position, as it would allow these companies to act independently of the behaviour of their customers and important competitors in the electricity generation market.

ii Trends, developments and strategies

Under Spanish law, competition rules apply equally to general and regulated industries. Further, the NCC is the competent body for the implementation of the SCA and, in particular, it is in charge of the supervision of market conditions from an antitrust point of view.

There are no specific competition rules applying to regulated sectors, although the SCA includes several references to the need of cooperation between the NCC and regulatory bodies. In particular, regulatory bodies shall inform the NCC of acts, agreements practices and conduct they may acknowledge in the framework of their activity, which may be contrary to SCA's provisions, in order for the NCC to adopt the relevant decisions.

This cooperation principle also applies to the NCC. Indeed, as stated in the SCA, where the NCC analyses concentrations of companies that develop their activities in a particular regulated sector, the NCC shall ask the relevant regulatory bodies to issue non-binding reports on the market situation of that particular sector.

This would be the case, for example, where the NCC is to authorise a concentration between electricity companies. In these cases, the NCC shall ask the National Energy Commission ('CNE') to address to the NCC an opinion informing it of the CNE's position.

On the other hand, where, in the application of the relevant regulatory laws, a particular regulatory body is to issue an opinion or decision that may significantly affect market conditions, it shall ask the NCC to issue a report with its opinion on the notified project.

Finally, in order to ensure the effectiveness of the cooperation between the NCC and regulatory bodies in Spain, it is envisaged under the SCA that the presidents of these bodies shall meet at least annually, in order to discuss the lines of action that should guide their respective activities. Moreover, it envisages the possibility of creating formal and informal mechanisms with a view to coordinating courses of action of these bodies.

iii Outlook

It is foreseeable that as a consequence of the current contacts held between the NCC and regulatory bodies, cooperation in the future will be more intense. However, as the Supreme Court has recognised in its decision of 20 June 2006 (*Planes Claros*), it is likely that in the future the NCC will remain in charge of the supervision of competition conditions of the market, while the activity of regulatory bodies will be limited to the regulation of market conditions in regulated sectors.

V STATE AID

i Significant cases

As described below, the NCC has limited competence in relation to state aid. Indeed, the responsibility of the NCC in this respect is restricted to the issuance of annual reports comprehending a list of public aid projects granted by Spanish public entities. For the time being, since the SCA came into force, the NCC has not issued yet any annual report and therefore as yet there is little available information.

As regards the regulation of state aid in Spain, it must be highlighted that, according to Articles 87 to 89 of the EC Treaty, the European Commission is the competent body for the authorisation of state aid granted by Member States – including Spain – that do not fall within the scope of the applicable block exemptions regulations. It is important to bear in mind that the implementation of state aid projects must be suspended until an authorisation from the European Commission is eventually issued.

The NCC's activity in the state aid field is limited. Indeed, Article 26 of the SCA envisages, among the duties of the NCC, the issuance of general or particular reports regarding the impact of state aid on effective competition. It is also entitled to analyse the criteria according to which state aid is granted and, eventually, it can recommend best practices to public authorities.

The NCC is entitled under Article 11 of the SCA to analyse the criteria according to which state aid is granted and also their potential effects on competition.[23] In particular, the NCC may issue reports in relation to state regimes and individual aid, as well as address recommendations to the government with a view to preserving effective competition in the market.

Finally, it must be noted that in cases where state aid does not have a community effect, the NCC, in the framework of its faculties under the SCA, is entitled to request information on such projects and singular aid granted.

ii Trends, developments and strategies

Despite the fact that beneficiaries are not obliged to carry out any notification to the European Commission (where applicable, the Member State is the competent body to carry such notification), every single beneficiary should check whether the aid granted has been authorised by the European Commission.

However, the register of state aid managed by the European Commission is not always a useful tool as it does not detail exhaustively the state aid granted by the European Commission.

In Spain, Article 8.3 of the regulation developing the SCA envisages the creation of a Telematic Information Centre which shall publish information on state aid in official diaries. However this information centre has not yet been implemented. It is expected that once it is active, it will allow interested parties to gain complete and accurate information in this field.

23 The NCC Annual Report on public aid granted in Spain during 2008 will be published on the NCC's webpage (www.cncompetencia.es) in the following months.

iii Outlook

Taking into consideration the current economic situation, an increase in state aid to national companies is foreseeable. Therefore, with a view to granting beneficiaries a minimum legal certainty of the lawfulness of state aid, it would be advisable that European and Spanish Administrations implement accessible information systems providing interested parties with complete and accurate information.

VI CONCLUSIONS

The new SCA includes several provisions which are strongly linked with the strengthening of the NCC's enforcement powers. In particular, the NCC has been very active in investigating and prosecuting potential infringements in several sectors (such as insurance, food, cosmetics, sherry, etc.).

Moreover, it should be highlighted that the leniency policy constitutes a relevant tool to detect and eventually sanction cartels.

Within this context, it seems that the NCC's activities will increase in the near future and the authorities will fight against anti-competitive practices in order to achieve a better functioning of markets.

During 2009, it will be possible to assess the effects that this new regulation will have on infringing companies as well as on the behaviour of economic agents and on the functioning of the Spanish markets.

Chapter 32

SWITZERLAND

*Alessandro Celli, Boris Wenger and Laurent von Niederhäusern**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

In Switzerland, public competition enforcement is a federal matter. The main enforcing authority is the Swiss Competition Commission ('Comco'). The Comco is supported by its Secretariat ('the Secretariat') which conducts investigations and prepares the Comco's decisions in administrative procedure.

Both public and private competition enforcement are based on the 1996 Federal Act on Cartels and Other Restraints of Competition ('ACart'). Several amendments to the ACart were enacted in 2003 in order to provide the Comco with efficient new enforcement instruments, including direct administrative sanctions (i.e., fines), dawn raids and seizures as well as a leniency programme. Furthermore, an *ex ante* notification procedure similar to the former EC individual exemption procedure was introduced. This procedure protects the notifying parties from potential direct sanctions. It does not, however, exempt the conduct notified from being investigated and prohibited by the Comco.

The ACart and in particular the 2003 amendments have recently been evaluated by a panel of experts, resulting in the 2009 Evaluation Report to the Swiss government. The Report recommends 14 amendments to the ACart. Based on this report, the government will decide in spring 2009 whether or not to suggest any amendments to the Swiss parliament.

The Comco has repeatedly emphasised its intention to tackle Switzerland's high prices which are well above the European average. The rather strict provisions of the Comco's 2007 Guidelines on Vertical Agreements ('GVA') may be seen as a means to attain this goal, and it is rather surprising that 2008 has not seen the Comco taking a single

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decision on vertical restraints. Another goal which the Comco has been pursuing on an ongoing basis is full compatibility between Swiss and EC substantive competition law. Furthermore, the Comco strongly advocates the conclusion of cooperation agreements with the EU and other important trade partners allowing the exchange of confidential information between competition authorities.

The chronic insufficiency of the Comco's financial and human resources remains a major concern. When closing a preliminary investigation in 2007, the Secretariat expressly stated that it had to abandon further investigations on a suspected abuse of a dominant position for lack of human resources. Accordingly, one of the suggestions put forward in the 2009 Evaluation Report is to raise the Comco's budget.

ii Cartels

Swiss competition law distinguishes between horizontal agreements on prices, quantity and the allocation of territories (hard-core cartels) according to Article 5(3) ACart and non-justifiable horizontal agreements significantly impairing effective competition according to Article 5(1) and (2) ACart.

Hard-core cartels are presumed to eliminate effective competition. They are unlawful and subject to direct sanctions according to Article 49a(1) ACart if this presumption cannot be rebutted or, in case it is successfully rebutted, if the agreement still significantly impairs effective competition and cannot be justified on grounds of economic efficiency. Horizontal agreements other than hard-core cartels are unlawful, but not subject to direct sanctions, if the agreement significantly impairs effective competition and cannot be justified on grounds of economic efficiency.

As to its structure, the assessment of cartels under Swiss competition law may differ from the assessment under EC competition law. As to the results of the assessment of cartels under Swiss and EC law, however, there are no significant differences.

iii Antitrust: restrictive agreements and dominance

As to vertical agreements, Swiss competition law distinguishes between agreements regarding retail price maintenance agreements or passive sales restrictions according to Article 5(4) ACart and non-justifiable vertical agreements significantly impairing effective competition according to Article 5(1) and (2) ACart.

The former category of vertical agreements are presumed to eliminate effective competition and are assessed the same as hard-core cartels (see above). If unlawful, they are subject to direct sanctions. The latter category, however, is not subject to direct sanctions and is assessed the same as non-justifiable horizontal agreements significantly impairing effective competition (see above).

The Comco explained its practice on vertical agreements in its 2007 GVA. Nevertheless, some uncertainty remains as only a few decisions have been taken in this area in the last couple of years. Generally, the GVA results in a slightly stricter practice than in the EU with regard to vertical restraints, in particular regarding retail price maintenance and market share thresholds.

Finally, exclusionary, exploitative and discriminatory conduct of enterprises having a dominant position in the relevant market are deemed abusive according to Article 7(1) ACart. Such abuses are unlawful and subject to direct sanctions.

iv Merger Control

Swiss competition law provides for rules on merger control. According to these rules, the Comco may prohibit a concentration or impose remedies if it creates or strengthens a dominant position liable to eliminate effective competition according to article 10(2) ACart.

Compared to EU and other merger controls, the Swiss jurisdictional filing thresholds are relatively high. In addition, decisions taken by the Swiss Federal Supreme Court in 2007 (*Swissgrid; Berner Zeitung/20 Minuten*) made it clear that the intervention threshold of the Swiss substantive test according to Article 10(2) ACart is significantly higher than the intervention thresholds of both the Swiss dominance test according to Article 7(1) ACart and of the SIEC test in EU merger control. Consequently, cases where the Comco imposes remedies or altogether prohibits a merger are rare.

One of the priority suggestions of the 2007 Evaluation Report is to harmonise Swiss merger control with EU practice by introducing the SIEC test. It also recommends to lower jurisdictional filing thresholds.

In the case of jurisdictional filings taking place both in the EU and in Switzerland, the Comco usually asks the merging parties to coordinate the filing dates in the two jurisdictions. This allows the Comco to await and adopt the decision of the European Commission. However, the Comco recently cleared a merger between the copper refiners Cumerio and Norddeutsche Affinerie before the European Commission had closed its Phase II review on the same merger, under the condition that the parties would await EU clearance to close the transaction in Switzerland and apply any remedies imposed in the EU to Switzerland, as far as relevant.

Furthermore, the Comco took a couple of high-profile decisions in 2007 and 2008 which ought to be mentioned.

Firstly, the Comco assessed two mergers on the Swiss retail market, with Migros taking over its competitor Denner and Coop purchasing Carrefour's sales areas. Although concluding that both mergers would strengthen the collective dominance of Migros and Coop, the Comco chose to approve the mergers subject to far-reaching conditions on both retailers for a duration of six to seven years. Inter alia, Migros (which sells its own brands only) must not interfere with Denner's operative independence and must allow it to keep separate channels of distribution. Denner retail shops which sell mostly branded goods must be maintained in order to ensure that consumers and suppliers of branded goods still have an option other than Coop. Coop was obligated to sell Carrefour retail shops in regions where the concentration would result in Coop/Carrefour's dominant position. Additionally, both Migros and Coop were forbidden to enter into exclusivity arrangements with product suppliers and to acquire any other competitor in the retail market.

Secondly, the Comco assessed a merger on the Swiss financial markets between SWX (Swiss Exchange) Group, SWX, SIS Swiss Financial Services Group and Telekurs. The Comco examined the vertical implications of the merger on the markets for listing, trading, clearing and settlement in depth, fearing a foreclosure effect as the companies would be in a position to privilege affiliate companies in the upstream or downstream markets and to discriminate commercial partners. The merger was cleared under the condition that SWX and SIS would sign the European Code of Conduct for Clearing and Settlement (CoC), making sure that the two companies would allow competitors to use their infrastructures. The signatories to the CoC committed to guarantee non-discriminatory access to their services, price transparency, service unbundling, etc.

v Procedural issues

The administrative procedure applying to Swiss public competition enforcement significantly differs from the procedure followed by the European Commission and has experienced some important developments in recent years.

Following dawn raids carried out by the Comco upon suspicion of horizontal price agreements, various shipping companies called the Swiss Federal Supreme Court to prevent the unsealing of seized documents, claiming that the work products of their in-house counsels were privileged. In its decision, the Supreme Court left open whether or not the work products of in-house counsels are privileged. It stated, however, that even if the work products of in-house counsels were protected by the legal privilege (which is contested by the Comco), this would not prevent their unsealing. Generally, legal privilege can only be invoked for information which is in custody of counsel, be it an in-house or external counsel. In any case, documents which are in the custody of other persons are not privileged, even if they were drafted by counsel. Moreover, only legal correspondence of counsel regarding the competition proceedings concerned is privileged.

Another important development concerns the *ex ante* notification procedure introduced in 2003 (see Section I(*i*) *supra*). The law provides that an undertaking considering to engage in potentially unlawful conduct may notify this conduct to the Comco. If the Comco does not open a preliminary or an in-depth investigation within five months following notification, the undertaking enjoys immunity from direct sanctions for the notified conduct.

Following a notification filed by four banks on the planned introduction of a Domestic Interchange Fee (DMIF) on debit card transactions in 2004, significant shortcomings of the *ex ante* notification procedure came to light. The Secretariat opened a preliminary investigation after two months following notification which lifted the notifying parties' immunity from direct sanctions. In 2006, the Secretariat concluded in an informal final report that the planned DMIF was a horizontal agreement on pricing likely to be unlawful, but refused to open an in-depth investigation and decide formally on the matter as long as the DMIF was not introduced yet. The four banks, at risk of being subjected to direct sanctions if they introduced the DMIF, appealed against the authority's refusal to open an in-depth investigation and to decide formally on the matter. In December 2008, the Swiss Federal Supreme Court dismissed the appeal, stating that the purpose of the notification procedure is to reduce legal uncertainty with regard to possible direct sanctions, but does not entitle the notifying parties to obtaining a formal decision on the legality of a future conduct.

The utility of the *ex ante* notification procedure has been considerably weakened by this decision. In case the Secretariat opens a preliminary investigation within five months following notification and, after a period of up to a couple of years, closes this preliminary investigation by an informal and inconclusive final report, all benefits of the notification (immunity from direct sanctions, legal certainty) are lost. In addition, the procedure delays market launch and is costly. It is obvious that, under such circumstances, the *ex ante* notification procedure results in over-deterrence and is usually not a valid option for enterprises. This is why the 2009 Evaluation Report suggests amending the notification procedure to the effect that the objection period of five months is shortened and that immunity is lifted only when an in-depth investigation, which must be closed by a formal decision, is opened within this objection period.

In the Comco's 2007 *Publigroupe* and 2008 *Documed* decisions (see Section III (*i*), *infra*), the Comco resolved an open issue with regard to direct sanctions according to Article 49a(1) ACart. The Comco stated that binding formal settlements closing an in-depth investigation according to Article 29 ACart may be combined with direct sanctions. In such cases, the range of the fine is defined in the settlement negotiated between the parties and the Secretariat and the final amount is left for the Comco to decide.

In the same two decisions, the Comco confirmed that subjective elements are taken into account when deciding on a direct sanction, although evidence of fault is not formally requested by law. An undertaking will be subjected to direct sanctions only if its conduct constitutes a violation of the due diligence reasonably expected under the circumstances and is therefore deemed intentional or at least negligent. In the cases at hand, the fact that the undertakings did not change their conduct after the Comco had started its investigation was considered an aggravating element.

On procedural matters, the 2009 Evaluation Report puts forward several suggestions to enhance the effectiveness of the ACart. Inter alia, the report suggests to introduce direct sanctions against officers and employees of enterprises engaging in unlawful conduct. Such sanctions would be limited to cases of hard-core cartels and linked with a leniency programme for individuals. Regarding the structure of the enforcing authorities, the report proposes to merge the Comco and its Secretariat into one single authority or at least to increase the Comco's independence by shaping it as an authority with a smaller number of completely independent experts with full-time positions. The report also underlines the necessity for the Swiss government to enter into formal cooperation agreements providing for an exchange of confidential information between the Comco and other competition authorities. Currently, any information exchange is either informal, if it is of general, non-confidential nature only, or based on a waiver of the parties concerned.

II CARTELS

i Significant cases

In 2005, the Comco opened an in-depth investigation regarding a hard-core cartel between 18 construction enterprises offering road asphalt works in the Italian-speaking part of Switzerland. The investigation unveiled that in a written agreement concluded in 1998, the companies had agreed on a sophisticated system to divide up all public orders as well as all private orders with a value exceeding 20,000 Swiss francs. The companies' representatives met weekly to decide on the allocation of the work orders based on fixed contingents reflecting past market shares. In the case of tenders, the future winner and his 'lowest' bid were agreed upon in advance. Due to a rotation system, each cartel member regularly received an amount of orders corresponding to its capacity. The Comco concluded that the rotation system and the price agreements constituted a hard-core cartel presumed to eliminate efficient competition. Since this presumption could not be rebutted, the hard-core cartel was deemed unlawful. The parties gave up their weekly sessions around March 2005, just in time to avoid the newly introduced direct sanctions. The Comco noted that prices for road construction works in the area concerned dropped by more than 30 per cent after the cartel was dismantled.

In another case, alerted by seemingly very high prices compared to foreign countries, the Comco investigated an alleged horizontal agreement on the private tendering of cement and concrete for the NEAT, a big-scale project of new railroad tunnels across the Alps. In the absence of any written evidence pointing to agreements between the bidders, the Comco carried out an in-depth investigation based solely on indirect evidence. In this context, the Comco stated that unusual offers and behaviour of the bidders may indicate anti-competitive agreements, but that a mere suspicion would not suffice to incriminate the bidders.

In its search for evidence, the Comco compared the prices offered for cements within single subprojects of NEAT, for different subprojects and then for the same kinds of cements abroad, especially in Germany. The Comco noted significant price differences, but discovered a number of economic reasons for the disparities such as different transport prices due to favourable locations or limited production capacity, higher costs due to the legal requirements of transporting all cement by train even to remote mountain regions and the costs of development and production of specific kinds of cements. The low number of bidders, which may have been interpreted as an indication of geographical market allocation, was explained by high costs of railroad transport and by the limited production capacity of most Swiss cement producers. Thus, the Comco could not find sufficient evidence of the existence of a cartel between the bidders.

In an investigation regarding the Lucerne health services market, the Comco examined whether the accumulation of countervailing power, which was to be used to negotiate with a dominant or monopolistic opposite market side, could constitute grounds of economic efficiency justifying a horizontal agreement according to Article 5(2) ACart. In the case at hand, Swiss health insurers joined forces in their negotiations with public, dominant hospitals in the Canton of Lucerne regarding the costs of insurers' care.

The Comco deemed the horizontal agreement between the health insurers to be justified on grounds of economic efficiency. The insurers were allowed to build two negotiating groups, each representing a maximum 60 per cent market share. The decision was made dependent on the groups not engaging in any anti-competitive conduct on the market, considering the danger of insurers establishing joint practices on other areas of activities. Besides, the decision applied only to the actual situation where the hospitals' dominant position made countervailing power necessary. Finally, the Comco limited the scope of its decision to the tightly regulated area of health insurance, where insurers are forced to negotiate with all public hospitals.

With this decision, the Comco explored new territory by giving formal advice to legal subjects based on hypothetical facts. Most Cantons have a situation similar to the one in Lucerne and the Comco chose to issue this decision in consideration of the important need for legal certainty for health insurers all over Switzerland. However, the Comco expressly advised other Swiss health insurers to use the *ex ante* notification procedure according to Article 49a (3)(a) ACart prior to relying on this decision.

ii *Trends, developments and strategies*

Swiss associations of liberal professions often issue fee recommendations in the form of lists of indicative prices or calculation aids. The Comco qualifies such recommendations as unlawful price agreements and does not accept the reasons put forward by the associations – price transparency, help to newly arrived professionals, protection of customers – as grounds of economic efficiency justifying the recommendations.

Following a preliminary investigation regarding attorneys' fees, the Comco recently recommended an alternative to the professional associations wishing to increase transparency and to protect customers against abusive pricing without engaging in anti-competitive conduct. The Comco suggested entrusting a third party, such as a fiduciary, a university or a consumer association, with a survey of the minimum, maximum and average prices for the different services offered by the liberal profession. This data is then published in a booklet addressed to consumers and professionals along with the statement that the prices are not mandatory to the members of the association.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i *Significant cases*

Following a complaint by Agusta SpA, an Italian helicopter manufacturer, about irregularities in the procedure that led to the purchase of 20 helicopters by the Swiss Army, the Comco investigated whether Armasuisse's conduct qualified as an unlawful abuse of a dominant position. Armasuisse, the entity which organises the purchase of all equipment of the Swiss Army, was qualified by the Comco as an undertaking subject to the ACart because it exercises market power, notwithstanding the fact that it is legally obliged to consider political or military interests of the Swiss government.

Since the Comco defined a worldwide market for the sale of helicopters, there could be no dominant position of Armasuisse. Even so, the Comco seized the opportunity to issue a recommendation to the Swiss government according to Article 45(2) ACart, asking the government to increase legal protection for companies involved in procurement procedures led by Armasuisse.

In another case, the Comco investigated whether Documed, a company specialised in the publication of information on pharmaceuticals, engaged in an unlawful abuse of a dominant position. Documed's main product is a compendium of all drugs available in Switzerland. This compendium is important for the pharmaceutical companies as they are obliged by law to publish comprehensive information on the drugs they offer in a publication featuring all the drugs available on the Swiss market. As Documed is the only competitor releasing such a wide-ranging publication, the pharmaceutical companies are virtually forced to turn to Documed for the publication of their medical information. Hence, the Comco concluded that Documed had a dominant position.

Documed's price policy entailed different prices for the same publications and equal prices for publications of different values. Since these practices were discriminatory and not justified by legitimate business reasons, they were deemed to be unlawful by the Comco according to Article 7(1)(b) ACart.

The Comco further examined if Documed had abused its dominant position by imposing exaggeratedly high prices to its customers. The Comco was unable to use the 'relative method' of comparing them with prices for similar services abroad as sufficient data was not available. Therefore, the Comco turned to applying the 'absolute method' of calculating reasonable costs and profits of the company. This calculation, however, did not uncover a practice of excessive pricing.

On the market for advertisement placement in written media, the Comco investigated Publigroupe's practice of paying commissions only to companies which were mainly active in the advertisement business and reached certain sales per year. Considering Publigroupe's dominant position, the Comco qualified this policy as discriminatory and denied the existence of legitimate business reasons which could have justified this conduct according to Article 7(1) ACart. Although Publigroupe committed to abandon the illegal practices in a binding settlement with the Comco, the Comco imposed direct sanctions in the amount of 2.5 million Swiss francs on Publigroupe (see Section I(*v*), *supra*).

On the telecommunications market, the Comco has conducted several investigations against Swisscom for abuse of dominant position in recent years, some of which are still ongoing. Swisscom as the successor of the formerly state-owned monopolist PTT is a priority target to competition investigations because it owns facilities essential to other companies providing telephone and internet services.

