

International Anti-Trust

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I. Argentina*

A. MERGERS

1. *Abrasivos*

On October 21, 2008, the Secretary of Domestic Trade authorized Brazilian-based Saint-Gobain Abrasivos Ltda. (SG) to acquire 100 percent of the shares of Abrasivos

* The contribution for Argentina was written by Maria José Rodríguez Macías and Alfredo Rovira of Brons & Salas Abogados.

Argentinos S.A. (AA).¹ Both companies produce and market abrasive products, with SG concentrating on solid abrasives like discs and stones and AA concentrating on flexible products like sandpaper. Following the acquisition, the merged party would hold a 59.46% share of sales. AA accounts for ninety-five percent of domestic production; and consumer loyalty creates significant barriers to entry.

The Argentine Antitrust Commission (AAC) expressed concerns about the impact of the transaction and required the purchaser to divest selected assets and trademarks.

2. *Alpargatas*

On October 23, 2008, the Secretary of Domestic Trade authorized Sao Pablo Alpargatas S.A.'s to acquire control of Alpargatas S.A. through the purchase of 34.4994% of the latter's outstanding shares.² The two companies manufacture work apparel and other products.

The AAC found that the two companies are close competitors (#1 and #2) and would have had a 43.28% post-merger market share. Accordingly, the AAC required the merged entity to assign the high-end "Pampero" trademark and related assets to a competitor.

B. COURT DECISIONS

On April 16, 2008, the Argentine Supreme Court of Justice (the CSJN) ruled that the AAC and the Secretary of Domestic Trade are the competent authorities to enforce Anti-trust Law No. 25,156, until the Argentine Antitrust Tribunal (Tribunal Nacional de Defensa de la Competencia) is created pursuant to that law.³ The CSJN confirmed that the AAC should hear cases and investigate and prepare opinions, while the Secretary of Domestic Trade should issue the final Resolution. The ruling reversed the judgment of the Argentine Court of Appeals in Civil and Commercial Matters, which had held that the AAC, as the entity created by the repealed Law No. 22,262, should investigate and decide the cases submitted to it for consideration, independently of the Secretary of Domestic Trade.

1. Comision Nacional de Defensa de la Competencia, Expte. No. S01:0098017/2007 (Conc. No. 625) DP/EA-DG-MPM, "SAINT-GOBAIN ABRASIVOS y SR. DAVISON S/ NOTIFICACION ART. 8 LEY 25.156 (Conc. 625)," *available at* http://www.cndc.gov.ar/dictamenes/saint_gobain_abrasivos_argentinos.pdf.

2. Comision Nacional de Defensa de la Competencia, Expte. No. S01:0401242/2007 (Conc. No. 658) DP/VDV-DO-WB-YDC-JP-MA, "SAO PABLO ALPARGATAS S.A. Y OTROS S/ NOTIFICACION ARTICULO 8 LEY No. 25,156 (Conc. 256)," *available at* http://www.cndc.gov.ar/dictamenes/sao_paulo_alpargatas_alaprgatas_argentina.pdf.

3. Corte Suprema de Justicia [CSJN] [Supreme Court], 16/4/2008, "Belmonte, Manuel and Asociación Ruralista General Alvear v. Estado Nnacional - Poder Ejecutivo Nacional - Ministerio de Economía y Produccion - Secretaria de Ccoordinacion Tecnica - Comision Nacional de Defensa de la Competencia / FAL," http://www.csjn.gov.ar/documentos/cfal3/cons_fallos.jsp (enter Docket No. "B. 1626. XLII" in "No. de expediente" field and decision date "16/4/2008" in "Fecha de resolución" field).

II. Australia*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

On October 27, 2008, the Federal government released the “final” exposure draft of its legislation to criminalize cartel conduct under the Trade Practices Act 1974 (Cth) (the TPA), the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (the Bill).⁴ The Bill also creates a parallel civil prohibition that replicates the criminal offense. Subject to consultation with the states and territories, the government intends to introduce the Bill into Parliament in late 2008. If passed, the Bill is likely to come into effect in early 2009.

The Bill specifies that the relevant fault element to be applied to the criminal cartel offense is “knowledge or belief.” That is, did the defendant know or believe that the relevant contract, arrangement, or understanding contained a cartel provision?

Contravention of the criminal cartel offense can entail fines of up to AUD\$220,000 (approximately US\$140,000) and imprisonment for up to ten years⁵ for individuals and fines for corporations up to the greater of (i) AUD\$10 million (approximately US\$6.4 million), (ii) three times the value of the benefit attributable to the cartel as a whole, or (iii) where the value cannot be determined, 10 percent of the corporation’s annual turnover. Contravention of the civil cartel prohibition will carry the same corporate fines and fines up to AUD\$500,000 (approximately US\$320,000) for individuals.

The Federal government also introduced legislation on June 26, 2008 to clarify and strengthen provisions in the TPA relating to misuse of market power.⁶

Finally, the Australian Competition and Consumer Commission (ACCC) released its revised merger guidelines for public comment on February 8, 2008.⁷ The revised guidelines seek to modernize existing guidelines dating from 1999 by adopting the key theoretical frameworks developed in Europe and the United States.

B. CARTELS

Several significant fines were agreed to and ordered against participants in price fixing cartels, including in the supply of: corrugated fibreboard packaging (AUD\$36 million/approximately US\$23 million),⁸ international air cargo services (AUD\$25 million/approx-

* The contribution for Australia was written by Paul Schoff of the Sydney office of Minter Ellison.

4. Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008—Exposure Draft, *available at* <http://www.treasury.gov.au/contentitem.asp?NavId=006&ContentID=1426>. The release of the Bill follows the release of an initial exposure bill by the Federal government in February 2008. The initial exposure bill was accompanied by a brief discussion paper issued by the government and a draft memorandum of understanding between the Australian Competition and Consumer Commission and the Commonwealth Director of Public Prosecutions to facilitate arrangements between them. Submissions on this initial exposure bill were sought as part of the Government’s consultation process.

5. This is an increase from the five-year maximum term of imprisonment imposed in the initial exposure bill.

6. Trade Practices Amendment, *supra* note 4.

7. See AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, MERGER GUIDELINES DRAFT (2008), *available at* <http://www.accc.gov.au/content/index.phtml/itemId/776536>.

8. Australian Competition and Consumer Comm’n v. Visy Indus. Holdings Proprietary Ltd. (No. 3) [2007] FCA 1617, *available at* <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2007/1617.html>.

imately US\$16 million),⁹ wood preservatives (AUD\$2.5 million/approximately US\$1.6 million),¹⁰ and educational services (AUD\$125,000/approximately US\$80,000).¹¹ The ACCC also commenced criminal proceedings against a person for allegedly providing false or misleading evidence during its investigation into the corrugated fibreboard packaging cartel.¹²

C. COURT DECISIONS

Following an epic court battle, the ACCC finally succeeded in securing a judgment against Baxter Healthcare Pty Ltd (Baxter) for breaches of section 46 (misuse of market power) and section 47 (exclusive dealing) of the TPA in relation to bundled offers in the tender process for contracts entered into by Baxter and State government health purchasing authorities between 1998 and 2005.¹³

In March 2008, the High Court handed down its much-anticipated judgment on a constitutional challenge to parts of the telecommunication service access regime in the TPA.¹⁴ The challenge was brought by Telstra, Australia's incumbent telephony provider, which argued that the TPA provisions that allow the ACCC to set prices for compulsory third party unbundled access to Telstra's copper wire network constitute a compulsory seizure of its property "other than on just terms."¹⁵ In a unanimous judgment, the High Court concluded that the legislative provisions for the exercise of access rights by other carriers "effect no acquisition of Telstra's property in the local loops"¹⁶

III. Austria*

A. LEGISLATIVE DEVELOPMENTS

Unlike most European states, the decision-making power in Austrian antitrust and merger cases rests with a specialized court (the Cartel Court), with the Federal Competition Authority (the FCA) being limited to an investigative role. A proposal by the Austrian Ministry of Economics to bring the Austrian system into line with the European

9. Australian Competition and Consumer Comm'n v. Qantas Airways Ltd. [2008] FCA 1976; *Australian Competition and Consumer Comm'n v. British Airways PLC*, [2008] FCA 1977.

10. Australian Competition & Consumer Comm'n v. FChem (Austl.) Ltd. [2008] FCA 344, *available at* <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2008/344.html>.

11. Australian Competition & Consumer Comm'n v. Kokos Int'l Proprietary Ltd. (No 2) [2008] FCA 5, *available at* <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2008/5.html>.

12. The ACCC has commenced criminal prosecution against Richard Pratt for allegedly providing false or misleading evidence in the course of an ACCC investigation. *See* Press Release, Australian Competition and Consumer Commission (ACCC), ACCC begins criminal prosecution against Richard Pratt for allegedly providing false or misleading evidence (June 20, 2008), *available at* <http://www.accc.gov.au/content/index.phtml/itemId/832393/fromItemId/631281>.

13. Australian Competition and Consumer Comm'n v. Baxter Healthcare Proprietary Ltd. [2008] FCAFC 141, *available at* <http://www.austlii.edu.au/au/cases/cth/FCAFC/2008/141.html>.

14. Telstra Corp. Ltd. v. The Commonwealth (2008) 234 C.L.R. 210, *available at* <http://www.austlii.edu.au/au/cases/cth/HCA/2008/7.html>.

15. *Id.*

16. *Id.*

* The contribution for Austria was written by Dr. Axel Reidlinger and Dr. Heinrich Kühnert of Freshfields Bruckhaus Deringer LLP, Vienna.

model by granting the FCA decision-making power failed to gain sufficient political support in 2008.¹⁷

B. MERGERS

As of October 31, 2008, 233 merger filings had been submitted to the FCA in 2008, with eight going to Phase II review.¹⁸

The only substantive merger decision by the Cartel Court in 2008 related to a transaction between two Austrian press companies that contributed their respective regional free newspapers to a joint venture.¹⁹ The transaction did not result in any significant geographic market overlaps. The proceedings therefore mainly focused on the proposed joint venture's conglomerate effects, i.e., whether the combination of the companies' portfolios of regional free weeklies would disadvantage competitors that operate in only one region. The Cartel Court's investigation revealed that this was unlikely to happen. The Cartel Court also found that the efficiencies resulting from the combination would make the joint venture more competitive for national advertising campaigns, which, for the most part, can only currently be placed in a single national newspaper, the *Kronen Zeitung*. The FCA has appealed the Cartel Court's decision, alleging various substantive and procedural errors.²⁰

C. CARTELS

In October 2008, the Supreme Court confirmed the Cartel Court's record fine of €75.4 million (approximately US \$96 million) imposed in 2007 against a cartel in the elevators and escalators market.²¹ The Supreme Court ruled that the Cartel Court was correct in focusing on an "overall cartel" which did not have to be broken up into single violations (of which some could have benefited from the statute of limitations). The Supreme Court also explicitly approved the Cartel Court's method for setting fines, which is consistent with the European Commission's 2006 guidelines.

The Supreme Court also affirmed the Cartel Court's decision in a related civil damages case.²² As Austrian civil procedure does not provide for pre-trial discovery, private litigants may find it difficult to prove that they suffered damage as a consequence of a cartel.

