CLEARY GOTTLIEB

National Competition Report

This report summarizes principal competition law developments in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, the Netherlands, Spain, Switzerland, and the United Kingdom during the fourth quarter of 2007. There is no report for Sweden this quarter.

AUSTRIA

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

Horizontal Agreements

Record Fines Imposed on Participants in Elevators and Escalators Cartel

On December 14, the Cartel Court imposed fines totaling € 75.4 million on five companies involved in cartel agreements on the Austrian markets for elevators and escalators.

The arrangements concerned involved, in particular, bid rigging and the allocation of contracts for the installation and maintenance of elevators and escalators in Austria.[1] The companies fined were Otis (€ 18.2 million), Kone (€ 22.5 million), Schindler (€ 15 million), Haushahn (€ 6 million), and Doppelmayr (€ 3.7 million). ThyssenKrupp, which had also participated in the arrangements, reported the cartel to the Austrian competition authorities and was granted full immunity under Austria's leniency program. Otis was the second applicant for leniency and received a 50% reduction of its fine.

ThyssenKrupp and Otis are the first undertakings to benefit from Austria's leniency program, which entered into force in January 2006. The FCA heralded the decision as a major step in Austria's antitrust enforcement history, despite initially having proposed significantly higher fines than the Cartel Court ultimately imposed.[2]

In any event, the fines in this case are the highest ever imposed for antitrust offenses by the Austrian authorities. The highest antitrust fine prior to this decision was a €7 million fine imposed on Europay Austria (now "PayLife Bank") and other Austrian banks in September 2007 for the abusive implementation of an anti-competitive agreement for payment card services between 1998 and 2004.[3]

BELGIUM

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

1 Similar cartel arrangements relating to Belgium, Germany, Luxembourg, and the Netherlands were the subject of an investigation by the European Commission that began in early 2004; see Case COMP/E-1/38.823 – *Elevators & Escalators*, Commission decision of February 21, 2007 (not yet published). In that case, the European Commission imposed fines totaling more than € 990 million on Kone, Mitsubishi Elevator, Otis, Schindler, and ThyssenKrupp.

2 The Cartel Court can only act upon the FCA's request and may not impose fines exceeding the amounts proposed by the FCA. The FCA in this case requested fines totaling € 88 million be imposed.

3 Originally, by decision of December 1, 2006, the Cartel Court had imposed a fine of € 5 million. Upon appeal, on September 12, 2007, the Austrian Supreme Court confirmed the Cartel Court's decision, and increased the fine to € 7 million.

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Mergers and Acquisitions

Brussels Court Of Appeals Finds That Plaintiffs Had Right To Access Competition Council's Kinepolis File

On October 3, the Brussels Court of Appeals ruled that the Competition Council had unlawfully refused the plaintiffs Belgian Cinema Federation, UGC and Utopolis access to file in the proceedings leading up to the Council's previously reported April 16, 2007 decision. That decision lifted the conditions and obligations imposed on Kinepolis with its creation in 1997, following the merger of two Belgian cinema groups. As was reported in the Belgian Competition Report for the third quarter of 2007, on August 23, 2007, the Brussels Court of Appeals had granted an interim suspension of the Competition Council's April 16 decision.

In its October 3 ruling, the Court of Appeals recognized the plaintiffs' specific interest in the case and held that they were entitled to make their views known in the proceeding. The Court also stated that under the plaintiffs' right of defense they were entitled to access the file, even if such right was not expressly provided for in the Act on the Protection of Economic Competition (APEC). Notwithstanding, the Court finally held that Kinepolis still had a right to protect its confidential documents, and that its competitors should not been given access to Kinepolis's business secrets.

Walloon Cable Merger Cleared Following Ruling By Brussels Court Of Appeals

The Tecteo/Brutélé-Câble merger was notified to the Competition Council on September 28 as the first (non-simplified procedure) notification under the new APEC. The Brussels Court of Appeals cleared the merger on November 27, after the Competition Council chose to suspend its review pending a request for clarification on procedural issues to the Supreme Court.

Belgacom, the Belgian incumbent telecommunications provider with its own significant television activities, requested leave to intervene before the Competition Council and to obtain access to the Council's file. The Council granted Belgacom leave to intervene on November 21, but stayed its decision on the access to file request pending referral to the Supreme Court on whether, and on what basis, a third party may gain access to the Council's file in merger proceedings, and, if so, how confidential data should be treated. The Council also temporarily suspended its merger review pending the Supreme Court's resolution of these issues.

Tecteo and Brutélé immediately challenged the Competition Council's decision before the Brussels Court of Appeals. The Court ruled on November 27, 2007 that the suspension of merger proceedings pending the Supreme Court's ruling was incompatible with the strict deadlines that apply in merger review procedures. It further found that the Court had already established in the Kinepolis case that third-parties may be permitted to intervene and gain access to the Council's file in merger proceedings. The Court thus held that the transaction had to be considered cleared, since the phase one deadline for merger review had lapsed. Tecteo and Brutélé closed the transaction the following day.[4]

4 Belgacom appealed the Court of Appeals' decision to clear the merger to the Brussels Court of Appeals. Depending on the outcome, the closed transaction may have to be reviewed.

Policy and Procedure

New Leniency Guidelines Adopted

The Belgian Competition Council adopted revised leniency guidelines on October 22. The new guidelines update the previous June 2004 guidelines, and are based on the European Competition Network's model leniency program.[5]

The revised guidelines are primarily meant to:

- Set out the conditions that must be fulfilled in order to benefit from full immunity from or reductions in fines in cartel cases;
- Harmonize Belgian leniency rules with those in other Member States; and
- Clarify procedure or issues raised in the 2004 guidelines, including the conditions under which a company qualifies from full or partial immunity from fines.

The new leniency guidelines are a significant improvement from the previous version, and offer several notable changes:

- First, a marker system was introduced to protect a leniency applicant's place in the queue of applicants. The system also provides the leniency applicant with time to gather necessary information and evidence before perfecting its application. There is some ambiguity, however, as to exactly what conditions must be fulfilled for an applicant to receive a marker and what level of discretion the Council has in deciding to grant a marker.
- Second, the new guidelines allow for oral leniency statements, thus protecting applicants from potential disclosure of such statements to civil plaintiffs.
- Third, corporate leniency statements may be drafted in English, though subsequent translations to Dutch or French may be required.
- Finally, when applying for leniency for the same or similar conduct with the European Commission, applicants may submit summary applications in Belgium.

DENMARK

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

Horizontal Agreements

Danish Appeals Tribunal's Local Bank Cartel Ruling

On October 2, the Danish Appeals Tribunal rendered its judgment on the appeal by seven local banks of the previously reported March 2007 Danish Competition Council decision finding that the banks had engaged in a cartel involving information exchanges and market allocation.[6]

Although the Danish Appeals Tribunal confirmed that the banks' conduct constituted an anti-competitive agreement, it found that their conduct was "not nearly" as serious as the Council

5 The Council has received approximately 20 immunity applications since 2004, the majority of which have been so-called "double-dip applications", under which applicants apply for leniency in multiple jurisdictions.

6 See the National Competition Report for the first quarter of 2007.

had described. The Appeals Tribunal stated that the banks' cooperation should not be viewed as a "*cartel in the classical sense*" or as market allocation. It found no evidence that the conduct involved had a detrimental effect on competition or on consumers. The Appeals Tribunal also dismissed the Competition Council's local geographic market definition, finding instead that the market for retail banking is national in scope.

Horsens District Court Fines Danske Kroer og Hoteller's For Price Fixing

On October 4, the District Court of Horsens fined Danske Kroer og Hoteller, an association of Danish inns and hotels, as well as its director and chairman of the board, for prohibiting its members from displaying or advertising room rates below a minimum amount set by the association.

The Court found that Danske Kroer og Hoteller, in doing so, had committed a serious breach of competition law, and ordered it to pay a fine of DKK 400,000; its CEO and the chairman of the board of directors were also each fined DKK 10,000. Fines for violations of competition law are criminal sanctions under Danish law and must, generally, be imposed by a Court.

Distributors of Mobile Phones Fined for Price Fixing

On November 27, the District Court of Roskilde found that Telemobilia ApS and its CEO had committed a serious breach of competition law by co-ordinating prices with other mobile phone distributors, including Jokerprice ApS and Aircom Erhverv ApS.

The companies had agreed on the retail prices and shipping fees to be charged for mobile phones sold via the website www.mobilpriser.dk. Telemobilia ApS was ordered to pay a fine of DKK 125,000; its CEO was fined DKK 10,000.

The other companies involved had already plead guilty following an investigation by the Danish Competition Authority, and had accepted a fine set by administrative notice. Jokerprice was ordered to pay DKK 125,000, while the CEOs of the both Jokerprice and Aircom Erhverv were each fined DKK 25,000. Aircom Erhverv had ceased to exist at the time of the notice and therefore could not be fined.

Amendments to the Danish Competition Act of 2007 had introduced the "administrative notice" fining mechanism, which allows the Competition Authority to impose a fine via administrative notice provided (i) it has the consent of the Public Prosecutor for Serious Economic Crimes and (ii) the maximum penalty in the case is a monetary fine. This allows the case to be settled without trial if the offender admits the infringement and is willing to pay the listed fine within a specified time limit. If the fine is accepted, further proceedings are discontinued.

This case demonstrates that the Danish Competition Authority has already begun to make use of the new fining mechanism. It also suggests that the Authority and the Courts tend to impose significantly lower fines on directors than on their companies; the fine for CEOs generally amounts to approximately DKK 10,000, though fines of up to DKK 25,000 have been imposed on directors to date.

Vertical Agreements

Competition Council Approves Football Media Right Agreement

On October 31, the Danish Competition Council approved a binding agreement with commitments related to the sale of football media rights as entered into between DBU/Divisions-forening, the Danish Football Union, and its league associations.

DBU thereby agreed to make its sale of football media rights subject to the following commitments:

- Media rights for the Danish football league must be sold by way of tender;
- Media rights must be divided into a number of separate packages which are separately tendered under open, non-discriminatory and objective conditions;
- Media rights must not be transferred for a period longer than three years, *i.e.* three seasons;
- A media rights sales agreement may not be exclusively renegotiated;
- No purchaser may acquire all packages for direct transmission of particularly popular super-league matches (unless there are only two bidders in the first bidding round);
- Media rights must be granted to the purchaser with the most economically favorable bid, taking account not only of the value of the purchaser's bid but also of the market penetration of its TV channels, and its marketing and programming plans; and
- The tender process must be monitored by a trustee who shall act in accordance with a mandate approved by the Danish Competition Authority.

Abuse of Market Power

Eastern High Court Confirms Post Danmark's Abuse of Dominant Position in the Market for Non-Addressed Mail

On December 21, the Danish Eastern High Court confirmed the decisions of the Danish Competition Council and the Danish Appeals Tribunal of September 29, 2004 and July 1, 2005 respectively, holding that Post Danmark had abused its market power on the market for distribution of unaddressed mail and local and regional newspapers by engaging in price discrimination and selective discount schemes. In particular, Post Danmark had granted larger rebates to supermarkets Coop, SuperBest and Spar than to other comparable customers, and was not able to justify the larger rebates on the basis of cost differences.

