CLEARY GOTTLIEB

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This report summarizes the principal developments in the competition laws of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Spain, Sweden, Switzerland, and the United Kingdom during the first quarter of 2006. Conversions to Euro are approximate and, where applicable, based on current market rates.

Austria

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

MERGERS AND ACQUISITIONS

Erste Bank / Ceska sporitelna / Slovenska sporitelna.

On March 27, the Austrian Supreme Court annulled a judgment by the Cartel Court and held that two acquisitions by Erste Bank (namely, of Ceska sporitelna, a Czech bank, and Slovenska sporitelna, a Slovenian bank) were not notifiable under Austrian merger control rules, as there was no effect of competition in Austria (Case 16 Ok 49/05).

While the acquisitions met the Austrian notification thresholds, none of the target banks achieved any turnover in Austria. The Cartel Court had ruled that the acquisitions were notifiable because the acquisitions were capable of increasing Erste Bank's financial strength and were likely to give rise to synergies. In such circumstances, the Cartel Court held that effects on competition in Austria could not be excluded.

The Supreme Court took a more restrictive position, holding that the target banks were active on markets distinct from the Austrian market. It declined to take into account any of the indirect effects referred to by the Cartel Court and held that the acquisitions would not have any effect on competition in Austria.

Under established Austrian case law, an acquisition must be notified – provided the relevant notification thresholds are met – only if the acquisition may have competitive effects in Austria. This "effects" test has generally been interpreted widely. In earlier cases, such as Case 27 Kt 238/03, the Cartel Court held that the "abstract possibility" of potential effects was sufficient to render an acquisition notifiable. The judgment in *Erste Bank* suggests that indirect effects should not be taken into account in determining whether a transaction may have an effect on the Austrian market. The FCA has heavily criticized this judgment, arguing that indirect effects clearly have the potential to affect the competitive situation in Austria, and that the Austrian and eastern European banking markets involved are not geographically distinct.

Belgium

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

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MERGERS AND ACQUISITIONS

Gaz de France/Suez.

On March 6, the Electricity and Gas Regulatory Commission (EGRC) published a study assessing the impact of the proposed concentration on the Belgian gas and electricity markets between Gaz de France (GdF) and Suez.[1]

The EGRC study was carried out at the request of the Belgian Government, and expresses concern as to the possible strengthening of Suez's dominant position on the electricity and gas markets in Belgium, and as to the security of energy supplies in Belgium.

The study adopts market definitions similar to those commonly used by the European Commission: it distinguishes between several sub-markets within the gas and electricity markets corresponding to activities in production, wholesale, transportation, distribution, and supply; and it defines the electricity market as being national in scope, and the gas market as potentially broader than national.

The study notes that a merger between Suez (parent company of Electrabel and Distrigaz, Belgium's incumbent electricity and gas companies) and GdF would create a dominant player in all gas and electricity sub-markets: Distrigaz and GdF (on the gas market) and Electrabel and SPE (Belgium's second largest electricity provider) (on the electricity market) would belong to the same group. The study concludes that this would contradict the objectives currently being pursued by the European Commission in its efforts to de-regulation the industry, hinder competition, and raise barriers to entry. In addition, a merger between Suez/GdF would also increase the integration of the gas and electricity markets, with the risk that the merged entity would be able to leverage its position on the gas market to further strengthen its position on the electricity market. Finally, the study expresses doubts regarding the efficiency arguments put forward by the parties to justify the merger, as it considers that no significant economies of scale will be created on the electricity market. According to the study, even the strengthening of the merged entity's negotiation position towards gas producers is unlikely to lead to better prices for consumers, given the reduction of the worldwide gas reserves and the consecutive long-term international trends towards higher gas prices.

On the security of supply issue, the study notes that post-merger, the French Government would be able to influence the development of Belgium's gas transportation network and electricity production facilities. Should potential conflicts of interest emerge, Belgium's security of supply would be endangered as the French Government may be able to divert energy supplies from Belgium to France.

The study reviews possible remedies to address the concerns identified above, and in particular, a possible divestment of either SPE or Distrigaz. As regards SPE, out of the two potential buyers that have already expressed interest, the study favors a sale to Centrica, a U.K. electricity producer that already holds a stake in SPE, rather than a sale to EdF (Electricité de France), given that the French Government is EdF's main shareholder. The study notes, however, that Centrica does not have the production capacity of EdF, which could assist SPE in competing on equal terms with Electrabel in Belgium. As regards Distrigaz, the study was unable to identify any potential buyers that had expressed interest. The study also considers other remedies, including the sale of transportation capacity and long-term nuclear power plant exploitation rights, as well as improvements in access to the Zeebrugge gas hub. Finally, the study stresses the need to ensure the independence of the gas network operator from market actors involved in production, trading, and distribution activities. To that end, the study favors a structural separation or, at the very least, establishment of an ownership structure where no market operator would hold a blocking minority stake.

Denmark

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

ABUSE OF MARKET POWER

Aria Foods.

On February 10, the Court of Århus imposed a fine of DKK 5 million (approximately €670,000) against the Danish diary firm Arla Foods A.m.b.A for abusing its dominant position on the markets for fresh milk and acidified dairy products. This is the highest fine ever imposed by a Danish court for a violation of the competition law. This is also the first time that an undertaking has been fined for abuse of a dominant position in Denmark, and the first time that a court has imposed fines since sanctions for competition law infringements were tightened by the Danish Competition Act of 2002.

The proceeding began in October 2003 after a complaint by Hirtshals to the Competition Authority, which was followed by a subsequent unannounced inspection by the Competition Authority at Arla's premises. Arla had allegedly paid one of its customers, Metro (a supermarket chain) to terminate its business relationship with Hirtshals Andelsmejeri, one of Arla's smaller competitors.

The Court held that Arla had not generally applied trading conditions with exclusionary or otherwise abusive elements. The decisive question was therefore whether it could be proven that there was a connection between the marketing bonus offered

[1] Study of March 6, 2006, n° (F)060306-CDC-534 (http://www.creg.be/pdf/Etudes/F534FR.pdf.)

to Metro and Metro's subsequent decision to phase out Hirtshals.

The Court held that this had been so proven. Arla was found to have granted Metro a marketing bonus on the condition that Metro terminated its relationship with Hirtshals. In so doing, the Court held that an isolated incident may be sufficient to establish the existence of an abuse, and that it was not necessary for abusive conduct to form part of a general strategy. The Court regarded the abuse as a "serious infringement" of competition law, and found that aggravating circumstances existed, as Arla was also preparing to replace Hirtshals as the supplier to Dansk Supermarket. The Court did not, however, accept the prosecutor's request for a fine of DKK 30 million (approximately €4 million) to be imposed.

Toyota.

On March 16, the Competition Appeals Tribunal annulled a 2005 decision by the Competition Council which found that Toyota held a dominant position on the market for granting authorizations for Toyota repair shops in Denmark. The Appeals Tribunal was skeptical of this market definition but left this question open, as it also overruled the findings of the Competition Council in respect of abuse.

TDC.

On February 10, the Competition Appeals Tribunal partly annulled a decision of the Competition Council concerning TDC. The Competition Council had found that TDC had abused its dominant position by implementing a margin squeeze and unlawful bonus system for certain telephony and telecommunication services. The Competition Appeals Tribunal overruled the decision as regards the finding of a margin squeeze for lack of proof, but upheld the finding in respect of unlawful bonus systems based on marginal purchases, as these were held to have fidelity-enhancing effects.

Viasat.

On March 29, the Danish Competition Council decided not to intervene in respect of the general terms and conditions of Viasat Broadcasting U.K. Ltd., either under Article 6 of the Danish Competition Act on restrictive agreements or under Article 11 of the Danish Competition Act on abuse of dominance.

According to its general terms and conditions, Viasat required that its programs (channel TV3 and 3+) be included in an attractive program package that must contain channels other than the public "must carry" channels DR 1, DR 2 and TV 2. The purpose of this condition was to maximize Viasat's broadcasting viewers, thereby attracting advertisement revenue.

The Competition Council rejected the complaint filed by a Danish antenna association, which had argued that it should have the freedom to determine the composition of its program packages. The Competition Council found that Viasat's terms did not have an appreciable effect on competition. In respect of abuse of dominance, while the Competition Council indicated that Viasat might, with a share of 30.72%, hold a dominant position on the Danish market for free TV and "mini pay" TV (excluding must-carry channels), as indicated by its vertical integration, exclusive rights to broadcast certain important football games (national and Champions league), and its recent ability to increase prices considerably, the Council held that the terms and conditions were normal and fair trading conditions.

Energi E2.

On January 9, the Competition Authority published its decision to terminate the agreement on commitments given by Energi E2 in 2003 concerning Energi E2's behavior on the East Danish electricity market. The commitments were given following a finding by the Authority that Energi E2 held a dominant position on this market and had charged unfair prices. The Competition Authority found, however, that the commitments had been ineffective in curbing Energi E2's pricing practices, and that the market conditions had changed considerably since 2003. By terminating the commitments, the Competition Authority will, according to the decision, be in a better position to investigate the electricity market anew. The decision thus illustrated the Competition Authority's willingness continuously to monitor the Danish energy and electricity markets.

MERGERS AND ACQUISITIONS

Ferti Supply.

