NEWSLETTER

ANTITRUST

INTERNATIONAL BAR ASSOCIATION LEGAL PRACTICE DIVISION

the global voice of the legal profession

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FROM THE CO-CHAIRS

A year of change in antitrust enforcement

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The introduction of new antitrust regimes, changes in existing laws, and the creation of new enforcement agencies around the globe is a feature of our times. However, this year will be noted for changes in two major competition jurisdictions: in the United States, the new antitrust enforcement team elected by President Obama is in place; while in the European Union, a new Commission will be appointed by November 2009.

In his 2007 statement before the America Antitrust Institute, then Senator Barack Obama referred to what he called 'lax enforcement' by stating that 'the current administration has what may be the weakest record of antitrust enforcement of any administration in the last half century'. President Obama called for reinvigoration of antitrust enforcement, taking effective action against mergers that are likely to harm consumer welfare.

On 2 March, President Obama appointed Jon Leibowitz as Chair of the Federal Trade Commission (FTC). He also nominated Christine A Varney as Assistant Attorney General for the Antitrust Division of the Department of Justice (DoJ). The Senate confirmed the appointment of Christine Varney on 20 April. On the basis of the public statements and known positions of the newly appointed heads of the agencies, there is a consensus that the FTC and the DoJ will engage in more aggressive enforcement and regulation, and a greater number of transactions will be challenged. A closer scrutiny of mergers and conducts is to be expected. Indeed, in her first public address on 11 May 2009, Assistant Attorney General Varney criticised the Department's enforcement efforts during the Bush administration and announced that she was

Continued overleaf

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officially withdrawing the Department's guidelines on monopolisation enforcement that were issued in late 2008.

In the European Union, the five-year mandate of Ms Neelie Kroes will conclude later this year. It has been a term marked by profound reform and novel enforcement in many areas of EU competition law. The presence of antitrust in the daily life of European businesses has become very significant. The EU Commission has also been influential in the renovation of competition laws and enforcement agencies in the Member States. A much more coherent enforcement system exists nowadays through the European Competition Network. The enhancement of private enforcement seems to be the ultimate pending issue, at least in the numbers that the Commission expected to see.

It is too early to know what the new European Commission will bring in terms of competition law enforcement. But the Antitrust Committee of the IBA will certainly be prepared to cooperate with the EU Commission in any antitrust-related initiative.

We will have the opportunity to gather to discuss all these issues and others in our next two specialised events. On 25–26 June, we will meet in New York for the conference 'Antitrust in a Global Economy', organised in conjunction with the Section of Antitrust Law of the American Bar Association, and supported by the IBA North America Regional Forum. On 11–12 September, we will hold our acclaimed 13th Annual Competition Conference in Fiesole. Of course we will also present a full programme at the IBA Annual Conference in Madrid, on 4–9 October. We hope to meet many of you at these exciting events.

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Madrid

4–9 October 2009

International Bar Association Conference

the global voice of the legal profession

IBA Annual Conference Madrid 2009: Antitrust Committee sessions

Antitrust and Trade Law Section

Private standards – application of antitrust and trade rules

Council Liaison Officer

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This session will explore the issue of private standards, generated by private enterprises with or without the tacit agreement or participation of the governments. These standards are applicable to the export and import of goods, particularly those relating to food, animal feed, and drugs, and they can have a significant impact on restricting such trade flows. The session will examine how trade and antitrust rules are implicated by different types of standards. Speakers will address the WTO and antitrust rules that may, or may not, govern private standards. The format will involve questions posed by the chair to various speakers and could also involve several hypotheticals.

MONDAY 1000 – 1300

Antitrust

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Ronan Harty

Extraterritorial application of competition law

In a world where business acts on an increasingly global scale, the extraterritorial application of antitrust rules raises a number of important questions on the basis of jurisdiction and the need for coordination among enforcers. This panel will identify the main principles governing extraterritoriality relating to cartels, unilateral conduct and mergers, and discuss how to address conflicts that arise in practice, in light of the IBA Legal Practice Division's Report of the Task Force on Extraterritorial Jurisdiction.

MONDAY 1500 – 1800

Cartels: should companies wait for a decision or choose settlement?

This panel will explore, from various perspectives in different jurisdictions, how the settlement possibility is affecting the outcome of cartel investigations, the imposition of penalties and the subsequent actions for damages. The panel will address fundamental issues, such as how to balance the interest of the authorities *vis-à-vis* the best alternative for companies while at the same time focusing on practical aspects such as when to choose a settlement. The impact of the financial crisis in the decision-making of companies regarding settlement will also be discussed.

TUESDAY 1000 – 1300

Patent settlements in the pharma sector – wholesome end to litigation or dubious market allocation?

In 'reverse settlements' – the innovator challenges the generic imitator of its patented product for patent infringement. The parties settle the litigation in a deal under which the generic leaves the market and receives some money from the innovator. The US FTC has brought several cases in court unsuccessfully. The European Commission's pharma sector inquiry revealed similar suspicions of the fact that the industry tries to prolong to maintain and to enforce its patent on popular and profitable drugs. A panel of experts will discuss the tensions between the role of patents in fostering innovation and the role of competition law in fostering competition and reducing prices for consumers.

TUESDAY 1500 – 1800

Private litigation: antitrust class actions – where do they work and how?

As the European Commission proceeds to promote private litigation as a means for customers and consumers to recover damages from competition law violations, there is much debate about whether the class action regime in the United States needs to be reformed. This session will examine developments in key jurisdictions in Europe as well as the United States and elsewhere in areas such as:

- the test to be met for a claim to proceed on a class basis;
- the interface between direct and indirect purchaser claims;
- the extent of rights of discovery for and controls on possible abuses; and the fee arrangements available to plaintiff's counsel.

WEDNESDAY 1000 – 1300

International distribution of goods and services – how do antitrust rules keep up with changing business patterns?

Internationally, the role of manufacturers and distributors is changing significantly. Many businesses shift from traditional sales channels to e-commerce solutions, creating new ways of approaching the customer, and often changing business models in the process. At the same time distributors are 'vertically integrating' themselves by creating their own branded goods. All the while, business patterns, as well as shopping patterns, become more international. Such factual changes affect the legal framework within which businesses operate – in particular in the area of antitrust. Divergent national views prevail in some areas. One example is the treatment of retail price maintenance issues. Lawyers often struggle to fit newly developing business practices into an existing legal framework and to distinguish truly anti-competitive practices from developments that actually benefit the consumer. This panel will examine the state of the law and the most recent developments in a number of key jurisdictions, including the discussion about the approach under the European Block Exemption Regulation, trying to find common strands, identify existing differences and highlight potential pitfalls for the unwary.

WEDNESDAY 1500 – 1800

New antitrust regimes in emerging markets – trends and challenges

With the emergence of economic giants like the BRIC countries of Brazil, Russia, India and China, new antitrust laws and authorities are being established that are facing a unique set of challenges, including how to deal with formerly state-owned companies and foreign multinationals. Multilateral groups like the International Competition Network are attempting to provide assistance and further convergence of enforcement standards, which is very important for cross-border transactions and multinational businesses. A panel of experts will discuss these important issues and also how these issues are viewed by developed countries.

THURSDAY 1000 – 1300

Trade and Customs Law Committee

Chair

Scott Andersen *Sidley Austin Brown & Wood, Geneva, Switzerland*

Legal issues relating to movement of persons

Joint session with the Asia Pacific Regional Forum and the North American Regional Forum.

This session will explore the rules under the WTO Services Agreement and possible amendments to those rules. It will focus on movement of persons from South Asia to North America, and of persons from North America to South Asia. The format will use hypotheticals involving, inter alia, the movement of legal professionals as examples. Speakers will address the WTO rules, the existing restrictions in the North American and South Asian countries on free movement of people, and examples of problems and solutions involving such movements.

MONDAY 1500 – 1800

Facilitating trade within developing countries – breaking down customs-related barriers to the free flow of goods and services

Joint session with the African Regional Forum.

This session will explore ways in which trade in goods and services could be enhanced by eliminating red tape in customs. It will examine 'best practices' in eliminating customs-related barriers to trade. Speakers may include experts from UNCTAD and the World Customs Organization together with customs experts in Africa and around the world. The session may examine various case studies of what has worked, and not worked, in terms of facilitating trade flows by eliminating customs barriers.

TUESDAY 1000 – 1300

Fuel rules – energy, emissions and international trade laws

Joint session with the Power Law Committee.

This session will provide an overview of the international legal regimes applicable to trade in energy products. It will also address the use of regional trade agreements to secure energy supplies. It will focus as well on how international trade rules will need to be adapted in order to achieve global climate change goals and rules. Finally, it will discuss how existing mechanisms for the settlement of international disputes in the energy sector and provide suggestions for improvements.

THURSDAY 1000 – 1300

INTERNATIONAL REPORTS

Argentina

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CNDC softens filing requirement criteria

On 29 January 2009, the Secretary of Domestic Trade fined Advent Postal Cayman for its delay in notifying a transaction that required clearance from the Argentine Antitrust Authority. Although the transaction was closed on 4 August 2005, it was not until 1 September 2005 that the parties informally reported the transaction to the Antitrust Commission ('CNDC') and requested an exemption from filing for various reasons. On 25 July 2007, the CNDC ruled that the transaction was subject to mandatory filing.

In order to determine the period of delay, the CNDC considered that although the parties did not formally request a consultative opinion – a mechanism whereby the CNDC determines whether a transaction needs antitrust clearance, suspending the notification period – they did in fact report the transaction. The informal presentation made by the parties in reporting the transaction was considered by the CNDC to have the same effect as a formal consultative opinion request, thus suspending the period to notify the transaction. This is a change in the criteria used in a similar case in 2003. In that case the CNDC considered that an informal notification did not fulfil the filing requirement.

Using a non-binding report issued by the CNDC, the Secretary of Domestic Trade decided that each day's delay in filing was to incur a fine of US$2,000. Therefore, Advent was fined US$31,500 while IMC was fined US$33,500.

Mitigating factors in the calculation of the fine were the complexity of the case in determining whether antitrust clearance was mandatory, the fact that the acquiring company already had *de iure* control over the target and the fact that the transaction raised no antitrust concern. Aggravating factors were the lack of a formal request for a consultative opinion and the fact that the acquiring group already had expertise dealing with the CNDC.

Australia

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Merger control in the global financial crisis

Since the global financial crisis erupted in September 2008, companies seeking informal merger clearance from the Australian Competition & Consumer Commission (ACCC) are increasingly relying on the 'failing firm argument' and finding success.

The failing firm argument operates in circumstances where one of the parties to a merger, and its assets, are likely to exit the market in the event that the merger does not take place. It is often misunderstood as being a 'defence' that arises when a merger would otherwise be blocked due to its adverse effect on competition. Rather, it is a set of circumstances that it taken into account by the ACCC as part of its overall assessment of whether the merger will substantially lessen competition.

When considering whether a merger will substantially lessen competition, the ACCC compares two future scenarios: the 'factual', comprising the future with the merger, and the 'counterfactual', comprising the future without the merger. This involves a comparison as to whether the factual represents a substantially less competitive outcome than the counterfactual.

In the case of the failing firm, when considering the counterfactual the ACCC has indicated that it will assess whether:

- the relevant firm is in imminent danger of failure and unable to be successfully restructured without the merger;
- in the absence of the merger, the relevant assets, including brands, will leave the industry; and
- the likely state of competition with the merger would not be substantially less than the likely state of competition after the target has exited and the target's customers have moved their business to alternative sources of supply.

In a strong market with easy access to credit, these conditions are not easily satisfied. But the current global economic conditions have resulted in a resurgence of the failing firm argument. In recent months, the failing firm argument has been successful

on three separate occasions (although the ACCC did not explicitly rely on such an argument on each occasion), all of which were closely tied to the global economic crisis.

In September 2008, Babcock & Brown commenced selling some of its non-core businesses and assets in order to cover bad debts. This included sale of the half-completed Tamar Valley Power Station to Aurora Energy, a company owned by the Tasmanian State Government. The ACCC did not object to the acquisition, despite the result being that the Tasmanian Government would own all electricity generation assets in the State. It accepted that Babcock & Brown did not have the access to funds required to complete the project and that it was unlikely that any other party would purchase the half-built power station. On this basis, it concluded that without the acquisition, the construction and commission of the power station would be substantially delayed or terminated.

This decision was followed by the acquisition of BankWest by the Commonwealth Bank of Australia. The ACCC accepted that BankWest's historically aggressive price competition had been underpinned by cheap wholesale funds from global debt markets accessed through its parent, HBOS Plc. With HBOS suffering severe financial distress, the ACCC considered that BankWest would no longer be a strong competitor in the future. Although there was little evidence that BankWest would exit the market, it was decided that, as a result of economic credit conditions, a future under Commonwealth Bank ownership was not a substantially less competitive outcome.

Most recently, the ACCC did not oppose the acquisition of Hans Continental Smallgoods by P&M Quality Smallgoods (Primo). This decision has been reported as being the first time the failing firm argument has been unconditionally and explicitly successful in seven years. After a lengthy and unsuccessful sales process, the Hans business was placed into voluntary administration by its owner in 2008, at which time the administrator commenced a further sales process. After extensive inquiries, the ACCC concluded that unless acquired by Primo, Hans would be likely to cease trading imminently and would be liquidated by the administrator, with its assets likely to be lost to the industry permanently. In these circumstances, the ACCC considered that it was unlikely that the competitive situation would be much different with or without the acquisition by Primo.

Despite the increasing success of the failing firm argument in Australia, the ACCC has warned that the current economic climate will not result in merger regulation being relaxed. Financial distress alone is not sufficient to convince the ACCC not to oppose a transaction. Companies will be required to provide detailed financial data and evidence supporting the lack of any alternative purchaser or restructuring option that would result in a more competitive outcome. The Australian market is likely to see more parties involved in informal merger review adopting this argument. Their success will depend on clear evidence that the target is likely to fail without the acquisition and that this is not a better outcome for competition than its exit from the market.

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In recent months, the Federal Competition Authority (Bundeswettbewerbsbehörde, 'BWB') has stressed the importance of leniency applications. In this regard, it not only stated that it is 'highly satisfied' with the application of the system, but also filed new proceedings based on leniency applications (overall, the fourth case based on leniency). In merger cases, the Cartel Court twice reversed the BWB's competition assessment. Both transactions received clearance.

Antitrust/fines

New cartel in the chemical industry

The BWB has applied to the Cartel Court for the imposition of fines against four undertakings active in the chemical industry with regard to an alleged cartel at the wholesale level. The products concerned are chemicals used in the print industry. Two leniency applicants initiated the proceedings. According to the BWB's press release, the cartel took place from the mid-nineties until at least the end of 2007.

The BWB said that the fines requested were for an indefinite amount so that they could be calculated more precisely once the evidential process confirms the assertions of the BWB and once the participation of the non-leniency applicants has been determined.

According to the BWB, the alleged cartel comprised increases in prices, price cuts in order to force competitors out of the market, customer allocations (with adjusted bid-riggings) and the exchange of information with regard to conditions and payment arrangements (discounts and bonuses).

€1.5m fine against telecommunication operator

At the BWB's request, the Cartel Court has imposed a fine of €1.5m on Telekom Austria TA AG in respect of an alleged abuse of a dominant position. As all parties concerned (ie, Telekom Austria, BWB and the Federal Competition Attorney) waived their right to appeal, the decision is legally binding. No information about the content of the alleged abuse was published.

Cartel litigation

Margin squeeze

There are currently proceedings in front of the Cartel Court and the Commercial Court over the question of whether Telekom Austrian TA AG as a vertically integrated undertaking offered its customers broadband access on a price level which could not be followed by its competitors at the retail level due to an insufficient margin between the prices of Telekom Austria at a wholesale level and at retail level (so called margin squeeze). So far, requests for preliminary injunctions of Telekom Austria's competitors have been dismissed.

Merger control

Expert opinion forces parties to withdraw their merger notification

Two undertakings active in the scrap trade intended to merge their businesses (Scholz Austria GmbH, the market leader in Austria, acquiring 50 per cent of the shares in Gebrüder Gratz Ges mbH.). The BWB, in its Phase I investigations, concluded that there had been contradictory information concerning the market, which in itself was sufficient not to exclude a dominance in the respective market without further investigation. Therefore, both the BWB and the Federal Cartel Attorney requested Phase II proceedings in front of the Cartel Court.

The Cartel Court appointed an expert, who, in his written expert opinion, concluded that the merger would lead to dominance in the respective market (ie, collecting and processing iron scrap in Upper Austria), which could not be justified by any means and could not be avoided by reasonable commitments.

As a consequence of this, the parties withdrew their notification on 11 December 2008. However, the FCP still published the case, including a summary of the conclusions of the appointed expert.

Cartel Court twice reverses authorities' competition assessment

In two recent merger decisions in front of the Cartel Court, the court did not follow the arguments of the BWB. Both transactions got clearance, and both decisions are legally binding.

In the first case, two regional undertakings in Tyrol (IKB and DAKA) planned to merge their sewer business in a newly established joint venture ('JV'). Mainly due to disputes with regards to the geographical market definition, the BWB requested an in-depth examination (Phase II procedure) in front of the Cartel Court.