In 2007, the Comco ruled that Swisscom had abused its dominant position on the Swiss mobile phone market by imposing excessive termination charges to other providers. The Comco qualified the charges as excessive after examining prices abroad and analysing Swisscom's costs. Considering the profit Swisscom had made by overcharging consumers, the Comco imposed a fine in the amount of 333 million Swiss francs, the highest ever imposed by the Comco. This decision concerned Swisscom's conduct before 31 May 2005 and has been appealed before the Swiss Administrative Federal Court. Another investigation on the same subject but concerning the period after 31 May 2005 is still pending.

With regard to the wholesale market for broadband internet access, the Comco acted as an expert for the Federal Communication Commission (ComCom). In its expert report, the Comco concluded that Swisscom enjoys a dominant position on this market. Pursuant to Swiss telecommunication legislation, the fact that Swisscom enjoys a dominant position will allow the ComCom to force the company to lower its prices to make them consistent with actual costs.

In a separate investigation, this time on the market for ADSL (a form of broadband) internet connections, the Secretariat has come to the conclusion that Swisscom had abused its dominant position by setting excessive prices on the access to its network, which resulted in a margin squeeze for its competitors. The Comco still has to confirm the Secretariat's conclusions under consideration of Swisscom's arguments and to decide on possible direct sanctions. In another investigation regarding the ADSL market, the Comco had already concluded that Swisscom had abused its dominant position by granting discounts to its subsidiary Bluewin and denying them to other providers. The Comco dropped this investigation in May 2007 after Swisscom accepted to grant equal discounts to other providers.

After final judgment was rendered in 2007 on the prohibition by the Comco of the price cartel according to Article 5(3) ACart regarding German books, the associations of book retailers asked the Swiss Federal Council to issue an exceptional authorisation on grounds of compelling public interests according to Article 8 ACart. Such authorisation is an exceptional measure based on political grounds, aiming to correct possible negative effects of the competition legislation in the case of overwhelming public interests. In only the second decision of this kind, the Swiss Federal Council admitted that the diversity of books and bookstores was in the public interest, but denied the authorisation because the evidence put forward by the Comco clearly showed that the price cartel was not necessary to reach this goal.

ii Trends, developments and strategies

The 2007 Guidance on Vertical Agreements (GVA) leans widely on Commission Regulation (EC) No. 2790/1999, the Comco's stated intention being the harmonisation with EU practice on vertical agreements. In reality, however, the principles of the GVA result in a slightly stricter approach towards vertical agreements than in the EU.

The 2009 Evaluation Report criticises the relatively strict treatment of vertical agreements in Switzerland and the formal regulation based on assumptions of illegality as contrary to the international trend of assessing vertical restraints using an economic, effects-based approach.

The most important suggestion of the 2009 Evaluation Report concerns the assumptions of unlawfulness against vertical agreements on retail price maintenance or passive sales restrictions in Article 5(4) ACart. These agreements are presumed to eliminate effective competition according to Article 5(4) ACart and therefore to be unlawful. Section 10(2) GVA states that the assumption cannot be rebutted by evidence of interbrand competition only. In the case of resale price maintenance, Section 11(2) further states that making price recommendations public, indicating expressly that they are not binding on the distributors and avoiding any pressure on the distributors regarding pricing will help rebutting the assumption. Significantly lower prices abroad and the fact that most distributors actually follow the recommendation, however, are elements pointing to unlawful retail price maintenance.

The 2009 Evaluation Report suggests to give up these assumptions of unlawfulness, but wants to keep the possibility of direct sanctions against vertical agreements on retail price maintenance or passive sales restrictions. The report further considers that, should the assumptions of unlawfulness be kept, at least evidence of interbrand competition should suffice to rebut the assumption. Most experts and practitioners seem to agree with these suggestions.

iii Outlook

In March 2008, the Comco opened an investigation regarding the book market in the French-speaking part of Switzerland. French books are supplied to Swiss book stores almost exclusively by French book importers, which are affiliated to the French publishing houses. The Comco intends to examine if the prices in Switzerland are excessively high compared to France. If this is the case, and the higher prices are not justified by legitimate business reasons, the Comco may conclude that this pricing is excessive and constitutes an abuse of a collectively dominant position according to Article 7(1) ACart.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Swiss competition law does not provide for sectoral investigations as in the EU. It only provides for a rather informal observation of specific markets by the Comco according to Article 45(1) ACart, a tool which has been rarely used by the Comco.

However, some industries and sectors have stood under close scrutiny by the Comco for many years. For example in the telecommunication sector, suspicions of the Comco and complaints of competitors about abusive conduct of a dominant position by the incumbent Swisscom have led to several investigations (see Section III (*i*), *supra*). Other markets watched closely by the Comco include the markets for banking and payment services, the markets for health services as well as the energy and retail markets.

V STATE AID

As the regulation of the European Economic Area (EEA) does not apply to Switzerland, state aid in Switzerland is only subject to World Trade Organization rules. Furthermore, the Federal Act on the Internal Market ensures that the Swiss market is not impeded by domestic barriers to trade.

VI CONCLUSIONS

i Pending cases and legislation

At this point, it is difficult to assess which of the suggestions put forward by the 2009 Evaluation Report may find their way into the ACart. However, three key suggestions seem to be capable of winning a majority: First, the treatment of vertical agreements according to Article 5(4) ACart and the GVA is too strict and needs to be harmonised with the corresponding EU law. Secondly, the substantive tests of Swiss and EU merger control must be harmonised. Thirdly, the *ex ante* notification procedure according to Article 49a (3)(a) ACart does not fulfil its purpose and needs to be amended in order to provide legal certainty.

The Swiss parliament is currently discussing the unilateral introduction of the *Cassis-de-Dijon* principle in Switzerland by means of an amendment to the Federal Act on Technical Trade Barriers. Under this principle, all goods which are lawfully introduced in the EU market would be allowed to be imported into Switzerland without any restrictions or duties. While the principle's introduction, which has been strongly advocated by the Comco, seems to be widely accepted, the parliament is discussing mainly the range of exemptions to this principle, in particular in the area of food products.

Another new law concerns the territorial exhaustion of patents. Current Swiss law provides for international exhaustion of copyright and trademarks but not of patents, which are still subject to national exhaustion. Although Article 3(2) ACart states that any restriction to the import of patented goods is subject to competition law, national exhaustion constitutes an important barrier to parallel imports of patented goods since most importers are reluctant to rely on competition law when facing litigation with the manufacturers of the patented goods. In December 2008, the Swiss parliament decided to introduce the principle of international exhaustion into the Patent Act. However, the international exhaustion of patents will be limited to the territory of the European Economic Area unless the patent is of minor significance for the functionality of the patented goods, in which case the law provides for global exhaustion. International exhaustion will not apply to goods with administered prices, such as pharmaceutical products. This amendment is expected to enter into force in the second semester of 2009.

ii Analysis

The last few years have seen a consolidation of Swiss public competition enforcement after the first modern competition law entered into force in 1996 and some important amendments were enacted in 2003. Generally, based on Swiss and EU case law as well as the Comco's guidelines and notices, a level of legal certainty has been achieved which allows the enterprises to ensure their compliance with Swiss competition law.

Parts of the Comco's practice, in particular on vertical agreements, may be relatively strict and some tools initially designed to provide legal certainty such as the *ex ante* notification procedure may be flawed. These deficiencies, however, are likely to be addressed by a set of amendments which is expected to be proposed to the Swiss parliament in 2009.

All in all, it seems that, depending on their financial and human resources, the Comco and its Secretariat will be able to continue consolidating public competition enforcement in Switzerland and to increasingly coordinate their tasks with foreign competition authorities.

Chapter 33

UKRAINE

*Franz Urlesberger and Pavel Grushko**

I OVERVIEW

i Preliminary remarks

The authority mainly responsible for public enforcement of competition rules in the Ukraine is the Antimonopoly Committee ('AMC'). The AMC has branches in every region of the Ukraine as well as in Kiev and Sevastopol.

The competition rules are set out in the Act on Economic Competition Protection ('the Competition Act'). The AMC is in the process of drafting new regulations and amendments to the current legislation.

ii Prioritisation and resource allocation of enforcement authorities

At present, the AMC has 10 state commissioners and more than 924 officials, 260 of which are permanently stationed in the headquarters in Kiev and 664 in the regional offices. The vast majority of the AMC's officials are qualified lawyers and economists. Special bid-rigging and cartel investigation task forces have been established recently (please refer to Section II, *infra* for details).

The AMC is organised into 10 departments and directorates and several other supporting divisions. Decisions of the AMC are taken in meetings of the commissioners (by simple majority of votes).

iii Enforcement agenda

The number of cases reviewed and the amount of fines imposed by the AMC are growing constantly. According to the 2008 Annual Report, the AMC investigated 1,616 suspected competition law infringements, of which over 40 per cent related to an alleged abuse of dominance and 30 per cent to anti-competitive actions of undertakings and

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state government authorities. In 2008, the AMC imposed fines totalling some 6 million hryvnas.

In June 2008 the AMC established a special bid-rigging task force (its actual manning is unknown); it took the task force less than four months to unveil the first bid-rigging cartel (for further details on these cases see Section II, *infra*).

II CARTELS

i Preliminary remarks

The Competition Act does not differ significantly from Article 81 EC Treaty in relation to horizontal agreements. What differs is that there is still a notification system in place. Restrictive agreements have to be notified to the AMC for prior approval and will be exempted if:

a They create countervailing efficiencies. Agreements may be exempted for a maximum period of five years. Upon request, the AMC may issue a preliminary decision stating whether it would grant an approval, as well as whether such approval is in fact necessary. Such requests can usually be obtained within one month. The AMC may also issue a declaratory statement whether certain actions qualify as concerted actions. Within 30 days of a decision in which the AMC prohibits a (notified) practice, undertakings may approach the Cabinet of Ministers. The Cabinet may approve the respective practice if the participants can prove that its positive effects outweigh the anti-competitive effects.

b If they meet certain market share thresholds. According to the AMC, agreements are exempted if the implicated parties' aggregate market share is below 5 per cent on the respective market. Agreements may also be exempted if the parties' aggregate market share is below 15 per cent or 20 per cent, provided they meet some further requirements (aggregate volume of assets or turnover, inter-relation of markets involved, etc). However, Ukrainian law does not provide clear guidelines on market share calculation and the AMC may, at its discretion, employ various methods of market share calculation. Therefore, even if the parties' self-assessed aggregate market share remains below 5 per cent, experience shows that it may well exceed this threshold when calculated by the AMC.

Leniency

The Competition Act contains leniency provisions which do not differ significantly from the leniency programme of the European Commission. To our knowledge, no leniency application has been submitted so far.

Sanctions

Violations of the cartel prohibition may entail the following fines:

a a fine of up to 10 per cent of the respective undertaking's group turnover, if the profit from the respective behaviour accounted for less than 10 per cent of the group turnover of the implicated undertaking; or *b* if the unlawful profit accounted for more than 10 per cent of the total group revenues of the infringing undertaking, the fine may amount to up to a triple of this profit.

The amount of the unlawful profit can be calculated by the AMC also by way of evaluation. If the respective undertaking did not achieve any turnover or does not provide turnover information upon request of the AMC, a fine of up to 340,000 hryvnas may be imposed, but, if necessary, the AMC may also set the fine on the basis of information from other sources.

Concluding agreements aimed at price-fixing; allocation of markets or customers; or establishing barriers to market entry may also entail sanctions for responsible directors of up to 255 hryvnas and individuals which carry out a business activity of up to 510 hryvnas.

In addition, pursuant to the Criminal Code, compulsion to commit anti-competitive practices constitutes a criminal offence and may lead to limitation of freedom for up to five years (limitation is not tantamount to imprisonment, even though the respective person will be held at a correctional facility, as the person will not be isolated from society). Compulsion by an organised group or by a repeat offender may entail limitation of freedom for up to six years.

ii *Significant cases*

In 2008 the AMC unearthed more than 10 cartels. Most investigations were triggered by complaints of end-customers and competitors. Below we summarise the most noteworthy cases (the imposed fines are not always publicly available):

Coal wholesale

The AMC found members of the association of coal whole-sellers to have infringed the cartel prohibition by allocating 32 coal-mining companies amongst each other and fixing prices for the sale of coal to power generating companies. The imposed fines totalled 914,500 hryvnas.

Milk price

In the regions of Sumy and Chernigiv, milk refineries were found (in two separate cartels) to have colluded on milk prices: purchase prices for individuals were decreased, whereas prices for legal entities were increased. The implicated undertakings failed to provide objective justifications for their pricing behaviour and were fined by the AMC.

Petrol and diesel oil retail sales

In the region of Dnepropetrovsk seven retailers simultaneously stopped selling petrol and diesel oil in Dnepropetrovsk and surrounding cities. The AMC found that the respective undertakings had colluded on the conditions under which they would supply petrol and diesel oil. The AMC found the undertakings to have breached the cartel prohibition and consequently fined the undertakings.

Another investigation, this time in the region of Volyn, revealed that three retailers of diesel oil had simultaneously increased diesel oil prices by almost equal levels. Diesel was then significantly higher than petrol. The parallel price move was believed to be coordinated and the implicated undertakings were consequently fined.

Gas retail

Three other retailers adopted a parallel price increase in the region of Rivne at the end of 2007 until beginning of 2008. They were believed to have colluded on the price increase and were fined.

Aviation fuel

In 2007, the AMC established that two firms had colluded on the provision of aviation fuel at Kiev's Boryspil international airport. The two firms implemented identical price levels that were also found to be excessive. The Committee imposed fines totalling 150,000 hryvnas.

Bid-rigging task force

As mentioned above, a new bid-rigging task force was established in 2008. It did not take long until it unveiled the first bid-rigging cartel. It related to a tender for promoting and advertising national tourist products 'Ukraine invites' in the Ukraine and abroad. The participating undertakings were found to have rigged their bids and were altogether fined 605,000 hryvnas in relation to the promotion and advertising of the national tourist product.

iii Trends, developments and strategies

Looking at the various decisions of the AMC over the last years, a constant increase in fines levied on infringing undertakings can be observed, although the amount of fines are relatively low compared with the level of fines by the European Commission or national competition authorities in Western Europe. Therefore they also do not have the same deterrent effect. This should, however, be partly counterbalanced in the future with the proposed criminal sanctions for hard-core infringements.

iv Outlook

Pending and future cases

During the third quarter of 2008, the AMC initiated a record number of investigations into suspected cartel behaviour. In view of the trend of an increment in fines, it would not come as a surprise if new record fines were imposed (even though fines are still low compared with Western European standards).

It is also expected that even more cartels will be unveiled by the AMC in the near future once the leniency programme is fully implemented.

Legislation

Amendments to the Criminal Code were proposed recently. Price-fixing, market or customer sharing and limiting output shall entail the following criminal sanctions:

a fines between 17,000 and 85,000 hryvnas ;
b limitation of freedom of up to five years;
c imprisonment for up to six years; or
d disqualification for up to three years.

Repeat offenders face imprisonment between three and seven years and disqualification of up to three years.

Coercing somebody to enter into the hard-core restrictions may be sanctioned by imprisonment for up to six years and disqualification for up to three years. Severe forms of coercion (either by a group of people or by threatening somebody's life or health) may be sanctioned by imprisonment between three and seven years and disqualification for up to three years.

The draft amendments provide, however, for the possibility of a leniency application by the offender, namely, he or she will benefit from immunity from any sanctions if he or she is the first to report a hard-core restriction to the authorities before any authority has learnt of the offence. Immunity, however, is not available for the organiser of the hard-core infringement.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Preliminary remarks

Vertical agreements

Under Ukrainian competition law, vertical restraints are only prohibited if they:

a lead to a significant restriction of competition on the relevant Ukrainian market;

b restrict or establish barriers for other undertakings to access the market; or

c lead to economically unjustified price increases or deficits of goods.

Please note that therefore under the Competition Law, resale price maintenance is only unlawful if it leads to economically unsubstantiated prices or a deficit in the supply of the affected product. However, the burden of proof that a particular vertical agreement is not anti-competitive lies on the undertakings concerned.

Abuse of market dominance–aviation fuel

The concept of dominance differs slightly from Article 82 EC Treaty. Most importantly, a dominant market position is also assumed if the market share of the undertaking exceeds 35 per cent on the relevant product market, unless such undertaking proves that it is exposed to substantial competition.

At the end of April 2009 the AMC imposed a record fine of 265 million hryvnas on three major jet fuel suppliers (Krebo, Ukrtatnafta, Luk Avia Oil) and the country's largest state-owned airport, Boryspil, for an abuse of market dominance. The AMC established that the companies charged excessive jet fuel prices on Boryspil airport late last year. This resulted in Boryspil being one of the most expensive airports in Europe in terms of prices for aviation fuel. The AMC imposed the following fines: (1) 125 million hryvnas on Krebo, (2) 110 million hryvnas on Ukrtatnafta, (3) 20 million hryvnas on Luk Avia Oil and (4) 10 million hryvnas on Boryspil. In addition obligations were imposed on Krebo and Boryspil. In particular, Krebo was ordered to re-sign service agreements with airlines, while Boryspil is now required to conduct a public tender for the use of its jet fuelling infrastructure. It is expected that the decision will be challenged.

ii Significant cases

Vertical agreements

In 2007 a bakery and a distributor entered into an agreement that prevented the bakery from making direct sales to retailers at prices lower than those charged to retailers by the distributor. The distributor was also affiliated with a second bakery that competed with the first one. The parties were fined by the AMC 8,500 hryvnas.

The AMC found agreements between Ukrgaz-Energo, a former monopoly supplier of imported natural gas, and Naftogaz Ukrainy, the state-owned gas monopoly operator, to fall foul of the cartel prohibition; the agreements prohibited Naftogaz Ukrainy to resell gas purchased from Ukrgaz-Energo to Ukrainian customers except those listed in the agreements. The AMC imposed a fine of 600,000 hryvnas.

Abuse of dominance

In 2006, a case was initiated against the European Consulting Agency, which held a monopoly position in providing government procurement information on the internet. The AMC came to the conclusion that the Agency offered access to information only in the form of contracts that entailed fees for other services, and eventually imposed a fine of 100,000 hryvnas. Again in 2007, the same Agency was accused of abusing its dominant position by impeding the set up of an alternative system for internet access to procure information and was fined 875,000 hryvnas.

iii Trends, developments and strategies

As with cartels, the number of investigations into suspected restrictive agreements and abuses of market dominance is growing, and so is the level of fines imposed on infringing undertakings. Still, it can be observed that fines are low given the seriousness of the various infringements and the size of the respective undertakings, and thus lack sufficient deterrent effect. It is also expected that fines for restrictive agreements and abuses of dominance will rise (this is underpinned by the most recent decision of the AMC in the sector for aviation fuel).

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Preliminary remarks

Whereas there are regulated industries in the Ukraine, the applicable laws and regulations do not contain any competition rules.

ii Trends, developments and strategies

In February 2009 the National Commission for regulating telecommunications in the Ukraine adopted a resolution which defines seven retail and 10 wholesale markets. For every market it specifies the:

a type of customer network;

b geographical scope;

c consumers;

e suppliers; and
f types of provided services.

Based on the Resolution, the AMC will have to review for each market the prevailing market conditions and define the position of each market player.

In October 2008, during the meeting of the Interstate Council for Antimonopoly Policy (the International Governmental Organisation comprising competition authorities of the CIS countries), Ukraine initiated the creation of a subgroup for investigating cartels. This subgroup will be headed by the representative of the AMC and will scrutinise the markets for grain, fuel, lubricants, cement and air carriers.

iii Outlook

Sectoral competition in the Ukraine has been dormant to date. One can only hope that the initiatives taken recently will pay off and foster public enforcement in various industries and thereby also lead to more effective competition in these sectors.

V STATE AID

i Preliminary remarks

Ukrainian legislation on state aid is fragmentary. There is no unified legal act but separate provisions, for example in:

a the Constitution;
b the Business Code;
c the Budget Code;
d the Competition Act;
e the Law of Ukraine 'On Antimonopoly Committee of Ukraine';
f annual state budgets of Ukraine, approved as a separate Law of Ukraine;
g Laws of Ukraine regulating establishment of special economic zones, territories of priority development, tax system, subsidies, subventions and other spheres; and
h international treaties.

The decisional practice of courts on state aid is insignificant and undeveloped. This can be attributed to the absence of a coherent legal framework. The criteria for providing state aid have not been clarified yet. In particular, investment projects that merit state aid have not yet been identified and sanctions for violating the conditions for receiving state aid have not been regulated clearly. Thus, most of the court's decisions are based on general administrative provisions regarding either misuse of powers by state authorities or breach of procedure of an adoption of such decision, but not on specific competition rules.

ii Significant cases

Below we summarise two cases that relate to state aid.

Zaporizhya City

The Zaporizhya City Council ('the City Council') adopted a decision which granted the Zaporizhya City Investment Agency ('the Agency') certain advantages on the market of external advertisement. The territorial office of the AMC found these advantages to infringe competition rules, because, inter alia:

a all companies that had not been registered as advertisement tax payers in the tax authorities of the city of Zaporizhya to install external advertisement constructions; and

b the City Council refused without reasons to permit or prolong installations of external advertisement.

The Supreme Commercial Court of Ukraine supported the position of the AMC in this case.

Lviv City Council

The Executive Committee of Lviv City Council adopted a decision on tariffs for water supply services. By way of this decision, the Executive Committee of Lviv City Council established different tariffs for different categories of customers. The Highest Economic Court of Ukraine concluded that such a decision was, inter alia, adopted in breach of the state aid provision. It held that the Executive Committee of Lviv City Council granted privileges to certain companies while others could not benefit despite the fact that they have the same rights on the market. Moreover, it continued by saying that according to the current competition legislation, the Executive Committee of Lviv City Council should have sought the AMC's approval in relation to its draft decision.

VI CONCLUSIONS

i Pending cases and legislation

Two changes to the current legislation are anticipated. First, the change of the Competition Act will predominantly affect the merger control regime in the Ukraine, but by amending the jurisdictional thresholds, fewer concentrations should be notifiable and thus more resources should be available for public enforcement of antitrust rules. Second, the proposed changes to the Criminal Code will likely have a deterrent effect. This, in combination with a strengthened leniency programme, will hopefully raise the level of public enforcement in Ukraine to a standard which is comparable with a level in other CEE jurisdictions.

It will also be interesting to see how the recent trend of higher fines will impact the currently pending cartel investigations.

ii Analysis

A modern competition law regime foresees that anti-competitive agreements that create countervailing efficiencies are valid with no prior decision by a competition authority needed and that companies that infringe the cartel prohibition are exposed to high fines with a deterrent effect. This description does not currently apply to Ukraine. The level of fines is far from having any deterrent effect and several industries are feared to lack effective competition. The notification system that is still in place also means that recourses of the AMC that could be used for the detection of cartels are absorbed by standard notification proceedings. Also, Ukraine lacks a coherent state-aid regime.

Ukraine has taken several steps to enhance public enforcement: one was the creation of the bid-rigging task force, another was the creation of a task force to investigate several industries. Probably the most important one will be the proposed criminal sanctions for individuals that were in charge of cartel infringements. It remains to be seen whether this will also be enforced. Further steps that are needed are the implementation of an effective leniency programme and last, but not least, a considerable increase in the amount of fines.