On February 22, the Danish Competition Council approved the creation of a joint venture between Dansk Landbrugs Grovvareselskab (DLG), AgroDanmark and Yara Denmark A/S subject to certain commitments. The joint venture, known as Ferti Supply, will co-ordinate the purchase and supply of fertilizers in Denmark.

Following a reasoned submission on Form RS to the European Commission, the case was referred to the Danish Competition Authority under Article 4(4) of the EC Merger Regulation. The Competition Council identified the following competition concerns. First, DLG and AgroDanmark would hold a combined market share of 55-60% in the Danish market for commercial fertilizers. Second, the joint venture would result in vertical integration, as Yara belongs to one of the leading European producers of fertilizers. Access for competing fertilizer producers/traders to the distribution network would thus become difficult.

The parties undertook to abandon the upstream exclusivity provisions agreed between Yara and Ferti Supply (which would have led to an input foreclosure) and the downstream minimum purchase obligations between Ferti Supply and both DLG and AgroDanmark (which would have involved customer foreclosure). This was the first time the

Competition Authority has conducted a merger proceeding in English according to Section 15c of the Danish Competition Act (amended in 2005).

Finland

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

VERTICAL RESTRAINTS

Pharmaceuticals Rebates.
On March 20, the FCA closed its investigation into the legality under Finnish and European competition rules on vertical restraints regarding rebates granted to pharmacies on their purchases of pharmaceutical products. The FCA's decision indicates that, in a regulated market, certain rebates that traditionally are regarded as potentially abusive may also constitute a violation of the rules on vertical restraints.

Under Finnish pharmaceuticals legislation, the retail price of pharmaceutical products is regulated and cannot be determined by pharmacies. In its investigation, the FCA found that producers or distributors of pharmaceutical products had granted rebates on the condition that: (i) the pharmacy receiving the rebate recommend to its customers the relevant supplier's product over other products; or (ii) the pharmacy purchase most or all of its requirements of a given product from a certain supplier. In some instances, a rebate was granted on all purchases made in a given month (as opposed to purchases exceeding a certain threshold) if the monthly purchases had reached a certain threshold (so called non-linear rebates).

In its decision, the FCA considered that such rebates had the effect of foreclosing the market from competing suppliers of pharmaceutical products. There was, however, no suggestion that the companies under investigation were in a dominant position. In the FCA's view, in a regulated industry where the purchasers could not pass on the rebates to their customers, the types of rebate offered in this case violated the Finnish and European rules on vertical restraints. The FCA nevertheless decided to close its investigation because the companies under investigation had notified the FCA that they would refrain from granting such rebates in the future, and because the types of rebate at issue could no longer be granted under a new law, effective February 1, that required the wholesale prices of pharmaceutical products (sold only in pharmacies) to be identical for all pharmacies.

MERGERS AND ACQUISITIONS

SOK/Suomen Spar.
On January 4, the FCA approved with conditions the acquisition by SOK, a central organization for the S-daily consumer goods cooperative store chain, of Suomen Spar that operates the Spar and Eurospar store chain. The transaction also included a 35% stake held by Suomen Spar in Tuko Logistics, a procurement organization used by Suomen Spar, as well as other retailers, for their procurement of daily consumer goods.

The FCA assessed the competitive effects of the transaction on local retail markets for daily consumer goods, including both large and small daily consumer goods stores. The FCA concluded that, without conditions being imposed, the transaction would lead to the creation or strengthening of a dominant position on a number of local markets where, in most cases, the combined market share of the parties exceeded 50%. In these areas, mostly small municipalities, competing stores were considered too far removed to be effective competitive constraints on the merged entity. In order to alleviate the FCA's concerns, the parties offered to divest a number of stores in the areas where competition would be most affected.

In addition, the FCA considered that the S-group could, through its 35% ownership in Tuko Logistics, gain access to sensitive information concerning its competitors' purchases, which would have strengthened its dominant position in the retail market. As a result, the parties also undertook to divest Suomen Spar's 35% stake in Tuko Logistics.

France

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

VERTICAL RESTRAINTS

Luxury Perfumes.
On March 13, the French Competition Council imposed fines totaling €46.2 million on 13 suppliers of luxury perfumes and cosmetics – Beauté Prestige International (Jean-Paul Gaultier et Issey Miyake), Chanel, Parfums Christian Dior, Comptoir nouveau de la parfumerie (Hermès), ELCO (Clinique et Estée Lauder), Parfums Givenchy, Guerlain, Kenzo Parfums, L'Oréal, Pacidic Créations Parfums (Lolita Lempicka), Shiseido France, Thierry Mugler Parfums, Yves Saint-Laurent Parfums – and on the three main French retailers (Marionnaud, Nocibé, Séphora) for resale

price maintenance practices in breach of Articles 81 EC and L. 420-1 of the French Commercial Code.[2]

The Competition Council noted that the selective distribution of luxury products may justify suppliers exercising a certain degree of control over supply conditions. It does not, however, allow suppliers to prevent retailers from fixing their own retail prices since resale price maintenance constitutes a "hard-core" restriction of intra-brand competition to the detriment of consumers.

The Competition Council held that, in order to prove a resale price maintenance agreement, three elements must be shown.

First, the suppliers must have communicated to retailers a recommended price and a maximum level of rebate for each product. In the present case, the Competition Council found evidence that each perfume supplier had communicated a "*prix public indicatif*" (recommended public price) for each product to their distributors, including each of the three retailers. The Council also found that the suppliers had indicated an authorized maximum level of rebate in order to harmonize retail prices artificially.

Second, there must be some evidence of the existence of a price-monitoring system. In the present case, the Competition Council found that the suppliers introduced such a system and put pressure on retailers to implement the recommended prices through surprise inspections and retaliatory measures.

Third, a significant number of retailers must comply with the suppliers' recommended price policy. In the present case, an analysis of retail prices reported during the Competition Council's investigation showed that retailers complied with the resale price maintenance agreements, as most prices were close to, or exceeded, the recommended price levels.

The Competition Council held that these required elements were met in this case. The Council also held that it was not necessary to demonstrate the existence of a resale price maintenance agreement between each supplier and each individual retailer. The Council considered that it had discretion to involve only those retailers who were instrumental in the implementation of the agreement in the proceedings, even though the resale price maintenance scheme concerned all distributors.

[2] Competition Council Decision N°06-D-04 of March 13, 2006, concerning practices in the luxury perfumes sector.

ABUSE OF MARKET POWER

JCDecaux.

On February 21, the Paris Court of Appeals partially annulled a decision by the French Competition Council against JCDecaux, a worldwide supplier of outdoor advertising, for breach of injunctions, and reduced the fine from €10 million to €2 million.[3]

In 1998, the Competition Council found that JCDecaux abused its dominant position on the French market for street furniture and ordered JCDecaux to remove certain clauses from its standard supply agreements with local authorities. On June 30, 2005, the Competition Council ruled that five companies of the JCDecaux group had failed to comply with the injunctions contained in the 1998 decision and fined them a total of €10 million. The Competition Council also ordered that the 2005 decision should be published in a newspaper and notified by letter to all French public local and regional authorities with which JCDecaux had a contractual relationship.

On September 6, 2005, the Paris Court of Appeals ordered the suspension of the notification to public authorities on the grounds that it would damage JCDecaux's reputation and was likely to have an adverse impact on the award of pending tenders.

On February 21, 2006, the Court of Appeals upheld JCDecaux's argument that four out of five companies should be cleared of all charges, as they were not involved in any breach of the decision and, accordingly, annulled the fines imposed by the Competition Council on these companies. The Court also ruled that the Competition Council had exceeded its powers by sanctioning practices that were not strictly within the scope of the 1998 injunctions. The Court found that, contrary to the Competition Council's assessment, JCDecaux had only violated one out of four injunctions. Consequently, the Court reduced the fine to €2 million. The Court also annulled the publication and notification measures ordered by the Competition Council.

Nouvelles Messageries de Presse Parisienne.

On January 31, the Paris Court of Appeals partially annulled a decision by the French Competition Council granting interim measures against Nouvelles Messageries de Presse Parisienne (NMPP) following a complaint filed by Messageries Lyonnaises de Presse (MLP).[4]

In France, press messaging services, such as NMPP and MLP, distribute newspapers and magazines to wholesalers, which in turn supply these publications to retail newsagents. In order to

[3] CA Paris, *1ère Chambre Section H*, February 21, 2006, n°2005/14774.

[4] CA Paris, *1ère Chambre Section H*, January 31, 2006, n°2005/14782.

manage press distribution, wholesalers use a software package called *"Presse 2000"* which was designed by NMPP. Some of the functionalities of *"Presse 2000"*, known as the *"tronc commun"* (or core section), are shared by NMPP and MLP. MLP has its own computer system which transfers information to wholesalers but which is not directly connected to *"Presse 2000."* Consequently, wholesalers that work with MLP have to re-enter data manually, which is expensive, time-consuming, and inevitably leads to errors.

On December 22, 2003, the Competition Council considered that certain NMPP practices could constitute an abuse of a dominant position and cause severe prejudice to MLP. In particular, it found that NMPP's refusal to allow MLP's software to interface with *"Presse 2000"* was likely to pose a serious and immediate threat to MLP. Consequently, the Council required NMPP to allow MLP to access *"Presse 2000"* under fair economic terms, thereby enabling the automatic transfer of files between MLP's system and *"Presse 2000.*"

On February 12, 2004, the Paris Court of Appeals, in upholding the Competition Council's decision, considered that the core section of *"Presse 2000"* was an essential facility. On July 12, 2005, the *Cour de Cassation* overturned the judgment and referred the case back to the Court of Appeals. The *Cour de Cassation* held that the Court of Appeals should have verified that there was no other economically reasonable alternative for MLP, even if less profitable, than providing direct access to the *"Presse 2000"* core section, and that such access was indispensable for MLP's activity.