Mergers and Acquisitions

Dansk Shell/ XY Energi Transaction Obtains Unconditional Clearance

On October 31, Dansk Shell A/S obtained unconditional clearance for its acquisition of control of 66 XY Energi A/S retail fuel stations.

The parties are active in the retail motor fuel and convenience retail markets. Shell is also active in the upstream and fuels wholesale sector as it owns one of the two refineries in Denmark.

The Danish Competition Authority found that the fuel stations concerned amounted to a very limited share of the market for motor fuel sales and that Shell would not gain a competitive edge as a result of this acquisition.

DLG/Raiffeisen Hauptgenossenschaft Nord Transaction Obtains Unconditional Clearance

On November 28, the Danish Competition Authority unconditionally approved Dansk Landbrugs Grovvareselskab A.m.b.a. (DLG)'s acquisition of sole control of Raiffeisen Hauptgenossenschaft Nord AG.

The transaction concerned the market for agricultural chemicals and animal feed. The transaction did not give rise to any competitive concerns since the parties had no overlapping activities in Denmark (DLG is mainly active in Denmark, while Raiffeisen Hauptgenossenschaft Nord AG is active in Germany).

FINLAND

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

Horizontal Agreements

Market Court Fines Members of Asphalt Cartel

On December 19, the Market Court rendered its judgment in the asphalt cartel case, imposing fines on seven asphalt contractors for (i) the allocation of customers and markets, (ii) illegal information exchanges, and (iii) bid rigging, with respect to both state projects (from 1996 to 2000), and municipal and private customers (from 1994 to 2001).

The Market Court broadly agreed with the FCA's findings, holding that the defendants had infringed both the Finnish Act on Competition Restrictions and Article 81 EC; however, it significantly reduced the fines recommended by the FCA. The Court imposed the highest fine – €14 million – on Lemminkäinen (generally seen as the ring leader), a reduction from the FCA's proposed fine of €68 million. The other cartel participants including NCC Roads, Rudus Asfaltti, SA-Capital, Skanska Asfaltti, Super Asfaltti and Valtatie, received fines ranging from €20,000 to €2.5 million each. The Asphalt Association, while found to have engaged in illegal information exchanges in 1997, was not ordered to pay a fine as its infringement was committed more than five years before the FCA's proposal to the Market Court and had, therefore, become time-barred.

In its decision, the Court also ruled on important questions of law relating to (i) the principle against self-incrimination; (ii) liability following corporate restructuring; and (iii) the identification of the relevant undertaking for purposes of calculating the maximum fine of 10% of annual turnover.

As for the principle against self-incrimination, the Court rejected the request to allow two of the witnesses to refrain from answering questions, where such responses could involve an admission that their employer had participated in cartel activities. The Court considered that the witnesses did not enjoy the right to remain silent in this case since they could not be indicted in a personal capacity as a result of their responses. The Court further observed that the witnesses' employer, the State Road Authority, was not a defendant in the current proceedings since the FCA had not been able to obtain sufficient proof of the Road Authority's involvement in the cartel. The ruling thus appears to take a restrictive approach on the possible right of defendant companies to invoke the principle against self-incrimination, though it does not provide definitive guidance on the issue as the relevant witnesses' employer was not a defendant in the proceedings.

As for the question of liability following corporate restructuring, two of the defendants had engaged in a restructuring of their corporate groups, such that the legal entities which had engaged in the cartel activities had been liquidated and their assets transferred to their respective parent companies by the time of the Court's decision. The Market Court considered that in the case of a transfer of assets the transferor generally remains liable for competition law infringements carried out before the transfer. However, the Court further distinguished between transfers where the seller remains a functioning legal entity and those where the transferor ceases to exist after the transfer. In the present case, the *recipient* of the liquidated company's assets was held liable for the competition law infringements committed by the transferred business. Imputation of liability was justified, among other factors, on the basis that the legal person that had committed the infringements had ceased to exist as a result of the decision by a group company controlling the entity, and that the restructuring measures were implemented shortly after the inspections carried out by the FCA.

With respect to the calculation of fines, the Act on Competition Restrictions provides that the fine may not exceed 10% of the relevant undertaking's annual turnover in the preceding year. Under case precedent, turnover has been interpreted to mean the group's turnover in cases where the fine is to be levied on the parent company. In the present case, the Market Court clarified that, where the fine is to be levied on a subsidiary, the maximum fine is calculated on the basis of the subsidiary's turnover.

FRANCE

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

Horizontal Agreements

Council Applies Leniency Program A Second Time

On December 18, the Competition Council issued Decision 07-D-48 finding that 14 moving companies had agreed on and fixed the prices of certain moving-related services and engaged in market allocation.

For only the second time since the establishment of the program, the Council applied its leniency program and granted full immunity to Allied Arthur Pierre SA and Maison Huet SA (now Sirva SA), the two companies that reported the cartel's existence in October 2003. The Council found that Allied and Sirva had provided it with sufficient evidence to enable the Council to commence proceedings *ex officio*, including launching an investigation and conducting surprise inspections at the parties concerned.

The Council held that the cartel had been active in the international and national French moving markets. The cartel members specifically participated in informal meetings from 2000 forward allowing them to exchange pricing and cost information, and to set minimum storage and insurance rates. Several of the cartel's members raised their rates for these services, following the group's agreement, in order to align themselves with the generally agreed rates.

The cartel had particularly serious effects on the moving market for military personnel (which is governed under specific regulations). Cartel participants engaged in market allocation, and provided estimates that ensured they would not actually gain business that was not allocated to them. Maison Huet designed specific software that provided so called "accommodating estimates", meant to ensure that the market would remain allocated as agreed.

The Council stressed that any conduct by competitors meant to fix prices should be considered an extremely serious infringement of the competition laws, particularly where the parties involved represented more than 50% of the relevant market. Twelve of the companies involved received fines of between €12,000 and €975,000, while the two leniency applicants were granted full immunity.

Competition Council Finds No Anti-Competitive Behavior By Baby Milk Suppliers

On November 30, 2007, the Competition Council closed its investigation into the market for the supply of baby milk formula to maternity wards, finding no competition law infringement.

The investigation was initiated following a complaint by the Minister of the Economy alleging that the four main maternity ward suppliers of "ready-to-feed" baby milk (Nestlé, Blédina, Sodilac, Nutricia-Milupa) had engaged in anti-competitive practices with the goal of consolidating their position in the retail market.

As mothers are likely to remain loyal to the baby milk brand that maternity wards used and recommended for their children, suppliers offer significant benefits to different maternity wards in order to become their preferred supplier. This includes significant discounts and large financial contributions to the wards.

The Minister of the Economy, however, alleged that the suppliers had engaged in an arrangement to fix the prices of baby milk, pointing in particular to (i) the relatively uniform prices of baby milk charged by the different suppliers to maternity wards, and (ii) discussions regarding pricing that took place at the French Baby Food Trade Association. He also claimed that the four suppliers of maternity wards abused their collectively held dominant position on this market by offering below-cost product in order to prevent other manufacturers from supplying maternity wards.

The Competition Council found that the alleged alignment in prices was, in fact, attributable to a floor price that was imposed by the French Directorate General for Competition (DGCCRF) in 1998. European Directive 91/321/EEC prohibits the sale of baby milk at extremely low prices, in order to encourage breast-feeding. As the directive was somewhat ambiguous on the pricing requirement, the French Baby Food Trade Association sought clarification from the DGCCRF as to what exactly was meant by "extremely low prices." On November 16, 1998, the DGCCRF issued a letter setting out a price floor of FF 1.50 (€0.23) under which baby milk prices would be considered "extremely low" for purposes of the directive.

The Competition Council thus held that any uniformity in pricing to maternity wards at this floor price level, resulted from the overlap in (i) the incentives to suppliers to compete as vigorously as possible for the maternity ward segment (in order to influence parents' post maternity ward purchases), and (ii) the requirement not to price below the level set by the DGCCRF. The Council further held that the evidence did not suggest that any observed price parallelism was the result of a market-sharing agreement; instead, supplier market shares had varied wildly in the relevant period, sales of manufacturers not supplying maternity wards grew significantly, and several suppliers had successfully entered the market.

With regard to the abuse of dominance claim, the Council concluded that the four suppliers in question did not hold a collective dominant position, given their very different market shares and market positions. While Nestlé and Blédina are active in the baby food market as a whole, Sodilac and Nutricia-Milupa are uniquely suppliers of baby milk. An abuse of any potential collective dominant position through below cost pricing would not have been sustainable in the long run from the two suppliers active purely in the baby milk market as they would not have a means for recouping their losses. The Council also stressed that, in any event, other suppliers were, in fact, able to enter the market in question.

Abuse of Market Power

France Telecom And Competition Council Reach Negotiated Settlement On A Reduced Fine For The Company's Repeat Abuse Of Its Dominant Position

On October 15, the Council fined France Telecom €45 million for the abuse of its dominant position on the local network market; from January 2001 to mid-2002 it had favorably marketed the internet services of its subsidiary Wanadoo to the detriment of competing internet service providers.

As of January 2001, competing internet service providers have been eligible to provide internet access (over France Telecom's network) to those consumers who have DSL eligible lines. However, only France Telecom has information on which consumers actually have such lines. The Council found that in the time period at issue, France Telecom provided inferior (less updated and detailed) information with respect to which consumers have DSL eligible lines, to its competitors than it provided to its own Wanadoo subsidiary (thus giving its subsidiary a marketing advantage). France Telecom also provided Wanadoo a superior DSL online order system, not available to its rivals.

The Council considered that the company had previously committed similar infringements[7] and thus increased France Telecom's fine by 50%. The company was able to negotiate a fine reduction, however, applying the settlement procedure introduced in France in 2001. In doing so France Telecom agreed not to contest the facts or their treatment as an abuse of a dominant position, and provided several commitments, including:

- Establishing a monitoring system, to immediately identify any consumers complaints related to competition-related contentious acts or practices; and

- Implementing corrective measures – both individually (individual employee training programs and sanctions) and collectively (broad distribution of instructions and reminders on competition law rules).

In light of this settlement, the Council reduced France Telecom's fine by 25% to €45 million.

Competition Council Rejects Claims Of Predatory Practices By Eurostar

On November 23, the Council dismissed allegations by British Airways Plc that France Rail Publicité, the SCNF, and the Eurostar Group Ltd (EGL) had engaged in predatory pricing and provided illegal cross-subsidies.

British Airways claimed that, in 2004 (the relevant time period), Eurostar had deliberately incurred losses, (i) selling deeply discounted tickets, and (ii) saturating the market with an unreasonable number of trains, in order to drive air transport providers out of the Paris-London passenger transport market, and to maintain its own dominant position in this market. British Airways pointed to several factors allegedly proving that Eurostar's commercial policies could not have had reasonable business justifications, including: (i) the

7 *See* Decision 94-D-21 of March 22, 1994, Decision 97-D-53 of July 1, 1997, Paris Court of Appeals Ruling of June 29, 1999, Decision 01-D-46 of July 13, 2001.

relation of Eurostar's revenues to its fixed and variable costs, (ii) Eurostar's actual losses as compared to variable (avoidable) costs that could have been limited by reductions in service, and (iii) Eurostar's opportunity costs in failing to redirect its resources. British Airways also alleged that Eurostar's reliance on cross-subsidies from the French railway, SNCF, to finance its practices had caused a lasting market disruption.