17. Wettbewerbsbehördenreorganisationsgesetz 2008 [Competition Authorities Reorganization Act 2008 (Draft)], 224/ME (XXIII. GP) (Austria), *available at* http://www.parlament.gv.at/PG/DE/XXIII/ME/ME_00224/pmh.shtml.

18. *See* FCA website, <http://www.bwb.gv.at/>.

19. Oberster Gerichtshof [OGH] [Supreme Court] Dec. 17, 2008, Docket No. 16Ok15/08 (Austria), *available at* <http://www.ris2.bka.gv.at/Jus/> (check only the "Entscheidungstexte (TE)" box and enter "16Ok15/08" in Geschäftszahl field).

20. *See* Merger Notification, Federal Competition Authority (FCA), BWB/Z-671 - Styria Medien AG; Moser Holding AG (Mar. 18, 2008), *available at* http://www.bwb.gv.at/BWB/Veroeffentlichungen/Zusammenschlusse/Zusammenschlusse_2008/z_0671.htm.

21. Oberster Gerichtshof [OGH] [Supreme Court] Oct. 8, 2008, Docket No. 16Ok5/08 (Austria), *available at* <http://www.ris2.bka.gv.at/Jus/> (check only the "Entscheidungstexte (TE)" box and enter "16Ok5/08" in Geschäftszahl field).

22. Oberster Gerichtshof [OGH] [Supreme Court] Oct. 8, 2008, Docket No. 16Ok8/08 (Austria), *available at* <http://www.ris2.bka.gv.at/Jus/> (check only the "Entscheidungstexte (TE)" box and enter "16Ok8/08" in the "Geschäftszahl" field).

In an attempt to overcome this problem, a number of customers allegedly affected by the elevators and escalators cartel brought an application in the Cartel Court for a declaratory judgment against the cartel participants. The Supreme Court upheld the Cartel Court's dismissal of the application, on the grounds that the Cartel Court does not have the jurisdiction to issue declaratory judgments merely for the purpose of supporting a private damages claim.

D. ANTICOMPETITIVE PRACTICES

As of the writing of this article, there was only one decision in 2008 requiring an undertaking to cease abusing its dominant position.²³ That case involved a vertically-integrated film distributor/theatre operator that was ordered to provide a local theatre operator with a copy of the film "Asterix at the Olympic Games" because of its revenue-earning potential. The Court granted the order even though the distributor only had a ten percent share of the film distribution market in Austria, based on the likely "grave harm" to the theatre operator's business if it did not get the film.

In a July 2008 decision, the Supreme Court held that the provision prohibiting discrimination against "resellers" in the Act on Local Supplies also extends to companies that process goods prior to their "resale" (such as sawmills), and not just to the resale of goods at retail. Although the Act on Local Supplies applies to non-dominant parties, a similar provision in the Austrian Competition Act prohibits dominant parties from discriminating against "resellers." As a result, the prohibition against discrimination may now be broad enough to apply to any wholesale supplier of goods, dominant or not, irrespective of whether its customers process the goods purchased prior to resale.²⁴

IV. Belgium*

A. CARTELS

The Belgium Competition Council issued three important cartel decisions in 2008, consistent with its objective of spending less time on merger review and more resources on cartel enforcement.²⁵

23. Oberster Gerichtshof [OGH] [Supreme Court] July 16, 2008, Docket No. 16Ok6/08 (Austria), *available at* <http://www.ris2.bka.gv.at/Jus/> (check only the "Entscheidungstexte (TE)" box and enter "16Ok6/08" in the "Geschäftszahl" field).

24. Oberster Gerichtshof [OGH] [Supreme Court] July 16, 2008, Docket No. 16Ok3/08 (Austria), *available at* <http://www.ris2.bka.gv.at/Jus/> (check only the "Entscheidungstexte (TE)" box and enter "16Ok3/08" in the "Geschäftszahl" field).

* The contribution for Belgium was written by Thibault Balthazar and Bruno Lebrun of Latham & Watkins LLP, Brussels.

25. This objective has been furthered by the increase in jurisdictional thresholds for merger control review in the new Competition Act of 2006, and by introducing a "simplified procedure" handled exclusively by the Auditors and not by the Council. See Act of September 15, 2006 for the Protection of Economic Competition, *MONITEUR BELGE* [Belgian Gazette], Sept. 29, 2006, *available at* http://mineco.fgov.be/organization_market/competition/pdf/RD_31102006_copies.pdf. The simplified procedure was revised on June 8, 2007 and allows parties, if certain conditions are satisfied, to file a much less detailed information form. Under certain conditions, the Auditor will confirm in a letter within twenty working days that the concentration does not raise competition concerns. This letter has the value of a decision of the Competition Council.

On January 25, 2008, the Council imposed its first cartel fine under the new Competition Act of 2006 against VEBIC, the Flemish bakers' trade association.²⁶ VEBIC was fined a total of €29,000 (APPROXIMATELY US\$38,000)²⁷ for having created and sent to its members a detailed cost scheme and bread price index, which induced the bakers to increase their prices. In its decision, the Council acknowledged that a trade association may provide information to its members to help them better assess their own cost structures and independently determine their selling prices. But the Council found that the system that VEBIC had established was designed to induce its members to increase their prices. The *VEBIC* case represents the first time that the Council has imposed a fine on an association of undertakings, which it is now authorized to do under the new Competition Act of 2006.