On referral, the Court of Appeals held that the refusal to grant access to the software could not constitute an abuse of a dominant position and therefore annulled the Competition Council's decision. The Court of Appeals took into consideration the following elements: (i) MLP developed a software program several years ago which enabled it to process the data of the *"Presse 2000"* core section, thus the fact that the wholesalers have to re-enter the data manually does not constitute an unreasonable technical constraint that prevents MLP from exercising its activity; (ii) MLP could have developed software similar to *"Presse 2000"*, wholesalers would not oppose the development of a second software system, and there is no proof that such development would not be profitable; (iii) there is no evidence that MLP could not set up its own wholesaler network; and (iv) MLP did not prove that it had suffered any loss as a result of restricted access to the software.

MERGERS AND ACQUISITIONS

CEGID/CCMX.

On February 13, the French Supreme Administrative Court, the *Conseil d'Etat*, upheld the clearance decision by the Minister of the Economy regarding the acquisition of CCMX by Cegid.[5] The *Conseil d'Etat*'s ruling puts an end to an unprecedented procedural process in the context of merger control in France.

On October 24, 2004, the Minister of the Economy approved the proposed acquisition of CCMX by Cegid, both active on the market for software used by accountants and small-medium sized enterprises (SMEs). The Minister found that the transaction would not distort competition on the relevant market. However, Fiducial, a competitor and a client of the newly combined entity, applied to the *Conseil d'Etat* seeking the annulment of the clearance decision and an interim suspension of the decision.

On May 19, 2005, the *Conseil d'Etat* suspended the Minister's clearance decision, pending its judgment on the merits, in view of the inconsistencies it found in the Minister's reasoning. On the one hand, the Minister considered that an efficient retail network and strong brands were two prerequisites for a potential competitor that was willing to enter the market; but on the other hand, the Minister considered that there were no barriers to entry.

Before ruling on the merits, the *Conseil d'Etat* referred the proposed transaction to the French Competition Council for an advisory opinion. This was the first time the *Conseil d'Etat* had taken such action in the context of merger control. On December 14, 2005, the Competition Council issued an opinion supporting the Minister's clearance decision. In view of this opinion, and of the arguments put forward by the Minister and by Cegid, the *Conseil d'Etat* upheld the approval of the acquisition of CCMX by Cegid in its final ruling. Throughout the *Conseil d'Etat*'s review, the proposed transaction had remained on hold.

The *Conseil d'Etat* held that the "new and additional information put forward by the Minister before the Conseil d'Etat confirm in substance the findings of the challenged decision." First, the Minister substantiated the finding of low barriers to entry. Second, the Minister also provided a more detailed analysis as to why the proposed transaction would not lead to any anticompetitive effects on the relevant market. Based on this additional information, the *Conseil d'Etat* upheld the approval of the proposed transaction without modifying the Minister's reasoning.

Germany

This section reviews developments concerning the Act against Restraints of Competition of 1957 (the Competition Act), which is enforced by the Federal Cartel Office (the FCO), the cartel offices of the

5 *Conseil d'Etat*, February 13, 2006, n°279180.

individual German Länder and the Ministry of Economic Affairs and Labor.

ABUSE OF MARKET POWER

E.ON Ruhrgas.
On January 17, the FCO held that E.ON Ruhrgas' long-term gas supply agreements containing high purchase obligations constituted an infringement of Articles 81 and 82 EC and Section 1 GWB.[6]

The FCO ordered E.ON Ruhrgas to discontinue the enforcement of long-term duration and total requirements clauses in its supply agreements by September 30, 2006, and prohibited the conclusion of new gas supply agreements between E.ON and regional or local gas distributors that either: (i) have a term of more than 2 years and contain clauses obligating the distributor to purchase more than 80% of its total requirements from one gas supplier; or (ii) have a term of more than 4 years and contain an obligation on the distributor to purchase more than 50% of its total requirements from one supplier.

The FCO ordered that its decision is to be effective immediately. E.ON Ruhrgas has appealed both the substantive decision and the order of immediate effectiveness.

Soda-Club.
On February 9, the FCO held that the implementation of the distribution system of Soda-Club GmbH and its affiliated companies constituted an abuse of their dominant positions in the national market for gas refills of CO_2 cylinders used in so-called Drinksmaker machines.

Soda-Club is a soft drinks company that produces and sells at-home beverage carbonation systems, flavored soda mixes, carbonating bottles and CO_2 gas to consumers worldwide. According to the FCO, Soda-Club has a market share of 70% in the gas refill market.

Currently, there are two distribution systems operated by companies active in the gas refill market: the distribution system of Soda-Club (the rental system) on the one hand and the distribution system of its competitors (the barter system) on the other hand. Under the barter system, end users purchase the cylinder containing CO_2 gas, thus gaining ownership of it. When a cylinder needs to be refilled, the retailer takes it back and replaces it with a new cylinder. Under the rental system, the cylinders remain the property of Soda-Club. Upon purchasing a Soda-Club-product including a cylinder, the customer pays an "advance rental fee" which is only refunded if the customer complies with requirements determined by Soda Club.

[6] See National Competition Reports, October – December 2005, July – September 2005 and January – March 2005.

The rental system is implemented by a "Soda-Club and Sodastream Cylinder Retail- and License-Agreement" concluded by Soda-Club and its retailers. Pursuant to this agreement, the retailers are granted the exclusive right to refill Soda-Club cylinders. (The actual refilling process is carried out by Soda-Club, which provides the retailers with the refilled cylinders.) Soda-Club retailers also accept cylinders of Soda-Club competitors for refilling purposes, although they replace them exclusively with Soda-Club cylinders, leading to an increase in the number of Soda-Club cylinders in circulation in the market. Should a retailer wish to terminate this agreement, it can only return a certain number of cylinders (equivalent to the number of cylinders received when concluding the agreement) to Soda-Club. The cylinders returned to the retailer after the agreement has been terminated cannot be returned to Soda-Club. Hence, the retailer is forced to take these cylinders back at its own expense. Retailers and gas refill companies not contractually bound to Soda-Club are effectively prevented from refilling Soda-Club cylinders, since Soda-Club has in the past taken legal action against such companies, claiming an infringement of its proprietary rights.

The FCO found that the manner in which Soda-Club operated its distribution system constituted an abuse of a dominant position under Section 19(1), (4) sentence 1 no.1 GWB. It also held that Soda-Club had violated Section 19 GWB, as well as Article 82 EC. The FCO ordered Soda-Club to permit companies not contractually bound to Soda-Club to refill Soda-Club cylinders. Accordingly, end users are now able to choose refill companies other than Soda-Club companies for the purpose of refilling Soda-Club cylinders. Furthermore, the FCO issued a prohibition pursuant to Section 32(1), (2) GWB against Soda-Club taking measures to deter other companies from refilling Soda-Club cylinders.

Soda-Club has filed an appeal with the Higher Regional Court of Düsseldorf.

Gas Sector.
On February 14, the FCO discontinued proceedings against seven gas companies (E.ON Thüringer Energie AG, E.ON Avacon AG, RWE Westfalen-Weser-Ems AG, MITGAS Mitteldeutsche Gasversorgungs GmbH, SpreeGas GmbH, ENTEGA Vertrieb GmbH & Co. KG and an independent company of Thüga AG) after the companies undertook to offer private customers the possibility of switching gas providers as of April 1, 2006. E.ON made this commitment on behalf of all its affiliated companies. In January, the FCO had initiated formal proceedings against the gas companies for charging excessive prices to end-users.

A nationwide report on the gas prices charged by more than 700 gas providers, conducted by the FCO and the competition authorities of the Länder, had identified price differences of more than 40% between providers. In addition to the FCO proceedings (involving 29 gas providers), the

competition authorities of the Länder have initiated more than 80 proceedings against gas providers in their respective territories. Consumers had not only complained about high prices but also that they were not free to switch between the gas providers.

The possibility of switching between gas providers is known as "provision" (*Beistellung*), a market-opening arrangement which is already applied in the telecommunications and electricity sectors. Under this market-opening arrangement, the end consumer concludes a supply contract with a new supplier, which in turns buys the gas from an established local network operator on the basis of a provision contract (*Dreiecksverhältnis*).

According to FCO president, Dr. Böge, the provision scheme will serve as a temporary solution until an effective entry-exit-system for household customers has been put in place; this will allow alternative gas providers to transmit gas through the network of local network operators on a non-discriminatory basis. The Federal Network Agency, the German regulatory authority, anticipates that such an entry-exit-system will be operational on October 1.

MERGERS AND ACQUISITIONS

RTL/n-tv.

On February 6, the FCO issued a warning letter regarding the planned acquisition of sole control of the n-tv news channel by RTL Television GmbH. RTL, which currently holds 50% of the shares in n-tv, intends to acquire the remaining 50% from CNN/Time Warner.

The FCO stated that the acquisition would lead to a strengthening of the collective dominant position of the RTL group (which includes the TV stations RTL, VOX, Super RTL and n-tv) and ProSiebenSat.1 Media AG in the national TV advertising market. According to the investigations carried out to date by the FCO, the acquisition of sole control over n-tv by RTL would result in RTL being in a position to increase its influence over n-tv to a considerable extent. In addition, the planned acquisition would lead to a further concentration of the existing duopoly between RTL and ProSiebenSat.1.