The undertakings concerned defined an extensive geographical market (comprising North and East Tyrol, Salzburg and Southern Bavaria), which would have resulted in a negligible market share of the JV. However, the BWB solely included North Tyrol in its market definition due to the fact that – in the BWB's view – orders came almost exclusively from this area and as there had been significant barriers for new market entries. Following the BWB's market definition, the common market share would have reached approximately 45 per cent in the relevant product markets.

However, the Cartel Court, after ordering an independent expert opinion, defined a different and broader geographical market, including North Tyrol, Salzburg and Southern Bavaria. The transport costs were considered to be insignificant and, due to the non-existence of trade barriers, services could also be provided cross-border. Within such a broader geographical market definition (with a market share of 'far below' 30 per cent) the Cartel Court considered there was sufficient competition and therefore granted clearance. As the BWB withdrew its right to appeal, the decision is legally binding.

An interesting aspect of this case is that the BWB stated that there had been market investigations, including interviews of competitors. However, due to lack of time (Phase I, administrated by the BWB, is strictly limited to four weeks), the BWB stated in its press release that customers could not be included in its investigation. This incomplete market investigation may also be a reason why the Court came to a different approach concerning both its market definition and its competition assessment.

In the second case, Styria Medien AG and Moser Holding AG intended to merge their activities on the free newspaper market to provide free weekly newspapers Austria-wide. The clearance decision of the Cartel Court (see our report in October 2008) was confirmed by the Austrian Supreme Court. Contrary to the BWB's (and the Federal Cartel Attorney's) view, both Courts defined a broader market definition (as regards both the geographical and product related market definition) and, in terms of an overall view, came to the conclusion that the pro-competitive effects of the transactions outweighed the negative ones.

General policy

Federal Competition Authority draws conclusion from its leniency programme

The BWB has said that it is 'highly satisfied' with its leniency programme, which was introduced on 1 January 2006. So far there have been three big cartel cases, which were based on leniency applications and which led to an aggregate fine of more than €77m for the undertakings involved. The three decisions were: *Austrian elevators* (€75.4m, 2008), *Industrial Chemicals* (€1.9m, 2009, not legally binding) and *Driving Schools in Innsbruck* (€70,000, 2006).

In a fourth case based on a leniency application, the BWB has filed a request for a fine to the Cartel court (for the time being, in indefinite amount). For details, see above.

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President of Competition Council rejects request for interim measures to protect parallel trader

In a decision on 2 April 2009, the President of the Competition Council confirmed a decision from the Council's prosecutor in which a request for interim measures filed by a parallel trader against a series of pharmaceutical companies had been rejected.

The case followed a complaint and a request for interim measures filed by Bofar, a pharmaceutical wholesaler active in parallel trade. Bofar claimed that a number of pharmaceutical companies had significantly reduced supplies of pharmaceutical products or even stopped supplies entirely, notwithstanding the existence of an established commercial relationship between Bofar and these suppliers. Bofar claimed that the pharmaceutical companies acted in a concerted way in violation of Article 2 of the Belgian Competition Act and Article 81 EC Treaty and that their behaviour constituted an abuse of dominance. An important factual element was that Bofar was only engaged in parallel exports out of Belgium. It did not sell pharmaceutical products in Belgium.

In its decision on the requested interim measures, the prosecutor stated that there was no prima facie competition law infringement. Bofar appealed this decision before the President of the Competition Council, but limited its appeal to the claim of an abuse of dominance.

The President first clarified that a number of the defendants had not (significantly) reduced supplies and that in the case of some defendants, there was no pre-established commercial relationship. With regard to the defendants that had significantly reduced or stopped supplies and that had a long-standing commercial relationship with Bofar, the reasoning of the President heavily draws on the *Syfait II* judgment from the Court of Justice (Joined Cases C-468/06 to 478/06, *Sot Lelos ea/GlaxoSmithKline*, judgment of 16 September 2008). In that judgment, which was rendered after the prosecutor's decision was appealed by Bofar, the Court of Justice held that it is not abusive for a pharmaceutical company to refuse to meet orders of pharmaceutical products that are out of the ordinary (in the light of the size of those orders, the requirements of the national market and the previous business relationship).

The starting point in the President's decision is the right of any undertaking, whether dominant or not, to choose its trading partners. In addition, the President confirms the right of a dominant undertaking to protect its commercial interests. For a pharmaceutical company, this right may take the form of restricting parallel trade. The President adds that it does not constitute an abuse of dominance for a pharmaceutical company to reduce supplies to a parallel trader exclusively selling on export markets. The President further notes that in this particular case, there was evidence of parallel trade by other parties than Bofar. The defendants did not therefore eliminate all parallel exports. The President recalled, with reference to the *Syfait II* judgment, that such a practice would constitute an abuse.

In the absence of a prima facie infringement of Article 82 EC Treaty and/or Article 3 of the Belgian Competition Act, the President rejected the request for interim measures.

The decision closely follows the Syfait II precedent. However, an important difference between the *Bofar* and the *Syfait II* cases is that in the Belgian case, the parallel trader was exclusively selling on export markets. This fact was a decisive element in the decision of the President.

No further appeal is possible against the decision of the President. However, the decision only relates to the request for interim measures and the case remains to be analysed on its merits.

Competition Council conditionally clears Belgacom/Scarlet concentration

In a decision on 7 November 2008, the Belgian Competition Council cleared the concentration between Belgacom and Scarlet, after a turbulent and lengthy procedure taking eight months between notification and clearance. The Council attached a number of conditions and obligations to its decision.

Belgacom is the incumbent Belgian

telecommunications operator offering a wide range of electronic communications services, including fixed and mobile telephony, internet and television. Scarlet is a small 'no frills' operator offering a limited number of telecommunications services on the Belgian market. Although Scarlet's market share is relatively modest, the Competition Council viewed Scarlet as an innovative company making markets more dynamic. In addition, Scarlet had its own network that it also leased to third parties.

In its final decision, the Competition Council focused on two activities: retail broadband internet access and retail fixed telephony markets. The Council noted that in the first market, Belgacom had a market share of about 50 per cent. The other operators in this market are the cable operators, with a combined market share of 30–40 per cent, and a number of alternative DSL operators, including Scarlet, with smaller market shares. As a result of the proposed concentration, Belgacom would have added a few percentage points to its existing market share, reaching a market share of more than 50 per cent. Even if the increase in market share was limited, the Competition Council considered that the exit of Scarlet would lead to a qualitative difference in the market structure. The Competition Council indeed attached importance to the role of alternative DSL operators as a source of competitive pressure in the market. The Council took the view that a duopolistic market structure with Belgacom on the one hand and the cable operators on the other hand was not optimal. The Council further confirmed its initial doubts on the transaction in the retail fixed telephony markets. In the overall analysis of the Competition Council, the presence of Scarlet's network played an important role.

The Competition Council eventually cleared the proposed concentration on the basis of a comprehensive remedy package. The remedies are both structural and behavioural. The key remedy was the obligation for Belgacom to divest the Scarlet network. Other remedies include the option for Scarlet customers to switch operators without incurring financial sanctions, a commitment to maintain the existing Scarlet concept and brand under the same commercial conditions for at least three years, and some tariff commitments. Belgacom also committed to observe Scarlet's existing wholesale contracts, including its dark fibre lease contracts. The Competition Council noted that more far-reaching commitments would make the concentration devoid of any purpose. The Council further stressed that its approach was strictly based on competition law and that its analysis could not go beyond an assessment of the impact of the proposed concentration on the market structure. The Council referred other possible measures that had been requested by third party complainants but that were not directly related to the concentration to the sector regulator.

Brazil

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Increased competition in the aviation sector resulting from regulatory and judicial decisions

The heated debate about competition among airline companies has always placed those in favour of regulation and more government against those in favour of more competition and less government. This has been no different in Brazil where the first deregulatory measures in the aviation industry took place in the early 1990s. In spite of the snail's pace of the deregulatory movement, the liberal policy had devastating effects for several inefficient companies. Even so, many aspects of the aviation industry continue to be highly regulated. To make things worse, experts argue that many regulatory rules unduly restrict competition.

One good example is the minimum price for international flights with a Brazilian destination and origin – the reason for such a restriction would be that local companies are subject to a very burdensome taxation regime and the minimum price would level the playing field between Brazilian and international airlines.

Regulatory restrictions with an impact on competition are particularly true when they involve the aviation infrastructure in the airports. In this regard, another example is the existing high capital requirements for entrants which create unnecessary difficulties for entrants. Besides the restrictive regulations, Brazilian airports are operating close to the installed capacity which is said to create economic stimulus for abuse of a dominant position.

The Secretariat for Economic Surveillance (Secretaria de Acompanhamento Econômico, SEAE), a branch of the Brazilian Antitrust Authorities in charge of promoting competition advocacy, has been pushing for the liberalisation of regulatory reforms since 2006, when it issued a report strongly criticising the existing criteria used to determine how entrants are screened and with suggestions about how the airport slots should be divided to foster competitive pressure from entrants.

Under increasing pressure, the Aviation Regulatory Agency (Agência Nacional de Aviação Civil, ANAC) has softened the policy on the minimum price for international flights. From 1 September 2008, airline

companies have been allowed to freely set the ticket prices for flights with Latin American destinations. This was the last stage of a reform beginning on 1 March 2008 which used to allow airline companies to grant up to 30 per cent discounts on the minimum price established in the regulations.

Following this change, the ANAC agreed to soften the price restrictions on international prices with other destinations. On 21 November 2008, the ANAC passed Resolution 61, which allowed airline companies to grant up to 20 per cent discounts for international flights with destinations outside Latin America. More importantly, the governmental restrictions on pricing are set to disappear on 1 January 2010, when the price of every international airline ticket will be freely set. The ANAC's plan is to increase competition to lower prices.

It is not only the SEAE which has been pushing for pro-competitive regulatory changes. The Brazilian courts have also begun to play an active role.

Following a request by Azul Airlines, a new entrant in the Brazilian market, the ANAC denied authorisation to operate regular flights between Santos Dumont (Rio de Janeiro's central airport) and Viracopos (Campinas' airport), as well as between Santos Dumont and other Brazilian airports. The ANAC dismissed Azul's request on the basis of an administrative rule with the objective of limiting the air traffic at Santos Dumont in order to stimulate the use of Galeão (Rio de Janeiro's airport located in the suburbs).

However, the entrant airline commenced proceedings before the Federal Courts to ask for an authorisation in the lieu of the regulatory agency. One of the main arguments was the restrictive feature of the existing regulations which would collide with constitutional principles of free competition. Federal judge João Batista Moreira agreed with Azul's arguments and ruled that the ANAC should reconsider its decisions within ten days, since 'airline companies hold a public concession to exploit domestic airline services without any restriction except previous ANAC's registration. If there is the idle operating capacity in the airports, there is no ground for the regulatory restriction'.

Following the court's decision, the ANAC was forced to review its regulation and in practice, a substantial entry barrier was removed. The decision may bring to an end the duopoly in many domestic airline routes, in which only the two dominant companies operate. On the same occasion, the ANAC also revoked another restriction on the large airplanes and longer flights operating at Santos Dumont – a new regulation now allows airplanes with more than 50 seats and with other destinations than Congonhas (São Paulo's central airport).

Uproar between the Brazilian Antitrust Authorities (CADE) and the Central Bank expected to end

Since the late 1990s, CADE has been trying to reaffirm its competence to decide on mergers and acquisitions in the Brazilian financial industry. The controversy results from contradictory provisions about the competence of the Brazilian Central Bank and CADE:

(i) The Financial Regulation Law, passed prior to the Antitrust Law, empowers the Brazilian Central Bank to clear mergers and acquisitions in the financial sector – as *lex specialis derogat lex generalis*, the Financial Regulation Law would exempt the banking industry.

(ii) The Antitrust Law does not provide for any exemption and states it is applicable to every industry – the lack of exceptions in the Antitrust Law would empower CADE to analyse mergers and acquisitions in the financial industry.

As with every legal debate, both sides have developed consistent arguments. As the dispute took place among several Brazilian governmental entities, the President endorsed the legal opinion of the Federal Attorney-General on 5 April 2001 and decided in favour of the Central Bank – CADE should no longer insist on the competence to clear transactions in the financial industry. Nevertheless, based on the notion of independence of the regulatory agencies, CADE did not accept the Executive Order and continued to analyse transactions in the financial industry. Needless to say, such a dispute caused great regulatory uncertainty.

At least one case was brought to court involving the application of the Executive Order. After analysing a merger not subject to the exemption, CADE discovered that the acquisition of BCN by Bradesco, which had happened almost five years earlier, had not been notified to CADE and determined that both banks should request the antitrust clearance. Both BCN and Bradesco disagreed with CADE's decision, challenged it before the courts and appeal courts and obtained a favourable injunction. In 2007, after several decisions favourable to the exclusion of the antitrust control, the judges of an appeal court concluded the acquisition was subject to CADE's clearance. When CADE finally obtained a favourable decision, the then Attorney-General and now CADE President, Arthur Badin, stated that the banks would have to notify all mergers and acquisitions in the financial industry which had not been notified.

From the end of 2008, both CADE and the government began to negotiate an intermediate solution, which forms part of the government's bill under analysis at the National Congress: CADE will be able to analyse the financial industry except when there is a threat of systemic risk and the Central Bank will decide whether there is systemic risk. The bill clearly recognises that mergers and acquisitions in the financial industry have specific features recognised by both regulators and competition authorities. The pivotal role of financial institutions in the smooth

operation of the economic system was highlighted during the recent economic crisis and uncertainty is the least desirable adverse regulatory effect that a policy-maker could wish.

As a result, some sources argue that there would be an amnesty for non-notified mergers. These rumours coincided with the execution of an administrative agreement between CADE and the Central Bank in order to increase institutional cooperation and dialogue. Both entities asked the Federal General Attorney to reevaluate the 2001 Executive Order and this request was used by CADE to halt the trial of the Bradesco/BCN case which was on the docket of a higher court.

After a long period of uncertainty, it seems more important to have certainty rather than a discussion about the optimal regulatory solution, especially when the world financial crisis is shaking well established financial markets. The Brazilian Central Bank was actively engaged in promoting the acquisition of broken banks by larger, healthier banks without considering any antitrust concern. Compared to the late 1980s, there are fewer banks in Brazil today, although the concentration ratio is still below several developed markets like the United Kingdom, Japan and France. Fortunately, analysts say this policy was correct and insulated Brazil from the worst effects of the world financial crisis.

Canada

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Significant amendments to Canada's Competition Act and Investment Canada Act now in force

On 6 February 2009, the Canadian Government tabled the Budget Implementation Act, 2009 (Bill C-10)[1] before Parliament to implement the provisions of the new federal budget, including far-reaching amendments to the Competition Act and the Investment Canada Act. Bill C-10 received royal assent and came into force of law on 12 March 2009.

Significant amendments to the Competition Act include:

- the establishment of a dual-track approach to agreements between competitors, with a per se criminal anti-conspiracy provision aimed at price-fixing, market allocation, and similar hardcore conduct, and a civil provision to address other agreements that substantially prevent or lessen competition;
- the repeal of the criminal provisions dealing with price discrimination, promotional allowances, and predatory pricing, thereby leaving them under the civil provisions of the Act (ie, abuse of dominance);
- the replacement of the criminal resale price maintenance provision with a new civil provision that will address situations where price maintenance is having an adverse effect on competition;
- the introduction of administrative monetary penalties for abuse of dominance;
- increased potential fines and terms of imprisonment for, among other things, conspiracies, bid-rigging, obstruction, and failure to comply with a prohibition order;
- the introduction of an initial 30-day waiting period followed by a possible demand for more detailed information for mergers that raise substantive competition issues;
- increased thresholds for pre-merger notification; and
- the Commissioner of Competition's right to challenge a merger before the Competition Tribunal will be limited to a period of up to one year after closing, as opposed to the current three years.

The Investment Canada Act applies to the acquisition of control of a Canadian business or the creation of a new Canadian business by a non-Canadian investor. Significant amendments to the Act as a result of Bill C-10 include:

- increased financial thresholds (based on 'enterprise value' of assets) for triggering review – C$600 million for the first two years following the implementation of the relevant provision (which is not yet in force), C$800 million for the following two years, and C$1 billion thereafter, adjusted annually for inflation;
- all investments – even those that do not amount to an acquisition of control – may now be reviewed on grounds of whether they are likely to be injurious to national security (the term 'national security' is left undefined); and
- the federal Cabinet now has broad powers over investments that raise national security concerns, including the power to block transactions or impose terms and conditions prior to authorising the investment.

Companies considering transactions that could trigger the application of the Competition Act or the Investment Canada Act should be mindful of the amendments that have been implemented as a result of Bill C-10 – notably, the revised initial waiting period and possibility of a supplementary information request under the Competition Act and the introduction of a national security test under the Investment Canada Act. Companies are also encouraged to review key agreements to ensure compliance with the Competition Act, given the introduction of a per se criminal anti-conspiracy provision aimed at price fixing, market allocation, and similar conduct.

Notes

1 The full text of Bill C-10 is available at: **www2.parl.gc.ca/HousePublications/ Publication.aspx?Language=E&Parl=40&Ses=2&Mode=1&Pub=Bill&Doc=C-10_4**.