Chapter 34

UNITED KINGDOM

*Shaun Goodman and Neil Rigby**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

In the past year, the UK's competition and consumer authority, the Office of Fair Trading ('OFT'), has focused its resources on a limited number of cases in which it considers there to be a realistic prospect of establishing an infringement or an important reason for issuing a decision. This trend began during 2007 and has continued in 2008 with publication of the OFT's Prioritisation Principles.[1] These Principles set out four key considerations that the OFT will take into account in deciding whether to pursue an investigation:

a the likely impact on consumer welfare and efficiency or productivity were the OFT to intervene;

b the strategic significance of the case, taking account of the objectives set out in the OFT's annual plan, whether the OFT is best-placed to act (or whether private enforcement or regulatory intervention might be better suited to the case), and the impact of intervention on the OFT's portfolio of work;

c the likelihood of a successful outcome; and

d the resource implications for the OFT, both in absolute terms and in proportion to the anticipated benefits of the case.

As a result of these principles, the OFT has closed many long-standing cases without any finding of infringement, and has commenced far fewer investigations than in previous years. By way of illustration:

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1 OFT Prioritisation Principles, OFT953, October 2008.

a From 2004 to 2006, the number of investigations concluded by the OFT and sectoral regulators fell from more than 40 in 2004 to around 15 in 2006, with around 50 per cent of these terminated by way of 'case closure' (i.e., the investigation was terminated without the regulator reaching a decision one way or the other as to the existence of an infringement).

b In 2007, when the regulators began to focus resources more effectively, only 11 investigations were concluded, of which more than 80 per cent were terminated by way of case closure, reflecting the need to conduct some housekeeping and clear out older cases.

c In 2008, the regulators adopted a more focused approach with five investigations being concluded, only two of which were by way of case closure.

ii Enforcement agenda

The OFT's annual plan for 2009/10 confirms its intention to prioritise and focus its resources on 'high impact' cases involving serious misconduct. The OFT has stated that it is fully committed to using its criminal law powers to prosecute individuals for the cartel offence, and that cartel enforcement will remain a particular priority during the economic downturn. The OFT has also indicated that, in the current economic climate, it will aim to promote competition through a flexible regulatory response and will work with the government to identify priority sectors for future economic growth.

Financial services have been identified as a priority area for the OFT, and it is consulting on a financial services plan, to be published in June 2009, which will set out the OFT's approach to the application of competition law and consumer protection law across the financial services sector. This policy focus is likely to be of particular relevance during the economic downturn, although the OFT intends to publish a financial services plan every year in conjunction with its annual plan. The plan will also include an annual review of the impact that public ownership of Northern Rock and other banks is having on competition in the banking sector.

II CARTELS

i Significant cases

No cartel infringement decisions were issued by the OFT in 2008, although there were two significant developments: settlement agreements were reached with a number of undertakings under investigation; and for the first time criminal charges were brought for engaging in a cartel.

ii Settlements

The OFT announced that it had reached early settlement agreements with undertakings in two separate cartel investigations. These agreements were reached a few months after the OFT had issued statements of objections, and have allowed the OFT to focus its resources on the remaining undertakings still under investigation. In contrast to the practice of the European Commission, the OFT's approach to early settlement has not been formalised and remains somewhat flexible.

Tobacco products

On 11 July 2008, the OFT announced that it has reached early resolution agreements with certain tobacco manufacturers and retailers[2] in relation to pricing of tobacco products. Following a statement of objections in April 2008, a number of the undertakings under investigation admitted liability for breaching Chapter I of the Competition Act 1998 ('CA98') by agreeing to link the retail price of certain brands of tobacco to that of other brands, and (in relation to certain of the undertakings) by indirectly exchanging information regarding future pricing intentions.[3] The undertakings have agreed to pay fines of up to £173 million in total, although this may be reduced subject to the ongoing cooperation of parties throughout the remainder of the investigation and the OFT's determination of various leniency applications. The investigation is continuing against a number of other undertakings alleged to have participated in the infringement.[4]

Dairy products

In a separate case, the OFT reached similar early resolution agreements in December 2007 and February 2008 with several undertakings[5] in relation to allegations of price-fixing of dairy products.[6] Following a statement of objections in September 2007, several undertakings admitted liability for fixing the retail prices of milk, butter and cheese contrary to Chapter I CA98. The undertakings have agreed to pay fines of up to £120 million, although this may be reduced subject to the ongoing cooperation of parties throughout the remainder of the investigation. The OFT has indicated that one factor it took into account in reaching settlement agreements is that the infringements occurred in circumstances in which the companies were under considerable pressure to increase the prices paid to dairy farmers to support the domestic dairy industry. The investigation is ongoing against a number of other undertakings.[7]

iii Criminal proceedings

Marine hose

The first convictions under section 188 of the Enterprise Act 2002 (the cartel offence, which came into force in 2003) occurred in 2008. In June 2008, three individuals pleaded guilty to dishonestly participating in a cartel in the supply of marine hose in the United Kingdom.[8] (Separately, in January 2009 the European Commission imposed fines on the undertakings involved in the cartel.[9])

2 Asda, First Quench, Gallaher, One Stop Stores, Somerfield and TM Retail. Sainsbury's received full immunity.

3 OFT press release 82/08.

4 The Co-operative Group, Imperial Tobacco, Morrisons, Safeway, Shell and Tesco.

5 Asda, Dairy Crest, Safeway, Sainsbury's, The Cheese Company and Wiseman. Arla received full immunity.

6 OFT press release 170/07, OFT press release 22/08.

7 Lactalis McLelland, Morrisons and Tesco.

8 OFT press release 72/08.

9 IP/09/137, 28 January 2009.

The convictions followed plea agreements in the United States, whereby the individuals (all UK nationals who had been arrested while in the United States following a parallel investigation by the US Department of Justice) pleaded guilty to criminal charges in the United States and agreed to return to the United Kingdom to face UK charges and serve their sentences in UK jails. A condition of the plea arrangements was that any UK sentence would run concurrently, such that if the individuals received UK sentences that were shorter than their US sentences (which ranged from 20 to 30 months), they would need to return to the United States to serve any remaining portion.

At trial in the United Kingdom, the individuals received sentences of 30 to 36 months' imprisonment, together with director disqualification orders for five to seven years. These sentences were in fact longer than those imposed in the United States (which in turn had been the longest sentences ever imposed on foreign nationals for engaging in a cartel). Accordingly, in November 2008, the sentences were reduced on appeal to the same level that had been agreed in the US plea bargain agreement.[10] The Court of Appeal cited a range of factors to be taken into account when deciding the appropriate sentence, and noted that it may have reduced the sentences still further, having regard to the circumstances of the case and the fact that the UK cartel offence provided for a maximum sentence of five years' imprisonment as opposed to the 10 year maximum under US law.

Passenger fuel surcharge

Criminal charges were brought in a second case in August 2008, alleging that four senior managers from British Airways had dishonestly participated in a cartel by agreeing with Virgin Atlantic Airways a fuel surcharge applicable to long-haul passenger flights to and from the United Kingdom.[11] The investigation follows on from the OFT's August 2007 decision imposing record fines of £121.5 million (the largest fines yet imposed for breach of UK competition law) on British Airways for participation in the cartel. Following its successful application for full immunity, the OFT has not imposed fines on Virgin Atlantic or brought criminal charges against its executives.

Norris extradition

In March 2008, the House of Lords held that, absent 'aggravating circumstances', individuals who have participated in price-fixing cartels prior to the introduction of the cartel offence in June 2003 are not liable to be extradited to the United States to face criminal charges for participation in a cartel, as the conduct does not constitute an extraditable offence under the Extradition Act 2003.[12] As a corollary, extradition will be possible for participation in price-fixing cartels post-June 2003.

Ian Norris, a former chief executive of Morgan Crucible, was indicted in the United States on criminal charges for his role in Morgan Crucible's participation in a price-fixing cartel for carbon products, and on charges of conspiring to obstruct the

10 *R. v. Whittle & Ors* [2008] EWCA Crim 2560.

11 OFT press release 93/08.

12 *Norris v. Government of the United States of America & Ors* [2008] UKHL 16.

investigation. The cartel is alleged to have occurred from 1989 to 2000, thus before the entry into force of the UK cartel offence. The Home Secretary acceded to the US request for extradition in September 2005, following which Ian Norris challenged the extradition order. At the High Court, Norris argued that he had not committed an extraditable offence as his conduct had occurred prior to the entry into force of the cartel offence, while the US government argued that participation in a cartel amounted to the common law offence of conspiracy to defraud and thus constituted an extraditable offence. The High Court ruled that the common law offence of conspiracy to defraud extended to cover an agreement dishonestly to fix prices so as to cause prejudice to others, and that the introduction of the cartel offence did not preclude price-fixing from being regarded as a common law criminal offence.

On appeal, the House of Lords held that, under the Extradition Act 2003, an individual should be liable to extradition to face criminal charges abroad only where his or her conduct would have constituted a criminal offence had it occurred in the United Kingdom. Participation in a price-fixing cartel did not constitute a criminal offence in the United Kingdom prior to the entry into force of the cartel offence in June 2003, as the common law criminal offence of conspiracy to defraud required additional aggravating elements (such as fraud, misrepresentation, violence or intimidation), which are not typically present in a cartel and which were absent in the instant case. Indeed, the House of Lords noted that no individual or company had ever been criminally prosecuted in the UK for conspiracy to defraud on the basis of a price-fixing cartel. However, the House of Lords further held that the allegations of obstruction could be considered an extraditable offence, as the conduct would constitute a criminal offence in the United Kingdom. The matter was remitted to the Magistrates' Court for consideration as to whether an extradition order on a secondary charge of obstruction would be consistent with Norris's human rights under the European Convention of Human Rights given that extradition under the primary charge was not permitted. Following a judgment of the Magistrates' Court that extradition could proceed and an order by the Home Secretary authorising extradition, Norris has further appealed.

Pharmaceuticals price-fixing case

In July 2008, the criminal case being pursued by the Serious Fraud Office ('SFO') against five UK pharmaceutical companies and nine individuals for conspiracy to defraud in relation to the pricing and supply of certain drugs to the National Health Service collapsed after the Court of Appeal declined to hear an appeal against the Crown Court's refusal to allow the SFO to amend its indictment.[13]

Since 2006, the SFO had been pursuing criminal proceedings against certain individuals and companies alleged to have fixed the prices of warfarin, the branded drug Marevan, and penicillin-based antibiotics to the National Health Service between January 1996 and December 2000. As this alleged conduct pre-dated the entry into force of the cartel offence in June 2003, the SFO brought the case on the basis of the common law offence of conspiracy to defraud. Following the ruling of the House of Lords in the

13 *R v. GGPlc (No.2)* [2008] EWCA Crim 3061.

Norris case (discussed above), which held that aggravating factors were required before price fixing could amount to the offence of conspiracy to defraud, the defendants sought to quash the indictment, but were unsuccessful in the Crown Court and in the Court of Appeal. On further appeal to the House of Lords (heard concurrently with the *Norris* appeal), the indictment was held to be defective, as it assumed, contrary to *Norris*, that price fixing alone was dishonest in itself and sufficient to establish a conspiracy to defraud. However, the House of Lords remitted the case to the Crown Court for a decision whether to allow the indictment to be amended. The Crown Court refused to grant leave to amend – effectively signalling the end of the case – and the SFO sought leave to appeal to the Court of Appeal.

The Court of Appeal refused to grant leave to appeal and handed down an atypically detailed judgment explaining its reasons for so doing. The court noted that the proposed amended indictments contained more detail regarding the alleged aggravating factors over and above price fixing, including allegations of secret price increases; deception in the form of variations to the price increases to hide the fact that they were the result of a price-fixing agreement; deceiving the Secretary of State for Health by submitting collusive prices and misrepresenting that the prices were the result of competition; and providing false explanations for apparent shortages of medicines.

The Court of Appeal agreed with the Crown Court that it was not clear how the alleged aggravating factors constituted the 'positive deception' needed to sustain a charge of conspiracy to defraud, rather than merely steps taken to maintain the secrecy and deception inherent in the price-fixing cartel, which would not be sufficient to establish the offence. In considering this difficultly when exercising its discretion to refuse to allow amendment of the indictment, the Crown Court had held that it would not have been in the interests of justice for a jury to be called upon to consider the obscure dividing line between deception as a mere adjunct to the cartel, and positive deception constituting a criminal offence. The Court of Appeal agreed, holding that this was a permissible exercise of the judge's discretion and that there had been no misdirection as to the law.

iv Trends, developments and strategies

The OFT has taken a number of steps in 2008 that highlight its intention to provide greater incentives for individuals and companies to cooperate to enhance detection of cartels and streamline its enforcement efforts, while at the same time increasing the pressure on individuals who participate in cartels.

First, to encourage detection of cartels, in February 2008 the OFT introduced an innovative scheme whereby it will pay individuals up to £100,000 for accurate, verifiable information that is of value to the OFT in leading to the identification and prosecution of cartels. The scheme is intended to protect the anonymity of informants and will initially operate on a trial basis for 18 months. The OFT will have wide discretion in assessing the amount of payment, and will take into account the value of the information, the economic harm that has been avoided, and the risk taken by the informant to provide the information. Payments will be made at the end of the investigation when the usefulness of the information may be determined. Individuals directly involved in the infringement will not normally be eligible, although such individuals may approach the OFT in the context of its programme for individual amnesty from criminal prosecution.

Second, in December 2008, the OFT clarified aspects of its leniency policy for undertakings and individuals by publishing revised guidance on the handling of applications for corporate leniency from fines and for individual 'no-action' letters in relation to criminal prosecution. This updates the draft issued in November 2006 and provides further guidance on the information needed to perfect a 'marker' (to hold a place in the queue), on 'Type B' applications (i.e., where there is a pre-existing investigation), on the circumstances in which a criminal investigation might be pursued, and on a number of procedural issues.

Third, as noted above, the OFT has used early settlement agreements in relation to two investigations in 2008 (*Tobacco Products* and *Dairy Products*) as a means of rewarding cooperation and making more effective use of its resources. This is a continuation of the OFT's earlier efforts to encourage settlement. In *Independent Schools*[14] in 2006, the OFT reached a settlement with a number of schools that admitted infringement. In its ongoing investigation into bid rigging in the construction industry, the OFT in 2007 announced that while it would no longer accept leniency applications, it would offer reduced fines in exchange for an admission of guilt and cooperation from companies under investigation to 'fast-track' such cases.[15]

Finally, as also noted above, the OFT has now begun to use its criminal enforcement powers against individuals involved in cartel activity and has indicated that it continues to see criminal investigations as an important enforcement tool.

v *Outlook*

The OFT has indicated that cartel investigation will remain a priority during the economic downturn. In a speech at the start of 2009, John Fingleton, CEO of the OFT, emphasised that '[i]t is important that we are vigilant to the potential rise of cartels in a recession, and have the resources to respond to a rise in immunity applications' and that 'achieving early resolution of cases may be a useful way to increase efficiency, and free up resources to address other issues.'[16] The OFT is continuing its investigations in a number of alleged cartels. Investigations in the tobacco products and dairy products cases are ongoing in respect of alleged participants that have not already reached settlements with the OFT. The OFT is conducting a major investigation into the largest-ever cartel in the UK in respect of collusive tenders in the construction industry, and the SFO is also conducting its own criminal investigation into collusive tendering, suggesting that further criminal charges may be expected.

14 OFT decision (CA98/05/2006).

15 OFT press releases 49/07 and 50/07.

16 'Competition Policy in Troubled Times', speech by John Fingleton, 20 January 2009, p.15.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Few competition decisions were adopted in 2008, and most of these originated from sectoral regulators rather than the OFT. Interestingly, all these cases involved application of the abuse of dominance provisions of Chapter II of the Competition Act 1998 'CA98'/Article 82 EC rather than the provisions on restrictive agreements under Chapter I CA98/Article 81 EC.

Cardiff Bus

The only decision adopted by the OFT in 2008 concerned its finding that Cardiff Bus had engaged in predatory conduct contrary to Chapter II CA98 by intentionally sustaining losses in the short term to eliminate competition from a new entrant, 2 Travel.[17] Following entry by 2 Travel with a 'no-frills' service on selected routes on which Cardiff Bus was already present, Cardiff Bus launched its own lower priced no-frills service which supplemented its existing services on those routes, and which were scheduled to arrive a few minutes before the 2 Travel services. The OFT found that normal and no-frills bus services competed, and that Cardiff Bus faced little effective competition and was dominant. As to abuse, the OFT concluded that Cardiff Bus had launched its own no-frills service solely for the purpose of eliminating 2Travel. The new service generated revenues far below avoidable costs, and the evidence as a whole gave rise to a strong inference of exclusionary intent. In the circumstances of the case, the OFT held that it was not necessary to prove the possibility of recouping losses, although it noted that Cardiff Bus had increased its fares by around 40 per cent following 2Travel's exit from the market. However, having found Cardiff Bus guilty of abusing its dominant position, the OFT declined to impose penalties. This is because conduct of minor significance (i.e., where the undertaking has a turnover of less than £50 million[18]) benefits from immunity from fines pursuant to section 40 CA98 and Cardiff Bus fell into this category. While the OFT may remove this immunity in appropriate cases, it chose not to do so in this instance.

National Grid

The Gas and Electricity Markets Authority ('Ofgem') issued the only decision imposing fines for infringement, fining National Grid £41.6 million in February 2008 for breaching the Chapter II prohibition of the CA98 and Article 82 EC by imposing restrictive terms in its long term supply and maintenance contracts for domestic gas meters.[19] National Grid is a former monopoly gas transporter. Historically, National Grid provided and maintained all domestic gas meters in Great Britain as part of its regulated monopoly over gas transmission. Following liberalisation, gas suppliers are no longer compelled to

17 *Abuse of a dominant position by Cardiff Bus*, OFT decision dated 18 November 2008.

18 Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000, SI 2000/262.

19 *Investigation into National Grid (formerly known as Transco)*, decision of the Gas and Electricity Markets Authority dated 21 February 2008.

obtain gas meters from National Grid, as they may instead choose to own gas meters directly or lease or rent them from third parties. When the market was liberalised, National Grid introduced new long-term supply contracts, which bundled meter provision and maintenance, and which contained early replacement charges designed to limit the proportion of meters that a gas supplier could replace without paying penalties.

Ofgem found that National Grid was dominant in the market for the supply and maintenance of domestic gas meters in Great Britain (National Grid's share remained around 90 per cent following liberalisation). It considered that the long-term contracts offered by National Grid were an abuse of this dominant position. The contractual terms foreclosed competitors by imposing switching costs which deterred gas suppliers from switching anything but a very small percentage of meters, as a higher rate of switching would incur penalty payments that would likely exceed any economic benefit obtained from switching. Such terms were not objectively justifiable because they were not regarded as a proportionate means of recovering the sunk costs associated with the installation of meters that National Grid had incurred prior to liberalisation. Ofgem imposed a fine of £41.6 million, equal to around 4 per cent turnover in the relevant market, multiplied by four to reflect the four years during which the infringement persisted.

National Grid has appealed this decision to the CAT[20] on the basis that the market definition was incorrect (in that it should have excluded legacy meters installed prior to liberalisation), that National Grid was not dominant, had not committed an abuse, that the fine was excessive and disproportionate, and that the directions to end the infringement were unlawful. The appeal was heard in January 2009 and judgment is awaited.

Albion Water

In May 2008, the Court of Appeal dismissed an appeal brought by Dwr Cymru and upheld the judgment of the Competition Appeals Tribunal ('CAT') finding that Dwr Cymru was dominant and that it had abused that dominance by imposing a margin squeeze for the prices charged to Albion Water for common carriage of water.[21]

The Water Services Regulation Authority ('Ofwat') had found that Dwr Cymru had not infringed Chapter II CA98 by charging excessive prices and imposing a margin squeeze in respect of the prices charged to Albion Water for the common carriage of water. Albion Water appealed this decision to the CAT. In several judgments in 2006, the CAT found that Ofwat had made a number of errors in its assessment of these issues. In relation to dominance, Ofwat had proceeded on the assumption that Dwr Cymru was dominant, but this assumption was not considered in much detail as Ofwat found that there was no abuse. The CAT held that Dwr Cymru was dominant, and that Dwr Cymru had committed an abuse by engaging in a margin squeeze. This was the subject of the appeal to the Court of Appeal. The question whether there had been excessive pricing was remitted to Ofwat and subsequently considered by the CAT (see further below).[22]

20 *National Grid plc v. Gas and Electricity Markets Authority*, case 1099/1/2/08.

21 *Dwr Cymru Cyfyngedig v. Albion Water Ltd & Anor* [2008] EWCA Civ 536.

22 *Albion Water Limited v. Water Services Regulation Authority* [2008] CAT 31.

In relation to the margin squeeze allegation, Dwr Cymru, which had intervened in support of Ofwat, obtained leave to appeal to the Court of Appeal on the questions whether the CAT had applied the correct test for a margin squeeze, and whether the CAT had the jurisdiction to make a finding of dominance in circumstances where Ofwat had not made any such finding and had not issued a statement of objections to Dwr Cymru. The Court of Appeal upheld the judgments of the CAT on both issues. In relation to margin squeeze, the Court reviewed prior EC and UK cases on this issue and held that the CAT had applied the correct test. In particular, the court noted that, while the prior cases referred to both an 'equally efficient competitor' and a 'reasonably efficient competitor', and appeared to be moving towards the former, the CAT had considered both tests. In doing so, the court rejected the argument of Dwr Cymru and Ofwat that a margin squeeze implied two additional elements, namely, the need for the downstream competitor to add value by transforming the products or services supplied, and the need for the upstream supplier to avoid costs associated with such transformative activity. Such issues should rather be considered as part of the inquiry into whether the conduct could be objectively justified. In relation to jurisdiction, the court held that the CAT was entitled to make a decision that the regulator could make, if still seised of the matter, and that this power did not impose on the CAT the provisional requirements that applied to the regulator, such as the requirement to issue a statement of objections.

In relation to the excessive pricing allegation, Ofwat's report for the CAT calculated Dwr Cymru's costs for the services to be provided to Albion Water according to three different methodologies (average accounting cost plus, long-run incremental cost, and local accounting cost). Ofwat concluded that the price quoted to Albion Water exceeded these costs by a material extent, but held that there was insufficient evidence that the excessive price was abusive. The CAT explained its approach to excessive pricing: it is first necessary to calculate the costs reasonably attributable to the services provided; the difference between those costs and the price must be excessive; and the excessive price must bear no reasonable relationship to the economic value of the service provided and must be abusive, such that it is unfair either in itself or when compared to competing products. As explained below, the CAT held that the prices quoted by Dwr Cymru were excessive and constituted an abuse of its dominant position.

As to the level of costs, the CAT held that, while it was appropriate to calculate costs using a variety of methods to reduce the risk of false positives, the estimates should be realistic, having regard to the fact that Dwr Cymru benefited from the use of fixed assets that had been acquired from a former state monopoly at a substantial discount. The CAT therefore found that one method (long-run incremental costs) was not appropriate in the circumstances and that certain cost items should not have been included. The CAT further held that the difference between costs and price was excessive, as the prices quoted by Dwr Cymru were at least 47 per cent higher (depending on methodology) than the costs reasonably attributable to the services provided.

As to whether the price was unfair and constituted an abuse, the CAT held that, as the services had economic value to Albion Water only if it could provide water at a retail price that was competitive with Dwr Cymru's prices, and as Dwr Cymru could reduce its retail prices to the level of its own costs, the economic value of the services was not significantly more than the cost of providing them. As to whether this was unfair, the CAT held that while it could not be determined whether the price was unfair when compared with competing products (as there was no suitable comparator), the price was unfair in itself because it was substantially higher than the economic value of the service and had been set by a monopoly dominant undertaking that was unconstrained by the competitive process. Moreover, the price placed Albion at such a disadvantage that its ability to compete would have been significantly compromised and its customers would have been denied a potential choice of supplier.

