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National Competition Report

April - June 2003

Included in this issue:

This report summarises the principal developments in the competition laws of Austria, Belgium, Denmark, Finland, France, Germany, Italy, the Netherlands, Sweden, Switzerland, and the United Kingdom during the second quarter of 2003. Conversions to Euro are approximate and, where applicable, based on current market rates.

Austria

This section reviews the most recent developments concerning the Cartel Act of 1988, which is enforced principally by the Court of Appeals of Vienna, as Cartel Court, and the Supreme Court, as Cartel Court of Appeals. The decision summarized below has not yet been publicly reported.

Mergers and Acquisitions

Intra-group exemption not applicable for ÖIAG / ÖBB.

On March 10, the Supreme Court held that the intra-group exemption from merger notification requirements was not applicable to the sale of a 100% stake in Österreichische Postbus AG (ÖPAG) by Österreichische Industrieholding Aktiengesellschaft (ÖIAG) (Austria's main holding company of State-owned enterprises) to the Austrian railway operating company, Österreichische Bundesbahnen (ÖBB). The Court nonetheless granted merger clearance for the transaction.

ÖPAG's primary business is the supply of bus transport services, which the Federal Government sought to integrate into the overall transport services business of ÖBB in anticipation of achieving synergies. ÖPAG, ÖIAG, and ÖBB sought an exemption from merger notification requirements on grounds that the sale would fall under the Cartel Act's section 41(3) intra-group exemption, since both ÖPAG and ÖBB were directly or indirectly owned by the Federal Government.

The Supreme Court upheld the lower court's finding that the transaction did not fall under the intra-group exemption and was therefore subject to national merger control. In its decision, the Court examined (i) the general scope of the intra-group exemption, including the "group" definition set forth in section 41(3), (ii) its implications on mergers of State-owned enterprises, and (iii) to what extent the specific law regulating ÖIAG and its affiliates affected the analysis.

On the first issue, the Court put an end to past practice and held that for competition law purposes, the "group" definition is not the same as for corporate law purposes. To qualify for the intra-group exemption, the concept of "group" must cover all circumstances under which one entity has the possibility (whether exercised or not) to influence the competitive and market behaviour of another entity.

On the second issue, the Court held that State-owned enterprises form a group when (a) they are held under a central and coordinated management or (b) the controlling interest in the State-owned enterprises, absent restrictive legal provisions, enables or specifically requires the State to determine a coordinated business policy for the entities.

On the third issue, the Court found not only that there was no central and coordinated management of ÖPAG and ÖBB, but also that the law regulating ÖIAG and its affiliates restricted the government's ability to set a coordinated business policy for ÖBB and ÖPAG, ruling out the possibility that the various ÖIAG entities could form a group for competition law purposes.

BELGIUM

This section reviews developments concerning the Competition Law of July 1, 1999, which is enforced principally by the Competition Service and the Competition Council.

MERGERS AND ACQUISITIONS

Electricity sector restructuring.
On July 4, the Competition Council approved eight concentrations in the Belgian electricity and gas sector, subject to certain conditions. The transactions involved the incumbent operators Electrabel and Distrigaz and Belgian municipalities, which are the traditional distributors and suppliers of electricity and gas in Belgium.

Currently, many municipalities operate both distribution and supply businesses in joint ventures with Electrabel/Distrigaz. While Electrabel/Distrigaz holds the majority of the shares in these joint ventures, the municipalities have the majority of voting rights. As a result of energy market liberalization, municipalities are required to separate their distribution activities from the supply of electricity and gas to so-called "eligible" customers (those who are free to choose their energy supplier). The eight approved transactions involve the transfer of these eligible customers to Electrabel Customer Solutions (ECS), a subsidiary of Electrabel.

To obtain clearance, the municipalities, Electrabel, and Distrigaz offered several commitments. With respect to both the electricity and the gas parts of the transactions, Electrabel and Distrigaz offered to grant all eligible customers who will have signed a long-term contract with Electrabel/ECS by July 1, 2005 early termination rights, and to inform those customers about these rights. Electrabel and Distrigaz also committed to install a system of "Chinese walls" that would prevent the use of confidential information received from the municipalities. Finally, the municipalities and Electrabel/Distrigaz committed to refrain from engaging in any joint marketing activities, in that the municipalities will refrain from using Electrabel's or Distrigaz's logos in their commercial communications.

With respect to the electricity part of the transaction only, Electrabel ended its association with SPE (the other large Belgian electricity producer), and committed to create an exchange market for electricity in Belgium and to auction 1,200 MW of its production capacity, thereby creating a third "virtual" producer. With respect to the gas part of the transaction only, Distrigaz committed to gradually sell to its competitors the quantity of gas they need to fulfil the needs of the customers they will acquire.

The Competition Council found these commitments sufficient to guarantee the emergence of competition in the electricity and gas sectors and therefore cleared the transactions.

Although the decisions are not yet public, they will likely raise the same issues as previous decisions involving this sector, namely (i) whether the transfer of eligible customers can be considered as a change of control over an undertaking within the meaning of the Competition Law, (ii) whether the jurisdictional thresholds were met, and (iii) how the dominant position of the incumbent operators on the markets for supply of electricity/gas to eligible customers is determined and how this position is strengthened by these transactions.[1] In addition, it appears from the press release that the Competition Council has now accepted a number of commitments that it had rejected in previous decisions because it considered that they would fall outside the scope of its powers (for example, the obligation to auction virtual production capacity).

DENMARK

This section reviews developments concerning the Danish Competition Act of June 10, 1997 enforced by the Competition Council assisted by the Competition Authority and the Competition Tribunal.

POLICY AND PROCEDURE

Permissible scope of questions during cartel investigations.

The Danish company Trioplast Nyborg A/S (a manufacturer of packaging products, and in particular, plastic films) recently complained that it was not given sufficient legal protection during a "dawn raid" carried out in August 2001 by the Authority and the European Commission in relation to a possible cartel in the European packing industry.

