CLEARY GOTTLIEB

National Competition Report

This report summarizes the principal developments in the competition laws of, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Spain, Switzerland, and the United Kingdom during the first quarter of 2007. There is no report for Austria or Sweden this quarter. Conversions to Euro are approximate and, where applicable, based on current market rates.

BELGIUM

This section reviews developments concerning the Act on the Protection of Economic Competition of September 15, 2006, which is enforced principally by the Competition Service and the Competition Council.

Horizontal Agreements

VZW Fedoba

On January 29, the Competition Council issued a decision finding that Fedoba, a trade association for manufacturers of confectionery products, had infringed Article 2 of the Belgian Competition Act and Article 81 EC in the organization of its two annual trade fairs (Case MEDE-I/O-04/0072). This is one of only a small number of decisions in which the Council has found a breach of Article 2 of the Belgian Competition Act.

Participation in the trade fairs was restricted to Fedoba's members which, according to Fedoba's articles of association, had to be established in Belgium. As a result, manufacturers located outside Belgium were excluded from the trade fairs. Fedoba's board of directors also had the ability to refuse membership to any applicant without justification.

While the Council's reasoning is not very detailed, it is clear that the Council characterized Fedoba's practice of excluding foreign manufacturers from its trade fairs as a decision by an association of undertakings which was anti-competitive and not objectively justified. Foreign manufacturers are now admitted to the trade fairs in addition to non-Fedoba members, provided they comply with the fairs' internal regulations.

No fine was imposed on Fedoba or on its members. The Council was constrained by the terms of the prior Competition Act (1999), which did not provide for fines to be imposed on associations of undertakings. Likewise, the 1999 Act expressly excluded fines being imposed on small and medium enterprises, which make up most of Fedoba's membership. Since the anti-competitive practices at issue had ceased before the entry into force of the 2006 Competition Act, the new fining provisions were also found inapplicable. Although the Council expressed concern that, by not imposing a fine, it may harm the effectiveness of Article 81 EC, the Council decided that, as Fedoba's practices had lasted for only one year after the entry into force of Regulation 1/2003 EC, and were modified immediately after the Auditor communicated its objection, it would not be appropriate to impose fines in this case.

Abuse of Market Power

Portima

On February 14, the President of the Council issued an interim order against Portima compelling it to disclose information required to ensure the compatibility of competing operating systems with its secure network system (Case MEDE-V/M-03/0060).

Portima was established by a number of insurance companies to design a telecommunications network, called AS/2, for the exchange of data among insurance companies and brokers in Belgium. To access the AS/2 network, subscribers need a compatible operating system. The compatibility is ensured by software sourced from Portima or from competing providers, including Computer Resource Management (CRM).

CRM complained that Portima had failed to disclose various updates and modifications made to the AS/2 network, thereby impairing the reliability of CRM's software product. CRM further contended that Portima was harming competition to the benefit of its own software offering.

The Council upheld CRM's complaint, finding that Portima held a monopoly because there was no credible alternative to Portima's AS/2 network in Belgium. The Council also found that Portima held a "very strong market position", with a 75-80% market share, on a market for operating systems specifically designed for insurance companies and brokers established in Belgium. As a result, the Council found that, by abusing its dominant position on the market for telecommunication platforms aimed for data exchange between insurance companies and brokers, Portima was harming competition on the market for operating systems. The Council thus concluded that Portima was required, in a timely manner, to disclose to competing operating system providers the modifications to its telecommunications platform so that competitors can ensure the compatibility of their products and prevent compatibility problems with their customers.

The Council then considered the risk of serious and irreparable harm to be sufficiently established in light of the immediate compatibility issues arising from Portima's behavior and the risk of Portima monopolizing the market for operating systems. The Council ordered Portima to disclose to competing operating systems providers when modifications to its network system will occur, and to provide the specifications required to ensure the compatibility of competing software products. The interim order mandates the disclosure to occur reasonably in advance of the implementation of the modifications to the network so as to enable competing providers to make the necessary adjustments. The Council's decision also discusses at some length certain procedural issues relating to access to file in interim proceedings.

DENMARK

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

Horizontal Agreements

Banking Cartel

On March 28, the Competition Council found that seven Danish banks violated the Competition Act during 2004-2006 by entering into an illegal cartel agreement and concerted practices.

The Council found that the banks had engaged in market sharing practices by agreeing not to open branch offices or to compete with each other in the cities in which each of the banks had their respective head offices, and not to actively target each other's customers. The Council also found that the banks had engaged in illegal concerted practices by exchanging confidential information regarding the calculation of their respective prices and fees. The Council rejected the primary defense of *de minimis* considerations (a defense based on the fact that the banks' combined turnover did not exceed the statutory turnover and market share threshold), pointing to the Competition Authority's finding that the alleged illegal agreement, directly or indirectly, affected more than 150,000 clients.

The Council ordered the banks to revoke the illegal agreement and to cease the exchange of confidential information. The banks have appealed the Council's decision to the Competition Appeal Tribunal. Should the appeal be unsuccessful, fines will most likely be imposed.

Vertical Restrictions

Hempel A/S

In September 2006, the Competition Authority conducted a dawn raid at Hempel A/S based on a suspicion of resale price maintenance (RPM) regarding certain Hempel products (including paint and lacquer for ships). The Authority found a number of documents substantiating their suspicion of RPM. In February 2007, Hempel filed a statement with the Authority admitting the infringement. The case was subsequently handed over to the Public Prosecutor for Special Economic Crimes, who fined Hempel DKK 2 million (€268,000), paid by Hempel as part of an out-of-court settlement.

Mergers and Acquisitions

CVC/Matas A/S

On January 31, the Competition Council approved the takeover by CVC of Matas A/S and most Matas A/S shops, subject to a number of commitments aimed at upholding competition in the high-end cosmetics market.[1] The Council was concerned about the transformation of Matas stores from independent stores, which were part of a voluntary retail chain, to a centralized capital chain controlled by CVC. In the Council's view, the takeover would eliminate competition at the retail level and would allow CVC to increase its buyer power. According to the Council, the takeover would allow CVC to influence prices in the market, and would increase barriers to entry and expansion.

The commitments imposed by the Council include: (i) a requirement not to enter into exclusive contracts with suppliers of high-end cosmetics as regards products already on the Danish market; (ii) not to impede competitors' access to tenancies via exclusive contracts with lessors of rental housing, *inter alia*, in shopping centers; and (iii) for a period of time, not to acquire competing stores that belong to a chain of three or more stores.

Dansk Avis Omdeling JV

On February 28, the Competition Council conditionally approved a joint venture – Dansk Avis Omdeling (DAO) – established by two large distributors of addressed newspapers in Jutland, Syddanske Medier and JP/Politikens Hus. The Council required commitments because the joint venture would enjoy a dominant position on the market for addressed newspaper distribution in Jutland. The commitments require the joint venture to trade only on usual, commercial, and non-discriminatory terms. This includes trading with the joint venture parents. Furthermore, DAO may only refuse to trade with a customer where it is documented that the refusal is due to capacity limitations. The Council found that the joint venture would result in certain cost synergies and

1 See National Competition Report, October-December 2006.

operational benefits, and better quality of distribution to the benefit of customers.

Policy and Procedure

Proposed Amendments to the Danish Competition Act

On February 7, the Danish Minister of Economic and Business Affairs proposed amendments to the Danish Competition Act. The Minister's proposed amendments include a leniency program, which is modeled on the European Commission's leniency program and on the Model Program developed by the European Competition Network. The proposed conditions to apply for and obtain leniency are similar to those under these two programs, although the procedural framework differs somewhat to take into account the procedural rules governing competition law cases under Danish law. As cases involving fines are handled under the criminal system in Denmark, the proposed amendments contain, *inter alia*, special rules on the cooperation between the Competition Authority and the Public Prosecutor for Special Economic Crime in leniency cases.

The proposed amendments also grant the Authority with new investigative powers regarding site inspections (dawn raids). These powers include the possibility to take electronic copies of computer files and other electronic media for further investigation, and the right, under certain circumstances and with police assistance, to inspect the contents of employees' bags, pockets, etc.

The proposed amendments also allow the Authority to impose administrative fines in certain cases where an undertaking pleads guilty. In addition, the Authority's legal staff will be appointed by the Chief Public Prosecutor for Special Economic Crimes, and will be empowered to initiate criminal proceedings and conduct trials in the lower courts in cases where the accused pleads guilty.

On March 28, the Danish Minister of Justice proposed an amendment to the procedural rules governing public authorities' use of investigatory powers. The proposed amendment requires public authorities, including the Competition Authority, to hand over inspections to the Danish police where the purpose of the inspection is to gather evidence regarding a suspected criminal offence. The proposed amendment only addresses who should be responsible for carrying out the inspection: the Authority may be present during the inspection and assist the police throughout the inspection.

FINLAND

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

Horizontal Agreements

Roofing Felt Sector

On February 16, the FCA issued a decision concerning the illegal exchange of confidential market information between three suppliers of roofing felt (Icopal, Katepal and Lemminkäinen) in connection with their activities as members of the Finnish Confederation of Construction Industries (RTT).

The FCA found that, during 1993 and between 1996 and 2001, the three companies supplied, on a monthly basis, confidential disaggregated data to RTT's Roof Bitumen Group regarding their respective sales of roofing felt (broken down by sales to distributors and to end-customers) in order to compile industry statistics. The confidential data exchanged between these companies revealed their respective market shares and those of their competitors, and identified any changes in their respective market positions on a monthly basis. The resulting statistics were only made available to members of RTT's Roof Bitumen Group.

According to the FCA, exchange of market information between competing undertakings is prohibited if it allows coordination of their competitive behavior. As a general rule, exchange of information that is less than 12 months old is prohibited. Also, according to the FCA, exchange of information is likely to have a negative effect on competition if the market is concentrated and the products are homogenous. In this case, the three roofing felt suppliers held a combined 90% share of retail sales in hardware stores and a combined 70% share of sales to the trade sector.

The FCA did not to impose a fine, however, because under the relevant Finnish law in effect before May 1, 2004, the extent to which the exchange of such information was prohibited was unclear, and also because the undertakings, on their own initiative, changed their practices prior to the FCA opening an investigation. Although the prohibition was clear under EC competition law, the FCA is entitled to enforce EC competition law only in respect of conduct that occurred after May 1, 2004.