Colombia

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Comcel declared dominant by the Telecommunications Regulatory Commission

The Colombian Telecommunications Regulatory Commission (CRT) has published the results of a study into relevant markets, carried out over several months in order to regulate competition between telecom operators and to help prevent the anti-competitive practices that currently occur in this sector in Colombia. The purpose of the exercise was to establish regulatory measures against the abuse of the dominant market position exercised by Comcel, a subsidiary in Colombia of América Móvil, a company owned by Mexican tycoon Carlos Slim.

After the study started, the Colombian subsidiary of América Móvil submitted a document to the CRT substantiating its position and rejecting the Bill that would declare it the dominant player, as this would place its rates under regulation. Comcel's stance was sent to the CRT during the project's public consultation.

In late December 2008, the CRT made public the draft defining relevant markets and dominant positions in telecommunications converging markets. This classified Comcel as a dominant operator, meaning that its rates could be regulated. The mobile phone company believed that 'the proposed regulation would have deep and permanent negative effects on mobile telephony's competition'. Comcel concluded that CRT's decision and its original analysis were based solely on the size of the company's market share.

According to figures from the Superintendence of Industry and Commerce (SIC), Comcel holds 66.3 per cent of the market, with its 27 million cell phone lines in late 2008. Movistar reached 9.95 million customers, representing 24.5 per cent of the market. Tigo holds nine per cent participation, with 3.7 million lines.

The main points at issue were the rates for Comcel's off-net calls, that is, the price of calls made to other operators different from Comcel. These are the rates that could be subject to the CRT monitoring, according to the draft regulations of relevant markets.

After the consultation phase of the project had closed, Christian Lizcano, Director of the CRT, reported that 14 companies and organisations, as well as Comcel, had submitted their views on this topic. He added that he hoped the relevant market rules would come into force before the end of February. This finally happened on 10 March 2009 with the publication of four resolutions.

Under these resolutions, the CRT adopted regulatory measures to safeguard the right to free competition. It set pricing rules associated with the calls made by Comcel subscribers to other mobile operators in the country. It also defined the conditions under which the operator must make available content to providers and a wider application to implement various services such as tele-health, tele-banking and education via mobile phone.

Adrian Hernandez, President of Comcel, expressed his disagreement with the upcoming measures to the Colombian press early this year. Mr Hernandez insisted that the operator has the largest number of clients as a result of high investments made over a long period of time, and the high credibility of the company among its users. He said the company considered that the regulation of off-net fees would not generate the expected results because if Comcel lowered its rates, this would increase call traffic, further increasing their income and lead to more 'punishment actions' from the regulatory body. He added that if Comcel's growth slowed down, the company would decline to invest further in Colombia.

Other mobile phone operators and Avantel (a Mexican telecommunications and satellite company) expressed their support for the CRT's proposal, stating that it would benefit both competitors and users. Moreover, Avantel believed that the measure was limited, when considering the asymmetry of the market.

The CRT also ruled out allowing mobile virtual network operators (MVNOs) to operate in the country without a license. Mr Lizcano stressed that the CRT would not allow the use of a well-established infrastructure without licensing fees. This possibility was considered because the project could force Comcel to sell wholesale minute packages or traffic packages to a third party, to be sold in turn to other companies in the market.

However, Mr Lizcano told the Colombian newspaper La Republica that it was not the CRT's goal 'to allow competitors to enter a market without making investments that other well-established firms had already made,' or for 'Comcel to make a public offer of a large bag with millions of minutes or network capacity that can be used by another company'.

The possibility of a MVNO using Comcel's network or one belonging to another operator is prohibited by the current legislation, which dictates that operators can only be those companies that go through a public bidding process to enable them to provide the service.

Because of this, Comcel is eligible for a set of pricing rules that will lead to a decrease in the price of calls to other networks in a matter of days. This would happen as soon as the CRT issues a firm decision, which may be subject to legal challenge. If it failed to abide by

these rules, Comcel would be exposed not only to the sanctions of the Superintendence of Industry and Commerce, but possibly even to the cancellation of its operating license by Colombia's Ministry of Communications.

The CRT has clarified that the decisions regarding Comcel were taken by individual administrative actions that are now in the notification stage and, therefore, subject to remedies under Colombian law.

Croatia

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Competition Agency's decision on abuse of dominant position by Zagreb Airport

In a rare recent abuse case (during 2008 there were no published decisions on the abuse of dominance), the Croatian Competition Agency ('the Agency') found that Zagreb Airport and its catering subsidiary had abused its dominant position in the market for transport and loading/unloading of food and drinks for aircrafts. The procedure was initiated by a complaint filed by Croatia Airlines, the national airline operator and major customer of the Zagreb Airport. The Agency's decision was rendered on 26 March 2009 and is not yet available in full text. However, publicly available data reveals certain elements of the decision which appear to be precedents in the current practice of the Agency and could be of particular interest to practitioners and scholars.

At the outset, the geographic dimension of the relevant market has been defined narrowly. The Agency has confined the relevant market to the area of the Zagreb Airport. Obviously, such narrow definition of the relevant market is mandated by the characteristics of this particular case and of the services in question. However, it also shows that the Agency is prepared to approach the required analysis on a case by case basis and when necessary, deviate from the general rule of the Competition Act and Regulation on the Relevant Market when the relevant market should be defined as the territory of the Republic of Croatia. One of the direct consequences of such a narrow market definition is the straightforward conclusion on the dominant position of the Zagreb Airport which holds a monopoly in the relevant services.

The Agency found that the Zagreb Airport and its catering subsidiary had abused their dominant position in two different ways. First, they refused to provide services to Croatia Airlines for a certain period of time. Secondly, after the services had been re-established (it appears that the continuation of the services was ordered by the competent Ministry of Transport), the catering subsidiary of Zagreb Airport imposed unfair and unequal prices for its services. In other words, the Agency has analysed and established two types of abuse: refusal to supply and exploitative pricing. It will be interesting to see the detailed reasoning behind this decision especially taking into account the fact that the procedure was initiated by Croatia Airlines while the inequality of prices was inter alia established precisely because of large discounts offered to Croatia Airlines (ie, to the complainant). Also, the reasoning behind the allegation of 'unjust prices' is viewed as being economically grounded.

The whole case is characterised by significant State involvement. On the one hand, it follows from the available data that the competent ministry (Ministry of Transport) was authorised and willing to act with regard to the irregularity in the market behaviour of Zagreb Airport. More importantly, the Ministry has apparently exercised its authority and ordered Zagreb Airport to resume providing services to Croatia Airlines. Zagreb Airport has complied with the order and thus rectified its allegedly abusive behaviour. In these circumstances, it is doubtful whether there was any room or call for the Agency's subsequent action.

On the other hand, it appears that the Agency has not analysed the close capital affiliation between Zagreb Airport as the defendant and Croatia Airlines as the complainant. More specifically, from the publicly available data, it follows that the Republic of Croatia has a controlling influence in both Zagreb Airport (55 per cent) and Croatia Airlines (more than 90 per cent). This fact might have been relevant in the context of the competition law analysis and the single entity doctrine but also from the perspective of rules of Croatian administrative procedure that require some kind of 'legal interest' for filing a complaint. Arguably, entities belonging to the same group would not have such an interest. Regrettably, publicly available data does not reveal whether the Agency has looked at these issues at all.

Taking into account all of the above, the publication of the complete decision is eagerly awaited by the professional community not only because it is one of rare and thus precious decisions on the abuse of dominance, but also because it considers many interesting elements not yet developed in the Agency's practice.

Czech Republic

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Criminalisation of certain horizontal cartels

The new Czech Criminal Code (Act No 40/2009 Coll) will enter into effect on 1 January 2010. The general tendency is towards a certain decriminalisation of economic activities and it is hoped to lead to more efficient criminal proceedings compared to the old Criminal Code 140/1961 Coll dating back to communist times which is not able to deal with present day circumstances.

One of the main points of interest is the introduction of prison sentences of up to three years for anyone entering into agreements with a competitor on price fixing, market sharing or other (horizontal) agreements with anti-competitive effects (section 248 (2) of the new Criminal Code). The maximum prison sentence will increased to between six months and five years if such an act has been committed as member of an organised group, has been repeated, or considerable damage or profit for the guilty party was made. Such considerable damage or profit is defined by the Code as being above CZK 500,000 (€18,000). Should the damage or profit made be above CZK 5 million (€180,000) or such behaviour leads to insolvency of a third party, the minimum prison sentence is raised to a period of between two and eight years. Should the prison sentence be above three years, no alternative probation period is possible (section 81 (1)), which means a jail sentence is inevitable.

Certain anti-competitive behaviour has, of course, been a criminal act in the past. In addition to bid-rigging, there is a general clause dealing with 'severe breach of the rules of economic relations and unfair competition'. Section 127 of the old Code threatened prison sentences of up to two years for such behaviour. Since the reintroduction of antitrust law in the Czech Republic in 1991, however, no member or actor in a Czech cartel has ever had to face criminal court proceedings.

The reason for the new provisions as pointed out by the lawmakers is that, according to international trends, the most effective deterrent against cartel behaviour is the criminal prosecution of those who carry it out. According to the draft of the Code, the new provisions merely serve as more precise wording of the prior law.

Severe – though late – criticism has come from the Czech antitrust community, pointing out first that the wording 'another agreement disturbing economic competition' is too far reaching and may affect any horizontal cartel. Due to this far reaching description, there have been concerns about the constitutionality of this provision.

Moreover the wording that the cartel agreement must be entered into with a competitor will probably mean that almost no cartels will be punished. Considering the strict interpretation required in criminal law, a manager in a company entering into a cartel agreement is not entering into such agreement with a competitor but only with persons acting for a competing company. In our opinion, such a defence will be successful in all cases unless there are only natural persons acting as entrepreneurs.

Neighbouring Slovakia already has more experience with the practical application of criminal law in cartel matters and does not have the requirement of an 'agreement with another competitor'. But even there, the wording of § 250 Slovak Criminal Code causes major problems in practice.

The Czech Antitrust Office – unlike other antitrust authorities – does not have the powers to carry out criminal investigations. In the experience of the Czech business community, the police and state prosecutors, as well as criminal courts, do not have the economic understanding to investigate economic offences. Unless there is a final decision by the Czech or European antitrust authorities, it is scarcely imaginable that a meaningful criminal investigation can ever be executed.

Critics have in addition pointed out that even though it is unlikely that this new provision will be applied in practice (an opinion shared also by the Czech Antitrust Office, which, nevertheless, supported the provision), it may still have a negative effect on the willingness of companies to cooperate with the Office. In particular, fears were expressed that the leniency programme that the Czech Antitrust Office modernised in the summer of 2007 will lose most of its incentive when a company applying for leniency must be aware that its directors or some key employees might be prosecuted and that in the case of a significant cartel with high damages, they could go to jail or at least be prohibited from any entrepreneurial activity for many years after being prosecuted under the criminal law. The same will apply for settlements – a more frequent practice in the last years – as the criminal prosecution is not at the disposal of the Antitrust Office.

As there is still time left before the new Criminal Code enters into force, hopefully some of these issues can be resolved before 2010.

Denmark

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Danish competition authorities focus on trade organisations

The Danish competition authorities have recently displayed an increased interest in the activities of trade organisations. In four recent cases the authorities have investigated the distribution of information from trade organisations to the members.

ITD

A recent decision of the Danish Competition Council on trade organisations, published on 12 February 2009, concerned International Transport Danmark (ITD), a trade organisation for haulage transporters in the Danish transport and logistics sector. In the decision, the Danish Competition Council found that ITD had infringed section 6(1) of the Danish Competition Act and the corresponding Article 81(1) of the EC Treaty by distributing certain information to its members.

ITD's members are made up of approximately 420 haulage transporters that transport goods to and from Denmark. The members also provide transport within Denmark. According to the Danish Competition Council, there were two relevant product markets: one market for the national transport of goods and one for international transport. The geographical market was comprised of a number of markets for the transport of goods to and from Denmark, which included in particular Sweden, Norway, Germany, Belgium, and Austria.

The information distributed by ITD was comprised of a number of cost calculation programmes, which the members could use for calculating their own costs and prices. Parts of the data were added to these programmes in advance. For example, data on profit margins was provided, which could be used to standardise the members' transport pricing. Furthermore, ITD supplied its members with a future cost prognosis and a statement on wait tariffs included in ITD's standard contract. Finally, the Competition Council found that ITD had encouraged its members to pass cost increases, among these fuel costs, on to customers. These measures were considered restrictions on competition, and ITD was deemed to have infringed section 6(1) of the Danish Competition Act and Article 81(1) of the EC Treaty.

DTL

The decision in the *ITD* case above follows an earlier case regarding Dansk Transport & Logistik (DTL), also a trade organisation in the Danish transport sector. In the *DTL* case, decided on 17 December 2008, the Council found that the information distributed by the organisation to its members risked reducing competition between its members.

Similar to ITD, DTL had provided their members with a fuel surcharge and cost calculation programme, where the organisation, in some cases, had inserted estimated figures. Furthermore DTL had indicated the expected rise in profits to their members and urged them to pass on cost increases to customers. The council found that this conduct was in conflict with section 6(1) of the Danish Competition Act. The Council's decision of 2008 follows an earlier decision from 1998, also regarding DTL's calculation programmes. In 1998, the Council's conclusion was that the programmes were not contrary to the law. The Council argued that because it had been ten years since its last examination, and the fact that the circumstances under which the information and figures were published to members had changed, this had led to a different result.

DTL is currently challenging the Danish Competition Council's decision before the Competition Appeals Tribunal.

Danish producers of Christmas trees

On 17 February 2009, the Court of Frederiksberg found that the Danish trade organisation for the producers of Christmas trees and its director had infringed section 6(1) of the Danish Competition Act. The infringement took place in the form of price statistics published in the period between August 2002 and August 2006. The statistics included an overview of the previous years' prices and a recommendation to charge the same prices next year plus a surcharge. Additionally the trade organisation arranged meetings to discuss prices in order to discourage members from offering lower prices to customers, which included Danish and foreign buyers of Christmas trees.

During the proceedings, the Public Prosecutor for Special Economic Crime had emphasised the fact that the Danish Competition Authority had in 2001 required the trade organisation to cease publishing the price statistics. Although price recommendations in the time before 2002 were time barred from the proceedings, the court found that this constituted aggravating circumstances.

The court levied a fine of DKK 200,000 (approximately €27,000) on the trade organisation and the director received a fine of DKK 15,000 (approximately €2,000). In setting the level of the fine, the court acknowledged that the trade organisation had cooperated with the authorities during the investigation and had not attempted to withhold information.

Danish bus companies

The latest case involving a trade organisation is a judgement from the City Court of Copenhagen on 1 April 2009, finding that a trade organisation of Danish bus companies (DB) had infringed section 6(1) of the Danish Competition Act. The trade organisation had sent three letters to its members in 2005 and published an article in its trade paper encouraging them to add a special four per cent oil surcharge to their invoices. Furthermore, DB on more than one occasion had encouraged its members to add the surcharge in unison on a given date as the members otherwise would be reluctant to do so due to the intense competition in the market.

In addition to the director of DB, the Public Prosecutor for Serious Economic Crime also requested that the court fine the deputy director as he had been responsible for sending the abovementioned material to DB's members.

The court levied a fine of DKK 1 million (approximately €134,000) on the DB. The director and the deputy director received fines of DKK 35,000 (approximately €4,700) and DKK 25,000 (approximately €3,400) respectively, corresponding to one month's net pay. The trade organisation is comprised of about 500 members that operate over 3,500 buses in Denmark.

DB has stated that the judgment will be appealed in the High Court of Denmark.

Finland

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Reform of the Finnish Competition Act

In June 2007, the Finnish Ministry of Trade and Industry appointed a working group to assess the need to reform the Finnish Competition Act. In its final report published on 29 January 2009, the working group proposed the enactment of a new Finnish Competition Act, with the following main changes to the current regime.

Sanctions

There has been some debate whether the Finnish sanctions for competition law infringements are low by international standards. The proposals of the working group – including a more mechanical calculation of fines largely in line with the European Commission's fining guidelines – would arguably entail not only better predictability, but also higher fines at least for hardcore cartels. New rules on succession liability and limitation periods are likewise intended to increase enforcement efficiency. The working group furthermore assessed whether criminal sanctions and/or trading prohibitions should be introduced, but concluded that the current system with administrative fines is preferable.

Leniency

The Finnish leniency programme adopted in May 2004 is largely modelled on that of the European Commission. There have nonetheless been some notable discrepancies. Even a company that has coerced other companies to participate in a cartel may, for example, presently benefit from total immunity of fines. Furthermore, the prerequisites for reductions of fines are not very specific. The working group proposed that these discrepancies be remedied and specific fine reduction percentages introduced. The leniency procedure would also be streamlined.

Damages

Only undertakings are entitled to claim damages on the basis of the Competition Act currently in force. The working group proposed the removal of this restriction, which would also enable consumers and public bodies to claim damages. Furthermore, the relevant limitation period would be adjusted to facilitate private enforcement actions.

