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Austria

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

Vertical Agreements

Supreme Court Rejects Appeal against Decision on Vertical Restraints in Print Media Distribution Agreement

On December 1, 2009, the Austrian Supreme Court (the "Court") rejected an appeal by Bauer Media Group ("Bauer"), a German publishing house, against a decision by the Cartel Court on certain anti-competitive clauses contained in its distribution agreement with Pressegroßvertrieb Salzburg ("Pressegroßvertrieb") (now Valora Services), the major wholesale distributor of print media in Austria.[1] Under the agreement in question (which concerned consumer magazines), Pressegroßvertrieb was appointed the sole distributor for Austria (with territorial protection) and was obliged to include resale price maintenance clauses in its own contracts with retailers.

In its appeal, Bauer argued that (i) Pressegroßvertrieb was not an independent undertaking, but acted as a mere commercial agent, bringing the agreement outside the scope of Art. 101 TFEU, that (ii) the agreement did not have any effect on trade between Member States, and that (iii) vertical agreements could not constitute infringements of Article 101 TFEU by "object" (and that thus proof of anti-competitive effects on the market is required to establish an infringement). The Court rejected each of these arguments.

First, the Court rejected Bauer's view that Pressegroßvertrieb acted as a mere commercial agent. In particular, the Court noted that Pressegroßvertrieb acquired ownership of the products subject to the agreement, and had complete freedom to choose which retailers to deal with. Further, Pressegroßvertrieb bore the risk of the retailers' insolvency, and received no remuneration for its efforts to sell magazines that were later returned (even though it was required to bear substantial transport and marketing costs).

Second, the Court held that Pressegroßvertrieb's 33% market share in Austria (and its role as the exclusive distributor for Bauer's products in the entire country) was sufficient to establish that the distribution agreement had the potential to affect trade between Member States.

Third, the Court found that vertical restraints (including, in particular, clauses on resale price maintenance and territorial protection) could constitute infringements of Article 101 TFEU by their very object, regardless of their effects on the market. As a result, the Court rejected Bauer's argument that the Cartel Court erred by not establishing the agreement's effect on the market.

Belgium

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

Mergers and Acquisitions

Court Of Appeals Partially Annuls The Council's Decision To Maintain The 1997 Merger Conditions Imposed On Kinepolis

On March 11, 2010,[2] the Brussels Court of Appeals partially annulled the Council's October 1, 2008 decision,[3] granting Kinepolis' request to lift certain restrictions imposed on it in 1997.

The Council had initially lifted the 1997 restrictions in an April 16, 2007 decision,[4] as a result of changes in the structure of the Belgian cinema market during the preceding 10 years. However, on March 18, 2008,[5] the Brussels Court of Appeals annulled that decision and referred the case back to the Council.

1 Oberster Gerichtshof, 1 Dezember 2009, 16 Ok 10/09. This judgment confirmed an earlier Supreme Court decision in the same case in summer 2009, where Pressegroßvertrieb had argued along the same lines and Bauer's appeal was mistakenly held to be time-barred (Oberster Gerichtshof, 15 Juli 2009, 16 Ok 6/09).

2 Court of Appeal in Brussels (18th House), No. 371 of March 11, 2010, Business 2008/MR/22, 2008/MR/23, 2008/MR/24, BS, March 30, 2010, p. 19 493.

3 Competition Council, Decision No. 2008-C/C-52 of October 1, 2008, Kinepolis request for waiver of the conditions in decision 97-C/C-25 of November 17, 1997, BS, October 20, 2008, p. 55779.

4 Competition Council, Decision No. 2007-C/C-12 of April 16, 2007, request of Kinepolis NV and NV Kinepolis Film Distribution to remove the conditions imposed in 97-C/C-25 of November 17, 1997, BS, May 16, 2007, p. 26805.

5 Court of Appeal in Brussels (18th House), No. 646 of March 18, 2008, Business 2008/MR/22, 2008/MR/23, 2008/MR/24.

The Council's October 1, 2008 decision affirmed some of the restrictions imposed on Kinepolis in 1997, but limited their continued application to a non-renewable period of three years. During the three-year period, the decision required Kinepolis to obtain the Council's prior approval for the construction or acquisition of new theatre complexes. However, the Council lifted the condition requiring Kinepolis to seek authorization prior to the renovation, expansion or replacement of existing complexes. Kinepolis' competitors, UGC, Vzw F.C.B., and the group Multiscope appealed the decision to the Brussels Court of Appeals.

In its March 11, 2010 decision, the Court of Appeals confirmed the Council's October 1, 2008 decision lifting the condition requiring Kinepolis to seek prior authorization for the renovation, expansion, and/or replacement of existing complexes. As to the other conditions, the Court of Appeals decided that they should stay in place for renewable (as opposed to non-renewable) periods of three years. The Court found that, in imposing the restrictions for a non-renewable three-year period, the Council simply assumed that Kinepolis' competitors would be able to change the structure of the Belgian cinema market within a three-year period (such that the merger conditions would no longer be necessary to avoid the risk of restriction of competition by Kinepolis). The Court found that the Council did not justify this assumption and therefore decided to maintain the merger conditions for renewable periods of three years, with the possibility for Kinepolis to request that these conditions be lifted at the end of every three-year period.

Policy and Procedure

Belgian Competition Commission Issues Opinion Concerning Possible Criminalization of Competition Law Infringements

On February 4, 2010, the Belgian Competition Commission (the "Commission")[6] issued an opinion on the possible criminalization of competition law infringements in Belgium.[7] The Commission's opinion was requested by the Belgian Minister for Enterprise and Simplification, Vincent Van Quickenborne, after an initial investigation into the matter by the Directorate-General. In September 2009, the Directorate-General concluded in favor of the imposition of criminal sanctions for "hardcore" infringements of competition law (subject to certain qualifications, described below).

In its opinion of February 4, 2010, the Commission agreed with the Directorate-General that there are two *sine qua non* conditions for the introduction of criminal sanctions in Belgian competition law: (i) the current leniency regime should not be undermined by the introduction of criminal sanctions (*i.e.*, individuals should be granted immunity from criminal sanctions if they contributed to a leniency application made by their company), and (ii) a criminal procedure against individuals should not suspend administrative proceedings, which already tend to be too lengthy.

However, the Commission noted that launching both criminal and administrative proceedings at the same time would lead to procedural problems (*e.g.*, parallel investigations and obstacles to an effective exchange of information, resulting in particular from the conflict between the rights of defense in criminal proceedings and the protection of business secrets in competition proceedings) and that the introduction of criminal sanctions in Belgian competition law would require a new section in the APEC addressing the interaction between an administrative investigation and a criminal investigation.

Furthermore, the Commission stressed that the exact scope of infringements of competition law leading to criminal sanctions needs to be clearly defined in order to respect well-established principles of Belgian criminal law, such as legal certainty and the clarity of criminal provisions. In this respect, the Commission considered it appropriate that criminal sanctions should be limited to "hardcore" infringements.

Finally, the Commission noted that, in certain cases, disqualifying individuals from directorships or other mandates and functions could be more effective than the pecuniary fines (between €100 and €10,000) and imprisonment (from 2 months to 5 years) envisaged by the Directorate-General.

However, the Commission stated that it could not give its final views on the introduction of criminal sanctions in Belgian competition law in the absence of an evaluation of the different measures that have been taken in the past few years to strengthen both competition law enforcement (*e.g.*, the reinforcement of the Belgian competition authority by the APEC, and the introduction of a leniency program) and the currently applicable sanctions.

6 The Commission is an advisory body, separate from the Belgian competition authority, which gives non-binding opinions on matters of general competition policy.

7 The Commission's opinion is available at http://www.ccecrb.fgov.be/txt/fr/doc10-233.pdf.

Denmark

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

Horizontal/Vertical Agreements

Commitment concerning exchange of price information between franchise partners

On March 24, 2010, the DCC adopted a decision allowing Bestseller A/S ("Besteller") to once again gather price information from its independent franchise partners.

Bestseller is a wholesale clothing distributor both for Bestseller brand stores (which are either owned by independent franchise partners or by subsidiary companies of Bestseller), and other (non-Besteller branded) stores. In August 2003, the DCC ordered Bestseller to remove provisions on resale price maintenance from certain agreements between Bestseller and its independent franchise partners. The DCC also ordered Bestseller to modify its IT system so that its franchise partners' sales, prices, and profits were no longer accessible to Bestseller (on the grounds that reporting this information would facilitate continued price monitoring by Bestseller). Both the Danish Competition Appeals Tribunal and the Western High Court confirmed the DCC's decision.

The DCA subsequently reassessed the matter, and its investigation revealed no signs of any explicit or tacit agreements between Bestseller and its franchise partners on resale price maintenance. Consequently, the DCC found that Bestseller sufficiently proved that future access to price information would only be used for purposes aimed at promoting efficiencies. However, the DCC raised concerns that confidential information received from franchise partners might be passed on to other franchise partners or to Bestseller-owned stores, and thereby facilitate collusion at the retail level.

To allay these concerns, Bestseller offered a number of commitments, including undertakings to prevent individual dealers from accessing other dealers' data, and to guarantee total separation between the persons receiving data from franchise partners and the persons setting prices in Bestseller-owned stores. Based on a number of factors, including the fact that this information was to be exchanged on a highly competitive market, the DCC found that Besteller's commitments were sufficient to allay its concerns.

Unilateral Conduct

Commitment concerning the conditions for leasing of space in high masts

On February 25, 2010, the DCC accepted commitments from DR, TV 2|Danmark A/S, and I/S 4M to change joint utilization practices for broadcast masts and antenna systems which are over 100 metres high. Access to high broadcasting masts is restricted, as planning permission to construct additional broadcasting masts is unlikely to be granted. The DCC found that each mast constituted a separate relevant market and consequently each mast owner was held to be dominant.

The DCC had previously granted an exemption to standard agreements on the joint utilization of masts and antenna systems. However, the DCC refused to renew this exemption, as it was concerned that the methods for calculating rent could lead to excessive and/or discriminatory prices. To address these concerns, the companies offered commitments to change the basis for calculating the rent charged for joint utilization of masts and antenna systems. The commitments include detailed instructions as to the valuation of the investment undertaken when establishing a broadcasting network, ensuring both that tenants pay reasonable rent and that network owners receive a reasonable return on their investment.

Mergers and Acquisitions

Revocation of approval

On February 1, 2010, the DCA revoked its approval of the acquisition of S.A.B. a.m.b.a. Landbrugets Andel ("SAB") by Danish Agro a.m.b.a. ("DA") after finding that its approval was based on incorrect or misleading information provided by one of the parties. Both companies were active in the supply of animal feed, grain, and fertilizers to Danish farms. This is the first time that the Authority has revoked approval for a merger or acquisition.

The acquisition was originally approved on January 25, 2010, based on the Authority's assessment that potential competitors, including Aarhusegnens Andel a.m.b.a. ("AAA"), would remain in the market and their presence would offset any competition concerns. However, a few hours after the clearance decision was issued, DA's counsel notified the DCA that DA had entered an agreement with another company (Dansk Landbrugs Grovvareselskab) for the joint acquisition of AAA on January 13, 2010. The DCA concluded that DA's counsel (who were involved in both acquisitions) should have informed the DCA of the existence of DA's agreement to jointly acquire AAA. The DCA revoked its clearance decision after determining that it was based on insufficient information, which could be attributed to one or more of the parties concerned.