The Council prefaced its analysis by recalling that, "*…predatory practices may be defined as practices by which a company in a dominant position fixes its prices at levels that result in losses or foregone profits in the short-term, in order to force its competitors out of, or hinder entry into, the market, only to raise its prices at a later date to recover its losses.*"[8]

The Council distinguished Eurostar's practices from predatory practices, however, noting that it saw these as commercially sound and justifiable. It found that contrary to British Airways' claims, Eurostar did not saturate the market by increasing its capacities during the period under consideration. Eurostar's pricing policies were developed with the aid of highly specialized marketing studies and management input, with the goal of optimizing revenue on every train. In its decision, the Council included detailed descriptions of the variable, fixed and total costs of Eurostar's high speed network, and focused, in particular, on Eurostar's long-term commitment to repay certain overhead costs regardless of whether it ceased its operations. The Council concluded that, far from predatory, Eurostar's pricing practices were the company's only means of covering its fixed costs and thus managing its total losses.

The Council further rejected British Airways' claim that air carriers were losing market shares as a direct result of Eurostar's pricing practices. It held that "*…such a decrease in market share was to be expected upon the arrival of any new competition, including a new means of transport.*"[9]

Finally, the Council concluded that, in the absence of predatory practices as was established above, and given the expansion of the market resulting from the launch of this alternative means of transportation, SNCF cross-subsidies could not been seen to have a detrimental impact on the market as a whole (notwithstanding a fall in air carriers' market shares).

Competition Council Imposes Interim Measures On Schering Plough To Remedy Abusive Practices Aimed At Delaying Generic Entry

On December 11, the Council issued an interim decision prohibiting Schering Plough from engaging in certain measures promoting its Subutex product.

This decision followed a November 13, 2006 complaint by Arrow Génériques related to certain practices Schering implemented when Arrow launched a generic equivalent for Subutex. According to Arrow, Schering abused its dominant position in the concentrated ("*haut dosage*") buprenorphine market by implementing a sales strategy including: (i) the distribution of defamatory information to pharmacists alleging serious safety concerns with Arrow's generic, both before its launch and at least until June 2006, and (ii) Schering's adjustment of certain of its commercial policies toward pharmacies. In particular, Schering (i) implemented direct sales of Subutex to certain pharmacies as of December 22,

8 Decision, paragraph 100

9 Decision, paragraph 145

2005, (ii) granted certain pharmacies particularly favorable payment terms in January and February 2006; (iii) made substantial payments to certain pharmacies for "non-contractual services" from January to March 2006; and (iv) made further excessive payments to certain pharmacists for surveys conducted from January to July 2006.

The Council noted that "*a company in a dominant position may, without abusing such position, develop commercial means to compete with newly launched products" and that "it is, in fact, legitimate for a company in a dominant position to seek to compete with new products, provided that the means of doing so are based on competition on the merits*". However, "*an operator in a dominant position is subject to specific restrictions as to the commercial means it may use to increase its sales.*"[10]

In the Council's view, Schering's practices could not be seen as "competition on the merits", especially given that:

- The denigration of Arrow's generic, which challenged not only the generic's effectiveness but also its safety to consumers, was not based on any scientific evidence.
- Schering's direct sales and favorable payment terms were limited to those 8,734 pharmacies (of the 22,500 pharmacies in France) that distributed the largest volumes of Subutex.

The Council concluded that such conduct tended to evidence an abuse of Schering's dominant position. It held that Schering's practices were intended both to delay the entry of Arrow's generic, and to prepare for the French launch of Suboxone, a new Schering pharmaceutical intended to replace Subutex. The Council was not, however, provided with sufficient data to reach a conclusion on Schering's payments related to survey completion, and left these to be further evaluated in the course of the proceedings on the merits.

The Council ordered Schering to issue a statement to doctors and pharmacists confirming that certain competing generic pharmaceuticals are exactly bioequivalent to brand name Subutex. No interim measures were ordered with respect to direct sales of Subutex as Schering had already discontinued these.

Schering filed an appeal of the Council's decision with the Paris Court of Appeals.

GERMANY

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

Horizontal Agreements

Liquefied Gas Cartel Fined

On December 19, the FCO imposed fines totaling almost €208 million on seven liquefied gas suppliers who had entered into customer allocation agreements. Proceedings are still pending against four other companies.

The FCO found that the leading liquefied gas suppliers in Germany, including the members of the German Liquefied Gas Association (DVFG), had entered into agreements dating as far back as 1997, that ensured that cartel members would not

10 Decision, paragraphs 88 and 89

"poach" customers from one another. Customers wishing to switch suppliers were either refused a quote from competing suppliers, or quoted an excessive "deterrent" price, ensuring they would remain with the incumbent supplier.

The FCO found that, despite liquefied gas being a homogenous product, prices offered by the largest suppliers (and members of the cartel) often differed by as much as 100% from those charged by smaller, independent suppliers.

As the violations occurred before the new fining guidelines came into effect, the FCO calculated the fines under the former guidelines. It refused to accept the companies' argument that this level of fines would jeopardize their survival.

Abuse of Market Power

Netto Marken Discount Prohibited From Engaging in Below-Cost Pricing

On October 25, the FCO prohibited Netto Marken-Discount, a food-retailer with more than 1,000 stores in Southern and Eastern Germany, from continuing certain of its pricing practices, including the sale of dairy products below purchase price[11]. Such practices, it held, were in violation of § 20(4) 2 of the GWB[12].

The FCO held that, as a subsidiary of the EDEKA group, Netto Marken Discount, in fact enjoyed "superior market power to small or medium sized competitors" (relative dominance) within the meaning of § 20(4) 2 GWB.

In line with its precedent, the FCO defined the relevant product market to include the retail food sector generally, including all retail food stores providing a "typical variety" of groceries. It also identified several regional geographic markets – specifically the regions 20 kms (or, alternatively, a 20-minute car-ride) surrounding several "main retail food centers."

Netto Marken Discount (and its parent EDEKA) was found to have superior market power in the relevant markets examined, as compared to small or medium-sized retailers (but not necessarily as compared to the other primary retail food suppliers such as Schwarz (including its Kaufland and Lidl chains), or Aldi, which each have billions of Euros in annual German turnover).

The FCO further found that Netto Marken Discount had regularly sold certain of its products below purchase costs during the period under examination – ten weeks from mid-December 2006 to mid-February 2007. The FCO noted that, under the guidelines, the same products did not necessarily need to be priced below cost for the course of the period under review, for such pricing to be considered "non-occasional." Rather, below cost pricing relating to an alternating group of products would have a comparable effect, making such practices not "merely occasional."

RTL/ Pro7Sat.1 Fined for Anti-Competitive Discount Agreements

On November 30, the FCO imposed fines totaling €216 million on subsidiaries of RTL and Pro7Sat.1 active in the marketing of advertising time, as these had entered into agreements with media

11 The purchase price is determined on the basis of the supplier's list price (excluding VAT) minus direct discounts, promotional payments and other rebates and bonuses (including year-end and promotional rebates), plus all direct costs to the retailer relating to the supply in question (e.g., packaging, transport, freight, and insurance).

12 § 20(4) GWB reads (as translated): "*Undertakings with superior market power in relation to small and medium-sized competitors shall not use their market power directly or indirectly to hinder such competitors in an unfair manner. An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking offers goods or services not merely occasionally below its purchase cost price, unless there is an objective justification for this.*"

agencies that contained anti-competitive discounts.

The FCO reviewed RTL and Pro7Sat1's agreements with certain media agencies, under which such agencies were granted substantial discounts and other refunds if they spent large proportions of their advertising budget with the respective broadcasting group. Since discounts were granted retrospectively on all advertising expenditures over a given period, *i.e.* not only for the amount in excess of the discount thresholds, media agencies had a strong economic incentive to spend the relevant proportion of their advertising budget with the two large marketing companies belonging respectively to RTL and Pro7Sat.1. This incentive was found to foreclose smaller broadcasters from participating in the market for television advertising.

In view of the companies' joint shares of more than 80% of the affected market for television advertising, the discount system implemented by RTL and Pro7Sat.1 was found to violate German and European competition law. RTL and Pro7Sat.1 have announced that they will comply with the fines, and have meanwhile both introduced a new discount system.

Mergers and Acquisitions

Federal Supreme Court Upholds Düsseldorf Court of Appeals Suspension of FCO Prohibition Order in Sulzer/Kelmix

On September 25, in a landmark decision, the Federal Supreme Court upheld an interim order by the Düsseldorf Court of Appeals suspending enforcement of the FCO's prohibition order involving Sulzer's acquisition of Kelmix.

In August 2006, Sulzer, a company primarily active in separation column and static mixing technologies, sought to acquire 75% of the shares of Kelmix, which manufactures cartridge-based mixing and application systems.

After initially notifying the transaction, the parties subsequently withdrew their notification on the basis that notification was not required where the total German market size of each of the two affected product markets (cartridges, mixers and application systems for (i) medical, and (ii) industrial applications) was less than €15 million and the parties thus benefited from the GWB's *de minimis* exception under § 35(2)(1) No. 2.[13]

The FCO disagreed with the parties' view that application of the *de minimis* exception should be assessed based on the size of German market only, arguing that the affected geographic markets were *European-wide* and, that consequently, the *de minimis* rule should apply to the full geographic market. The FCO concluded that it had jurisdiction to review the transaction given that the overall market size of the affected European markets exceeded €15 million. It also claimed jurisdiction on alternative grounds, arguing that the size of the two affected markets in Germany could be aggregated as the transaction involved two very similar product markets. Following its review of the transaction on the merits, the FCO concluded that the transaction would result in the strengthening or creation of Sulzer's dominant position in the relevant markets. It prohibited the transaction and ordered the parties to dissolve the merger.

Sulzer and Kelmix appealed the FCO's prohibition decision to the Düsseldorf Court of Appeals, which

13 Under § 35(2)(1) No. 2 GWB parties are not required to notify a transaction where the market at issue is a market "*in which goods or commercial services have been offered for at least five years, and which had a sales volume of less than € 15 million in the last calendar year*" This *de minimis* clause is particularly important in Germany, given Germany's relatively low filing thresholds; these generally require notification of any transactions in which (i) the combined aggregate worldwide turnover of the parties exceeded € 500 million; and (ii) the German turnover of at least one party exceeded € 25 million in the last calendar year.

issued an interim order suspending the FCO's ruling. This order in turn was upheld by the Federal Supreme Court on September 25.