FRANCE

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

Abuse of Market Power

GlaxoSmithKline France

On March 14, the Competition Council fined GlaxoSmithKline France €10 million for using predatory (below-cost) prices and tied rebates in the sale of certain pharmaceuticals to hospitals in France in 1999 and 2000. This is the Council's first decision on the merits condemning predatory pricing as an abuse of a dominant position. Glaxo has announced that it would appeal the Council's decision, which sets out interesting principles and methodology to assess predatory pricing.

The case concerned two products sold by Glaxo to hospitals: Zinnat, an antibiotic, and Zovirax, an antiviral. Patent protection for Zinnat and Zovirax expired in 1999, and Glaxo faced the threat of competition from generic manufacturers, including Flavelab, which sold a Zinnat generic to hospitals in 1998. Glaxo unsuccessfully pursued legal action for infringement against Flavelab, and implemented selective price decreases when Zinnat competed with generics in hospital bids. In 2000, Glaxo was awarded 29 hospital bids, Flavelab only 3 and Panpharma, another generic manufacturer, only 1. Flavelab filed for bankruptcy protection in 2001, and was sold to Panpharma in 2002.

The Council defined predation as "*the practice by which a company in a dominant position sets its prices at a level such that it incurs losses or foregoes profits in the short term, with the goal to evict or discipline one or several competitors, or make the entry on the market of future competitors more difficult, so as to later increase its prices to recoup its losses.*" The Council found that Glaxo's prices for Zinnat had been selectively set below cost in 12 hospital bids in 1999 and in 29 bids in 2000, which were the same bids that had been targeted by the generic competitors. According to the Council, the investigation also showed that Glaxo's average price for injectable Zinnat had fallen dramatically from 1997 to 2000, before increasing again in 2001 after Flavelab had filed for bankruptcy, and resulting in a 2005 price slightly above its initial 1999 level. In addition, Glaxo offered tied rebates to hospitals which purchased Zinnat and Zovirax (bundling was found to be part of the predatory pricing strategy, rather than constituting a separate infringement). The Council considered that Glaxo pursued a predatory strategy which succeeded in eliminating Flavelab from the hospital market and deterring other generic manufacturers from entering the market for pharmaceuticals competing with Zovirax, a market ten times larger than the market for Zinnat-related pharmaceuticals.

The Council considered that the transfer price between two companies within the Glaxo group constituted an appropriate cost benchmark to assess the predatory character of the relevant Zinnat prices. While the Council seemed to rely on this measure in the absence of alternative cost data, it is doubtful whether a transfer price generally is an adequate substitute for a company's actual average variable cost.

In addition to deciding the specific case at hand, the Council spelled out general principles to assess predatory pricing practices.

First, in accordance with agreed economic theory, the Council emphasized the importance of recoupment opportunities and the economic effects of the alleged predation. The expectation of exclusionary effects is central to the characterization of a predatory strategy and helps distinguish between predatory prices and low prices that may not be anti-competitive: "*for example when the financial sacrifices are necessary to penetrate a new market, [a company may] initiate a reduction in production costs through an education effect (learning-by-doing), or broaden a client installed base to create a network effect.*" In addition, it is the possible recoupment of losses that justifies regulatory intervention, as consumers would suffer from higher prices or reduced choices following the elimination or weakening of competition by the dominant company. On these issues, the Council is more aligned with economic analysis than recent EU case law such as *Wanadoo*, which rejected the need to show recoupment or economic effects.

Second, because a predation strategy entails losses, the Council considered that, for predatory pricing allegations to be credible, the dominant company must have an incentive to apply such a policy (such as the protection of an entrenched position threatened by competition) and the financial capacity to absorb initial losses. There must be an anti-competitive rationale for the profit sacrifice, such as, in the case of competition between branded and generic pharmaceuticals, the intention to delay or limit generic entry and retain, if at least only temporarily, monopoly profits even after patent expiry. In this respect, the Council identified three types of predation strategies: financial predation; predation in order to give a "signal" to competitors; and predation in order to deter market entry by creating an aggressive reputation. According to the Council, Glaxo's prices for Zinnat were intended to create a "reputation effect" in order to deter generic entry on several markets.

Using these principles, the Council laid down a three-step approach to investigating the lawfulness of very low prices applied by a dominant firm: (i) an investigation of the costs (variable/fixed) and the prices (in particular, their selective nature); (ii) the behaviour of the company (the rationale for the profit sacrifice); and (iii) the rebuttal arguments put forward by the company (such as alignment on competitors' prices, impossibility of recoupment, and the "as efficient competitor" defense).

Mergers and Acquisitions

Pan Fish/Fjord Seafood

On December 8, the Minister of the Economy fined Pan Fish €57,700 for failure to notify a reportable transaction under French merger control rules. This is the first fine ever imposed in France on an undertaking for failure to notify.

While reviewing the acquisition of Marine Harvest by Pan Fish, which was conditionally authorized on December 1, 2006, the French competition authorities became aware that Pan Fish had failed to notify its acquisition of another company, Fjord Seafood, in early 2006. Pan Fish argued that it had relied on publicly available information (Fjord Seafood's annual reports) to conclude that Fjord Seafood's turnover did not meet the French notification thresholds. However, the Minister considered that Pan Fish had gained access to Fjord Seafood's financial and commercial information when its control over Fjord Seafood became effective (when Pan Fish was appointed to the Board of Directors) and, at that time, Pan Fish should have checked the accuracy of the public information previously used, in particular whether Fjord Seafood's turnover had been calculated in accordance with merger control rules.

The Minister found that Pan Fish had committed "*gross negligence*" by failing to comply with the obligation to notify and receive approval prior to closing. For the first time, the Minister used its powers under Article L. 430-8 I of the French Commercial Code to impose fines of up to 5% of an undertaking's French turnover during the last fiscal year if the undertaking fails to notify a reportable transaction. The Minister nevertheless took into account mitigating circumstances in determining the final fine, including: (i) Pan Fish acted in good faith; (ii) Pan Fish fully cooperated with the competition authorities; and (iii) there was no French precedent of fines being imposed on undertakings for failure to notify. The final fine of €57,700 represented 0.1% of Fjord Seafood's annual turnover. On the merits, the Minister considered that the acquisition did not raise any substantive issues.

GERMANY

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

Abuse of Market Power

Rossmann

On February 8, the FCO imposed a €300,000 fine on the drugstore chain Rossmann for violating the Section 20(4) GWB prohibition against the sale of products at below-cost prices. In 250 cases, Rossmann had sold 55 drugstore products from various manufacturers at below-cost prices.

The most contentious issues dealt with by the FCO were the definition of cost prices and the determination of the extent to which contributions to advertising costs may be included in the calculation of such prices. In accordance with its general pricing policy, Rossmann had set-off the entire amount of its rebates (contributions to advertising costs) solely to cut the sale prices of certain individual products by up to 50-60%. In line with its guidelines, the FCO found that the cost price of each product should be calculated on the basis of both the net price charged and all relevant conditions of purchase, which include contributions to advertising costs and other lump-sum payments. However, such contributions may only be included in the calculation of the cost price of the entire range of products bought from the same manufacturer. Hence, a company may not calculate the cost price of a single individual product on the basis of the entire amount of contributions received by the manufacturer.

The FCO's approach on the calculation of cost prices is in line with its earlier decisions, namely *Wal-Mart* and *Schlecker*, despite the negative reaction from the industry in this regard. The impact of the FCO's decision from a practical perspective is that companies wishing to uphold their current aggressive pricing policies will now need to enter into specific promotional agreements with manufacturers that will allow them to offset advertising contributions against discounts on end-consumer prices in respect of individual products only.

Rossmann has appealed the decision to the Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*).

Mergers and Acquisitions

RWE Energy AG/SaarFerngas AG

On March 12, the FCO prohibited the acquisition by RWE Energy AG (RWE) of 76.88% of the shares in SaarFerngas AG (SFG), on the grounds that the acquisition would have led to a strengthening of RWE's dominant position in various electricity and natural gas markets.

RWE, the distributing company of the RWE Group, offers distribution and transmission services for electricity and natural gas at the national level. SFG supplies natural gas to its customers at the regional and local levels, and has a market share of almost 100% in the areas it serves. Both RWE and SFG hold, directly or indirectly, stakes in several other regional utility companies and electricity/gas suppliers. Furthermore, the FCO found that RWE and the E.ON Group, which indirectly holds 20% of the shares in SFG, jointly dominate the German electricity market. The proposed acquisition would have led to a further strengthening of the already very strong position of the parties in the markets in which they are active by bringing together their shareholdings in downstream and upstream utility companies. Moreover, the acquisition would have reinforced the dominant position of the alleged duopoly comprising RWE and the E.ON Group in the German electricity market.

On a procedural note, the FCO also dealt with the unresolved question of how many offers of remedies it must consider in an individual case before reaching a decision. In this case, the parties made repeated offers, whereby they submitted a revised offer upon each rejection by the FCO of their previous offer. This resulted in prolongation of the regular time limit of four months (which is intended to ensure the swift conclusion of proceedings in the interests of the parties involved). The FCO is under an obligation to fully investigate the competitive implications of a notified transaction and any remedies offers made. This could result in a situation where negotiations continue for so long, however, that neither the outright prohibition of the acquisition nor an approval subject to conditions can be justified. In this case, upon the FCO's rejection of the parties' last informal offer, yet another revised – formal – offer was submitted. The FCO found that it was no longer required to evaluate this offer or to take it into consideration in making its decision. At this point, Phase II had taken six months. In any event, even if the FCO had considered the last offer, the remedies proposed by the parties would not have been sufficient to eliminate the competitive concerns raised by the transaction.

The parties have appealed before the Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*).

Sulzer/Kelmix

On March 3, the Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*) suspended the FCO's decision of February 14, 2007, that had prohibited the acquisition of Kelmix by Sulzer and ordered its dissolution. The court affirmed its interpretation of the *de minimis* market clause in *DuPont/Pedex*.[2]

According to the *de minimis* market clause in Section 35(2) GWB, transactions are not subject to German merger control law, and may not be prohibited, if they solely concern markets with total sales of less than €15 million in the previous calendar year. Following the court's decision in *DuPont/Pedex* (according to which the calculation of the relevant turnover for the purposes of determining whether the *de minimis* threshold had been exceeded is based solely on sales within Germany, even where, in economic terms, the geographic scope of the market extends beyond Germany), Sulzer and Kelmix had withdrawn their notification of the proposed transaction to the FCO. The parties subsequently closed the transaction.