Sectoral Investigations

DCA Report concludes that regulation restricts competition in the pharmaceutical sector

On February 23, 2010, the DCA published a report concluding that the regulatory system in the Danish pharmacy sector unduly restricts competition. The Danish pharmacy sector, like other health sectors, is characterized by significant regulation, including (i) a restrictive licensing system for pharmacy ownership; (ii) an equalization system transferring revenues from pharmacies with a large turnover to pharmacies with a small turnover; and (iii) price and profit regulation.

The DCA found that the regulatory system restricts competition, as it (i) limits access to the market, (ii) excludes price competition, and (iii) provides only limited incentives to compete on quality of service. The DCA concluded that the lack of competition on the market results in long waiting times in pharmacies in urban areas, and a significant difference in earnings between high profit pharmacies in urban areas and low profit pharmacies in rural areas.

According to the DCA, healthy competition would result in new pharmacies opening up in urban areas, which would in turn lead to lower profits and reduced waiting times. In order to remedy these problems, the report suggests lowering barriers to entry in the Danish pharmacy sector (by lessening the licensing requirements to own a pharmacy) and abandoning the equalization system (in order to strengthen incentives to compete on quality of service).

Finland

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

Vertical Agreements

A-Tec Resale Price Maintenance

On January 29, 2010, the Market Court imposed a fine of €80,000 on A-Tec Service ("A-Tec") for resale price maintenance. A-Tec, which imports industrial machinery and equipment and provides related installation and maintenance services in Finland, was found to have fixed the prices for repair and maintenance services charged by its authorized service company Pohjolan Laitehuolto ("PL") over a period of approximately seven months. The FCA applied to the Market Court in March 2006, seeking to impose fines of €120,000 on A-Tec.

As an authorized service company, PL provides services on behalf of A-Tec, but also on its own account as a distributor. According to the agreement between the parties, PL was obliged to follow list prices established by A-Tec for spare parts, installation, maintenance, and repair work. Moreover, A-Tec was entitled to cancel the agreement with immediate effect if PL failed to comply with its terms.

According to the Market Court, the agreement restricted price competition in the sale of spare parts, installation, maintenance and repair work. The Market Court considered that the agreement obliged PL to charge a fixed price not only when acting on behalf of A-Tec, but also to its own customers when acting as a distributor. Thus, PL was not entitled to determine the prices charged for its services, which restricted customers' options when choosing between A-Tec and PL.

The Market Court emphasized that resale price maintenance is a "hard-core" restriction on competition that is expressly prohibited by both the Act and EU legislation. In its fining analysis, the Market Court held that the infringement was "serious" in nature, but noted that the limited duration of the infringement, and the fact that the restriction applied only to one contracting party, were mitigating factors.

Unilateral Conduct

Forcit Rebate System

On February 15, 2010, the FCA accepted binding commitments from Forcit, a Finnish manufacturer and importer of explosives, after an investigation led to concerns that Forcit had abused its dominant position. The FCA initiated the investigation in 2005 after receiving a complaint from Alkupanos, a Finnish distributor of explosives, that Forcit's rebate system was unclear.

Although the FCA did not define the relevant antitrust market, it held that Forcit had a very strong market position in Finland, as the company was the most significant manufacturer and importer of explosives. The FCA therefore assessed the case under the rules concerning abuse of dominant position.

The FCA found that Forcit was granting discounts to customers based on the customers' purchases during the previous six-month period, leading to uncertainty about prices. The FCA held that, according to established Finnish case law, such non-transparent pricing arrangements are *per se* abusive. The FCA considered that such discounts, granted only following a delay of six months, and on a non-transparent and unforeseeable basis, were contrary to the Finnish Competition Act. According to the FCA, this rebate system would tie customers to Forcit, foreclosing competition. Furthermore, the FCA held that Forcit's rebate system could lead to price discrimination.

To address the FCA's concerns, Forcit offered commitments to abandon its rebate system and apply future rebates with consistency and transparency (excluding situations where Forcit responds to competition). The FCA considered Forcit's commitments, which are required to be in effect by June 30, 2010, as a sufficient remedy and closed the investigation.

France

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

Horizontal Agreements

Paris Court of Appeal Drastically Reduces Cartel Fines On Account Of Crisis Affecting Steel Sector

On January 19, 2010, the Paris Court of Appeal reduced the fines imposed by the FCA on several steel undertakings for horizontal anticompetitive practices from €575 million to €75 million, on the grounds that (i) the fines were disproportionately high against the backdrop of the ongoing economic crisis; (ii) the infringement had only a moderate impact on the market; and (iii) the FCA did not sufficiently individualize the level of the fines imposed.[8]

On December 16, 2008, the FCA imposed fines amounting to €575 million on 11 steel manufacturers and a steel industry trade association for price-fixing and market-sharing practices in violation of Article L.420-1 of the French Commercial Code and Article 101 TFEU.[9] The FCA found that the infringement took place between 1999 and 2004, covered the entire French territory, and affected between 70% and 90% of French steel sales. The FCA also found that the infringement was orchestrated at the highest management levels of the companies involved, and that the participants closely monitored and enforced cartel prices. Because the affected products were used by a variety of companies across different industries, the FCA found that the infringement caused significant damage to the economy.

Eight steel manufacturers lodged an appeal before the Paris Court of Appeal. The Court upheld a number of the appellants' claims relating to (i) the gravity of the infringement, (ii) the damage caused to the economy, and (iii) the steel manufacturers' individual circumstances.

First, the Court held that the FCA should have taken account of certain mitigating circumstances (including the presence of a maverick player on the market) that significantly reduced the impact of the infringement. The Court also ruled that the FCA should have taken into consideration the exceptional level of uncertainty faced by steel manufacturers as a result of the economic crisis. In the Court's view, the FCA should therefore have imposed a fine significantly lower than the 10% turnover ceiling set out in Article L.464-2 of the French Commercial Code.

Second, the Court took issue with the FCA's failure to take into account an economic study noting various features of the steel industry that would render adherence to the cartel prices unlikely. In particular, the report noted the decisional autonomy of Arcelor's subsidiaries (Arcelor was the parent company of three of the fined undertakings), the essentially local nature of the steel trading business, the relative absence of price transparency, and the instability of steel prices. In the Court's view, these market features demonstrated that the impact of the infringement was likely to be limited.

Third, the Court ruled that the fines imposed by the FCA should have taken account of each steel manufacturer's individual situation (e.g., the size of their market presence, the value of their affected sales compared to their total turnover, and the duration of their participation in the cartel). Notably, the Court also held that the financial difficulties faced by each of the undertakings concerned (and their consequent inability to pay large fines) should have been taken into account. Finally, the Court held that where a parent company is not held liable for infringements committed by one of its subsidiaries, the fine ceiling should be based only on the turnover of the subsidiary in question (as opposed to the entire corporate group). Since three of the fined undertakings (Arcelor Profil, AMD, and PUM) belonged to the Arcelor group, the Court held that the FCA's decision to determine the fine ceiling for each subsidiary on the basis of the group's total turnover resulted in a disproportionate cumulative fine.

8 Judgment of the Paris Court of Appeal of January 19, 2010, n° 2009/00334.

9 Decision n° 08-D-32.

The Court concluded that infringement did not warrant fines in excess of 5% of the turnover achieved by each subsidiary over the relevant period, and therefore drastically reduced the fines imposed by the FCA. The Minister of the Economy decided not to appeal the decision, but instead set up an expert committee to review the methodology for calculating antitrust fines. The expert committee is due to report by May 2010.

Vertical Agreements

French Supreme Court Annuls Judgment Of Paris Court of Appeal Regarding The Exclusive Distribution Of iPhones

On February 16, 2010, the French Supreme Court annulled a judgment of the Paris Court of Appeals upholding the FCA's decision to suspend the exclusivity period granted to Orange over the sale of iPhones in France.[10]

In October 2007, Orange (the main mobile telephone operator in France) entered into agreements with Apple granting Orange the exclusive right to sell and distribute iPhones in France for a period of five years. Simultaneously, Apple set up a selective distribution system whereby authorized retailers committed to purchase iPhones exclusively from Orange, and to sell iPhones with Orange as the exclusive service provider.

On December 17, 2008, the FCA found that the exclusive rights granted to Orange were *prima facie* contrary to Article 101 TFEU and Article L.420-1 of the French Commercial Code, and were likely to cause serious harm to consumers. In an interim decision, the FCA ordered the suspension of the exclusivity clause pending its final decision on the merits.[11] As a result of this decision, Bouygues and SFR (Orange's main competitors) were able to market the iPhone in France.

On February 4, 2009, the Paris Court of Appeals upheld the FCA's interim decision.[12] The Court considered that, given the attractiveness of the iPhone product, the exclusivity granted to Orange was likely to give Orange a significant competitive advantage on the French mobile telephony market. In addition, the Court emphasized the risk of market foreclosure if other mobile network operators were to enter into similar exclusive arrangements with Apple's competitors (e.g., SFR with Blackberry). Finally, the Court found that the duration of the exclusivity period was disproportionate and could not be justified by Orange's alleged need to recover investments relating to the launch of the iPhone in France.

On February 16, 2010, the French Supreme Court reversed the judgment of the Paris Court of Appeals on two grounds. First, it held that the Court of Appeals failed to assess whether Orange's competitors had alternatives to the iPhone and could therefore offer a competing solution to their customers. The Supreme Court also rejected the argument that if other mobile operators entered into exclusive agreements with smartphone manufacturers, there would be cumulative anticompetitive effects.

Second, the Supreme Court held that the Court of Appeals overestimated the revenues that Orange would derive from the exclusivity period. In the Supreme Court's view, these revenues could not be deemed disproportionately high compared to costs incurred by Orange in order to launch the iPhone in France. Moreover, the Supreme Court held that the Paris Court of Appeals should not have calculated the revenues attributable to the exclusivity period by reference to the total revenues generated from iPhone customers, but should instead have considered only the incremental revenues, *i.e.*, the revenues generated by customers who subscribed to Orange only in order to buy the iPhone. The Supreme Court did not, however, provide any method to calculate these incremental revenues.

In practice, however, this judgment will have little practical impact, since Orange has nevertheless committed to waive its exclusive rights to the iPhone in France.[13]

Mergers and Acquisitions

The French Competition Authority Issues Its First Phase II Decision

On January 26, 2010, the FCA issued its first ever Phase II clearance decision (before 2009, the Ministry of the Economy was in charge of merger control decisions).[14] The FCA authorised, subject to commitments, the acquisition by TF1 (the main free-to-air television channel in France) of NT1 and TMC (two of the main general-interest TV channels offering free Digital Terrestrial Television (DTT) programming).

10 Judgment of the French Supreme Court of February 16, 2010, France Télécom Orange France, n° 229 FS-D.

11 Decision n° 08-MC-01.

12 Case 2008/23828.

13 Decision n° 10-D-01, January 10, 2010.

14 French Competition Authority, Decision No.10-DCC-11, January 26, 2010, relating to the TF1 group's acquisition of sole control over NT1 and Monte-Carlo Participation (group AB).