The Supreme Court accepted the FCO's contention that the relevant geographic markets were European-wide, but it agreed with the parties that the GWB's *de minimis* exception applied only to German national turnover. It reasoned that the *de minimis* clause was intended to exempt mergers from the obligation to notify in Germany where their effects on the German economy were insignificant. The Court also noted that this interpretation was consistent with § 19(2)(3) GWB, which stipulates that relevant markets "*within the meaning of the GWB*" may reach beyond the scope of the act. This provision, implemented in 2005, simply codified the FCO's pre-2005 jurisprudence, which incorporated the assumption that any de minimis assessment should be limited to the domestic market. The Supreme Court was not able to locate any evidence suggesting that legislators had intended to deviate from this approach by enacting § 19(2)(3) GWB.

The Court also concluded that the turnovers for the two different relevant markets could not be combined for this purpose. Turnovers from different relevant product markets may only be combined, so the Court held, in exceptional circumstances where the markets at issue are identical both in terms of the factual circumstances (competitors, customers, etc.) and market structure. In this case, the Court found the market structures to differ significantly.

This Supreme Court ruling is noteworthy as it will significantly limit the number of cases that will need to be notified with the FCO going forward to those in which the relevant market sizes in Germany exceed €15 million. The judgment also effectively limits the application of the "bundle theory", that is the bundling of turnovers from separate relevant product or geographic markets to overcome the *de minimis* exception. To date the Court has accepted the bundling of turnover in only three limited cases:

- A transaction involving different, yet very similar geographic areas, that had been arbitrarily divided into two separate markets by the parties,
- A transaction involving different geographic markets, that were considered as different only due to the parties' unique organizational structures;[14] and
- A transaction involving parties active in three vertically related relevant markets, of which one met the de minimis exception.

FCO Issues Prohibition Decision in Faber Straßen- und Tiefbau/Basalt AG Transaction

On November 15, the FCO issued a decision prohibiting Faber Straßen- und Tiefbau's acquisition of a 30% shareholding in AML Asphaltmischwerk, previously held by Basalt AG.

Faber Straßen- und Tiefbau (Faber) is a member of the Faber Group, a road construction and underground works company that also owns a 50% shareholding in AMK Asphaltmischwerk (AMK), an asphalt mixing plant located in Kirchheimbolanden.

Basalt AG (Basalt) is the largest manufacturer of mixed asphalt in Germany. Its parent company (Werhahn) owns the remaining 50% of AMK Alsphaltmischwerk, and Basalt itself owns a separate asphalt mixing plant in Langenthal (AML Asphaltmischwerk (AML)).

14 See the summary below of the FCO's prohibition decision in *Faber Straßen- und Tiefbau/Basalt AG*.

The transaction was not technically notifiable as neither of the two relevant geographic markets (the areas within 25 km from both the Langenthal and Kirchheimbolanden plants) had total market sizes exceeding the €15 million *de miminis* threshold. The FCO, however, asserted jurisdiction by bundling the two geographic markets, arguing that the markets at stake (i) represented neighboring markets (the distance between the Kirchheimbolanden and Langenthal plants is approximately 35 km); and (ii) were interconnected via the parties' shareholdings in asphalt mixing plants in both regions.

The FCO also asserted jurisdiction on the alternative ground that the transaction would allow Faber to vertically integrate its asphalt and road construction activities in the Langenthal region (with the goal of facilitating access to upstream asphalt supply for its downstream road construction business, whose market size well exceeded the €15 million *de minimis* threshold).

The FCO issued a prohibition decision, following its review on the merits. It had serious competitive concerns stemming from (i) Werhahn/Basalt's extremely high market shares - between 49 and 59% in Langenthal, and between 80 and 95% in Kircheimbolanden (including both captive and non-captive asphalt); (ii) the fact that the next largest competitors in the region were significantly smaller; (iii) the fact that high barriers to entry (resulting from high investment costs and regulatory approval procedures for asphalt plants) prevented other competitors from offering similar services in the near future; (iv) surplus capacity in Langenthal making entry even more difficult; and (v) Werhahn/Basalt's significant financial resources. The FCO was particularly concerned that Faber would source its asphalt from AML in Langenthal going forward, thus serving as an extension of Werhahn and broadening Werhahn's dominant position into the Langenthal downstream road construction business. The FCO thus prohibited the transaction on this basis, but left open the question as to whether the market conditions in Kirchheimbolanden also justified a prohibition.

Policy and Procedure

GWB Reform

On December 24, two significant sector-specific amendments to the GWB came into effect. The amendments cover (i) below-cost pricing by dominant food retailers and (ii) excessive pricing by dominant public utilities.

With respect to below-cost pricing, § 20(4)2 GWB now reads (with amendments highlighted in bold, and as translated):

> *"An unfair hindrance within the meaning of sentence 1 exists in particular if an undertaking offers*
>
> ***1. food within the meaning of Section 2(2) of the Food and Food Stuff Act below purchase price, or***
>
> *2. other goods or services more than merely occasionally and below purchase price,*
>
> *unless there is an objective justification for such pricing.*
>
> ***The offering of food below purchase price is objectively justified if it is necessary to prevent spoilage or the risk that the goods cannot be sold by the merchant, or in any comparably severe cases. There is no unfair hindrance if food is being passed on to public utility institutions for use within the framework of their tasks."***

These amendments introduce two significant changes: first, it will no longer be necessary for the FCO to establish that below-cost pricing occurred more than merely occasionally, provided such pricing applies to a food product.[15] As a result, any offer of food made below the purchase price will be illegal (unless objectively justifiable). Second, the "objective justification" defense is now limited to cases in which the goods concerned would otherwise be spoiled or could not be sold. As for the "*comparably severe cases*" phrase, the President of the FCO recently stated that he is currently not aware of any situations that would qualify under this category.

With respect to excessive pricing, the newly inserted § 29 GWB reads (as translated):

> *"Any undertaking supplying electricity or gas (public utility company) on a market on which it has a dominant position alone or jointly with other public utility companies shall be prohibited from abusing/exploiting this dominant position by*
>
> *1. demanding prices or other terms or conditions which differ from those of other public utility companies or companies on comparable markets, except in circumstances where the public utility company can demonstrate legitimate reasons for divergence, or*
>
> *2. demanding prices which exceed costs excessively.*
>
> *Costs which would not occur under competitive conditions shall not be taken into account when assessing abuse under paragraph (1). This section is without prejudice to Sections 19 and 20."*

The section will allow the FCO to more closely monitor the energy sector for potential excessive pricing concerns. Notably, in contrast to the GWB's general prohibition of abuse of a dominant position, this new provision effectively reverses the burden of proof: utility companies must now prove the legitimacy of their pricing policy, where their prices are different from those of comparable utility companies.

GREECE

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

Horizontal Agreements

Milk Product Manufacturers Fined for Cartel Activity

On November 29, the Competition Commission issued a long-awaited decision following its investigation into the Greek milk products market.

The Commission's investigation had commenced in March 2006, and involved the five largest suppliers of milk products in Greece (Vivartia, Mevgal, Nestle Hellas, Olympos and Fage) as well as a number of smaller suppliers including Evrofarma, Kri-Kri and Rodopi. The Commission also targeted SEVGAP, the Greek Association of Milk Product Suppliers. The Commission included all products derived from cow milk in the scope of its investigation, examining the entire production

15 By way of reference, food (or foodstuff) is defined by Art. 2 of Regulation 178/2002 as "*any substance or product, whether processed, partially processed or unprocessed, intended to be, or reasonably expected to be ingested by humans.*"

chain from cow milk itself down to milk products.[16]

As background, the Commission explained that since the total volume of milk produced in Greece was subject to a system of quotas, as in all EU Member States, the producers of milk products were forced to compete among each other for raw materials, *i.e.* milk. Producers of milk products generally choose their sources of milk supply on the basis of the quality of the milk, the quantity available, the distance of supplier to the milk product producer, and the hygiene conditions prevailing in the milk supplier's stables and other facilities.

In its November decision, the Commission then defined the relevant product market as the market for the production and sale of milk products, which it further divided into five sub-markets: (i) pasteurized milk; (ii) milk cream; (iii) milk-based desserts; (iv) yogurt; and (v) sour milk. The Commission also distinguished white and chocolate milk within the pasteurized milk sub-market, and fresh pasteurized milk, milk of high pasteurization, long life milk, as well as concentrated milk in the pasteurized white milk sub-(sub-)market. It noted that further segmentation of these types of white milk based on their fat content was possible. The Commission concluded that consumer taste and the milk's preservation period were the most important factors in determining the degree of demand-side substitutability between the different segments of white milk.

The Commission then found that the defendant suppliers were liable for three groups of distinct infringements under Article 1 of Law 703/77 and Article 81 EC Treaty:

- First, purchase price fixing and supply allocation agreements concluded at Larissa

On May 31, 2004 the milk department managers of five firms (Vivartia, Fage, MEVGAL, Nestle Hellas, Olympos) met in a hotel in Larissa to fix prices and allocate supply. The Commission, in particular, relied on the following evidence to prove this infringement:

  - Typed minutes of the meeting that included mention of an agreement to prevent milk suppliers from selling to different milk product manufacturers and to prevent these suppliers from raising their prices. The minutes also evidenced a decision to set up a group that would meet at regular intervals in order to ensure the quality and competitiveness of the milk supplied. The participants further exchanged their mobile and office telephone numbers.

  - Handwritten notes titled "Decisions 31.5.2004", located during the dawn raid of MEVGAL's offices in June 2006. The notes were drafted by the MEVGAL officer who had attended the meeting, and included the following statements: "Limit producers shifting suppliers to a minimum and always follow consultation of the companies involved" and "Attempt to control prices for the month of May and to reduce from June by 1 to 1.5%." Three of the participants, Nestle, Fage and Vivartia, contested the authenticity of these notes and requested a graphological examination of the original. The original had been destroyed, however, and the Commission's document was a mere photocopy, which it held to be sufficient for its purposes.

16 In its November decision, the Commission described that the majority of cow milk produced is used in the production of pasteurized milk. Under the Greek Food and Beverages Code, only this type of milk may be labeled as "fresh."

- Affidavits produced by the companies, combined with a number of internal documents found during the dawn raid of MEVGAL, allowed the Commission to conclude that the industries had regularly discussed and consulted with each other in order to adopt a common policy towards the prices of milk purchased from milk producers. These documents proved that the meeting at Larissa was only one in a long line of meetings dating back much further.

The Commission concluded on the basis of the above evidence that an agreement had been reached between the five companies participating in the May 31, 2004 meeting, with the purpose of restricting competition by maintaining or reducing the price paid to milk suppliers, and preventing milk product manufacturers from shifting among suppliers. The five undertakings involved were ordered to refrain from further breaches of Article 1 of Law 703/77 and Article 81 EC, and were required to pay significant fines: Vivartia €15.97 million, Fage €9.13 million, MEVGAL €13.16 million, Nestle Hellas €6.18 million, Olympos €3.16 million.