BT NTS call termination charges

In August 2008, the Office of Communications ('Ofcom') published a decision in which it found that BT had not infringed Chapter II/Article 82 in relation to the pricing of NTS call termination (i.e., charges for termination to non-geographic numbers prefixed by 08 and 09).[23] Cable & Wireless Communications had complained to Ofcom that price increases for NTS call termination on certain number rates imposed an unlawful margin squeeze, were excessive and discriminatory. Ofcom found that, despite BT's share of NTS call termination being only 31 per cent, BT should be regarded as dominant given the existence of barriers to expansion by competitors, and the inability of competitors and customers to constrain BT's pricing for NTS call termination. However, Ofcom concluded that there was insufficient evidence to establish that BT had committed an abuse.

There was no evidence of a margin squeeze as BT's retail margins were sufficient to allow an equally efficient or a reasonably efficient downstream competitor to compete. There was no evidence of price discrimination because, to the extent that such conduct might be regarded as an abuse, it would entail the same analysis as that required to determine a margin squeeze, i.e., whether BT would be able to make a profit had it been required to pay the same charges that it levied on its competitors. Finally, Ofcom found no evidence of excessive pricing. The evidence in relation to BT's pricing compared to its costs was contradictory and inconclusive in this respect when compared on two different bases (fully allocated costs and stand-alone costs). As there was no evidence that prices were excessive, no abuse could be made out. Ofcom nonetheless noted that, while it considered that BT's pricing had increased its revenue at the expense of its competitors, this in itself was not an abuse and there was no evidence that the pricing had distorted competition or had an adverse effect on consumers.

ii Trends, developments and strategies

Two significant trends in antitrust enforcement can be identified in 2008. First, as is evident from the cases discussed above, sectoral regulators have become an important source of competition law enforcement. In contrast to earlier years, cases brought by sectoral regulators accounted for most of the CA98 decisions, and account for most CA98 appeals currently pending before the CAT. As these cases arise in regulated industries, which often have large incumbent providers that were formerly state monopolies, they generally entail detailed consideration of alleged abuses of dominance and are therefore of general application across all industries. This wider relevance is reinforced by the fact

23 Ofcom decision *NCNN 500*.

that many such cases have resulted in appellate judgments from the CAT and the Court of Appeal.

Second, as noted above, the OFT is now focusing its resources on a much smaller number of more significant cases. This strategy reflects an intention on the part of regulators to exercise greater discretion in deciding whether to open investigations in order to use resources effectively. A recent judgment of the Administrative Division of the High Court in *Cityhook* affirmed the OFT's discretion in this respect.[24] The complainant Cityhook had sought judicial review of the OFT's decision to close a long-standing investigation on the basis of administrative priorities. The court was highly critical of the OFT's conduct in the case, during which the OFT had investigated for four years, had almost decided to issue a statement of objections, but then changed its mind and closed the case for reasons that the court considered were less than convincing. Nevertheless, the court held that it was necessary for the OFT to have the discretion to set administrative priorities and close cases to be able to function properly.

iii Outlook

The OFT may be expected to continue its emphasis on case prioritisation and on focusing its resources on 'high impact' cases, including cartel enforcement and criminal prosecutions. The OFT has also indicated that it will be vigilant to potential infringements during the economic downturn, such as the risk of increased cartelisation. Perhaps the most significant pending cases are the investigations into the multilateral interchange fees levied by MasterCard and Visa in their respective credit card networks. Both cases have been running for some time and are likely to be conducted in close cooperation with the European Commission, which has also been investigating these practices at a European level, reaching a prohibition decision against MasterCard in 2007 (and accepting undertakings from MasterCard in April 2009) and opening proceedings against Visa in 2008.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

BAA airports inquiry

In December 2008, the Competition Commission ('CC') published its provisional decision on remedies in its investigation into the UK market for the supply of airport services by BAA Limited ('BAA').[25] The CC's final report, published in March 2009, largely upholds the conclusions of the provisional decision on remedies, with some minor amendments.[26] The CC concluded that BAA must divest Stansted, Gatwick and either Edinburgh or Glasgow airports. It also imposed a behavioural remedy on BAA

24 *R (on the application of Cityhook Limited) and Cityhook (Cornwall) Limited v. Office of Fair Trading* [2009] EWHC 57 (Admin).

25 BAA Airports Market Investigation, Provisional Decision on Remedies, 17 December 2008.

26 BAA Airports Market Investigation, Final Report, 19 March 2009.

to provide information and consult in relation to capital expenditure plans at Aberdeen airport, and made recommendations to the CAA (to strengthen capital expenditure consultation and service quality requirements) and to government (to adopt a new regulatory regime for airports and reconsider its air transport policy in light of the anticipated divestitures).

The CC found that common ownership of airports by BAA resulted in an adverse effect on competition, and therefore required divestitures to provide for separate ownership of Heathrow, Stansted and Gatwick airports, and the divestiture of either Edinburgh airport or Glasgow airport. Divestitures were considered necessary because alternatives (e.g., regulatory intervention or behavioural remedies) would be insufficient to create the competitive rivalry arising from separate ownership.

As to the choice of airports to be divested, the CC concluded that the divestiture of Stansted and Gatwick would be appropriate, as this would be less restrictive on BAA than a divestiture involving Heathrow. The CC rejected BAA's proposal to divest only Gatwick – for which BAA has already begun the divestiture process – as it considered that this would fail to address the lack of competition between Heathrow and Stansted, which it believed would emerge under separate ownership of those two airports. The CC also concluded that, while divestiture of Edinburgh airport might potentially be preferable to divestiture of Glasgow airport, the evidence in support of this preference was insufficiently strong to deny BAA the choice of which to divest.

In considering whether the proposed divestitures would be proportionate to the harm they aimed to remedy, the CC found that the long-standing problems stemming from common ownership were a structural feature of the market that required a structural remedy. The CC noted that the cost to BAA of separating ownership would be relatively small as a proportion of the market value of the airports, that the current owners of BAA (the Ferrovial consortium) had acquired BAA after the OFT had announced its intention to conduct a market study into BAA in which common ownership of airports was an issue, and that divestiture would be expected to result in substantial customer benefits that would considerably outweigh the costs of divestiture.

The CC considered whether to impose behavioural remedies to address the fact that Heathrow would be likely to retain significant market power because of its status as the only significant hub airport in the south-east of England, and that Stansted and Gatwick might also retain significant market power until such time as the divestitures were completed and competition emerged. The CC concluded, however, that it would be more appropriate to recommend that the Civil Aviation Authority (the sectoral regulator for the aviation industry) use its existing regulatory powers to strengthen information and consultation processes in relation to capital expenditure, and to strengthen provisions on service quality. The intention is to improve the extent to which BAA will be required to consult with airlines regarding the operation and development of the airport, and to restrict the extent to which BAA may provide airport facilities or services to one customer that might have a significant competitive impact on other airlines for a significant length of time.

Divestiture was not regarded as an appropriate remedy for the significant lack of development at Aberdeen airport, as such concerns stemmed from its being a natural monopoly rather than from common ownership. While the CC had proposed a price cap and customer rebate to reduce charges to a level more comparable to other airports, further consultation suggested that this might reduce incentives for capital investment. Instead, the CC required BAA to publish certain financial information concerning Aberdeen airport, and to consult with airlines and other stakeholders on its capital expenditure plans.

Finally, the CC made recommendations concerning the future shape of economic regulation of airports and air transport policy, noting that the existing system of airport regulation, put in place more than 20 years ago at the time of the privatisation of BAA, was inadequate, inconsistent with the approach taken in other regulated sectors, and distorted competition. The CC, whose approach was largely consistent with that of an independent panel currently advising the Department for Transport on a new regulatory regime, recommended that the government adopt a flexible licence-based regime, an important focus of which would be the promotion of competition between airports (having regard principally to the interests of consumers, with an ancillary duty to have regard to airlines), that legislation be amended to permit terminals to be operated separately from runway facilities, and that its role be changed to that of an appellate body to which airports, airlines and passenger groups may appeal. The CC also recommended that the government take into account the impending divestiture of Stansted and Gatwick in its air transport policy statement, particularly to ensure that government policy does not unduly restrict scope for competition from Gatwick post-divestiture.

Supply of groceries

In April 2008, the CC published its final report in its investigation into the supply of groceries.[27] The CC considered the effectiveness of competition within three main product markets for the supply of groceries: larger grocery stores (larger than 1000-2000m^2), larger and mid-sized grocery stores (larger than 280m^2) and all grocery stores (including convenience stores). Geographic markets were found to be local, defined by drive time (5-10 minutes, or 10-15 minutes, depending on store size).

A number of potential issues that had featured prominently in the inquiry were found not to be problematic from a competition perspective, including the cost advantages of larger retailers, the entry of larger retailers into the convenience store sector, the risk of coordination between retailers (although the OFT subsequently found that retailers had engaged in cartels, as noted above), and a number of policy issues such as the impact of large retailers on local communities and on sustainable farming in the UK.

In respect of larger grocery store markets, the CC also found that the planning regime acted as a barrier to entry and expansion by limiting the construction of new stores while making it somewhat easier for existing stores to expand, thereby strengthening the position of incumbents. In respect of both larger and larger/mid-sized grocery store markets, the CC found that there was a high level of concentration in many local markets (defined as areas having three or fewer fascias, one of which accounted for more than 60 per cent of sales in the local area) and that prices would be expected to be higher in those areas. The CC also found that incumbent suppliers in these concentrated markets often controlled the use

27 Market investigation into the supply of groceries in the UK, Final Report, 30 April 2008.

of land (e.g., by use of restrictive covenants) to deter entry by competitors on potential sites for new stores. In the overall grocery store markets, the CC found that certain retailers used their buyer power to make retrospective changes to the terms of supply, thereby transferring excessive risks and unexpected costs to their suppliers.

To remedy these adverse effects, the CC intends to seek undertakings from retailers to release restrictive covenants on land (and not impose any additional restrictions), and has recommended that, in respect of land agreements by retailers that restrict competition, the government lift the existing exemption from the CA98 set out in the Land Agreements Exclusion Order. More controversially, the CC also recommended that planning rules be amended to include a 'competition test' for larger grocery store developments, whereby new stores or extensions in areas with three or fewer fascias would not be permitted if the developer accounted for 60 per cent or more of local sales, unless the benefits to the local area would outweigh the competitive detriment and the development would not occur without the involvement of the retailer that had failed the test. The purpose of this test was to prevent large incumbents from expanding, thereby providing opportunities for entry or expansion by competitors. Finally, the CC recommended the establishment of a code of practice and an ombudsman to address effects within the supply chain. The government has indicated that it is considering the recommendations to amend the planning regime and the land agreements exclusion, but has not yet taken any action. As regards the proposed competition test in the planning regime, Tesco appealed to the CAT, which held in March 2009 that the CC had failed to consider certain matters that were relevant to whether the competition test would result in detrimental economic effects or was a proportionate remedy.[28] The CC will therefore need to reconsider this issue, although no determination has yet been reached.

Rolling stock leasing

In August 2008 the CC published its provisional findings in its market investigation into passenger rail rolling stock leasing.[29] The reference had been made in 2007 by the Office of the Rail Regulator. Following rail privatisation, passenger rail rolling stock fleets are predominantly owned by three rolling stock leasing companies (each accounting for around one-third of rolling stock), and are leased to train operating companies that have successfully bid for a rail franchise following a competitive tender by the government. The success of bids is largely driven by the amount of subsidy the train operating company requires, and rolling stock leasing represents a significant proportion of the franchise's costs. Despite the importance of rolling stock leasing costs, there is very little switching by train operating companies and competition seemed to be less developed than had been hoped following privatisation. The government therefore requested the Office of the Rail Regulator to refer the market to the CC.

The CC held that a number of features of the market for the leasing of passenger rail rolling stock for franchised services restricted competition. First, there is a shortage of alternative rolling stock solutions. Technical and operational factors often mean that

28 *Tesco plc v. Competition Commission* [2009] CAT 6.

29 Rolling Stock Leasing Market Investigation, Provisional Findings Report, 7 August 2008.

there is no alternative to the incumbent fleet used on the franchise. This is exacerbated by a general shortage of rolling stock, and by the timing of franchise re-letting, as bids and re-letting often occur when other potential fleets of rolling stock are being used in other franchises. Second, there are considerable costs and risks associated with switching to new fleets that discourage train operating companies from switching at the time they bid for franchises. Moreover, the criteria specified by the government for the award of franchises (e.g., the criteria may specify service requirements that limit scope for choice, or may not allow for the costs of fleet upgrades), and the short duration of franchises (typically seven years), which restricts the scope for payback within the franchise period, limit the benefits of switching and thereby remove incentives for train operating companies to switch to different fleets.

In December 2008, the CC published its provisional decision on remedies,[30] in which it recommended that the government consider granting longer franchises, take account of the benefits of rolling stock beyond the duration of the franchise, and impose more flexible rolling stock specifications. To enhance the ability of train operating companies to negotiate competitive terms for leasing, the CC also proposed to require leasing companies to provide greater information to train operating companies, and to allow leasing companies to offer different terms to different train operating companies by removing the existing obligation to offer the same terms to all. The CC's final report is pending.

Ofcom spectrum auction

In December 2008, the Court of Appeal dismissed appeals brought by T-Mobile and O2 against a judgment of the CAT that had held that it did not have jurisdiction to hear appeals from an Ofcom decision on the conduct of auctions for radio spectrum.[31] In April 2008, Ofcom had issued a decision describing how it proposed to proceed with an auction for radio spectrum. T-Mobile sought to appeal that decision on the basis that Ofcom should first have decided how it would deal with the liberalisation and possible re-auctioning of other spectrum ranges before conducting the auction. O2 sought to appeal on the basis that Ofcom implicitly rejected the possibility of conducting a split auction for the spectrum ranges being auctioned. The CAT held that, while a range of Ofcom decisions could be appealed to the CAT under section 192 of the Communications Act 2003, Ofcom's decision (to which effect would be given by regulations under the Wireless Telegraphy Act 2006) in this instance was excluded from this jurisdiction. Instead, the decision could be challenged in the Administrative Court by way of judicial review. The Court of Appeal upheld the CAT judgment and dismissed the appeal. The court held that, while Article 4 of the Framework Directive[32] required that Member States provide for the possibility of appeal on the merits in this circumstance, the means by which this was done was within the discretion of the Member State. The court further held that judicial review

30 Rolling Stock Leasing Market Investigation, Provisional Decision on Remedies, 16 December 2008.

31 *T-Mobile (UK) Ltd & Anor. v. Office of Communications* [2008] EWCA Civ 1373.

32 Directive 2002/21, 2002 OJ L 108/33.

could provide a full merits investigation where required, that appropriate expertise could be ensured by having a chancery judge – who may sit in the CAT – sit in the Administrative Court to conduct the judicial review, and that Parliament had not intended these quasi-legislative functions of Ofcom to be subject to an appeal to the CAT.

Directory enquiry services data

In November 2008, the CAT upheld appeals against an Ofcom decision relating to BT's charges for directory enquiry data.[33] To facilitate competition in the provision of directory enquiry services, BT is subject to two relevant conditions under the regulatory framework: General Condition 19 ('GC19'), which obliges BT to provide data on its own subscribers to any third party wanting to offer directory enquiry services; and Universal Service Condition 7 ('USC7'), which obliges BT to collect subscriber data from all communications providers, aggregate the data into a database, and provide access to that database to any third party wanting to offer directory enquiry services (in effect, aggregating the data that each provider must provide under GC19). In both instances, BT must provide data on fair, reasonable and non-discriminatory terms. Directory enquiries companies Conduit and The Number complained to Ofcom that BT's charges for the data were inconsistent with these obligations.

Ofcom held that USC7 was unlawful because it failed to impose on BT an obligation to provide directory enquiry services to end-users at the retail level, which Ofcom considered to be in breach of the obligation under Article 5 of the Universal Services Directive for Member States to ensure the provision of directory enquiry services to end-users.[34] The fairness of the pricing under USC7 was therefore not an issue, as USC7 was regarded as unlawful. Ofcom further held that the prices charged for BT subscriber data were consistent with GC19. Conduit and The Number appealed to the CAT, seeking a declaration that USC7 was lawful and an order remitting the case to Ofcom.

On appeal, the CAT held that USC7 was lawful. The CAT held that BT had been designated as a universal service operator under Article 8 of the Directive, and that USC7 identified the specific services BT was designated to guarantee. The combined effect amounted to a designation for BT to guarantee the provision of directory enquiry services, consistent with the terms of Article 5 of the Directive. To ensure compliance with this obligation, BT was not obliged to provide directory enquiry services itself; rather, BT could choose to do so, or it could provide aggregated directory enquiry information to third parties who would provide the services; in either instance, BT would be guaranteeing the provision of the services, consistent with Article 5. In this circumstance, the terms of USC7 were lawful and consistent with Article 5, and were also consistent with the domestic regulatory framework by which Ofcom was entitled to impose conditions on universal service providers that it regarded as appropriate to ensure compliance with the universal service obligation. The CAT therefore remitted the case back to Ofcom for reconsideration on the basis that USC7 is lawful. Ofcom's reconsideration is pending.

33 *TheNumber (UK) Limited and Conduit Enterprises Limited v. Office of Communications* [2009] CAT 33.

34 Directive 2002/22, 2002 OJ L 108/51.

Number portability

In September 2008, the CAT upheld an appeal against a decision by Ofcom that had required mobile telephone operators to modify arrangements for number portability to facilitate consumers switching between networks.[35] Number portability is mandated by Article 30 of the Universal Services Directive and General Condition 18. At present, customers switching networks continue to have calls routed through their original network in the first instance and subsequently re-routed to their new network. In reviewing General Condition 18, Ofcom concluded that a common database of telephone numbers should be established to enable direct routing of calls, and that the process of mobile number porting should be driven by the new network and should occur within no more than two hours. Ofcom also set deadlines within which this new system should be established. Vodafone, supported by other mobile networks as interveners, appealed against this decision to the CAT on the basis that Ofcom had failed to take into account sufficient evidence and failed to properly conduct an analysis of the likely costs and benefits associated with establishing its proposed system.

The CAT held that, in conducting an appeal on the merits of Ofcom's decision, the CAT would conduct its review in a 'profound and rigorous manner' to determine whether Ofcom's decisions were correct. While the specialist nature of Ofcom meant that the CAT may be slower to intervene where there were a range of reasonable responses open to Ofcom, even in those instances Ofcom was required to conduct a cogent analysis and reach reliable conclusions. The CAT held that, in this instance, that standard had not been met and Ofcom's assessment was inadequate. The CAT found that Ofcom had failed properly to consider the potential costs associated with the new database and direct routing system that it proposed: Ofcom had provided insufficient information as to the technical nature of its proposed system to enable proper market testing; it had failed to allow for additional costs that might accrue; and to take account of the cost implications of interoperability standards that had been adopted by the industry; and its sensitivity analysis was not sufficient properly to test the accuracy of its conclusions. Ofcom had also failed properly to assess the benefits that it alleged would result from its proposals: it had not attempted to assess the probability of network failure or its adverse effects – the prevention of which was said by Ofcom to be the principal objective behind its proposals – and had failed properly to assess alleged efficiencies and cost savings. Ofcom's reasoning was therefore flawed such that the correctness and reliability of its conclusions was in doubt. In response to the CAT judgment, Ofcom has set aside these proposed changes to General Condition 18.

ii *Outlook*

There are a number of important ongoing sectoral investigations that are likely to be completed in the near future. For example, Ofgem is consulting on proposed remedies to address concerns identified in its Energy Supply Probe in respect of competition in the retail supply of gas and electricity to households and small businesses, and has indicated that it may make a market investigation reference to the CC if it is unable to

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35 *Vodafone v. Office of Communications* [2008] CAT 22.

agree appropriate undertakings with energy suppliers. Ofcom is currently conducting its second consultation regarding access to premium content in the pay-TV sector, and in particular as to whether it should impose a wholesale supply obligation on Sky or make a market investigation reference to the CC. The OFT completed its market inquiry into personal current accounts in July 2008 and is consulting on appropriate next steps to remedy its concerns in relation to the use of less visible fee elements such as charges for insufficient funds, and will consider whether to make a market investigation reference to the CC.

Sectoral regulators are also assessing how they might adapt their existing regulatory frameworks to take account of market developments and promote greater competition. The OFT has committed itself to developing guidelines to determine more objectively the circumstances in which it will launch and terminate market studies, and intends to conduct an impact review of at least two market interventions annually in an effort to improve in this respect. Ofgem is conducting its 'RPI-X@20' review, a two-year review of the future of the RPI-X price control formula, which lies at the heart of the electricity regulatory regime, on which Ofgem is expected to report in 2010. Ofcom is consulting on the scope for future deregulation and competition and the need for changes to the regulatory framework in the mobile sector in light of technological and market developments, and is awaiting the outcome of a number of significant appeals dealing with price controls for mobile call termination rates.[36] Ofwat is reviewing how it might adapt the regulatory framework for water and sewerage to make it more flexible and provide greater scope for market mechanisms, and has contributed to the review being conducted in parallel by the government (the Cave Review) into competition and innovation in this sector. Ofwat has supported the interim recommendations of the Cave Review that the government introduce legislation to allow large public and private sector organisations to choose their water and sewerage supplier.

V STATE AID

The most significant state aid measures in the UK in 2008 were aimed at remedying the effects of the economic downturn in the financial sector. The first measures were adopted in September 2007 when the Bank of England provided emergency liquidity to Northern Rock secured by collateral and at a premium interest rate. This initial assistance did not constitute state aid, although two further measures were held to be state aid: a Treasury guarantee on deposits, and additional liquidity and guarantees by the Bank of England (backed by a Treasury indemnity), provided in September and October 2007. The European Commission approved these measures in December 2007 as constituting rescue aid. Such aid must be temporary (i.e., not more than six months), but may be extended for a longer period if it forms part of a restructuring plan. The Commission therefore required the government to submit a restructuring plan to the Commission by March 2008, six months after the first aid measure.

36 *Hutchison 3G UK Limited & Ors v. Office of Communications* (Mobile Call Termination), CAT judgment pending.

In February 2008, the government took Northern Rock into temporary public ownership. The Commission subsequently opened an in-depth investigation into Northern Rock following receipt of a restructuring plan in March 2008, which envisioned state aid remaining in place until at least 2011 to allow Northern Rock to adapt its business model, obtain funding from sources other than volatile wholesale funding markets, and gradually repay the loans made to it and have the guarantees lifted. The Commission's decision in this investigation is still pending.

In September 2008, following major liquidity difficulties, the Financial Services Authority revoked Bradford and Bingley's authorisation to accept retail deposits, effectively closing down the bank. The government took the bank into public ownership with the intention of selling its retail deposits and branches to Abbey National, winding down the remainder of the bank, and providing an interim working capital facility and guarantees to facilitate this process. The Commission approved these measures as rescue aid within 24 hours of formal notification in October 2008.

In October 2008, the government announced an industry-wide package of measures to ensure the stability of the UK financial system. The measures comprised an extension of the special liquidity scheme to provide sterling or dollars against collateral, the credit guarantee scheme to recapitalise banks by providing capital in exchange for shares, and government guarantees on borrowing. The Commission adopted an accelerated procedure to approve these measures as emergency rescue aid to remedy a serious disturbance in the UK economy. Modifications to the credit guarantee scheme in December 2008 (principally to allow a wider range of currencies and to adjust the fee payable) were also approved. The government made commitments to report to the Commission every six months on the status of the scheme.