The parties' turnover in the German markets for two-component cartridges for industrial and medical use did not exceed the threshold of €15 million. However, the FCO had considered the *de minimis* market clause to be inapplicable in this case, and prohibited the transaction and ordered its dissolution (as the parties had already closed the transaction). The FCO had calculated the parties' turnover based on the European-wide sales in the market for two-component cartridges for industrial applications and, in the alternative, also calculated the parties' turnover based on the combined turnover for two-component cartridges for industrial and medical applications in Germany.

The Court of Appeals addressed two questions: (i) whether the *de minimis* market clause referred to the turnover in the domestic market only or to the economically relevant geographic market (potentially broader than the German market); and (ii) under what circumstances may the combined turnover of neighboring markets be considered for the purposes of determining whether the *de minimis* threshold had been exceeded. The court affirmed its decision in *DuPont/Pedex* and held that the *de minimis* market clause refers to the turnover in the domestic market only and not to the turnover in the economically relevant geographic market. Again, the court referred to the purpose of the de minimis clause, which is to exclude economically insignificant transactions from the FCO's merger control purview. Furthermore, the court held that the de minimis clause only referred to the turnover in the specified relevant product market. The turnover from neighboring product markets may only be considered for the purposes of determining whether the de minimis threshold has been exceeded if both the products and the structure of the markets in question were similar. As this was not the case for industrial and medical two-component cartridges, these product markets were held to be distinct from each other and therefore could not be combined for purposes of determining the de minimis threshold.

2 See National Competition Report, October-December 2006.

ABAC/Atlas

On February 8, the FCO approved the acquisition of ABAC Aria Compressa S.p.A. by Atlas Copco AB of Sweden, on the condition that Atlas divests part of ABAC's German business prior to implementation.

The parties manufacture and distribute different types of compressors for industrial applications. The FCO found that, absent the divestiture, the acquisition would result in a dominant position in two of the six German compressor markets affected by the transaction. Post-acquisition, the combined entity would have a market share of between 30-40%, thus triggering the presumption of dominance under German law. The FCO also found that, with ABAC, Atlas would acquire a manufacturer with a well-established brand, a domestic production site, and a well-developed domestic distribution system. In the FCO's view, this would lead to a situation compelling independent distributors of compressors to stock the combined entity's brands to the detriment of other brands in order to compete with the combined entity's own distributors. The FCO further found that competitors would not be able to exercise sufficient competitive constraints. While the FCO acknowledged that one competitor is controlled by a private equity fund, which may indicate financial strength, the FCO noted that the private equity fund was unlikely to provide further financial assistance due to its merely short- to mid-term interests in this competing supplier and its substantial existing investments.

Xella/Nord-KS

On December 21, 2006, the FCO revised its decision in *Xella/Nord-KS*, where it had found that the formation of a joint venture by competitors infringed antitrust law. The revised decision is in response to a successful appeal for interim measures filed by the parties before the Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*). The Court of Appeals set aside the FCO's decision on October 25, 2006.

The FCO had found that the implementation of the bylaws of the joint venture, Nord-KS GmbH + Co. KG (Nord-KS), infringed Section 1 GWB and Article 81 EC due to possible spill-over effects, namely, coordination of the competitive behavior of undertakings that remain independent. Hansa Baustoffwerke GmbH & Co. KG (Hansa) held 32.6% and Xella Deutschland GmbH (Xella) held 17.5% of the joint venture's shares. Hansa and Xella were two of five parent companies.[3] Nord-KS, Hansa, and Xella are active in the production and sale of lime sand bricks. The FCO found that Hansa and Xella were in a position to coordinate their competitive behavior as a result of their participation on Nord-KS's advisory board. The FCO ordered Xella to withdraw from the joint venture within three months of receiving the FCO's decision.

The Court of Appeals reversed the FCO's decision only insofar as the modalities of withdrawal are concerned. The court stated that the FCO should have imposed alternative, less prohibitive, and more proportionate measures. While the court indicated that the FCO might have imposed less restrictive measures, such as the requirement that Xella withdraw from the advisory board or a restriction on the topics discussed during board meetings in which Xella takes part, the court ruled that at least the short period imposed by the FCO for Xella's complete withdrawal from the joint venture was disproportionate. In response, the FCO issued a revised decision that only extended the time period for Xella to withdraw from the joint venture by a few months. The FCO argued that its initial decision did not infringe the principle

3 Initially, Xella only held a small stake in Nord-KS. At the beginning of 2004, Xella increased its shareholding to 17.5%. The FCO did not consider this increase to be a concentration subject to merger control review at that time. The decision does not provide any further details in this regard.

of proportionality. Contrary to the court's decision, the FCO considered Xella's withdrawal from the joint venture as the only measure that would eliminate the spillover effects resulting from the joint venture.

The FCO's revised decision is under appeal before the Düsseldorf Court of Appeals. The oral hearing is scheduled to take place in early June.

Radio Ton

On November 7, 2006, the Federal Court (*Bundesgerichtshof*) set aside a decision of the Düsseldorf Court of Appeals (*Oberlandesgericht Düsseldorf*), which had annulled a FCO merger prohibition decision.

The FCO previously prohibited the acquisition of 49% of the shares in the radio broadcaster Lokalradio Services GmbH & Co. KG (Lokalradio) by Radio TON Regional Hörfunk GmbH & Co. KG (Radio Ton). The FCO found that, prior to the planned acquisition, Radio Ton was indirectly involved in radio broadcasting in the same transmission area as Lokalradio. The acquisition would have resulted in a dominant position in the advertising market in the relevant transmission area.

For the Federal Court, the key issue was whether Radio Ton could exercise joint control over a competing radio broadcaster. Radio Ton and another company each held 44.3% of Hit Radio Antenne. In addition, the parent companies had installed a conflict control mechanism whereby an independent third person, to be appointed by a court, would settle disputes to the extent the parent companies could not establish a common position. Contrary to the Court of Appeals' holding, the Federal Court did not rule out the possibility of joint control under such circumstances simply due to the existence of the said conflict control mechanism (which vests the ultimate decision-making power in a third person). The Federal Court placed greater importance on the interaction of the parent companies in practice than on the provisions laid down in the articles of association. The Federal Court pointed out the need to take into account the economic realities prompting the parent companies to act in certain ways, as well as their strategic interest in the jointly held company. It referred the case back to the Düsseldorf Court of Appeals for a decision after examining these factual details.

Policy and Procedure

De Minimis Notice and SME Leaflet

In March, the FCO issued a revised notice on agreements of minor importance (the *de minimis* notice) and a revised information leaflet for small and medium-sized enterprises (SMEs). Both publications incorporate changes to German competition law resulting from its alignment with European law brought about by the most recent amendment to the GWB in July 2005.

The *de minimis* notice replaces the previous notice issued in 1980 and identifies cases in which anti-competitive effects of cooperation agreements will be considered to be of minor importance. In such cases, the FCO will – as a general rule – not institute antitrust proceedings against the companies concerned. According to the *de minimis* notice, horizontal agreements that do not contain hard-core restrictions will be exempted from antitrust review if the combined market share of the companies involved does not exceed 10%. Vertical agreements will not be considered to be restrictive of competition to an appreciable extent if the combined market share of the parties to the agreement does not exceed 15%. These thresholds are in line with the European Commission's *de minimis* notice and are not limited to SMEs. The FCO may also intervene in exceptional cases where the thresholds are not met.

The SME leaflet concerns a special feature of German law: Section 3 of the GWB allows SMEs to enter into agreements that would normally fall within the scope of Section 1 of the GWB (so-called *Mittelstandskartelle*), provided that the objective of these agreements is to recognize certain efficiencies, improve competitiveness of the SMEs involved, and does not affect trade between the EU Member States. This exception is designed to compensate for competitive disadvantages of a structural nature that affect SMEs, and to enable them to compete with larger enterprises. In light of the abolition of the notification system for such agreements brought about by the latest amendment of the GWB, the SME leaflet provides guidance in respect of the "self-assessment" which companies intending to conclude such cooperative agreements are required to undertake. One important difference between German and European law is that, under German law, SMEs are not defined according to absolute thresholds in respect of turnover or employees, but rather according to their size in relation to other companies active in the business sector concerned.

The two publications are not binding on the courts and have no effect on the question of the legality of such cooperative agreements from a civil law standpoint.

Admissibility Decision on Damages Claims

On February 21, the District Court of Düsseldorf (*Landgericht Düsseldorf*) issued a decision on the admissibility of the €114 million damage claims brought by the Belgian company, Cartel Damage Claims SA (CDC), against six members of the cement cartel.[4] For the first time, a German court acknowledged that private damage claims, such as those brought by CDC, are admissible.

Following the FCO's decision to fine the cement cartel members in 2003,[5] 29 direct customers affected by the cement cartel assigned their damage claims to CDC for a nominal amount, in exchange for CDC agreeing to distribute approximately 75-80% of the expected damages to the assignors. The customers also paid a lump sum to cover part of the legal costs for the proceedings and the necessary pre-trial preparations. The court considered these arrangements to be in line with the German civil procedure regulations. The court will examine at a later date, as part of the substantive case, whether the customers' assignment of their claims to CDC was valid.

According to the court's finding that it had local jurisdiction because the impact of the nationwide cartel was also felt in its circuit, private antitrust damage claims for similar cases may now be brought before any court in Germany. The court also confirmed CDC's approach of claiming only the minimum amount of damages and allowing the court to decide on the appropriate amount of damages suffered. On the question of applicable law, the court indicated that it will apply the GWB in its form prior to the latest amendment (July 2005). While the 2005 amendment made it substantially easier for parties to file civil damages claims, the court held that the 2005 amendment only clarified the correct interpretation of the law in its previous form.

The defendants have appealed the decision. The case is not expected to proceed on the merits until a final ruling is rendered.

4 See National Competition Report, July-September 2006.

5 See National Competition Reports, April-June 2003 and October-December 2003.

GREECE

This section reviews developments concerning the Greek Competition Act 703/1977, enforced by the Competition Commission assisted by the Secretariat of the Competition Commission.

Vertical Agreements

MAVA SA

On March 8, the HCC fined MAVA SA, the exclusive distributor of Renault cars in Greece, €12.6 million for breaches of Article 1 Law 703/77 and EC Motor Vehicles Regulation 1475/1995 (Decision No. 332/V/2007). This is the first fine imposed by the HCC under the HCC's Notice of May 2006 setting Guidelines for the Calculation of Fines.