- Second, price fixing arrangements among Sevgap Members

  In its dawn raid of MEVGAL, the Competition Commission further discovered documents dating from 2001 which established that SEVGAP directors had met and adopted decisions fixing the minimum and maximum prices for cow milk. This constituted a breach of Article 1 of Law 703/77 and Article 81 EC and SEVGAP was ordered to abstain from similar practices in the future. The Commission stated that it would impose a fine of €5 million and a daily penalty of €10,000 on any company that remained non-compliant with this order.

- Third, wholesale and retail milk product pricing and rebate agreements

  The Commission found that a number of milk product manufacturers had also exchanged wholesale price lists from 2003 to 2006 with the purpose of fixing wholesale and recommended retail prices for milk products. The Commission ordered Vivartia, Mevgal, Olympos, Rodopi, Evrofarma and Kri-Krii to abstain from such practices in the future, stated that it would impose a daily penalty of €5,000 in case of non compliance, and ordered the undertakings to notify the Commission within 60 days of precisely what programs were put in place to ensure compliance.

Finally the Commission found that a number of companies had coordinated their rebates policies for fresh milk and imposed fines ranging from €16,000 to €230,000.

IRELAND

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

Mergers and Acquisitions

Competition Authority Clears Communicorp/SRH (M/07/040) Transaction with Commitments

On December 7, the Irish Competition Authority announced, following a full Phase 2 investigation, that it approved the proposed acquisition by Communicorp Group Ltd. of certain assets and businesses (Today FM, FM104 and Highland Radio) of Scottish Radio Holdings. The parties are involved in radio broadcasting and radio advertising sales.

The Competition Authority's concerns that the proposed transaction might "substantially lessen competition" were assuaged by the parties' commitments, which included the full divestment of FM104, and a commitment not to obtain or exercise a controlling interest in Independent Radio Sales, one of two established sales agencies in Ireland which act on behalf of local and regional radio stations selling advertising time to advertisers and advertising agencies.

Policy and Procedure

Competition Authority Report on Competition in Dental Services

On October 3, the Irish Competition Authority published a detailed report on competition in the dental services sector in Ireland, finding that an "outdated system of regulation" is restricting and discouraging competition in the sector.

The report's key findings were that dentists are prohibited from (i) advertising their prices, (ii) offering discounts to customers, and (iii) canvassing for each other's customers. The number of dentists and orthodontists being trained in Ireland has not kept pace with growing demand and consumers in Ireland do not have the option of going directly to qualified dental hygienists and clinical dental technicians for dental hygiene services and dentures.

The report's recommendations included:

- The introduction of new oral healthcare professions of (i) clinical dental technician and (ii) advanced dental hygienist, who can operate independently of dentists and can be directly reimbursed under the State dental schemes
- The review of the number of training opportunities for dentists and other oral healthcare professionals;
- Removal of unnecessary restrictions on advertising and bans on discounts; and
- The amendment of the composition of the Dental Council and the granting of power to the Dental Council to deal with fitness to practice issues for all groups of dental workers regulated by it.

ITALY

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

Horizontal Agreements

Authority Fines Public Transportation Cartel

On October 30, the Authority fined fifteen transportation companies[17] a total of € 10 million for entering into agreements, in violation of Art. 81(1) EC, aimed at reducing competition on the local public transportation market.

The Authority's investigation revealed that, from 2002 to 2006, the Companies entered into various forms of alliances (including consortia and partnerships) aimed at coordinating their participation in public tenders for the supply of local public transportation services throughout Italy. According to the Authority, these alliances had two primary purposes: (i) protecting alliance participants from competition in public tenders for the supply of public transportation services within their territories, and (ii) avoiding competition between alliance participants in public tenders for

17 The companies fined were SITA S.p.A., A.P.M. Esercizi S.p.A., ACTV - Azienda Consorzio Trasporti Venezia S.p.A., G.T.T. - Gruppo Torinese Trasporti S.p.A., ATCM S.p.A., TRAMBUS S.p.A., ATC S.p.A. (Bologna), ATAF S.p.A., ATC S.p.A. (La Spezia), ATP S.p.A., Tempi S.p.A., TEP S.p.A., APAM Esercizio S.p.A., Consorzio Italiano Trasporti - CO.TR.I. and the French company Societé Européenne Pour Le Developpement Des Transports Publics - TRANSDEV S.A. (the Companies).

the supply of public transportation services outside their territories.

The Authority held that the alliances created an obstacle to the liberalization of the local public transportation sector in Italy, and harmed both local public administrations and consumers, due to the higher costs they incurred for local public transportation services.

Authority Fines Autoclaved Aerated Concrete Manufacturers

On October 24, the Authority fined concrete manufacturers Xella and RDB € 510,000 and € 1,860,000 respectively, for entering into an agreement in breach of Art. 81 EC in the Italian market for autoclaved aerated concrete ("AAC") (a concrete primarily used for wall-building) The Authority also imposed a fine of € 1,960,000 on RDB for violating Article 82 EC by abusing its dominant position in the Italian AAC market.

The Authority found that Xella and RDB - respectively the number one and two manufacturers of AAC world- and Italy-wide – engaged in an anticompetitive agreement with the goal of coordinating their respective commercial strategies, monopolizing and allocating the Italian AAC market, and compartmentalizing neighboring markets. The authority held that a joint venture between Xella and RDB, RDBH, played a significant role in the implementation of this agreement as it facilitated meetings, discussions, and information exchanges between the competitors. Taking into account the highly concentrated nature of the AAC market, the conduct and market position of the parent companies, and the joint venture's lack of reasonable justification, the Authority required the dissolution of the RDBH joint venture, despite the fact that Law No. 287/1990 does not explicitly entrust the ICA with the power to impose structural remedies.

With respect to RDB's abuse of its dominant position, the Authority found that RDB had engaged in a complex strategy, including selective predatory pricing and unfair business practices, with a view to eliminating Italgasbeton, the only other remaining competing manufacturer of AAC active on the Italian market.

Mergers and Acquisitions

Authority Clears AEM/ASM Transaction Subject To Commitments

On December 13, the Authority cleared the merger between AEM S.p.A. (AEM) and ASM Brescia S.p.A. (ASM), subject to certain commitments.

AEM and ASM are energy companies respectively controlled by the Municipality of Milan (*Comune di Milano*) and the Municipality of Brescia (*Comune di Brescia*). The merger between the two parties resulted in an entity, named A2A S.p.A. (A2A), jointly controlled by the *Comune di Milano* and the *Comune di Brescia*, each holding 27.5% of its shares (sufficient to ensure joint control given that under A2A's by-laws, no other shareholder is entitled to hold more than 5% of A2A's share capital). The merger also resulted in A2A's acquisition of joint control of Plurigas S.p.A., a company mainly active as gas supplier to its parent companies, *i.e.* AEM (40%), ASM (30%) and Iride S.p.A. (30%).

The transaction affected several relevant product markets, including markets for the: (i) wholesale supply of electrical energy; (ii) distribution of electrical energy; (iii) sale of electrical energy to end-customers; (iv) wholesale supply of gas; (v) distribution of gas; (vi) sale of gas to end-customers; (vii) integrated water cycles; (viii) collection, treatment and removal of urban waste; (ix) collection, treatment and removal of specialized waste; (x) heating management; (xi) facility management; and (xii) district heating.

Except for the market for the wholesale supply of electrical energy, the Authority held that the transaction would not raise any competitive concerns (the parties had low market shares in these markets and/or no significant geographical overlaps).

With respect to the market for wholesale supply of electrical energy, the Authority focused on potential coordinated effects deriving from structural links and interlocking directorships that would exist between A2A (the second largest operator on the market) and its main competitors. The Authority noted that: (i) ASM held 20% of the share capital of Endesa Italia S.p.A. (Endesa Italia), the third major operator on this market; (ii) ASM played an important role in the management of Endesa Italia, appointing two members of its board of directors; (iii) ASM and Endesa Italia entered into electric energy supply agreements on an annual basis; (iv) ASM and Endesa S.A. (an entity indirectly controlling Endesa Italia) were party to a shareholders' agreement providing for a complex frame of put and call options and preemption rights regarding Endesa Italia's shares; (v) ASM and Endesa Italia jointly controlled Ergon Energia S.r.l. (Ergon Energia), a company active in the Italian market for wholesale supply of electrical energy; and (vi) ASM and Endesa Europa jointly controlled Ergosud S.p.A. (Ergosud), a company established for the purpose of managing a turbogas plant located in Scandale.

In order to dispel the Authority's competitive concerns arising from the above-mentioned structural links, the parties proposed replacing those members of Endesa Italia and Ergon Energia's boards of directors appointed by ASM with independent directors. Moreover, the parties proposed that the electricity generated by the joint venture Ergosud be managed and allocated without any form of co-ordination between its parent companies.

In light of the above commitments, the Authority concluded that the transaction would not create or strengthen a dominant position on any of the relevant markets, as a result of which competition would be impeded on a lasting basis.

THE NETHERLANDS

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

Horizontal Agreements

On Appeal, Court Reduces Bicycle Manufacturer Fines

On July 18, the District Court of Rotterdam reduced fines imposed on three bicycle manufacturers for concerted practices that allegedly resulted in the fixing of prices for bicycles sold in the Netherlands. In 2004, the NMa had initially fined Gazelle €12.898 million, Giant €3.978 million and the Accell Group NV €12.809 million for this conduct.

According to the NMa, the three companies engaged in concerted practices that resulted in the fixing of discounts to bicycle dealers and the maximum amount payable to associations promoting the use of bicycles in the Netherlands.

On appeal, the district court found that the companies' concerted practices related to bicycles generally and not to any specific models. As such, competition still existed between the three manufacturers for specific models. The Court also found that there was insufficient proof to establish that the concerted practices resulted in a maximum amount payable to the bicycle association. It also held that the length of the NMa's investigation was not conducted within a reasonable time as required by Article 6 of the European Convention on Human Rights. The district court thus lowered the fines on the three manufacturers to approximately €6.7 million for Gazelle, €1.4 million for Giant and €4.6 million for Accell.

Abuse of Market Power

Abuse Of Dominance In The Health Sector

On August 21, the District Court of Rotterdam ruled on three appeals brought by physiotherapists and oral hygienists, who had initially complained to the NMa about alleged abuses of dominant positions by certain health insurance companies.

With the liberalization of the Dutch health care sector, the NMa has received a number of complaints by health care specialists alleging abuse of dominance by health insurance companies, though none of these have been successful. The particular complainants in this case alleged a number of abuses including:

- the implementation of a benchmarking system to measure the effectiveness of the specialists' care without informing the specialists what criteria were being used to assess effective care;
- the health insurance companies' unilateral implementation of a new system of compensation for specialist care;
- the use of standard contracts with health care specialists that could not be individually negotiated;
- partial compensation (80%) for health care services supplied by *physiotherapists* not affiliated with the insurance company at issue; and
- the refusal to compensate *oral hygienists* not affiliated with the insurance company at issue for health care provided.

The NMa rejected all allegations of abuse and concluded that it would not need to determine whether the insurance companies, in fact, held a dominant position on the relevant markets. The district court agreed with the NMa on most points. It held that applying a non-transparent benchmarking system could not constitute an abuse in itself. Rather, it had to be shown that this system, in combination with other factors, lead to the foreclosure of health care specialists. The Court also held that the unilateral implementation of a new system of compensation did not constitute an abuse, as long as the system was objective, transparent and non-discriminatory.