The FCA defined two categories of relevant markets: (i) the markets for the acquisition of broadcast rights for television programmes, and (ii) the markets for television advertising. As regards broadcast rights for television programmes, the Authority adopted a traditional market definition based on whether the programmes in question are to be broadcast on television or on mobile phones, and programme content (i.e., films, series, sports, or other programming). As regards the markets for television advertising, the FCA noted the specific characteristics of television compared to other media forms (Internet, written press, radio, outside advertising) since it is able to quickly reach a large target audience. The FCA did note, however, that the market investigation suggested that there is some convergence towards a single advertising market, given that advertisers increasingly seek to provide a comprehensive advertising solution. In particular, the FCA noted the growing convergence between advertising for television and the Internet, but held that Internet advertising is not yet sufficiently strong to influence the price of television advertising. As regards geographic market definition, the FCA held that the markets for both broadcast rights and advertising were national in scope.

The FCA held that despite the relatively small market shares held by NT1 and TMC (less than 5% on all affected markets), the transaction was nevertheless likely to affect competition in both the markets for the acquisition of broadcast rights and the markets for television advertising. First, as regards broadcast rights, the FCA noted that although the acquisition of TMC and NT1 would not significantly strengthen the market share of the TF1 group, the TF1 group would gain a competitive advantage through its ability to generate profits from the broadcast rights acquired for three channels instead of one. Therefore, following the transaction, TF1 would have particularly strong buyer power on the markets for broadcast rights. The FCA also expressed concern at the increasing imbalance in the market position of DTT channels backed by an established channel as compared to their independent competitors.

Second, as regards the markets for television advertising, the FCA considered that, despite recent market developments, TF1 still held a dominant position. In addition to its high market share (40-50%), due to the high viewer ratings of the TF1 channel, it has the unique ability to offer advertisers "powerful" access to a large target audience. The Authority found that the acquisition of two additional general-interest channels would strengthen this dominant position. Although a unilateral price increase would be unlikely in the short term, the FCA nevertheless considered that the TF1 group could leverage its existing position by bundling sales of advertising airtime on the TF1 channel with airtime on the TMC and NT1 channels. Moreover, the Authority considered that the relevant TV markets are two-sided: the acquisition of programmes and the sale of advertising space are mutually reinforcing, because increased programme quality improves audience reach. This in turn drives increased advertising revenues, enabling the purchase of more programmes. The Authority concluded that the transaction could trigger a positive feedback loop that would strengthen the position of TF1 on the advertising markets.

The Authority accepted a number of behavioral commitments intended to facilitate the circulation of broadcasting rights between competing channels. Specifically, TF1 has committed to limit re-runs of programmes within the group, and not to cross-promote TMC and NT1 programmes on the TF1 channel. Within the television advertising markets, TF1 committed not to enter into any form of bundling with respect to advertising airtime on TF1 and on the NT1 and TMC channels. Moreover, advertising airtime on TMC and NT1 is to be marketed by an entity separate from that responsible for marketing TF1's airtime. TF1's commitments remain effective for a period of five years.

Germany

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

Horizontal Agreements

Federal Court Of Justice Decides On Rescission Of Civil Contract On Grounds Of Cartel Participation

On January 28, 2010, the FCJ held that a customer may in principle rescind a contract with a supplier on the ground of fraudulent deceit because the supplier formed part of a cartel.[15]

The FCJ quashed a decision of the Düsseldorf Court of Appeals *(Oberlandesgericht Düsseldorf)* in private contractual litigation, in which the Court of Appeals had rejected the customer's rescission (which could have rendered the entire contract void and allowed for repayment claims based on unjust enrichment). The Court of Appeals had elaborated that under the general civil law rules, follow-on

15 Federal Court of Justice, Decision of January 28, 2010, Case VII ZR 50/09, available in German at: www.bundesgerichtshof.de; Düsseldorf Court of Appeals, Decision of February 20, 2009, Case I-22 U 135/08, available in German at: www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2009/I_22_U_135_08urteil20090220.html.

contracts of cartel participants with end customers would typically not be void, and could potentially only be partially invalid with respect to the price agreed, provided that the price reflected the cartel overcharge. However, the customer had not substantiated any overcharge in his specific contract, and the Court of Appeals stated that the existence of a cartel alone would not allow the conclusion that all contracts with end customers included cartel overcharges.

The FCJ held that the Court of Appeals should not have considered only the general rules on validity, but should have dealt with the actual reason for the customer's rescission on grounds of fraudulent deceit. The FCJ clarified that if the customer entered into the agreement with the cartelist because he was fraudulently deceived, the contract is in general subject to rescission. Further, the FCJ held that the burden of proof for knowledge of the deceit falls on the party relying on the expiry of the statute of limitations, in this case the supplier, not the customer. The fact that in the litigation the customer had referred to a press release on the cartel in a different context was alone not deemed sufficient to demonstrate that the customer actually had known the cartel infringement at the time of the press release. This may also be relevant for civil damage litigation. As the FCJ did not have all the facts at hand, it could not decide the matter and referred it back to the Court of Appeals.

FCO Initiates Cartel Proceedings Against Health Insurance Funds

On February 17, 2010, through formal questionnaires, the FCO initiated cartel proceedings against nine health insurance funds of the statutory health insurance system.[16] At the end of January 2010, the health insurance funds jointly announced in a press conference that they intended to charge additional contributions from insurants, which triggered the FCO's action.

Düsseldorf Court Of Appeal Clarifies Method For Setting Fines In The Cement Cartel Case

In March 2010, the Düsseldorf Court of Appeals *(Oberlandesgericht Düsseldorf)* published its decision dated June 26, 2009[17] in the appeal proceedings against the fines the FCO had imposed on cement cartel participants in 2003.[18] The Court significantly reduced the fines from a total amount of approximately €590 million on appeal to €329 million.

The Court reviewed the fines both under the law applicable in 2003 (according to which fines of up to three times the additional proceeds obtained through a cartel could be imposed) and under the currently applicable law[19] (adopted in 2005 and amended in 2007), as the most favorable law is applicable when fining provisions are changed after the termination of an infringement *(lex mitior)*.[20] The new law (modeled after EU rules) provides that fines imposed on enterprises may not exceed 10% of the enterprise's total turnover in the preceding year (the "10% of turnover rule").[21] The Court found that for all but one fine, the amount would be lower under the old law, and imposed reduced fines based on the latter. In particular, the Court determined that the additional proceeds gained from the cartel were not as high as the FCO had assumed in its fining decision. Further, the Court found that when setting the fines, previous sanctions for cartel infringements should not be taken into account as aggravating factor if the sanctions had been imposed more than five years ago. This may also be relevant for the FCO's current fining policy.

When dealing with the new law, the Court clarified the interpretation of the 10% of turnover rule. In its fining guidelines, the FCO (like the European Commission with respect to EU law) treats the 10% of turnover rule as a maximum cap to be applied once the fine has been calculated taking into account gravity and duration.[22]

The Court, however, held that the 10% of turnover rule does not represent a cap, but should be viewed as the upper end of the possible fine range. This means a fine of 10% of the company's turnover should only be applied for the most serious infringements. The FCO further appealed the decision to the Federal Court of Justice *(Bundesgerichtshof – "FCJ")*.

16 FCO, press release of February 22, 2010, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2010_02_22.php.

17 Düsseldorf Court of Appeals, Decision of June 26, 2009, Case VI-2a Kart 2 – 6/08 OWi, available in German at: www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2009/VI_2a_Kart_2___6_08_OWiurteil20090626.html.

18 In 2003, the FCO had imposed total fines of approximately € 660 million against six cement manufacturers and individuals. See FCO press release of April 14, 2003, available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2003/2003_04_14.php. Five of these companies and one individual had appealed against the fining decisions, see FCO press release of June 29, 2009, available at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2009/2009_06_29.php.

19 Section 81 (4) (2) GWB.

20 Section 4 (3) of the Law on Administrative Offences *(Ordnungswidrigkeitengesetz)*.

21 Section 81 (4) (7) GWB.

22 *See* the FCO's 2006 fining guidelines, available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bussgeldleitlinien-E_Logo.pdf.

In an unusual step, the FCO issued a press release on the decision,[23] and defended its current practice as in line with the policies of the European Commission and several national competition authorities. The FCO also announced that as long as its appeal is pending, it would continue its current fining policy (*i.e.*, applying the 10% of turnover rule as a cap).

FCO Fines Building Materials Trade Cooperatives And Trade Associations

On March 2, 2010, the FCO imposed fines totaling €13.36 million on two building materials trade cooperatives, two trade associations, and four individuals for agreeing on set-up fees for dry mortar silos.[24] The FCO also fined the trade associations because it found that these had facilitated the implementation of the agreement of the mortar manufacturers.

Vertical Agreements

Karlsruhe Court Of Appeals Decision On Selective Distribution/Prohibition Of Internet Sales via Third Party Auction Platform (eBay)

On November 25, 2009, the Karlsruhe Court of Appeals (Oberlandesgericht Karlsruhe) found that a manufacturer could prohibit Internet sales of authorized dealers in a qualitative selective distribution system via third-party auction platforms (eBay) without infringing Article 101, because the dealer in question did not meet the qualitative criteria applicable to Internet sales with its eBay offering.[25] The Court left open whether the general ban on third party Internet auction platforms as contained in the contract went beyond what was necessary, because the actual offering of the dealer via eBay clearly did not meet the (permissible) contractual criteria applicable to Internet sales (in particular, offering a variety of the contracted products and referring to the brick and mortar shop that offers sales services). The Court did not allow further appeal.

FCO Confirms Dawn Raids Of Retailers And Branded Goods Manufacturers On The Suspicion Of Fixing End Consumer Prices

On January 14, 2010, the FCO confirmed that it inspected several companies in the food retail, drugstore, pet supplies sector, as well as manufacturers of branded consumer goods. In addition, the FCO informed several trading companies that they are subject to the investigation. The FCO's investigation was triggered on the suspicions that manufacturers of branded goods and retailers have fixed end consumer prices. While the FCO's leniency program does not include vertical agreements, the FCO explicitly mentioned that it would consider any voluntary cooperation when setting the fines.

Unilateral Conduct

FCO Applies The Essential Facilities Doctrine To Grant Access To A Port

On January 27, 2010, the FCO ordered Scandlines Deutschland GmbH ("Scandlines") to negotiate with two Norwegian ferry operators on the access (for a reasonable fee) to the Puttgarden ferry terminal in Northern Germany.[26] Scandlines had previously rejected the Norwegian ferry operators' request for access on the ground of maritime safety and because it did not want to curtail its own ferry services. The FCO found that Scandlines is dominant in the provision of terminal facilities and the downstream market for ferry services between Puttgarden and Rødby. The refusal to grant competitors access to the port constituted an abuse of dominant position pursuant to Section 19 GWB and Article 102 TFEU because the port formed an essential facility. Access was indeed indispensable to other companies intending to offer a competing ferry service on the route, as duplication of the terminal or use of another sailing port was impossible. Based on an expert's report the FCO found that the use of the terminal by an additional ferry operator would not compromise maritime safety. Further, the FCO stressed that joint use of an essential facility cannot be refused by invoking restraints on the dominant company's own services.

Mergers and Acquisitions

FCO Approves Stationery Company Pelikan's Acquisition Of Rival Herlitz Without Restrictions

On March 17, 2010, after an in-depth investigation, the FCO approved stationery company Pelikan's acquisition of 66% of the

23 *See* FCO, press release of February 23, 2010, available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2010/PM_Bussgeldpraxis_final-E.pdf.