The City Court of Nyborg had granted the authorities the power to ask questions of the company during the dawn raid. Trioplast contested the validity of certain questions that, in its view, would expressly or impliedly call for self-incriminatory responses. The Supreme Court of Denmark confirmed the approach taken by a High Court judgment of October 2001, and found that the Authority was entitled to ask the questions that it had, but noted that in general, such questions should not be phrased on the presumption that the company is guilty.

However, the Supreme Court's reasoning was limited to the question of the general principles to be applied, and Trioplast did not raise arguments as to whether the specific questions asked were permissible. Consequently, while the Supreme Court's judgment confirms that the Danish position on this issue is the same taken by the European courts, the judgment does not provide further clarification as to which types of questions will be permitted during dawn raids.

Electronic filings to the Authority.

On May 1, 2003, the Authority began to accept electronic filings. Form K1 (the equivalent of Form A/B) and Form K2 (the equivalent of Form CO) have been amended to reflect the possibility of submitting them electronically.

VERTICAL AGREEMENTS

DONG and DUC amend natural gas contracts.

On April 24, after extensive negotiations, DONG (a State-owned North Sea oil and gas producer) and DUC (a joint venture between A.P. Møller, Shell, and Texaco) informed the Danish Competition Council and the European Commission of amendments they would make to their agreements for the supply of natural gas. Under these agreements, DONG has purchased natural gas from DUC since 1979. The changes mean that DONG's monopoly on the sale of natural gas extracted from the Danish areas of the North Sea by DUC will be broken and that A.P. Møller, Shell, and Texaco will no longer sell gas in cooperation. The amendments therefore further liberalise the Danish natural gas market and address concerns over possible infringements of Article 6 of the Danish Competition Act (the equivalent of Article 81(1) EC). The DUC partners and DONG gave six undertakings:

1. A.P. Møller, Shell, and Texaco will cease cooperation in relation to the sale of natural gas, and will instead compete with each other for customers.

2. A.P. Møller, Shell, and Texaco will offer seven million cubic meters of natural gas to businesses other than DONG over a five-year period, from January 1, 2005.

3. DONG will not, for a certain period, purchase natural gas from DUC that comes from new and certain recent exploitation efforts; these new quantities of natural gas will therefore only be available to competitors of DONG.

4. DONG will give its competitors better options for the transport of natural gas to and from Denmark through its sea pipe transmission.

5. If the DUC parties enter the Danish market for the supply of natural gas, the agreements previously provided that DONG would be able to renegotiate the volume of natural gas to be purchased; DONG has now given up this right.

[1] See National Competition Report October-December 2002.

6. The DUC partners will no longer base their wholesale prices on the customers to whom DONG is reselling the natural gas.

JOINT VENTURES

Statoil Gazelle/Naturgas Fyn.
The Authority has approved the formation of a joint venture between Statoil Gazelle (part of the Norwegian oil company Statoil) and Naturgas Fyn (a Danish trader and distributor of natural gas). The joint venture is to market and supply natural gas and other forms of energy to Danish consumers who, from January 1, 2004, will have a free choice of natural gas supplier.

The joint venture will start with the existing client base of Naturgas Fyn, which consists of 30,000 private customers and 1,200 professional customers. On the Danish retail market for natural gas, the joint venture will have a market share of 8%, while the dominant player DONG has a market share of 73%. Given the size of DONG's market share, the Authority decided that the concentration would strengthen competition on the market for the supply of natural gas.

FINLAND

This section reviews developments concerning the Act on Competition Restrictions of May 27, 1992, which is enforced by the Finnish Competition Authority (FCA). Decisions of the FCA may be appealed to the Market Court (previously to the Competition Council which has now been abolished) and further to the Supreme Administrative Court.

POLICY AND PROCEDURE

Market Court denies right of appeal to a competitor of AGA.
On March 13, the Market Court held that a competitor did not have a right to appeal a decision of the FCA, whereby the FCA terminated its investigation into alleged competition law infringements involving AGA's rental conditions for bottles used for industrial gases.

Messer, an industrial gas producer and distributor, had complained to the FCA that its competitor AGA had not complied with the conditions imposed by an earlier FCA decision concerning the lease of industrial gas bottles. Messer alleged that AGA had abused its dominant position in the market for bottled industrial gases by tying customers through insufficient reimbursement of rental fees where lease contracts were terminated early. An earlier FCA decision had held that customers were entitled to such reimbursement. The FCA found that AGA's conduct, although not manifestly abusive, could constitute an abuse of a dominant position. However, since AGA had agreed to amend the contracts at issue so as to secure a sufficient reimbursement, the FCA decided to close the case. Messer appealed this decision to the Market Court.

The Market Court noted that, under the relevant statute, persons other than the addressee of an FCA decision may appeal a decision if it directly affects their rights, obligations, or interests. The Court held that, since Messer was not a customer of AGA and did not have a contractual relationship with AGA, the FCA decision did not directly affect Messer. Accordingly, Messer did not have the right to appeal the FCA's decision.

This judgment follows the strict interpretation of competitors' rights to appeal FCA decisions, established in the Supreme Administrative Court's 2002 judgment concerning an appeal against an FCA merger clearance decision.[2] The Market Court makes clear that, contrary to the practice of the Community Courts, competitors do not have a general right to appeal an FCA decision, even if they were previously involved in the case as a complainant. The judgment nevertheless suggests that customers or other contract parties of an undertaking suspected of competition law violations may have a right to appeal related FCA decisions.

HORIZONTAL AGREEMENTS

Mobile phone payment system granted clearance.
On June 26, the FCA granted negative clearance to the proposed cooperation between Nordea and Sampo, two commercial banks, and Radiolinja, a mobile phone operator, in creating a platform for payments made by mobile phones. The FCA concluded that, since the cooperation did not involve joint setting of prices, and the entry to the system would be unrestricted, the cooperation did not infringe the Act on Competition Restrictions.