The court disagreed with the NMa on the use of standard contracts and the refusal to compensate services provided by an unaffiliated oral hygienist. Given these requirements, the court doubted whether insured customers had a realistic choice between affiliated and unaffiliated specialists. However, it followed the NMa in its reasoning that the partial compensation (80%) of services provided by an unaffiliated physiotherapist did not constitute an abuse, since this percentage represented the extra costs and loss in quality the insurance company incurred in dealing with unaffiliated specialists.

On this basis, the court rejected the appeal by the physiotherapists and upheld the appeal of the oral hygienists. It ordered the NMa to properly examine whether the insurance companies held a dominant position before reaching a decision on the oral hygienists' complaint.

Alarm Centrale Nederland v. NMa

On November 27, the District Court of Rotterdam confirmed the NMa's decision of August 4, 2006, in which the NMa had held that Stichting Incident Management Nederland (SIMN) did not violate Article 24 of the DCA. SIMN is an association of automotive assistance companies that concludes contracts with towage companies. The appeal was launched by Alarm Centrale Nederland B.V. (ACN), an automotive assistance company that also carries out towage services.

ACN accused SIMN of foreclosing the market for automotive assistance by pressuring towage companies to refrain from doing business with ACN. In its decision of February 5, 2003, the NMa rejected the complaint for lack of evidence. ACN successfully appealed to the District Court of Rotterdam, which annulled the NMa's decision in its judgment of August 15, 2005. The Court ruled that the NMa had insufficiently investigated a possible violation by SIMN, since it neglected a statement of an employee of a towage company evidencing possible anticompetitive behavior of SIMN.

After further investigations, the NMa rendered a new decision on August 4, 2006, again concluding that SIMN had not abused its dominant position. ACN appealed once more, and included a second complaint regarding SIMN's refusal to grant ACN membership to its organization. The District Court of Rotterdam rejected the appeal in so far as it related to Article 24 of the DCA. The court confirmed that by interviewing all relevant individuals and reviewing SIMN's meeting minutes, the NMa had carried out a sufficient investigation to conclude that SIMN had not pressured towage companies to exclude ACN from the market. The court also ruled that the grounds on which SIMN refused ACN's membership were justified:

- First, ACN' s membership would grant it with free access to all rates and contracts of other towage companies.

- Second, in its complaint, ACN had raised several issues condemning certain practices of SIMN, which therefore rightly concluded that the ACN did not support the goals of the SIMN and would not contribute to the organization.

- Third, since SIMN covers only a segment of the market (20%), the court found that the commercial success of an independent automotive assistance company is not dependent on its membership to SIMN.

Vertical Restrictions

Leeuwaarden Court Of Appeals Finds Franchise Agreement To Be Anticompetitive

On November 7, the Court of Appeals of Leeuwaarden overruled a decision by the District Court of Assen in finding that a supermarket rental and franchise agreement between X v.o.f. and Prisma infringed Article 6 DCA.

The parties signed a supermarket rental agreement in 1989 granting X v.o.f. an option to purchase the premises. The agreement also specified that if X v.o.f. exercised that option, Prisma would be granted a subsequent option to repurchase, which it could exercise should X v.o.f. terminate the parties cooperation. In 1990, the parties concluded a separate franchise agreement that required X v.o.f. to use Prisma’s supermarket formula. On September 30, 1994, X v.o.f. purchased the premises from Prisma and concluded a new franchise agreement. Both the deed of transfer and the franchise agreement repeated Prisma’s option to repurchase the supermarket in the event X v.o.f. terminated the franchise agreement or sold or encumbered the supermarket premises. Both documents also fixed the future purchase price. The franchise agreement contained a non-compete obligation for 10 years in the event the premises were resold to Prisma. The franchise agreement and option to purchase was valid for 10 years with an automatic renewal for 10 years, unless terminated in a timely fashion.

On January 9, 2003, X v.o.f. terminated the franchise agreement and commenced negotiations to sell the premises back to Prisma. These negotiations were unsuccessful and on July 18, 2003, X v.o.f. informed Prisma that it considered the franchise agreement void in accordance with Article 6 of the DCA. Prisma commenced proceedings before the District Court of Assen and requested specific performance of X v.o.f.'s obligation to resell the supermarket premises. The court held that Prisma's option to purchase could be separated from the franchise agreement, so that even if that agreement was void for violation of Article 6 DCA, the option to purchase remained valid. The court further found that Prisma's reliance on the option was not unreasonable and ordered X v.o.f. to transfer the property to Prisma under the purchase price set out in the agreement.

The Court of Appeals overruled this decision. It held that the obligation of X v.o.f. to offer the premises for sale to Prisma in the event that the franchise agreement was terminated, the purchase option of Prisma to buy the premises for a price that could not be determined by X v.o.f., and the non-compete obligation that would apply if Prisma invoked its option have as their object the restriction of competition on the market for the sale of franchise services to independent supermarkets. These obligations make it impossible for X v.o.f. to align itself with a competing supermarket franchise without the approval of Prisma.

In so deciding, the court of appeals rejected a number of arguments put forward by Prisma:

- First, it rejected the argument that the clauses did not have an appreciable effect on competition. The Court pointed to the fact that the combined turnover of the parties concerned was above the thresholds provided in Article 7 DCA for the application of Article 6 DCA, that Prisma had not refuted that other supermarket chains had shown an interest in the premises, and that the clauses had effectively prevented X v.o.f. from switching franchise formulas.

- Second, the court rejected the argument that the non-compete clause could be classified as a permissible ancillary restraint, since it was the obligation to sell to and the right to purchase of Prisma that constituted the main transaction and these together restricted competition.

- Third, the court rejected the argument that the franchise agreement fell under the Vertical Block Exemption Regulation, since Article 5(b) of that Regulation only allows for such a non-compete for one year.

- The Court also rejected Prisma's reliance on a clause in the franchise agreement that calls on the parties to find a solution with comparable results should one of the clauses in the agreement be found void. The Court held that such a clause could not be honored, even if it would lead to a solution with less restrictive effects that did not fall under Article 6 DCA, since it would undermine the provision in Article 6(2) DCA that anti-competitive agreements are automatically void. It would also undermine the private enforcement of competition law infringements.

Ultimately, the Court rejected Prisma's contention that if these clauses were void, the underlying sales agreement should be void as well and that the initial sale of the premises from Prisma to X. v.o.f. should be undone.

Policy and Procedure

NMa Rejects Access To File Request

On December 20, the NMa rejected DLA Piper's request to access the NMa's Statement of Objections in case 6259. The request was based on the Open Administration Act (*Wet openbaarheid van bestuur*), which the Dutch Council of State recently ruled applies to case files held by the NMa. This ruling was previously discussed in NCR 1Q07.

With a limited number of exceptions, the Act generally allows parties to request access to documents from government agencies. In the present case, the NMa based its rejection on Articles 10(2)(c) and (g), which allow for a refusal to access where criminal acts are being investigated, and where disclosure would result in disproportional benefit/harm for the undertakings concerned or third parties, respectively.

The NMa argued that since the investigation had not yet been completed in this case, premature disclosure of information could jeopardize its outcome and undermine the functioning of the NMa. Moreover, disclosing incomplete and fragmented information during the investigatory stage of the proceedings could lead to an inaccurate indication of whether one or more undertakings had infringed the competition laws. The NMa concluded that disclosure at this early stage would disproportionately harm the undertakings concerned. The NMa also pointed out that the legislators had explicitly rejected making the preparatory stage of the investigation public and had specifically laid out what types of information could be made public and how and when they should be made public.

Note that on January 15, 2008 the NMa approved an access to file request from the law firm of Houthoff Buruma that related to all correspondence between the NMa and DLA Piper regarding its request in the above matter.

SPAIN

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

Horizontal Agreements

National Competition Commission Fines Regional Savings Banks

On October 18, the National Competition Commission fined four regional savings banks, all members of the Basque-Navarre Federation of Savings Banks (Bilbao-Bizcaia Kutxa-BBK, Caja de Ahorros de Vitoria y Álava-Caja VITAL, Caja de Ahorros y Monte de Piedad de Guipúzcoa y San Sebastián-KUTXA, and Caja de Ahorros de Navarra-CAN) a total of €24 million for engaging in a number of anti-competitive concerted practices, including market allocation and price fixing agreements.

The Commission's decision was the result of an investigation commenced by the former Competition Service, on its own initiative, following its review of a number of suspicious press articles.[18] Having examined the content of more than 100 Basque-Navarre Federation meeting minutes for the 1990-2005 period, in the course of its investigation, the Commission located evidence of the following types of restrictive practices:

- market allocation agreements through which the four named savings banks agreed to maintain the same territorial division of activities in the Basque and Navarre regions as had existed prior to deregulation. In the Commission's view, the fact that none of the banks had opened any branches in the each others' traditional territories, despite having expanded outside their respective four territories, provided further evidence of these agreements;

- agreements to fix prices and other commercial conditions for certain groups of customers, including developers and real estate promoters. The savings banks' meeting minutes, for example, evidenced an agreement to homogenize commercial real estate financing conditions;

- pervasive information exchanges of sensitive data including strategic plans, real estate data bases, and cost structures, all with the goal of maintaing current market shares and creating entry barriers for potential competitors; and

- coordination of influence exerted by the savings banks as members of corporate boards of companies in various industry sectors.

The defendants insisted, among other arguments, that the alleged conduct constituted isolated incidents and should not be considered one continuing infringement. This, they argued, barred the Commission from prosecuting certain conduct under the statute of limitations period, and resulted in the Commission not holding sufficient evidence to meet its burden of proof with respect to other conduct. The Commission rejected this argument, however, holding that all of the alleged conduct amounted to a single cartel infringement.

Mergers and Acquisitions

Dia/Plus Transaction Cleared in Phase I

On October 30, the National Competition Commission issued a decision conditionally clearing Distribuidora Internacional de Alimentación S.A. ("DIA")'s acquisition of discount supermarket chain, Plus Supermercados S.A. ("PLUS").[19] The decision marked the first time the Spanish authority granted clearance for a transaction following Phase I proceedings involving remedies.

DIA and PLUS are active in retail sales of consumer goods (such as foodstuffs and other daily household goods). Both parties operate chains of retail outlets, with PLUS specializing in discount sales. DIA and PLUS both have a significant presence on the Spanish national market.

Applying European Commission and National Competition Authority precedent, with a particular focus on the *Promodes/Casino* (IV/M.991) and *Caprabo/Enaco* (N-230) cases, the National Competition Commission defined two separate vertical product markets relevant to the consumer goods retailing sector: (i) the market for local

18 The agreements at issue can be dated back to Royal Decree 1582/1988 and Law 3/1994 which together removed territorial restrictions on the activities of savings banks (and other credit insitutations).