In July 2002, Psipsikas, a car trader in northern Greece and an official member of the MAVA distribution network, filed a complaint with the HCC. In 2007, the HCC found that, between 1997 and 2002, MAVA implemented a retail price maintenance (RPM) policy on the members of its distribution network. According to the HCC, the RPM policy was achieved: (i) by means of circulars distributed to its members that stated the retail price to be charged by the members (not a recommended retail price), and the members' profit margin; (ii) by requiring members to adhere to MAVA's pricing policy in order to receive a bonus (in 2002, the bonus was an additional 30% of the profit achieved by the member for each car sold). MAVA also required members to arrange financing for their customers through MAVA's affiliate, FIREN (FINANCEMENT RENAULT) in order to receive the bonus.

The HCC held that unilateral acts of an exclusive distributor in a territory towards its distributors, constituted, in essence, an agreement between them, as the acts in question were part of the contractual relations between them. In this case, the HCC found that MAVA's distributors had tacitly accepted and implemented the content of MAVA's circulars and the conditions of MAVA's bonus system, which suggested an illegal agreement between the parties. The Commission did not, however, impose a fine on MAVA's distributors. The HCC found that, in cases where the illegal practice is implemented on the initiative of an exclusive distributor and is imposed on economically weaker traders who are members of the exclusive distributor's network, it is not appropriate to impose fines on the economically weaker undertakings.

As it was the first time the HCC had applied its May 2006 fining notice, the HCC reduced its fine by €2 million, to €12.6 million.

Sectoral Investigation

Oil Products

On March 20, following public consultation, the HCC issued adopted measures and made recommendations regarding the purchase and trade of oil products (Decision No. 334/V/2007).

In August 2006, the Ministry of Development requested the HCC to issue a decision in this sector on the basis of Article 5 of Law 703/77 (which empowers the HCC to impose behavioral or structural measures on undertakings in sectors of the economy where the HCC considers that competition is not effective).

The measures adopted by the HCC included: (i) an obligation on the two oil refining undertakings in Greece, Hellenic Petroleum and Motor Oil, to invoice their oil products to the trading companies at a price made known to the trading companies at the date of placing the order; and (ii) an obligation on oil trading companies to adopt objective criteria on a national basis regarding their discount policies, and to notify the same to the Commission, as well as to state the amount of the discounts on the invoices issued to their customers. A daily fine of €10,000 may be imposed on each undertaking for non-compliance with these measures.

The HCC's recommendations to the Ministry were designed to provide the final consumer with a broader choice of supply, thus reducing retail fuel prices. Recommendations included: (i) a requirement that trading companies notify the Ministry of Development of the discounts granted to each of their customers; (ii) liberalization of the hours of operation for petrol stations; (iii) review of existing legislation regarding the licensing and conditions of operation of petrol stations to enable potential competitors to enter the retail market (such as hypermarket chains) and to allow these stations to sell other products (such as snacks, magazines, and food) to increase their overall turnover and reduce their overall reliance on fuel sales to generate profits. The HCC also recommended that electronic notice boards be placed along motorways to inform consumers about the fuel prices at the next two closest petrol stations.

Policy and Procedure

Notice on HCC Priorities Regarding Examination of Anti-competitive Practices

On February 15, the HCC issued a Notice setting out the criteria on which it would examine complaints regarding anti-competitive practices under Law 703/77. The Notice stated that the HCC does not possess unlimited capabilities or resources to investigate complaints on a "first-come first-served" basis. Furthermore, priority would be given to matters involving the protection of public interest. The Notice identified the following criteria the HCC would use to establish its investigatory priorities: the scope of effects of the anti-competitive practice, in terms of number of consumers or undertakings affected, on a local or national basis; the consequences such a practice may have on consumers; the sector(s) affected which, due to the illegal practice, may experience considerable price increases; the cumulative effect that the anti-competitive conduct may have; and the effects of the resolution of a novel legal matter in securing healthy conditions of competition. Finally, investigations initiated on the HCC's own behalf would have priority over investigations initiated by third-party complaints.

IRELAND

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

Policy and Procedure

Guidelines for Hospital Consultants

On January 10, the Competition Authority published a guidance note under Section 30(1)(d) of the Competition Act, 2002, for hospital consultants regarding the prohibitions under Irish law relating to their negotiations with private health insurers. The impetus for the note arose from an investigation, which began in 2003, into the consultants' representative body, the Irish Hospital Consultants Association (IHCA), and their negotiations *vis-à-vis* private health insurance companies, such as Vhi and BUPA. The initiation of proceedings against the IHCA was averted in 2005 by the IHCA's agreement to a series of undertakings proposed by the Authority, which included, *inter alia*, a commitment to refrain from agreements or concerted practices regarding the negotiation of fees or from discouraging its members from individually negotiating with health insurers. Subsequently, the Authority published a consultation document in January 2006 to improve the Authority's understanding of the manner in which consultants' fees are negotiated. The 2007 guidance note outlines both negotiating practices that are illegal (*e.g.*, agreements or practices that aid price-fixing and collective boycotts) and those that are permitted (such as genuine partnerships). The Authority hopes that the guidance note will help facilitate compliance with the Competition Act by hospital consultants.

Revocation of Notice in Respect of Employment Agreements

The Competition Authority revoked its Notice of Employment Agreements dated September 18, 1992. The Notice had stated erroneously that if an employee were to leave employment to set up a business independently, the original contract of employment would become an agreement between undertakings.

ITALY

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

Horizontal Agreements

Industrial Gases

On January 15, the Administrative Tribunal of Lazio partially reversed the Competition Authority's 2006 decision[6] that had imposed fines totaling €56.9 million on the main producers of industrial gases in Italy for engaging in market-sharing practices and denied the renewal of the authorization under Article 4 of Law 287/90 of two joint ventures – active in the production of industrial gases in southern Italy since the early 1990s – owned and run by some of the undertakings involved in the infringement.

The Tribunal upheld in its entirety the Authority's finding regarding the existence of a market-sharing scheme carried out mainly through bilateral meetings and contacts aimed at maintaining a reciprocal balance, in terms of customer bases, among the undertakings involved. Contrary to the parties' contention, the Tribunal confirmed the Authority's definition of the relevant market as a single national market for all industrial gases, as the market-sharing scheme provided for the allocation of customers among the undertakings based on economic value rather than on the type of gas purchased. The Tribunal also confirmed the Authority's findings regarding the economic analysis of the market.

With respect to the results of the price analysis (which – as claimed by the applicants and as also acknowledged in the Authority's decision – showed a stable or even decreasing trend in prices), the Tribunal held that stable or declining price trends did not amount to a decisive piece of exculpatory evidence, since it was sufficient for the Authority to demonstrate that conduct had as its object the fixing of prices and/or the sharing of markets. As a result, the interpretation of certain economic indicators concerning the effects of such conduct did not, and could not, have any bearing on the Authority's findings as regards the

6 See National Competition Report, April-June 2006.

existence of the infringement. Moreover, the Tribunal upheld the Authority's finding that the undertakings' profitability increased during the period investigated, adding that, in any event, the undertakings had failed to demonstrate that, in the absence of the collusive behavior, price levels would have been lower.

The Authority's decision was partially annulled with respect to the assessment of the two joint ventures pursuant to Article 4 of Law 287/90. The Tribunal held that the Authority wrongly assumed that collusive practices entered into by the industrial gas producers prevented customers from benefiting from the activity of the joint ventures. In particular, the Tribunal noted that: (i) the joint ventures did not have any role in the implementation of the collusive practices; and (ii) the collusive practices had ceased prior to the adoption of the decision. Since the Authority's assessment on granting an exemption pursuant to Article 4 of Law 287/90 must be carried out with a forward-looking view, the Tribunal concluded that the mere existence of collusive practices involving the joint ventures' parent companies, as well as their main competitors, was not sufficient to deny the exemption. The Tribunal ordered the Authority to undertake a new assessment of the application for an individual exemption presented by the parent companies of the two joint ventures.

The Tribunal also annulled part of the decision regarding the structural remedies imposed by the Authority in relation to the joint ventures (which basically implied the dismantling of the two joint ventures). The Tribunal considered these remedies to be unreasonable and disproportionate, as the anti-competitive concerns identified by the Authority (*i.e.*, homogeneity of product quality and production costs among the respective parent companies, and artificial transparency related to the volumes of industrial gases available to each of the parent companies) could be sufficiently removed by the adoption of the provisional remedies imposed by the Authority for the period prior to the implementation of the structural remedies. The provisional remedies required the joint ventures' parent companies to ensure: (i) the full separation between the management of the joint ventures and the activities of the parent companies; and (ii) the avoidance of information exchanges on the product volumes withdrawn from the joint ventures by the parent companies.

Aviation

In February, the Tribunal partially annulled the Authority's decision in the jet fuel case, which had found that six major oil companies (ENI, Exxon, Kuwait Petroleum, Shell, Tamoil and Total) infringed Article 81 EC by entering into an agreement and/or concerted practice aimed at sharing the aviation fuel supply market in Italy, as well excluding actual and potential competitors from the market. The Authority had imposed fines totaling €315 million, as well as behavioral and structural remedies.[7]

The Tribunal upheld the Authority's decision insofar as it found that the oil companies had infringed Article 81 EC by entering into a single and continuous anti-competitive arrangement that had as its object and effect the exchange of confidential information, the coordination of commercial strategies regarding bids in public tenders for the supply of aviation fuel to airlines, the adoption of retaliatory measures and the creation of barriers to entry into the aviation fuel market. The Tribunal also held that the Authority rightly considered that the joint ventures providing aviation fuel storage and delivery services, jointly controlled by the oil companies, played a crucial role in the implementation of the anti-competitive practice, since they enabled the oil companies to

7 See National Competition Report, April-June 2006.

share competitively sensitive information and obstruct market entry. The Tribunal also upheld the Authority's decision to impose fines, as well as the amount of the fines imposed.

The Tribunal annulled the decision insofar as it ordered the oil companies to implement measures whereby only one of them would hold a stake in any storage or delivery joint venture in the aviation fuel market. In the Tribunal's view, the imposition of these structural remedies infringed the principle of proportionality. In particular, the Tribunal held that the Authority had not sufficiently demonstrated that the commitments proposed by the oil companies, namely granting access to the storage and delivery joint ventures to interested third parties, were not appropriate and sufficient to dispel competition concerns. The Authority had also failed to analyze the negative effects that the structural remedies might have on competition (by making it possible for a single oil company to acquire sole control of the storage/into-plane facilities at a single airport); had not correctly assessed the scope of the measures it had imposed with a view to ensure the elimination of the information exchange among the oil companies; and did not analyze whether the structural remedies represented an excessive cost for the oil companies.