The OFT is also keeping under review public ownership of Northern Rock. In March 2009, the OFT published a report concluding that public ownership of the bank did not have a significantly adverse effect on competition in the UK. The OFT will continue its monitoring role and will publish a financial services plan in June 2009 setting out its approach to the application of competition law in the financial services sector as a whole. The OFT has indicated that it will hold public consultations on its proposed financial services plan in the spring of 2009.

In October 2008, the Enterprise Act 2002 was amended by adding a new section 58(2D), which specifies 'the interest of maintaining stability of the UK financial system' as a public interest consideration for the purposes of allowing the Secretary of State to intervene in the UK merger review process. This allows the Secretary of State to issue an intervention notice to the OFT where this public interest consideration is relevant to a merger being reviewed by the OFT. The effect of this procedure is to allow the Secretary of State to decide whether the relevant public interest consideration is such that the transaction should be approved without a reference being made to the CC. The amendment was introduced in response to the anticipated acquisition of HBOS by Lloyds TSB, a merger that was encouraged by the government as a means of stabilising the UK financial system by allowing the financially weakened HBOS to be taken over by the more financially robust Lloyds TSB. The new public interest consideration enabled the Secretary of State to ensure that the merger would be approved without a lengthy reference to the CC, notwithstanding any competition issues that might have been identified by the OFT.

VI CONCLUSIONS AND OUTLOOK

In October 2008, Part 3 of the Regulatory Enforcement and Sanctions Act 2008 came into force. The Act permits ministers to confer on regulators four additional civil enforcement powers against individuals: (1) fixed monetary penalties; (2) discretionary requirements (requirements to pay monetary penalties, or to take steps to discontinue an offence or restore a situation to what it would have been absent the offence); (3) stop notices (notices prohibiting a person from engaging in certain activities until they have complied with certain requirements); and (4) enforcement undertakings (undertakings in lieu). The powers are intended as alternatives to criminal prosecution in respect of statutory offences and are intended to allow regulators to have available a wider, more flexible and proportionate range of responses to misconduct. The OFT is considering whether to apply to have access to these new sanctions.

Chapter 35

UNITED STATES

*Leah Brannon**

I OVERVIEW

In 2009, public antitrust enforcement in the Unites States will be shaped by a new presidential administration, as well as a rapidly changing and highly uncertain global economy.[1] New leadership at both the Antitrust Division of the Department of Justice ('the DOJ') and the Federal Trade Commission ('the FTC') will provide an opportunity for the two agencies to mend relations that have become somewhat frayed in recent years.

In 2009, the DOJ and the FTC will likely place a high priority on resolving several high-profile disagreements that developed between the agencies toward the close of the Bush administration. In particular, in September 2008 the DOJ issued a 215-page report on unilateral conduct.[2] In a much-reported development, the Federal Trade Commission

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1 This chapter focuses only on US public (non-merger) antitrust enforcement at the federal level, and does not discuss enforcement by the state Attorneys General.

2 See Department of Justice, Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act (September 2008), available at www.usdoj.gov/atr/public/ reports/236681.pdf. Section 2 of the Sherman Act provides that: 'Every person who shall monopolise, or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of the trade or commerce [...] shall be punished by fine [...] or by imprisonment [...]' 15 USC Section 2 (2006). The other main statutory antitrust provisions in the United States are Section 1 of the Sherman Antitrust Act, which prohibits 'agreements, conspiracies or trusts in restraint of trade', 15 USC Section 1 (2006), and Section 7 of the Clayton Act, which prohibits mergers and acquisitions where 'the effect of such acquisition may be substantially to lessen competition', 15 USC Section 18 (2006). In addition, Section 5 of the Federal Trade Commission Act prohibits 'unfair methods of competition', 15 USC Section 45 (2006).

('the FTC') responded by issuing a statement describing the DOJ report as 'a blueprint for radically weakened antitrust enforcement'.[3]

The two agencies had previously jointly sponsored hearings on competition issues raised by certain types of unilateral conduct, but diverged on what conclusions could be drawn in the report. For example, the published DOJ report emphasises that over-enforcement of the antitrust laws risks deterring innovation and efficiency in the marketplace, and suggests that the government should therefore err on the side of limiting liability for unilateral conduct under Section 2 of the Sherman Act.[4] The FTC disagreed and issued a separate statement arguing that, while the US courts have held that consumer welfare is the central concern of the antitrust laws, the DOJ's report was more concerned with the welfare of businesses.[5] The FTC also stated that the DOJ's report 'seriously overstates the level of legal, economic, and academic consensus regarding Section 2'.[6]

There will likely be greater consensus between the agencies in the coming year, including with respect to issues raised by the unilateral conduct report. President Obama's nominee to head the Antitrust Division of the Department of Justice, Christine Varney, testified at her confirmation hearings that 'one of the first things that I will do, if I am confirmed, is sit down with my colleagues at the Department of Justice and the Federal Trade Commission to go over that Section 2 report.'[7] Ms Varney emphasised that, in her view, 'Policy disputes and jurisdictional squabbles between agencies with overlapping enforcement mandates lead to uncertainty for consumers, business, and for overseas antitrust enforcers.'[8]

i Agency leadership

In early 2009, President Obama nominated a new Assistant Attorney General for Antitrust and appointed a new Chairman of the FTC.[9] On the campaign trail leading up to the 2008 presidential election, then-Senator Barack Obama described the George W

3 Press Release, Federal Trade Commission, FTC Commissioners React to Department of Justice Report, 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act' (8 September 2008), available at www.ftc.gov/opa/2008/09/section2.shtm; see also Eric Lictblau, 'Antitrust Document Exposes Rift', *NY Times*, 9 September 2008 (describing the report as 'expos[ing] a rift' between the agencies).

4 Department of Justice, Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act (September 2008), available at www.usdoj.gov/atr/public/reports/236681.pdf.

5 Press Release, Federal Trade Commission, FTC Commissioners React to Department of Justice Report, 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act' (8 September 2008) available at www.ftc.gov/opa/2008/09/section2.shtm.

6 *Id.*

7 The Nomination of Christine Anne Varney To Be Assistant Attorney General In the Antitrust Division, Department of Justice: Hearing of the S. Comm on the Judiciary 111th Cong. (2009) (oral and written testimony of Christine Varney).

8 *Id.*

9 President Obama will also nominate two new Commissioners at the FTC, filling one existing vacancy and a vacancy to be created when Commissioner Pamela Jones-Harbour's term ends later this year.

Bush administration as having 'what may be the weakest record of antitrust enforcement of any administration in the last half century'.[10] If elected, Obama promised through his appointments to 'invigorate antitrust enforcement'.[11]

New leadership at the DOJ

Christine Varney has been nominated to serve as Assistant Attorney General for the Antitrust Division, and it is expected that the US Senate will confirm her nomination.[12] Ms Varney previously spent five years as an FTC commissioner during the Clinton administration, and she is generally viewed as an advocate of strong antitrust enforcement.[13] After her time at the FTC and before her recent nomination, Ms Varney was in private practice, where her work focused on 'information technology and information privacy policy'.[14]

During her confirmation hearings, Ms Varney highlighted a number of her enforcement priorities. As a general matter, Ms Varney indicated that she would enforce the antitrust laws more aggressively than did the Bush Administration DOJ, which came under criticism for what some perceived to be a lack of antitrust enforcement.[15] Ms Varney testified that she supports active enforcement of the antitrust laws to prevent vertical price agreements that harm consumers.[16] She also emphasised the need to protect competition in innovation markets.[17] And Ms Varney testified that she would continue efforts to promote international cooperation among antitrust authorities.[18]

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10 Barack Obama, Statement for the American Antitrust Institute 1 (5 November 2008), available at www.antitrustinstitute.org/archives/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

11 *Id.*

12 At the time of writing, Ms Varney's nomination has successfully passed out of the US Senate Judiciary Committee. Executive Reports of Committees, 111th Cong., 155 Cong. Rec. S3897-01 (2009).

13 The Nomination of Christine Anne Varney To Be Assistant Attorney General In the Antitrust Division, Department of Justice: Hearing of the S. Comm on the Judiciary. 111th Cong. (2009) (written testimony of Christine Varney), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3700&wit_id=7670.

14 *Id.*

15 *Id.*

16 *Id.*

17 See Answers to Questions for the Record: Questions from Sen. Kohl, The Nomination of Christine Anne Varney To Be Assistant Attorney General In the Antitrust Division, Department of Justice: Hearing of the S. Comm. on the Judiciary. 111th Cong. (2009) (stating 'innovation is a primary basis of competitive rivalry in technology markets' and that 'when reviewing alleged anticompetitive activities [...] we need to [...] take into account [...] the impact the activity has on innovation, and whether the activity results in foreclosure').

18 The Nomination of Christine Anne Varney To Be Assistant Attorney General In the Antitrust Division, Department of Justice: Hearing of the S. Comm on the Judiciary. 111th Cong. (2009) (oral testimony of Christine Varney).

Ms Varney further testified that she will support the FTC's enforcement efforts with respect to 'reverse payment' settlements between branded and generic pharmaceutical companies in which the branded company settles patent infringement litigation against the generic by paying the generic to delay its entry into the market – another area in which the DOJ had previously disagreed with the FTC.[19] Finally, while not the subject of this chapter, Ms Varney has also stated that she will enforce the merger laws aggressively, and has indicated that she is open to conducting retrospective analysis of cleared mergers.[20]

New leadership at the FTC

President Obama nominated current FTC Commissioner Jon Leibowitz to serve as Chairman of the FTC.[21] Like Ms Varney, Mr Leibowitz is viewed as a strong enforcer of the antitrust laws, and is noted for his opposition to 'reverse payment' settlements in the pharmaceutical industry, which will likely to be one of his key enforcement priorities as Chairman.[22] The FTC's Annual Report published in March 2009 states that the FTC intends to make health care a primary area of focus, and will 'work to eliminate threats to competition that deprive consumers of low-cost drugs [...] [and] to stop anticompetitive agreements among physicians […] that threaten to raise the cost of health care.' Mr Leibowitz has also expressed his support for using disgorgement as a remedy for antitrust violations and for expanding enforcement under Section 5 of the FTC Act, which prohibits unfair methods of competition.[23]

ii Congress and the federal courts

The newly elected 111th Congress recently published its agenda for the current session.[24] In the agenda, the Senate Subcommittee on Antitrust, Competition Policy, and Consumer

19 *Id.*

20 *Id.*; Ashby Jones, 'A Done Deal? Under New Antitrust Chief, Maybe Not', *The Wall Street Journal*, 16 March 2009, available at http://blogs.wsj.com/law/2009/03/16/a-done-deal-under-new-antitrust-chief-maybe-not/.

21 Press Release, The White House, President Obama Announces More Key Appointments (27 February 2009), available at www.whitehouse.gov/the_press_office/President-Obama-Announces-More-Key-Appointments/. Mr Leibowitz was originally appointed to the Commission in 2004. The other three sitting Commissioners are: (1) William Kovacic, a Republican appointed in 2006 and who served as Chairman from 2008-2009; (2) J. Thomas Rosch, a Republican appointed in 2006; and (3) Pamela Jones Harbour, an independent appointed in 2003, whose term will end in 2009.

22 Neal R. Stoll & Shepard Goldfein, 'FTC, DOJ Nominations Promise Reinvigorated Enforcement', *The New York Law Journal*, 18 March 2009, available at www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1202429144297.

23 John Leibowitz, Commissioner, Federal Trade Commission, 'Tales from the Crypt' Episodes '08 and '09: the Return of Section 5, Remarks at the FTC Workshop: Section 5 of the FTC Act as a Competition Statute, at 4-6 (17 October 2008).

24 Press Release, Senator Herb Kohl, Kohl, Hatch Announce Antitrust Subcommittee Agenda (25 March 2009), available at http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2468.

Rights stated that, 'In these challenging economic times, the need for strong antitrust laws to protect competition has never been greater.'[25] Several of the Congressional priorities set forth in the agenda – including addressing retail price maintenance, reverse payment settlements between pharmaceutical companies, and abuse of the standards setting process – are reactions to recent trends in judicial interpretation of US antitrust laws.[26] In all of these areas, there have been a number of notable recent decisions in favour of antitrust defendants.[27] For example, in *Leegin Creative Leather Products v. PSKS, Inc*, 551 US 877 (2007), the Supreme Court overturned a long-established precedent and held that vertical retail price maintenance is no longer *per se* unlawful under the federal antitrust laws. There is already proposed legislation pending that seeks to overturn this particular decision.[28]

iii General outlook

In summary, it seems likely that there will be increased federal antitrust enforcement in 2009, and continuing throughout the Obama administration. This increased enforcement, however, may be tempered to some degree by the weakened global economy. For example, companies may be poorly situated to bear the expense of agency demands for documents and data in connection with retrospective studies on merger enforcement.

25 *Id.* In particular, the Subcommittee intends to address: (1) vertical minimum retail price maintenance; (2) anti-competitive practices in the rail freight industry; (3) competition in the gasoline, natural gas, oil, and energy markets; (4) pay-for-delay settlements in the pharmaceutical industry; (5) possible antitrust concerns in collegiate American football; (6) consolidation among internet and online advertising companies; (7) competition in the media, cable, satellite, and concert and ticketing industries; (8) competition in the passenger airline and air freight industries; (9) competition in agricultural markets; (10) the competitive implications of standard-setting in various industries; and (11) competition in consolidating industries, particularly the financial services and banking sectors. *Id.*

26 Penelope M Lister *et al*, 'Shadow Over More Aggressive Antitrust Enforcement?', *Law360*, 24 March 2009 (suggesting that the courts may not follow the new administration's more proactive antitrust enforcement agenda).

27 See, e.g., *Leegin Creative Leather Products v. PSKS, Inc*, 551 US 877 (2007) (holding that vertical retail price maintenance is not per se unlawful under the federal antitrust laws); *FTC v. Schering-Plough*, 402 F.3d 1056 (11th. Cir. 2005) (rejecting the FTC's argument that reverse payment settlement violated the antitrust laws); *FTC v. Rambus*, 522 F.3d 456 (D.C. Cir. 2008) (rejecting the FTC's argument that Rambus violated the antitrust laws by abusing the standards setting process).

28 Jessica Dye, 'Senate Antitrust Committee To Take Aim At Leegin,' *Law360*, 25 March 2009. Notably, after Leegin Nine West Group petitioned the FTC to reopen a 2000 order prohibiting the company from engaging in resale price maintenance. See Petition to Reopen and Modify Order, In the Matter of Nine West Group, Inc., File No. 981-0386, Docket No. C-3937 (F.T.C. 30 October 2007), available at www.ftc.gov/os/caselist/9810386/071106 petition.pdf. In May 2008, the FTC granted that petition after engaging in a review of the potential effects of the agreements at issue. Order Granting In Part Petition To Reopen and Modify Order, In the Matter of Nine West Group, Inc., File No. 981-0386, Docket No. C-3937 (FTC 6 May 2008), available at www.ftc.gov/os/caselist/9810386/080506order.pdf.

The agencies are likely to be mindful of these issues, while also seeking to pursue their enforcement priorities.

II CARTELS

In the United States, the DOJ has sole authority to seek criminal penalties for price fixing.[29] Through substantial revisions to its leniency programme in the 1990s, the DOJ dramatically increased self-reporting of cartels, and thereby significantly increased its cartel enforcement activity.[30] This trend continued in 2008, with the DOJ securing large fines in several major cartel investigations, and the trend is likely to continue in 2009 as well.[31]

i Significant cases

In July 2008, in *Stolt-Nielsen Transportation Group Ltd v. United States*, 534 F.3d 728, 733 (D.C. Cir. 2008), the US Court of Appeals for the District of Columbia Circuit held that agreements between the DOJ and amnesty applicants are not automatically barred from public disclosure. The underlying case began in 2003, when Stolt-Nielsen, SA, entered into a conditional leniency agreement with the DOJ in return for providing information regarding illegal cartel behaviour in the deep-sea shipping industry. As a result of its subsequent investigation, the DOJ concluded that Stolt had provided inaccurate information regarding when it terminated its participation in the illegal activity, in violation of its leniency agreement.[32] As a part of subsequent court proceedings, Stolt filed requests under the Freedom of Information Act seeking access to redacted versions of other leniency agreements for the purpose of comparison with the Stolt agreement.[33] In early 2009, the DOJ reached an agreement with Stolt under which the DOJ released batched, redacted versions of amnesty agreements used by the Department between 1993 and 2008.[34]

29 Federal Trade Commission, The Enforcers, FTC Guide to the Antitrust Laws (2008) available at http://ftc.gov/bc/antitrust/enforcers.shtm.

30 Department of Justice, DOJ Leniency Program, available at www.usdoj.gov/atr/public/criminal/leniency.htm.

31 Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, Department of Justice, Presentation at the 56th Annual Spring Meeting of the ABA Section of Antitrust Law: Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program (26 March 2008), available at www.usdoj.gov/atr/public/speeches/232716.htm.

32 David Vascott, 'Scott Hammond on Stolt-Nielsen,' 11 *Global Competition Review* 13 (2008), available at www.usdoj.gov/atr/public/speeches/234840.htm (stating that based on witness statements, the DOJ 'revoked Stolt's leniency because we believed that Stolt had failed to take prompt and effective action to terminate the conduct, making them ineligible for leniency, and because we believed that the company had not been truthful about its continued participation in the cartel').

33 Settlement Agreement, *Stolt-Nielsen Transportation Group Ltd v. United States*, Nos. 05-2217 & 06-0474 (D.D.C. 26 January 2009), available at www.usdoj.gov/atr/foia/rll/stolt_agreement.htm.

34 *Id.*

ii Trends, developments and strategies

In 2008 the DOJ continued aggressive prosecution of cartel violations, undertook revisions to its guidance on its leniency programme, and continued its emphasis on international cooperation.

Aggressive prosecution of criminal violations

The Antitrust Criminal Penalty Enhancement and Reform Act, passed by the US Congress in 2004, increased maximum available corporate and individual fines and jail sentences. In 2008 the number of criminal antitrust cases in district court rose 32 per cent from the prior year, from 16 to 21.[35] Of the 26 individual defendants sentenced in 2008, seven received jail time, another eight received probation, and the remaining 11 were fined.[36]

Of particular note is the DOJ's price-fixing investigation related to LCD flat-panel displays, which led to $585 million in fines against three of the participants.[37] At the time the first fines were announced, the DOJ noted that, had the companies involved not cooperated with the DOJ investigation, these fines could have been significantly higher.[38] The DOJ also levied more than $500 million in fines against eight airlines accused of price fixing related to air cargo rates.[39] And a recent cartel investigation into bid rigging in the market for marine hose led to a prison sentence of 24 months and a criminal fine of $80,000.[40]

Cartel enforcement of this sort is likely to continue in 2009. In fact, already in 2009 the DOJ has obtained a 48-month prison sentence based on a guilty plea in a coastal freight transportation investigation.[41] This is the longest prison sentence imposed to date for a single violation of the antitrust laws.

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35 Statistics Division, Administrative Office of the US Courts, Appendix: Detailed Statistical Tables, Judicial Business of the United States Courts 2008, available at www.uscourts.gov/judbus2008/contents.cfm.

36 *Id.*

37 Press Release, Department of Justice, LG, Sharp, Chunghwa Agree to Plead Guilty, Pay Total of $585 Million in Fines for Participating in LCD Price-Fixing Conspiracies (12 November 2008) available at www.usdoj.gov/atr/public/press_releases/2008/239349.htm.

38 Thomas O Barnett, Assistant Attorney General, Antitrust Division, Department of Justice, Remarks Prepared For Delivery at a Press Conference Regarding LG, Sharp, and Chunghwa's Agreements to Plead Guilty in LCD Price-Fixing Conspiracies (12 November 2008).

39 Press Release, Department of Justice, Major International Airlines Agree to Plead Guilty and Pay Criminal Fines Totalling More than $500 Million for Fixing Prices on Air Cargo Rates (26 June 2008) available at www.usdoj.gov/atr/public/press_releases/2008/234435.htm.

40 Press Release, Department of Justice, Japanese Executive Pleads Guilty, Sentenced to Two Years in Jail for Participating in Conspiracies to Rig Bids and Bribe Foreign Officials to Purchase Marine Hose and Related Products (10 December 2008) available at www.usdoj.gov/atr/public/press_releases/2008/240307.htm.

41 Press Release, Department of Justice, Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy (30 January 2009), available at www.usdoj.gov/atr/public/press_releases/2009/242030.htm.

Updates to leniency programme guidance

In November 2008, in reaction to the Stolt litigation described above, the DOJ issued new guidance on participation in its leniency programme, including publication of revised model leniency letters. The DOJ took these steps in order to 'tighten up some of the [ambiguous] language in our model letter to avoid any uncertainty in the future'.[42]

Notably, the new model letters explicitly require an admission of a criminal violation, and the corporate letters make it clear that that leniency extends only to the activity reported in that letter. The DOJ also provided additional guidance indicating that leniency applicants must 'promptly' terminate their own participation in the cartel activity upon discovery of the conduct.[43] Reaction to the letters has generally been positive thus far.[44]

International cooperation

The DOJ has actively encouraged other countries to criminalise cartel activity and has established cooperation agreements with a number of countries to aid in international cartel enforcement. In part as a result of these agreements, more than 30 foreign nationals have now served jail time in the United States, with an average sentence of 12 months.[45]

International cooperation continued to be a focus in 2008, and likely will remain a focus in coming years. In 2008 the DOJ's attempts to extradite one particular foreign national were inconclusive. Ian Norris, the former chief executive officer of Morgan Crucible, faces criminal charges in the United States related to price fixing in the market for carbon parts during the 1990s. The British government authorised the extradition of Mr Norris to the United States in September 2005, but in March 2008 the House of Lords overturned that decision on the grounds that price fixing was not a crime in the United Kingdom at the time of the alleged criminal conduct.[46] The House of Lords, however, remanded the case to a magistrates court on a secondary matter, which resulted in a further extradition order being issued. Mr Norris has appealed.

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42 David Vascott, 'Scott Hammond on Stolt-Nielsen', 11 *Global Competition Review*. 13 (2008), available at www.usdoj.gov/atr/public/speeches/234840.htm.

43 Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, Department of Justice, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (19 November 2008), available at www.usdoj.gov/atr/public/criminal/239583.htm.

44 Sue Reisinger, 'Better Late Than Never', *Corporate Counsel*, 1 April 2009 (but noting that some lawyers have raised concerns about whether the DOJ will become less willing to depart from the standard model letter as a result).

45 Susan Bright & Alex Olive, 'Up close and personal: criminal sanctions and cartel activity', 11 *Global Competition Review* 12 (2008).