RTL/n-tv had the opportunity to comment on this warning letter by February 16.

Springer/ProSiebenSat.1.

On February 23, the publishing house Axel Springer AG filed an appeal with the Higher Regional Court of Düsseldorf against the FCO's decision prohibiting the merger of Springer and the broadcasting company ProSiebenSat.1 Media AG.[7]

Shortly after the FCO had prohibited the merger, Springer announced that it would not appeal the FCO's decision and would abandon its plans to acquire ProSiebenSat.1. Springer has now explained that while it will not be resuming its plans to acquire ProSiebenSat.1, it was nevertheless appealing the FCO's decision in order to obtain legal certainty for future transactions on the question whether the FCO findings were valid in respect of Springer's position in the reader market for tabloid newspapers and in the advertising markets for newspapers.

POLICY AND PROCEDURE

New Leniency Program.

On March 7, the FCO issued a new leniency notice, effective March 15, which replaces the previous leniency notice No. 68/2000 of April 17, 2000.

The leniency notice covers hardcore cartels and bid-rigging (horizontal infringements). Vertical agreements such as resale price maintenance agreements are not covered, even if they appear in a quasi-horizontal context.

The FCO will grant full immunity from fines where the individual or enterprise applying for leniency is the first of the cartel participants to contact the FCO and provides sufficient information to allow the FCO to prove the existence of an infringement of competition law. A key change introduced by the new leniency notice is that the FCO will also grant full immunity to the first leniency applicant even where it has already initiated proceedings and has sufficient evidence to obtain a search warrant. This implies that full immunity may still be available even after a dawn raid has been carried out.

Another change is that the FCO will now grant immunity to ringleaders, provided there are at least two. Where there is only one ringleader, immunity will not be available. In addition, the FCO applies the coercer test, which means that if an applicant coerced others to participate in the cartel, it will not be eligible for immunity.

The FCO may also grant a reduction of fines to leniency applicants which are not the first cartel participants to contact the FCO or which do not qualify for immunity by reason of the fact that the applicant was the sole ringleader or coerced others to participate in the cartel. The fine reduction can amount to up to 50%, depending on the value of the disclosure made by the applicant and on its place in the succession of leniency applications which have been made in the cartel matter in question.

The FCO will only grant leniency or fine reductions if the applicants cooperate fully throughout the duration of the proceedings.

In contrast to the European Commission's leniency notice, the new leniency notice of the FCO provides that leniency is not conditional upon the applicant immediately terminating its cartel activities. However, the applicant must terminate the cartel

[7] See National Competition Report, October – December 2005.

activities if and when the FCO instructs it to do so. The application must be kept confidential for as long as the FCO requires this, normally until the dawn raids are carried out.

The FCO has also introduced a marker system for applications: in order to secure their place in line, it is sufficient for applicants to provide to the FCO, verbally or in writing, a short description of the type and duration of the infringement, the product and geographic markets concerned, and the identity of the participants, and to inform the FCO of the other competition authorities, if any, to which they have applied for leniency. Applicants must then submit a full leniency application, either orally or in writing, within a timeframe to be determined by the FCO, which will not exceed eight weeks.

Greece

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

POLICY AND PROCEDURE

De Minimis Notice.
On March 2, the Greek Competition Commission issued a Notice on agreements of minor importance (so-called *de minimis* agreements) (Notice on agreements of minor importance, which do not appreciably restrict competition under article 1(1) of law 703/1977).

Similar to the European Commission's notice on *de minimis* agreements, the Greek Competition Commission applies market share thresholds to determine which agreements are unlikely to constitute an appreciable restriction of competition under article 1(1) of the Greek antitrust law:

(i) where the aggregate share held by the parties to the agreement does not exceed 5% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings who are actual or potential competitors on any of these markets; or

(ii) where the share held by each of the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is between undertakings who are not actual or potential competitors.

In cases where it is difficult to classify the agreement as being either an agreement between competitors or an agreement between non-competitors, the 5% threshold applies. Where competition is restricted by the cumulative effect of agreements, the 5% threshold also applies.

Again following the approach of the European Commission, the *de minimis* rules do not apply to agreements containing hardcore restrictions, including: (i) agreements between competitors for the purpose of price fixing, limiting output or sales, or allocating markets or customers; and (ii) agreements between non-competitors for the purpose of restricting the buyer's ability to determine its sale price; restricting the territory in which, or the customers to whom, a buyer may sell; restricting active or passive sales to end users by members of a selective distribution system; restricting cross supplies between distributors within a selective distribution system.

Leniency Program.
On March 2, the Greek Competition Commission issued a Decision establishing its leniency program (Decision 299/V/2006 establishing a Leniency Program for cartel cases). This is based largely on the European Commission's leniency program.

The leniency program provides that immunity from fines will be granted if an undertaking is the first to submit evidence which may enable the Commission to adopt a decision to carry out an investigation regarding an infringement of article 1(1) law 703/77 or/and of Article 81 EC.

For those undertakings which do not qualify for immunity, a fine reduction may be granted if an undertaking provides the Commission with evidence of the suspected infringement which adds "significant added value" to the evidence already in the Commission's possession. The undertaking must terminate its involvement in the suspected infringement no later than the time at which it first submits evidence to the Commission. Fines will be reduced by 30-50% for the first undertaking, 20-30% for the second, and up to 20% for subsequent undertakings.

An undertaking wishing to apply for immunity or a fine reduction should apply to the Head of the Directorate of Legal Affairs. If the conditions of the Decision are met, following a recommendation by the Director-General, the undertaking will be informed by the Commission's President of the intent to grant immunity or a fine reduction. The amount of the fine reduction will not be known until the end of the administrative procedure when the Commission issues a decision.

Ireland

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

HORIZONTAL RESTRAINTS

First Cartel Offence Convictions.
On March 6, for the first time under the Competition Act of 1996, Irish courts imposed criminal fines and a custodial (albeit suspended) sentence for participation in a cartel. This is one of the first times within the EU that a criminal conviction has been

imposed on an individual for offences arising from alleged price fixing.

In the most significant trial, *DDP v. J.P. Lambe*,[8] the Dublin Circuit Criminal Court held that a retired oil distributor, who held an unpaid and part-time position for the trade association Connacht Oil Promotion Federation, was the "enforcer" of the cartel in the oil distribution industry. The "enforcer" was fined €15,000 and given a six-month suspended sentence for negotiating agreements between ostensibly competing oil distribution companies and arbitrating disputes that arose amongst them. The presiding judge accepted that the defendant had not received remuneration for his activities when imposing the sentence. In a separate hearing, *DPP v. M. Flanagan*[9], another former oil distributor who participated in the same cartel, was fined €3,500. These sanctions imposed by the courts subsequently persuaded the remaining members of the cartel to change their pleas to guilty in the proceedings against them. Thus far, the defendants sentenced have received fines of between €3,500 and €7,500.

As the proscribed activity had occurred prior to the revision of the Competition Act in 2002 (which provides for stiffer penalties than under the 1996 Act), the court was limited to the imposition of a maximum custodial sentence of 2 years, in addition to fines of up to €3.8 million or 10% of turnover of the individual in the financial year ending in the 12 months prior to the conviction. Under the 2002 Act, these sanctions were strengthened to a maximum of 5 years imprisonment and possibility of fines totaling €4 million or 10% of turnover of the individual in the financial year ending in the 12 months prior to the conviction (similar fines are imposed on undertakings).

The Competition Authority initially launched the investigation into price-fixing in the home-heating oil sector in the west of Ireland in 2001 and early 2002. As a result of the investigation, including a series of dawn raids, criminal proceedings were initiated in several district courts against 24 defendants in February and March 2006. The solicitor who led the authority's investigation estimated that the cartel may have increased the price of home-heating oil by 10% in Galway city and county area for the duration of the cartel's existence (from January 2001 to February 2002).

ABUSE OF MARKET POWER

Galileo Ireland.

Galileo Ireland, a provider of computerized reservation technology to Irish travel agents, provided a series of legally binding commitments to the Competition Authority, thereby putting an end to the Authority's investigation into a possible abuse of a dominant position under Section 5 of the Competition Act of 2002.

The commitments include an undertaking to deal with future requests for its technology in an open, transparent, proportionate and non-discriminatory manner. The investigation arose from a third-party complaint alleging an unjustified refusal to supply technology, and concerns that such activity was stifling technological development in the Irish travel agency sector.

Italy

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

ABUSE OF MARKET POWER

Eni/TTPC.

On January 15, the Competition Authority found that Eni S.p.A. violated Article 82 EC through the exclusionary conduct of its wholly-owned subsidiary Trans Tunisian Pipeline Company Ltd (TTPC), with a view to protecting Eni's position in the downstream market for the wholesale supply of natural gas. Eni was fined €290 million, the largest fine ever imposed upon a company by the Authority (Case A358).

TTPC manages the pipeline carrying Algerian natural gas to Italy through Tunisia. In 2002, TTPC decided to increase its natural gas pipeline capacity in response to requests for additional capacity by certain new operators. On March 30, 2003, TTPC entered into contracts with seven shippers, whereby it granted them additional pipeline capacity beginning in 2008 (the planned date of completion of the expansion project). In order to secure the investment risk ($220 million), the entry into force of these 'ship or pay' contracts was made subject to certain conditions precedent to be fulfilled by June 30, 2003.