Procedure

According to the working group, it is essential that the Finnish Competition Authority (FCA) is able to handle matters with sufficient speed and efficiency. The FCA would have the right to prioritise certain matters. Accordingly, it would have wider decision-making discretion to cease the handling of cases, for example if overall competition is deemed to function in spite of the competition restriction under investigation. Such FCA decisions could be appealed to the Market Court only when a leave to appeal is granted.

Inspection powers

Currently, the FCA is entitled to assist in the inspection of private premises only if requested to do so by the European Commission in relation to suspected infringements of Article 81 or 82 EC. The working group proposes corresponding powers also when the FCA investigates infringements of the Finnish

Competition Act. Inspections of private premises would always be subject to the Market Court's prior approval.

Rights of defence

Although companies' rights of defence have been recognised, there have been no explicit stipulations in the Finnish Competition Act. In line with the emphasis on due process issues in international competition law enforcement, the working group proposes the codification of central principles such as access to file, privilege against self-incrimination, legal privilege, and the right to be heard.

Merger control

The current filing thresholds would remain, but a new substantive test would replace the dominance test. The proposed SIEC test (significant impediment to effective competition) corresponds to that applied by the European Commission. The Finnish merger control procedure would also be further aligned with its EU equivalent. Proposed amendments include the abolishment of the filing deadline and the introduction of a possibility to file on the basis of a good faith intention. A 'stop the clock' possibility would also be available.

The working group's proposal for a new Finnish Competition Act is welcome, as the systematic structure of the current one has suffered from several partial reforms. Many of the working group's individual proposals are also logical next steps to the most recent amendments in May 2004, when the material provisions on anti-competitive agreements and abuse of dominance were harmonised with Articles 81 and 82 EC.

However, the report of the working group also contains elements that merit further discussion. Certain proposed provisions could preferably be clarified in order to ensure an even better balance between enforcement efficiency and due process. Consequently, there has been some debate as the reform package has proceeded through a public consultation that ended in April 2009. Further preparatory measures will follow at Government and Parliamentary level. Once approved, the new Finnish Competition Act is expected to enter into force in 2010.

France

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As announced in our former report, the *Autorité de la Concurrence* has been set up based on Law no 2008-776 of 4 August 2008 (loi de modernisation de l'économie) replacing the Conseil de la concurrence for the antitrust and economic division of the Ministry of Economy (DGCCRF) for the investigation proceedings and control during mergers.

The members in charge of the judgment section were appointed on 28 February 2009 and a general rapporteur and heads of services were appointed on 5 March 2009.

The main decisions of Autorité de la Concurrence (and Conseil de la concurrence) since the beginning of 2009 include the following:

- The Autrorité de la Concurrence has fined Gaz et Electricité de Grenoble €320,000 because it was found to have abused its dominant position in the market for supplying electricity to small businesses in 2005.
- The Conseil de la concurrence has issued a decision fining the French national rail operator SNCF a total of €5 million and Expedia a fine of €500,000 for favouring its subsidiaries running the website 'www.voyages-sncf.com', and in particular its subsidiary created jointly with Expedia, 'www.Agence.Voyages-sncf.com', to the detriment of its competitors. SNCF has also made substantial commitments regarding its future behaviour, which will make it much easier for travel agencies to sell rail tickets online.
- The Conseil de la concurrence has also imposed fines on Adecco, Manpower and Vediorbis for collusion in order to limit competition between them by coordinating their commercial policy regarding their biggest clients, between March 2003 and November 2004. Adecco, Manpower and Vedior, three of the world's leaders in human resource services, cover 70 per cent of the French market and satisfy 90 per cent of demand from 'major accounts'. Adecco, Adia and VediorBis opted not to contest the charges brought against them, and undertook substantial commitments regarding their future behaviour. In view of this, the three companies received a reduction in their fines. The total amount of the fines imposed was €94.4 million (Manpower: €42 million; Adecco: €32.5 million; Adia: €1.7 million; and VediorBis: €18.2 million).

The Autorité has taken its two first decisions in the field of the merger since its creation.

Germany

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Germany begins to embrace Airtours criteria

Until recently, the German Federal Cartel Office (FCO) used a 'checklist' approach for the analysis of collective dominance cases. Guidelines that it had published in 2005 set out a number of criteria that could be of relevance in the analysis, including market shares, the balance of power within the oligopoly, links between the leading players, demand side power, maturity of the market, actual competition, transparency and product homogeneity. When prohibiting mergers, the FCO tended to use these criteria selectively, relying more heavily on those that came in handy in the particular case. While market transparency might be mentioned in passing, it was not the cornerstone of the analysis. In a number of decisions, the Düsseldorf Court of Appeal agreed with this approach.

This rift between German and European practice is being closed. The Federal Court of Justice (Bundesgerichtshof, BGH) in a decision on 11 November 2008 finally endorsed at least part of the Airtours approach (docket number KVR 60/07 – *E.ON/Stadtwerke Eschwege*). With an explicit reference to Airtours, the BGH said that market transparency and the existence of deterrents were decisive criteria. The BGH did not refer to the third Airtours criterion (inadequate reaction from competitors or consumers) as such. Instead it went on to explain that other factors had to be taken into account as well, such as symmetry between the leading enterprises, barriers to entry, demand side power, price elasticity, product homogeneity, links between the oligopolists and actual competition. Some of these factors fit nicely into the third Airtours criterion (eg, barriers to entry and demand side power), but it is not yet clear that the old 'checklist' approach has been abandoned completely. Cases that the BGH will hear later this year will show whether the endorsement of (most of) Airtours means there really is no longer a divide between German and European practice. At least the FCO has issued a statement that only those guidance documents that are still on its website are of relevance. The 2005 guidelines are no longer among them.

Hungary

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Modification of the Hungarian Competition Act

On 1 June 2009, several changes of the Hungarian Competition Act enter into force. The new cartel-busting provisions are particularly noteworthy. A new merger test will also be introduced.

Legal presumption of ten per cent damage payable by the cartelists

According to the new provisions, it is legally presumed that the hardcore cartel (ie, price fixing, market sharing, limitation of production or sales) caused a price increase of ten per cent. Thus, if the Hungarian Competition Authority (hereinafter GVH) or an administrative court, on appeal from the GVH's decision, establishes the unlawfulness of the practice, the civil court, before which the damages claim is filed, is bound by that part of the decision.

It must be added that, as for damages, the civil court retains its capacity to appreciate whether or not such claims are appropriate. Nevertheless, the claimant, despite this, will still face great difficulties concerning proof. He must demonstrate, first, what the competitive price would have been without the cartel; secondly, he must show that there is a causal link between the damage and the unlawful conduct of the cartelists; and thirdly, he must not have passed on the damages onto his buyers. Moreover, he must also show the level of damages he suffered as a result of the antitrust violation and that he did everything to mitigate the loss.

The 'ten per cent damages rule' is a rebuttable presumption, as the defendant may show that the cartel has not caused a price increase of that magnitude.

Leniency and damages

In order to increase the attractiveness of the leniency policy, the legislative modification stipulates that the firm submitting a leniency application would only be obliged to pay damages if the plaintiffs could not seek compensation from the other cartelists. The reason behind this provision is that, in almost all cases involving leniency, the firm filing the application does not appeal to the court against the GVH's decision, whereas the other cartelists do so. Thus, the door is open for claimants to seek damages from the leniency applicant, who bears, according to general civil law, joint and several liability for the unlawful conduct. According to the amendments, the damages procedure against the leniency applicant would be suspended until the final judgment is pronounced in the case. It

must be added that this modification only affects that leniency applicant which has been given full immunity of fines in the case at hand.

Leniency programme incorporated in the HCA

Since the GVH's leniency programme was introduced in 2003, undertakings have not submitted as many leniency applications as the GVH expected. The most probable reasons are that the company submitting an application for leniency cannot be sure it will not be subject to damages claims, that there are still criminal sanctions for cartelists in public procurement procedures and that the Hungarian market is a small one.

The idea of introducing a leniency policy, for the purpose of fighting against competition infringements, in particular secret cartels, stems from the European Commission's practice and is now influenced by the European Competition Network's model leniency programme.

Until now, the rules were contained in a notice issued by the GVH. The modifications to the Competition Act lay down detailed provisions as to how the GVH must proceed when receiving a leniency application. The incorporation of these provisions in the Competition Act offers more certainty for firms as the notice bound only the GVH but not the court.

A leniency applicant may be given full immunity from fines if it provides evidence on the basis of which the GVH receives judicial authorisation for a dawn-raid or evidence with which the unlawfulness of the conduct can be proven. An undertaking may receive partial immunity from fines if the evidence submitted to the GVH is of added value to compare to that what is already in the possession of the GVH.

It must be stressed that the immunity or reduction of fines is subject to the immediate termination of the infringement and the full cooperation with the GVH throughout the entire competition supervision proceeding.

The modification also contains an exception as immunity or reduction of a fine may not be accorded to a company which has played the role of a ringleader in a cartel.

SLC test instead of the dominance test

After many years of applying the 'dominance test', the amendment to the Competition Act now introduces the 'substantial lessening of competition (SLC) test'. On the one hand, this will allow the authorisation of concentrations which lead to the creation or to the strengthening of dominance, but which show substantial efficiency gains and, on the other hand, it will make it possible to prohibit concentrations which do not create or strengthen dominance but which would substantially lessen competition.

Notes

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Ireland

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Irish merger control prohibition overturned in first ever appeal

On 19 March 2009, the Irish High Court annulled a merger prohibition decision of the Competition Authority (the 'Authority') as 'vitiated by material error'. The judgment concerned the first appeal of a merger decision of the Authority. On 7 April 2009, the Authority announced that it is appealing the High Court's ruling to the Supreme Court. It is not yet clear on what grounds the Authority has instigated this challenge, although under the relevant legislation, an appeal to the Supreme Court may only be made on a question of law.

On 28 August 2008, following a five month in-depth review, the Authority had prohibited the merger of two of Ireland's leading food companies, Kerry Group plc and Breeo Foods Limited. This was only the Authority's third prohibition decision under the Competition Act 2002 and was based on a finding that the merger would substantially lessen competition across three product markets: rashers (or uncooked bacon); non-poultry cooked meats; and processed cheese.

The High Court found that the Authority's decision was fundamentally flawed, in particular as it had seriously underestimated the potential for countervailing buyer power to constrain price increases by the merged entity post-merger. According to the Court, evidence of supermarkets threatening to delist brands constituted '… compelling, direct evidence of the fact that retailers as a matter of invariable policy resist, oppose, and delay all attempts by suppliers to introduce price increases'. The Court held that the Authority 'misjudged the significance and weight of all of the evidence available to it as to the reality of the buyer power exercisable by the four main multiple chains'. The Court further found that examples extracted by the Authority from the evidence submitted by the parties and cited to support the Authority's conclusions were 'selective and unrepresentative of the probative force' of the evidence provided.

Unlike in the EU system (where transactions are remitted to the European Commission for re-assessment following successful appeal), under the Irish legislation, the deal did not revert to the Authority for re-examination. Rather, the consequence of annulment

was that the parties could proceed to close the deal.

It is worth noting that the High Court endorsed the approach of the EC Court of First Instance (the CFI) in reviewing Commission merger decisions. The judgment establishes a more rigorous standard of judicial scrutiny of decisions of the Authority than typical in judicial reviews of regulator decisions under Irish law.

The High Court's ruling was delivered by Mr Justice Cooke, one of Ireland's most respected competition law judges who, previous to returning to the Dublin High Court last year, was a judge at the CFI (where he heard both the *Airtours* and *Microsoft* cases).

Israel

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Antitrust Commissioner urges potential plaintiffs to sue Israel's five major banks for exchange of information regarding their fees

The Israeli Antitrust Commissioner has published a public opinion exposing a long-term mechanism of information exchange between leading banks, after the banks refused to pay NIS 290 million for a consent decree.

Israel's banking market is known as very concentrated; approximately 94 per cent of the market is controlled by the five leading banking groups in Israel – Poalim and Leumi (each group has approximately 30 per cent), Discount (approximately 16.7 per cent), Mizrahi-Tefahot (approximately 9.7 per cent) and FIBI (approximately 8 per cent). This, in addition to very high barriers to enter the market, keeps the Israeli banking market very uncompetitive.

Over the years, the Israeli antitrust entities have handled a number of cases concerning competitive aspects of the market. Back in 1984, the four leading banks and their superior officers were accused of coordinating the interest rates for deposits. After full admission, and as part of a plea arrangement, these banks undertook several 'behaviour rules' aimed at preventing future breaches of the antitrust laws. In 1996 the entire banking market appealed to the antitrust Tribunal asking for permission to coordinate the closure of their branches on Fridays. The application was denied.

In November 2004, the antitrust criminal investigators conducted a dawn raid of the banks' headquarters, investigated their superior officers and removed a significant quantity of documents. After the investigation – probably the largest and the deepest ever conducted in Israel – was concluded, the Commissioner announced to the banks in March 2008 that she intended to publish an administrative public opinion pursuant to Article 43 of the Israeli Antitrust Law, after the banks had the opportunity to be heard by the Commissioner. The findings of the Authority's investigation were that the banks coordinated, at least from the beginning of the 1990s, the fees they charged their clients. The coordination related to both actual fees and their future intention to raise fees at a particular time. Despite these findings, the agency decided not to submit bills of indictments against the banks and their superior officers, probably as the findings were not a sufficient basis for criminal proceedings.

At the beginning of 2009, after the Commissioner had heard the banks, she proposed a consent decree, under which the banks were required to pay a penalty of NIS 290 million (approximately US$72.5 million), and she would refrain from publishing the administrative opinion, that is prima facie evidence in any civil competent court in Israel. The banks rejected the Commissioner's proposal, and from the information available in the public domain, did not even seem to negotiate with the agency the terms and conditions of the proposed consent decree.

According to the Commissioner's opinion, almost all of the raising of fees by the banks were coordinated. Some of them were initiated by one bank, and after such intention or increase was published, other bank(s) showed interest in the move, and immediately after, raised their own fees accordingly. In one case, a certain leading bank decided to raise two quarterly fees (credit allocating fees, both for home accounts and business accounts) from 50 to 67 per cent at once. Another bank, charging the same fees, checked the reasons for the increase and immediately after raised its similar fees at the same rate. In another case, a bank investigated how another bank charged a certain fee for the preparation of legal documents and the same thing happened with other fees.

The Commissioner's opinion sets a precedent because the Commissioner explicitly urges potential plaintiffs to sue for their damages and also to submit class action(s) against the banks for their behaviour. In fact, a day after the publication of the Commissioner's opinion, a class action was submitted. The banks are expected to appeal to the Antitrust Tribunal against the Commissioner's opinion.

Italy

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The role of the Italian Competition Authority in overcoming the current economic and financial instability

The work being performed by the Italian Competition Authority (ICA) in this current period of economic and financial instability is proof of the essential role it is playing in overcoming the crisis.

Aware that public intervention alone, even if necessary, is not sufficient per se to resolve problems relating to economic growth on a permanent basis, the ICA considers that the main ingredient for overcoming the crisis is trust in the market. The idea of 'not eliminating the concept that the market, if correctly regulated, ensures that resources are allocated in the most efficient way' was the warning given by the ICA's chairman in a speech delivered to the Italian Senate on 18 February 2009.

It is thus necessary – according to the ICA – to encourage private economic enterprises and to stimulate the competition between undertakings in the market, and, to this end, the ICA urges the Italian government and parliament to take action aimed at:

- intervening in the banking and financial sector by introducing suitable measures directed at increasing the ability of banks to provide credit to undertakings, thereby encouraging them to continue planning their commercial strategies even during the present financial difficulties;[1]
- continuing the liberalisation process. The Italian State's role should not be limited to a mere welfare approach, nor should it be characterised by a complete corporative closure. The State should support and encourage private enterprises by liberalising those sectors which are still yet subject to strict regulations and removing all unjustified barriers to markets access;[2] and
- reforming the Italian Public Administration by simplifying the administrative regulation of certain economic sectors. The Public Administration, indeed, should be able to regulate the competitive dynamics without creating obstacles.[3]

In order to encourage private enterprises and stimulate the competition in the market, the ICA adopted a 'new approach' towards the undertakings:

- by giving preference to 'commitment procedures' over 'conventional procedures' (aimed at ascertaining the alleged antitrust infringement and punishing undertakings by applying fines). Commitments made by undertakings are intended to correct the anti-competitive conduct which is the subject of the antitrust investigation and are taking place with increasing frequency. Between 2008 and 2009, 19 procedures were settled by the ICA through commitments, while, in the same period, six procedures were settled with the conclusion that antitrust provisions had been violated, with the consequent application of fines. Recently, commitments have been made by the Ferrovie dello Stato (the Italian Railways) as part of the procedure opened by the ICA under Article 82 EC,[4] and two cases have been settled with the conclusion that antitrust provisions had been violated, with the consequent application of a fine: the *Pasta Producers Case*[5] and the *Costa Container/Sintermar Case*.6 In both of these cases, the ICA expressly took into consideration the current instability of the economic and financial situation in calculating the amount of the fines applied;
- by stimulating and encouraging the 'pre-notification procedure' regarding concentrations between undertakings, thus allowing them to have a profitable exchange of views with the ICA's officers prior to any formal notification of a concentration.