46 Russell Hotten, 'Ian Norris wins appeal against US extradition', *The Telegraph*, 14 March 2008, available at www.telegraph.co.uk/finance/newsbysector/supportservices/2785931/Ian-Norris-wins-appeal-against-US-extradition.html.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The federal antitrust agencies had a number of notable investigations of restrictive agreements in 2008, and the agencies had some high-profile disagreements with respect to dominance.

i Significant cases

Agencies disagree over 'price squeeze' doctrine in Linkline

In *Pacific Bell Telephone Co v. linkLine Communications*, internet service providers sued Pacific Bell, a vertically integrated provider of internet connection services.[47] Plaintiffs alleged that Pacific Bell engaged in an unlawful 'price squeeze' by selling internet access to its retail competitors at excessively high wholesale rates, which at times exceeded Pacific Bell's own retail prices.[48] The Court of Appeals for the Ninth Circuit held that these allegations were sufficient to state a claim under Section 2 of the Sherman Act.[49]

The Supreme Court of the United States agreed to review the case and, in May 2008, the DOJ filed an *amicus curaie* brief arguing that review should be granted and the decision of the Ninth Circuit should be reversed.[50] The DOJ argued that, if an antitrust defendant has no general antitrust duty to deal with a competitor based on an alleged failure to comply with a regulatory obligation, as the Court had previously held in *Verizon Communications, Inc v. Law Offices of Curtis V Trinko, LLP*, 540 US 398 (2004), then 'by definition [the defendant] has no duty to deal with [rivals] on particular terms that would permit them to compete.'[51] In a highly unusual development, the FTC published a statement declining to join the DOJ's brief.[52] The FTC argued that price-squeeze schemes can significantly harm competition, and that it would be a mistake to hold that such conduct categorically does not violate the antitrust laws.[53]

In a decision handed down in February 2009, by a vote of five to four, the Court agreed with the DOJ and held that a price squeeze alone cannot form a basis for liability under Section 2 of the Sherman Act.[54] The Court concluded that 'if a firm has no

47 *Pacific Bell Telephone Co v. linkLine Communications*, 555 US ___, 129 S.Ct. 1109, 1115 (2009).

48 *Id.*

49 *linkLine Communications v. Cal, Inc*, 503 F.3d 876, 885 (9th Cir. 2007), rev'd sub nom *Pacific Bell Telephone Co v. linkLine Communications*, 555 US, 129 S.Ct. 1109, 1115 (2009).

50 Brief for the United States as Amicus Curiae, *Pacific Bell Telephone Co v. linkLine Communications*, Inc., 555 US ____, 129 S.Ct. 1109, 115 (2009) (No. 07-512), available at www.usdoj.gov/atr/cases/f233500/233594.htm.

51 *Id.* at 10.

52 Federal Trade Commission, Statement Regarding Petition for a Writ of Certiorari in Pacific Tel. Co. d/b/a/ *AT&T California v. linkLine Communications, Inc* (No. 07-512), 23 May 2008, available at www.ftc.gov/os/2008/05/P072104stmt.pdf.

53 *Id.*

54 *linkLine*, 129 S.Ct. at 1119.

antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.'[55]

FTC proceedings in N-Data suggest increased role for Section 5

In early 2008, the FTC found that Negotiated Data Solutions LLC ('N-Data') was liable for violating Section 5 of the FTC Act in connection with royalties for Ethernet technology patents. N-Data had acquired these patents from their previous owner, who had committed to a standards-setting organisation to license the technology for a one-time fee of $1,000 if the technology was incorporated into an Ethernet standard, which it was.[56] On acquiring the patents, however, N-Data attempted to collect royalties in excess of the stated fee.[57]

The FTC found that N-Data's behaviour constituted an 'unfair act or practice' and therefore violated Section 5 of the FTC Act because the conduct was coercive and harmed competition by reducing incentives to participate in and rely on industry standards-setting organisations.[58] The FTC entered into a settlement with N-Data under which the company may not enforce its Ethernet patents unless it offers its potential licensees an agreement based on the terms offered in 1994.[59]

FTC Loss in Rambus

In another standards-setting case in 2008, this one brought under the Sherman Act, the FTC suffered a notable loss. The defendant in that case, Rambus, provides dynamic random access memory technology. The FTC concluded that, through a course of deceptive conduct, Rambus was able to distort a critical standard-setting process.[60] The FTC then filed an administrative complaint, and proceedings began before an administrative law judge, who ultimately dismissed the complaint.[61] The FTC appealed that decision to the full Commission, which reopened the record and, after its own plenary review, reversed the administrative law judge and held that Rambus had violated the antitrust laws. Specifically, the Commission concluded that the challenged conduct violated the antitrust laws either because it permitted Rambus to acquire a monopoly or because it allowed Rambus to avoid limits on its patent fees.[62]

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55 *Id.* (citing *Verizon Communications, Inc v. Law Offices of Curtis V Trinko, LLP*, 540 U.S. 398, 402-03 (2004)).

56 Press Release, Federal Trade Commission, FTC Challenges Patent Holder's Refusal to Meet Commitment to License Patents Covering 'Ethernet' Standard Used in Virtually All Personal Computers in U.S. (23 January 2008), available at www.ftc.gov/opa/2008/ 01/ethernet.shtm.

57 Complaint, *In the Matter of Negotiated Data Solutions LLC*, File No. 051 0094 (FTC 23 January 2008).

58 Decision & Order, *In the Matter of Negotiated Data Solutions LLC*, File No. 051 0094 (F.T.C. Jan. 23, 2008).

59 *Id.*

60 Press Release, Federal Trade Commission, FTC Finds Rambus Unlawfully Obtained Monopoly Power (2 August 2006), available at www.ftc.gov/opa/2006/08/ rambus.shtm.

61 *Rambus Inc v. FTC*, 522 F.3d 456, 461 (DC Cir. 2008).

62 *Id.* at 459.

Rambus petitioned the US Court of Appeals for the DC Circuit for review, and the DC Circuit reversed. The court concluded that, of the two alternative rationales the FTC articulated, 'the latter—deceit merely enabling a monopolist to charge higher prices than it otherwise could have charged—would not in itself constitute monopolization.' [63] The court also questioned the sufficiency of the evidence that Rambus had engaged in deceptive conduct in the first instance. The FTC sought Supreme Court review of the decision but, in February 2009, the Supreme Court declined to hear the case.[64]

Microsoft

The Department of Justice has now largely ceased to enforce the Final Judgment in *United States v. Microsoft*.[65] In January 2008, Judge Colleen Kollar-Kotelly extended the Final Judgment through at least November 2009, two years beyond the original term of the decree.[66] She did so after finding that Microsoft still had not fully complied with portions of the decree.[67] The DOJ opposed this extension, which was sought by a number of US states, and as a result the DOJ no longer actively enforces the decree, apart from one section regarding communications protocols.[68]

Google/Yahoo!

In 2008, Google and Yahoo! proposed a non-exclusive advertising partnership under which Yahoo! would obtain the right to place advertisements from Google on a portion of Yahoo!'s search engine results pages. The parties agreed not to implement their agreement in order to permit review by the DOJ.[69] The parties subsequently abandoned the transaction as a result of objections from the DOJ,[70] and the DOJ announced in its

63 *Id.*

64 *FTC v. Rambus, Inc*, 129 S.Ct. 1318 (2009).

65 Final Judgment, *United States v. Microsoft*, No. 98-1232 (DDC 12 November 2002), available at www.usdoj.gov/atr/cases/f200400/200457.pdf.

66 See Memorandum Opinion at 36, *New York v. Microsoft Corp*, 224 F. Supp. 2d 76 (DDC. 2002) (No. 98-1232), available at www.microsoft-antitrust.gov/pdf/Jan292008MemOp.pdf.

67 *Id.* at 38 ('[I]t is abundantly clear that more than five years after the Communications Protocols and related technical documentation were required to be available to licensees under Section III.E, the documentation envisioned by that Section is still not available to licensees in a complete, useable, and certifiably accurate form.'); see also Gregg Keizer, Judge Extends Microsoft Monitoring Until 2009, Computerworld, 30 January 2008, www.computerworld.com/action/article.do?command= viewArticleBasic&articleId=9060099.

68 Brief of the United States as Amicus Curiae in Opposition to the Motions to Extend the State's Final Judgments, *New York v. Microsoft Corp*, No. 98-1233 (DDC 9 November 2007).

69 Press Release, Google, Google Announces Non-Exclusive Advertising Services Agreement with Yahoo! in U.S. and Canada (12 June 2008), available at www.google.com/intl/en/press/pressrel/20080612_yahoo.html.

70 David Drummond, Ending our agreement with Yahoo!, Official Google Blog, 5 November 2008, http://googleblog.blogspot.com/2008/11/ending-our-agreement-with-yahoo.html; see also Press Release, Department of Justice, Yahoo! Inc. and Google Inc. Abandon Their

own press release that it would have filed a lawsuit to challenge the agreement had they not done so.[71]

ii Trends, developments and strategies

In addition to the cases discussed above, in 2008 the DOJ and the FTC implemented some practical changes related to process.

DOJ initiatives regarding electronic discovery

The DOJ recently released an overview of major issues and themes arising from the first two years of work by its e-discovery working group. Among other things, the DOJ published its standard template for electronic document productions.[72] The DOJ also noted that it is shifting away from seeking all potentially responsive documents in favour of seeking the most relevant material as quickly as possible, and that it now prefers access to corporate data systems over more traditional interrogatory responses.[73]

FTC releases plain-language antitrust guide

In the summer of 2008, the FTC released its 'Guide to the Antitrust Laws', a publication intended to summarise and explain the antitrust laws in plain language understandable by non-attorneys.[74] The guide describes various types of business conduct ('Dealings with Competitors', 'Dealings in the Supply Chain', 'Single Firm Conduct', and 'Mergers') and describes how the antitrust rules apply to each area.[75] In addition, the Guide provides a series of fact sheets addressing specific topics, and the Guide points to other sources of antitrust guidance, including documents developed by the DOJ.[76]

Streamlining of FTC's administrative enforcement process

The FTC took steps in 2008 to streamline its internal enforcement process, which is set forth in Part 3 of the FTC Rules of Practice.[77] The FTC proposed the rule revisions

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Advertising Agreement (5 November 2008), available at www.usdoj.gov/atr/public/press_releases/2008/239167.htm.

71 Press Release, Department of Justice, Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (5 November 2008), available at www.usdoj.gov/atr/public/press_releases/2008/239167.htm.

72 Tracy Greer, E-Discovery Initatives at the Antitrust Division (25 March 2009), available at www.usdoj.gov/atr/public/electronic_discovery/243194.htm.

73 *Id.*

74 Press Release, Federal Trade Commission, New FTC Online Resource Answers Questions about U.S. Antitrust Laws (14 July 008), available at http://ftc.gov/opa/2008/07/bcwebfyi.shtm.

75 Federal Trade Commission, An FTC Guide to the Antitrust Laws (14 July 2008), available at http://ftc.gov/bc/antitrust/factsheets/antitrustlawsguide.pdf.

76 *Id.*

77 16 CFR Sections 3.1, 3.2 (noting that the process laid out in Part 3 applies to all formal adjudicative proceedings before the FTC, including challenges to mergers and a wide range of other conduct).

in October 2008 and adopted interim final rules in December 2008.[78] The FTC notes that its goal in implementing these new rules is to expedite the Part 3 process, in part to reduce the burden of non-essential discovery and motion practice on the Commission, respondents, and third parties.[79]

iii Outlook

Both agencies have indicated that they will continue to prosecute restrictive agreement cases aggressively in 2009.[80] In addition, the FTC may increasingly consider adding claims under Section 5 of the FTC act as a 'gap-filler' to cover behaviour not clearly covered by the Sherman Act, such as invitations to collude and abuse of the standards setting process.[81]

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The US antitrust enforcement agencies took a number of actions in 2008 to investigate particular markets and ensure competition in regulated industries.

78 Press Release, Federal Trade Commission, FTC Issues Interim Final Rules Amending Parts 3 and 4 of its Rules of Practice (23 December 2008), available at www.ftc.gov/opa/2008/12/part3.shtm. The rules include new deadlines for the pre-hearing phase including, in cases seeking injunctive relief, an administrative hearing five months from the date of complaint (eight months in other cases). The rules also speed up the timeline for answers, the first meet-and-confer session, and the first scheduling conference. The rules require the FTC to decide pre-hearing motions within 45 days of filing, limit hearings to 210 hours (or 30 seven-hour trial days), require the administrative law judge to file an initial decision within 70 days of the last-filed briefs, and provide deadlines for resolution of appeals from the initial decision. The rules also limit the scope of discoverable materials, and make other changes including to the length of motions and the number of expert witnesses.

79 *Id.*

80 See The Nomination of Christine Anne Varney To Be Assistant Attorney General In the Antitrust Division, Department of Justice: Hearing of the S. Comm on the Judiciary 111th Cong. (2009) (oral testimony of Ms Varney) (indicating that she intends 'to continue to prosecute retail price maintenance where it results in anti-competitive consequence'); Jonathan Leibowitz, Commissioner, Federal Trade Commission, Op-ed, 'This Pill Not To Be Taken With Competition: How Collusion Is Keeping Generic Drugs Off the Shelves', *Washington Post*, 25 Febuary 2008, at A15 (stating that '[t]he Federal Trade Commission's approach to stopping these pay-for-delay settlements is twofold. We support the bipartisan legislation to ban such agreements that is moving through both houses of Congress. And until that law is enacted, we are doing everything in our power to end these unconscionable deals').

81 John Leibowitz, Commissioner, Federal Trade Commission, 'Tales from the Crypt' Episodes '08 and '09: the Return of Section 5, Remarks at the FTC Workshop: Section 5 of the FTC Act as a Competition Statute, at 4-6 (17 October 2008); J Thomas Rosch, Commissioner, Federal Trade Commission, The FTC's Section 5 Hearings: New Standards for Unilateral Conduct? (25 March 2009), available at www.ftc.gov/speeches/rosch/090325abaspring.pdf

i Trends, developments and strategies

Pharmaceutical companies

One of the major areas of focus for the FTC in recent years has been 'reverse payment' settlements, in which branded pharmaceutical companies offer payments to generic pharmaceutical manufacturers in exchange for delayed entry by the generic competitors into the market. In a highly unusual development, the DOJ publicly questioned the FTC's approach to reverse payments.

The public dispute between the agencies began in 2006, when the FTC petitioned the Supreme Court to review the Eleventh Circuit's decision in FTC v. Schering-Plough, 402 F.3d 1056 (11th. Cir. 2005). The DOJ filed a brief urging the Court not to review the case because, among other reasons, the DOJ believed that it was 'far from clear that the FTC [was] correct' in its legal and economic analysis of reverse payments.[82] The Supreme Court ultimately declined to review the case.

Since the denial of *certiorari* in Schering-Plough, the FTC has continued its opposition to reverse payment settlements in the pharmaceutical industry, including by advocating for Supreme Court review of other Court of Appeals decisions in this area, and by supporting proposed legislation to address the issue, and this trend seems likely to continue.[83] The FTC has also actively sought new test cases to challenge reverse payments. For example, in February 2008 the FTC filed suit against the branded pharmaceutical manufacturer Cephalon, the manufacturer of Provigil, a drug used to treat sleep apnea and narcolepsy.[84] The FTC alleges that Cephalon used reverse payments totalling more than $200 million to delay entry by generic manufacturers, and that as a result patients have been forced to pay hundreds of millions of dollars per year more for Provigil.[85]

During the 2008 presidential campaign, Senator Obama specifically pledged to target reverse payment settlements and, as discussed above, his nominees to the head

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82 Brief for the United States as Amicus Curiae, *FTC v. Schering-Plough*, No. 05-273 (US, 17 May 2006), available at www.usdoj.gov/atr/cases/f216300/216358.htm.

83 See, e.g., Anticompetitive Patent Settlements in the Pharmaceutical Industry: the Benefits of a Legislative Solution: Hearing of the S. Comm on the Judiciary. 110th Cong. (2007) (prepared statement of the Federal Trade Commission) (noting that '[r]ecent court decisions [...] have made it more difficult to bring antitrust cases to stop exclusion payment settlements [...] threaten[ing] substantial harm to consumers'); Jonathan Leibowitz, Commissioner, Federal Trade Commission, Op-ed, 'This Pill Not To Be Taken With Competition: How Collusion Is Keeping Generic Drugs Off the Shelves', *Washington Post*, 25 Febuary 2008, at A15 (stating that '[t]he Federal Trade Commission's approach to stopping these pay-for-delay settlements is twofold. We support the bipartisan legislation to ban such agreements that is moving through both houses of Congress. And until that law is enacted, we are doing everything in our power to end these unconscionable deals').

84 Complaint, *FTC v. Cephalon*, No. 1 :08-cv-00244, File No. 061-0182 (D.D.C. Feb. 13, 2008), available at http://www2.ftc.gov/os/caselist/0610182/ 080213complaint.pdf.

85 Id.; see also Press Release, Federal Trade Commission, FTC Sues Cephalon, Inc. for Unlawfully Blocking Sale of Lower-Cost Generic Versions of Branded Drug Until 2012 (Feb. 13, 2008), available at www.ftc.gov/opa/2008/02/ceph.shtm.

the Antitrust Division and the FTC have both spoken out in support of that agenda.[86] Similarly, the US Congress has placed the issue of these settlements on its agenda for the 111th Congress. This area is therefore likely to continue to be the focus of intense antitrust scrutiny.

Real estate services

In the past few years the DOJ has actively enforced competition laws in the real estate industry. In April 2008, in response to a nine-month DOJ investigation, the Montana Board of Realty Regulation repealed a rule that prevented real estate brokers from offering rebates and other customer incentives.[87] In May 2008, the DOJ settled litigation against the National Association of Realtors, which the DOJ had brought to challenge a number of the organisation's policies.[88] Under the settlement, the association is required to permit Internet-based residential real estate brokers to compete with traditional brokers. The organisation may not, for example, withhold listings from internet-based brokers or exclude them from multiple listing service ('MLS') membership based on their internet-based business model.[89]

Also in May 2008, the DOJ filed suit against Consolidated Multiple Listing Service of South Carolina, alleging that the organisation's rules unlawfully prohibited members from offering fee-for-service options to consumers.[90] As in its other real estate industry cases, the DOJ alleged these rules had the effect of raising prices, excluding competitors, and limiting consumer choice.[91]

The FTC has also been active in the real estate industry, most recently by obtaining a consent agreement with a Pittsburgh-area MLS that the FTC concluded was unlawfully limiting competition from discount brokers.[92] Both the DOJ and the FTC have remain committed to enforcing the competition laws in the real estate area and have

86 See supra Section III.iii.

87 Press Release, Department of Justice, Montana Board of Realty Regulation Permits Real Estate Brokers To Offer Rebates To Consumers (Apr. 1, 2008), available at www.usdoj.gov/atr/public/press_releases/2008/231769.htm.

88 Final Judgment, *U.S. v. Nat'l Assn of Realtors*, No. 05-C-5140 (N.D. Ill., Nov. 11, 2008), available at www.usdoj.gov/atr/cases/f239600/239655.htm.

89 *Id.*

90 Complaint, *US v. Consolidated Multiple Listing Service, Inc*, No. 08:cv-01786-SB (DSC 2 May 2008), available at www.usdoj.gov/atr/cases/f232800/232803.htm; Press Release, Department of Justice, Justice Department Files Lawsuit Against Consolidated Multiple Listing Service of South Carolina For Restraining Competition Among Real Estate Brokers (2 May 2008), available at www.usdoj.gov/atr/public/ press_releases/2008/232802.htm.

91 See, e.g., Press Release, Department of Justice, Justice Department Files Lawsuit Against Consolidated Multiple Listing Service of South Carolina For Restraining Competition Among Real Estate Brokers (2 May 2008), available at www.usdoj.gov/atr/public/press_releases/2008/232802.htm.

92 Press Release, Federal Trade Commission, FTC Charges Pittsburgh-Area MLS With Illegally Restraining Competition (9 January 2009), available at www.ftc.gov/opa/2009/01/westpenn.shtm.

both established websites containing information about competition and enforcement practices in the industry.[93]

Media and telecommunications

In November 2008, the DOJ issued a report on trends and developments in competition in the telecommunications industry.[94] The report was based on a symposium held in November 2007 and includes four chapters discussing:

a recent trends and developments in the telecommunications industry;

b basic economic principles applied to telecommunications competition;

c potential impediments to competitive entry in video, voice telephony, and broadband services, including the effects of regulation and conduct by incumbent service providers; and

d theDOJ's conclusions and planned future enforcement activities and competition advocacy.[95]

During his presidential campaign, Senator Obama also emphasised the importance of competition in the telecommunications industry. He advocated for increased attention to competitive concerns in the industry, and indicated his support for 'network neutrality' – the concept that internet providers 'should not be allowed to charge fees to privilege the content or applications of some web sites and internet applications over others.'[96] The Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy, and Consumer Rights has also stated its intent to focus on competitive conditions in the media and telecommunications industries during the current session of Congress.[97]

VI CONCLUSIONS

In 2009, the federal antitrust authorities in the United States have new leadership with a focus on aggressive antitrust enforcement. Both agencies have indicated that recent court losses and the economic downturn are unlikely to dampen their antitrust enforcement efforts.

93 See, e.g., Department of Justice, Antitrust Division, Competition and Real Estate, available at www.usdoj.gov/atr/public/real_estate/index.htm; Federal Trade Commission, Competition in the Real Estate Marketplace, available at www.ftc.gov/bc/realestate/.

94 Department of Justice, Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers, 17 November 2008, available at www.usdoj.gov/atr/public/reports/239284.pdf.

95 *Id.*; see also Press Release, Department of Justice, Justice Department Issues Report on Telecommunications Symposium (17 November 2008), available at www.usdoj.gov/opa/pr/2008/November/08-at-1022.html.

96 Frank Beacham, 'Obama to Expand Internet Access', *tvtechnology.com*, 5 January 2009, www.tvtechnology.com/article/72354.

97 Press Release, Senator Herb Kohl, Kohl, Hatch Announce Antitrust Subcommittee Agenda (25 March 2009), available at http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=2468.

Chapter 36

VENEZUELA

José H Frías *

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

During recent years, the Venezuelan Competition Authority (the Superintendencia para la Promoción y Protección de la Libre Competencia; 'the Directorate') has been trying to seek a balance between its obligation to promote and protect free competition in Venezuela and the socialist policies under the 'Socialism of the 21st century' advocated by President Hugo Chávez.

Such balance between competition enforcement and socialist policies has proved to be a difficult one. Obviously, the Venezuelan government's socialist policies have superseded the promotion of free competition when conflict arises, given that such policies are at the forefront of the government's priorities. Although under the law the Directorate is an independent body, its priorities have been accommodated to reflect the general trends of the government's policies and goals.

However, even within a socialist driven economy (in which private property has not been eliminated, but where there are many obstacles that hinder private investment), the Directorate, as well as the Law for the Promotion and Protection of Free Competition, enacted in 1992 ('the Pro-competition Law' or 'the Law') have surprisingly survived, even though, it must be said, they have not thrived.

The Directorate has been active during recent years in cartelisation, abuse of dominant position and unfair competition cases, mainly with a focus on protecting small businesses against big industries and national companies against multinationals, with the obvious issues of bias that such policy generates. Also, during the tenure of Milton Ladera as Superintendent (between 2004 and March 2009) the Directorate has given importance to certain consumer protection issues that fall outside the framework of the

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Pro-Competition Law, even issuing decisions that have been considered to be contrary to the Law.

Although the Law sets forth a merger voluntary notification system, there have been some merger cases notified to the Directorate (for example, the sale of Pfizer's OTC business to Johnson & Johnson, which was approved in 2007). In other cases, particularly in transactions involving telecoms companies, where notification is mandatory (through the Telecommunications Commission, as explained below), there has been certain activity. However, merger control (which includes merger enforcement, since a merger not notified to the Directorate may be subject to *ex post* investigation and even sanctions) has not been active recently.

ii *Enforcement agenda*

As stated *supra*, the enforcement agenda of the Directorate has been guided by the general policies of the Venezuelan government (generally, socialist policies related to 21st century socialism) and the particular interest that the Directorate has shown in cartelisation cases and certain cases of abuse of dominant position between a small Venezuelan company and a multinational.