On July 7, 2008, the Council fined another association, the Belgian Federation of Professional Driving Schools (FAB), for issuing recommendations designed to induce members to increase their prices.²⁸ The Council stated that a trade association may inform its members of market evolution and may provide members with advice to help them run their businesses, as long as the association does not, directly or indirectly, seek to restrict competition. The Council concluded that FAB intended not merely to inform its members but also to stimulate price increases and imposed a fine of €6,990 (approximately US\$9,000).²⁹

The third decision of note was rendered by the Council on April 4, 2008 in connection with a cartel in the Belgian market for Butyl Benzyl Phthalate (BBP), a chemical substance mainly used as a plasticizer for PVC.³⁰ The Council found that Bayer, Ferro/Solutia and Lonza had conspired to fix prices, allocate market shares and customers, and exchange sensitive information. This decision is particularly important because it is the Council's first decision following an immunity application and includes reductions of fine as a result of leniency applications.³¹ Bayer, which was the first to submit decisive evidence to the Council, benefited from immunity. The others received reduced fines ranging from €114,618 (approximately US\$149,000) to €175,594 (approximately US\$228,000).

This decision is also of particular relevance from a procedural point of view. The Council clarified that fines imposed in Belgium should be based exclusively on the Belgian

It is interesting to note that only twenty concentrations were notified in 2007 whereas the Belgian competition authorities conducted fifteen dawn raids and seventeen investigations relating to suspected illegal cartel conduct.

26. Decision No. 2008-I/O-04, Jan. 25, 2008 (Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewaterkers), *available at* http://economie.fgov.be/organization_market/competition/jurisprudence/042008io04_Vebic_pub.pdf.

27. Based on Nov. 25, 2008 noon exchange rate of €1 = US\$1.30.

28. Decision No. 2008-P/K-43, July 7, 2008 (ISC v. FAB and its members and Test-Achats v. driving schools of Belgium), *available at* <http://vlex.be/vid/concurrence-conc-isc-test-achats-40921323>.

29. The low amount of the fine was explained by the particular circumstances of the case, notably the length of the proceedings (almost ten years), FAB's cooperation and the significant decrease in FAB's membership over time (150 members in 1999 to 43 in 2008).

30. Decision No. 2008-I/O-13, Apr. 4, 2008 (*Bayer AG-Ferro (Belgium) SPRL - Lonza S.p.A and Solutia Europe S.A.*) *available at* http://economie.fgov.be/organization_market/competition/jurisprudence/13200813_Bayer_Ferro_Solutia_Lonza.pdf.

31. It should be noted that this decision was rendered pursuant to the Council's 2004 Leniency Notice rather than under the revised Leniency Notice adopted in October 2007.

turnover of the companies concerned, regardless of whether the companies also are fined for the same conduct in other jurisdictions.

V. Brazil*

A. LEGISLATIVE DEVELOPMENTS

Electronic filing of submissions to the Brazilian System of Competition Defense (SBDC) is currently being tested.³² The form of the filing is still being debated, although the Brazilian competition authorities aim to finalize it shortly. A bill to restructure the SBDC is currently under consideration in the National Congress.³³ It is expected to be voted on in 2009.

B. MERGERS

In 2008, Brazilian authorities required the unwinding of the Brazilian portion of Owens Corning's acquisition of fiber glass strengtheners manufacturer Compagnie de Saint Gobain.³⁴ This marked the first time in Brazilian antitrust history that an international transaction was ordered to be unwound. The Administrative Council for Economic Defense (CADE) based its decision on: (i) the high market concentration in certain relevant markets, (ii) the lack of installed capacity of competitors, (iii) the high barriers to entry, (iv) the strong likelihood of collusion after the acquisition, and (v) the lack of efficiencies resulting from the transaction. In order to comply with the decision, CADE ordered Owens Corning to: (i) sell the business units acquired in Brazil; (ii) hire, on CADE's approval, an independent company to evaluate the assets and conditions of payment; and (iii) hire, on CADE's approval, an independent company to monitor the selling process and identify potential purchasers.

Other notable transactions approved include the acquisition of VRG Linhas Aéreas (VRG), a major Brazilian airline holding company, by GOL (GTI S.A.) (GOL), another major airline company,³⁵ and Inbev's acquisition of Anheuser-Busch Companies, Inc.³⁶

* The contribution for Brazil was written by Mário Nogueira, Ricardo Inglez de Souza, and Bruno Drago of Demarest e Almeida. The authors would like to thank Stefanie Schmitt for her contribution in the research for this article.

32. Ministerio da Justica, Conselho Administrativo de Defesa Economica [CADE], Resolution No. 49 (July 23, 2008).

33. See Legislative Bill No. 3934/2004. This bill was initially proposed in 2004 and was re-introduced this year by Congressman Ciro Gomes. The full text of the bill is *available at* http://www.camara.gov.br/sileg/Prop_Detalhe.asp?id=260383.

34. See Ministerio da Justica, Conselho Administrativo de Defesa Economica [CADE], Concentration Act No. 08012.001885/2007-11.

35. See Ministerio da Justica, Conselho Administrativo de Defesa Economica [CADE], Concentration Act No. 08012.003267/2007-14.

36. See Ministerio da Justica, Conselho Administrativo de Defesa Economica [CADE], Concentration Act No. 08012.008015/2008-54.

C. CARTELS

Brazilian authorities announced intentions to move against international cartels that may produce effects in Brazil. For example, SDE has affirmed in recent cases that it will prosecute and impose fines on international companies and on their foreign managers (i.e., foreign individuals). Another measure involves including the names of foreign individuals on Interpol lists.