Since none of the shippers fulfilled all of the conditions by the agreed deadline, and three of them had fulfilled none of the conditions, TTPC declared that the three latter contracts were automatically terminated, and postponed until October 30, 2003, the deadline for fulfillment of the remaining conditions. No further postponement was permitted, however, after the four remaining shippers failed to fulfill the outstanding conditions by October 30.

The Authority acknowledged that the clauses concerning the conditions precedent were standard and legitimate clauses aimed at sharing the risk of

[8] *DPP v. J.P. Lambe*, Dublin Circuit Criminal Court, number 72/2005.

[9] DDP V M. Flanagan, Galway Circuit Criminal Court, number 58/04.

the investment between TTPC and the shippers. The Authority took the view, however, that – taking into account the economic importance of the project and the fact that the shippers had already done all they could to fulfill the remaining conditions – TTPC's refusal to grant a further extension ran contrary to TTPC's economic interests, and that TTPC had abandoned the project because it had been forced to do so by its parent company Eni, which had decided that the pipeline upgrade was no longer in Eni's best interest, due to the risk of oversupply in the Italian market (brought about by two new LNG re-gasification plants). In the Authority's view, had TTPC acted as an independent operator in the sector of international gas transportation, it would have found it profitable to pursue the pipeline extension, including by granting a further postponement of the deadline to the four shippers in question.

The Authority conceded that Eni did not have an obligation to promote an extension of the TTPC pipeline for the importation of gas from Algeria into Italy, and did not characterize this infrastructure as an essential facility. The Authority held, however, that, as a dominant undertaking, Eni had a special responsibility to not interfere with the business decisions of its subsidiary, which had already undertaken a procedure for the extension of the Tunisian pipeline.

Glaxo Group.

On February 8, the Competition Authority found that Glaxo Group Limited had abused its dominant position contrary to Article 82 EC by refusing to grant to Fabbrica Italiana Sintetici S.p.A. (FIS) (an Italian chemical company that produces and sells active ingredients to generics producers) a license for the production in Italy of the active ingredient Sumatriptan Succinate for export purposes (Case A363). The Authority did not impose a fine on Glaxo in light of its subsequent redeeming behavior.

Italian legislation provides that holders of pharmaceuticals supplementary protection certificates (SPCs) granted in Italy before the entry into force of Regulation 1768/92 EC are under an obligation to negotiate with interested third parties, before the Italian Ministry of Productive Activities, for the release of voluntary royalty-bearing licenses for the production in Italy (and later export into countries where patent protection has expired) of the active ingredients covered by the SPCs.

Based on this legislation, FIS requested a license from Glaxo in early 2003 for the production in Italy of the active ingredient Sumatriptan and its later export in countries where patent protection has expired. Following Glaxo's refusal to grant FIS the requested license, the Ministry transmitted to the Authority the file concerning FIS' request. On February 23, 2005, the Authority opened an investigation into the matter.

Sumatriptan is an active ingredient used for the production of drugs belonging to the triptans class, (a group of anti-migraine drugs especially effective in treating acute migraine attacks which are prescribed in cases where conventional analgesics fail). Moreover, Glaxo's Sumatriptan-based drug, in its injectable version, is currently the only remedy against the so-called cluster headache, which usually requires hospitalization. In Italy, Glaxo holds two SPCs for Sumatriptan: one that covers the general chemical formula from which a group of molecules, including Sumatriptan, are synthesized; and one SPC protecting only the Sumatriptan formula. According to the Authority, Glaxo is virtually the sole producer worldwide of Sumatriptan and is practically the sole marketer of Sumatriptan-based drugs in Europe, including those EU-Member States (such as Spain) where patent protection covering the active ingredient has expired.

The Authority found that Glaxo held dominant positions in the Italian and Spanish markets for triptans (the finished pharmaceutical drug) sold in the hospital channels. In the Authority's view, by refusing to grant the requested license to FIS, Glaxo prevented the production of a scarce input (Sumatriptan), which is indispensable for the production of generic triptans, since the other active ingredients that could be used for the production of such products are still covered by patent protection everywhere in the EU. Since, in the Authority's view, FIS was the only EU producer of active ingredients capable of satisfying the potential demand of generics manufacturers wishing to enter the triptans market, Glaxo's refusal impeded the entry of generics manufacturers into the geographic markets where Glaxo's patent protection has already expired, such as Spain, thereby depriving consumers of substantial price reductions which typically follow the introduction of generics.

The Authority explicitly rejected Glaxo's argument that its refusal was objectively justified by the fact that the above-mentioned Italian legislation on SPC voluntary licenses did not apply to the second SPC at issue as the latter had not yet come into force (the relevant patent not yet having expired). Glaxo further argued that, as FIS would have not been able to produce Sumatriptan under a license covering the first SPC without infringing the other patent, FIS should have waited for the second SPC to enter into force (in August 2005). The Authority held that, even if Glaxo's argument were correct, FIS' proposal to enter into an agreement whereby the requested licenses would enter into force only when the second SPC would take effect, was sufficient to overcome Glaxo's argument.

During the course of the proceedings, however, Glaxo not only released to FIS the requested license, but also granted FIS a license for the production of a key intermediate necessary for the production of Sumatriptan, and provided FIS with its proprietary technological know-how concerning the production process of the active ingredient. This, in turn, allowed FIS to "skip" the time period necessary to develop its own independent production process for Sumatriptan, which allowed FIS to begin

production and marketing of the active ingredient at about the same time it would have if Glaxo had never refused the requested license. In other words, Glaxo's redeeming behavior was viewed to have completely eliminated the anti-competitive effects stemming from its initial refusal to license. The Authority thus imposed no fine.

The Authority's substantive analysis arguably departs from established Community case law, whereby refusals to license intellectual property rights may be found abusive only if a number of cumulative conditions are met, including that the refusal prevents the emergence of a new product for which there is potential consumer demand. Clearly, this condition was not met in Glaxo's case. Indeed, FIS intended to produce exactly the same active ingredient (Sumatriptan) produced and marketed by Glaxo. Likewise, generics manufacturers will offer, by definition, a product identical to Glaxo's branded triptan. In its decision, the Authority argued that the case at hand was different from those analyzed in the relevant Community case law, insofar as Glaxo's refusal prevented commercialization of both Sumatriptan and Sumatriptan-based drugs in countries where Glaxo did not hold any intellectual property rights covering the active ingredient. According to the Authority, Glaxo's conduct did not fall within the subject matter of its SPCs because it prevented the development of competition in markets falling outside the scope of protection guaranteed by the SPCs. However, the Authority overlooked the fact that the SPCs cover both production and marketing, and that FIS' production of the active ingredient in Italy clearly falls within the subject matter of Glaxo's SPCs. The Authority's position appears to have been influenced by the underlying consideration that the peculiarities of Italian legislation make SPCs a weaker type of intellectual property right.

The Netherlands

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

HORIZONTAL RESTRAINTS

Concrete Sector.
On January 12, the NMa imposed fines totaling €6 million on 10 fluid concrete production companies. The fines range from €82,000 to €873,000.[10] The parties involved engaged in a classic cartel by informing each other annually during meetings and/or by letter of the price changes they each intended to make, on the basis of which the companies then determined their prices. The NMa considered this a "very serious" infringement of competition law. These fines are in line with the NMa's general approach to impose maximum fines in such cases.

MERGERS AND ACQUISITIONS

KPN Telecom/Nozema Services.
On March 6, the NMa cleared the acquisition by KPN Telecom (the incumbent telecom operator) of sole control of Nozema Services by acquiring from Nozema its 40% stake in Digitenne, the sole supplier of terrestrial digital TV in the Netherlands.[11] (KPN already held a 40% stake in Digitenne and the additional 20% stake remained with broadcasting companies in the city of Hilversum.)

KPN appears to have recognized at an early stage that its bid would raise competitive concerns, as KPN engaged in extensive pre-notification discussions with the NMa. The NMa found that the acquisition would not lead to KPN obtaining a dominant position, despite KPN's share of the Dutch digital television market doubling to 80%, as Digitenne had a share of only around 2% in the broader market for TV signal transmissions. The NMa also found that cable and possibly satellite transmission would exercise a sufficient competitive constraint on KPN.

Nonetheless, the NMa required KPN to divest a number of its broadcasting towers by March 2008, to avoid any concern in relation to the transmission of wireless radio signals. The KPN/Nozema decision is interesting because it is one of only a few examples where competitive concerns were raised in a transaction involving the transition from joint control to sole control, which generally would be regarded as pro-competitive.

POLICY AND PROCEDURE

Appointment of Chief Economist.
On February 1, the NMa announced the appointment of a Chief Economist, Jarig van Sinderen, who will head up a separate unit within the agency. The economist unit is tasked with providing specialist advice: (i) in broad sectoral investigations; (ii) to advise staff in cases before the NMa; and (iii) to reinforce internal agency checks and balances as a "devil's advocate" team in complex cases. This development is in line with the increasing European trend to focus on economic theory and on the "outcomes" of actions taken by regulators. The European Commission, for example, has had a Chief Competition Economist for several years.