However, as highlighted by the ICA's chairman, while guaranteeing competition between undertakings on the market may be a necessary condition, it is not sufficient per se to foster trust in the market.[7]

It is therefore essential – according to the ICA – to encourage private enterprises in the meantime by granting and ensuring strict protection of the consumers' interests and rights, and this is, indeed, becoming a priority for the ICA. In particular, in this period of economic and financial instability, the ICA is stressing the need for the 'transparency' of the contractual terms and conditions offered by undertakings to consumers, and the 'mobility of the final demand' between different operators. These needs have been pointed out with respect to the banking and financial sector[8] and to the insurance sector where the ICA recently intervened, in its opposition to certain amendments to parliamentary bill no 1195/2009, being proposed by the Italian Government, concerning – inter alia – Italian 'agency contracts'.[9]

Further investigations have been initiated (but not yet concluded) by the ICA, regarding 'transparency' and 'mobility' in those economic sectors which – according to the ICA – have a particular impact on consumers' interests, and which, therefore, require a specific and immediate public intervention.[10]

The priority being given by the ICA to consumer protection is clear from the abundant activity that it has been carrying out over the past few years, on the basis of the powers granted to it in the area of 'unfair commercial practices' under Legislative Decree no 146/2007. In 2009 alone, the ICA concluded 71

procedures for unfair commercial practices, concluding that there had been a violation of Legislative Decree no 146/2007 and applying an administrative fine. The majority of these procedures related to those economic sectors which are of prime importance for consumers (energy and gas, mobile-telephony and the banking sector). The aim of the investigations was for the ICA to determine whether misleading information had been provided to consumers in respect of the terms and conditions of contracts relating to the sale/supply of products/services offered and to check the tariffs/ prices charged. In stating its conclusions, the ICA emphasised in particular the 'essential duty and care to inform' which traders should respect and ensure for their customers.

Antitrust fines and associations of undertakings

The Italian Parliament is currently considering the amendment proposed by the Italian Government to Section 15 of the Italian Antitrust Law No 287/90 concerning the calculation of the fines to be paid by associations of undertakings in the case of antitrust infringements (carried out by them).

The amendment is based on the fact that, at the present date, Section 15 of Law No 287/90 contains methods for the calculation of fines applied on associations, which differs substantially from those at the EC level (Article 23 of EC Regulation 1/2003). Indeed, under Section 15 of Law No 287/90, the ICA may apply a fine against the associations of 'up to ten per cent' of their turnover (that is, of the associative subscriptions). The Italian Government proposed modifying this provision by introducing a clause stating that: 'the amount of the fine shall be calculated on the basis of the turnover realised by the associated undertakings which arises from the benefit of the antitrust conduct performed by the associations and it may be applied pro rata on the association and the associates'.

We have previously discussed the inconsistency between Section 15 of the Italian Antitrust Law and Article 23 of EC Regulation 1/2003, which indeed leads to the application of different fines even in the same case, as it depends on which Competition Authority (EC Commission or ICA) carries out the relevant investigation.

The *Lidl* case

The importance of the *Lidl* case concerns the concept of 'concentration', which has been recently clarified by the Italian Supreme Administrative Court (the 'Court') in judgment no 1984/2009. The judgment introduced a very interesting and innovative principle for all undertakings operating in the retail and superstores markets.

The transaction arranged by Lidl consisted in acquisitions of 'branches of businesses' from certain retailers having as their object the relevant trading licenses (and certain goods at a nominal price). The rationale of these acquisitions was to combine the trading licenses together in order to obtain the administrative authorisation from the authority that is required to open superstores under Italian laws and regulations.

Maintaining that acquisitions of 'licenses which allow an economic activity to be performed' constitute a 'concentration' under the meaning set forth in Section 6 of the Italian Antitrust Law No 287/90, and that they are thus subject to the prior-notification required by Section 16 of Law No 287/90, the ICA fined Lidl for its failure to comply with the pre-notification requirement, pursuant to Section 19 of Law no 287/90.

Upholding the appeal filed by Lidl against the ICA's decision and the subsequent judgment of the Italian Administrative Court of First Instance, the Court stated that acquisitions of 'branches of businesses' which contain sole trading licenses and which are aimed at obtaining the administrative authorisation required to open superstores do not constitute a 'concentration'. In the view of the Court, these acquisitions are not capable per se of increasing the turnover of the acquiring party, nor of enabling it to acquire 'control' of the branch acquired and, accordingly, fall outside the meaning of 'concentration' and are therefore not subject to prior-notification to the ICA. For these reasons, the Court annulled the ICA's decision (and the subsequent judgment of the Italian Administrative Court of First Instance) and the administrative fine applied to Lidl.

The *AstraZeneca* case

The importance of the *AstraZeneca* case concerns agency agreements and, more specifically, the extent to which the Principal may be considered liable, under the antitrust provisions, for the illicit conduct carried out by its Agent. In judgment no 1009/2007, the Italian Supreme Administrative Court (the 'Court') qualified the 'independence criteria' applicable to the agent pursuant to European competition law.

Following an antitrust investigation initiated in 2006, the ICA ascertained that a restrictive agreement existed between the leading pharmaceutical companies, including AstraZeneca, aimed at coordinating the supplies of disinfectants and antiseptics as part of public tender procedures. More specifically, this coordination was facilitated by the monitoring activity carried out – unbeknown to AstraZeneca – by its Agent (Pan Service) in the market of the supply of disinfectants and antiseptics to Italian hospitals. The ICA (and, subsequently, the Italian Administrative Court of First Instance) maintained that AstraZeneca was liable, on the grounds that Pan Service was a 'mere auxiliary' of

AstraZeneca, so that its conduct on the market was directly ascribable to the Principal – AstraZeneca.

Upholding the appeal filed by AstraZeneca against the ICA's decision and the subsequent judgment of the Italian Administrative Court of First Instance, by examining the agency relationships between AstraZeneca and Pan Service under the European Commission 'Guidelines on vertical restraints', the Court stated that Pan Service was an entity which was independent and autonomous from the undertaking AstraZeneca, with the consequence that: 'it is not possible to ascribe to AstraZeneca the conduct carried out by Pan Service'. In particular, the reasoning of the Court was grounded on the fact - inter alia - that the Agent carried out its 'monitoring activity' unbeknown to AstraZeneca, and was responsible for all the financial and commercial risks. For these reasons, the Court annulled the ICA's decision (and the subsequent judgment of the Italian Administrative Court of First Instance) and the administrative fine applied to AstraZeneca.

Notes

1 See the ICA's investigation into 'Relationships between Banks and Undertakings with Particular Reference to Financing Tools' (which follows a first investigation into 'Corporate Governance of Banks and Insurance Companies'), the contents of which were presented to the Italian Senate recently on 10 February 2009.
2 More specifically, the ICA recently intervened in connection with the professional institutes where, considering that the most of the institutes are still resisting the principles of liberalisation introduced in Italy by the 'Bersani Decree' of 2006, the ICA stated that liberalisation measures should be strengthened to ensure increased competition in the professional services (see ICA investigation no 497/2009).
3 More specifically, the ICA recently examined the administrative regulation of motorways tolls, highlighting the need to calculate tariff increases using the criterion of the 'price cap' which takes into account (not only the inflation but also) the quality of the services provided by the operator (see ICA' investigation no 16/2009).
4 The 'Ferrovie dello Stato' was alleged to have abused of its dominant position on the railway passenger transport market by carrying out a complex strategy directed to exclude the new comers from this market (see, procedure A-409 opened on 2 October 2008, Ferrovie delloStato).
5 This was a cartel among the major pasta producers over the price of pasta (see ICA decision no I694 / 2009).
6 This was a cartel between two undertakings over the price for container handling services (see ICA decision no I685/2009).
7 See the abovementioned hearings of the ICA of 10 February 2009.
8 With respect to banking sector, the ICA, with the added aim of ensuring fair competition between banking operators, expressly pointed out the need: i) 'to increase the transparency of the contractual terms and conditions related to banking services offered to customers in order to allow them to make an accurate comparison of the offers being proposed by various banking operators', and ii) 'to facilitate the ability of customers to move between banking operators' (see ICA hearings on 10 February 2009). A more specific investigation by the ICA into the banking sector 'on prepaid-cards' has recently been concluded, where in consideration of the fact that the top-up fees offered by banking operators for these cards are still too high for customers, the ICA stated that competition on this market should be 'stimulated' by opening it up to other operators such as telephone operators (see ICA investigation no 16/2009).
9 In particular, the ICA opposed: i) the amendment which would limit the adoption of 'multi-company agencies', by stating that 'multi-company agencies' are 'essential for creating competitive trust in the market as they allow customers to buy policies from different companies at the same agency'; ii) the amendment which would limit the customers' right of withdrawal from multi-year contracts by stating that this right is 'just as important, in order to facilitate the end consumer's ability to move between insurers' (see ICA hearings of 5 February 2009).
10 At the present date, the ICA is performing investigations into 'Local Public Transport'; the 'Status of the liberalization of the energy and natural gas sectors' and the 'Daily Papers and Periodical and Multimedia'.

Japan

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Abuse of dominant bargaining position

In order to implement Article 14 (abuse of dominant bargaining position) of the General Designation of the Antimonopoly Law (AML), the Subcontract Law was enacted in 1956. Under the Subcontract Law, the parent company is presumed to hold a stronger bargaining position than the subcontractor and the parent company is prohibited from engaging in certain actions, including unduly refusing to accept ordered products, unduly delaying payment, unduly returning the accepted products and unduly reducing the agreed price. The above actions by the parent company constitute violation of the Subcontract Law and the Japan Fair Trade Commission (JFTC), and if such a violation is found, they will issue an administrative guidance (warning) to take corrective measures (kankoku under Article 7 of the Subcontract Law). However, the JFTC did not issue such a warning the first time an alleged parent company voluntarily reported a violation of the Subcontract Law to the JFTC. With respect to the Abuse of Dominant Position, please see the Antitrust Committee Newsletter, Vol 20, No 4, December 2007.

Seven-Eleven Japan case

On 20 February 2009, the Asahi Shimbun newspaper reported that the JFTC had commenced an investigation into Seven-Eleven Japan, the largest convenience store in Japan, for alleged violation of Article 14 (abuse of dominant bargaining position) of the general designation of the AML. If the franchisor (Seven-Eleven Japan) imposes on its franchisees restrictions on sales methods, such as restrictions on discount sales of lunch boxes, the JFTC is likely to find that these restrictions violate Article 14 of the General Designation of the AML. In April 2002, the

JFTC released revised guidelines concerning franchise agreements and in the revised guidelines the JFTC provided that if the franchisee is forced to dispose of unsold goods because the franchisor restricts discount sales of such goods, this constitutes an abuse of dominant position under Article 14 of the General Designation of the AML.

In the *Seven-Eleven Japan* case, the franchisee is still obligated to pay a royalty to the franchisor for the disposed-of goods.

Monopolisation by JASRAC

Further to the report in the October 2008 newsletter, on 27 February 2009, the JFTC issued a cease and desist order against the Japan Society for the Rights of Authors, Composers and Publishers (JASRAC) asserting private monopolisation due to the exclusion of a new entrant into the music copyright management market in Japan. The JFTC found that the market share of the JASRAC is over 99 per cent of the music copyright management market in Japan and that JASRAC refused to reduce license fees as proposed by the Japan TV and Radio Broadcasting Company Association. The JASRAC, however, announced that it will request formal JFTC proceedings including litigation in court.

Netherlands

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Since July 2008, competition law in the Netherlands has been marked by a number of important cases before the courts, including a ruling on the standards of proof for object-based infringements, the tax deductibility of fines imposed by the Dutch Competition Authority (NMa) or the European Commission, the interpretation of a European Commission decision on collection societies and the workability of the NMa's Guidelines on digital investigations. It has also seen the publication of the NMa's first clearance of a merger solely on an efficiency defence, and of revised expedited processing rules for merger decisions. A bill on criminal sanctions for competition law infringements will be published in the course of 2009.

Court rulings

Effect of European Commission decision regarding collection societies restricted by Dutch court

Although European collecting societies may no longer prohibit each other from licensing their music portfolio outside their own territory, a Dutch court ruled that these societies have not, as a consequence, granted EU-wide licences to other collecting societies.[1]

The European Commission on 16 July 2008 ordered all European collecting societies to terminate provisions in reciprocal agreements between them which restricted these collecting societies from offering pan-European licences for broadcasting music over the internet, by cable and by satellite. The decision is intended to make it easier for broadcasters to obtain an EU-wide licence at a single collection society of their choice.

The Dutch collecting society BUMA granted a pan-European music licence to internet retailer Beatport.com. The collecting society of the United Kingdom, the Performing Right Society Limited (PRS), subsequently ordered BUMA to not include the portfolio of PRS in such EU-wide licence. BUMA instead filed a complaint at the European Commission against PRS, alleging infringement of Article 81 EC Treaty. PRS then requested the District Court of Haarlem to order BUMA to cease and desist from licensing PRS' portfolio outside its Netherlands territory.

The same Dutch court on 19 August 2008 ruled that even though the European Commission prohibited collecting societies from agreeing that they will not grant licences outside their own territory, the consequence thereof is not that these societies have automatically granted EU-wide licences on their entire portfolio to each other. PRS granted a licence to BUMA for exploitation of its portfolio within the Netherlands, and if this restricted licence were contrary to competition law, it would imply that the licence is void, and not that it would cover the entire EU. The Dutch court ordered BUMA to cease and desist from licensing PRS' portfolio outside the Netherlands.

This ruling will mean that the Commission's decision will have limited effect in the short term in the Netherlands, in enabling the granting of EU-wide licences at a single collecting society.

Highest administrative court sets high standards of proof for object-based infringements

The highest Netherlands administrative court in competition law cases, the CBb, ruled on 6 October 2008 that the NMa should further substantiate allegations of infringements which have the object of restricting competition.[2] It gave its decision in appeal against a fine imposed by the NMa on trade organisations of psychologists and psychotherapists for providing price recommendations to their members.

The NMa in the decision under appeal concluded that these price recommendations had the object of restricting competition and that no investigation of the legal and economic circumstances was required.

The CBb came to a different conclusion. It firstly reaffirmed that the object of an agreement or decision of a trade organisation should be investigated in light of its legal and economic context. In this case, the trade organisations argued that price was not a parameter on which the members competed; a price recommendation therefore could not have the object of restricting competition. The NMa in the decision under appeal[3] summarily dismissed this argument. The CBb concluded that the decision was inadequately substantiated, stating that the obligation of the NMa to investigate the legal and economic context of an agreement in this case would require investigating whether indeed price was a parameter on which the members competed.

The decision of the CBb further develops the criteria which should be met when alleging object-based infringements, especially as set out in the EC Court of First Instance's ruling in European Night Services,[4] where it concluded that when assessing an agreement, account should be taken of the actual conditions in which the agreement functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned, 'unless it is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets'. It follows from the decision of the CBb that when arguments are put forward that the alleged conduct does not concern obvious restrictions of competition, the NMa should investigate the merits thereof.

The NMa's Guidelines on digital investigations under fire

A recent judgment in interim relief proceedings on digital copies made during an NMa dawn raid may lead to an adjustment of the NMa's Guidelines on digital investigations.[5]

The NMa performed dawn raids at insurance companies Fortis and Allianz to investigate potential bid-rigging in respect of a European tender of fire insurances for local and regional authorities. During the dawn raids, the NMa made, over a specified time period, digital copies of the entire e-mail box of one Fortis employee and three Allianz employees.

The parties argued that the digital copying of entire e-mail boxes was against the principle of proportionality, particularly now that the e-mails at hand were arranged in a manner that enabled a more targeted investigative approach. The NMa, on the other hand, considered its actions proportional since it had limited itself to the e-mail boxes of a selected number of 'key players' and for a specified time period.

The court did not agree with the NMa's reasoning. Even though the NMa limited its search by time and by person, this could still result in the copying of data beyond the purpose and subject matter of the investigation. The court found the digital logbook as laid down in the NMa's Guidelines on digital investigations an insufficient safeguard against 'fishing expeditions', since it only provides insight into which files have been opened during the investigation without specifying how long and how thorough the files were examined.

As a remedy, the court ordered the NMa to invite an authorised representative of the parties to be present during its investigation of the digital copies to make sure that no copied data beyond the purpose and subject matter of the investigation would be examined.

We understand that the NMa has decided it will not appeal the ruling and will act in accordance with it. So far, the NMa's Guidelines on digital investigations have not been adjusted.

Tax deductibility of cartel fines

The District Court of Breda recently ruled, in line with an earlier ruling by the District Court of Haarlem,[6] that fines imposed for infringing Dutch competition law are not deductible for corporate tax purposes.[7] Cartel fines imposed by the European Commission, on the other hand, are partly deductible – or, at least, so the District Court of Haarlem thinks.[8]

Using similar reasoning as the District Court of Haarlem, the Breda District Court ruled that Dutch corporate income tax legislation explicitly excludes the possibility of deducting fines imposed by the NMa as a result of competition law infringements.

The fact that the District Court of Haarlem earlier ruled that the alleged non-punitive part of cartel fines imposed by the European Commission qualified as tax deductible was no reason to rule differently. Even though the Dutch competition rules mirror the European rules, the fact remains that Dutch corporate income tax legislation expressly excludes such possibility.