24 FCO, press release of March 2, 2010, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/press/2010_03_02.php. With this decision, the FCO finalized proceedings against mortar manufacturers, building trade cooperatives, trade associations, and several individuals, which started in 2006 and in which the FCO already had imposed fines of approximately € 40 million on nine mortar manufacturers in July 2009, see FCO, press release of July 3, 2009, available in English at: http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2009/2009_07_03.php.

25 Karlsruhe Court of Appeals, Decision of November 25, 2009, Case 6 U 47/08 Kart. The full text of the decision is available in German at: http://lrbw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=12213.

26 FCO, Case B9 – 188/05. The full text of the decision is available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Missbrauchsaufsicht/B9-188-05_Scandlines.pdf?navid=42. This is the second FCO decision establishing abusive refusal to access to the essential port facilities of Puttgarden. The first decision dated December 21, 1999 ((FCO, Case B9 - 199/97, B9 - 16/98, available in German at: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell03/B9_199_97_16_98.pdf?navid=43) was not successful, as the complainant declared bankruptcy before the initiation of ferry services.

shares in its rival Herlitz without conditions.[27] Both parties offer leading brands in the office and stationery supply business in Germany and have a broad portfolio of products.

The FCO rejected the notion of an overall market for cross-product assortments, as the retailers select and create their assortments, and defined several separate product markets instead. While the parties' activities overlap in a number of product markets, most of the markets fell under the *de minimis* exception.[28] The FCO did not bundle these *de minimis* markets as the focus and assortments of different stationery companies vary and customers do not face consistent strategies.

Despite the parties' significant market shares for fountain pens (Pelikan: 30-40%, Herlitz: <10%), the FCO found that the transaction would not create single dominance, as Lamy, with 40-50%, would exert sufficient competitive pressure. The transaction would also not create or strengthen collective dominance because the merging parties and Lamy focus on different distribution channels and show substantial structural differences.

In addition, the FCO clarified the scope of Section 38 (2) GWB, which stipulates that for merger control purposes, only three quarters of the total turnover should be taken into account when trading in goods is concerned. The provision is not applicable to goods manufactured by third parties and sold on by the undertakings concerned under their own brand or as a white-label product.

Policy and Procedure

FCO Publishes Position Paper On Broadband Expansion

On January 19, 2010, the FCO published a position paper "Guidelines on the competitive assessment of cooperations in optical fibre expansion in Germany."[29] The position paper reflects administrative principles and will bind the FCO in future cases, but will not bind courts.

In addition to referring to the principles of Article 101 TFEU and Commission Notices,[30] the position paper provides some specific conclusions with respect to the broadband sector in Germany: cooperation regarding the development and first-time supply of broadband connections in so-called "white spots" does not normally raise any concern, whereas other cooperation among competitors to upgrade existing broadband connections for bandwidths of 50Mbps or more would require a detailed competitive assessment, depending on the type of cooperation and the market position of the companies concerned. In particular, the FCO stipulates that any cooperation with incumbent Deutsche Telekom AG (DTAG) would be problematic, as such cooperation could impair third party access to the network and secure or strengthen DTAG's dominant positions in several wholesale and retail broadband markets.

The FCO focuses on restrictions of infrastructure-based competition, and claims that broadband network infrastructure can generally be widely duplicated, at least up to the local loop. The FCO states that cooperation on complementary network deployment, in which each party deploys individually only a part of the network infrastructure and grants the other party access to it, would typically fall within the scope of Article 101 TFEU. The FCO argues that all parties of current cooperation agreements were already active in infrastructure based ADSL-products in the area covered by such agreements, and would thus normally be able to enter the market individually. Nevertheless, complementary network deployment could benefit from exemption if the conditions are met. In particular, such agreements would not involve a hardcore territorial restriction, as long as network access is guaranteed for each party and competition for broadband connections to end-users would not be restricted within the area concerned. The FCO notes that the enhanced supply of broadband service with bandwidths of 50Mbps or more would be considered as an appropriate efficiency gain. Cooperation on parallel network deployment would normally fall outside the scope of Article 101 TFEU, as the parties would deploy parallel network infrastructure and use only a few infrastructure elements in common.

The FCO notes that joint ventures created for the purposes of broadband expansion would likely often be cleared in Phase I (except, again, those involving DTAG).

27 FCO, Decision of March 17, 2010, Case B2 – 137/09, available in German at: http://www.bundeskartellamt.de/wDeutsch/entscheidungen/fusionskontrolle/EntschFusionW3DnavidW2649.php; case summary available in German at: http://www.bundeskartel-lamt.de/wDeutsch/entscheidungen/fusionskontrolle/kurzberichtfus/KurzberichteFusionW3DnavidW2648.php.

28 Under Section 35 (2) no. 2 GWB, markets with a size of less than € 15 million per year are exempted from merger control.

29 The position paper "Hinweise zur wettbewerbsrechtlichen Bewertung von Kooperationen beim Glasfaserausbau in Deutschland" is available in German at http://www.bun-deskartellamt.de/wDeutsch/publikationen/Diskussionsbeitraege/StellungnahmenW3DnavidW2666.php.

30 Especially Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, OJ 2001 C 3/2, and Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/97.

Sectoral Investigations

FCO Publishes Interim Report On The Milk Sector Inquiry

On January 11, 2010, the FCO published an interim report on its milk sector inquiry, which had been launched in June 2008.[31] The report examines the relationship between milk producers and dairies and concludes that competition in the raw milk market is deficient. The milk producers lack substantial bargaining power, and the FCO thus questions the calculation method of the raw milk price, which is mostly calculated "upside down," *i.e.*, the dairies pay a raw milk price to producers based on their reselling prices negotiated with the retail sector. The FCO finds that the long-term supply contracts between milk producers and dairies and the high market transparency further impede competition in the raw milk purchasing market.

At the level of dairies and retailers the FCO has found no evidence for anti-competitive practices by retailers. Despite the high market concentration in the German retail sector and the buying power of some retailers, a random review revealed that price advantages achieved through negotiations with dairies are generally passed on to the consumers. However, many dairies depend on selling their products to the top six German retailers, in particular to the discounters Aldi and Lidl. The FCO found that conditions negotiated with Aldi determine the negotiations with other retailers, since Aldi is regarded as the price leader.

The FCO concluded that the structural change in the milk production and milk processing sector will continue. The market transparency and the supply relationship between milk producers and dairies will be at the heart of the planned consultation and further FCO investigation. In addition, the FCO recommended that the dairies engage in further product differentiation and realize economies of scale in the processing markets in order to improve the bargaining position of milk producers as well as dairies vis-à-vis retailers. The final report is expected in late 2010.

Greece

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

Mergers and Acquisitions

HCC Approves the Acquisition of BP Hellas SA by Hellenic Petroleum SA, Subject to Commitments

On October 20, 2009, following a Phase II investigation, the HCC approved HELPE's acquisition of BP Hellas subject to certain commitments (consistent with the European Commission's decision on the same case),[32] and offered guidance on the content of acceptable remedies.

The decision concerned the proposed acquisition of the wholesale and retail fuel businesses of BP Hellas in Greece (including its network of 1,200 fuel stations), by HELPE, Greece´s leading oil refining company. The HCC identified six affected product markets (including petrol, oil for vehicles and heating oil). Following a Phase II investigation, the HCC found that the concentration would not restrict competition at the wholesale level, as the parties' combined share did not exceed 35% in any of the relevant product markets. However, at the retail level, the HCC found that in light of the parties' high combined shares (up to 80%), the acquisition would lead to the creation of a dominant position in the markets for petrol, oil for vehicles, and heating oil in specific geographic areas (including Crete, Corfu, Rhodes and the Dodecanese islands). The HCC noted that these areas represented a substantial part of Greece, and required the notifying undertaking to propose adequate remedies to eliminate its competition concerns.

In its decision, the HCC laid down certain conditions for the parties' proposed remedies to be acceptable. The HCC stated that the commitments must be comprehensive, eliminate competition concerns entirely, and be capable of being implemented effectively within a short period of time. Although the HCC stated a preference for structural remedies (such as the divestiture of business units), it acknowledged that other types of commitments (*e.g.*, granting access to key infrastructure or inputs on non-discriminatory terms, or terminating long-term exclusive contracts) could also be acceptable.

In the case at hand, a divestiture was not possible, since all fuel stations in the affected geographic areas are independent (*i.e.*, owned and operated by the dealers themselves, not the merging parties). The HCC therefore accepted a commitment by HELPE to bring its share below 55% in the relevant areas by terminating (or not renewing) its long-term exclusive agreements with dealers. Under

31 The interim report is available at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Stellungnahmen/1001_Sektoruntersuchung_Milch_Zwischenbericht_2009.pdf. In particular, the so-called "milk strike" in 2008 led to the sector-inquiry into the German milk industry in order to examine the market structure and conditions of competition throughout the different levels of trade, see National Competition Report October – December 2008, p. 10; FCO decision of November 12, 2008 – Case B2-100/08 available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell08/B2-100-08.pdf?navid=37.

32 Decision No. 465/VI/2009 *Hellenic Petroleum/BP Hellas*.

the commitment, HELPE was obliged to release the stations from these contracts within six months, and was prohibited from acquiring these stations for a term of six years. HELPE was further obliged to abstain from maintaining *de facto* exclusivity over the stations in question. So that the HCC could monitor compliance, HELPE was required to provide a list of all stations released from its contracts.

Referral Under Article 9 of the EU Merger Regulation of the Acquisition by Motor Oil of Shell's Greek Fuel Business

On March 15, 2010, the European Commission referred the proposed acquisition of Shell's activities in the Greek oil sector by Motor Oil of Greece to the HCC. This referral was triggered at the HCC's request, as it was concerned that the transaction would result in high market shares in various retail fuel markets. The European Commission, according to its press release, found that the HCC's request was in line with Article 9 of the Merger Regulation and that the HCC would be best placed to assess the impact of the proposed transaction on the Greek market.

Ireland

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

Mergers and Acquisitions

Competition Authority Clears the Acquisition of VESI by Greenstar Holdings Ltd.

On March 11, 2010, the Competition Authority unconditionally approved the acquisition by Greenstar Holdings Limited of Veolia Environmental Services (Ireland) Limited. After a Phase II investigation, the Competition Authority found that the transaction raised no competition concerns on any of the affected markets for waste management and related services in Ireland.

The Competition Authority defined separate markets for (i) the provision of waste management services to either small or large commercial and industrial ("C&I") customers, (ii) the sale of recyclable materials, (iii) the management of recycling facilities on behalf of public authorities, and (iv) the provision of waste management services to multi-site C&I customers. With regard to waste management services for C&I customers, the Authority defined separate geographic markets for the Greater Dublin Area ("GDA"), the South-East region, and Cork City.

In each affected market, the Authority determined that the Transaction would not give rise to competition concerns, due to a combination of the following factors: (i) the market is fragmented with many competitors (*e.g.*, there are 10 companies active in the market for waste management services in the GDA), (ii) barriers to entry are low, (iii) there are a number of large customers that exert significant buyer power (*e.g.*, multiple retailers, building facility managers and major hazardous waste companies), and (iv) prices had dropped significantly in recent months due to vigorous competition on the market.

This case marks the 18th time that the Competition Authority has opened a Phase II investigation since 2003. Of these 18 transactions, only three have been blocked by the Authority.