An international cartel was at the center of the most discussed Brazilian competition law event of 2008, i.e., the signing of a Commitment to Cease Practices Under Investigation (TCC) by one of the parties under investigation in Brazil for being part of the international cartel of maritime hose manufacturers.³⁷ The signed TCC differed from ones typically employed as the party seeking leniency had already confessed its participation in and the existence of the cartel and therefore could not benefit from full immunity. Instead, in order to have the TCC signed, the applicant acknowledged its participation in the cartel, paid a fine proportional to its participation (limited to the impact of the violation in Brazil) and committed itself to assist the authorities in the investigation.

VI. Canada*

A. LEGISLATIVE DEVELOPMENTS

During Canada's October 2008 election, the Conservative party promised to introduce several far-reaching changes to Canada's Competition Act (the Act), including:

- a new criminal conspiracy offense focused on "hard core" cartel conduct such as price fixing and bid-rigging, with other types of potentially anticompetitive agreements to be dealt with on a separate non-criminal track;
- new maximum penalties for cartels and bid-rigging of CDN\$25 million (approximately US\$20.5 million)³⁸ in fines and fourteen years in prison (up from the current maximum of CDN\$10 million (approximately US\$8.2 million) in fines and five years imprisonment);
- new fines for abuse of dominance of up to CDN\$10 million (approximately US\$8.2 million) for initial offenders and CDN\$15 million (approximately US\$12.3 million) for repeat offenders; and
- repeal of the Act's criminal offenses for price discrimination, promotional allowances, and predatory pricing.

The Conservatives received a plurality of seats in the House of Commons and were set to form a minority government. As of the writing of this article, however, it is no longer clear who will be forming the government because a coalition of three other parties is threatening to vote against the Conservatives on a non-confidence motion. That said, the above proposals to amend the Act have received support in the past from these other

37. See Ministerio da Justica, Conselho Administrativo de Defesa Economica [CADE], Administrative Proceeding No. 08012.010932/2007-18.

* The contribution for Canada was written by Mark Katz and Jim Dinning of Davies Ward Phillips & Vineberg LLP.

38. Based on the November 25, 2008 noon exchange rate of CDN\$1=US\$0.82.

parties, so the changes may eventually be enacted even if the Conservative minority government is defeated.

B. MERGERS

Among its various investigative powers, the Competition Bureau is entitled to apply *ex parte* to a judge for orders requiring the production of documents and other information. The use of these orders has been controversial, with the business and legal communities expressing concern over the Bureau's general unwillingness to consult with parties prior to seeking such orders, and the tendency of such orders to be *OVERBROAD* and poorly drafted.

On January 28, 2008, a Federal Court judge took the unusual step of setting aside two Bureau production orders obtained in the course of a merger investigation on the grounds that the Bureau's applications for the orders were "misleading, inaccurate and incomplete."³⁹ As a result of this criticism, the Minister of Industry ordered an investigation into the Bureau's processes and procedures for obtaining production orders. The report was publicly released on August 13, 2008.⁴⁰ Although largely refraining from finding fault with the Bureau, the report offered several helpful suggestions, including that the Bureau should engage in pre-application dialogue with parties where feasible.

C. CARTELS

Charges were laid in June 2008 against thirteen individuals and eleven companies accused of fixing gasoline prices in Quebec.⁴¹ While many defendants have indicated their intent to contest the charges vigorously, certain individuals and companies have pleaded guilty and agreed to pay total fines exceeding CDN\$2 million (approximately US\$1.6 million).⁴² One individual defendant pleaded guilty and agreed to be sentenced to twelve months' imprisonment to be served in the community.⁴³ The Bureau used wiretaps as part of its investigation.

In July 2008, the Bureau announced that two individuals had been extradited to the United States for their role in a deceptive telemarketing scheme involving American consumers and had been found guilty and sentenced to a combined forty-two years in prison by the U.S. Federal Court in the Southern District of Illinois.⁴⁴ This is the first time that Canadian nationals have been extradited to a foreign jurisdiction for a competition-related offense.

39. *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, [2008] FCA 22.

40. BRIAN GOVER, REVIEW OF SECTION 11 OF THE COMPETITION ACT (2008), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02709.html>.

41. Press Release, Competition Bureau Canada, Competition Bureau Uncovers Gasoline Cartel in Quebec (June 12, 2008), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02694.html>.

42. Press Release, Competition Bureau Canada, Third Individual Pleads Guilty in Quebec Gasoline Cartel Case (Oct. 31, 2008), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02744.html>.

43. *Id.*

44. Press Release, Competition Bureau Can., Canadian Scammers Extradited to the U.S. Receive Lengthy Prison Sentences (July 30, 2008), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02717e.html>.

On November 21, 2008, the Competition Bureau announced that Akzo Nobel Chemicals International BV had pleaded guilty to criminal charges for its role in an international cartel to fix the price of hydrogen peroxide sold in Canada. Akzo agreed to pay a fine of CDN \$3.15 million (approximately US \$2.6 million). This case is yet another example of an international cartel investigation where the Bureau benefited from the co-operation of an immunity applicant.

Finally, in April 2008, the Bureau released a Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (the Draft Bulletin).⁴⁵ The Draft Bulletin sets out the Bureau's suggested approach for recommending sentences in cartel cases, including when it will recommend that cartel participants that do not qualify for immunity may receive "lenient treatment" (i.e., a reduced penalty). A final version of the Bulletin should be released in 2009.

VII. Chile*

A. LEGISLATIVE DEVELOPMENTS

A bill to amend the Chilean Antitrust Law⁴⁶ (DL 211) is expected to be enacted during the first quarter of 2009. The bill has been the subject of discussion in the Chilean Congress since June 2006. One objective of the bill is to strengthen cartel enforcement, mainly by affording greater investigative powers to the Antitrust Attorney and by increasing the independence and impartiality of the Antitrust Court and its members.⁴⁷ The bill would grant the Antitrust Attorney new investigative powers, such as the power to access private or government-owned areas, carry out dawn raids, intercept communications, and obtain communication companies' records of transmitted or received communications. The bill also contemplates the introduction of a leniency program and proposes an increase in the maximum fine for violations of DL 211 from approximately US\$15 million to approximately US\$22 million.