It remains to be seen whether the (partial) tax deductibility of European Commission fines will be upheld in the pending appeal, particularly now that EC Court of Justice's Advocate General Mengozzi recently concluded that Article 15(3) of Regulation 1/2003 enables the European Commission to intervene as amicus curiae in the appeal.[9] The fact that the case does not relate to the direct application of the European competition rules was considered irrelevant. According to the Advocate General, the main question to be answered in determining the European Commission's competence to intervene is whether the national proceeding is capable of affecting the coherent application of the European competition rules.

Hopefully the EC Court of Justice will follow the Advocate General's opinion, as the Commission's

intervention in appeal may bring an end to the current inconsistency in tax deductibility. If not, it will lead to the odd situation of companies rooting for (tax deductible) European fines, even though Regulation 1/2003 enables the NMa to apply the European competition rules just like the European Commission.

NMa merger decisions

NMa accepts efficiency defence first time ever

The NMa has approved the merger between two hospitals in the province of Zeeland after an extensive Phase II investigation, subject to strict conditions. In its decision, the NMa took account of the opinions of the Dutch Healthcare Authority and the Dutch Healthcare Inspectorate.[10]

The merger will result in there being only one general hospital in the geographical market, which will significantly limit patients' options. The NMa nevertheless approved the merger since its investigation proved that a merger was necessary to guarantee the continuity of hospital care in this region.

In order to have a guarantee that the efficiencies will materialise and will be passed on to the patients, the NMa has imposed a number of conditions on the parties. These include an obligation to create and maintain a (level 2) intensive care unit and emergency room and a price cap for non-regulated medical services based on a national price average. In addition, the merged hospital has to facilitate the possible entry of new providers of specialist medical care in the region.

This is the first time that the NMa has cleared a merger solely on an efficiency defence.

Legislative developments

A bill on criminal sanctions for competition law infringements

The Minister of Economic Affairs has announced that the long-awaited bill introducing criminal sanctions for competition law infringements will not only include the possibility of imposing prison sentences on individuals who have ordered or perpetrated an infringement of competition law, but also disqualification of individuals.[11] The Minister of Economic Affairs has announced that the bill will be published in the first half of 2009.

More concentration cases eligible for expedited processing in the Netherlands

The NMa on 2 September 2008 extended its ability to decide on concentration cases through expedited processing (ie, without publishing the reasoning behind a decision).[12]

Prior to that, the NMa could only handle cases in expedited processing if the combined market share of the parties did not exceed 25 per cent (in a horizontal relationship) or 30 per cent (in a vertical relationship). The NMa may now decide to handle a case in expedited processing if it can be cleared in a first phase, and none of the following conditions are fulfilled: (a) a remedy is offered; (b) the concentration decision differs from advice of the Netherlands Healthcare Authority (NZa), the Independent Regulator of Post and Electronic Communications in the Netherlands (OPTA), or the Dutch Media Authority; or (c) interested parties raise relevant objections during the handling of the concentration case.

Notes

1 District Court Haarlem, The Performing Right Society Limited/ Vereniging BUMA, 19 September 2008, LJN:BE8765, see, **www.rechtspraak.nl/ljn.asp?ljn=BE8765**.
2 College van Beroep voor het Bedrijfsleven, 6 October 2008, LJN: BF8820, see, **www.rechtspraak.nl/ljn.asp?ljn=BF8820**.
3 NMa decision 20 April 2005, case 3309, see, **www.nmanet.nl/Images/3309BBS_tcm16-47381.pdf**.
4 CFI 15 September 1998, case T-374/94, *European Night Services*, par. 136. See, **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994A0374:EN:HTML**
5 District Court of The Hague, 13 October 2008, LJN:BH2647, see, **www.rechtspraak.nl/ljn.asp?ljn=BH2647**.
6 Haarlem District Court, 3 October 2008, LJN:BF7320, see, **www.rechtspraak.nl/ljn.asp?ljn=BF7320**.
7 Breda District Court, 28 January 2009, LJN:BH6870, see, **www.rechtspraak.nl/ljn.asp?ljn=BH6870**.
8 Haarlem District Court, 22 May 2006, LJN:AX7112, see, **www.rechtspraak.nl/ljn.asp?ljn=AX7112**.
9 OJ 2003, L1/1, see, **http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:001:0001:0025:EN:PDF**.
10 NMa press release of 25 March 2009, see, **www.nmanet.nl/engels/home/News_and_publications/News_and_press_releases/Press_2009/09-06_NMa_imposes_strict_conditions_on_hospital_merger.asp.**
11 Letter by the Minister of Economic Affairs of 11 March 2009, EP/ EMC/9027693, see, **www.ez.nl/dsresource?objectid=162926&type=PDF**.
12 NMa Uitvoeringsregels verkorte afdoening 2008, Staatscourant 5 September 2008, p 18, see, **www.nmanet.nl/Images/Verkort%20afdoen%20van%20concentratiemeldingen_tcm16-119323.pdf**.

New Zealand

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Court of Appeal confirms expansive extra-territorial jurisdiction

On 18 March 2009, the New Zealand Court of Appeal confirmed that the New Zealand courts will apply a broad test as to when overseas based persons, whether companies or individuals, can be found

to have breached the Commerce Act 1986 (Act). An anticompetitive arrangement that is formed overseas but directed at a New Zealand market will be subject to the jurisdiction of the New Zealand courts if the conduct was implemented in New Zealand. Implementation can occur if the overseas person directs an agent, even an innocent agent, who carries contravening conduct into effect in New Zealand. The Court held that companies cannot expect to enter into arrangement overseas directed at New Zealand and insulate themselves from liability in New Zealand by operating through local entities, whether or not they are subsidiaries.

The New Zealand Commerce Commission (NZCC) can now pursue proceedings against three executives involved in an Australasian wood preservative chemicals cartel who were overseas residents. Participants in the cartel have already been fined a total of NZ$7.5 million.

NZ$1.05 million fine in first case brought under leniency programme

In December 2008, Schneider Electric was ordered to pay a penalty of NZ$1.05M for its role in the international gas insulated switch gear cartel. This fine would have been higher if the conduct had occurred post-2001, when penalties for breaching the Act were significantly increased. This was the first case brought by the NZCC as a result of receiving a leniency application. The High Court emphasised the importance of applying deterrent penalties to ensure that cartel members do not refrain from applying for leniency because they see the costs of complying with a leniency agreement as too high compared to the likelihood of detection and its consequences.

A change at the helm

Paula Rebstock's reign as Chair of the NZCC came to an end after five and a half years at the end of March 2009. As Chair, she undoubtedly raised the profile of the NZCC and leaves a strong NZCC that is seen by many in the business community as a body to reckon with. Ms Rebstock's replacement, Dr Mark Berry, a former Deputy Chair of the NZCC, took over the role in April.

Draft Streamlined Authorisation Process Guidelines

The NZCC has followed up on its recent Clearance Process Guidelines (Clearance Guidelines) with its inaugural Draft Streamlined Authorisation Process Guidelines, March 2009 (Draft Guidelines). The Draft Guidelines propose that for straightforward authorisation applications, where there are obvious public benefits and limited impacts on competition, the NZCC will make a final determination within 40 working days from the time the application is registered.

Applicants who wish to be considered under the streamlined process are to submit a written request pre-registration. The NZCC will assess the proposed application against a number of flexible criteria such as: whether the issues raised are limited and discrete; there are only a small number of markets which are affected; there are obvious benefits; and the NZCC is familiar with the markets. The NZCC also retains the discretion to change its mind and conclude at any stage of the process that it is no longer appropriate to assess an application under the streamlined process.

Consistent with the Clearance Guidelines, the Draft Guidelines place considerable emphasis on pre-registration discussions. The discussions will allow the NZCC to review a substantially developed draft application and clarify what further information and evidence should be included, assist the NZCC to plan resource allocation and allow informal discussion about the NZCC's likely approach to novel issues.

The Draft Guidelines aim to create a more timely, cost-effective and transparent process. The process could be particularly useful in cases of likely technical breaches of the per se provisions where there are clear public benefits that outweigh the lessening of competition that the Act deems to have occurred. If successful, it is likely to be met with enthusiasm by practitioners and businesses as the authorisation process has seldom been used due to its costs and complexity.

Norway

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New regulation on partial exemption from the standstill obligation of concentrations under the Norwegian Competition Act

The Norwegian Competition Authority has adopted a regulation on partial exemption from the standstill obligation under section 19 of the Norwegian Competition Act. The Regulation entered into force on 1 April 2009.

The partial exception applies to a public bid or a series of transactions in securities admitted to trading on a regulated market such as the Oslo Stock Exchange and Oslo Axess and entails that such transactions can be partly implemented notwithstanding the general

standstill obligation under section 19 first paragraph of the Norwegian Competition Act.

As of 1 July 2008, a general and automatic standstill obligation applies to all notifiable concentrations under the Norwegian Competition Act. In practice, the standstill obligation has caused difficulties in cases involving a public bid of listed securities as such trades have to be settled through the central securities settlement system (VPO) in accordance with the trading rules of the Oslo Stock Exchange (the NOREX member rules). These rules entail that the settlement of the trade must take place three trading days after the trade was carried out (so-called T+3 settlement), independent on the case handling periods of the Competition Authority pursuant to the Competition Act. If such a settlement results in the acquisition of control, this will be contrary to the standstill obligation. Until the adoption of the Exemption Regulation, it was therefore necessary to apply for an exemption, without these rules having being formalised as to the deadline for the submission or the required contents of such an application.

The adopted exemption makes it unnecessary to make a formal application for an exemption, and allows the acquirer to take over the securities and to perform such obligations which the acquirer will have pursuant to securities law, provided that the concentration is notified to the Competition Authority in accordance with Article 18 of the Competition Act immediately upon the acquisition of control, and that the acquirer does not exercise the voting rights attached to the securities in question. In this respect, the Regulation does in the essence mirror Article 7(2) of the Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation). EU/EEC practice related to the said provision will therefore be relevant as guidance for the interpretation of the Norwegian regulation.

The requirement of an immediate submission of the notification will normally imply that the notification has to be submitted the day control is acquired or as soon as the transaction becomes public, if this takes place prior to the acquisition of control, for instance when the bid is publicly announced. However, if this is not possible, a notification has to be submitted as soon as it is possible, ie, when practical and all factual information necessary for the notification is obtained.

The Regulation only allows the acquirer to take over the securities in question, and is not applicable to the exercise of voting rights. Thus, the acquirer is still prohibited from exercising any kind of control over the target company. Therefore, the Regulation only grants a partial exemption from the standstill obligation. As for a series of transactions, the limitation with respect to the exercise of voting rights may also apply to securities already held by the acquirer if each of the transactions is considered as being interrelated or where the exercise of voting rights will result in the object of the stand-still obligation being undermined.

Violation of the stand-still obligation may be subject to an administrative fine under Article 29 and penalty under section 30 of the Competition Act. Until now, the highest fines imposed amounted to NOK 150,000. No penalties have been imposed.

Poland

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At the beginning of 2009, the Office for the Protection of Competition and Consumers (the 'Office') published its 'Explanations for determining the level of fines imposed on undertakings breaching antimonopoly law', which apply to fines imposed as of 1 January 2009 for violations of the competition law. According to public statements of the Office Chairman, fines must be stringent in order to ensure their deterrent function. It is understood that the introduction of the rules contained in the Explanations will lead to higher fines.

The Explanations set forth a number of steps for calculating fines.

- The first step for setting the level of a fine is to determine its 'base amount'.

  The base amount is set on the basis of two factors: the revenues generated by the party to the agreement; and the harmfulness of the violation.

  The violations are divided into three types:

  (i) very severe violations pertaining to the most serious cases of breaching the competition law (such as horizontal price cartels and abuses of dominant positions with the aim or effect of eliminating competition in the market), where the basis for the calculation is from over one per cent to three per cent of revenues;

  (ii) severe violations which include other horizontal agreements, vertical agreements impacting upon prices or conditions of offers, incidents of abuse of a dominant position with the aim or effect of leading to a substantial restriction of competition or to a severe exploitation of commercial partners or consumers. The basis for calculating

these violations is from over 0.2 per cent to one per cent of revenues; and
(iii) other violations, which include vertical agreements not related to prices or to the possibility of re-selling goods and abuses of dominant positions of a lesser severity. The 'starting point' for fines for these violations is over 0.01 per cent but cannot exceed 0.2 per cent of revenues.

When assessing the harmfulness of a violation, the Office takes into consideration, for example, the significance of the product for the market, the number of market players, entry barriers, whether the agreement was actually put into effect and the negative consequences of the agreement for business partners and consumers. The above factors may increase the fine level (which is determined on the basis of revenues) by a maximum of 80 per cent.

- The second step provides that if the long-term nature of a violation had an extremely harmful effect upon the market, the Office may triple the base amount in the case of anti-competitive agreements and double the base amount in the case of an abuse of a dominant position. The Explanations introduce the presumption that a long-term practice is a practice lasting more than a year.
- The third step is to analyse mitigating and incriminating circumstances, based on which the level of a fine may be increased or decreased by as much as 50 per cent.
  Mitigating factors include: having played a passive role in the illegal agreement; ceasing to participate in an agreement prior to the instigation of proceedings or soon after their initiation; and cooperation with the Office during the investigatory proceedings.
  Incriminating circumstances include: playing a leading role in the violation as well as recurrent and deliberate breaches.
- In any case, a fine may not exceed ten per cent of the revenues generated by an undertaking. If the fine calculated on the basis of the Explanations is higher than that amount, the Office must reduce it to ten per cent of revenues.

The Polish leniency programme, which was introduced in 2004, was significantly amended in February 2009. The Council of Ministers' new leniency regulation[1] entered into force on 24 February 2009, and introduced a 'marker system' as well as provided for the possibility of submitting a summary leniency application.

The marker system allows an applicant to conditionally reserve 'a place in a queue' even if it lacks all necessary information concerning the illegal conduct. If the Office accepts an incomplete application, it specifies the scope of information that needs to be produced and gives a deadline within which to submit the outstanding information. If the application is duly completed, it will be considered as submitted on the date of filing the incomplete application.

The Office may accept a summary application if the application has been submitted to the European Commission in the event that the illegal conduct affects, in addition to Poland, at least three other Member States.

At the time the regulation became effective, the Office published its guidelines on leniency, which offered practical points for leniency applicants.

The Office also launched an extensive media campaign promoting the programme in Poland, which is hoped to widen undertakings' knowledge concerning benefits from seeking leniency

Notes

1 Regulation of the Council of Ministers on 26 January 2009 concerning the mode of proceeding in cases of undertakings' applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines.

South Africa

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Possible constitutional law issues delay amendments to the competition act

The Amendment Bill to the Competition Act discussed in the last newsletter has not yet come into effect due to concerns about the constitutionality of certain provisions. The amendments include provisions that directors or certain managers who cause a firm to engage in cartel conduct (or acquiesce in that conduct) are guilty of a criminal offence. The competition authorities will however not have jurisdiction to deal with these criminal offences which will be prosecuted by the State prosecutors in the civil courts. Section 12(5) of the Bill provides that an acknowledgement by a firm in a consent order (or a finding by the Competition Tribunal or the Competition Appeal Court) that a firm has engaged in cartel conduct is prima facie proof thereof in such criminal court proceedings. However in criminal trials, the State is required to show evidence that the accused is guilty beyond reasonable doubt. Findings by the Competition Tribunal are based on a lesser burden of proof, namely a balance of probabilities. In addition, an admission by a firm in a consent order (or settlement agreement with the Commission) will generally be based on a view that the firm would be

found by the Tribunal (on a balance of probabilities) to have contravened the Competition Act. The effect of section 12(5) is accordingly to partially reverse the normal onus of proof on the State to prove all elements of the criminal offence allegedly committed by the accused. In the ordinary course, the State would have to prove beyond reasonable doubt that the firm engaged in cartel conduct.

Section 12(5) has raised concerns that it contravenes the constitutional right to a fair trial. In February 2009, the President refused to sign the Bill and referred it back to Parliament for revision due to such concerns. Parliament however disagreed with the President and sent the Bill back to the President for signature without any changes to section 12(5). The President's options are now either to sign the Bill (with the resulting strong possibility (if not probability) that section 12(5) will be challenged before the Constitutional Court) or to refer section 12(5) to the Constitutional Court for its opinion.

The concerns about section 12(5) have delayed the commencement of the Bill. Ironically, one of the most important reforms of the Bill (namely the criminalisation of cartel conduct) is being delayed by the dispute over the interpretation of a procedural provision. Meanwhile directors and managers of firms engaging in cartel conduct are being given a reprieve (and opportunity to cease such conduct) as the Bill does not operate retrospectively.

Commission publishes small merger guideline

As discussed in the last newsletter, the merger filing thresholds were significantly increased with effect from 1 April 2009. It is expected that the increased thresholds will result in a decrease in the number of mergers being notified to the Commission. Under the Competition Act, mergers exceeding the thresholds cannot be implemented without the prior approval of the competition authorities. Mergers under the thresholds are defined as 'small mergers' and may be implemented without such approval. However the Competition Act empowers the Commission to require a small merger to be notified for approval if, in the Commission's opinion, the small merger raises competition or public interest concerns. The Competition Act provides that the Commission must exercise such right within six months after the implementation of the small merger. If it does so, the parties must immediately cease the implementation of the small merger until the Commission's decision on the merger. It is possible that the Commission could then prohibit the small merger (requiring eggs to be unscrambled) or impose a conditional approval which is not acceptable to the parties.