Italy

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

Horizontal Agreements

Tribunal Annuls Authority's Decision Regarding The Italian Lead Battery Recycling Industry

On March 9, 2010, the Tribunal annulled the Authority's decision condemning the lead battery-recycling consortium ("COBAT"), a number of smelting companies associated with COBAT, and the recycling industry association ("AIRPB"), for breach of Article 101 TFEU.

COBAT is an Italian consortium, entrusted by law with the operation of a national system for the collection and recycling of used lead batteries. The Authority's investigation focused on three aspects of the system operated by COBAT, namely (i) a quota system for the allocation of used lead batteries to smelting companies, based on their respective stakes in the consortium (which, in turn, are based on production quotas for the previous year); (ii) the automatic reduction in the number of batteries allocated by the consortium to smelters who sourced used lead batteries from third parties; and (iii) a system penalizing smelters for failing to notify COBAT if they source batteries from third parties. In the Authority's view, this system facilitated the preservation of existing market shares and removed incentives to develop alternative systems for the collection of lead batteries. Moreover, the Authority held that the system could not benefit from the exemption set forth in Article 106(2) TFEU, since, in the Authority's view, full compliance with the antitrust laws would not prevent the accomplishment of COBAT's public mission.

The Tribunal took a different approach, holding that the Authority did not attach appropriate weight to the environmental and public health policies behind COBAT's activities. The Tribunal noted that the regulatory framework entrusted COBAT with the development of an efficient system for the collection and recycling of used lead batteries. In the Tribunal's view, COBAT's behavior was justified by its public health and environmental objectives, which should prevail in the case of conflict with the competition rules. The Tribunal further held that the Authority failed to demonstrate that an alternative allocation system (based on competitive bids) would be more efficient. In particular, the Tribunal noted that the available data showed that a very high percentage of used lead batteries in Italy were in fact collected and recycled through COBAT, which demonstrated COBAT's effectiveness in achieving its environmental mission.

Authority Imposes Fines Totaling €22 million For Price Fixing Cartel For Sale Of Domestic Liquefied Petroleum Gas ("LPG")

On March 24, 2010, the Authority found Butan Gas S.p.A. ("Butan Gas"), Liquigas S.p.A. ("Liquigas") and ENI S.p.A ("Eni") liable for anticompetitive agreements in the Italian market for the sale of domestic LPG, contrary to Article 101 TFEU. According to the Authority, from 1995 to 2005, the companies unlawfully agreed on price lists for domestic LPG in order to artificially inflate price benchmarks used in negotiations with customers. As a result, the Authority imposed a total fine of €22 million on Butan Gas and Liquigas while granting full immunity to Eni under the Italian leniency program.

The Authority found that from 1995 to 2005, the companies' top management met frequently to agree on price adjustments designed to compensate for fluctuations in the cost of raw materials for domestic LPG. In addition, the Authority determined that the companies monitored and enforced the infringement through cartel meetings and exchanges of information concerning domestic LPG sales trends. In the Authority's view, the infringement was "very serious" in light of its nature and effects. In particular, the Authority noted the long duration of the infringement (10 years) and the fact that the companies involved were the three main operators active in the market. The infringement therefore had a significant effect on prices and favored the maintenance of the status quo in the Italian market for the sale of domestic LPG.

In order to prove the infringement, the Authority largely relied on leniency statements submitted by Eni. The Authority also carried out dawn raids, during which it seized documents such as hotel invoices, travel expenses and calendar notes. This evidence, however, only provided indirect proof of anticompetitive meetings. In order to collect further corroborating evidence, the Authority carried out an in-depth economic analysis to demonstrate further links between the unlawful meetings and uniform increases in the domestic LPG prices charged by each company.

This case represents the second time the Italian leniency program has been applied since it was adopted in February 2007. However, this is the first case in which the Italian leniency program was formally applied from the beginning of an investigation. In the first case (the May 2007 chipboard manufacturers case),[33] the leniency applicant first submitted evidence before the leniency notice was adopted, and the Authority granted immunity by applying the notice retroactively.

Netherlands

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

Horizontal Agreements

NMa Considers "Crisis Cartel" Scheme For "Laying Up" Inland Vessels Inconsistent With Competition Act

On February 10, 2010, the NMa published its "Informal Views" on the compatibility with the competition rules of the "laying up" scheme for inland vessels proposed by Het Crisisberaad Binnenvaart to counteract overcapacity caused by the financial crisis.[34]

Het Crisisberaad Binnenvaart ("Het Crisisberaad") was set up in 2009 by two private trade associations for inland shipping companies (Centraal Bureau voor de Rijn- en binnenvaart and Kantoor Binnenvaart) to discuss possible solutions to the adverse impact of the financial crisis on the inland shipping industry. In October 2009, Het Crisisberaad presented its "laying up" scheme for inland vessels, a plan to reduce overcapacity in the dry cargo and container inland shipping industry. Under the proposed scheme, inland shippers could, if a research company objectively concludes that there is overcapacity, enroll in a tender to temporarily take their vessels out of service ("laying vessels up"). When enrolling in the tender, the

33 *See* National Competition Report (Italy) 2007 – 2nd Quarter.

34 Informele Zienswijze: Oplegregeling Crisisberaad Binnenvaart, http://www.nmanet.nl/Images/Informele%20zienswijze%20oplegregeling%20crisisberaad_tcm16-134834.pdf.

inland shipper would have to indicate the price it wants as compensation for laying its vessel up. The tender would be granted to the inland shipper requesting the lowest compensation. The compensation would be paid out of a "crisis fund," managed and paid for by the inland shipping industry, freight forwarders, banks, the dock industry, and the national government. The scheme has not yet been implemented, as the specific role of each participant has to be developed in more detail.

In the course of discussions in October 2009, the NMa indicated that the "laying up" scheme would violate the cartel prohibition of the Dutch Competition Act, as it would negatively affect competition and pricing on the market. Het Crisisberaad replied that the scheme would fall under the exceptions to the cartel prohibition.

Article 6(3) of the Dutch Competition Act, the equivalent of Article 101(3) TFEU, provides for an exception to the cartel prohibition for any agreement that contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and that does not (i) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and (ii) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. According to Het Crisisberaad this exception would apply to the "laying up" scheme, as the available vessel capacity would be used more efficiently due to the scheme.

The NMa found that Het Crisisberaad had not shown sufficiently that all the conditions for the exception were met. In particular, the NMa found that it was unclear (i) whether the scheme would produce efficiency benefits that could not be produced without the scheme, and (ii) how the scheme would correct the existing inefficiencies in the market. The NMa therefore found that there were insufficient efficiency benefits to compensate for the scheme's negative effects on competition. The NMa also found that Het Crisisberaad had not shown that consumers would benefit from the alleged efficiencies.

The NMa concluded that the "laying up" scheme would violate the cartel prohibition and that it was not likely that the Article 6(3) exception would apply. As this analysis was presented as an "Informal View," it does not bind the NMa.

The European Commission has also expressed concern that the coordinated "laying up" of vessels might violate European competition law, having opened an investigation into the "Baltic Max Feeder" scheme (by which the owners of feeder vessels would collectively cover the costs of "laying up" vessels). However, the scheme was ultimately abandoned and the investigation closed.

Mergers and Acquisitions

NMa Decides That Acquisition Of Hospital By Medical Cooperative Association Requires Further Review

On February 18, 2010, the NMa found that the acquisition of the hospital Vlietland Ziekenhuis (Stichting Samenwerkende Schiedamse en Vlaardingse Ziekenhuizen) by Coöperatie Vlietland U.A. could negatively affect competition and therefore requires further review.[35]

Coöperatie Vlietland U.A. is a cooperative association, including the medical insurer DSW, a cooperation of general practitioners, foundations active in the care home sector, and the medical specialists and personnel of Vlietland Ziekenhuis. It is the first time that the NMa has decided on a vertical concentration between a medical insurer and a hospital.

First, the NMa considered the relationship between medical insurer DSW and Vlietland Ziekenhuis. The NMa considered whether, post-acquisition, DSW could be tempted to agree an exclusive contract with Vlietland Ziekenhuis. Although it would be legal for a medical insurer to contract exclusively with one hospital, it is not done in practice, as insurance policyholders are unwilling to limit their choice of hospital. The NMa also considered whether Vlietland Ziekenhuis could, in turn, be tempted to contract exclusively with DSW. Although that would also be legally permissible, Vlietland Ziekenhuis would have no incentive to do so, as its capacity would probably not be fully utilised by patients insured by DSW (even accounting for increased customers attracted by the exclusive contract with Vlietland Ziekenhuis). The NMa therefore found that the relationship between DSW and Vlietland Ziekenhius would not negatively affect competition.

Second, the NMa considered the relationship between Vlietland Ziekenhuis and the general practitioners who are members of Coöperatie Vlietland U.A. The NMa considered whether the general practitioners could, as members of Coöperatie Vlietland, have an incentive to send patients to Vlietland Ziekenhuis, thereby strengthening the competitive position of the hospital. If Vlietland Ziekenhuis then had an exclusive contract with DSW, it is possible that patients would become too dependent on DSW, and DSW (therefore facing less competition) could then increase its prices to policyholders. The likelihood of this happening depends on various

35 Case 6669/194, *Coöperatie Vlietland – Vlietland Ziekenhuis,* NMa decision of February 18, 2010.

factors, including the strength of the incentive for GPs to send their patients to Vlietland Ziekenhuis, and the extent to which patients follow GPs' advice. The NMA concluded that it would need to research such issues further before it could be sure that competition concerns would not arise, and therefore decided that further review would be necessary.

Third, the NMa considered the relationship between Vlietland Ziekenhuis and the care homes that are members of Coöperatie Vlietland. The NMa considered whether, post-acquisition, Vlietland Ziekenhuis could have incentives to send patients who need follow-up care to the care homes that are members of Coöperatie Vlietland. This could foreclose entry by new providers of care home services, as prospective entrants could be deterred by the difficulty in accessing patients. The NMA concluded again that it would need to research such issues further before it could be sure that competition concerns would not arise, and therefore decided that further review would be necessary.

Sectoral Investigations

NMa Publishes New Guidelines For The Health Care Industry

In March 2010, the NMa published new Guidelines for the Health Care Industry.[36] The main goal of these new Guidelines is to clarify that the Dutch Competition Act does not prohibit all types of cooperation. The Guidelines are designed to help undertakings in the health care industry assess their individual and collective behavior. The Guidelines are not exhaustive. Behavior that is not expressly prohibited by the Guidelines could also violate competition law, while behavior that is not expressly allowed could also be compatible with competition law.

The Guidelines consider the cartel prohibition, abuse of dominance, and merger control in the context of the health care industry. For example, regarding vertical concentration in the health care industry (such as the acquisition of Vlietland Ziekenhuis by Coöperatie Vlietland U.A.), the Guidelines indicate that such concentration does not generally raise competition concerns. A concentration between a medical insurer and a health care provider could, for example, enable a medical insurer to direct health care providers to focus on quality and prevention, thereby saving money and offering better service to its policyholders. However, the NMa also indicates that vertical concentration can, in some circumstances, raise competition concerns. For example, a vertical concentration between a medical insurer and a health care provider could raise competition concerns if the concentration would lead to foreclosure on either market (*e.g.*, because the health care provider and/or the medical insurer, post-transaction, would be able to steer patients and/or policyholders to each other, such that competing health care providers and/or medical insurers would be less able to compete effectively).