The parties intend to develop an open system enabling payments to be made by customers of any mobile phone operator operating in Finland. In the system, Nordea and Sampo would transfer

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2 See National Competition Report July-September 2002, page 4.

payments from a so-called "mobile purse," to be created for individual customers, to which money could be electronically loaded from the bank account of each customer. In a mobile purchase transaction, the money would be transferred from the mobile purse of the buyer to the account of a merchant who had agreed with Nordea or Sampo to be part of the system. Radiolinja would transmit the relevant payment information. Under the cooperation agreement, the parties remain free to develop and offer competing mobile payment systems; however, Nordea and Sampo agree not to grant third parties access to the relevant interface information during an initial period reserved for the completion of the system, estimated at 10 months. In addition, Radiolinja undertook not to prevent its customers from using other mobile payment systems. As access to the completed system would be offered on non-discriminatory terms, the FCA granted negative clearance to the cooperation.

FRANCE

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

MERGERS AND ACQUISITIONS

Crédit Agricole/Crédit Lyonnais.
On March 14, the *Comité des établissements de crédit et des entreprises d'investissement* (CECEI) (the French agency in charge of monitoring banking activities) authorized the acquisition of Crédit Lyonnais by Crédit Agricole SA, subject to two conditions: the disposal of 85 branches, and a two-year moratorium on the opening of new branches in approximately one-third of the French territory.

The *Conseil d'Etat* overturned this decision on the ground that the CECEI had no power to carry out antitrust merger review in the banking sector. Pursuant to the *Code Monétaire et Financier* (the Banking Code), the CECEI grants authorizations to credit institutions to conduct business and ensures that they comply with the legal obligations specified by the Banking Code. In particular, the CECEI must ensure that transactions requiring its authorization do not affect the proper functioning of the banking system and will not lead to an infringement of "behavioural" competition rules. For example, if it finds that an operation will lead to an abuse of a dominant position, the CECEI must prohibit the operation. Nevertheless, the *Conseil d'Etat* found that the Banking Code does not grant the CECEI a general power to review the impact on competition of mergers or any other type of "structural" transaction, or to impose conditional authorizations on that basis. Accordingly, the *Conseil d'Etat* declared void the first condition subject to which the acquisition was authorized.

The *Conseil d'Etat* held further that the Minister for the Economy also lacked competence to review the merger.

This decision brought to light a loophole in the French merger control system. In cases where the EU Merger Regulation thresholds are not met, there is no national authority with competence to review mergers in the banking sector. The legislature has now corrected this situation by deciding that the Minister for the Economy and, where necessary, the Competition Council, will review bank mergers. The Competition Council will nevertheless have to consult with the CECEI in order to take into account the special circumstances of the banking sector.

HORIZONTAL AGREEMENTS

Intra-group cartel in the road signs market.
On February 4, the Competition Council ruled that several companies belonging to the Girod group, active on the market for road signs, had infringed article L. 420-1 of the Commercial Code by engaging in bid-rigging. Between 1996 and 1998, the companies submitted parallel coordinated bids for public procurement tenders organised by local government authorities.

In its decision, the Council first stated that, as a general rule, pursuant to French and EC case law, the provisions prohibiting anti-competitive agreements do not apply to companies belonging to the same group, provided that the companies are not commercially and financially autonomous. Absent this autonomy, the companies constitute a single economic entity, within which agreements are not subject to competition law.

The Council went on to list factors indicating that the companies in the present case lacked commercial and financial autonomy. In particular, the companies' activities were limited to the marketing of the group's road signs, with the help of the group's logistical, technical and commercial backing. The companies were also run by managers of the parent company.

Notwithstanding this analysis, the Council considered that the simple fact that the companies had submitted distinct bids in the procurement processes was sufficient to show that they had acted autonomously on the market. Accordingly, the Council held that the collusion between the companies when submitting bids amounted to an unlawful competitive arrangement between two distinct entities, even though the entities clearly belonged to a single economic unit.

This approach is similar to that taken by the Council a few weeks earlier in its *Air Liquide* judgment.[3] As noted in the previous National Competition Report, the Council's approach is at odds with the Court of Justice's judgment in Viho/Parker Pen, and it is submitted that the concerns identified by the Council would be better addressed under public procurement or fraud rules, rather than under Article 81.

ABUSE OF MARKET POWER

Order for interim measures in Cegetel v. France Télécom.

On March 5, the Competition Council granted Cegetel's request for interim measures against France Télécom, on the basis of article L.464-1 of the Commercial Code. Cegetel alleged that France Télécom had abused its dominant position by introducing barriers to entry in the market for special telephone services.

France Télécom provides companies with special shared cost call phone numbers that enable them to share the cost of the call with the calling party, or free call numbers that make the phone call entirely free for the calling party. The names of these numbers (*numéro azur*, *numéro indigo* and *numéro vert*) are registered trademarks that may only be used by customers of France Télécom.

The Competition Council identified the relevant market as special telecommunication services. The provision of such services has in principle been open to competition since January 1998, but competition only became effective in 2002 after it became possible for customers to switch phone operators without changing phone numbers. The Council found that France Télécom held a dominant position, as: (i) it had an 85% market share for "free call" numbers and an 80% market share for "shared cost call" numbers; (ii) it had enjoyed a monopoly from 1984 to 1998, and possessed a related trademark portfolio that it had received from the State; and (iii) it had a majority of the largest French companies as its clients.

France Télécom's contracts stipulated that customers would immediately lose the right to use the France Télécom trademarks if they switched to another operator. The Council found that this could be very costly and could therefore dissuade customers from terminating their contracts with France Télécom. In view of this, the Council ordered the suspension of these clauses.

GERMANY

This section reviews developments concerning the Act against Restraints of Competition of 1957 (the Competition Act), which is enforced by the Federal Cartel Office (the FCO), the cartel offices of the individual German Länder and the Ministry of Economic Affairs.

HORIZONTAL AGREEMENTS

Record fines imposed in the cement sector.

On April 14, the FCO imposed record fines totalling € 660 million on the six largest manufacturing companies in the cement sector: Alsen, Dyckerhoff, HeidelbergCement, Lafarge, Zement, Readymix, and Schwenk Zement. According to the FCO, the companies had engaged in illegal market allocation and quota agreements, which ceased in 2002, and in some cases had been on-going since the 1970s. The agreements covered eastern Germany, Westphalia, northern Germany, and southern Germany.