B. MERGERS

In January 2008, the Antitrust Court approved, subject to conditions, the merger of two private pension funds, AFP Santa María and Bansander AFP.⁴⁸ The conditions required that the merged entity: (i) establish and maintain for two years a uniform total commission regime to ensure that commissions would not be higher post-merger than pre-merger; and (ii) guarantee free and non-discriminatory access to any new competitor re-

45. Press Release, Competition Bureau Can., Draft Information Bulletin on Sentencing and Leniency in Cartel Cases (Apr. 2008), *available at* <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02663e.html>.

* The contribution for Chile was written by Claudio Lizana, Marcos Ríos, and Lorena Pavic of Carey y Cía. Abogados.

46. Law for the Defense of Free Competition, 1973, Decree Law No. 211, *available at* <http://www.tdlc.cl> and <http://www.fne.cl>.

47. Bill No. 4630/2006 (proposing to amend Decree Law No. 211 (1973), as modified by Law No. 19, 911 (2003)), *available at* <http://www.bcn.cl>.

48. AFP Santa María S.A.'s Voluntary Consultation regarding its merger with Bansander AFP S.A., NC 205-07 Res. No. 23/2008 (Jan. 4, 2008), *available at* www.tdlc.cl.

quiring the services rendered by Previred, a private entity owned by the five Chilean pension funds that supports the payment of social security contributions through the Internet.

Also in January 2008, the Antitrust Court prohibited the merger between two leading retail groups.⁴⁹ This marked the first time that the Antitrust Court had refused to approve a transaction submitted for consultation. The Court concluded that there was insufficient evidence to support the parties' efficiencies claims and that it would be impossible to mitigate the anticompetitive effects of the merger by imposing conditions.

Finally, the Antitrust Court ruled on a case brought by the Antitrust Attorney against Cencosud, a leading retail and supermarket company, to halt Cencosud's strategy of acquiring its smaller regional or local competitors.⁵⁰ The Court ordered Cencosud to give it prior notification of any subsequent acquisitions.⁵¹

C. CARTELS

In a split decision, the Supreme Court confirmed the Antitrust Court's dismissal of a claim filed by the Antitrust Attorney against private health insurance companies alleging a conspiracy to reduce the coverage of certain health plans. The Court held that there was insufficient evidence of collusion.⁵²

D. ABUSE OF A DOMINANT POSITION

In July 2008, the Antitrust Court approved a settlement between CCU (Chile's main beer producer) and the Antitrust Attorney General. According to the agreement, CCU is banned from entering into agreements that require other parties to sell CCU products exclusively or that prohibit the display of non-CCU products.⁵³

VIII. China*

A. LEGISLATIVE DEVELOPMENTS

China's new Anti-Monopoly Law (the AML) came into force on August 1, 2008 and is expected to have a significant impact on multinational companies doing business in China. The AML is administered and enforced by multiple authorities: the Anti-Monopoly Law Enforcement Authority (the AMEA), which is responsible for day-to-day enforcement, and the Anti-Monopoly Commission (the AMC), which formulates competition policy

49. S.A.C.I Falabella and Distribución y Servicio D&S S.A. Voluntary Consultation, Res. No. 24/2008 (Jan. 31, 2008), *available at* www.tdlc.cl.

50. Requerimiento de la FNE contra D&S S.A. y Cencosud S.A., Ruling No. 65/2008 (May 8, 2008), *available at* <http://www.tdlc.cl>.

51. A similar case brought by the Antitrust Attorney against D&S, another leading retail and supermarket company, was settled.

52. Sup. Ct. Ruling No. 57 (Jan. 30, 2008), *available at* <http://www.tdlc.cl>. For the Antitrust Court's decision, see Requerimiento de la Fiscalía Nacional Económica contra Isapre ING S.A. y otros [Complaint filed by the Antitrust Att'y Gen. against Isapre ING S.A. and Others], Ruling No. 57/2007 (July 12, 2007), *available at* <http://www.tdlc.cl>.

53. Settlement Agreement between Antitrust Att'y Gen. and Cervecera CCU Chile Limitada, Case No. C-153-08 (July 23, 2008), *available at* <http://www.tdlc.cl>.

* The contribution for China was written by Peter Wang and Yizhe Zhang of Jones Day.

and coordinates enforcement activities. The functions of the AMEA are in turn shared by three existing government agencies: the Ministry of Commerce (MOFCOM), responsible for merger review; the State Administration for Industry and Commerce (SAIC), responsible for abuses of dominance and administrative abuses; and the National Development and Reform Commission (NDRC), responsible for price-related conduct, mainly price-fixing cartels.

Due to its broad and ambiguous language, the AML leaves much room for discretionary enforcement. It has been reported that the AML enforcement authorities are drafting a wide range of implementing regulations and rules for the AML. So far, however, only one implementing regulation has been issued under the new AML: the Regulation on Notification Thresholds for Concentrations of Undertakings (the Notification Thresholds Regulation) issued by the Chinese State Council on August 3, 2008.⁵⁴ Without the benefit of detailed implementing regulations or precedents, the AML presents serious compliance challenges and risks for foreign and Chinese companies alike.