19 DIA and PLUS are Spanish subsidiaries of the Carrefour Group and Tengelmann Groups respectively.

distribution of consumer goods, in which retailers act as suppliers to end-use consumers and, (ii) the wholesale market for consumer goods, in which retailers (and wholesalers) purchase consumer goods from their producers.

The Commission found no adverse competitive effects on the upstream consumer goods procurement market (in which the parties have a combined market share of less than 20%), and, instead, focused its assessment on the local distribution market. In that market, the Commission concluded that the transaction might significantly reinforce DIA/Carrefour's already strong market position. It noted that in certain provinces, including Andalucía, Extremadura, Castilla-La Mancha and Murcia, the parties' combined market shares exceed 30%, and that in those regions they face no significant competitive restraints from current or potential competitors. Entry barriers such as legal restrictions on retail distributors (requiring them to obtain hard-to-get building and operating licenses) make growth by potential competitors particularly unlikely.

The Commission, however, accepted the parties' Phase I remedies (including the divestment of six PLUS outlets and one DIA location in the regions with significant overlap), as sufficiently alleviating its competitive concerns. It cleared the transaction subject to these remedies.

Abuse of Market Power

National Competition Commission Council Reinstates Abertis Investigation

On November 6, the National Competition Commission's Council annulled the (former) Competition Service's decision to close its investigation into certain allegedly abusive conduct by Abertis Telecom SAU (Abertis), a major Spanish telecommunications, infrastructure and services group.

The Service's investigation had been initiated following a complaint by Red de Banda Ancha de Andalucía SA (Axión), a Spanish network operator, alleging that Abertis had violated Article 82 EC and Article 6 of the former Spanish Competition Law (now equivalent to Article 2 of Law for the Protection of Competition of 2007). Axión claimed that Abertis had engaged in a number of anticompetitive practices (including bundling discounts, predatory pricing, and abusive conditions for contract termination) with the object of preventing competitive entry into the Spanish audiovisual signal carrier services market.

The Service issued a Statement of Objections (SO) finding that Abertis, with a broad network covering 85% of the Spanish population, had undisputed market power in the Spanish audiovisual signal transport and delivery markets. The Service preliminarily concluded in its SO that Abertis had abused its dominant position in that market by:

- imposing excessive penalties on customers for early contract termination, without objective justification and with the effect of impeding competitors from entering the market;
- offering customers discounts in exchange for their adherence to long term agreements, further impeding competitors from entering the market; and
- offering customers bundling discounts in exchange for contracts for the distribution of audiovisual signals for all Spanish territories.

The Competition Service, however, discontinued its proceedings following the submission of observations by the Spanish Telecommunications Commission ("CMT"), which the Service viewed as providing "objective justifications" for the alleged conduct. Axion and the Spanish television networks, Sogecable and Telecinco, appealed the Service's decision to abandon its proceedings to the National Competition Commission's Council.

The Council revoked and annulled the Service's decision to discontinue its proceedings holding that:

- First, the Service's failure to find evidence of complete competitive foreclosure did not warrant abandoning the proceedings. The Council noted that a standard of proof requiring total foreclosure or exclusion of a competitor would render establishing exclusionary abuses by dominant companies practically impossible. Citing European CFI precedent (in particular, T-24/93 *France Telecom*, T-219/99 *British Airways*, and T-201/04 *Microsoft*), the Council held that, in proving abuse of a dominant position, it is sufficient for the Service to demonstrate that the dominant undertaking's conduct is capable of having an exclusionary effect, without necessarily demonstrating such concrete effects on the market concerned.

- Second, the Council noted that the burden of proof is initially on the relevant authority to show circumstances constituting an abuse, but that the party concerned may counter any such evidence with evidence establishing that its conduct was "objectively justified." If it makes such a showing, the burden shifts back to the authority to prove the contrary.

- The Council rejected the Competition Service's "objective justifications" for the conduct concerned on the following grounds:

  - Regarding penalties for early contract termination and discounts granted to customers for adherence to long-term contracts, the CMT and Abertis had claimed that such penalties and discount scheme were necessary to ensure that Abertis was able to amortize its investments. The Council rejected this argument noting that the CMT had not made any determination as to the proportionality of the penalties or discounts offered.

  - Regarding bundling discounts for nation-wide coverage, Abertis sought to justify such discounts by showing that mere regional offerings would have significantly increased its costs and minimized its synergies. While the Council broadly acknowledged the advantages to be gained from economies of scale, it held that a a detailed evaluation of Abertis's discounts was necessary to assess whether their level was justified by the claimed cost savings.

On this basis the Council ordered the Investigation Directorate (which has replaced the Competition Service) to reopen the investigation into Abertis's practices.

SWITZERLAND

This section reviews competition law developments under 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 Federal Administrative Tribunal.

Horizontal Agreements

Competition Commission Closes Investigation Into Construction Companies

On December 6, the FCC brought to a close its long-running investigation into the practices of four Bernese construction companies involved in the renovation of the Swiss National Library, by discontinuing its proceedings without a finding of violation.

On December 17, 2001 the FCC had concluded that Betosan AG, Isotech AG (now Hela AG), Renesco AG (now Arkosol AG) and Weiss + Appetito AG had agreed on the prices they included in their tender offers. At the time, the FCC issued a decision forbidding such practices in the future, but it refrained from imposing fines on the companies since the FCC was then only able to impose fines where a company violated a decision that the FCC had already issued.

The companies involved appealed the decision to the Appeals Commission (as it existed at the time), which, on November 22, 2005, partially annulled the FCC's decision. The Appeals Commission referred the case back to the FCC with the direction that the FCC provide evidence that the tendering party was in possession of detailed and reliable cost estimates, and that price was one of the central criteria for selecting a contractor.

Competition Commission Prohibits Ticino Road Asphalting Cartel

On November 19, the FCC issued a decision formally prohibiting a market-allocation cartel of 17 road asphalting companies from Ticino.

The FCC initiated an investigation into the practices of both asphalt producers and road asphalting construction companies in April 2005. It found that 17 of the 18 companies active in the road asphalting market had engaged in the allocation of public tenders and other private contracts from 1999 through 2004. These companies met each week to discuss prices and decide on the apportionment of work. The cartel was discontinued prior to the grace period introduced by amendments to the Swiss Competition Act (*i.e.* prior to 31 March 2005), and no fines were imposed as a result.

In its decision, the FCC held the cartel to be a hardcore violation of Swiss competition law and found that it had caused injury to customers, both public and private, resulting in unnecessary burden on the taxpayer. The FCC further stated that had fines been a possibility, they would have amounted to CHF 30 million, including fines on individual companies of up to CHF 3 million.

UNITED KINGDOM

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

Horizontal Agreements

OFT Brings First Arrests For Criminal Cartel Activity

On December 19, the OFT announced that three UK nationals had been arrested and charged with having dishonestly participated in a cartel. This marks the first occasion on which individuals have been charged with the criminal cartel offence provided under section 188 of the Enterprise Act 2002, which came into effect in June 2003.

Section 188 criminalizes individual participation in certain types of "hardcore" cartels, including arrangements to fix prices, limit product supply, share markets, or rig bidding processes. Individuals found to have dishonestly engaged in prohibited cartel activities can be subject to unlimited fines, up to five years imprisonment, or both forms of punishment.

The arrests have resulted from an investigation conducted over a period of some twelve months. While the OFT does not normally comment on current criminal proceedings, in May 2007 it announced that it had conducted searches of domestic premises as part of a wider criminal investigation into a potential cartel affecting the international supply of marine hoses to petrochemical companies.

The searches conducted by the OFT, and the subsequent disclosure of these actions, were prompted by a concurrent enforcement action undertaken by the US Department of Justice (DOJ). On May 8, the DOJ had arrested eight foreign executives for alleged violations of US antitrust laws arising in connection with the suspected worldwide marine hose cartel. Among those arrested were three UK nationals, identified as a consultant with PW Consulting (Oil & Marine) and senior employees of Dunlop Oil & Marine Ltd.

On December 12, the DOJ announced that the three arrested UK nationals had agreed to plead guilty to charges of participating in a conspiracy to rig bids, fix prices and allocate markets. As part of the plea bargain arrangements, the DOJ indicated that the defendants would be escorted under custody back to the UK, to face prosecution by the OFT. It was indicated that the individuals involved had voluntarily chosen to return to the UK, and have not been subject to, or threatened with, extradition.

On December 18, the three suspects returned to the UK. They were arrested on arrival at Heathrow Airport, on suspicion of having dishonestly participated in cartel arrangements intended to fix prices, rig bids, and allocate markets, thereby contravening section 188 of the Enterprise Act 2002. The charged individuals have been released on police bail, pending court proceedings that will likely commence in early 2008.

This case represents the culmination of a year of intensive OFT cartel enforcement action. In particular, on August 1 the OFT imposed a fine of some £121.5 million (roughly €175 million) on British Airways plc as a result of its illegal fixing of the price of long-haul passenger fuel surcharges. This fine constitutes the largest monetary penalty imposed by the OFT for the infringement of U.K. competition laws. It is interesting to note that the prosecution of the fuel surcharge cartel was achieved only through close and sustained cooperation between the OFT and DOJ. It is evident that international cooperation in respect of cartel enforcement is proving increasingly common and effective.

Settlement Agreed In Dairy Cartel

On December 7, the OFT announced that it had concluded "early resolution agreements" with a number of supermarkets and a dairy processor suspected of having fixed the prices of certain dairy products. Under these arrangements, the parties have admitted liability, in principle, and have agreed to pay reduced fines, amounting in total to £116 million.

The UK dairy market has been subject to intense scrutiny over the last several years. In 2006, the OFT investigated the activities of six Scottish diary processors, suspected of being implicated in price-fixing arrangements and agreements not to compete for the business of selected customers. At that time, the OFT warned retailers not to enter into collusive arrangements concerning the supply and sale of diary produce, and made clear that such actions would likely be anti-competitive and attract heavy censure.

A further investigation into dairy retailing was launched subsequently, and, on September 20, the OFT published its provisional conclusion that a number of large UK supermarkets and dairy processors colluded to fix the prices of diary products. It is estimated that as a result of the price-fixing arrangement, UK consumers suffered an overcharge of approximately £270 million (roughly €390 million).

In its statement of objections (SO), setting out its provisional findings, the OFT explained that between 2002 and 2003 the five largest U.K. supermarkets, comprising Asda, Morrisons, Safeway, Sainsbury's and Tesco, colluded with the five principal UK dairy processors to fix the retail prices of milk, butter and cheese. The supermarkets and dairy processors exchanged confidential and commercially sensitive information, including details as to the levels of proposed price increases.

Following the publication of the SO, the OFT concluded early resolution agreements with Asda, Dairy Crest, Safeway (in relation to conduct prior to its acquisition of Morrisons), Sainsbury's, The Cheese Company, and Wisemans. These parties admitted involvement in certain of the anti-competitive practices identified in the SO, and undertook to cooperate fully with the OFT in its continuing investigation. Moreover, these parties admitted liability, in principle, and will therefore pay substantial penalties, in total amounting to £116 million. In consideration for their cooperation, the penalty imposed on each party was reduced significantly, on the condition that complete cooperation continues to be provided. The OFT will continue to proceed with its investigation in relation to those addressees of the SO who declined to enter into early resolution agreements.