Spain

This section reviews developments concerning the Law for the Protection of Competition of 1989,

10 Case 2112 *Betonmortelcentrales*, decision of January 12, 2006.

11 Case 5454 *KPN/Nozema Services*, decision of March 6, 2006.

which is enforced by the Spanish Competition authorities and Spanish Courts.

MERGERS AND ACQUISITIONS

Telefónica/Iberbanda.

On January 27, the Cabinet, strictly following the Tribunal's non-binding opinion (C 93/05), prohibited the acquisition by Telefónica of a controlling share in Iberbanda, a Spanish broadband wireless operator.

Iberbanda uses LMDS technology and holds a national 3.5GHz license which will allow it to offer WiMAX, a standards-based technology based on LMDS enabling the delivery of "last mile" wireless broadband access (BOE n. 44, 21/02/06, p. 7086). WiMAX is considered to be a revolutionary and disruptive alternative to cable and DSL in the electronic communications sector.

Based on the Tribunal's opinion, the Cabinet found that the transaction would have a negative effect on competition on the broadband internet access markets where Telefónica holds materially high market shares (around 73%) with its DSL service.

The Tribunal had found that the relevant markets consisted of retail and wholesale broadband internet access services at a fixed location, both of which are national in scope due primarily to the need for local infrastructures and the existing national regulatory framework. Based on the principle of technology neutrality, the following technologies were considered as competitive constraints in these markets: xDSL, cable, satellite, wireless local loop (including LMDS), broadband over power lines (BPL), and 3G. The dominant technology in Spain is xDSL and, more particularly, ADSL, in which Telefónica is the dominant incumbent operator.

The market for the provision of broadband internet access services was viewed by the Tribunal as a dynamic and not yet mature market, in which Telefónica, with its ADSL technology, holds around 73% share while other technologies (such as LMDS for wireless local loop, fibre optic through BPL and BPL) together represent only around 0.6%, of which Iberbanda, with its LMDS technology, represents less than 0.5% share. At present, broadband internet access services with LMDS technology are provided only to non-residential customers in Spain.

The Tribunal found that while LMDS promises to be a disruptive technology in the broadband access markets, only three independent operators remain (Iberbanda, Basa and Neo-Sky) from the original six licensees in 2000. This is due to the limitations in the licensed use of radioelectric spectrum, the amount of investment required to successfully operate with this technology, and strong competition from ADSL and cable operators (particularly in urban areas). As regards rural areas, the Tribunal found that Iberbanda had improved its market position in the deployment of networks, and that Telefónica and Iberbanda are expected to compete in local administrative bids to extend broadband access in such areas. The Tribunal also noted that Iberbanda's portfolio of non-residential customers (including Iberbanda's current shareholders Prisa, IECISA, and Omega, and other third parties) to which it renders electronic communication services, would be assigned to Telefónica by virtue of the ancillary agreements to the transaction.

To assess whether effective competition in the relevant markets may be substantially impeded by the proposed transaction, the Tribunal took into account the following barriers to entry: (i) the scarcity of licensed spectrum to operate LMDS networks, for which an administrative concession is required; (ii) the high sunk costs to deploy an alternative access network; (iii) although access to Telefónica's network is regulated, the Tribunal pointed out Telefónica's track record in obstructing access to competitors; and (iv) the increased entry costs derived from bundling of services (such as "triple-play" - a bundled offer usually offered by cable operators which includes telephony services, television distribution and broadband internet access).

From a static view, the Tribunal noted that even though the acquisition of Iberbanda would only slightly increase Telefónica's share in the relevant market (by less than 1%), even a small incremental increase in share may be problematic when the acquirer holds a dominant position in the relevant market.

The Tribunal based its decision, however, on a dynamic view of the market, by focusing on whether Telefónica's acquisition of a competing technology (and the licensed frequencies to which Telefónica had not previously had access) would distort competition in the future. The Tribunal concluded that LMDS technology and, in particular, the WiMAX standards-based technology, was a genuine competitive threat to ADSL technology, since WiMaX enables delivery of "last mile" wireless broadband access (direct to the consumer without the need to connect to xDSL for delivery) and thus, allows the supplier to operate with full autonomy from xDSL technology. Furthermore, the Tribunal found that Iberbanda was the only independent operator who could credibly disrupt the market.

The Tribunal concluded that it should be for the market, and not for the dominant incumbent, to decide the future of LMDS technology. The Tribunal noted that Telefónica would likely not have the incentive to invest in or foster the development of LMDS technology, with the exception of broadband services in rural areas where Telefónica has not made significant investments in ADSL technology. On the contrary, the Tribunal expected that Telefónica would continue defending and exploiting its existing investments in ADSL technology.

On April 17, Telefónica re-filed its notification for the proposed acquisition of Iberbanda with the Competition Service. In order for the Competition Service to consider this as a "new" notification, essential amendments to Telefónica original notification would have had to be made.

Gas Natural/Endesa.

On February 3, the Cabinet approved, subject to conditions, Gas Natural's proposed acquisition of sole control (through an unsolicited public takeover bid) of Endesa, a Spanish energy company mainly active in the electricity sector (BOE n. 30, 04/02/06, p. 4402).[12]

Gas Natural is the incumbent gas company in Spain. Two months before the Cabinet's decision, both the Tribunal and the Energy Commission issued their respective statutory non-binding opinions. The Tribunal recommended the prohibition of the acquisition (with three out of nine members dissenting) (C 94/05), although the Energy Commission recommended the approval of the acquisition subject to certain conditions (with four out of nine members dissenting) (Ref. 33/2005).

In approving the acquisition, the Cabinet relied primarily on the Energy Commission's report and the dissenting opinion issued by the Tribunal. While the Tribunal found that no remedies could realistically be imposed to alleviate the negative vertical, horizontal and conglomerate effects on competition resulting from the acquisition, the Cabinet found otherwise. The Cabinet invoked its discretionary powers, as well as the proportionality principle, to approve the acquisition by imposing certain remedies designed to maintain reasonable competitive conditions, on one hand, and the constitutional right to free enterprise, on the other. Unlike Commission Regulation 139/2004 EC, under the Law for the Protection on Competition, the Cabinet is entitled to depart from any proffered commitments and to impose structural and/or behavioral conditions it deems necessary.

The Cabinet, noting that the remedies offered by Gas Natural (the divestiture of certain energy assets to Iberdrola, the second largest energy operator in the Spanish electricity sector) were insufficient to meet the competitive concerns, conditioned its approval of the acquisition on thirteen substantive structural remedies and seven procedural conditions to ensure the implementation of the structural remedies. The structural remedies imposed by the Cabinet are designed to remove competitive concerns in respect of the following markets: (i) the supply and transport of natural Gas in Spain; (ii) electricity generation and the vertical integration of gas and electricity; and (iii) the distribution and retail supply of gas and electricity.

Supply and transport of natural gas. The Cabinet found that the acquisition raised competitive concerns due to a number of factors: Gas Natural's share of the supply of natural gas would increase as a result of Endesa's small share (less than 4%, through Carboex), and Endesa would be eliminated as a competitor in this market and as potential competitor in the midstream business; Gas Natural would also obtain control of Endesa's 12% stake in Medgaz (holder of gas pipelines for importing gas into Spain), and Gas Natural would acquire Endesa's shares in the regasification plants of Sagunto and Mugardos, as well as Endesa's shares in Enagás, the operator of the gas networks, and positions on Enagás' board.

To address these competitive concerns, the Cabinet imposed a gas liberalization program on Gas Natural by which Gas Natural would make available to other commercial suppliers a volume of natural gas equivalent to that imported by Endesa (around 10% of demand), Endesa's shares in Sagunto and Mugardos would be divested, and Gas Natural would reduce its participation in Enagás to 1% and would withdraw from Enagás' board.

Electricity generation and vertical integration of gas and electricity. The Cabinet found that the acquisition raised a number of competitive concerns, including: Gas Natural's existing generation capacity and market power in the wholesale electricity pool, and its subsequent increased power to set wholesale prices in the electricity pool; Gas Natural's monopoly in Andalucía and Cataluña to provide solutions in the sub-market for technical restrictions (electricity generation programs are reviewed from a supply safety perspective to resolve any technical restrictions that may be encountered); reduced incentives to continue projected electricity generation investments, given the increased combined-cycle power plant capacity; and reinforced vertical integration, which would increase the price of natural gas for electricity generation and the electricity pool, and would also allow Gas Natural to take advantage of access to sensitive information from competitors to whom natural gas is supplied to increase competitors' costs in electricity generation through combined-cycled power plants where natural gas is an essential input.

To address these competitive concerns, the Cabinet imposed the following remedies: (i) divestiture of 4,300 megawatts in electricity generation assets located in mainland Spain, including at least 400

[12] On November 11, 2005, prior to the Cabinet's decision, the European Commission rendered a decision regarding this acquisition (Case COMP/M.3986 *Gas Natural/Endesa*) declaring a lack of Community dimension. On November 29, 2005, Endesa brought an action before the Court of First Instance seeking an annulment of the European Commission's decision and the granting of interim measures (Case T-417/05). On February 1, 2006, the President of the Court of First Instance dismissed the application for interim measures (Case T-417/05 R). The Court's ruling on the merits is still pending.

megawatts generated in Andalucía and Cataluña, and combined-cycled power plants and hydro plants; (ii) a two-year prohibition on the acquisition of combined-cycled power plants; and (iii) an obligation to provide customers with the right to terminate contracts for the supply of natural gas as an input to electricity generation, so that customers may optimize their supply decisions and access to competitors' sensitive information can be prevented.