Policy and Procedure

Commitment Decisions

Since the recent reform of Law No. 287/1990 that permits the Competition Authority to adopt commitment decisions in the application of EC and national antitrust rules,[8] the Authority has issued six decisions regarding commitments proposed by undertakings involved in antitrust proceedings.

In *Anti-competitive Conduct on the Power Exchange*,[9] the Authority applied its new power for the first time to accept and render binding the commitments offered by Enel in order to allay the Authority's concerns regarding Enel's strategies for supplying the wholesale electricity market. The commitments require Enel, through its subsidiary Enel Produzione, to sell 1,000 MW and 700 MW of virtual capacity in 2007 and 2008, respectively, on conditions in line with those prevailing on the electricity exchange. The 2008 selling quota is subject to an assessment by the Authority of Enel's ability to exercise unilateral power in determining market prices (its so-called pivotal role), based on the structural nature of supply and demand. The Authority considered the commitments sufficient to significantly reduce Enel's pivotal role in the markets concerned.

In *Merck-Active Ingredients*,[10] the Authority accepted and made binding the commitment by Merck & Co. Inc. and Merck Sharp & Dohme (Italia) to grant free licenses of the active ingredient Finasteride and related generic drugs to third parties to allow them to manufacture and sell the products in Italy (as well as in the Member States where the active ingredient is not covered by any patent) two years before the expiration of the Complementary Protection Certificate. The Authority opened proceedings in this case to assess the allegedly abusive nature of the Merck group's refusals to grant two licenses that were deemed indispensable for the production of active ingredients in quantities sufficient to allow wide distribution of generic drugs.

In *Eni-Regasification business*,[11] the Authority accepted and made binding the commitments by Eni, thereby closing the Authority's investigation

8 See National Competition Report, October-December 2006.

9 Decision of December 27, 2006, case A366, Comportamenti abusivi sulla borsa elettrica.

10 Decision of March 21, 2007, case A364, *Merck-Principi attivi.*

11 Decision of March 9, 2007, case A371, *Gestione ed utilizzo della capacità di rigassificazione.*

into the potential abuse of a dominant position regarding the Panigaglia regasification plant. In November 2005, the Authority had opened a proceeding against Eni and its subsidiaries (Gnl Italia and Snam Rete Gas) over the alleged abuse of a dominant position in the management and use of the LNG regasification plant at the Panigaglia terminal by impeding access to the terminal by downstream competitors.

Eni initially offered a commitment to sell 1.5 billion m3 of natural gas for one year to interested third parties, with a possible increase up to 2 billion m3 depending on the average price if the sale was conducted by auction. Following the results of a market test, and based on the opinion of the Energy Authority, Eni modified its original commitments, doubling the quantity of gas to be sold (4 billion m3), and extending the time period to two years at reduced sales prices. In the Authority's view, Eni's revised commitments satisfied any anti-competitive concerns as the commitments would allow Eni's competitors to ensure their gas supplies during the interim period before the planned upgrades to pipelines for imported natural gas from TAG GmbH and Trans Tunisian Pipeline Company Ltd come on line in October 2008.

In *Audipress*,[12] the Authority accepted and made binding commitments offered by Audipress, to the effect that Audipress' six-monthly surveys of newspaper circulation in Italy will include free daily newspapers as well as paid newspapers. In the Authority's view, these commitments obviated the exclusion of the free press from the circulation certification system run by that association in Italy that led to discrimination in the sale of advertising to the benefit of paid newspapers. Audipress also undertook to ensure that surveys of the free press within its system will be comparable with those made for paid newspapers, in particular in terms of methodology and economic conditions.

In *Veterinarians Council of Turin*,[13] the Authority accepted and made binding on the Veterinarians Council of Turin and the Italian National Federation of Veterinary Council several commitments, including the granting of freedom to advertise, cancellation of all disciplinary proceedings against veterinarians who promote their businesses or who do not apply scale fees, and the abolition of minimum fees and changes to the veterinarians' professional code to bring the parties into line with competition principles. The Authority opened its proceedings following a complaint from the medical director of a veterinary surgery who was subject to disciplinary proceedings for failing to apply the minimum tariff and for violating limitations on advertising, as set out in the veterinarians' professional code.

By contrast, in *Marine paint manufacturers*,[14] the Authority deemed the commitments offered by five undertakings involved in the proceedings insufficient to remedy competition concerns raised by an alleged market-rigging agreement in the market for marine paints (paints used in the maintenance of large cargo ships and passenger liners). The undertakings had proposed to cease gathering data necessary for preparing merchant marine statistics through their trade association AVISA. Although it did not accept the proffered commitments, the Authority took a favorable view in determining the amount of the fines.

12 Decision of March 2, 2007, case I651, *A.D.S. Accertamenti Diffusione Stampa-AUDIPRESS*.

13 Decision of March 7, 2007, case I668, *Ordine dei Medici Veterinari di Torino*.

14 Decision of February 9, 2007, case I646, *Produttori vernici marine.*

THE NETHERLANDS

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

Policy and Procedure

Access to File

On February 7, the Dutch Council of State ruled on appeal that the Open Administration Act (*Wet openbaarheid van bestuur*) applied to case files held by the NMa. The ruling was part of the larger investigation by the NMa into illegal cartel practices in the Dutch bicycle industry.

In 2004, the NMa fined bicycle manufacturers Gazelle BV, Accell Groep NV, and Giant Europe NV almost €30 million for illegal agreements to fix prices for bicycles sold in the Netherlands. During the NMa's investigation, Gazelle believed it had not been given access to all documents contained in the NMa's file to which it was entitled. As a result, on the basis of the Open Administration Act Gazelle requested access to the documents which had been withheld. The NMa refused Gazelle's request, claiming that Section 90 of the Competition Act provided the only basis for such a request, and that the Competition Act preempted other legislation. Gazelle appealed the NMa's decision to the District Court of Arnhem, which decided in Gazelle's favor, and the Council of State affirmed the District Court's decision. The Council of State ruled that the wording of Section 90 of the Competition Act, as well as its drafting history, argued against the NMa's position.

As a general rule, the Open Administration Act does not apply to requests to government agencies for access to documents where the applicable statute provides exhaustive provisions for the disclosure of information. Provisions are considered exhaustive if the statute explicitly states that the purpose or intent of the applicable statute would be undermined through the application of the Open Administration Act. According to the NMa, Section 90 of the Competition Act is such a provision, and the application of the Open Administration Act to requests for access to file by undertakings under investigation would undermine the purpose and intent of the Competition Act.

According to the Council of State, Section 90 provides that the NMa may use the information it obtains from a particular undertaking during the course of an investigation only for the purposes of applying the Competition Act. Section 91 provides an exception to this rule, which allows for disclosure of information to foreign national competition authorities responsible for the application of foreign competition law, and to government agencies responsible for duties relating to the application of competition law. In no way do these provisions provide for the disclosure of information to third parties or to any undertaking involved in the NMa's investigation. Rather, the purpose of these provisions is to guarantee the protection of confidentiality of information where it is exchanged between public bodies. Moreover, the drafting history of the Competition Act specifically refers to the application of the Open Administration Act on a number of occasions when dealing with requests for access to file. The Council of State concluded that Section 90 does not address the disclosure of information to the exclusion of the Open Administration Act.

This judgment will increase the availability of documents contained in the NMa files to undertakings subject to an NMa investigation, and also possibly to third parties that have an interest in disclosure of the documents concerned. This does not mean, however, that all documents in possession of the NMa will need to be disclosed. The Open Administration Act provides for a limited set of exceptions where a public body may refuse access to documents. This includes confidential business information provided by the undertaking to the agency involved. The agency may also refuse access to documents where the interest in supplying such documents does not outweigh, *inter alia*, the agency's interest in inspection, control and monitoring, or the disproportional harm that could be suffered by the undertaking to which the documents relate. Nevertheless, these exceptions are far more limited than the discretion the NMa believed it had to refuse access to documents under Sections 90 and 91 of the Competition Act. The abstract nature of these exceptions (and associated uncertainty as a result of this decision) raises questions about the increased likelihood that third parties will be granted access to these documents. This may, in turn, lead to a reduced willingness of undertakings to provide certain information to the NMa in the context of an infringement proceeding or leniency application. This is particularly true given the recent increased attention to civil damage suits filed by third parties for infringements of competition law.

SPAIN

This section reviews developments concerning the Law for the Protection of Competition of 1989, which is enforced by the Spanish Competition authorities and Spanish Courts.

Mergers and Acquisitions

Sogecable/AVS

On March 23, in a decision which substantially follows the Tribunal's earlier opinion (C-102/06), the Spanish Cabinet conditionally approved the acquisition by Sogecable of sole control in Audiovisual Sports SL (AVS) (Order EHA/800/2007).

The Cabinet's decision expressly revoked the ten conditions the Cabinet had previously imposed on Sogecable in a merger clearance decision as regards broadcasting rights to certain sporting events. On November 29, 2002, the Cabinet approved the merger between Sogecable and the other Spanish Direct-to-Home (DTH) platform, Via Digital, subject to the conditions that Sogecable not purchase options or rights of first refusal over football games, not enter into contracts which are exclusive or have a duration of more than three years, and that it waive exclusivity provisions in existing contracts for Internet and mobile platforms. These conditions were due to expire by the end of 2007.

Sogecable's merger with Via Digital included the acquisition of an additional stake in AVS, a company that exploits the broadcasting rights to regular football games involving Spanish teams, in particular, the Spanish League and the King's Cup. This additional stake did not give Sogecable sole control over AVS, as the minority shareholder, TVC Multimedia, S.L., retained some veto rights by which it could exercise decisive influence over AVS's exploitation of football rights.

The proposed acquisition by Sogecable of sole control in AVS was one of the conditions of a broader agreement entered into between

Sogecable, AVS, TVC Multimedia and Mediapro on July 24, 2006, which covered not only structural but also cooperative aspects (the AVS III Agreement).[15] The Cabinet expressly stated that its conditional approval of Socecable's acquisition of sole control of AVS was without prejudice to an investigation into the cooperative aspects of the AVS III Agreement under Article 81 EC and Article 1 of the Law for the Protection of Competition. Indeed, the Tribunal ordered the Service to open proceedings to investigate whether the AVS III Agreement would infringe the European and Spanish competition laws.

The Tribunal defined the following relevant markets:

(i) the Spanish market for the acquisition from the relevant football clubs of media or broadcasting rights to football games of the Spanish League and the King's Cup;

(ii) the Spanish market for the wholesale distribution of the foregoing rights, that is, the market in which the undertakings which have acquired such rights grant licenses to operators for all types of broadcasting (free-to-air tv, pay-tv, and pay-per-view);

(iii) the downstream Spanish pay-tv market;

(iv) the downstream Spanish free-to-air tv market; and

(v) the downstream Spanish market for the exploitation of transmission rights to football games by means of Internet and UMTS.