By concluding early resolution agreements, the OFT has resolved much of the case in an expedited fashion, conserving resources and securing evidence through continuing cooperation obligations. By consenting to such agreements, the relevant parties have achieved a speedy resolution of the case, reducing legal and administrative costs, and obtained material fine discounts.

Early resolution schemes are a novel feature of UK cartel enforcement, used in only one other completed case, to bring to a close the OFT's investigation into the fixing of public schools' fees in 2006. In both the public schools and dairy products investigations, the particular facts of the case recommended settlement. In the current case, the supermarkets and dairy processors submitted that their pricing initiatives were undertaken to support British diary farmers, and that this intention was widely reported and debated in 2002 and 2003. The pricing initiatives subject to investigation had been a matter of public record, and had not been introduced covertly by a secret cartel. It was contended that the additional profit achieved through retail price initiatives was returned to farmers, as a means to support the sector. The OFT appears to have responded sympathetically to such submissions, and in finding means to settle has maintained its policy of flexible enforcement.

Mergers and Acquisitions

OFT Applies "Failing Firm" Defense

On December 11, the OFT cleared the anticipated acquisition by Tesco Stores Limited (Tesco) of five grocery outlets formerly owned by Kwik Save Stores Limited (Kwik Save) (the Acquisition Stores). The clearance decision is notable since it constitutes only the second instance in which the OFT has accepted a "failing firm defense" in the course of reviewing a merger under the Enterprise Act 2002. In reaching its conclusion, the OFT set out in detail the principles it will apply when considering whether such a defense may be pleaded.

In July, Kwik Save went into administration. The sale of the Acquisition Stores comprised part of the ongoing divestment of Kwik Save's assets and businesses. In advance of their sale, the Acquisition Stores had been operated, on a provisional basis, by companies appointed by the administrators. The sale process was made by way of a competitive auction, during which Tesco was the sole bidder.

The particular circumstances of the case, afforded the OFT an opportunity to provide clarification as to the application of the failing firm defense under UK merger control law. The OFT explained that it assesses the effects attributable to a merger by comparing the likely post-merger competitive outcome with the outcome absent the merger, commonly referred to as the "counterfactual". The OFT will normally proceed on the basis that the best proxy for the counterfactual is the generally prevailing competitive conditions prior to the merger. To apply the failing firm defense, the OFT is required to depart from orthodox practice, and instead have regard to likely and imminent changes in the structure of competition, namely the exit of the target company from the market absent the merger.

The OFT has adopted a stringent approach to failing firm defense cases, recognizing that counterfactual analysis can be subject to self-serving speculation on the part of merger parties. This risk is exacerbated significantly by the information asymmetry existing between the merger parties and the OFT, which further recommends a cautious approach on the part of the agency.

Accordingly, the OFT affirmed that it will be "slow" to clear a transaction based on the inevitability of the target business exiting the affected market. In such circumstances, the OFT will apply strictly the conditions to be met for the failing firm defense to be effective. First, sufficient compelling evidence must be provided to demonstrate that the target business is in such a parlous situation that without the merger it, and its assets, would exit the market in the near future. Decisions by profitable parent companies to close down loss-making subsidiaries are unlikely to meet this criterion. Second, there must be no serious prospect of re-organizing the business. Third, there should be no less anti-competitive alternative to the merger. For instance, even where a sale is inevitable an acquisition by an alternate purchaser may deliver the optimal competitive outcome.

Having provided guidance as to its policy, the OFT proceeded to apply its principles to the facts of the current case. First, the OFT concluded that it had been provided with sufficiently compelling evidence of imminent exit of the Acquisition Stores from the retail market. It was informed that the Acquisition Stores were being run with a view to sale by Kwik Save's administrators. There was no interest in or ability on the part of administrators to run the Acquisition Stores as a going concern. Without a successful sale, the Acquisition Stores would be closed and the leases to the retail units sold as stand-alone assets. On these bases, the prospect of market exit was proven, and it was further established that there was no realistic possibility of the re-organization of the business conducted from the Acquisition Stores.

Second, the OFT was required to consider whether acquisition by Tesco represented the most favorable competitive outcome. Tesco and the Kwik Save administrators submitted evidence concerning the auction of the Acquisition Stores, demonstrating that the other major UK grocery chains were provided with an opportunity to bid, and that no such bids were forthcoming. The OFT therefore concluded that there were no realistic alternate retailers whose purchase of the Acquisition Stores would have producer a better competitive outcome. Similarly, the OFT was convinced that the failure of the Acquisition Stores would not engender greater rivalry among remaining competitors active on the retail market. Put simply, the OFT concluded that local consumers could not realistically be expected to be worse off with one more rather than one less grocery store active on the local market.

The OFT's detailed exposition as to its approach to merger analysis, and the successful application of the failing firm defense in this case, is instructive. It remains clear that the failing firm defense will be available only in exceptional circumstances. The decision emphasizes the high evidentiary threshold to be met by merger parties pleading the defense, with Tesco assisted by the unambiguous facts in the case, the active support of the impartial administrators of Kwik Save, and the absence of any complainants disputing its submissions.

Policy and Procedure

OFT Adopts And Applies New De Minimis Principles

On November 15, the OFT revised its substantive merger guidance through the introduction of new rules relating to markets of a minor economic size. The OFT now has the ability to effectively exempt from investigation mergers and acquisitions relating to markets with an aggregated annual value in the UK of £10 million or less. The OFT is of the view that markets of minor size are generally of insufficient significance to merit second phase investigations by the CC.

The OFT is under a statutory duty to make a reference to the CC where it believes that it is, or may be the case, that a completed or anticipated merger has resulted, or may be expected to result, in a substantial lessening of competition in a market or markets in the UK. The statutory duty is subject to certain narrow exceptions provided in the Enterprise Act 2002. Among these, sections 22(2) and 33(2), relating to completed and anticipated mergers respectively, provide the OFT with a discretion not to make a CC reference where it believes that the market concerned is not of sufficient importance to justify reference. Only the CC is competent to prohibit mergers. Accordingly, by precluding a CC reference, the application of the market size or *de minimis* exemption has the same effect as the OFT approving a merger unconditionally.

The principles by which the OFT has historically applied the *de minimis* exception are set out in the OFT publication "*Mergers – Substantive assessment guidance*" (May 2003) (the Guidance). In its Guidance, the OFT explained that CC references should not be made where the cost would be disproportionate to the size of the market or markets concerned. At the time the Guidance was issued, the OFT judged that a CC inquiry cost around £400,000. Having regard to the incremental cost to taxpayers of a CC inquiry, the OFT restricted its discretion to decline to make a CC reference to those mergers affecting markets achieving an aggregated annual value in the UK of £400,000 or less.

The UK *de minimis* regime was reconsidered by the OFT through a consultation process conducted in 2007. Several developments had caused the OFT to propose reforms. First, the OFT had not been presented with a merger case in which it was adjudged appropriate to apply the market size exception. The OFT was of the view that such an outcome was inconsistent with the scheme of the Act. The Act expressly provides derogation from review in respect of markets of minor economic significance. The fact that this derogation had never been utilized indicated that the OFT was misapplying the Act. Second, it is widely recognized that the general threshold in relation to the OFT's statutory duty to refer mergers to the

CC was, in effect, lowered by the judgment of the CAT in *IBA Health Limited v Office of Fair Trading* [2003] CAT 27. Accordingly, the OFT was concerned that anticipated mergers relating to small markets, raising marginal competition issues, were more likely to be referred to the CC for second-phase investigation. In its experience, the OFT had found that many "small transactions" were simply abandoned on reference to the CC. The merging parties were therefore deprived of the opportunity to realize transaction efficiencies and synergies, with any potential consumer welfare benefits also eliminated.

To address these issues, the OFT proposed several amendments to the existing *de minimis* exception. Of foremost importance, the OFT proposed that the size threshold in relation to minor markets should be raised from £400,000 to £10 million. Notwithstanding this amendment, the OFT rejected the notion that market size should be applied formulaically as the exclusive indicator of the broader economic significance of a market. Instead, the OFT proposed that an evaluation should be made on a case-by-case basis, by reference to costs and benefits of reference.

Interested parties were invited to respond to the consultation process by August 10, 2007. The proposed reforms were widely supported by all parties, albeit a substantial number of respondents submitted that the market size threshold should be significantly higher than £10 million. In addition, clarification was requested as to the means by which market values are to be calculated. A number of submissions also addressed the manner in which the OFT would apply certain proposed exceptions to the *de minimis* principle, causing mergers, in specified circumstances, to be investigated, notwithstanding the small size of the affected market.

Mindful of these comments, the OFT published revisions to the Guidance on November 17. The *de minimis* threshold has been revised upwards, from £400,000 to £10 million. The revised Guidance explains that in calculating affected market sizes, the OFT will have regard only to those markets in which there is a realistic prospect of the merger causing a substantial lessening of competition. Market size will be calculated as the sum of all suppliers' annual turnover in the UK on the affected market. Where the geographic scope of the affected market is wider than the UK, turnover generated outside the UK will be disregarded. Conversely, where a merger results in multiple affected markets, the OFT will have regard to the aggregated turnover of all affected markets when applying the *de minimis* exception.

The OFT identified those factors that will likely result in a merger being referred to the CC, notwithstanding the small size of the affected market. First, the market size exception will rarely be available where the affected market is highly concentrated, and is characterized by substantial and durable barriers to entry and/or expansion. In these circumstances, the OFT is of the view that the likelihood of a merger causing material consumer detriment is high. Second, and for the same reason, the exception will generally also be unavailable in respect of markets where there is historic evidence of anti-competitive coordination between rivals.

As a result of the consultation process, the OFT has provided additional explanation as to how it will assess those merger cases that might warrant investigation, notwithstanding the small affected market size. The OFT has emphasized that the pivotal issue will be whether the merger is likely to be particularly significant. Mergers occurring on highly concentrated markets, for instance, will not automatically fall for examination. The OFT will be guided by the degree of competition eliminated by the merger, measured in terms of the short-term effect on price and non-price parameters of competition, and the durability of the merger's impact. Mergers will likely have a less durable impact where the affected market is susceptible to new entry or expansion, or where buyers exercise significant power. Similarly, the OFT will investigate mergers on historically coordinated markets only where the merger increases the coordination risk, or causes coordination to become more widespread or durable.

The OFT applied the revised Guidance on December 20, for the first time clearing several mergers under the Enterprise Act 2002 on the basis of the *de minimis* exception. The clearance decisions related to the completed acquisition by Arriva plc of the Cross Country passenger rail franchise, and the proposed acquisition by National Express Group plc of the Inter City East Coast rail franchise. In both cases the OFT considered that the competition concerns were realistic enough to establish a duty to refer, but established that the size of the affected markets was approximately £1 million or less. Given the insignificant size of the affected markets, the OFT concluded that the relatively remote potential benefits of further inquiry would be disproportionate to the certain costs involved, and therefore exempted both transactions from investigation.

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