Distribution and retail supply of gas and electricity. The Cabinet found that the combined group would be the sole operator of the gas and electricity networks in certain Spanish geographic markets (Andalucía, Aragón, Cataluña and Southern Extremadura), which would reinforce the vertical integration effects already existing in each of the gas and electricity markets. The combined group would also control networks for the commercial supply of energy to mainly domestic-commercial customers, which would significantly impede effective competition in these markets due, in particular, to access to competitively sensitive information. The group's position in the commercialization of gas and electricity would be significantly reinforced by the addition of Endesa's business, particularly as Endesa is the next closest or second next closest competitor to Gas Natural in the geographic areas in which Gas Natural is dominant, and *vice versa*.

To address these competitive concerns, the Cabinet required divestiture of a volume of business equivalent to the volume of Gas Natural's electricity retail supply business and to Endesa's gas supply business, both in the liberalized markets, divestiture of Gas Natural's shares in any independent competitor in the commercial supply of gas and electricity, and divestiture of Gas Natural's natural gas distribution assets, consisting of complete networks and regulated price contracts with a minimum of 1,500,000 distribution points so that at least two new operators may enter the market with a minimum of 250.000 distribution points each. The Cabinet also required Gas Natural to assign to a third party not operating in any energy supply activity the services to execute and formalize the change in suppliers which may take place as regards gas or electricity customers, either on the regulated or the liberalized markets, located in areas in which the combined group exercised a significant degree of control over gas and electricity distribution networks. Finally, the Cabinet required Gas Natural to establish functional separation between the distribution networks and the retail supply businesses.

Following approval by the Cabinet, Endesa appealed the decision to the Supreme Court, seeking an annulment of the Cabinet's decision and interim measures to provisionally suspend the decision. On April 21, under plenary review with 18 votes in favor and 14 votes against, the Supreme Court provisionally suspended the Cabinet's decision. This is the first time the Supreme Court has granted interim measures to provisionally suspend a merger decision by the Cabinet.

Endesa also brought a private action against Gas Natural and Iberdrola in the Commercial Court, claiming that the pre-agreement between these two companies on the sale and purchase of certain of Endesa's assets to meet competitive concerns raised by the competition authorities constituted a restrictive agreement prohibited by Article 81 EC, and requesting interim measures suspending the bid and the agreement between Gas Natural and Iberdrola. On March 21, the Commercial Court issued an injunction provisionally blocking Gas Natural's bid. Endesa was required to provide a bank guarantee of €1 billion to effectuate the injunction.

Sweden

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

POLICY AND PROCEDURE

New Leniency Guidelines.
On March 1, the Competition Authority issued a new set of guidelines (KKVFS 2006:1) explaining how the Authority interprets the leniency rules under the Swedish Competition Act.

The Authority's interpretation of the leniency rules under the new guidelines has not changed in any material respect compared to the old guidelines. However, the new guidelines contain a greater level of detail on procedural issues. According to the Director General, the expectation is that a clearer set of recommendations will enable companies to foresee how the authority intends to act on information disclosed by companies wishing to expose cartels in which they have participated.

Switzerland

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

HORIZONTAL RESTRAINTS

Air Freight Surcharges.
On the basis of information received from third parties, the Secretariat of the FCC opened a preliminary investigation against several air companies into the alleged existence of agreements on air freight surcharges. The alleged agreements deal with surcharges relating to fuel, security, war risk and customs clearance.

On the basis of the bilateral agreements in place between the European Union and Switzerland in respect of air transport, the FCC will carry out the investigation in cooperation with the European Commission, and will focus on air traffic between Switzerland and non-EU Member States. The European Commission has also launched its own investigation focusing on air traffic between Switzerland and EU Member States.

ABUSE OF MARKET POWER

Axpo.
The FCC published its decision of December 19, 2005 in respect of alleged abuse of dominant positions by cantonal electricity companies. Following a lengthy investigation, the FCC closed proceedings without finding any infringement.

In March 2002, the FCC opened an investigation into the alleged abuse of a dominant position against five Swiss electricity companies: AEW Energie AG, Elektrizitätswerk des Kantons Thurgau AG, Electrizitätswerk des Kantons Zurich, die St-Gallisch-Appenzellischen Kraftwerke AG (each of which are owned by a Swiss canton), and their commonly controlled electricity supplier, Axpo Vertrieb AG. The four canton-owned electricity companies are active in the supply of electricity to end suppliers and consumers in their respective cantons. Each purchases electricity mainly from Axpo Group and own their own electricity networks. The FCC examined whether the "partnership agreements" between Axpo, the cantonal electricity companies, and end suppliers amounted to an abuse of a dominant position in each of their respective geographic markets. The contractual clauses under examination were the obligation for the end suppliers to procure electricity exclusively from the relevant cantonal electricity company, for a five-year term, and the application of discounts for end suppliers which were not party to these partnership agreements.

The FCC defined the relevant markets as being local markets for the supply of medium tension electricity to end suppliers. It found that the electricity companies held dominant positions on the relevant markets on the basis of the following factors: the electricity companies still benefit from a monopoly in network infrastructure, as alternative third-party' networks are almost non-existent and the development of new network infrastructure is subject to very strict regulatory requirements; and the obligation for network owners to grant access to third-party electricity transporters is based only on the case law of the Supreme Court (Decision of the Supreme Court of June 17, 2003, *EEF v. Watt/Migros/FCC*) and is too recent to have had any impact on competition in the relevant markets.

During the FCC proceedings, the electricity companies reduced their rates and abandoned the practice of offering discounts only to end suppliers which were party to the partnership agreements. The FCC decision therefore only considered the five-year exclusivity clause, which the FCC did not regard as an abuse of a dominant position. First, competitors in the relevant markets were entitled to access to the networks pursuant to judgment in *EEF v. Watt/Migros/FCC*. Second, exclusivity for a period of five years was considered justifiable by the high sunk costs needed for electricity production and distribution, and the exclusivity obligation was linked to an obligation for the electricity companies to satisfy the entire demand for electricity of the end suppliers. Third, the end suppliers had the possibility to enter supply agreements for only a one-year term.

MERGERS AND ACQUISITIONS

Emmi/Aargauer Zentralmolkerei.
On March 6, the FCC cleared the acquisition of AZM Aargauer Zentralmolkerei AG by Emmi AG. Although the FCC found that the acquisition would place Emmi in a dominant position on the Swiss markets for milk, cream and butter, it cleared the acquisition on the basis of the failing firm defense as, absent the acquisition, AZM would have exited the market and Emmi would have gained AZM's share.

Following the approach taken by the European Commission, the FCC requires the following conditions to be present in order for the failing firm defense to apply: (i) the firm to be acquired would exit the market failing the acquisition; (ii) the acquirer would gain the shares of the firm to be acquired if the latter would exit the market; and (iii) there are no alternative offers for the acquisition of the failing firm that are less restrictive of competition.

The relevant markets are regulated under Swiss law and are therefore closed to foreign competitors. The FCC concluded that only by opening the Swiss market to non-Swiss companies would effective competition be restored in the relevant markets. Following its decision, the FCC issued a recommendation to the Swiss Federal Council to accelerate the opening of the Swiss markets for the products concerned.

United Kingdom

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

HORIZONTAL RESTRAINTS

Independent Schools.
On February 27, the OFT announced that it had, in principle, reached an agreement to end its investigation into the alleged exchange of sensitive fee information by 50 leading independent U.K. schools. This marks the first occasion on which the

OFT has negotiated an agreed resolution to an infringement investigation.

In 2003, the OFT opened an investigation into the alleged participation by 50 independent schools in a fee-fixing cartel. On November 9, 2005, the OFT announced that it had provisionally concluded that the schools had infringed the Chapter I prohibition contained in the Competition Act 1998 (the U.K. equivalent of Article 81 EC) by systematically exchanging information regarding intended fee increases and fee levels for boarding and day pupils, resulting in fees being higher than they would otherwise have been.

The OFT acknowledged that the peculiar nature and circumstances of the case rendered the imposition of severe financial penalties counter-productive, as substantial financial penalties would serve only to divert funds from pupils. To resolve this issue, the OFT entered into negotiations with the Independent Schools Council, a representative body acting on behalf of the independent school sector, the result of which is the agreed settlement proposal.

The proposal notes that, while the schools could in principle be subject to fines of up to £65 million (being 10% of the £650 million in fees charged collectively by them), the schools would instead be obliged to make a payment totaling £3 million into a charitable trust fund which would benefit those pupils who attended the schools during the period over which fee information was exchanged. In addition, each of the schools would be obliged to pay a £10,000 nominal penalty. The OFT stated that the novel and exceptional features of the case, and in particular the not-for-profit, charitable status of the schools, rendered a total penalty of £3.5 million proportionate.

The proposal was subsequently accepted by the schools in May, and the OFT will now proceed to issue a formal infringement decision. The agreement to settle liability in this case, despite the existence of a serious competition infringement, underlines the ability and willingness of the OFT to take innovative enforcement action in appropriate circumstances.

ABUSE OF MARKET POWER

London Metal Exchange.

On February 27, the OFT issued a direction prohibiting the proposed extension of trading hours by the London Metal Exchange (LME) of its electronic trading platform, LME Select. This is the first instance in which the OFT has ordered interim measures under the Competition Act1998, and provides useful guidance as to the OFT's likely approach in future cases.