As regards the Spanish market for the acquisition of media or broadcasting rights to the football games of the Spanish League and the King's Cup, broadcasting rights must be obtained from each of the football teams involved and the acquirers need to pool such rights. Unlike the Union of European Football Association (UEFA) system or other European competitions, the pooling of these rights does not take place at the supply level (football clubs) but at the demand level (the acquirers of the broadcasting rights). From 1996, AVS has traditionally been the pooling instrument used to exploit the relevant broadcasting rights. In the middle of 2006, some of the licenses granted by the football clubs expired, which opened this market to third parties unrelated to AVS. Mediapro entered the market by acquiring the broadcasting rights of certain important clubs. Mediapro's disruption of AVS' system was the reason why Sogecable, AVS, TVC Multimedia and Mediapro entered into the AVS III Agreement.

The Tribunal evaluated the effects of the acquisition on the markets concerned in conjunction with the imminent expiration of the previous conditions imposed by the Cabinet in its Sogecable/Via Digital decision, and with the current regulatory regime in Spain to exploit football rights (which binds the right holders to provide for the transmission of certain number of games through free-to-air tv). As described below, the Tribunal's analysis proceeded from the rights retained by AVS and on which Sogecable acquired sole control by virtue of the AVS III Agreement.

As regards the Spanish pay-tv market, the Tribunal considered that the acquisition would reinforce

15 The AVS I Agreement, by which Telefónica, Sogecable, and TVC Multimedia jointly exploited football rights individually acquired, was authorised by the European Commission in 1998 (Case IV/36.438). The AVS II Agreement, which extended and amended the system of joint exploitation, was notified to the Commission after Sogecable and Via Digital merged (Case COMP/37.652). As part of the AVS III Agreement, TVC Multimedia transferred its minority stake in AVS to Mediapro without transferring TVC Multimedia's veto rights conferring joint control. By virtue of the cooperative aspects contained in the AVS III Agreement, AVS retained the exploitation of broadcast rights in Spain and Andorra for the King's Cup, and for all transmission means, as well as the exploitation of broadcast rights for the Spanish League, in pay-television (tv) (including pay-per-view), Internet, and Universal Mobile Telecommunications System (UMTS) mediums. Mediapro retained the exploitation of broadcast rights outside Spain and Andorra for the Spanish League and the King's Cup, with the exception of Internet and UMTS, as well as the exploitation of broadcast rights for the Spanish League in free-tv.

the vertical integration between Sogecable's dominant position in the wholesale market for the relevant rights and the downstream pay-tv market, and the possible foreclosure effects. The Tribunal concluded that, by virtue of the AVS III Agreement, Sogecable could alter the current exploitation system in the pay-per-view window (to which all competitors have access) by reserving more exclusive content to the pay-tv window (exclusively exploited by Sogecable) to the detriment of competitors.

On the other hand, the Tribunal did not identify any negative effects of the acquisition in the Spanish free-to-air tv market. First, the Tribunal considered that, unlike the situation for pay-tv, sport content is not a driver for this market. Second, the Tribunal considered that the broadcasting rights to the King's Cup held by Sogecable for free-to-air tv are of much less importance than the Spanish League, and that the rights to the final in the King's Cup are held by the Spanish Football Federation.

On the Internet and UMTS markets, where Sogecable would hold exclusive transmission rights, the Tribunal concluded that the vertical integration of Sogecable with other media belonging to the same group (for example, the on-line versions of the newspaper "El Pais", or of the radio station "Cadena Ser"), could lead Sogecable to benefit those operators to the detriment of other competitors.

On the basis of the Tribunal's conclusions, the Cabinet approved the acquisition subject to the following eight conditions:

(i) For broadcasting rights to the Spanish League and the King's Cup controlled by Sogecable, Sogecable must ensure: (a) non-exclusive access to interested third party pay-tv operators for the broadcast of matches on pay-per-view; (b) should the number of matches on pay-tv increase, the new matches should be available on a non-exclusive basis to interested third-party pay-tv operators; and (c) non-exclusive access by interested third-party operators to images of matches transmitted through the Internet and UMTS.

(ii) Access to the foregoing content, both to related parties or interested third-parties, must be provided under objective, transparent, and non-discriminatory conditions.

(iii) Sogecable and its group companies must guarantee that the election of matches for pay-per-view shall be decided by a system agreed with the third-party operators which currently broadcast football on pay-per-view. If no agreement is reached, the Service, at Sogecable's proposal, shall appoint a trustee to manage the election of matches for pay-per-view. The trustee must be independent from Sogecable as well as from the interested third-party operators, and must be remunerated by AVS in a way that does not endanger the trustee's independence.

(iv) The duration of new contracts entered into by Sogecable, or any of its group companies, for the wholesale of broadcasting rights to the Spanish League and the King's Cup, exclusive or non-exclusive, shall be limited to three seasons, including any extension or option right. Sogecable is freed from the three year limitation, however, regarding contracts to acquire rights from the football clubs (based on the Cabinet's former decision in the Sogecable/Via Digital transaction). The Cabinet understands that the duration of these contracts shall be left to the assessment of the antitrust authorities under Article 81 EC and Article 1 of the Law for the Protection of Competition.

(v) Any controversy between Sogecable and third parties derived from the implementation of conditions (i) and (ii) above shall be submitted to arbitration.

(vi) The Cabinet's decision and conditions shall be in force at least until the end of the 2008-2009 season, and automatically extendable for three season periods, provided the Service, on the basis of the Tribunal's and the Telecommunications Commission's non-binding opinions, establishes that Sogecable continues holding control of the greater part of the broadcasting rights to the Spanish League and the King's Cup, particularly for pay-tv, and holds a dominant position in the pay-tv market.

(vii) Should prevailing market conditions change, Sogecable shall be entitled to ask for the termination or modification of the foregoing conditions.

(viii) In order to implement the foregoing conditions, Sogecable must submit to the Service a detailed action plan within one month from the Cabinet's decision entering into force. A non-confidential version of this action plan shall be subject to a restricted public consultation procedure. The approved action plan will be publicly available.

SWITZERLAND

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

Abuse of Market Power

Telekurs Multipay

Telekurs Multipay provides services permitting the payment of goods and services by credit and debit cards. A feature of such services is dynamic currency conversion (DCC), which permits the immediate conversion of payments into another currency (usually a currency that is more familiar or convenient to a given customer, such as that currency used in the customer's credit card statement). Unlike ordinary credit card payments, DCC allows the customer to know the proposed exchange rate and the converted final amount at the time the purchase is made, rather than waiting until the credit card statement has been issued.

On January 17, the FCC launched an inquiry into Telekurs Multipay's refusal to provide interface information to support the DCC function on payment terminals furnished to merchants by competitors of its sister-company, Telekurs Card Solutions.

The FCC had proposed to adopt provisional measures directing Telekurs Multipay to provide the necessary interface information to competitors of Telekurs Card Solutions to support the DCC function. Telekurs took the initiative, however, to provide such access while the FCC was conducting its inquiry. As a result, the FCC decided not to adopt provisional measures, but is still investigating these practices.

Ferrero

On February 9, the FCC terminated its investigation into the prices charged by the Italian chocolate manufacturer Ferrero to the Swiss supermarket chain Migros for Kinder-brand milk chocolate bars produced by Ferrero. The FCC terminated the investigation upon receiving confirmation that Ferrero had agreed with Migros, with the help of the FCC, to lower the prices to Migros by 22%.

In 2005, when Ferraro refused to lower its price to Migros Switzerland for Kinder milk chocolate bars to the same level as Ferraro charged for the same product to Migros' German outlets, Migros Switzerland began ordering the product from Ferraro's German distributor. Ferraro Germany soon claimed that it was out of stock, and was unable to fill Migros Switzerland's orders. Migros Switzerland then launched a new chocolate bar to market, which was a copy of the Ferraro product, at a substantially lower price. Migros Switzerland complained to the FCC that Ferraro Germany was not filling Migros Switzerland's orders because Ferraro's distributors were engaging in absolute territorial protection, prohibiting even passive sales, and that this practice was contrary to Swiss competition law.

Swisscom Mobile

On February 5, the FCC fined Swisscom Mobile CHF 333,365,685 (€202.5 million) for abuse of a dominant position in the call termination charges market. This is the largest fine ever imposed by the FCC .

The FCC defined the relevant market for call termination charges as being limited to the operator making the charge. Swisscom thus had a dominant position in respect of termination charges to all its users. Swisscom had fixed these charges, billed to other telephone operators (which pass them on, in one form or another, to their own subscribers), at CHF 0.335 (€0.215) per minute. The FCC found that Swisscom had abused its dominant position from April 1, 2004 to May 31, 2005. On June 1, 2005, Swisscom reduced its call termination charges to CHF 0.20 (€0.12) per minute.

The FCC may fine undertakings up to 10% of their group turnover in Switzerland for the past three years. In this case, Swisscom was fined around 3-4% of the Swisscom group's most recent annual turnover. This fine, therefore, is only one-tenth of what the FCC could have imposed. The fine ultimately imposed by the FCC was also less than the proposed fine of CHF 489 million (€297 million) in the FCC's draft decision.

This decision is notable in that, of the three mobile phone operators in Switzerland, only Swisscom was found to have abused its dominant position, and fined accordingly. In the EU, by contrast, it has always been the case that either all mobile telecom operators active on a market were fined for abuse in relation to termination charges, or none were fined.

The FCC found that all three mobile telecom operators had abused their respective dominant positions in relation to termination charges. According to Swisscom, it applied the lowest call termination charges of the three operators. However, Swisscom is by far the largest operator in terms of both subscribers (4.3 million) and revenue (CHF 4.1 billion (€42.5 billion) in 2005). Termination charges are justified in part by reference to costs, and Swisscom enjoys significant economies of scale advantages over its competitors. Moreover, Swisscom's network advantages may have been another reason why the FCC imposed fines only on Swiscom, and not on the other two operators. On average, a lower proportion of calls made by Swisscom subscribers will be subject to termination charges, since most Swisscom customers' calls will start and finish within Swisscom. To be competitive with Swisscom, other operators may have been justified in charging high termination charges.

Swisscom Mobile will appeal this decision to the Administrative Tribunal (which, as of January 1, 2007, has sole jurisdiction to hear appeals of FCC decisions).