In calculating fines, the FCO aims to remove the illegal gain achieved through cartel activity. Consequently, fines are not based on the turnover of the undertaking concerned, but on the amount of the additional turnover achieved by the undertaking as a result of its participation in the cartel. Fines may be imposed of up to three times the amount of this illegal gain, and may be particularly high where, as in the present case, the cartel operated for some considerable time.

The FCO claimed that the break-up of the cartel proved the success of its leniency program (introduced in 2000) and its special unit for combating cartels (established in 2002). Fines for other cement producers may follow.

[3] See National Competition Report January-March 2003, page 6.

ABUSE OF MARKET POWER

Stadwerke Mainz ordered to reduce fees for energy-related network use.

On April 17, the FCO held that Stadtwerke Mainz, Mainz's municipal utility, had abused its dominant position by charging excessive fees for energy-related network use. The FCO ordered Stadtwerke Mainz to reduce its current fees for network use by just under 20%, and declared the decision to be immediately enforceable, arguing that immediate enforcement was indispensable to improve conditions of competition in the downstream markets for electricity supply.

In determining that Stadtwerke Mainz's fees were excessive, the FCO followed its traditional 'comparable market' approach, whereby the prices charged are compared to those of a competitor (in this case, RWE Net) operating under similar market conditions. This may be contrasted with the 'cost calculation' method, used by the FCO in the Thüringer Energie case,[4] where the reasonableness of each expense factor was examined in detail.

This order is the second decision in ten formal abuse proceedings in this sector initiated by the FCO in January 2002, and follows the Thüringer Energie decision earlier this year (see National Competition Report January-March 2003 and below).

Court suspends immediate enforcement of FCO order against Thüringer Energie.

On May 8, the Higher Regional Court of Düsseldorf annulled the FCO's order providing for the immediate enforcement of its decision that Thüringer Energie must lower its fees charged for network use by energy traders.

On February 19, the FCO had held that Thüringer Energie had abused its dominant position by charging excessive fees for network use. The FCO declared that order to be immediately enforceable irrespective of any appeal filed by Thüringer Energie against the decision. The FCO argued that absent the immediate enforcement of its order, price competition on the downstream market for the supply of electricity to end customers would be significantly impeded, since the fees charged on the upstream market by Thüringer Energie were passed on by energy traders to end customers.

The Court held that the FCO's arguments did not justify immediate enforcement. In the Court's view, the FCO failed to prove that its order to lower fees for network use would appreciably improve conditions of competition in the downstream market for the supply of electricity to end customers. The fact that Thüringer Energie demanded excessive prices on an upstream market was in itself not sufficient to justify an order to immediately enforce an FCO decision.

MERGERS AND ACQUISITIONS

Ajinomoto/Orsan.

On May 2, the FCO cleared the acquisition of Orsan, a French company and the only remaining European manufacturer of the flavour enhancer monosodium glutamate (MSG), by Ajinomoto, a Japanese company and one of the leading producers of MSG in the world. Together, Ajinomoto and Orsan had in excess of two-thirds of German sales, and had similar market shares throughout the whole of Europe.

The FCO approved the merger only after the parties agreed that Orsan will not request a prolongation of the protective anti-dumping duties currently in force for imports from non-Community MSG producers, and will not apply for new anti-dumping duties for a period of three years. The FCO expects that the elimination of these duties (currently up to 20%) will enable other MSG producers to gain market share and prevent the creation of a dominant position by Ajinomoto.

The case raises interesting questions of public international law concerning the power of the FCO to prohibit an entirely non-German transaction. The FCO held that it had jurisdiction over a foreign-to-foreign transaction if its competitive focus clearly lay in Germany (based on the parties' market shares and turnovers), regardless of any economic and socio-political interests affected in other countries. The latter issue had been raised in particular by the French Minister for Agriculture, Nutrition, the Fishing Industry and Rural Areas, in a letter to the FCO and the German government. Due to significant losses sustained by Orsan in recent years, there was a significant risk that Orsan would soon withdraw from the market in the absence of the acquisition, which would have led to detrimental economic and socio-political consequences for a structurally weak region in northern France.

4 See National Competition Report January-March 2003, page 7.

Lekkerland/Tobaccoland.
On June 24, the Federal Supreme Court for the first time ruled on an action brought by a third party directly challenging an FCO merger approval decision. The Court had to decide on an appeal brought against a decision of the Berlin Court of Appeals of May 9, 2002 (see National Competition Report April – June 2001) concerning the merger of the German food company Lekkerland and the German tobacco products company Tobaccoland, which was approved by the FCO in February 1999 and has since been consummated.

Following a third-party appeal, the Berlin Court of Appeals lifted the clearance decision and remanded the case back to the FCO. The Court of Appeals held that it only had jurisdiction to examine whether the reasons given by the FCO for clearing the merger would hold up against judicial review; having found the FCO's justifications to be inadequate to support the clearance decision, the Court of Appeals refused to consider whether any additional reasons would allow the clearance decision to be upheld. The Court of Appeals thus held that the FCO was obliged to open an additional merger review process subject to the time-limits provided for in the Competition Act.

The Federal Supreme Court overruled this judgment, and stressed the particular interest of the merging parties in obtaining legal certainty as soon as possible on whether the merger would receive clearance. The Supreme Court held that courts are only entitled to remand a case to the FCO for further investigations in exceptional circumstances, and may only do so at the very beginning of the appeal proceedings. Most importantly, the Supreme Court held that courts are under an obligation to investigate the merger themselves, where this is necessary either to uphold the clearance decision – whether based on the reasons provided in the initial FCO decision or on other grounds – or to prohibit the merger. To this end, the courts may order the FCO to assist them with supplementary investigations even during their judicial review process. This position is contrary to a recent decision of the Higher Court of Düsseldorf, which held that the FCO loses jurisdiction to carry out supplementary investigations once appeal proceedings have been initiated.

The ruling is a landmark decision on the ability of third parties to bring lawsuits against second-phase merger clearance decisions. This ability was introduced through the sixth amendment to the Competition Act, which came into force on January 1, 1999. The present judgment should considerably shorten the period of legal uncertainty following a challenge of a merger clearance decision by a third party.