Portugal

This section reviews competition law developments under the Competition Act (Law 18/2003) enacted on June 11, 2003, which is enforced by the Portuguese Competition Authority ("PCA").

Unilateral Conduct

Portuguese Court Overturns €38M Fine Imposed on Portugal Telecom

On March 2, 2010, the Lisbon Commerce Court (the "Court") overturned a €38M fine imposed by the PCA on telecommunications incumbent Portugal Telecom ("PT") for an abuse of its dominant position under both national and EU law.

In an August 2007 decision, the PCA found that PT had a dominant position on the following markets: (i) the market for access to infrastructure for the laying of cables; (ii) the market for access to infrastructure for electronic communication networks; and (iii) the downstream markets for Pay TV services, retail broadband, and retail fixed-line telephone services.

According to the PCA, PT had abused its dominant position by not allowing competitors Tvtel and Cabovisão to access the two upstream infrastructure markets. The PCA found that PT's conduct denied Tvtel and Cabovisão the opportunity to make their downstream services (*i.e.*, Pay TV services, retail broadband, and retail fixed-line telephone services) available to more than 73,000 homes.

On appeal, the Court held that the PCA had not shown that PT's infrastructure constituted an essential facility. In addition, the Court ruled that, even if PT's infrastructure were found to be an essential facility, the PCA had not shown the PT's refusal to allow access to Tvtel and Cabovisão was either unjustified or discriminatory. The Court further held that the PCA's decision had not established that PT's refusal to allow access to its infrastructure prevented competitors from developing their own networks for the provision of telecommunications services.

The Court's ruling is significant as it overturned the first large fine imposed by the PCA. In addition, the PCA's decision was made

36 Richtsnoeren Voor De Zorgsector, 2009, http://www.nmanet.nl/Images/Richtsnoeren%20voor%20de%20zorgsector_tcm16-135479.pdf.

during a period when the Portuguese government was attempting to bring greater competition to the country's telecommunications sector. The PCA has announced that it will appeal the Court's decision to the Lisbon Appeals Court.

Spain

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

Horizontal Agreements

Sanitary waste management companies fined over €7 Million for market sharing

On January 18, 2010, the CNC imposed fines totaling €7 million on four sanitary waste management companies (Consenur, S.A ("Consenur"), Cespa Gestion de Residuos S.A. ("Cespa"), Interlun S.L., and Sistemas Integrales Sanitarios ("SIS")) for sharing the market for the provision of waste services to public healthcare providers in Spain.[37] Cespa was fined an additional €600,000 for implementing an agreement with the aim of excluding the firm Athisa from the market.

After its investigation, the CNC found that Interlun, SIS, Consenur and Cespa shared public sector clients by coordinating the presentation of bids in various tender procedures operated by healthcare authorities. This coordination was achieved either through the creation of temporary joint ventures (even though it was technically and economically feasible for the main companies to compete against each other), or through other arrangements, such as abstaining from participating in certain tenders, submitting uncompetitive bids or agreeing the terms of the bids that were to be presented.

Accordingly, the CNC found that the four companies infringed Article 1.1.c of Law 16/1989. It also found Cespa had infringed Article 1 of Law 16/1989 by implementing its non-competition agreement to exclude Athisa from the market.

Cartel fine of €8.3 million imposed on gel producers

On January 21, 2010, the CNC fined three undertakings (Sara Lee, Puig and Colgate) a total of €8.3 million for their participation in a cartel in the market for bath and shower gel.[38] Another undertaking, Henkel, also participated in the infringement, but was granted full immunity from fines under the Spanish leniency program. This is the first time that the CNC has levied fines pursuant to the leniency program, which came into force on February 28, 2008, pursuant to Law 15/2007.

Following the leniency applications of Henkel and Sara Lee on February 28, 2008, the CNC conducted dawn raids at the premises of all companies involved (Henkel, Sara Lee, Puig, Colgate, and Colomer). As Henkel was the first leniency applicant, it was granted full immunity from fines. Sara Lee was granted a 40% fine reduction as it provided the CNC with additional information of significant added value. All of the companies involved were fined except for Colomer (an investigation is underway to clarify to what extent it publicly distanced itself from the cartel).

The CNC found that Henkel, Sara Lee, Colgate and Puig participated in the infringement from December 2005 to February 2008. The top executives of the involved companies met at least twice to implement a disguised price increase in bath and shower gels. The participant companies agreed to progressively change their product formats (to reduce the volume of product sold in one container) without a corresponding reduction in the price, in order to mask an increase in the unit price paid by consumers. Accordingly, the CNC found that the parties to this agreement had infringed Article 101 TFEU and Article 1.a of Law 16/1989.

In its fining analysis, the CNC stated that it considered the infringement to be a "very serious" violation of Spanish competition law. In particular, the CNC noted that the infringement affected not only the prices charged by the participant undertakings (who were the market leaders in Spain), but also the prices charged by other companies active in the market. Following a price increase by the market leaders, other companies (including those selling so-called white brands) would find it easier to raise their prices, or to discontinue promotional campaigns, without the risk of losing market share.

Mergers and Acquisitions

Fine of €143,000 for failing to notify the purchase of Teledifusión Madrid

On January 26, 2010, the CNC fined Tradia and its subsidiary Abertis €143,000 for failing to notify the acquisition of Teledifusión Madrid to the CNC.[39] Pursuant to Law 15/2007, the CNC can impose a fine amounting up to 5% of a company's group turnover in the preceding business year if it fails to notify a concentration.

37 Decision S/0014/07, Gestión Residuos Sanitarios.

38 Decision S/0084/08, Fabricantes de Gel.

39 Decision SNC/0003/09, Abertis-Tradia.

By March 7, 2008, Tradia had already paid the agreed price for the acquisition of Teledifusión Madrid and the transmission of shares had also taken place. On July 18, 2008, Abertis notified the concentration to the CNC, although it initially believed that the concentration was not notifiable (as the 30% market share threshold had not been met). However, the CNC considered the operation to be notifiable. Following a Phase II investigation, the CNC authorized the concentration with conditions on July 16, 2009. On August 6, 2009, however, Tradia decided not to implement the transaction.

Despite the fact that the transaction was not implemented, the CNC found that Tradia had infringed Article 9.1 of Law 15/2007 by failing to duly notify the acquisition. As Tradia is a fully owned subsidiary of Abertis, the CNC held both firms to be jointly and severally liable for the payment of the fine. In its fining analysis, the CNC refused to take into account the fact that Tradia halted the transaction as a mitigating circumstance.

Policy and Procedure

The CNC publishes its report on the collective management of intellectual property rights

On January 19, 2010, the CNC published its report on restrictions of competition in the Spanish market for the collective management of intellectual property rights (IPRs). Under the Spanish Intellectual Property Act 1996 ("IPA"), collecting societies manage and exercise intellectual property rights on behalf of their holders, either under voluntary assignments or by legal mandate.

In its report, the CNC found that the monopoly enjoyed by Spanish collecting societies reduced their incentives to operate efficiently and contributed to the establishment of discriminatory and/or inequitable fees. Based on an analysis of the current regulatory framework and the collecting societies' current practices, the CNC made several recommendations for the reform of collective rights management.

First, the CNC stated that any reform should aim to increase the choices available to copyright holders and end-users. This would require a major overhaul of the IPA, and the removal of entry barriers to the market for rights management (especially in light of the growing importance of the management of IPR on the Internet). In particular, the CNC recommended that: (i) the obligation to manage IPR through collecting societies should be removed from the IPA (with the exception of obligations arising from European Directives); (ii) the current requirement of an administrative authorization to establish a collecting society should be replaced with a simple registration system; and (iii) the requirement that collecting societies must be non-profit organizations should be removed.

Second, the CNC recommended certain measures to avoid possible abuses and inefficiencies. In particular, the CNC recommended that the provisions of the IPA relating to (i) minimum membership periods, and (ii) notice requirements for the termination and renewal of management contracts, should be repealed. According to the CNC, the maximum duration of contracts should be set to one year, and the term of notice set to three months, so as to enable copyright holders to change collecting society easily. In addition, the CNC recommended that the IPA should oblige collecting societies to be transparent as regards the repertories they manage and the contracts they hold with individual users and organizations (and sanctioned if they fail to comply).

Third, the CNC recommended that the existing Intellectual Property Commission should be reformed and invested with decision-making and disciplinary powers in order to resolve all IPR disputes (including disputes relating to the fees charged by collecting societies).

Sectoral Investigations

Extension of the proceedings to include UNESA in the electricity sector investigation

On February 4, 2010, the CNC decided to continue its investigation into the electricity sector and extended the proceedings to include the Spanish Electrical Industry Association (UNESA), as well as additional alleged anticompetitive practices.

The Royal Decree of April 3, 2009[40] provided for the liberalization of the Spanish electricity sector, and gave consumers the option to either: (i) stay with their current electricity provider, and benefit from government-fixed prices, or (ii) switch electricity provider and negotiate prices on the free market. In the latter case, consumers would be assisted by the newly created Electricity Provider Change Office. In response to this legislation, the electricity companies Endesa, Iberdrola, Hidrocantábrico, Gas Natural and E.On allegedly refused third parties online access to the data needed to process a change of supplier for end consumers.

On June 24, 2009, the CNC opened an investigation into these alleged anticompetitive practices. On May 4, 2010, the CNC found that the electricity providers had infringed Article 81 TFEU and Article 1.1.a of Law 15/2007 and adopted interim measures forcing Endesa,

40 Royal Decree 485/2009 of 3 April 2009, BOE N° 82 of 4 April 2009, p. 31971.

Iberdrola, Hidrocantábrico, Gas Natural, and E.On to reestablish immediate online access to the data in question.[41]

Following these interim measures, the CNC conducted dawn raids in the offices of UNESA on November 5-6, 2009. As a result, it decided to extend the proceedings to include UNESA. The CNC has also broadened the scope of its investigation to include an alleged strategy of coordination to hinder consumers in their attempts to change electricity suppliers. The CNC still has until December 24, 2010, to reach a final decision on the matter.

Sweden

This section reviews developments concerning the Swedish Competition Act 2008, which is enforced by the Swedish Competition Authority ("SCA").

Unilateral Conduct

Decision of the Swedish Market Court in the Arlanda Taxi Case

On February 5, the Swedish Market Court dismissed the appeal brought by the Swedish Civil Aviation Administration ("CAA") against the SCA's interim decision prohibiting the CAA's planned changes to the taxi queuing and call-up system at Stockholm's Arlanda Airport.

In 2009, the CAA announced that it planned to establish a system whereby (i) the taxi lanes at Terminal 5 of Arlanda Airport would be allocated to taxi companies based on their traffic volume, and (ii) taxi companies that reached a certain threshold would be granted their own lanes. The CAA further planned to reallocate the two taxi lanes at Terminal 2, so that the lane chosen by most customers would be located closer to the exit whereas the less popular lane would be moved further away.