A guideline on small merger notification has been published in the Government Gazette of 17 April 2009. The guideline states that the Commission 'will' require the notification of all small mergers if at the time of entering into the merger, any of the firms (or firms within their group) are subject to an investigation by the Commission (or are respondents in pending proceedings referred by the Commission to the Tribunal) with regard to horizontal or vertical prohibited practices or abuses of dominance. Notwithstanding this pre-emptory wording, the guideline then advises parties to such small mergers to voluntarily inform the Commission of their intention to enter into the small merger and that the Commission will then advise the parties whether the small merger must be notified to the Commission.

The Commission is concerned that mergers which would have been notified under the previous thresholds will now 'slip through the cracks'. Although the Competition Act does not oblige the parties to a small merger to notify the Commission, the parties may do so voluntarily. The guideline provides a mechanism to assist the Commission in identifying small mergers that raise competition or public interest concerns. However:

- the Competition Act requires the Commission to consider each small merger on its own merits before deciding whether or not to exercise its right to require a notification. The mere fact that merging firms (or members of their respective groups) are subject to an investigation or Tribunal proceedings is not necessarily proof that the small merger raises competition or public interest concerns; and
- the success of the guideline will ultimately depend on whether the parties to small mergers will in practice voluntarily advise the Commission of small mergers referred to in the guideline. Even under the previous thresholds, parties voluntarily filed small mergers to avoid the risk that the Commission would require a filing and this practice is likely to continue. The guideline is however a useful indication of Commission's policy to small merger notification.

It is clear that the Commission will be vigilant in assessing whether to require notifications of small mergers under the increased thresholds. However under the previous thresholds, the vast majority of notified mergers were unconditionally approved. The increased thresholds will also allow the Commission to devote more resources towards its investigations of cartel conduct, abuses of dominance and other prohibited practices (which is the likely focus of future Commission activities).

Spain

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Enhanced use of settlements

The termination of investigations through settlement seems to be one of the new enforcement trends of recent months. It is currently achieving increasing importance as an instrument for prevention, deterrence and promotion of competition in Spain. Under the 'old' Competition Act 16/1989, settlement had only been applied in three cases (*DAMA v SGAE*; *ASEMPRE v CORREOS*; and *Asociación Nacional de Grandes Empresas de Distribución (ANGED) and Confederación Española de Comercio (CEC) v Sistemas de Medios de Pago ServiRed,* Euro 6000 and 4B). It had a very limited application because Article 36 bis stated that conventional termination of proceedings was possible only if done before the adoption of the statement of objections. The new Competition Act 15/2007 broadens the scope for settlements: Article 52 of the new Act allows the alleged offenders to propose commitments even after the statement of objections is adopted, but before the proposal report for resolution is submitted to the Council of the National Competition Commission (CNC).

Termination by settlement provides the possibility of reaching an agreement between the alleged offenders and the Competition Authorities which puts an end to the investigation. Termination by settlement is attractive to the alleged offenders because the resolution terminating the proceedings will contain no finding of an infringement and no fine. It will include the commitments that the parties accept in order to neutralise the alleged anti-competitive effects of the conduct.

On 16 March 2009 the CNC terminated by settlement two sanctioning proceedings affecting collective labour agreements. The proceedings were brought against several business associations and trade unions for an alleged infringement of Article 1 of the Competition Act 15/2007, the equivalent of Article 81 EC. The cases concerned two collective agreements, for the contact centre (ie, telemarketing) and security guards sectors. These collective agreements contained detailed provisions dealing with salaries (concept, structure and amount). In both cases, the collective agreements contained provisions for these costs to be passed on, so that any offer for services for a price lower than these costs would be considered as unfair competition.

The alleged offenders submitted commitments to the Investigation Directorate undertaking to withdrawal the illegal clauses and to refrain from repeating the same conduct in future collective agreements. Finally the CNC has agreed the conventional termination of these proceedings, considering that the commitments proposed, which are binding, resolve the competition concerns raised.

Regional competition agencies, such as the Basque and Madrid competition tribunals, have also made use of this way of terminating proceedings.

It is becoming more and more frequent for companies subject to an investigation to offer commitments in order to enable termination by settlement. Although the authorities seem to be inclined to this type of termination in a number of cases, they enjoy a large margin of discretion. There is still no coherent pattern that can be identified regarding which type of cases are more or less likely to be terminated by settlement, and in what circumstances.

Sweden

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Experiences of the new Swedish thresholds from November 2009

As reported earlier, a new Competition Act (2008:579) ('Act') introduced new notification thresholds in Sweden on 1 November 2008. The notification thresholds have been amended so that they solely relate to turnover in Sweden, and the individual domestic turnover threshold has been increased.

According to the new rules, a concentration must be notified to the Swedish Competition Authority (SCA) if, in the previous financial year: (i) the parties' combined annual turnover in Sweden exceeded SEK 1 billion; and (ii) each of at least two of the parties' annual turnover in Sweden exceeded SEK 200 million. Thus, the new notification thresholds relate solely to turnover achieved in Sweden (not worldwide) and the individual domestic threshold has been increased from SEK 100 million to SEK 200 million. The aims of the amendments are to significantly reduce the number of mergers which are subject to notification and review in Sweden, to increase the accuracy of the law, and to focus on such concentrations that are potentially harmful to competition in Sweden.

The new notification thresholds have been in force for just six months. It is thus too short a time to conclude whether the legislation has achieved its aims.

It should be noted that the number of notifications between 1 November 2008 and 1 May 2009 has been significantly reduced compared to the same period one year ago, from 55 notifications to 18. The reduction might have some relation to the new notification thresholds. However, it is more likely explained by the current financial situation. It should be noted that between 1 November 2008 and 1 May 2009, the SCA delivered the majority of its clearance decisions within a significantly shorter period of time than previously. According to the Act, the SCA has 25 working days to make its decision whether to clear the concentration or to initiate an in depth investigation, but most of the notifications were cleared significantly faster than 25 working days and only one in depth investigation was initiated, which was subsequently cleared. So far, it is obvious that the SCA's handling time of notifications has been significantly shortened, particularly such notifications which do not raise any competition concerns. However, it is too early to conclude whether the new notification thresholds were able to catch all potentially harmful concentrations in Sweden and if the SCA will concentrate their effort on them.

The Swedish Competition Authority rules on SAS EuroBonus programme

On 9 January 2009, the SCA ruled that an earlier order issued by the Swedish Market Court ('Market Court') prohibiting SAS from applying its EuroBonus programme under penalty of a fine could no longer be enforced. Following the SCA's decision, SAS reintroduced its EuroBonus programme on Swedish domestic routes as of 1 February 2009.

On 27 February 2001, the Market Court found that SAS had abused its dominant position by applying its EuroBonus programme to domestic air travel in Sweden between cities where SAS, or airlines cooperating with SAS on the bonus scheme, encountered competition through existing or newly established air passenger traffic (case A 14/99). The Market Court ruled that the EuroBonus programme was loyalty-inducing, led to high barriers to entry and, thus, significantly restricted competition on the Swedish market. Therefore, the Market Court ordered SAS, under penalty of a fine of SEK 50 million, to cease applying its EuroBonus programme to domestic routes where SAS competes with other carriers. Following the Market Court's order, SAS ceased to apply its EuroBonus programme to said routes.

On 29 May 2008, SAS requested that the SCA review the Market Court's order. SAS argued that market conditions and competition on the domestic traffic routes have changed radically since the order was issued and that application of EuroBonus programme would no longer constitute an abuse of a dominant position. According to SAS, the conditions for the imposition of the order would not be fulfilled in the current market situation.

In the case in question, the SCA ruled that the Market Court's order applies only to the infringements which took place at the time the order was issued and does not apply in the event of a reintroduction of the EuroBonus programme. However, as the SCA is not authorised to give negative clearances or advance notification of its position, it therefore did not assess whether the reintroduction would constitute an abuse of a dominant position. The SCA ruled that the Market Court's order cannot be enforced but also that it is for SAS assess whether the reintroduction of the EuroBonus programme is permissible under competition rules. Following the SCA's decision, SAS reintroduced its EuroBonus programme on Swedish domestic routes as of 1 February 2009.

Switzerland

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Swiss Government intends to amend the Cartel Act

A recently published report commissioned by the Swiss Government has found the Swiss Cartel Act to be effective in promoting competition but nevertheless suggests a number of changes.

With an amendment in 2003, the Swiss Cartel Act's effectiveness was improved by introducing fines in case of first time infringements of hardcore horizontal and vertical restraints and abuses of dominance and by introducing the possibility of dawn raids and a leniency programme. The Cartel Act amendment also included a provision whereby five years after their entry into force the amendments' effectiveness had to be evaluated. The Government commissioned the evaluation in the autumn/fall of 2007 and the task force which carried out the evaluation submitted its report in January 2009.

The evaluation was based on 15 different reports and studies regarding the ongoing effects and functioning of the Cartel Act. The studies included an effect-based analysis which found the new legal instruments adopted in 2003 to be useful. They have enabled the competition authorities in Switzerland to prevent and uncover practices restricting competition. An analysis on the number, duration and outcome of investigations undertaken by the competition authorities themselves revealed that the Swiss authorities proportionally deal with a similar number of cases as the European authorities. A majority of the

competition authorities' decisions, according to this report, have been upheld in court.

An international comparison in the context of the evaluation showed that Switzerland's antitrust laws are similar to those found in comparable countries. However, in certain specific areas, international best practices have not been achieved in Switzerland. These areas include the institutional organisation of the competition authorities, international cooperation, merger control and the treatment of vertical restraints. Also, private enforcement and sanctions against individuals, according to the report, have not achieved an international benchmark level in Switzerland.

Institutional set-up

The report suggests that substantial modifications must be undertaken with respect of the institutional set-up of the Swiss competition authorities (which consist of the Competition Commission and its Secretariat). The size of the Competition Commission and the fact that its members are not professionals and represent trade and consumer organisations is criticised by the report. Furthermore, issues arise in connection with the lack of independence of the authorities. Certain specific steps relating to the effectiveness of the authorities' organisation are already being implemented by the authority while other changes will require an amendment of the law.

International cooperation

The current international cooperation between Swiss competition authorities and those abroad is confined to informal exchanges of information except in the area of air transportation where a bilateral treaty with the European Commission permits broad cooperation. However, according to the evaluation report, the increasing frequency of cross-border antitrust restraints and merger control investigations requires the competition authorities to be able to also exchange confidential information regarding specific cases. Furthermore, parallel investigations by authorities in different jurisdictions may lead to inefficiencies. The report therefore finds it necessary that Switzerland concludes cooperation agreements with its major trading partners in order to allow for exchange of confidential information in pending cases. Furthermore, a formal legal basis would be required to make such information exchanges legitimate.

Merger control

With respect to merger control, the report holds that the Swiss regime requires modernisation. The substantive test in Swiss merger control only permits the prohibition of a concentration if the concentration would create or strengthen a dominant position and such a dominant position would allow the elimination of competition. This two pronged test has been confirmed by the Swiss Federal Supreme Court and makes it extremely difficult, if not impossible, for the Swiss authorities to prohibit concentrations. In addition, the high sales turnover thresholds, which must be met in order for a merger control obligation to exist, prevent certain concentrations with effects in the domestic markets and thus must be notified. The report therefore suggests a modernisation of Swiss merger control along the lines of the European merger control regulation.

Vertical restraints

In the area of vertical restraints, the report has found that the amendment approved by Parliament in 2003 is too far reaching and does not adhere to international and European best practices. The rules adopted in 2003 provide for per se illegality of vertical price fixing and absolute territorial restraints (prohibitions of passive sales). According to the report, there is currently a risk of preventing efficient vertical agreements and it is therefore necessary to amend the Cartel Act and its current application by the authorities in order to make the Swiss regime compatible with international standards relating to vertical restraints.

Private enforcement

The report has found private enforcement regarding antitrust matters in Switzerland to be minimal. It therefore suggests that civil procedure rules must be enhanced so as to enable claimants to more easily bring actions for damages caused by anti-competitive conduct. The report suggests improvements in the area of the administration of evidence, expanding locus standi and increasing damages.

Fines against individuals

The report finally advocates that the Swiss legislator should consider the possibility of introducing administrative fines against individuals (including a leniency programme in favour of individuals). The application of fines against individuals does not mean that there will be no fines against the respective enterprises; fines against individuals would be a complement in enforcing antitrust regulations.

The report concludes that taken as a whole, the Cartel Act has achieved its objectives. The instruments introduced in the amendment of the Cartel Act in 2003 (leniency programme, dawn raids, etc) accomplished the objectives of the legislator. However, certain improvements are nevertheless recommended and the evaluation task force has proposed a total of 14 recommendations which include inter alia:

- Maintaining of the underlying concept of the Cartel Act as introduced in 1995 and revised in 2004;
- The competition authorities must be completely independent of political and business influences and their decision making members must be professionals. The Competition Commission and the Secretariat should be merged to a single entity;
- Switzerland must conclude international treaties regarding cooperation in competition matters with its main trading partners allowing for formal exchange of confidential information between competition authorities. Swiss law needs to be amended to enable the competition authorities to such cooperation;
- Switzerland must harmonise its merger control regime with the corresponding EU regulations, including the SIEC-test, efficiency defence and a dynamic consumer welfare standard. Notification thresholds should be lowered;
- Switzerland must abandon the legal presumption of illicit conduct regarding certain verticals restraints. However, direct sanctions should remain available in the area of vertical minimum or fixed price setting and restrictions with respect to territorial agreements (prohibition of passive sales); and
- Additional improvements are required in the area of private enforcement, administrative procedure and sanctions against individuals.

The Government has approved the task force report and will now prepare a bill for an amendment of the Act on Cartels which is expected to be presented to Parliament in summer 2010.

Turkey

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General

Leniency Regulation and Regulation on the Determination of Fines

The Leniency Regulation and the Regulation on Determination of Fines came into force on 15 February 2009. These two regulations are assumed to increase the expected cost of forming a cartel. The Regulation on Fines sets the minimum fine for participating in a cartel to two per cent and abusing a dominant position to 0.5 per cent of the previous year's annual turnover and contains some aggravating factors parallel to the EU fining guidelines. All of these factors are to be used at the discretion of the board and previous decisions were seldom that harsh. The success of the leniency programme seems to be dependent on the implementation of the Leniency Regulation. At present, the expected revenue from forming a cartel or breaching competition law in general seems to be greater than the expected cost of it, which leaves very few motives to apply for leniency.

The other important news from the Agency is the election of a case handler to the Competition Board. Mr Cetinkaya, who is amongst the first competition experts of the Agency, joined the seven member Board along with Mr Gunay, a Court of Appeal judge and an associated professor of law. Former President Mr Kaldirimci has been re-elected to the Board for a further six years. Time will show whether the new members will change the liberal position of the Agency against the dominant market players.

Competition policy

Turkish competition law enforcement is in material danger

Dawn raids and inspections belong to the fundamental components of efficient competition law enforcement in every country. However, there appears to be a formal measure that calls into question the effectiveness of such activities. A recent decision of the Turkish Government Accounting Bureau has set a very low cap for the daily expenses of officials of the Turkish Competition Authority (TCA) during their stays away from headquarters when doing dawn raids. TCA is located in Ankara which does not have many commercial activities. When the officials of TCA need to make dawn raids on the premises of the firms under investigation, they have to spend time away from Ankara. At present, officials may only claim €10 (TL 22.5) in travel allowances. This means that the expenses of dawn raids are paid not by the state but by the officials personally. Even though the decision which created this situation has only just been published, its existence has been rumoured for six months. However, government institutions responsible for raising the issue in Parliament have remained silent.

Major cases

Turkish Council of State orders stay of execution of Competition Board's remedies

The Turkish Council of State, which is the appeal body for competition authority decisions, has ordered a stay of execution of the Competition Board's decision on clearance in the daily newspapers market. On 10 March 2008, the Competition Board conditionally cleared the acquisition of Vatan

Newspaper by Dogan Gazetecilik AS (the biggest media group in Turkey), by accepting the 'failing firm defence', subject to the transfer of the 'Vatan Gazetesi' trade mark and privileges to a third party within two years following the Board's clearance decision. On 11 March 2009, the Group announced that the Council of State suspended the execution of that decision. According to Dogan Group, the Council of State concluded by as majority of votes that the 'Competition Board's remedies do not have legal basis in the Competition Act and include some conditions where the Board's competence is moot. Furthermore, these conditions are based on hypothetical situations for the upcoming two years and cannot be determined right now in business life'. The Council of State's suspension decision is partial and covers only conditions of the Board's decision. Thus, the authorisation of the acquisition will remain in force.

The Draft Act, dated 23 June 2008, on the amendments brought to the Competition Act includes provisions concerning commitments and conditional authorisation procedure. Although the Competition Authority is qualified as an NCA that has achieved improvements in terms of its compliance with EU practice, it is obvious that development of this new mechanism of conditional clearance is likely to be shaped under the Council of State's supervision.