It must be pointed out that such agenda may be subject to changes as a result of the appointment, in March 2009, of a new Superintendent (who is the Head of the Directorate). However, it is likely that the alignment of the Directorate to the policies of the government could be increased, since the new Superintendent was also appointed as Vice Minister of Commerce, and currently holds both positions.

In general, cartelisation cases have been opened at the request of certain associations of competitors, such as the claim filed by the travel agencies' association against major carries in Venezuela for allegedly fixing the commissions for the sale of tickets or by consumer associations, such as the case opened against the banks and credit card companies for alleged cartelisation in the determination of the merchant discount fee, both of which are described in more detail *infra*.

II CARTELS

In Venezuela cartel regulation is contained in Article 10 of the Pro-competition Law, which prohibits all horizontal and vertical agreements, concerted practices, collective recommendations and decisions whose object is:

a to fix prices and other marketing or service conditions directly or indirectly;

b to restrict production, distribution and technological development;

c to divide markets, geographical areas, or industries or sources of supply among competitors;

d to discriminate by applying different conditions for equivalent services to different customers, thus placing some competitors at a disadvantage in relation to others; or

e clauses whose object is to make the entering into of contracts subject to the acceptance of additional services that are not related to the subject matter of those contracts because of their nature or normal trading practices.

'Agreement' means documented agreements between economic actors whose aim is to carry out an anti-competitive practice, regardless of the existence or absence of subsequent action in the market. The concept of 'concerted practice', for its part, involves firstly a meeting of minds to carry out one of the anti-competitive practices specified in Article 10 and, secondly, a parallel action in the market that does not arise from market reality. Both agreements and concerted practices require proof of a meeting of minds between economic operators. The difference lies in the fact that agreements require a formal contract, whereas the proof of a 'meeting of minds' in concerted practices stems from the intentional exchange of information between the economic actors with the aim of carrying out anti-competitive behaviour, whose effect is to produce parallel actions in the market.

With regard to recommendations and decisions, there is a distinction between 'collective recommendations' and 'decisions'. Whereas the former arise from trade associations or similar bodies and are aimed at guiding the market behaviour of competitors within the association, the latter are adopted by associations to force the competitors within them to behave in a particular way. In other words, decisions are binding.

i Significant cases

The most important cartelisation case decided by the Directorate in 2008 was the investigation opened at the request of the travel agencies' association ('AVAVIT') against the major airlines (both national and international) operating in Venezuela for alleged price fixing on the commissions they pay to the travel agencies. AVAVIT argued that the airlines had agreed to lower the commissions they pay to the travel agencies.[1]

The Directorate decided that the airlines had carried out a concerted practice to lower the commissions paid to the travel agencies (from 10 per cent to 6 per cent), and that the airlines had also colluded in concerted practices to exclude the travel agencies from the market. There were no evidences of even informal contacts between the airlines or any other evidence of an agreement among competitors. Notwithstanding such lack of evidence, the Directorate decided against the airlines.

In an interesting twist, the Directorate also found that some airlines had a dominant position in the air routes serviced by a single airline (thus defining the relevant market based on routes). For example, the Directorate stated that Delta Airlines has a dominant position in the route Caracas-Atlanta, because Delta is the only airline covering such route. It is not clear from the decision the relationship between such supposed dominant positions and the alleged cartelisation findings.

As a result of its findings, the Directorate imposed fines to all airlines involved in the investigation (including American Airlines, Delta, Air France, Iberia, Alitalia, Continental, TAP, Lufthansa, Air Europa, Varig, Air Canada, Avianca, TACA, among others), ranging from US$40,000 to US$840,000. The decision in currently under appeal before the Administrative Courts in Caracas.

1 Resolution No. 20-2008 dated 3 November 2008.

ii Trends, developments and strategies

As commented *supra*, the most relevant trend that the Directorate has followed in the previous years has been to integrate its activities within the general framework of the government's policies. In such regard, certain sensitive areas, such as the activities of state-owned companies, have been exempted from investigations opened by the Directorate.

Additionally, in certain cases involving companies that may have conflicts with the government, such as the media, the Directorate has been inclined to decide against such companies. For example, in 2005, the Directorate imposed the biggest fines to date (approximately US$10 million) on the most important TV networks in Venezuela (Venevision and RCTV) for alleged cartelisation, with complete lack of evidence.[2]

iii Outlook

In 2008 the Directorate opened an investigation at the request of a consumer protection association (Fevacu) against the major banks operating in Venezuela, the Venezuelan Banking Council and the credit card companies, for alleged price fixing with respect to the determination of the merchant discount rates. The case was opened just weeks before the Venezuelan Central Bank issued a resolution establishing the maximum limits of merchant discount rates in Venezuela, thus rendering the case useless. However, the case has continued and the decision is pending. There is a likelihood that the Directorate in deciding this case may use the precedent set in the airlines case issued in 2008.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Although Article 10 of the Pro-competition Law applies to both horizontal and vertical agreements, Regulation No. 1 exempts the following vertical agreements from the prohibition contained in that rule: vertical agreements whose object is to fix prices, distribute markets, restrict production, discriminate and, through their clauses, subordinate the conclusions of contracts to the acceptance of supplementary services which are not related to the object of those contracts because of their nature or normal trading practices (such as clauses tied on without any commercial justification). The exemption only applies if the behaviour in question does not prevent or hinder effective competition in the relevant market. However, vertical agreements which affect effective competition may be authorised by the Directorate in accordance with the authorisation procedure.

Article 12 of the Pro-competition Law prohibits contracts between economic operators that fix prices and contracting conditions for the sale of goods or the provisions of services to third parties, with the intention or effect of restricting free competition in all or part of the market. According to the Directorate's criteria, the following requirements must be met in order for the prohibition to apply: (1) there must be a contract; (2) intended to fix prices or other contracting conditions with third

2 Resolution No. 07-2007 dated 24 February 2005.

parties to the contract; (3) with anti-competitive results (rule of reason). Establishing recommended prices is not considered a resale price agreement.

Regulation No. 1 allows the Directorate to issue block exemptions for categories of practices. Pursuant to this power, the Directorate has issued a block exemption for exclusive distribution and exclusive purchasing agreements.

Under Regulation No. 1 it is possible to apply for individual authorisation to enter into certain agreements which restrict competition, provided they result in advantages to consumers and help increase the financial efficiency of the parties to the agreement. Under Article 8 of the Regulation, agreements between competitors can be authorised provided they do not involve price fixing, limiting production or market sharing. The Article also introduces the possibility of authorising vertical agreements of any type.

Individual authorisations may only be granted if the following conditions are met:

a the nature and duration of the agreement must not prevent effective competition in the relevant market;
b the exclusion of competition must not be significant;
c the possibility of coordination among competitors must not be encouraged;
d the agreement must be restricted to the essential in order to obtain the beneficial effects in question;
e the agreement's advantages must be greater than its restrictive effects; and
f the agreement must have beneficial consequences on the production, distribution or development of the goods.

The Directorate has not applied the individual authorisation rules very often.

Regarding unilateral practices, Article 6 prohibits exclusionary practices, actions or conducts by persons who, without having a legal right to do so, attempt to prevent undertakings, products or services from entering or remaining in the market. According to the criteria laid down by the Directorate, the following requirements must be met in order for a conduct to qualify as an exclusionary practice:

a the operator carrying out the practice must have sufficient economic capacity to affect the market structure;
b the operator must use that capacity to prevent operators from entering or staying in the market; and
c the exclusion must be irrational or unjustified.

For its part, Article 7 of the Pro-competition Law prohibits boycotts, which are defined as inciting third parties to do any of the following:

a refuse to accept the delivery of goods or the provision of services;
b prevent the acquisition or provisions thereof; or
c refuse to sell raw materials or supplies or to render services to other firms.

Article 13 of the Pro-competition Law prohibits abuse of a dominant position, which would exist in the following cases (this list has been supplemented by the administrative jurisdiction case law):

a discriminatory practices and other marketing conditions;

b an unjustified restriction of production, distribution or technological development;
c an unjustified refusal to meet demand for the purchase of products or the provision of services (refusal to deal);
d discrimination relating to the application of different conditions for equivalent benefits in trade relations, placing some competitors at a disadvantage in relation to others; and
e the imposition of clauses aimed at making the entering into of contracts subject to the acceptance of additional benefits that are not related to the subject matter of those contracts because of their nature or trading practices.

i *Significant cases*

In a decision issued in December, 2006, the Directorate stated that an international company (Wyeth) had tried to hinder a Venezuelan manufacturer (Dollder) from entering into the market by sending a warning letter with regards to a pharmaceutical product protected by a valid patent. The Directorate declared that the warning letter evidenced the intention of Wyeth of preventing the copy of the patented product from being launched in Venezuela. According to the decision, the warning letter as such amounted to an exclusionary practice against a competitor, an anti-competitive practice prohibited under the Pro-competition Law.[3]

Warning letters are legal in Venezuela (despite the findings of the Directorate). According to Venezuelan law, filing a lawsuit and obtaining an injunction for patent infringement does not constitute an anti-competitive practice. The protection of intellectual property rights (including patents) is guaranteed under article 98 of the Venezuelan Constitution. Therefore, filing a lawsuit for patent infringement – and obviously sending a warning letter – constitutes the exercise of a constitutional right.

In a similar case decided in 2008, the Directorate declared that Sanofi Venezuela violated Articles 6 (exclusionary practices) and 13 (abuse of dominant position) of the Pro-competition Law, and imposed a fine of approximately US$1.5 million. The Directorate declared that Sanofi has a dominant position in the relevant market (products with the active ingredient clopidogrel). The Directorate stated that by sending warning letters Sanofi had tried to hinder a competitor's product entry into the market.[4]

This decision showed a strong bias against international pharmaceutical companies and patents for pharmaceutical products. The decision by the Directorate is illegal, because it failed to analyse arguments such as, for example, that the letters sent by Sanofi could not be regarded as warning or cease and desist letters. Also the Directorate did not take into account arguments stating that the relevant market must be defined according to therapeutic indication and not active ingredient, and that therefore Sanofi does not have a dominant position. There was no evidence to demonstrate that Sanofi has a dominant position or that clopidogrel may be considered as a relevant market. Also, sending two letters should not be construed as an exclusionary practice

3 Resolution No. 76-2006 dated 26 December 2006.

4 Resolution No. 18-2008 dated 15 October 2008.

or as an abuse of dominant position, especially taking into account that the competitor supposedly affected entered into the market. In general, the decision lacks sufficient analysis and is not based on evidence.

In other significant case on dominant position, the Directorate declared that AGB Panamericana de Venezuela, a subsidiary of AGB Nielsen, had violated the Pro-competition Law and imposed a fine of approximately US$500,000. AGB is the main provider of television ratings in Venezuela. At the request of Televen (a local TV station) the Directorate opened an investigation on AGB's rating system. In its decision, the Directorate declared that there were inconsistencies in the samples used by AGB for the TV audience measurement, which resulted in a manipulation of the distribution of rating information to the market.[5]

Although the Directorate declared that AGB has a dominant position in the relevant market (defined as the 'market of electronic measurement of TV ratings in Venezuela'), it declared that AGB did not abuse its dominant position. However, the Directorate considered that the sample used by AGB does not accurately reflect the reality of the Venezuelan TV audience, thus affecting the market of TV advertisements in Venezuela. This constituted a manipulation of the distribution of ratings information in the Venezuela market, a violation of Article 8 of the Pro-competition Law.

Another significant case on abuse of dominant position was decided in 2007. The Directorate fined Fiat's distributor in Venezuela (Comercializadora Todeschini) approximately US$2 million for abuse of dominant position. A local Fiat dealer claimed before Procompetencia that Fiat had unilaterally terminated the dealer's agreement without having a commercial reason, therefore incurring in an unjustified refusal to supply.[6]

The Directorate declared that Fiat has a relative dominant position *vis-à-vis* its dealers, because there is a relationship of economic dependency between Fiat and its dealers in Venezuela due to the exit barriers created by the customisation of the dealers' infrastructure and facilities, trademark loyalty, etc. According to the Directorate, there were no justifiable reasons for Fiat's decision to terminate the agreement with the local dealer, and therefore Fiat abused its dominant position.

ii Trends, developments and strategies

The most interesting trend that the Directorate has showed in abuse of dominant position cases is the opening of several investigations on grounds of both cartelisation and abuse of dominant position (as, for example, in the airlines case). Although in the final decisions the Directorate has decided only on grounds of cartelisation, at the outset of the case the Directorate has alleged collective dominance in price-fixing cases.

As seen *supra*, warning letters in cases regarding intellectual property rights have been affected by the decisions of the Directorate. In two cases the Directorate has decided that sending a warning letter (in cases where there was a valid patent over a pharmaceutical product) constitutes an exclusionary practice prohibited under the Pro-

5 Resolution No. 10-2008 dated 28 June 2008.

6 Resolution 04-2007 dated 6 February 2007.

competition Law. This criteria of the Directorate has obviously affected the protection of intellectual property rights in Venezuela. As stated *supra*, according to Venezuelan law, filing a lawsuit and obtaining an injunction for patent infringement does not constitute an anti-competitive practice. Therefore, filing a lawsuit for patent infringement – and obviously sending a warning letter – constitutes the exercise of a legal and constitutional right that may not be considered anti-competitive. Also, the criteria of the Directorate with respect to warning letters hinder possible amicable settlements that may arise after the sending of such letters.

iii Outlook

A probable future development in the enforcement of restrictive agreements in Venezuela may be a renewed focus on vertical agreements. In 2007, after a much publicised case, the Directorate fined spirits companies Diageo US$3.2 million and Pernod Ricard US$1.4 million for alleged use of exclusionary contracts for the distribution and marketing of its spirits and liquors.[7]

The investigation was opened following the complaint by Pernod Ricard alleging that Diageo was using exclusionary contracts. During the course of the investigation, Diageo filed a counter-claim against Pernod Ricard. The Directorate declared that both companies have used exclusionary practices by prompting bars and restaurants to stock their products. In addition to the fines, the Directorate ordered the companies to file the agreements with bars and restaurants with the authority for review and issued a cease and desist order allowing smaller companies to bid for promotional agreements.

Regarding state-owned companies, the outlook of the Directorate has changed. For example, before its nationalisation in 2007, CANTV (Venezuela's biggest telecom company) was subjected to several investigations by the Directorate, and was also fined for abuse of dominant position (in a case involving internet service providers). After the nationalisation, all cases against CANTV have been decided in favour of CANTV or have been dismissed at the outset.[8]

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

With regards to legal monopolies, the single paragraph of Article 16 of the Pro-competition Law provides that, if the dominant position is created by law, the prohibition on abusing a dominant position applies to undertakings in that position unless otherwise provided for by the law governing them.

Other than the mention in Article 16, the only area where Venezuelan competition law deals with regulated industries is merger control. Although neither the Pro-competition Law nor the Merger Regulations contain special rules regarding particular sectors, the Telecommunications Law (dated 12 June 2000) establishes that mergers or acquisitions between telecommunications operators are subject to prior approval by the

7 Resolution No. 26-2007 dated 4 June 2007.

8 See, for example, Resolution No. 29-2007 dated 7 June 2007.

Venezuelan Telecommunications Commission ('Conatel'). In order to render its decision on such mergers, Conatel must request an opinion by the Directorate. The Directorate must determine the effects on competition arising from the transaction. Conatel may only approve transactions that have obtained a favourable opinion from the Directorate.

Also, the Venezuelan Capital Markets Law provides that any person intending to commence a tender offer of a listed company shall notify its intention to the Venezuelan Securities Commission. With the notification, the person intending to commence the tender offer must inform the Securities Commission the effects of the transaction on competition, according to the Pro-competition Law. If the person intending to commence the tender offer directly or indirectly competes with the target, it must announce whether the transaction has obtained a clearance from the Directorate or, if the transaction was not notified, the reasons for the lack of notification.

V STATE AID

There are no rules in the Pro-competition Law or other Venezuelan competition regulations with respect to state aid. However, it may be important to mention that a draft of the Antimonopoly Law (discussed in the National Assembly during 2006 and 2007), which would replace the Pro-competition Law, sets forth that government-owned companies and other government instruments would be exempted from the prohibitions of the law.

VI CONCLUSIONS

i Pending cases and legislation

A draft of the Antimonopoly Law was discussed in the National Assembly during 2006 and 2007. The Antimonopoly Law would be applicable to all forms of private legal entities that perform economic activities in Venezuela. The Law would also be applicable to agreements that have an economic impact in Venezuela, such as cross-border mergers and acquisitions. Government-owned companies and other government instruments would be exempted from the Law.

The forbidden practices under the Antimonopoly Law are:

a 'horizontal agreements' (cartels): agreements among competitors aimed at reducing, limiting or eliminating competition (such as price fixing, output restrictions, market sharing, collusive tendering, etc.);

b 'vertical agreements': such as exclusive distribution agreements, franchising agreements, etc., that may reduce or eliminate competition. Vertical agreements may be authorised;

c exclusionary practices and boycotts;

d abuse of dominant position; and

e unfair competition practices (such as misleading advertisement, confusion, appropriation of trade secrets, etc.).

A new National Antimonopoly Institute (Instituto Nacional Antimonopolio y Antioligopolio; 'INANTI') would replace the Directorate (the current competition Authority).

The proposed Antimonopoly Law increases the fines for breaching the Law and INANTI's orders and resolutions. Fines range from 1,000 to 4,000 tax units for breaching INANTI's orders and fines of up to 35 per cent of the company's gross income can be be imposed for violations of the Antimonopoly Law. The Antimonopoly Law would also penalise cartelisation with imprisonment for up to 10years.

Regarding enforcement, the terms of admitting, substantiating and deciding cases are extended under the draft Antimonopoly Act and the statute of limitations for forbidden practices is extended from one year to three years. The new Law grants INANTI, with the cooperation of other public agencies, the power to forcibly exercise the precautionary measures issued; anyone in breach of a precautionary measure will be fined 300 tax units per day of default.

APPENDICES

Appendix 1

ABOUT THE AUTHORS

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Mr Akuyev joined the firm in 1995 and became a partner in 2008. In 1996 and 1997 he was resident in the London office. Mr Akuyev received an LLM degree from New York University School of Law in 1995 and a JD equivalent, with highest honours, from the Moscow Institute for International Relations (MGIMO) in 1994. He also graduated from the Beijing Language Institute in 1992.

Mr Akuyev is a member of the Bar of New York and is a Russian qualified lawyer. His native language is Russian, he is fluent in English and Mandarin and has basic knowledge of Kazakh.

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Oliver Borgers is a partner in the firm's competition or antitrust law group. He provides strategic advice to major national and international clients on all aspects of Canadian competition law, including merger control. Mr Borgers also regularly obtains approvals of mergers under Canada's foreign investment review laws, notably the Investment Canada Act. Mr Borgers has extensive experience advising clients on premerger notifications, various marketing and pricing practices, exclusive dealing and other civil and criminal issues that arise out of Canadian antitrust law. Recent major matters have included mining, hospitality, entertainment, oil and gas, financial services, technology, consumer products, retail goods, and pharmaceutical industries.

Mr Borgers is recognised as a leading competition and foreign investment lawyer in *Chambers' Global*, *The International Who's Who of Business Lawyers* and *The International Who's Who of Competition Lawyers & Economists*, *Competition Law Review*, *Practical Law Company's Competition Law Handbook* and *Lexpert's Canadian Legal Lexpert Director*. He received a BA in Philosophy and an LLM from the University of Toronto and an LLB from the University of Ottawa. He has been a member of the Law Society of England and Wales since 1995 and was called to the Ontario Bar in 1988. He speaks English, French, German and some Spanish.

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Alessandro Celli graduated from the University of Zurich in 1987 and obtained his Doctor in Law degree (Dr iur) in 1993. He was admitted to the Swiss bar in 1990 and joined Froriep Renggli in 1991, becoming a partner in 1998. He is a member of the following professional associations: Zurich Bar Association, Swiss Bar Association, Inter-Pacific Bar Association (IPBA), American Bar Association (ABA), Swiss Association of Competition Law, Association Suisse pour la Protection de la Propriété Intellectuelle (AIPPI) and International Trademark Association (INTA). Alessandro Celli is a former lecturer at the University of Fribourg and currently member of the board of the Zurich law society.

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Frederico Coutinho obtained his Law Degree from the University of Lisbon Law School in 1987 and was admitted to the Portuguese Bar in the same year. He has been a partner of the firm since 1996. Mr Coutinho was a lecturer on International Private Law at the University of Lisbon Law School between 1988 and 1989 and legal adviser of the Portuguese Tourism Fund between 1987 and 1990.

One of Mr Coutinho's main areas of practice is competition law where he gives advice on a number of high profile mergers and joint ventures, litigation, companies' commercial practices from the point of view of competition and European law, distribution systems and antitrust litigation. He also gives advice on several aspects of competition with special emphasis in merger control, anti-competitive practices, competition compliance, due diligence, state aid, dawn raids and leniency. Mr Coutinho is also active in several other practice industries, such as the automobile industry, pharmaceuticals, energy, telecommunications, sport, banking and insurance and aviation.

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His professional work focuses on advising clients and representing them before the antitrust authorities on matters relating to pre-merger control, cartel investigations, anti-competitive investigations and general market investigations.

He has also dealt with mergers, acquisitions and joint venture transactions, advising buyers and sellers on the transfer of shares or assets in Argentina. He has been very active in advising foreign clients on setting up businesses in Argentina and compliance with local regulations.

He has published several works related to his area of expertise and has participated as a panelist and moderator in different conferences related to his area of expertise.

He is an assistant professor of Competition Law at the Postgraduate Courses of Business and Economics Law of the Universidad Católica.

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José H Frías is a partner in D'Empaire Reyna Abogados. He has participated in many of the most significant competition or antitrust cases in Venezuela in the last years, including his representation of Global Crossing in connection with the acquisition of Impsat; Telecom Italia Mobile (TIM) in connection with the sale of Digitel; Continental Airlines in an investigation brought by the Venezuelan travel agencies' association; Procter & Gamble in its acquisition of Gillette; Pfizer in its acquisition of Pharmacia; and Cemex in a cartel investigation of the cement industry. Mr Frías has been considered as one of the best competition or antitrust lawyers in Venezuela by *PLC Which Lawyer* and *Chambers Latin America*. Before joining D'Empaire, he worked with the Venezuelan antitrust authority (Procompetencia). He also worked as a foreign intern at the New York office of Skadden, Arps, Slate, Meagher & Flom LLP in 2001. Mr Frías studied law at Universidad Católica Andrés Bello, Caracas (JD 1993) and received an LLM from McGill University, Montreal (2000). He is fluent in Spanish and English.

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Mr Goodman joined Cleary Gottlieb in September 2002 and became a partner in 2006. Prior to joining Cleary Gottlieb he was a senior associate with Slaughter and May. He is distinguished as a leading individual by *Chambers and Partners*, and has been recognised by *The Lawyer* as one of the United Kingdom's 'Hot 100' legal practitioners, and by *In Brief* as a 'Rising Star' in the UK competition field.

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Peter Hinton studied antitrust and corporate finance at Harvard University in 1979. He practised in those areas at Covington & Burling in 1980 and has maintained both specialties at Simpson Grierson where he co-leads the competition law group. Peter has written extensively on competition law matters and has recently been appointed to the Commerce Commission's review of the enforcement framework relating to single firm conduct. Peter contributed principally to Section III of the New Zealand chapter.