Following complaints from small taxi operators, the SCA launched an investigation into the CAA's activities. On October 23, 2009, the SCA issued an interim decision against the CAA, ordering it not to implement the proposed system, on the basis that it would amount to an abuse of dominance. In particular, the SCA held that the planned allotment of the taxi lanes at Terminal 5 would result in four of the five lanes being allotted to the three largest taxi operators, while the smallest taxi operators would have to compete for places in the sole remaining lane. The SCA further held that moving the more popular lane at Terminal 2 (which was used by the larger taxi companies) closer to the exit would further benefit the large taxi operators to the detriment of their smaller competitors.

The CAA appealed this interim decision to the Market Court, arguing that the new system was objectively justified, since its main purpose was to accelerate the switch to environmentally friendly taxi vehicles and to help the flow of traffic. The Market Court rejected this argument and upheld the SCA's decision. In particular, the Market Court found that (i) the CAA held a dominant position on the market for the supply of taxi queuing and call-up systems at Arlanda Airport, (ii) the planned change was abusive, since it would benefit the largest taxi operators and discriminate against their smaller competitors, and (iii) the CAA had failed to show that the system could be objectively justified, since the goals of environmental protection and traffic management could be achieved by means less detrimental to competition.

Following the Market Court's decision, the CAA announced that it would explore an alternative taxi queuing system for Arlanda airport. On February 19, the SCA decided that in light of the CAA's announcement, it would close its investigation into the queuing system.

Switzerland

This section reviews competition law developments under the Federal Act of 1995 on Cartels and Other Restraints of Competition (the "Competition Act") amended as per April 1, 2004, which is enforced by the Federal Competition Commission ("FCC"). The FCC's decisions are appealable to the Federal Administrative Tribunal (the "Tribunal").

Horizontal Agreements

The FCC Launches an Investigation Into Cooperation Agreement Between Hallenstadion and TicketCorner

On February 2, 2010, the FCC opened an investigation against Aktiengesellschaft Hallenstadion Zürich ("AGH") and TicketCorner SA ("TicketCorner") for alleged anticompetitive practices.

AGH runs the Hallenstadion (a multifunctional sports arena and auditorium in Zurich), while TicketCorner is a Swiss ticketing services provider. In early 2009, AGH and TicketCorner concluded a 5-year "cooperation agreement" whereby companies wishing to organize an event in the Hallenstadion would be obliged to distribute at least 50% of their tickets through TicketCorner.

Following complaints from other ticketing companies, the FCC opened a preliminary investigation, which indicated that the cooperation agreement had the potential to exclude competitors from the market. Moreover, the FCC noted that AGH might be

41 Decision S/0159/09, Unesa y Asociados.

abusing its dominant position by compelling event organizers to distribute at least 50% of their tickets through TicketCorner. Accordingly, the full investigation aims to determine whether (i) the cooperation agreement between AGH and TicketCorner and (ii) AGH's behavior towards event organizers, constitute violations of the Swiss Cartel Act.

The FCC issues interim measures in the credit card sector

The FCC approved an amicable settlement by way of interim measures, pursuant to which the current system for the determination of Swiss Domestic Multilateral Interchange Fees ("DMIF")[42] can be maintained (but under an improved form).[43] The interim measures will be applicable for three years (or longer if the investigation is not completed by then), unless the investigation is concluded earlier by a formal decision of the FCC.

Under Article 17 of the Competition Act, the FCC has the power to order interim measures. Such interim measures have been taken against Credit Suisse, Cornèr Banca, UBS AG, Viseca Card Services AG (as issuers) and Aduno SA and SIX Multipay AG (as acquirers) in the context of an investigation into the interchange fees applicable to four-party credit card payment systems (such as Visa and Mastercard credit card payment systems) that the FCC launched on July 15, 2009. The investigation is aimed at re-examining the control mechanisms in place and the lawfulness of the collective determination of interchange fees.[44]

The interim measures came into effect on February 1, 2010, and require a reduction of the interchange fees from 1.282% to 1.058% for 2010. The FCC also set the method to be used to calculate interchange fees for the remainder of the interim period. The interim measures replace the system put in place following a 2005 FCC decision.[45] In that decision, the FCC found that the interchange fees for the Visa and Mastercard credit card systems (which were negotiated multilaterally by the issuers and the acquirers in Switzerland) amounted to an illegal agreement on prices prohibited under the Swiss Cartel Act. However, instead of prohibiting the multilateral agreements, the FCC considered that the interchange fees agreements were justified on the grounds of economic efficiency (subject to a certain number of commitments by the Swiss issuers and acquirers).

Unilateral Conduct

Tribunal Overrules the FCC's Mobile Termination Fine

On February 24, 2010, the Federal Administrative Tribunal overturned an FCC decision imposing a fine of SFr. 333 million on Swisscom Mobile ("Swisscom") for an alleged abuse of its dominant position in the market for mobile call termination.[46]

In October 2002, the FCC launched an investigation into mobile termination fees charged by the three mobile phone network providers operating in Switzerland (Swisscom Mobile, Orange, and Sunrise).[47] In February 2007, the FCC found that Swisscom held a dominant position on the mobile call termination market, which it abused by charging unreasonably high fees to other providers. Under Article 7(2)(c) of the Swiss Cartel Act, a dominant undertaking is deemed to have committed an abuse if it "enforces" (*i.e.*, imposes) excessive prices on another party.

The Tribunal first confirmed the FCC's competence to impose administrative fines, thus dismissing Swisscom's appeal on those grounds. According to the Tribunal, the procedure for setting fines set out in the Swiss Cartel Act is compatible with the European Convention on Human Rights and that there was no violation of Swisscom's right to be heard.

Although the Tribunal confirmed that Swisscom held a dominant position in the market for mobile termination, it held that Swisscom's fees were was not contrary to the Swiss Cartel Act. According to the Tribunal, network providers must negotiate termination fees among themselves, but may file a complaint with the Federal Communication Commission ("ComCom") for excessive prices. Since neither Orange nor Sunrise filed such a complaint, Swisscom's termination fees could not be deemed to have been "enforced" against other parties within the meaning of Article 7(2)(c) of the Swiss Cartel Act. According to the Tribunal, such practices cannot therefore be assessed under the Cartel Act, even if there is insufficient enforcement by ComCom (which cannot investigate without a complaint from an operator).

42 Interchange fees are the commissions paid to the companies issuing credit cards (issuers) by the companies that affiliate retailers to credit card payment systems (acquirers).

43 A German version of the decision is available at http://www.weko.admin.ch/aktuell/00162/index.html?lang=fr.

44 *See*, in particular, MasterCard commitments towards the European Commission regarding Crossborder-Interchange Fees, Press release of 1 April 2009, IP/09/515 and MEMO/09/143. *See* also decision of the European Commission of 19 December 2007, MasterCard (COMP/34.579).

45 *See* DPC 2006/1, p. 65 *et seq*.

46 A German version of the FAC's decision is available at http://www.bundesverwaltungsgericht.ch/index/entscheide/jurisdiction-datenbank/jurisdiction-recht-urteile-aza.htm.

47 Termination fees are the fees charged by mobile network providers to other providers for routing calls through their network.

On August 28, 2008, the FCC, the Price Supervisor, and ComCom jointly called on the government to introduce an instrument for the determination of the network access prices charged by Swiss telecom companies, and to amend Telecommunications Act so as to allow ComCom to act on its own initiative. The Swiss Government and Parliament have not yet given effect to the proposal (which would relate exclusively to determination of the access or interconnection prices charged by dominant network providers).

On March 22, 2010, the FCC announced its intention to appeal the Tribunal's ruling to the Swiss Supreme Court on the grounds that the Swiss Cartel Act should also be applicable to regulated sectors.

United Kingdom

This section reviews developments under the Competition Act 1998 and the Enterprise Act 2002, which are enforced by the Office of Fair Trading ("OFT"), the Competition Commission ("CC"), and the Competition Appeal Tribunal ("CAT")

Horizontal Agreements

Court Rejects Application To Strike Out Safeway's Damages Claim Against Former Employees

On January 15, 2010, the High Court dismissed an application to strike out claims brought by Safeway Group against former senior employees for damages caused by breaches of competition law.[48] The Court rejected the arguments of the former employees (including Safeway's former chairman) that the claimant, Safeway, had no arguable case with a real prospect of success. The proceedings will therefore continue to trial.

Prior to its acquisition in 2004, Safeway was active on the U.K. groceries market. In 2005, the OFT commenced an investigation into collusion between supermarkets and dairy processors to fix the retail prices of dairy products between 2002 and 2003. In 2007, the OFT sent a Statement of Objections to the principal U.K. supermarkets, including Safeway, alleging price-fixing contrary to the Chapter 1 prohibition in the Competition Act 1998 (equivalent to Article 101 TFEU). Safeway subsequently reached an early resolution agreement (accepting liability in principle for a breach of competition law) with the OFT. A final decision is expected in the course of 2010.

In early 2009, Safeway brought claims for damages and equitable compensation against the defendants, senior employees of Safeway at the time of the alleged infringement. Safeway contended that by participating in the unlawful anti-competitive conduct, the defendant employees were in breach of their contract with, and fiduciary duties to, the company. As a consequence, Safeway sought an indemnity from the employees against the penalty imposed by the OFT, and also claimed as damages the costs of the OFT investigation, which have come to nearly £200,000. This action marks the first attempt by a company to reclaim from employees damages arising from a competition law infringement.

In July 2009, the defendant employees sought to strike out Safeway's claim by relying on the legal principle of *ex turpi causa non oritur actio* – a person who commits an unlawful act cannot maintain an action based on that unlawful act. The defendants argued that their unlawful conduct must be attributed to the company, and that the company could not therefore sue them for damages.

For an action to fall within the *ex turpi causa* principle, the unlawful act on which the action is based must: (i) be significantly serious; and (ii) have been committed by the claimants. First, the Court held that the infringements of the competition rules in question were sufficiently serious act to engage the *ex turpi causa* principle. The second, more difficult question for the Court was whether the infringements in question should be attributed to the employees only, or also to the company. If the latter, the defendant employees could not be sued by the company.

The Court held that the employees were acting in the course of their employment, and, although as a matter of agency law the company was liable for the acts of the employees, this was not sufficient to attribute liability to the company for the purposes of the *ex turpi causa* principle. The judge did not think it relevant that, as a matter of competition law, there is no distinction between acts done by a company and by its senior management – both are covered by the concept of an "undertaking." He concluded that Safeway had a real prospect of successfully defeating at trial any defence based on the *ex turpi causa* principle and refused to strike out the claim. Safeway's claim against the former employees will now go to trial.

RBS Fined £28.6m For Sharing Confidential Price Information With Barclays

On March 30, 2010, the Royal Bank of Scotland ("RBS") was fined £28.59 million for sharing confidential price information with Barclays.[49] RBS initially agreed to pay a fine of £33.6 million after

48 *See Safeway Stores Ltd & Ors v. Simon John Twigger & Ors* [2010] EWHC 11 (Comm) http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Comm/2010/11.html&query=title+(+safeway+)+and+title+(+twigger+)&method=boolean.

49 *See* http://www.oft.gov.U.K./news/press/2010/34-10.

admitting that the infringements took place between October 2007 and February or March 2008. This fine was reduced by £5 million to take into account RBS's admission of the infringement and agreement to co-operate with the OFT.