ITALY

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

POLICY AND PROCEDURE

New merger turnover thresholds.
The Authority established new turnover thresholds triggering the obligation to notify concentrations. Transactions are now reportable if: (i) the undertakings concerned realized combined turnover in Italy of at least € 398 million (net of indirect taxes and sales rebates) during the most recent financial year; or (ii) the target company or business realized turnover in Italy of at least € 40 million (net of indirect taxes and sales rebates) during its most recent financial year.

HORIZONTAL AGREEMENTS

Cartel in diabetic self-diagnostic tests.
The Authority fined Roche Diagnostics S.p.A., Ortho Clinical Diagnostic S.p.A., Bayer S.p.A., A. Menarini S.r.l, and Abbott S.p.A. a total of over € 30 million for entering into and implementing an agreement restricting competition between 1996 and 2001 in the Italian market for self-diagnostic tests for diabetics, commonly known as "strips".

According to the Authority, the companies, with the active participation of the national trade association of biomedical and diagnostic technology companies (Assobiomedica), pursued a strategy aimed at avoiding any form of price competition among them with respect to strips. In particular, the companies restricted competition by rigging public tenders for the purchase of strips, carried out by local units of the national health system, and by jointly defining offer terms and prices for strips sold to pharmacies.

In calculating the fine, the Authority applied the new, stricter regime provided by Law No 57/2001, because it found that the unlawful conduct had been continuous and had not terminated until shortly after April 4, 2001 (the date the new rules entered into force).

Referring explicitly to the European Commission's guidelines on the method of setting fines, the Authority divided the companies into four categories, according to their respective size on the market. Roche Diagnostics, being the market leader, was put in the first category and was fined € 9 million; Ortho Clinical Diagnostic, in the second category, was fined € 7.5 million; Bayer and A. Menarini, in the third category, were fined € 6 million each; and Abbott, in the fourth category, was fined € 2 million, a reduction of 20% because of the Authority's finding that Abbott had limited participation in the unlawful activity (as demonstrated by its competitive conduct in certain of the public tenders that were subject to collusion by the other Companies).

ABUSE OF MARKET POWER

Ground handling services at Bologna airport.
The Authority held that Aeroporto Guglielmo Marconi di Bologna S.p.A. (SAB), the company that manages the Bologna airport, abused its dominant position by delaying access to the airport by the ground handling operator Aviapartner S.p.A., and subsequently hampering Aviapartner's activities. According to the Authority, SAB, as the sole licensee for the management of the Bologna airport, held a dominant position in both the market for the provision and management of airport facilities at the airport, and in the related market for the supply of ground handling services there.

Starting in February 2000, Aviapartner repeatedly submitted to SAB a formal request for access to the airport to provide ground handling services to the Dutch air carrier, KLM. Pursuant to the Italian rules implementing the relevant EC liberalization directive, in its role as airport manager, SAB was subject to the obligation to promptly provide any new entrant with the necessary facilities and equipment, as well as to transfer to such entrant some of its own employees. According to the Authority, SAB deliberately and unjustifiably delayed acting on Aviapartner's request, and at the same time pressured KLM to terminate its contract with Aviapartner. The exclusionary nature of SAB's conduct was confirmed by a comparison of the nine-month application processing period for Aviapartner, with the one-month period in which access was granted to Bologna Airport Services S.p.A. (BAS), a ground-handling company in which SAB has a 40% stake and which it jointly controls.

In addition, once Aviapartner began operating at the Bologna airport, SAB successfully pressured Air France to refrain from contracting for Aviapartner's ground handling services, including factors such as relocating Air France's ticketing facilities from the departure area to the arrival area shortly after Air France indicated it intended to start using Aviapartner's services. According to the Authority, SAB's anticompetitive objective was clearly demonstrated by the fact that SAB moved these facilities back to the departure area as soon as Air France decided not to use Aviapartner's services, but to use those of SAB's subsidiary BAS instead.

The Authority fined SAB € 880,000, taking into account both the seriousness of the infringement and the mitigating circumstance that SAB had ceased the violation before the Authority initiated formal proceedings.

MERGERS AND ACQUISITIONS

Sai/Fondiaria.
The Authority for the first time revoked undertakings imposed as a condition to a merger clearance decision, following requests from the parties involved and on the basis of a change in the factual circumstances that had initially prompted the imposition of the conditions.

On December 17, 2002, the Authority had conditionally authorized the acquisition of 29.9% of La Fondiaria Assicurazioni S.p.A. by Sai-Società Assicuratrice Industriale S.p.A. and their subsequent merger into the new company, Fondiaria-Sai S.p.A. The Authority had imposed undertakings on the parties because it found that Fondiaria-Sai was jointly controlled by Premafin Finanziaria Holding and Mediobanca Banca di Credito Finanziario S.p.A., which also held *de facto* control over Assicurazioni Generali S.p.A., Fondiaria-Sai's main competitor in several markets. In its subsequent analysis, the Authority determined that Mediobanca no longer held joint control of Fondiaria-Sai, because Mediobanca had reduced its stake in Fondiaria-Sai from 11% to 2%, and Premafin had extinguished the significant indebtedness it had had towards Mediobanca, which eliminated Mediobanca's ability to influence Fondiaria-Sai's management through its economic ties to Premafin. These conditions having changed, the undertakings were no longer considered necessary.

The Netherlands

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

Policy and Procedure

NMa 2002 Annual Report.
On June 30, the NMa issued its 2002 annual report. The report outlines the NMa's recent focus on cartel investigations, describing recent investments in its investigation capabilities. The NMa also re-stated that the construction, financial, and liberalizing energy and health-care industries are enforcement priorities.

Some key numbers concerning the NMa's 2002 performance include: six cartel cases, with record fines totalling € 99.6 million (of which € 88 million involved a single case concerning mobile telephony); nine reports/statements of objection concerning suspicions of illegal behaviour; 45 exemption requests; and 187 complaints. As a result of the recent amendment of the merger notification thresholds, the NMa took only 66 merger decisions — over 50% fewer than the 135 decisions taken in 2001.

Commenting on the annual report, the Minister of Economic Affairs (under whose authority the NMa acts) revealed in a letter to parliament that a bill will be introduced by the end of 2003 to extend the NMa's powers; if passed, this will enable the NMa to search private homes and to impose higher fines for refusals to cooperate with investigations.