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Randal T Hughes is one of the leaders of McCarthy Tétrault's national competition/antitrust law group. He has successfully handled the competition law and Investment Canada aspects of numerous mergers and acquisitions and represented clients before the courts in criminal proceedings under the Competition Act and before the Competition Tribunal in respect of reviewable matters. Mr Hughes represents clients in international conspiracy investigations and prosecutions involving competition authorities in the United States and Europe and other jurisdictions around the world, as well as the Competition Bureau in Canada. He also represents clients in substantial civil actions, including leading class actions and in competition law matters. Mr Hughes is globally recognised as a leading competition law practitioner and is a frequent speaker on current issues. He served as Canadian non-governmental adviser (NGA) at the International Competition Network (ICN) Cartel Leniency Workshop of enforcement agencies in Sydney, Australia, in November, 2004, the ICN Cartel Workshop in The Hague, Netherlands, in November, 2006, and the ICN Annual Conferences in Bonn, Germany in June, 2005 and Kyoto, Japan in April, 2008. Mr Hughes also participated on the faculty of the ABA/IBA International Cartel Workshop in London, England in February, 2006 and in San Francisco, California in January/February, 2008.

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Mr Izvekov's practice focuses on corporate and financial transactions, particularly mergers and acquisitions, joint ventures, securities offerings and antitrust matters. He also has extensive experience in cross-border transactions involving businesses in Russia.

Mr Izvekov joined the firm as an associate in 2006. He received an LLM degree from the London School of Economics and Political Science in 2005 and received a JD equivalent from Moscow State University Law School in 2003. Prior to joining Cleary Gottlieb, Mr Izvekov practised as an in-house counsel with Lukoil Group from 2003 to 2004, as an associate in Russian law firm ALM-Feldmans in 2004 and as an associate with Lovells from 2005 to 2006.

Mr Izvekov is a qualified Russian lawyer. His native language is Russian, he is fluent in English and has a basic knowledge of German.

JUAN JIMÉNEZ-LAIGLESIA

DLA Piper

Juan is a partner and head in the firm's litigation and regulatory group in the DLA Piper Madrid office. He specialises in EC law, competition and regulatory law. He has practised in Brussels and Madrid. He has extensive experience in the following areas: joint ventures, strategic alliances, and mergers and acquisitions (on behalf of both notifying parties and third parties), as well as abuses of dominant position, cartel investigations, and state aid matters before the European Commission, the European courts and Spanish competition authorities and courts.

Juan is an associate professor of competition at Carlos III University of Madrid (Spain), professor of competition law and energy markets at the Instituto de Empresa in Madrid (Spain), and sits on the editorial board of the journal *Gaceta Jurídica de la Unión Europea y de la Competencia* (EU and Competition Law Gazette).

KOZO KAWAI

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Mr Kawai is a senior partner of Nishimura & Asahi and renders a wide range of services to both domestic and overseas clients, covering every area of competition law. He represented the Japanese companies who filed the very first and second leniency applications with the JFTC, and he represented foreign companies in connection with the very first international cartel cases ever handled by the JFTC.

Mr Kawai graduated from the University of Tokyo (LLB) in 1984 and earned a Master of Laws from Columbia University School of Law in 1993 and LLM, EC Law in Katholieke Universiteit Leuven, 1994. He also worked at Cleary, Gottlieb, Steen & Hamilton, Brussels from 1994 to 1995 and the Ministry of International Trade and Industry, Tokyo, from 1995 to 1997 and is now teaching a competition law course at the University of Tokyo, School of Law, since 2006.

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Schoenherr Attorneys at Law

Vid Kobe is an associate of Schoenherr in Ljubljana, where he focuses on M&A, competition and IP law. Vid graduated from the Law School of Ljubljana University in the beginning of 2007. During his studies, he completed one year in the Law School of the University in Heidelberg, Germany. Since the autumn of 2007, he has continued his legal studies at the University in Ljubljana where he is attending a postgraduate programme focusing on corporate and commercial law. Vid joined the Schoenherr team in 2006.

SEBASTIAN OLMEDO LANSAC

Vouga & Olmedo, Law Firm

Sebastian Olmedo Lansac, born in 1978, was admitted to the bar in 2003 in Paraguay. Mr Lansac obtained his JD at the National University of Asunción (2003) and LLM at the University of Southern California. He is a member of the Paraguayan Bar Association and Intellectual Property Agent. He speaks Spanish, English and German. Mr Lansac's practice areas include litigation, contracts and commercial law.

JITKA LINHARTOVA

Schoeherr vos

Jitka Linhartova is an associate of Schoenherr in Prague and primarily specialises in competition and regulatory law. Jitka advises clients in various fields of industry and other markets regarding compliance with Czech competition law. Jitka graduated from the ZCU University of Pilsen. Jitka earned her specialisation as a case handler of the Office for the Protection of Competition of the Czech Republic and European Commission (DG COMP, Cartel Unit). She moved from the public to the private sector when she began working for Gleiss Lutz in 2007.

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Kateřina Mandulová is an associate of Schoenherr in Prague and primarily specialises in the fields of competition and IP law. Kateřina advises international clients, in particular in relation to competition and regulatory aspects of their transactions. These clients include companies from the construction, transportation, real estate and pharmaceutics industries. Kateřina graduated from the Charles University in Prague and continued her studies at the University of Paris II. Pantheon-Assas. She holds an LLM in European Law from the College of Europe, Bruges.

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Stephanos Mavrokefalos is a graduate of the University of East Anglia (LLB), 1995, and of the London School of Economics and Political Science (LLM – Labour Law), 1996. He is a member of the Cyprus Bar Association and of the Nicosia Bar Association since 1997, and has served as a member of the Council of the Nicosia Bar Association twice. He is also a Founding Member of the Cyprus Young Lawyers Association, of which he also served as a Treasurer and member in the Council. He is also a member of the Board of Judges of the Nicosia Football Union, has served as a Legal Counselor and Member of the National Council of the Junior Chamber of Cyprus and is currently a member of the Cyprus Intellectual Property Authority by presidential appointment.

He has extensive practical experience in matters of Competition Law and is a repeating contributor to Kluwer Law International's *A Practical Guide to National Competition Rules Across Europe*, and to Practical Law Company's *PLC Cross Border Competition Handbook*. He joined L Papaphilippou & Co in 2001 and has been a partner since 2003.

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Fiona is a partner in Arthur Cox's EC and Competition Department. Fiona's practice includes advising companies on all aspects of EC and Irish competition law, merger control law and state aid law. Fiona has advised on leading EC and Irish merger control cases and investigations carried out by the Competition Authority. Fiona's clients include public limited companies, semi-state bodies and privately owned companies operating in sectors as diverse as aviation, FMCG and the waste industry.

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Benjamín Mordoj is a graduate of the University of Chile (2005), with postgraduate studies in Administrative and Economic Law at the Catholic University of Chile (2008). He has been an associate of FerradaNehme since 2007. His main practices areas are focused on antitrust, economic regulation (telecommunications, ports, gas, and water utilities) and complex litigation. Benjamín was assistant teacher of economic law and securities law, both at the University of Chile (2003 to 2006).

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Martin Nedelka is a partner of Schoenherr, Prague and Bratislava, where he specialises in competition law, public procurement law and regulatory matters. Martin is a member of the Czech, Slovakian and Brussels (B-list) Bar Associations, and studied law at the University of Prague (MA; PhD), Regensburg (LLM) and Dublin (LLM). Prior to joining Schoenherr in 2009, he worked for the Prague and Brussels office of leading German law firm Gleiss Lutz, where he had been a partner since 2003. In 2000, Martin Nedelka was an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton Brussels, Belgium.

In competition law, Martin Nedelka advises clients in all aspects of Czech, Slovak and EC competition law, in particular merger control, investigations of alleged cartels and abuses of dominant position. In regulatory matters, Martin has gained broad experience, particularly in the area of energy and telecommunications. In recent years he has been involved in various headline cross-border transactions covering Czech Republic and Slovakia. Martin Nedelka is author of articles on competition, EU law, telecommunications and energy.

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Andile Nikani is a partner and the head of the Competition Law Department at Fluxmans Attorneys. Andile Nikani holds BA and LLB degrees from the University of Cape Town. Andile Nikani specialises in competition law and mergers and acquisitions. Andile Nikani has been involved in a number of high-profile cases representing international companies such as Goldman Sachs and many others. Before joining Fluxmans Attorneys, he was a partner in the corporate department of Moss Morris Attorneys, a firm which eventually formed part of Routledge Modise, where he specialised on all aspects of competition law, which included pre-merger counselling, merger filings with the Competition Commission, conducting competition law audits, formulating compliance programmes and competition law litigation. On occasion, he gave high-level presentations to merchant banks and smaller law firms on topical competition law matters. Mr Nikani cut his teeth in competition law at Bowman Gilfillan Attorneys.

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Pat is a partner in the EC and competition law group of Arthur Cox. He obtained a BCL degree from University College, Cork in 1987 and a post-graduate qualification in European law from the College of Europe, Bruges in 1988. He went on to practise EC and competition law in Brussels for two years before joining Arthur Cox in 1990. Pat qualified as a solicitor in 1993 and became a partner in 2000. In addition to representing clients on competition law and merger control related issues before the Irish Competition Authority and the European Commission, Pat has also been involved in a number of Irish High Court, Supreme Court and European Court proceedings involving the application of Irish and EC competition law. He is the lead instructing lawyer representing the Irish beef industry in the ongoing *BIDS* case involving the application of Article 81 of the EC Treaty. Pat represents a wide variety of clients including many Irish associations of undertakings. Pat was also appointed by the Minister for Enterprise, Trade & Employment as a member of the National Competitiveness Council from 2005 to 2007.

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Alfredo O'Farrell has been a partner with Marval, O'Farrell & Mairal since 1978. He is currently chairman of the firm and chair of the antitrust law department. He specialises in corporate and antitrust law, M&A and other related corporate matters.

Within his area of specialisation he has advised national and foreign firms in corporate matters, mergers, acquisitions, different antitrust issues, distribution and agency contracts, privatisations and financings. His advice includes operation structuring, acquisition of real estate, contracts relating to the construction of plants and other related matters.

He graduated from the Universidad de Buenos Aires in 1975 and obtained a Master in Comparative Jurisprudence from New York University in 1977.

Before joining the firm he worked for the law firm Rosenmann, Colin, Freund, Lewis & Cohen, in New York.

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Cristina Pana is a senior associate of Schoenherr si Asociaţii SCA, Bucharest and specialises in competition law. Her main areas of practice are merger control and investigation proceedings before Romanian Competition Council. She also regularly advises national and international clients on antitrust matters and state aid issues. Prior to joining Schoenherr in 2003, she graduated from a LLM programme in international business law at Central European University, Hungary.

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Mariya Papazova is an attorney-at-law of Advokatsko druzhestvo Andreev, Stoyanov & Tsekova, Sofia in cooperation with Schoenherr. She specialises in competition law, IP law, as well as corporate and commercial law. Upon her graduation from the Sofia University St. Kliment Ohridski, she worked in a reputable Bulgarian law firm from 1999 to 2001. In 2003 she finalised her postgraduate one-year LLM study in Friedrich-Alexander University Erlangen, Nürnberg, Germany. Before joining the firm in 2007, she worked in the Bulgarian Commission for Protection of Competition for four years. During her work in the Commission she did a four month traineeship in the European Commission, DG Competition.

KOSTANDIN PEÇI

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Kostandin Peçi is a lawyer resident in the Rome office of Cleary Gottlieb.

Mr Peçi's practice primarily focuses on EC and Italian antitrust and regulatory law. He also has extensive experience in capital markets transactions. His recent experience includes advising the Antitrust Authority of Albania on several proposals aimed at reforming the Albanian competition legislation.

Mr Peçi joined the firm in 2005. He graduated from the Law School of the University of Bologna in 2004 and received a LL.M. degree from the College of Europe in Bruges in 2005, focusing on European Legal Studies.

Mr Peçi has been a member of the Tirana Bar since 2006. He is a native Albanian speaker, and is fluent in Italian, English and French.

SRDANA PETRONIJEVIC

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Srđana Petronijevic is an attorney at law of Moravčević Vojnović Zdravković OAD in cooperation with Schoenherr and primarily specialises in competition law and corporate/M&A matters. Srđana advises international clients on their market entry in Serbia, Montenegro, Bosnia and Herzegovina and Macedonia, in particular in relation to competition aspects of their transactions. Among such clients are companies from the telecommunication, insurance, banking, construction, real estate, road development, pharmaceutics and IT industries. Srđana graduated from the University of Novi Sad. Further, she holds an LLM in International Business Law from the Central European University in Budapest and a specialisation degree in International Business and Trade Law from the Asser College in The Hague. She is a licensed Stock Exchange Dealer and Broker (Serbia, 2003). Srđana earned her specialisation degree in Advanced European Union Practice and successfully completed the programme conducted by the World Law Institute in 2005. She is also licensed sworn court interpreter for the English language.

HENRIK PEYTZ

Nielsen Nørager

Henrik Peytz has been partner in Nielsen Nørager since 1999. He was born in 1959 and graduated with a Master of Laws from the University of Copenhagen in 1983. He holds an MBA degree from INSEAD. Prior to joining Nielsen Nørager he worked with the Danish Ministry of Justice, Kromann & Münter Law Firm (Copenhagen and Brussels) and Clifford Chance (Brussels). He is co-author of *EU Karnov*, a leading Danish commentary on EU law, author of various tax law commentaries, and part-time lecturer at the University of Copenhagen in advanced competition law.

Henrik Peytz and the competition team of Nielsen Nørager conduct litigation and advise public and private undertakings on issues of competition law, public procurement, state aids, marketing and matters involving public regulation (for example regulation of the media, food standards, radio, TV, energy and telecommunications).

VAIDO PÕLDOJA

Paul Varul

Vaido Põldoja is an Estonian lawyer working for an Estonian Law Firm Paul Varul from 2002 where he has been dealing with competition law and regulated industries regulation, in electronic communication, electricity and pharmaceuticals.

Vaido Põldoja graduated from the University of Tartu, Estonia in 2002. In 2005, Vaido obtained a Masters Degree in EC Law from the University of Stockholm where he majored in EC Competition Law.

From March to July 2006, Vaido worked as a trainee in DG Information Society and Media, Directorate B, in Brussels where he worked with issues pertaining to EC electronic communication regulation, competition law and state aid. He also participated in drafting the EU Roaming Regulation.

Vaido speaks English fluently and has a good knowledge of Swedish, Finnish and Russian.

JEANNE L PRATT

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Jeanne L Pratt is a partner in the McCarthy Tétrault LLP national competition/antitrust law group in Toronto, practising exclusively in the area of competition law and related litigation. She represents clients in investigations by the Competition Bureau and Department of Public Prosecutions and in criminal and civil litigation before the courts and the Competition Tribunal. Ms Pratt regularly advises clients on all aspects of competition law, including criminal matters, reviewable practices and deceptive marketing practices. Ms Pratt has experience in the Competition Act and Investment Canada Act aspects of merger transactions and has developed comprehensive competition law compliance training programmes. She has written numerous articles and papers on competition law and related litigation issues which have appeared in national and international publications. Ms Pratt is ranked as a leading up-and-coming competition lawyer in the most recent edition of *Chambers Global: The World's Leading Lawyers*. She is vice-chair of the Canadian Bar Association Competition Law Section Civil Actions Committee.

NEIL RIGBY

Cleary Gottlieb Steen & Hamilton LLP

Neil Rigby is an associate based in the London office.

Neil's practice focuses on a variety of EU and UK competition law, including both merger review and antitrust. He also has experience in multi-jurisdictional transactions.

Neil joined the firm in 2001. He received a Master of Law degree from the University of Cambridge in 2000. He also received a Bachelor of Laws degree in 1997 and a Bachelor of Arts (Honours) degree in 1994, both from Queen's University (Canada).

Neil is qualified as a solicitor of the Supreme Court of England and Wales and as a barrister and solicitor in Ontario, Canada. His native language is English, and he is proficient in French.

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Samuel Rivero is an associate in the litigation and regulatory department and works in the EU and Spanish competition law department. Samuel holds a Law Degree from the Universidad de Granada (Spain) and an LLM from the Instituto de Empresa Business School of Madrid (Spain). He has broad experience in competition matters.

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Arantzazu Ruiz is an associate in the litigation and regulatory department and works in the EU and Spanish competition law department. Arantzazu holds a Law Degree from the Instituto Tecnológico Autónomo de México and a masters in EU Law by the Universidad Carlos III of Madrid (Spain). Arantzazu is a lawyer specialised in EC law, competition and regulatory law. She has practised in Mexico DF and Madrid.

LUIS SOTELO

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Luis Sotelo is an associate in the Litigation and Regulatory Department and works in the EU and Spanish Competition Law Department. Luis holds a Law Degree from Peruvian University of Applied Sciences (UPC) and an LLM from the Instituto de Empresa Business School of Madrid (Spain). Luis specialises in EC law, competition and regulatory law. He has practised in Perú and Madrid.

FRANZ URLESBERGER

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Franz Urlesberger became partner at Schoenherr in 2007; he has worked in the firm's EU and competition unit in Vienna since 2000. Franz Urlesberger also heads the competition group in the firm's international offices. His practice focuses on European and Austrian competition law where he represents and advises clients in a wide range of industries, including paper and packaging, energy, oil and media. He is engaged in all types of public and private litigation as well as out of court advice, and – of course – in merger control work. In addition, Franz Urlesberger has gained broad experience in supporting firms to implement comprehensive antitrust compliance programmes. Recent headlines cases include: representation of VA TECH Group in the *GIS* cartel, of collecting society AKM in the *CISAC* case, and an undertaking in the *printing chemicals* cartel.

SANDER VAN DER VOORDE

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Sander van der Voorde is a graduate of the University of Groningen, the Netherlands (1993). He is currently a partner of FerradaNehme. Previously he worked as a competition lawyer at Loeff, Claeys, Verbeke (1994 to 2000) and Allen & Overy (2000 to 2004) in Rotterdam, Brussels, New York, London and Amsterdam.

DIRK VANDERMEERSCH

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Dirk Vandermeersch is a partner based in the Brussels office.

Mr Vandermeersch's practice focuses on EC and Belgian competition law, including merger control, as well as media law. In addition, Mr Vandermeersch has extensive experience in matters relating to EC regulatory law, including product regulation and personal data protection. He lectures and has published on EC, competition, media and environmental law. Mr Vandermeersch has authored a book on Belgian competition law. He is furthermore distinguished as a leading competition/antitrust lawyer by *Chambers and Partners Global – The World's Leading Lawyers* as well as *by PLC Which Lawyer? Yearbook*.

Mr Vandermeersch joined the firm in 1979 and became a partner in 1989. In 1979, he was resident in the New York office, and from 1982 to 1983 served as legal advisor to the Minister of Economic Affairs of Belgium. Mr Vandermeersch has been visiting professor at Ghent University Law School (1998 to 2006). He received an LL.M degree from Harvard Law School in 1979 and a law degree, *magna cum laude*, and criminology degree, *cum laude*, from the University of Ghent in 1977.

Mr Vandermeersch is a member of the Bar in Brussels. His native language is Dutch, and he is fluent in English, French and German.

RITA LEANDRO VASCONCELOS

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Rita Vasconcelos obtained her Law degree from the School of Law of the Portuguese Catholic University of Porto in 1998, her Master of Laws in European Law from the University of Lisbon Law School in 2004 and her Diploma of Technical Specialisation in Competition Policy in 2004. Ms Vasconcelos also earned a postgraduate degree in Economics in Competition Law from King's College University of London in 2007 and a Master of Arts in Economics in Competition Law from King's College University of London in 2009.

She was the Deputy of the Secretary of State of the Presidency of the Council of Ministers in 2002, assistant professor in the University of Lisbon Law School between 2001 and 2006 and currently cooperates with the University of Lisbon Law School on the postgraduate course in Energy Law.

Ms Vasconcelos was admitted to the Portuguese Bar in 1998 and has been an associate of the firm since 2003. She is a member of the Portuguese Association of European Law. Her main areas of practice are EU and competition law. She advises clients on proceedings relating to practices restricting competition, drafts and analyses the competition compliance of horizontal and vertical agreements in a number of industrial and commercial areas and prepares competition compliance due diligence.

LAURENT VON NIEDERHÄUSERN

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Laurent von Niederhäusern is an associate at Froriep Renggli in Zurich and a member of the firm's competition and IP & technology groups. Laurent's practice focuses on intellectual property law, competition law, contract law and corporate law. He is also active in the area of employment law.

Laurent von Niederhäusern studied at the University of Zurich and at the faculty of law at Trinity College, Dublin, Ireland. In 2003, he obtained his Swiss law degree from the University of Zurich. He was admitted to the Swiss bar in 2007 and joined Froriep Renggli as an associate in 2008. Laurent is a member of the Swiss Bar Association and of the Zurich Bar Association.

ELISABETH WELSON

Simpson Grierson

Elisabeth Welson has practised extensively in the competition and regulatory areas. Her interest in these areas of law extends over 25 years, with her Honours thesis providing a comparative analysis of the approach to restrictive trade practices in the European Union, United States, and New Zealand and advocating reform for New Zealand at a time when New Zealand's competition law framework was minimal. Elisabeth contributed principally to Section IV of the New Zealand chapter.

BORIS WENGER

Froriep Renggli

Boris Wenger is a senior associate at Froriep Renggli in Zurich. His practice focuses on Swiss and EC competition law. He regularly advises clients on competition law compliance and business strategies with competition law implications. He represents clients in investigations, merger control proceedings and other proceedings before the Swiss Competition Commission, in appeals against competition law decisions and in civil competition law litigation. Boris Wenger practices in other areas of administrative and regulatory law such as public procurement, transport and customs law, etc. He is also active in the areas of corporate and commercial law as well as M&A transactions.

Boris Wenger graduated from the University of Basle in 1996 and was admitted to the Swiss bar in 2001. In 2002, he graduated as a Master of the Science of Law (JSM) from Stanford Law School (USA). He joined Froriep Renggli as an associate in 2005. Boris is a member of the Zurich and the Swiss Bar Associations, the Swiss Association of Competition Law, and the International Association of Young Lawyers (AIJA).

YOUNG CHUL YIM

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Mr Young Chul Yim is a senior partner and the head of the antitrust practice group of Shin & Kim. Previously, Mr Yim spent multiple years with the Korea Fair Trade Commission as the General Counsel and the Director General of the Commission's Competition Policy Bureau and Subcontract Bureau. Mr Yim was the recipient of both the 'role model officer' award by the Commission's officers and staff members, which has earned him a reputation within the Commission as 'Mr Competition Law', and the 'best antitrust lawyer' award by collective votes among top 20 Korean law firms. Mr Yim was also a judge for 13 years and is the author of the acclaimed legal treatise titled *Korean Competition Law with Commentaries*, which has been studied by numerous practitioners. Today, Mr Yim is widely regarded as the most influential figure in the Korean antitrust community.

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Anastasios Xeniadis is an associate of Schoenherr in Vienna, where he focuses on Austrian and European competition law. He obtained his law degrees from the University of Vienna (JD, 2003), the University of Cambridge (LLM, 2005) and Columbia Law School (LLM, 2006). Anastasios has been a member of the New York bar since 2007. His main areas of practice are merger control and antitrust proceedings, as well as the implementation of antitrust compliance programmes. Anastasios advises national and international clients in a wide range of industries, including undertakings active in the private equity industry. Before joining Schoenherr, he practised competition law and corporate law in Brussels and Vienna.

Appendix 2

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