B. MERGERS

The first decision of conditional approval under the AML involved Inbev's acquisition of Anheuser-Busch. MOFCOM conditioned its approval of the transaction on a commitment by Inbev that it will not seek to acquire shares in two major domestic competitors nor to increase the parties' existing shareholdings in two others.⁵⁵

This landmark decision provides a window into MOFCOM's developing merger review practices and procedures. The parties first submitted their filing on September 10, 2008 and supplemented it twice in response to MOFCOM's requests for additional information. The filing was finally accepted on October 27, 2008 and publicly declared as approved on November 18, 2008. In other words, the pre-filing stage took more than seven weeks, while the actual decision was released only two weeks after formal "acceptance." As for the remedy imposed, it appears that MOFCOM may have been more concerned about the effects of potential future transactions than the impact of this specific proposed transaction.

C. ANTICOMPETITIVE PRACTICES

The AML prohibits various types of anticompetitive practices, including horizontal cartels, vertical resale price maintenance, and restrictive practices by dominant firms. As of the writing of this article, no formal government enforcement actions against anticompetitive practices had yet been reported, although complaints were apparently received that

54. MOFCOM Announcement No. 95, Regulation on Notification Thresholds for Concentrations of Undertakings (Aug. 4, 2008) available at http://www.gov.cn/zwglk/2008-08/04/content_1063769.htm (in Chinese). Notification is required if (i) the combined worldwide turnover of all undertakings involved in the last fiscal year exceed RMB\$10 billion (approximately US\$1.5 billion), and the China-wide turnover of each of at least two undertakings exceeds RMB\$400 million (approximately US\$60 million); or (ii) the combined China-wide turnover of all undertakings involved in the last fiscal year exceed RMB\$2 billion (approximately US\$300 million), and the China-wide turnover of each of at least two undertakings exceeds RMB\$400 million (approximately US\$60 million).

55. *Id.* See also Li Jing, *MOFCOM approves InBev, AB merger* CHINA DAILY, (Nov. 19, 2008), http://www.chinadaily.com.cn/bizchina/2008-11/19/content_7219360.htm (in English).

Microsoft has abused its dominant market position by tying and charging monopoly (i.e., unfairly high) prices.⁵⁶

In the meantime, however, private litigants have seized the opportunity to bring lawsuits under the new AML. Several case filings have been reported in the press (although none is yet close to trial), including suits against: (i) state-owned telecom companies in Beijing for abuse of dominance; (ii) an insurance association in Chongqing for price fixing; and (iii) the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ, a department of the central government) for administrative monopoly (since dismissed).

IX. European Union*

A. MERGERS

In July 2008, the European Court of Justice (the ECJ) added another twist to the Sony BMG/Impala saga, setting aside the Court of First Instance's (the CFI) annulment of the European Commission's approval of the Sony BMG merger.⁵⁷ The ECJ held that the CFI had erred as a matter of law in several ways, including by misconstruing the legal criteria applicable to a collective dominant position arising from tacit coordination. As the CFI had only examined two of Impala's five pleas in its annulment judgment, the ECJ referred the case back to the CFI.

After their adoption at the end of 2007, the European Commission's Non-horizontal Merger Guidelines⁵⁸ were put to their first serious tests in 2008. In three important non-horizontal merger cases, Google/DoubleClick,⁵⁹ Nokia/Navteq,⁶⁰ and TomTom/Tèle Atlas,⁶¹ the Commission undertook detailed Phase II reviews and issued extensive decisions, eventually clearing the transactions without any remedies.

In September 2008, the CFI rejected the application of MyTravel (Airtours) for damages resulting from the Commission's unlawful decision blocking its acquisition of First Choice.⁶² The CFI found that the Commission did not commit a sufficiently serious infringement of a rule of law in its flawed collective dominance analysis or violate its duty of diligence when examining the commitments submitted by Airtours.

56. Zhang Boling, *Microsoft Faces an Antitrust Investigation*, CAIJING MAGAZINE (Aug. 26, 2008), <http://english.caijing.com.cn/2008-08-26/100077444.html>.

* The contribution for the European Union was provided by Gunmar Wolf and Michael Clancy from the law firm Covington & Burling LLP.

57. Case C-413/06, Bertelsmann and Sony Corp. of Am. v. Impala, [not yet reported in E.C.R.], *available at* <http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080049en.pdf>.

58. Commission Regulation C 265/6, Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. 265, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF>.

59. Case COMP/M.4731, Google v. DoubleClick (Mar. 11, 2008) [not yet reported in E.C.R.], *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf.

60. Case COMP/M.4942, Nokia v. Navteq (July 2, 2008) [not yet reported in E.C.R.], *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4942_20080702_20682_en.pdf.

61. Case COMP/M.4854, TomTom v. Tèle Atlas (May 14, 2008) [not yet reported in E.C.R.], *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4854_20080514_20682_en.pdf.

62. Case T-212/03, MyTravel Group plc v. Comm'n (Sept. 9, 2008) [not yet reported in E.C.R.], *available at* <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T=212/03>.

B. CARTELS

The Commission's leniency program continued to produce results for the Commission's cartel unit. The seventh cartel case resolved in 2008, however, was uncovered by the Commission following a tip-off from an anonymous source. In this case concerning the car glass industry, the Commission imposed the highest-ever cartel fines, both on a cartel as a whole (more than €1.38 billion/approximately US\$1.79 billion⁶³) as well as on an individual company, i.e., Saint-Gobain (€896 million/approximately US\$1.16 billion).⁶⁴ The case also showed the Commission's increased fining power under its revised fining guidelines⁶⁵ and brought the 2008 total to €2.27 billion (approximately US\$2.95 billion).