In another effort to boost the NMa's cartel enforcement, a senior NMa official stressed in a recent interview that the NMa's leniency bureau officials have no contact with the NMa's cartel enforcers. This should provide cartel participants with additional comfort when notifying infringements to the NMa's leniency bureau, in the hope of receiving a reduced fine. In the interview, the official revealed that several companies have approached the NMa for leniency, although the NMa has not yet adopted a decision in this regard.

Guidelines on privileged information in digital files.
On June 6, the NMa published guidelines on the removal of attorney-client privileged information and personal data from copies of digital files obtained through an NMa investigation at a company's premises. The NMa declared that a company may have documents excised, either during or after a search, by providing a list detailing the specific items it wants removed, providing a set of search parameters to filter and delete privileged or personal documents, or both. However, a company must express its intent to remove privileged documents within one week of the search. A company is also allowed to have representatives present at the NMa's offices when the digital files are examined, and it will also receive a list of the search terms the NMa used; however, it will not be afforded access to the results of the search.

Horizontal Agreements

Bid rigging in the construction industry.
On April 25, the NMa imposed fines of € 308,000 on each of four road construction companies for colluding on a tender for public road maintenance. Under the scheme, the company that was awarded the three-year, € 1,400,000 project would distribute 20% of this sum among the three "losing" bidders.

Following the NMa's Sentencing Guidelines, the project's total value formed the basis for the calculation of the fines. In this case, the total fine equalled almost the total value of the project, confirming the NMa's commitment to impose substantial fines. The NMa held that the high fine was justified because the companies were aware of the illegality of their conduct.

This is the first in a series of at least six decisions that are expected from the NMa's sector-wide investigation of the construction industry, whose propensity for collusion formed the subject of parliamentary hearings last year.

Abuse of Market Power

SENA collecting society royalties.
On April 10, the NMa upheld an earlier decision that SENA, a so-called "collecting society", does not abuse its legal monopoly when it levies royalties on behalf of artists from bars and restaurants that play music in public. The NMa considered that since SENA collects royalties on behalf of the performing artists, and not for itself, there does not need to be a match between the costs of collecting royalties and the amount charged. Moreover, the NMa would not come to a decision on the merits in this case because the Dutch Law on Neighbouring Rights, granting SENA its monopoly, establishes a specific judicial procedure for establishing equitable remuneration.

Investigation launched into Interpay PIN card payment system.

The NMa announced on April 17 that it will investigate a possible abuse of market power by Interpay, the sole provider of services for paying with PIN cards in retail outlets. Interpay is a joint venture among the principal Dutch banks. A few days later, the NMa announced that the fee reduction that Interpay grants to food retail giant Ahold is warranted because of the considerable investments made and the risks taken when Ahold was one of the first to widely implement the technology in 1992. The initiation of the investigation into Interpay's practices is in line with the NMa's announcement that it intends to prioritise cases related to the financial services industry.

SPAIN

This section reviews developments concerning the Law for the Protection of Competition of 1989, which is enforced by the Tribunal for the Protection of Competition and the Service for the Protection of Competition.

POLICY AND PROCEDURE

Amendment to the Competition Law.

Royal Decree 2/2003 of April 25 has modified Article 16.3 of the Competition Law, bringing greater transparency to Spanish merger control. Henceforth, the Tribunal will make available to the public its advisory reports after they have been received by the Ministry of Economy, and will no longer delay publication until after the Spanish Cabinet has issued its resolution in favour or against the proposed merger.

New statute for the Tribunal.

On July 4, the Spanish Cabinet approved the new statute of the Tribunal, pursuant to which the Tribunal will become a fully independent body with legal personality, its own capital and treasury, and management autonomy. The Tribunal has been criticized for being too dependent on the Ministry of Economy, and the purpose of this new statute is to reinforce the Tribunal's autonomy. However, the issue has not been entirely resolved, as the Tribunal will continue to be part of the Ministry of Economy.

HORIZONTAL AGREEMENTS

Fines upheld in Iberia/Spanair/Air Nostrum.

On February 19, the National Court upheld the fines imposed by the Tribunal on Iberia, Spanair, and Air Europa in relation to interline agreements on several of their national air traffic routes, which allowed flight tickets for one airline to be used with the other two companies. No further details are available, as the judgment has not been published. The Court further held that the companies had reached an illegal agreement on price policy, violating the competition law and justifying the Tribunal's decision to impose fines. The judgment also charged the Service with the task of overseeing the national passenger air transport market.

ABUSE OF MARKET POWER

Pharmacists' appeal allowed in complaint against Abbott Laboratories.

On May 22, the Tribunal allowed an appeal by the Spanish Association of Prescription Pharmacists (AEFF) against the Service's decision dismissing AEFF's complaint against Abbott Laboratories SA for abuse of its dominant position. The Tribunal ordered the Service to open a new investigation against Abbott for a possible abuse of dominant position arising from its refusal to supply pharmacies with sibutramine, a product used to prepare prescriptions for the treatment of obesity.

The Tribunal held that the Service had not sufficiently established that the relevant product market definition was that of 'products for the treatment of obesity' rather than the narrower market for such products produced with sibutramine. The Tribunal also held that the Service had failed to establish that Abbott's patent rights in sibutramine were sufficient to justify its refusal to supply the product to pharmacists. The Tribunal expressly stated that it was not reaching any conclusions as to the possible existence of an abuse, but speculated that the abuse in this case might be similar to the abuse described in the *Commercial Solvents* case. However, as Abbott had never previously supplied sibutramine to pharmacies, this comparison seems somewhat unwarranted.

SWEDEN

This section reviews developments concerning the Competition Act of 1993, which is enforced by the Competition Authority.

POLICY AND PROCEDURE

Nordic cooperation agreement.

The Swedish Competition Authority has signed an agreement with the Danish, Norwegian, and Icelandic competition authorities to exchange confidential information on cartels and other antitrust infringements.