The OFT has, since July 2003, been investigating the suspected abuse by the LME of its dominant position in respect of the exchange-based trading of forwards contracts relating to non-ferrous base metals. The OFT's investigation arose as a result of a complaint made by Spectron Group plc, a competitor of the LME, in relation to the pricing behavior of LME Select.

As of March 1, 2006, the LME had intended to extend the opening hours of LME Select so as to offer its services during morning trading in Asia. In response, Spectron petitioned the OFT for an interim measure prohibiting the extension of LME Select's trading hours, on the basis that such an extension would likely cause trading volumes to migrate from Spectron to LME Select, forcing Spectron to exit the market.

The OFT is permitted to grant interim measures under section 35 of the Competition Act 1998. Section 35(1) provides that an interim measure may only be issued against a party if the OFT has commenced an investigation for the potential infringement of Articles 81 or 82 EC (or the U.K. equivalents in Chapters I and II of the Competition Act 1998). In addition, Section 35(2) provides that the OFT may order interim measures only when necessary, as a matter of urgency, for the purpose of either: (i) preventing serious and irreparable damage to a particular person or category of persons; or (ii) protecting the public interest.

This is the first instance in which the OFT has applied the criteria contained in Section 35. In relation to section 35(1), the OFT stated that it had reasonable grounds to believe that the LME had infringed Article 82 EC by engaging in pricing abuses, and those potential abuses were subject to the current OFT investigation. The OFT observed that there was also an urgent need for interim measures, as there was no prospect of the OFT concluding its investigation into the allegedly abusive practices of the LME prior to the proposed date of the extension of LME Select's trading hours.

Having regard to the test of serious and irreparable harm provided by section 35(2), the OFT explained that such harm entailed the infliction of a considerable competitive disadvantage, including financial or reputational damage likely to have a long-lasting effect on the market position of a firm. The OFT noted that a firm could suffer no greater competitive disadvantage than being compelled to exit the market.

In respect of the protection of the public interest, the OFT explained that an interim direction was justified: (i) to prevent "harm to the general competitive process and to market conditions;" and (ii) to prevent the extension or exacerbation of an existing abuse, as this too was capable of damaging competition. The OFT's analysis suggests that the public interest is served by the protection of the competitive process, which is not necessarily synonymous with the protection of individual competitors. In the circumstances of the present case, however, the OFT found that harm to the competitive process necessarily resulted from

harm to Spectron, as Spectron was the LME's sole competitor in respect of the provision of electronic trading services for non-ferrous base metals contracts.

The OFT finally weighed the respective interests of the LME and Spectron. The OFT concluded that the ordering of interim measures would not unduly prejudice the interests of the LME, while failure to make an order could result in Spectron being eliminated from the relevant market. Accordingly, the balance of interests favored Spectron. The OFT issued an interim measure prohibiting the extension of LME Select's trading hours until such time as the OFT has completed its investigation of the LME's alleged infringement of Article 82 EC.

Following an appeal launched by the LME on April 26, 2006, the OFT withdrew its interim measures direction on May 15, 2006, prior to the appeal being heard.

MARKET INVESTIGATIONS

Supply of Consumer Credit Store Cards and Associated Insurance.

On March 7, the CC published its final report in relation to its investigation into the market for the supply of consumer credit through stores cards, and provision of associated insurance products.[13] The CC confirmed provisional conclusions its reached in September 2005, finding that certain features of the store card market adversely affect competition.

The CC has also indicated its intention to implement the remedies proposed in its provisional findings, requiring: (i) a warning to be displayed prominently on store card statements in relation to annual percentage rates set in excess of 25%; (ii) store cardholders to be provided with the facility to pay their account balance in full by direct debit; and (iii) the unbundling of payment, price and purchase protection insurance.

MERGERS AND ACQUISITIONS

Somerfield/W.M. Morrison.

On February 13, the CAT rejected the first appeal regarding a merger decision by the CC. (*Somerfield plc v Competition Commission* [2006] CAT 4.) The CAT's judgment provides detailed guidance as to the discretion afforded the CC when determining appropriate remedial action, and suggests that the CAT does not intend to scrutinize the CC's practices as critically as it has scrutinized the conduct of the OFT.

The case originated with the acquisition by Somerfield plc, the fifth largest U.K. supermarket retailer, of 115 supermarkets from WM Morrison Supermarkets plc. The transaction was notified to the OFT on December 8, 2004, and referred to the CC on March 23, 2005. The CC conducted an lengthy investigation published its final report on September 2, 2005, approving the transaction subject to divestments.

Somerfield brought an application for judicial review of two aspects of the CC's decision. First, the CC had concluded that the Transaction would result in a substantial lessening of competition (SLC) in 12 local grocery markets; Somerfield contended that the CC had erred in fact and law in reaching its SLC findings. Second, Somerfield submitted that the CC had acted unreasonably in determining the remedies required to address the SLC it had identified, and, in particular, by ordering Somerfield to divest certain stores, thus depriving Somerfield itself of the ability to identify suitable stores, and by placing restrictions on the potential buyers to which Somerfield could divest these stores.

Somerfield abandoned the SLC ground of review, proceeding with the appeal only in respect of remedies. Somerfield contended that, given that the purpose of the divestments was to remedy the SLC identified in the affected local markets by separating ownership of the stores, this could be achieved through the divestment of either Somerfield or Morrison stores. Somerfield therefore submitted that it, and not the CC, should identify stores suitable for divestment, given that Somerfield had a legitimate interest in determining which assets it wished to retain.

The CAT disagreed, observing that the CC was required to decide what action to take to remedy, mitigate or prevent the SLC it had identified, and that the CC was required to achieve "as comprehensive a solution as is reasonable and practicable." The CAT held that the CC had acted reasonably in assuming, as a starting point, that restoration of the pre-merger situation would normally entail the reversal of a completed acquisition. Such an approach was consistent with that prescribed in the CC's statutory merger guidelines, of which Somerfield was, or should have been, aware, and the CC could not, without good reason, depart from the practices set out in its own guidelines.

Somerfield further argued that, in relation to four local markets, the CC's assessment was unsupported by evidence and therefore unreasonable, and that the remedies were beyond the CC's permitted margin discretion. The CAT declined, however, to consider in detail the question of the standard of proof applicable to CC merger decisions, because Somerfield had failed to set out these objections in its original notice of application for judicial review and had raised the issues only later in the proceedings. The CAT considered that this constituted a "wholly inadequate basis on which to found an allegation that the CC had no, or insufficient, evidence."

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[13] See report on provisional findings in the National Competition Report, July – September 2005.

This approach differs markedly from the critical stance adopted by the CAT in initial appeals against OFT merger decisions. Those cases, most notably *IBA Health Limited v Office of Fair Trading* [2003] CAT 27, prompted significant reform of the OFT's procedural and substantive practices. By contrast, the CAT has affirmed the CC's procedural practices and ascribed broad discretion to the CC in assessing appropriate remedial actions. While the CAT's terms of reference were narrowed during the course of its proceedings, such that it could not comment on the CC's SLC findings, the strong endorsement of the other aspects of the merger decision suggests that there is a high threshold to be met in challenging successfully a CC merger decision. This is, in part, a function of the intensive and prolonged nature of the CC merger review process, and the significant input by the merging and third parties in that process, all of which militates strongly against appeals on the grounds of irrationality or lack of evidence.

POLICY AND PROCEDURE

Increased Merger Filing Fees.

On January 6, the Department of Trade and Industry announced a six-fold increase in U.K. merger filing fees. The increase will be implemented in two phases, with the first phase introducing a three-fold increase in fees effective as of April 6, 2006; the second phase of fee increases will become effective on April 6, 2009. In addition, foreign acquirers will, for the first time, be liable to pay merger filing fees.

Merger filing fees are levied on acquiring companies to assist with the cost of merger regulation by the OFT and CC. The fee is payable to the OFT and is provided immediately on the submission of a statutory Merger Notice. In instances where an informal merger submission is made, the fee is payable only after the OFT has issued a merger clearance or reference decision.

The present tariff system was established in October 1990, albeit subject to minor amendment under the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003 (S.I. 2003 No. 1370) (the 2003 Order). Fee levels have remained unchanged since 1990. Three fee bands are, and will continue to be, operated by reference to the turnover of the target company or target assets. At present, in instances where the U.K. turnover of the enterprise being acquired is less than £20 million, a merger filing fee of £5,000 is payable to the OFT. As of April 6, 2006, this will sum will be increased to £15,000, and further increased to £30,000 on April 6, 2009. Similarly, a merger filing fee of £10,000 is currently applicable in respect of enterprises with U.K. turnover of between £20 million and £70 million. The fee will increase to £30,000 and then £60,000. A filing fee of £15,000 is presently payable in relation to enterprises with U.K. turnover exceeding £70 million, which will be increased to £45,000 and then to £90,000.

The broader framework of the U.K. merger filing fee regime will remain largely unaltered. The exemption of small and medium-sized business from merger filing fees, provided under the 2003 Order, will continue. (The Companies Act 1985 provides that those businesses with turnover below £5.6 million and £22.8 million qualify as small and medium-sized companies respectively.) The Department of Trade and Industry has, however, determined that the exemption from merger filing fees available to foreign acquirers of U.K. companies or assets provides such companies with an unfair advantage relative to their U.K. rivals. Accordingly, foreign companies will, from April 6, 2006, be required to pay these fees.

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