In June 2008, it was widely reported that the OFT conducted inspections at the premises of RBS and Barclays as part of an investigation into price-fixing for loans to professional service advisors. The OFT found that individuals in RBS's Professional Practices Coverage Team had unilaterally disclosed to employees at a similar level at Barclays: (i) general confidential future pricing information, and (ii) specific information relating to two loan facilities. The data were then used to co-ordinate the prices offered by Barclays with those of RBS. The exchange of information took place on the fringes of social, client, or industry events, and related to the pricing of loan products to large professional service firms, such as law, accountancy, or real estate firms. RBS and Barclays are the principal providers of loans in this sector.

The OFT confirmed that Barclays provided information to the OFT under its leniency policy and, assuming its continued cooperation, will be granted immunity from fines. Further details as to how the fines are calculated will be disclosed in due course, although the press release suggests that the OFT has adopted an "early resolution" procedure, designed to progress fines on cartel participants quickly following the admission of infringements.

Unilateral Conduct

OFT Issues Statement of Objections Against Heartburn Medicine Manufacturer

On February 23, 2010, the OFT issued a Statement of Objections against Reckitt Benckiser, the manufacturer of the Gaviscon brand of heartburn medicine.[50] The OFT alleges that Reckitt Benckiser abused its dominant position on the market for the supply of heartburn medicines to the U.K. National Health Service ("NHS").

When the patent to a medicine has expired, and competitors are able to supply generic drugs that are functionally identical to the patented medicine, General Practitioners ("GPs") have software to search for a well-known branded product and provide patients with an "open" prescription that lists its generic name, rather than the name of a particular competitor's product. Pharmacies that receive those prescriptions can choose whether to dispense the relevant brand or equivalent, but cheaper, generic medicines. The result, according to the OFT, is price competition that saves the NHS money.

The OFT alleges that Reckitt Benckiser sought to restrict competition on the Gaviscon brand by withdrawing and de-listing its NHS product, Gaviscon Original Liquid. The OFT alleges that this withdrawal was deliberately timed to occur before the publication of a generic name for its product, so that when GPs search for "Gaviscon" medicines, they will identify Gaviscon Advance Liquid, a related but different product that is still patent protected, and not Gaviscon Original Liquid, for which a cheaper, "open" prescription could be provided.

The OFT will reach a decision as to whether Reckitt Benckiser has infringed competition law after it has received a response to the Statement of Objections and any submissions from third parties.

Mergers and Acquisitions

OFT Withdraws Request For Reference Of Orange/T-Mobile Joint Venture

On February 3, 2010, the OFT requested, under Article 9 of the EU Merger Regulation, that the European Commission refer the U.K. aspects of the proposed joint venture between the U.K. subsidiaries of mobile telephone companies Orange and T-Mobile to the OFT.[51] On March 1, 2010, the OFT announced that it had withdrawn that request.[52]

Orange and T-Mobile are, respectively, France Télécom's and Deutsche Telekom's U.K. subsidiaries. The OFT requested the referral because it considered that the joint venture threatened to significantly limit competition in mobile telecommunications in the UK. Ultimately, however, no decision was taken by the Commission because the OFT subsequently withdrew the request. On February 22, 2010, the OFT published the full text of the Article 9 request. The request disclosed that the OFT's preliminary assessment was to the effect that the proposed joint venture threatened to limit competition by (i) weakening or eliminating competitor Hutchinson 3G from the market by potentially reducing the number of vertically integrated competitors from five to three, as T-Mobile could terminate its "infrastructure sharing agreement" with Hutchinson 3G; and (ii) by leaving just one mobile telephone provider offering full speed fourth generation "Long Term Evolution" mobile telephone systems.[53]

50 *See* http://www.oft.gov.uk/news/press/2010/20-10.

51 *See* http://www.oft.gov.uk/news/press/2010/08-10.

52 *See* http://www.oft.gov.uk/news-and-updates/press/2010/23-10.

53 *See* http://www.oft.gov.uk/shared_oft/mergers_ea02/2010/Orange-T-Mobile-article-9.pdf.

The OFT was satisfied that the commitments entered into by Orange and T-Mobile will address the competition concerns identified by the OFT. In particular, Orange and T-Mobile have offered to divest certain quantities of their 1800MHz spectrum and reached an agreement with Hutchinson 3G that will ensure its ability to compete in the retail market is not affected as a result of the joint venture. The European Commission announced that, on the basis of these commitments, it approved the joint venture.[54]

CAT Quashes CC Clearance Of Ticketmaster/Live Nation Merger, But CC Clears Merger Again Three Months Later

On February 11, 2010, in a further twist to the protracted review of the proposed merger between Ticketmaster Entertainment Inc ("Ticketmaster") and Live Nation Inc ("Live Nation"), the CAT quashed the CC's initial clearance decision.[55] On May 7, 2010, the CC again published a final decision clearing the merger, on substantially the same grounds as before.[56]

Ticketmaster is the world's largest retailer of tickets to live events. Both Ticketmaster and Live Nation operate in the U.K. live music sector, but at different levels of the supply chain: Ticketmaster is a ticketing agent, while Live Nation is a promoter and venue operator. Live Nation historically used Ticketmaster as its principal ticketing agent, but this agreement expired in December 2009. In 2007, Live Nation had entered into a contract with Europe's largest ticketing agent, CTS Eventim ("CTS") to the effect that it would start providing ticket services in the UK, replacing Ticketmaster from January 1, 2010. On June 10, 2009, the OFT referred the merger to the CC on the grounds that there would be a realistic prospect of a substantial lessening of competition in the market for live music retail ticketing if the proposed merger went ahead, because of the prospect that CTS would withdraw from the U.K. market for ticket services.[57]

The CC found in the provisional report of October 8, 2009, that the proposed merger would result in a substantial lessening of competition.[58] However, the CC reversed its position and unconditionally cleared the merger in the final report of December 22, 2009, following the submission of new evidence from the parties to the effect that the merger would not harm CTS' prospects in the UK.[59] The CC concluded that successful entry by CTS would depend not on its relationship with Live Nation but on its own ability to attract customers, sell tickets, and gain further allocations of tickets, which would not be affected by the merger.

CTS challenged this decision before the CAT, primarily on the ground of procedural unfairness, alleging that it was denied a reasonable opportunity to respond to the CC's decision to reverse its view from the provisional findings and, in particular, to comment on the CC's analysis of CTS' own documents. CTS also alleged that there had been substantive errors in the CC's assessment. The CC subsequently conceded that the challenge based on procedural unfairness was at least arguable, and that CTS' concerns justified withdrawal of the final report.

However, as the statutory time period for the CC's investigation had elapsed, the CC could not reopen the investigation of its own accord, so applied to the CAT for an order quashing the final report (or part of it) and remitting the matter back to the CC.[60] On February 12, 2010, the CC reissued for consultation its final report on the Ticketmaster/Live Nation merger as "further provisional findings," with a period of further consultation opening on March 5, 2010.[61] On May 7, 2010, the CC again published a final decision clearing the merger, on the same grounds as before.

This case is unusual in several respects. First, the findings of the CC have historically not been successfully challenged, yet this is the fourth occasion on which the findings of the CC have been overturned in the last year (although, in this case, the CC conceded without the CAT reaching an adverse decision). The other successful appeals in 2009 were: (i) Tesco's appeal against the CC's introduction of a "competition test" into the planning regime,[62] (ii) Barclays' challenge against the CC's imposition of a "point of sale prohibition" on payment protection insurance services,[63] and (iii) the appeal by

54 *See* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/208&format=HTML&aged=0&language=EN&guiLanguage=en.

55 *See* http://www.catribunal.org.uk/files/1150_CTS_Ruling_110210.pdf.

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

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

58 *See* http://www.competition-commission.org.uk/inquiries/ref2009/ticketmaster/provisional_findings.htm.

59 *See* http://www.competition-commission.org.uk/rep_pub/reports/2009/552ticket.htm.

60 *See* http://www.catribunal.org.uk/files/1150_CTS_Ruling_110210.pdf at [5].

61 *See* http://www.competition-commission.org.uk/rep_pub/reports/2010/fulltext/553further_provisional_findings_report.pdf.

62 *See* http://www.catribunal.org.uk/238-3643/Judgment-.html.

63 *See* http://www.catribunal.org.uk/238-4529/Judgment-.html.

BAA against the CC's investigation into the market for airport services for the apparent bias of a member of the CC itself.[64]

Second, the decision was quashed on the ground, conceded by the CC, that the CC failed to consult an interested third party properly.[65] This point had succeeded previously against the OFT in the *Unichem* case, where in April 2005, the CAT quashed the OFT's merger decision on the basis that Unichem had no opportunity to dispute findings of fact central to the OFT's decision concerning the market conduct at issue.

Finally, although it is not the first time that the CC has reversed a provisional finding that a merger will result in a substantial lessening of competition (see, *e.g.*, the 2005 *British Salt/New Cheshire Salt Works* merger), it is rare for the CC to reverse decisions reached after a comprehensive second phase investigation.

CC Clears Sports Direct/JJB Sports Merger

On March 16, 2010, the CC cleared the acquisition by Sports Direct International plc ("Sports Direct") of 31 stores from JJB Sports plc ("JJB"), confirming provisional findings of February 11, 2010, that the store transfers would not increase the likelihood of tacit coordination or result in increases to the prices of sports products.[66]

In 2008, it was reported that JJB was in significant financial difficulties. To raise funds, JJB commenced a share issue and the sale of various assets (including its health club business to another purchaser and the stores in question to Sports Direct). The OFT became aware of the sales to Sports Direct in December 2008 and identified a number of competition concerns. It considered in particular that JJB and Sports Direct were each other's closest competitors. The OFT decided to refer the matter to the CC after Sports Direct failed to find a purchaser for five stores in relation to which the OFT considered accepting undertakings in lieu of a reference. The completed transaction was referred to the CC on August 7, 2009.

First, the CC found that, in the absence of the acquisitions, JJB would probably have closed 10 of the 31 stores because they were not profitable. Second, the CC identified a relevant product market comprising only JJB and Sports Direct. The CC considered that the relevant geographic market was local (a radius of 2-5 miles around each store), and competition from online sales was relatively limited. Third, the CC identified a number of barriers to entry, including: (i) access to, and (more importantly) volume discounts from, premium brands (such as Nike and Adidas), (ii) set-up costs, and (iii) reputational advantages. The CC considered that entry by a small player was possible, but that it was unlikely that any new entrant would be able to compete with JJB or Sports Direct.

Turning to pricing, the CC found that prices were set nationally and did not vary in response to local competition. A number of non-price factors did vary locally, but the CC found no evidence that the store transfers would result in a significant change to any aspect of Sports Direct's offer in terms of price, quality, range, or service. Nationally, Sports Direct's prices had increased since the store transfers began, but the CC found that the price increase attributable to the store transfers was not sufficient to cause concern.

The CC then considered coordinated effects. The CC found that the market could be conducive to coordination, since there were only two firms in the market and the OFT had found in 2003 that the prices of replica shirts had been fixed. However, the CC found no evidence to indicate that the store transfers significantly increased the likelihood of co-ordination. Accordingly, the CC concluded that the acquisition of the 31 JJB stores by Sports Direct had not substantially lessened competition in any market in the UK.

64 *See* http://www.catribunal.org.uk/237-3903/1110-6-8-09-BAA-Limited.html.

65 *See* http://www.catribunal.org.uk/files/1150_CTS_Ruling_110210.pdf at [7].

66 *See* http://www.competition-commission.org.uk/rep_pub/reports/2010/554SDI_JJB.htm.

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