Competition Board imposes a fine of €1.8 million on Sanofi-Aventis

The Competition Board has recently published its short decision in the Sanofi Aventis investigation. According to the decision, Sanofi Aventis is in a dominant position in a group of pharmaceuticals covering 27 different active ingredients, and it has abused its dominant position by sale conditions implemented in 2008 where wholesale distribution takes place in the relevant product markets.

Due to the infringement involved, the Competition Board has required Sanofi Aventis to cease its abusive practices and imposed a fine of approximately €1.8 million, at the rate of 0.5 per cent of turnover of Sanofi Aventis in the 2008 fiscal year.

Turk Telekom and its subsidiary in ADSL market penalised for abuse of dominant position

An investigation initiated by the Competition Board to establish whether Turk Telekom (the incumbent operator) and its subsidiary in the ADSL market, TTNET, abused their dominant position, has found that:

- the economic integrity formed by the undertakings in question is in a dominant position in both wholesale and retail broadband internet access services market;
- it has abused its dominant position by price squeezing on retail broadband internet access services market; and
- the economic integrity shall avoid the practices resulting in price squeezing in the framework of the principles to be specified in the reasoned decision.

Price squeezing discussions have recently come into the international antitrust law agenda. Even though its reasoned decision has not been published yet, it appears possible to say that the Competition Board, in imposing a fine of nearly €6 million, has followed the EC case-law in *Telefonica* and *Deutsche Telekom* and not the US Supreme Court's reasoning in *Linkline*. In addition, the injunction to avoid practices resulting in a price squeeze in accordance with the reasoned decision will probably raise debates on whether or not the Competition Board acted like a rate-setting agency.

United Kingdom

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'Class action' attempt fails

In a judgment handed down on 8 April 2009 in *Emerald Supplies Limited v British Airways Plc*, the High Court has confirmed the strict test which applies where a claimant seeks to bring proceedings on behalf of others who have the same interest in the claim.

Under the Civil Procedure Rules (CPR) applicable in England and Wales, a representative claim may be brought by or against one or more persons as representatives of any others who have the 'same interest' in the claim. The representative class are bound by any judgment or order in the action, but the Court's permission is needed to enforce a judgement or order against any member of the class who is not a party to the action.

In England and Wales there is no direct equivalent to the US 'opt-out' class action so that procedures for multiparty litigation generally require potential claimants to make a positive decision to opt-in to the proceedings. Representative actions, under the CPR, are an exception; the representative class need not take any positive action to be represented in the claim or be individually identified in the proceedings. These actions have not been widely used as courts have adopted a strict interpretation of the 'same interest' requirement.

The claimants were cut flower importers who used the air freight services of BA and other international airlines. They alleged that BA was party to a price fixing cartel with a number of other airlines, the effect of which was to inflate air freight prices. They brought

an action against BA both on their own behalf and as representatives of 'all other direct or indirect purchasers of air freight services the prices for which were inflated by' the alleged cartel. They sought a declaration that damages were recoverable from BA by the claimants and the other direct and indirect purchasers represented by the action. BA successfully applied to strike out the representative element of the claim.

BA's application was granted on the basis that the represented class did not have the same interest in the claim at the time the claim was begun. This was because the class was defined by reference to whether a person purchased air freight services at inflated prices as a result of a cartel which was the allegation the claimants had to prove in the action. As a result, the criteria for inclusion in the represented class could not be met at the time when the action was brought because it depended on the outcome of the action itself. It was impossible to say whether any person was a member of the class at the time the claim was issued.

The Court also accepted BA's submission that the relief sought was not equally beneficial for all members of the class. Whether a class member could establish damages would depend on their place in the distribution chain and who in that chain had absorbed or passed on the alleged inflated price. As such, there was an inevitable conflict between the claims of different class members. Significantly, the Court rejected arguments based on US policy of allowing direct customers to claim for the entire overcharge, even when this has been wholly or partly passed on.

The claimants were effectively seeking to use a representative action procedure under the CPR to launch the equivalent of a US style opt-out class action. This decision underlines a number of difficulties standing in the way of such an attempt particularly in a cartel case where issues arise as to whether an overcharge was passed on down the supply chain. Press reports indicate that the claimants intend to appeal this decision.

The UK Government is currently considering a proposal by the Civil Justice Counsel for a new form of generic collective action which will permit claims to be brought on behalf of a class of claimants with the Court deciding whether any particular case should proceed on an opt-in or opt-out basis. There would be no need to have the same interest in the claim although there would have to be sufficient commonality of interest and remedy to make the case suitable for a collective action procedure. In the present case, the Court refused to side step this policy commenting that the issue was better dealt with by Parliament than by stretching the use of CPR to accommodate this sort of case.

High Court rules on OFT case closure decision

On 20 January 2009, the High Court ruled on the Office of Fair Trading's (OFT) discretion in closing an investigation under the Competition Act 1998. In the case, *Cityhook v OFT*, the claimant unsuccessfully sought to judicially review the case closure by the OFT.

The Court recognised that the OFT has a discretion to decide whether or not to close an investigation without reaching a final decision and is entitled to prioritise its cases. The Court was nevertheless highly critical of the OFT's approach in the case, where having investigated the matter over a four year period and having come very close to issuing a Statement of Objections, it noted that the reasons given for closing the case were less than convincing. Although the case closure was upheld as it was not found to be irrational under judicial review principles (so unreasonable that no reasonable person could have made it), the Court directed that a proper consideration should be given to the possible transfer of the case to the Ofcom, the communications sectoral regulator.

United States

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New heads at FTC and DOJ antitrust divisions indicate enforcement priorities

President Obama's selections for the new Chair of the Federal Trade Commission (FTC) and Assistant Attorney General (AAG) at the DOJ Antitrust Division signal a new antitrust enforcement agenda. President Obama designated Jon Leibowitz as Chairman of the FTC on 9 March 2009, having served previously as a Commissioner. The US Congress has confirmed Christine A Varney as AAG for Antitrust at the DOJ. Varney was recently in private practice and served as a Commissioner at the FTC during the Clinton administration. Both appointees appear poised to pursue a more aggressive enforcement policy.

Chairman Leibowitz has been especially vocal about challenging so-called 'pay-for-delay' settlements in pharmaceutical patent litigation. The position is consistent with his recent concurring statement in *Federal Trade Commission v Watson Pharmaceuticals et al*, in which the Commission challenged the defendants' agreements to eliminate generic AndroGel competition as violations of section 5(a) of the FTC Act. The FTC's use of section 5 of the FTC Act is not limited to pharmaceuticals cases. Leibowitz has advocated more expansive use of section 5, which prohibits unfair or deceptive practices, to attack anticompetitive conduct

that may not meet the Sherman Act standards. For example, Leibowitz was a strong supporter of the FTC Reauthorization Act of 2008, which, among other things, would allow the FTC to prosecute businesses for 'aiding and abetting' violations of consumer protection statutes, and would expand the FTC's ability to seek civil penalties.

At the DOJ, Christine Varney intends to increase merger enforcement after a period of enforcement that has been criticised as unduly lax. For example, vertical mergers will once again be subject to review and possible challenge by the DOJ. Varney appears to believe that anti-competitive vertical mergers can pose as much of a threat to competition as anti-competitive horizontal mergers. Varney appears to reserve little sympathy for special treatment of 'troubled' industries. For example, she has supported rigorous review of the newspaper industry. Similarly, she favours eliminating antitrust exemptions for certain industries such as the rail freight industry and is prioritising mergers on the agricultural sector for closer scrutiny. Additionally, in light of her recent focus in private practice on the internet, it is expected that the internet (and broader IT sector) will face close scrutiny.

From a policy standpoint, it is also expected that the rift between the DOJ and FTC will be closed under the new administration. Varney has repeatedly indicated that she intends to work with the FTC on antitrust enforcement policy. For example, Varney has affirmed that she does not support the DOJ's recent section 2 Report, which was highly criticised for all but eliminating DOJ challenges to monopolisation. This coincides with concern expressed by Chairman Leibowitz that the Report focuses on the interest of firms instead of those of consumers.

Uruguay

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The Uruguayan antitrust regime was amended in August 2007, when Law 18.159 was enacted (the 'Antitrust Act') being then regulated by Decree No 404/2007 (the 'Decree'). As we have previously commented, the Antitrust Act seeks to promote and protect competition and promote economic efficiency and freedom and equal conditions for companies and products in the market, for the benefit of users and consumers.

In order to achieve these goals, the Antitrust Act created the Commission of Promotion and Defence of Competition (hereinafter the 'Commission') which is an entity of the Ministry of Economy and Finance (Executive Branch). The Commission has the power to apply the Antitrust Act and the Decree, except for in certain regulated sectors of the economy such as financial institutions or telecommunications where specific public authorities have been appointed.

On 19 February 2009, the Executive Branch appointed Messrs Sergio Milnitsky Zelmonovich, Javier Gomensoro Pedemonte and Luciana Macedo Saravial as members of the Commission.

It is expected that the appointment of the members of the Commission would impel the application of this relatively new Antitrust Act, especially considering the exclusive dedication and their knowledge in the field.

The Antitrust Act and the Decree grant the Commission several powers, including: (i) issuing general rules and particular instructions contributing to the attainment of the objectives of the Antitrust Act; (ii) issuing the reports and carrying on the investigations considered appropriate in order to analyse the competition in a market; (iii) requesting from individuals and legal entities (public or private) the documentations and collaboration considered necessary; (iv) carrying out investigations regarding civil and commercial documents, corporate ledgers, corporate meeting books, etc; (v) advising the Executive Branch in promotion issues and competition policies; and (vi) issuing rulings and answering questions effected by any individual or legal entity according to the activities carried out or activities which he pretends to carry out, or that carries out other individuals.

Additionally the current regime establishes that any act of economic concentration, when certain thresholds are exceeded ('Covered Transactions' for the purposes of this comment) must be notified to the Commission within ten days prior to the completion of the transaction. Potential acts of economic concentration are those operations that imply a modification in the control structure (ie, mergers of companies, acquisition of shares, quotas or participations, and any other type of legally valid agreements which imply transferring the control of all or part of the economic units or enterprises).

Section 7 of the Antitrust Act sets forth that notification filings are mandatory – whichever type of concentration – when one of the following conditions are met (each a Covered Transaction): (i) if as a consequence of the operation, a market share equal to or higher than 50 per cent is reached; and (ii) if the gross annual turnover in the Uruguayan territory of the group of participants in such a transaction, in any of the last three accounting years equals or exceeds 750,000,000 Indexed Units (considering an average of the value of the Indexed Unit in the relevant periods – in 2008 approximately US$55,896,734.67).

However, section 8 of the Antitrust Act establishes that the obligation to notify provided by section 7 is

not required when: (i) the acquisition of companies in which the buyer is the holder of at least 50 per cent of the shares of the target; (ii) the acquisition of bonds, debentures and securities or any other debt instruments issued by the company, or the acquisition of shares with no voting rights. The acquisition of these instruments does not imply a transfer of equity control; (iii) the acquisition of a sole company on behalf of a foreign company that did not previously possess assets or shares in other Uruguayan companies; and (iv) the acquisition of companies, whether or not declared bankrupt, with no activities in the country in the last year.

Finally, the Antitrust Act requires, in section 9, prior mandatory filings in those cases where the economic concentration operation ultimately results in a 'de facto monopoly' (ie, when as a consequence of the transaction, it results in just one enterprise in the relevant market). In that case, an authorisation should be requested and the Commission may reject the proposed transaction.

Venezuela

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Banks and credit cards in the crosshairs of the Superintendency

As has happened in Europe, the United States and Latin American countries such as Peru and Colombia, the Venezuelan Antitrust Agency – the Superintendency for the Promotion and Protection of Free Competition – initiated an administrative procedure to investigate the alleged commission of exclusionary practices, cartels, contracts conflicting with the antitrust law, and dominant position abuse by almost all the banks that provide credit card services in the country.

The Superintendency is also investigating the Venezuelan Chamber of Credit Cards, the Bank Association of Venezuela and The National Bank Chamber over the alleged commission of agreements or conventions which restrict or impede competition between the members of each association.

The opening resolution, numbered SPPLC/0017-2008, also mentions that the Superintendency is going to investigate Visa Inc International, MasterCard Inc International, American Express, and Diners Club over the alleged commission of exclusionary practices, cartels, contracts conflicting with the antitrust law and the abuse of their supposedly dominant position.

The investigation into the banks and Visa Inc International, MasterCard Inc International, American Express and Diners Club, is looking at the discount rates that businesses pay to banks when a customer uses a credit card. The Superintendency will determine whether the banks, independently or collusively, have established a discount rate that could be considered too high. Part of the way through the investigation, the Central Bank of Venezuela, by means of Resolution No 08-12-01, established the maximum percentage of the discount rate, taking into consideration the economic sector in which the credit card is used.

The Superintendency also wants to determine whether or not the banks or the other companies mentioned above collusively divide markets or geographical areas to impose a high discount rate. They are investigating whether the banks collusively impose unequal conditions within any commercial or service transactions.

The Superintendency is also investigating whether the banks, by means of contracts, imposed on their clients a high discount rate. It is also presumed that the banks have abused their alleged dominant position.

The investigation into the Venezuelan Chamber of Credit Cards, the Bank Association of Venezuela and the National Bank Chamber has been carried out on the basis that the chambers or the association could have issued recommendations, resolutions or decisions on how their members should determine the discount rates that are paid by the business to banks.

The investigation phase of the procedure ended on 18 February 2009. At the time of writing, no decision has been published, so it remains to be seen whether that decision will follow those in other countries, or whether it will not find against any of the parties involved.

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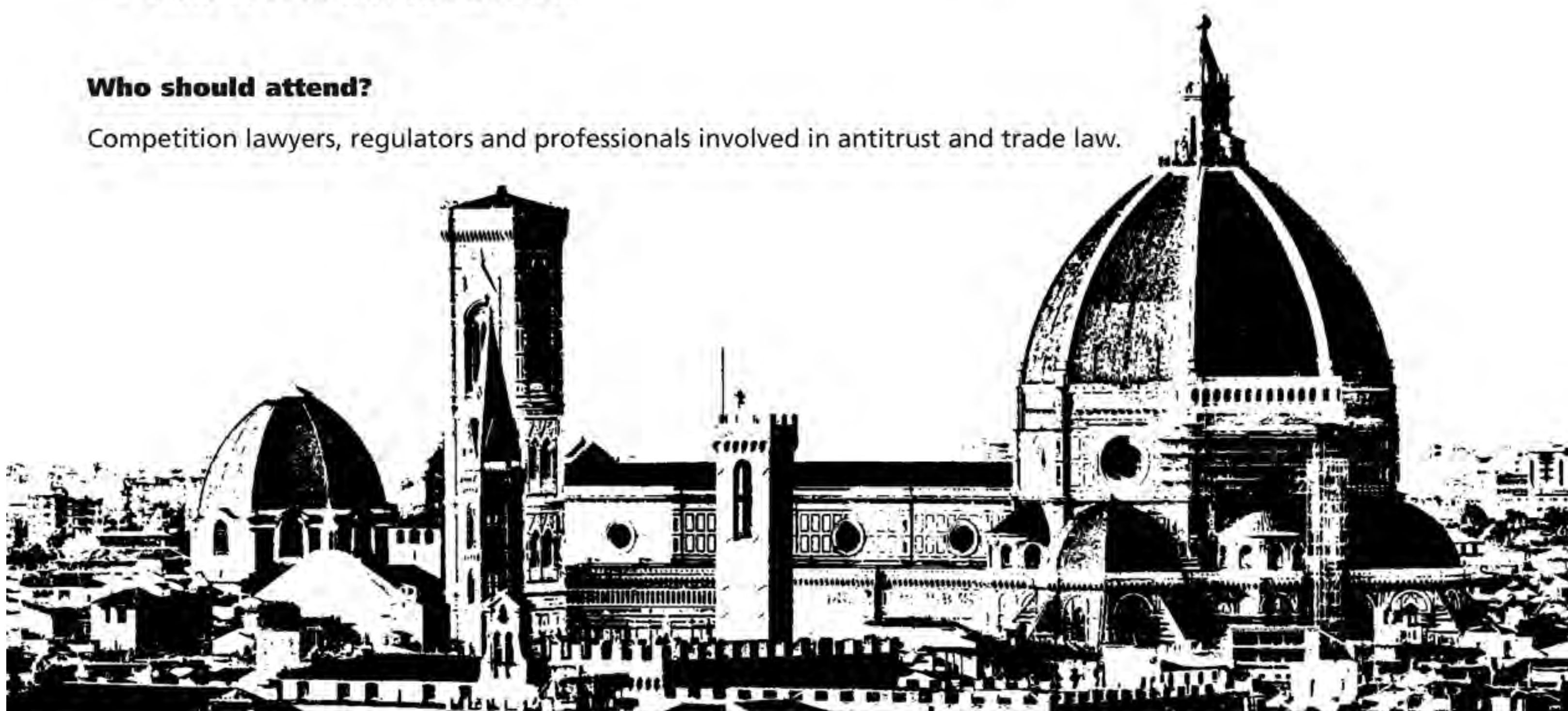

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