HORIZONTAL AGREEMENTS

Petrol cartel judgment.
In April, the Stockholm District Court fined Statoil, OKQ8, Shell, Preem, and Hydro for coordinating retail motor fuel prices and rebates. This is the largest Swedish cartel investigation to date, although the Court imposed a total fine of just SEK 52 million (€5.6 million), significantly below the SEK 651 million (€ 71 million) sought by the Competition Authority. The Court did not find sufficient evidence for several of the Authority's allegations; for example, it was not shown that the companies had agreed on customer allocation and a plan to maintain certain rebate and price levels, nor that the behaviour led to increased prices. Statoil received the largest fine of SEK 20 million (€ 2.2 million) for having played a leading role in the cartel. The Authority has since claimed that the fines are too low in view of the European Commission's fining policy, and has appealed the judgment to the Swedish Market Court.

Dawn raids against bus companies.
The Competition Authority has initiated an investigation into alleged price fixing and market allocation among bus companies, carrying out dawn raids on the premises of several bus companies in early June. The investigation follows allegations that certain bus companies coordinated their behaviour during the public procurement process in respect of certain routes, which resulted in a low number of competitive bids for those routes.

Dawn raids against bitumen companies.
The Competition Authority has initiated an investigation into alleged price-fixing and market allocation on the bitumen market. The Authority also suspects one of the companies investigated of abusing its dominant position. Dawn raids were carried out in June on the premises of several companies active on the bitumen market. The investigation is based partly on information received by the Air Traffic Authority concerning the public procurement process in respect of a third runway at Arlanda airport, and partly on evidence found during the investigation of the asphalt cartel that was brought before the Stockholm District Court earlier this year.

SWITZERLAND

This section reviews developments concerning the Federal Act of October 6, 1995 on Cartels and Other Restraints of Competition (the Competition Act), which is enforced by the Federal Competition Commission (FCC). Appeals against decisions of the FCC are heard by the Appeal Commission for Competition Matters.

POLICY AND PROCEDURE

Amendments to the Competition Act.
The amendment of the Competition Act, submitted by the Swiss Federal Council for parliamentary debate on November 7, 2001, was enacted by Parliament on June 20, 2003. The amendment effects three notable changes in the Competition Act. First, it provides for a system of non-mandatory preliminary notification of potentially unlawful agreements and practices. Second, it grants the FCC power to impose direct administrative fines on members of a hardcore cartel and on undertakings abusing their dominant position (the fines can reach up to 10 % of the turnover achieved in Switzerland during the last three financial years), and the power to reduce or eliminate fines when cooperation by hardcore cartel members allows the cartel to be discovered or suppressed. Finally, it removes the specific notification thresholds in the media sector.

Parliament amended the original draft to incorporate important additional elements. Vertical agreements will be presumed to eliminate workable competition when they determine minimum or fixed prices of resale, or when they lead to geographical market sharing. These presumptions are important, in that they will enable the authorities to issue decisions without conducting an in-depth analysis of the market. Another element added by Parliament is that the Competition Act will not apply to effects on competition that result exclusively from laws governing intellectual property, with the exception of restrictions on imports based upon intellectual property rights.

The publication of the amendment in the Federal Journal on July 1, 2003, marks the beginning of a 90-day referendum period. If no referendum takes place, it is likely that the amendment will enter into force at the beginning of 2004.

MERGER CONTROL

Banking.

On May 12, the FCC decided not to extend the obligation imposed on UBS AG to participate in the common institutions of the Swiss banks (Telekurs Holding SA, SIS Swiss Financial Services Group, and SECB Swiss Euro Clearing Bank Sàrl), nor to purchase services from them. This obligation — which aimed at strengthening competition in the retail banking sector — was imposed by the FCC on UBS in connection with the 1998 clearance of the merger between Union Bank of Switzerland and Swiss Bank Corporation. The FCC found that structural changes had occurred in the banking sector over the last years, and that new providers of financial services, active in the traditional fields of the common institutions of the Swiss banks, had recently entered Switzerland. Accordingly, it was not necessary to extend the obligation for a further five-year period.

UNITED KINGDOM

This section reviews developments concerning the Fair Trading Act of 1973, the Competition Act of 1980, and the Competition Act of 1998, which are enforced by the Competition Commission, the Department of Trade and Industry, and the Office of Fair Trading (OFT).

MERGERS AND ACQUISITIONS

Competition Commission publishes Safeway issues and remedies statements.

The Competition Commission's investigation into the proposed acquisitions by Wal-Mart Stores Inc, J Sainsbury plc, Wm Morrison Supermarkets plc, and Tesco plc of Safeway plc has progressed. Having received representations from the potential bidders, interested third parties, and members of the public in an open hearing on April 30, the Commission published its issues statement on May 8 and its remedies statement on June 24.

The issues statement discusses the changes in the market since the Commission's 2000 Report on Supermarkets, in particular, the diversification of products sold, the rise in smaller convenience stores, the definition of the geographic market, and the treatment of "chains of substitution". In order to identify areas of local competition between stores at a local level, the Commission confirmed that it would apply store-centred isochrone analysis (calculating local market catchment areas within equal driving times from the store), as well as population-centred isochrone analysis (calculating catchment areas within equal drive times of a population). At a national level, the Commission concluded that Safeway could be expected to provide effective competition absent a merger going forward, and as such that it did not consider Safeway to be a 'failing firm'. The Commission also concluded that any merger would raise quality and customer choice issues, and that it did not wish to see a market based on four low-priced or low-quality retailers.

The remedies statement provides a set of preliminary conclusions, as opposed to the hypothetical analyses that have previously been issued. It states that the Morrison merger could be 'pro-competitive', although it notes that issues have been raised as to the ability of Morrison management to integrate the Safeway stores effectively. By contrast, the Commission states that a merger between Safeway and any of the national players would raise national competitive concerns (in the form of a reduction in large players from four to three) on top of any local issues. Part of this concern arises from the Commission's conclusion that the Supermarkets Code appears ineffective to preclude buyer power issues from arising. As a result, the Commission has said that national players should consider remedies over and above any local divestments. This is complicated by the fact that the Commission has decided that it will examine both historical market share data and projected data for the next three years. The form that such remedies might take is neither immediately clear nor spelled out in the statement. The report expressly states that outright prohibition of the proposed bids by Wal-Mart, Sainsbury, and Tesco is a 'key issue'.