PubliGroupe

On March 5, the FCC fined PubliGroupe CHF 2.5 million (€1.5 million) for abuse of a dominant position on the market for advertisements in print media.

PubliGroupe is the principal conduit in Switzerland through which advertisements are placed for publication in print media. PubliGroupe had established conditions that intermediaries (on behalf of advertisers) needed to meet in order to receive a commission from PubliGroupe. A group of independent intermediaries wished to sell advertising orders to PubliGroupe without meeting PubliGroupe's conditions. PubliGroupe refused to pay commissions to these independent intermediaries.

The FCC launched an investigation into PubliGroupe's practices in November 2002. As a result of its investigation, the FCC found that PubliGroupe held a dominant position in the market for the selling and placement of advertisements in print media. The FCC based this assessment on PubliGroupe's large market share, its disproportionate share vis-à-vis that of its competitors, as well as on certain structural advantages enjoyed by PubliGroupe.

The FCC determined the fine based on the type and gravity of the infringement. The FCC also took into account that PubliGroupe discontinued the abuse during the course of the FCC's investigation. In particular, PubliGroupe agreed with the FCC to cease such practices as of January 1, 2006. As a result, PubliGroupe modified the conditions imposed on intermediaries by lowering the turnover required for intermediaries to benefit from commissions. Furthermore, intermediaries are no longer required to sell all types of advertisements appearing in the print media, but may specialise in one or more categories.

UNITED KINGDOM

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

Abuse of Market Power

British Horseracing Board

On February 2, the Court of Appeal overturned a ruling by the High Court that the British Horseracing Board (BHB) had infringed the Chapter II prohibition of the Competition Act 1998, and Article 82 EC, through the abuse of its dominant position, in particular through engaging in excessive pricing practices. In doing so, the Court of Appeal provided important guidance on the correct standard to apply in the assessment of excessive pricing abuses.

BHB is the administrator and governing body of British horseracing. Among its numerous responsibilities and functions, BHB compiles pre-race data in relation to every horseracing fixture, including the name and time of each race, course, race distance and information about horses and jockeys. BHB licenses the use of such data to various third parties, including Attheraces (ATR). ATR supplies websites, television channels, and other audiovisual media relating to British horseracing to bookmakers and punters. ATR alleged that BHB had abused its dominant position in respect of the supply of pre-race data, which was characterized as an essential input for the provision by ATR of its varied _nternet and audio-visual services. In particularly, ATR contended that BHB had threatened to terminate the supply of pre-race data, and had attempted to charge excessive and discriminatory prices.

Following a sustained commercial dispute, ATR commenced proceedings in the High Court in 2005. On December 21, 2005, the High Court ruled that BHB had abused its dominant position in respect of the supply of pre-race data (*Attheraces Limited v. The British Horseracing Board Limited [2005] EWHC 3015 (Ch)*). The court confirmed that, for the purpose of providing ATR's services, the pre-race data constituted an "essential facility", and that BHB's refusal to supply the data was without objective justification, and thus was both unreasonable and illegal. Of foremost significance, however, the court held that BHB's proposed prices were excessive and unfair.

In this regard, the court observed that BHB had proposed to charge a price calculated as a percentage of the net profit achieved by ATR through the sale of certain of ATR's services. This charge was deemed to be excessive, greatly outstripping the "economic value" of BHB's pre-race data. Critically, the court ruled that the economic value of BHB's pre-race data was measured properly by reference to the cost to BHB of collecting, collating, and distributing that data, with BHB, in addition, permitted to make a reasonable return on those costs (the cost-plus standard). The court ruled that BHB's proposed charges were "*so far in excess of any justifiable allocation of the cost of production and a reasonable return (in effect, the competitive price) that they are … plainly excessive*".

The High Court judgment was challenged by BHB, and the Court of Appeal issued its ruling in respect of that appeal on February 2 ([2007] EWCA Civ 38). BHB did not contest the market definition analysis adopted by the High Court, nor the finding that it was dominant. As was agreed by all parties, and the Court of Appeal, the principal matter for consideration was the High Court's finding of excessive pricing. BHB's primary contention was that the application of the cost-plus standard to determine the economic value, or proper competitive price, of BHB's pre-race data was unsound. BHB submitted, instead, that the economic value of a product or service was a different concept from its cost. BHB proposed that economic value was instead a function of the revenue-earning potential of the relevant product or service to the purchaser.

The Court of Appeal endorsed BHB's proposition. Having regard to the jurisprudence of the European Community Courts, the Court of Appeal identified the European Court of Justice's (ECJ) judgment in *United Brands v Commission* ([1978] ECR 207) as of seminal importance to the assessment of excessive pricing abuses. In United Brands, the ECJ held that a price was excessive where "*it has no reasonable relation to the economic value of the product supplied*". Having regard to this formulation, the Court of Appeal held that the critical issue was determining the economic value of a product. In this regard, the Court of Appeal rejected the notion that either Article 82 EC or settled case law indicated that "*the index of abuse is the extent of departure from a cost-plus criterion*" (¶ 207). To the contrary, the Court of Appeal maintained that the cost-plus measure had two primary functions: first, it comprised a baseline, below which no price can ordinarily be regarded as abusive; second, it could be used as a default measure in circumstances where market abuse meant there was no practicable means to otherwise determine economic value.

The Court of Appeal therefore found that the High Court had viewed the economic value in the context of excessive pricing abuses too narrowly. Having regard to contemporary economic theory, the Court of Appeal ruled that, to determine economic value, it was valid to have regard to the value assigned to a product or service by its purchaser and the wider market, rather than focusing solely on a supplier's relevant costs of production. In the current instance, it was therefore relevant to consider the benefit ATR derived through the purchase of pre-race data. The court determined that, in disseminating pre-race data to end-users, ATR achieved a very substantial profit, suggesting that the correct value of the pre-data was high, and higher than the value that would otherwise be assigned through the exclusive use of the cost-plus standard.

Moreover, the Court of Appeal observed that, as a general matter, Article 82 EC is not concerned with price regulation; rather, it (and the Chapter II prohibition) is intended to prevent abuses of dominant positions, with the object of protecting and promoting the process of competition, rather than individual competitors. On this basis, the threshold above which a price becomes abusive cannot be ascertained by reference in the abstract to the cost-plus standard. Instead, a charge is abusive when it is set at an excessive level that compromises the ability of purchasers to compete on the market. In this circumstance, it is demonstrably the case that the excessive charge adversely affects competition. The Court of Appeal held that there was no evidence to show that ATR's competitiveness on the market would be materially comprised by BHB's proposed charge for pre-race data. On these bases, the Court of Appeal rejected the finding that BHB's prices were excessive, and that it had engaged in abusive conduct.

The Court of Appeal's judgment is of considerable significance for several reasons. First, it confirms that there is no presumption of an abuse of a dominant position when pricing exceeds the cost-plus standard. This potentially provides dominant companies with greater freedom to set prices, albeit the concept of economic value remains nebulous, and therefore the exact pricing level that is permissible may prove difficult to ascertain. Second, the Court of Appeal eschews a narrow, formalistic approach to the application of Article 82 EC, and instead favors an economics-based mode of analysis, of the type advocated by the European Commission in its current review of the application of Article 82 EC to exclusionary abuses. In particular, the Court of Appeal establishes that an effect on competition cannot be presumed to arise from an excessive price. Instead, reference must be made to the effect on competition of the excessive price.

Mergers and Acquisitions

British Sky Boradcasting Group/ITV

On January 12, the OFT reached the provisional conclusion that the acquisition by British Sky Broadcasting Group (Sky) of a 17.9% shareholding in ITV plc (ITV) had given rise to a relevant merger situation, meriting potential assessment. Notwithstanding the OFT inquiry, the Secretary of State for Trade and Industry issued a public intervention notice on February 26, requiring that the OFT and the UK telecommunications regulator, OFCOM, respectively, provide assessments as to the potential competitive effects and public interest concerns arising from Sky acquiring an interest in a rival UK broadcaster. This is the first instance in which the Secretary of State has used powers under the Enterprise Act 2002 to intervene in a merger on public interest grounds.

On November 17, 2006, Sky acquired a 17.9% interest in its free-to-air rival TV broadcaster, ITV. This acquisition elicited considerable media attention and numerous complaints from rivals, including Virgin Media, the re-branded ntl Telewest, which had identified itself as a prospective bidder for ITV. On December 8, the OFT confirmed that it had received a complaint in respect of the acquisition, and would begin consideration, in the first instance, of whether it had jurisdiction to investigate the matter further.

The OFT is obliged under the Enterprise Act 2002 to investigate "relevant merger situations", which can arise only where two enterprises cease to be distinct. Enterprises will cease to be distinct where they are brought under common ownership or control. In considering Sky's acquisition of 17.9% of ITV, the OFT was required to consider whether Sky's minority shareholding in ITV provided Sky with the ability to control ITV's commercial policy.

In this regard, the OFT recognizes three forms of control, which comprise gradations in a spectrum. First, the ability materially to influence policy, known as 'material influence', which is presumed to arise from a shareholding of 25% or more (as it enables the shareholder to block special resolutions). The OFT's guidelines indicate that material influence may also arise from a lower level of shareholding, particularly when accompanied by board representation, and that the OFT may examine any case involving a shareholding of 15% or more. Second, a significant minority shareholding may confer *de facto* control where it enables the acquirer to determine matters of policy and commercial conduct. This may arise, for example, where the shareholder in practice accounts for a majority of the votes actually cast. Third, a company may acquire a majority shareholding conferring legal control.

In its provisional conclusion of January 12, the OFT determined that Sky's acquisition of a 17.9% shareholding was sufficient to confer material influence. This provisional decision is notable for confirming the low threshold at which, having regard to all relevant factual considerations, the OFT may make a finding that material influence exists. Notwithstanding the OFT investigation, on February 26, the Secretary of State for Trade and Industry took the unprecedented step of issuing a public intervention notice. Exercising powers granted under Section 42 of the Enterprise Act, the Secretary of State ordered the OFT to provide a full report on the competitive effects of Sky's acquisition of shares in ITV and, moreover, ordered OFCOM to assess potential public interest concerns. On the bases of these reports, the Secretary of State will decide whether the minority acquisition must be investigated fully by the CC.