ABUSE OF MARKET POWER

High Court upholds decision on mobile phone charges.

The High Court has upheld the Commission's decision that the call termination charges of the major U.K. mobile network operators (MNOs) from other fixed and mobile networks operate against the public interest and should be subject to charge control. On June 27, 2003 Mr. Justice Moses rejected the claims for judicial review brought by Vodafone, Orange, and T-Mobile.

Commission Chairman Sir Derek Morris said that "[t]he Commission conducted a very thorough investigation and our findings were that callers to mobile phones paid too much for their calls. This finding was challenged by the MNOs but Mr Justice Moses found no grounds to criticise the

Commission in that finding. The MNOs also challenged the Commission's recommendation of a price cap to cure the overcharging and again Mr Justice Moses rejected that challenge."

Genzyme fined for abuse.

At the end of March, the OFT fined Genzyme Limited £6.8 million (€9.6 million) for exclusionary pricing behaviour in breach of the Chapter II prohibition of the Competition Act 1998. This is the largest such fine to date in the United Kingdom.

Genzyme supplies a drug called Cerezyme, which treats Gaucher disease and until recently was the only product of its kind. The OFT concluded that Genzyme held a dominant position in the market for drug treatment of the disease, and that it had abused that position by (i) charging the U.K. National Health Service ("NHS") a price for the drug that included home delivery and provision of homecare services, thereby ensuring that only Genzyme could provide such services, and (ii) charging home care providers a price that allowed them to obtain no margin in the provision of competing services.

The OFT found that Genzyme's conduct prevented other drug companies from competing and ensured that new competitors could not enter the market, depriving the NHS and patients of a choice of providers. In addition to the fine, the OFT required Genzyme to end the pricing system, to refrain from adopting measures having an equivalent effect, to offer to supply Cerezyme to the NHS at a stand-alone price for the drug only, and to supply Cerezyme to third parties at a price no higher than the stand-alone price for the drug.

OFT decision in Aberdeen Journals upheld.

In June, the Competition Appeal Tribunal upheld the referred OFT ruling that Aberdeen Journals Limited had abused a dominant position as a result of predatory pricing under Chapter II of the Competition Act 1998. The OFT had ruled in September 2002 that Aberdeen Journals had a dominant position in the market for newspaper advertising in Aberdeen, and that from this position it had engaged in predatory pricing. The Tribunal held that the OFT's ruling was founded on "strong and compelling evidence" and that the company had failed to shed reasonable doubt on the analysis. Nonetheless, the Tribunal reduced the OFT's proposed penalty from £1.3 to £1 million.

Private enforcement of Article 82 EC in the English Courts.

In *Arkin v Borchard Lines*, Arkin sought damages from Borchard in the English courts, alleging that Borchard had breached Article 82 EC or, alternatively, Article 81 EC. Although the claimant failed to establish a case on the merits, the case is significant in that this is the first time that an English court has considered an action for damages arising from an alleged breach of Article 82 EC. The Court referred to the judgment in *Courage Ltd. v. Crehan*, which considered liability for breach of Article 81 EC. Although it did not address the point directly, the Court proceeded on the basis that an action for damages was also available for breach of Article 82 EC, thereby implicitly upholding the general private enforcement principle set out in *Garden Cottage Foods v Milk Marketing Board*.

The claimant, a shipping group, asserted that the defendant shipping conferences had engaged in predatory pricing, had used so-called 'fighting ships' to win business, and had spread rumours of the claimant's insolvency in order to drive business to the conferences. Alternatively, the claimant argued that the agreements between the conferences during the relevant period in 1991 fell outside the Article 81(3) EC shipping conference block exemption regulation, Regulation 4056/86.

The judge found that as the prices charged by the conferences during the alleged price war were above average variable cost, and as there was no evidence that the conferences' price reductions were implemented with the intention of eliminating the claimant from the market, they were not predatory. The judge confirmed, however, that had prices been below such average variable cost, proof of exclusionary intent would not have been necessary. Further, there was no evidence to substantiate the use of fighting ships or that any rumours were spread by the defendants. The defendants' behaviour during the relevant period did not fall outside of the block exemption regulation.

VERTICAL AGREEMENTS

Beer ties in Crehan/Inntreprenneur.

On June 26, the High Court ruled that a beer tie (*i.e.*, an agreement requiring a pub tenant to purchase its beer supplies exclusively from its landlord) was not a significant barrier to entry into the UK market for the sale of beer to licensed premises. Thus, the first of the two cumulative conditions under the *Delimitis* doctrine for establishing a breach of Article 81 EC in the context of a network of beer supply agreements (*i.e.*, that the national market was foreclosed) was not satisfied (the second limb, that the agreement in question materially added to such foreclosure, was therefore not addressed). Accordingly, the plaintiff's claim for damages was dismissed.

In 1993, Courage Group, the plaintiff in the main proceedings, brought an action for the recovery from Mr. Crehan of a sum for unpaid beer deliveries. Mr. Crehan contested the action on its merits, contending that the beer tie was contrary to Article 81 EC, and counterclaimed for damages.

The action brought by Mr. Crehan before the European Court of Justice continued what was originally Mr. Crehan's counterclaim for damages against Inntrepreneur and Courage (*i.e.*, the original party to the 20-year lease agreement, including an exclusive obligation to purchase beer from Courage), on the ground that the beer tie in the agreement was anticompetitive and thus illegal.

The Court ruled that "Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition."

However, the Court did not address the question of whether the beer tie of which Mr. Crehan complained was in breach of Article 81 EC. The questions referred by the Court of Appeal invited the ECJ to proceed on the assumption that the 'tied house agreement' – which it was considering – was prohibited, and the ECJ proceeded on that hypothetical basis. The High Court has now answered this question in the negative, and so the counterclaim for damages was dismissed.

If you are interested in more detailed information concerning any items in this report, please contact any of the following individuals at the Brussels office: Maurits Dolmans, Wolfgang Knapp, Nicholas Levy, Robbert Snelders, Romano Subiotto, Dirk Vandermeersch, Antoine Winckler.

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