As a general principle, the Enterprise Act reformed the UK merger control system such that ministers of state were removed from the regulatory process, and public interest considerations replaced by a substantive merger control test focusing exclusively on competition concerns. In certain narrow sectors where public interest concerns are paramount, powers have, exceptionally, been reserved to ministers. In particular, the Communications Act 2003 provided the Secretary of State for Trade and Industry with the power to intervene in relevant merger situations relating to newspaper and media companies, on the basis of specified public interest concerns. In the public intervention notice, the Secretary for State explained that investigation of Sky's acquisition was required to ensure maintain the plurality of UK media ownership and rights.

Independently of the instructions issued to it by the Secretary of State, on March 20 OFCOM announced that it had decided to launch a broad investigation of the UK pay-TV market to determine whether a market investigation reference should be made to the CC. In conducting its investigation into the market, OFCOM will review control over content, ownership of distribution platforms, retail subscriber bases, and the implications of vertical integration in the market.

Both the OFT and OFCOM are required to report their findings to the Secretary of State on April 27. While the OFT's investigation will focus solely on competition issues, and will not be prejudiced by OFCOM's findings in respect of media plurality issues, the UK TV market has fallen under intensive regulatory scrutiny. Irrespective of the conclusions reached by each of the OFT and OFCOM in respect of Sky's acquisition of shares in ITV, further industry consolidation will likely be delayed until the outcome of OFCOM's market review.

CC Evaluation Of Merger Remedies

On January 16, the CC published a study evaluating the effectiveness of past merger remedies, with the view that its conclusions should contribute to the development of the OFT's and CC's expertise, policy and practice. Of its conclusions, the CC places particular emphasis on the finding that the effectiveness of remedies can be prejudiced significantly if interim measures are not negotiated or imposed in a timely manner to prevent the integration of businesses following completion of a merger. This conclusion raises the expectation that interim measures may be applied with greater frequency in future.

The idea of undertaking a case study review of merger remedies was first proposed in April 2004 by the former CC Chairman, Professor Geroski, and it is evident that the current report is intended as the first in a series of such studies. In this initial paper, the CC has identified four cases it deems particularly well suited for review. To ensure that the remedies studied were sufficiently mature for their effects to be clear, the CC reviewed cases decided under the Fair Trading Act 1973, notwithstanding the procedural and substantive differences between this former regime and the situation under the Enterprise Act 2002.

The CC first considered the application of interim remedies, comprising measures either requested or imposed by the UK authorities to prevent merging parties from taking action that might prejudice the outcome of a merger inquiry. Typically, interim measures will take the form of undertakings by the merging parties not to further integrate their respective businesses.

In this respect, the CC highlighted the *Alanod/Metalloxyd* (1999) and *Sibelco/Fife Silica* (2001) merger cases. In both, the OFT became aware of the mergers only after their completion and, in accordance with the provisions of the Fair Trading Act 1973, was unable to take interim measures in advance of making CC reference decisions. As a consequence, the eventual remedies recommended by the CC in both cases proved only partially effective. In *Alanod/Metalloxyd*, the target business had been fully integrated with that of the acquirer in advance of the CC reference, such that the CC was deprived of the ability to formulate an effective divestiture package. More interestingly, in *Sibelco/Fife Silica*, it is suggested that the acquirer deliberately under-resourced and mismanaged the potential divestment business to limit the options available to the CC. During the period of the CC investigation, and the subsequent six-month period in which potential buyers were sought for the Fife Silica business, the acquirer made no significant capital investments in that business. As a result, by the time of the CC's final report the potential divestment business was on the verge of bankruptcy. Intentionally or otherwise, the acquirer's management had succeeded in compromising the divestiture process. On these bases, the CC concluded that it was imperative that appropriate interim measures be negotiated in a timely manner to preserve its ability to impose effective remedies.

In respect of other matters of policy and practice, the CC stressed the need for the competition authorities to have a credible contingency remedy option available when negotiating remedies with the merging parties. In particular, the CC considered it desirable to have a more onerous and intrusive back-up remedy available, as a means to provide merging parties with a strong incentive to cooperate in devising a preferable but fully effective remedy.

Turning to behavioral remedies, the CC noted initially the greater complexity of such remedies relative to structural remedies, in terms both of design and implementation. Nonetheless, the CC submits that, with active monitoring, behavioral remedies can be fully effective. In support of this contention, and having regard to the *Alanod/Metalloxyd* and *Coloplast/SSL* (2002) mergers, the CC made a number of detailed observations on price controls. First, in industries where input costs are subject to significant variation, price control mechanisms are likely to be difficult to design and will frequently be ineffective, even where efforts are made to correlate the price cap to relevant input costs. Second, in bidding markets, public disclosure of the price cap will cause all bids to coalesce around that level, impairing effective competition. Third, the CC found that, in relation to both *Alanod/Metalloxyd* and *Coloplast/SSL* (2002), price controls did not facilitate competition. To the contrary, price controls, by repressing a firm's prices, caused that firm to gain market share and, in effect, presented barriers to entry and expansion by rivals. While acknowledging the scope for price controls to have an adverse competitive impact, the CC maintained that its learning indicated that price control mechanisms could be effective where devised so as be fully responsive to relevant market characteristics.

Although only the first in a proposed series of papers on remedies, the current study presented several policy recommendations. First, it encouraged the OFT to utilize its interim powers, available under the Enterprise Act 2002, more often so as to preserve the ability of the CC to order comprehensive remedies at the conclusion of its investigation. The OFT appears to have heeded this suggestion, as the OFT now routinely requires hold separate undertakings in respect of completed mergers. Second, while identifying possible adverse consequences of price controls, the study endorsed the continued use of such remedies, albeit calling for price control mechanisms to be used only on appropriate markets.

Policy and Procedure

Settlement Initiative

On March 22, the OFT announced that it was offering a "fast-track" settlement procedure to offending construction companies currently being investigated for bid-rigging practices. In consideration for their admission of participation in the bid-rigging activities, companies would be offered reduced penalties. This is the first instance in which the OFT has offered a settlement in the context of a formal amnesty program (other than the negotiated settlement with certain independent schools regarding price fixing practices).

Over the last two years, the OFT has been carrying out an investigation under the Competition Act 1998 into bid-rigging by construction companies in England. During this investigation, the OFT has conducted on-site inspections at some 57 company premises, and 37 companies have applied for leniency. As a result of this investigation, the largest the authority has ever undertaken, the OFT has uncovered evidence of bid-rigging in thousands of tenders with a combined estimated value approaching £3 billion.

In July 2006, Vincent Smith, the OFT director of competition enforcement, discussed the practices of the Dutch competition authority, in particular the "amnesty" programs offered in relation to large construction cartels, which appear to have provided the inspiration for the OFT's fast-track settlement procedure in the current case. As in the case of the Dutch amnesty programs, the OFT has invited companies to admit their participation in specified bid-rigging activities on terms advertised by the OFT: the OFT will not engage in individual negotiation with firms, and all firms admitting participation and cooperating with the OFT will receive a significant fine reduction. At the same time as inviting companies to participate in its fast-track settlement procedure, the OFT announced that it would accept no further leniency applications in relation to the relevant bid-rigging activities.

The OFT initiative is consonant with statements made in the last several months by the European Commission expressing an interest in at least exploring the possibility of direct settlement agreements with cartel participants, in appropriate circumstances, as a means to achieve improved competition enforcement. Furthermore, as a matter of policy, the adoption of a settlement procedure in the current case is recommended since it permits the OFT to conserve enforcement resources. The bid-rigging cartel under review was evidently widespread, including a very large number of participant firms. In this respect, it is significant that the only other occasion on which the OFT has negotiated a settlement agreement was in its price-fixing investigation within the independent schools sectors. In that instance, some 50 independent schools were provisionally found to have infringed the Chapter I prohibition in the Competition Act 1998. The schools accepted the OFT's invitation to admit participation in the exchange of sensitive information, and thus admit the infringement of UK competition law, and make an small ex gratia payment to a charitable trust and pay a nominal penalty. On these bases, it might be expected that settlement procedures will likely only be offered in relation the largest cartel cases, involving industry-wide conduct by a large number of participants.

First Representative Damages Action

On March 12, a representative damages action was brought before the CAT on behalf of 130 consumers that had allegedly suffered loss as a result of illegal price fixing arrangements relating to the supply of replica football kits. This marks the first instance in which a representative action has been brought before the courts for compensatory damages in respect of an infringement of UK competition law.

In 2003, the OFT found that the resale prices of Manchester United and England replica football kits manufactured by Umbro had been fixed by a number of sporting goods retailers, in breach of Article 81 EC and the Chapter I prohibition of the Competition Act 1998. As a participant in these illegal pricing arrangements, JJB Sports plc (JJB), was fined £8.37 million. The OFT's decisions on both liability and fines were subject to multiple appeals, which proved largely unsuccessful. On February 5, the House of Lords refused JJB leave to appeal the judgment of the Court of Appeal, substantially approving the OFT's infringement decision, thereby exhausting the judicial appeal process for JJB.

On February 8, following the House of Lords decision, the UK Consumers' Association (Which?) indicated its intention to bring a representative damages action against JJB, on behalf of consumers who had suffered loss as a consequence of its infringement of competition laws. Consumers were invited to lodge appeals with the Consumers' Association, and provide evidence of having purchased a relevant football replica kit between April 2000 and August 2001.

On March 12, the Consumers' Association brought a claim for damages against JJB before the CAT, pursuant to Section 47B of the Competition Act 1998, on behalf of some 130 individual consumers. Unlike U.S.-style opt-out class actions, representative actions under Section 47B may be brought only by a specified representative body, such as the Consumers' Association, and on behalf of specific individuals, with damages payable to those individuals (unless otherwise agreed by the individuals and the CAT). Section 47A of the Competition Act 1998 permits damages claims to be brought directly by consumers themselves.

The Consumers' Association has claimed damages on several bases. First, it has claimed compensatory damages in respect of losses borne by individual consumers though the purchase of replica kits items. Second, exemplary or restitutional damages have been claimed equivalent to 25% of JJB's turnover during the period of the football kits infringement. A case management conference has been scheduled for April 26, 2007 to discuss continued proceedings.

The claim submitted by the Consumers' Association is significant as the first representation filed under the competition laws in the United Kingdom. These actions are intended to encourage private enforcement of competition laws, facilitating actions in circumstances where individual actions are unlikely to be brought because the amounts at issue are modest. The progress of the current proceedings will be closely monitored, as a test case. Moreover, the claim marks only the fourth occasion on which any type of Section 47 damages claim has been filed with the CAT. To date, individual actions have been settled informally by the parties, depriving the CAT of the opportunity to issue damages. Given the circumstances of the present case, the prospect of settlement appears remote, which adds further to the likely significance of the proceedings.

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