On June 30, 2008, the European Commission introduced a new procedure designed to facilitate the early settlement of cartel cases.⁶⁶ Under this procedure, if a defendant voluntarily acknowledges its involvement in the cartel and its liability, the Commission will grant it a ten percent reduction in the fine imposed. The success of the European Commission's settlement system will depend to a significant degree on its ability to successfully defend its cartel decisions that are currently on appeal at the Community Courts. As of October 2008, it had successfully defended its cartel decisions in six of the eight appeals decided by the European Court of First Instance, with parties receiving net fine reductions of fourteen percent⁶⁷ and twenty-five percent⁶⁸ in the remaining two cases.

C. ABUSE OF A DOMINANT POSITION

After having earlier declared that Microsoft was in compliance with its obligations under the 2004 Commission decision requiring, in part, the licensing of interoperability information for Microsoft's work group servers, the European Commission imposed a non-compliance penalty of €899 million (approximately US\$1.17 billion) on February 27, 2008, arguing that Microsoft had charged unreasonable royalties for access to the interoperability information.⁶⁹ Earlier, in January 2008, the Commission had announced two

63. Based on November 25, 2008 noon exchange rate of €1 = US\$1.30.

64. See Press Release, Europa, Antitrust: Commission fines car glass producers over €1.3 billion for market sharing cartel (Nov. 12, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1685>.

65. See Press Release, Europa, Competition: Revised Commission Guidelines for setting fines in antitrust cases – frequently asked questions (June 28, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/256>.

66. The Commission's settlement package consists essentially of an implementing regulation, Commission Regulation (EC) No 622/2008 of June 30, 2008 amending Regulation (EC) No 773/2004, with regard to the conduct of settlement procedures in cartel cases, the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Articles 7 and 23 of Council Regulation (EC) No. 1/2003 in cartel cases, the FAQ document, Antitrust: Commission introduces settlement procedure for cartels – frequently asked questions, and a press release, Antitrust: Commission introduces settlement procedure for cartels, all available at <http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html>.

67. Case T-53/03, BPB SA v. Comm'n (July 8, 2008) [not yet reported in E.C.R.], available at <http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080045en.pdf>.

68. Case T-410/03, Hoechst AG v. Comm'n (June 28, 2008) [not yet reported in E.C.R.], available at <http://curia.europa.eu/en/actu/communiqués/cp08/aff/cp080038en.pdf>.

69. Press Release, Europa, Antitrust: Commission imposes €899 million penalty on Microsoft for non-compliance with March 2004 Decision (Feb. 27, 2008), available at <http://europa.eu/rapid/pressReleasesAc>

new formal investigations against Microsoft for alleged abuses of its dominant market position through tying various software products and refusing to disclose interoperability information across a broad range of products.⁷⁰

In a long-awaited judgment, *Sot. Lélos kai Sia, et al. v. GlaxoSmithKline AEVE*,⁷¹ the ECJ preserved the limited right of a pharmaceutical company in a dominant position to refuse to supply orders from wholesalers who engage in parallel trade where such orders are not “ordinary.” The Court referred to two factors a national court can use to assess whether an order is “ordinary”: first, the size of the order “in relation to the requirements of the market in the first Member State,” and, second, “the previous business relations between that undertaking and the wholesalers concerned.”⁷²

X. France*

A. LEGISLATIVE DEVELOPMENTS

The new Law for the Modernization of the Economy was adopted on August 4, 2008⁷³ and its implementing regulation was adopted on November 13, 2008.⁷⁴ This is the most important change to French competition law since the New Economic Regulations Act 2001.

1. Merger Reforms

The merger review powers formerly exercised by the Ministry of the Economy (the Ministry) have been transferred to the new Competition Authority (*Autorité de la Concurrence*). But the Ministry retains a rather controversial “evocation” power, enabling it to compel an in-depth investigation of a transaction cleared by the Competition Authority in Phase I and reverse a Phase II clearance or prohibition decision on public interest grounds.⁷⁵

A “stop the clock” mechanism was also introduced whereby the parties (in Phase I and Phase II) and the Competition Authority (only in Phase II) can require the suspension of

tion.do?reference=IP/08/318. Microsoft has appealed this decision. See Case T-167/08, *Microsoft Corp v. Comm’n*, available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=Alldocs&docj=Docj&docop=Docop&docor=Docor&docjo=Docjo&numaff=T-167/08>.

70. Press Release, Europa, Competition: Commission initiates formal investigations against Microsoft in two cases of suspected abuse of dominant market position (Jan. 14, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/19>.

71. Joined Cases C-468/06 to C-478/06 (Sept. 16, 2008) [not yet reported in E.C.R.], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0468:EN:HTML>.

72. *Id.* ¶ 77.

* The contribution for France was provided by Maria Trabucchi, Jérôme Fabre, Clémentine Baldon, and Caroline Genevois de Weil, Gotshal & Manges.

73. Law No. 2008-776 of Aug. 4, 2008, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Aug. 5, 2008, <http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=?cidTexte=JORFTEXT00019283050>.

74. Ordinance No. 2008-1161 of Nov. 13, 2008 *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Nov. 14, 2008, <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000019758031>.

75. CODE DE COMMERCE [C. COM.] art. L430-7-I (created by Law No. 2008-776, Aug. 4, 2008), available at <http://www.legifrance.gouv.fr>.

the merger examination period where this proves necessary (e.g., if the parties submit undertakings).⁷⁶ This time-extension is limited to fifteen working days in Phase I and twenty working days in Phase II.

Finally, the new law introduces lower notification thresholds for mergers in the retail sector.⁷⁷

2. *Process Reform*

The Ministry's powers to investigate anticompetitive practices were also transferred to the Competition Authority. Appeal rights against dawn raids have been imposed in order to address concerns regarding the conformity of France's antitrust investigations with the European Convention on Human Rights.⁷⁸ In particular, investigated companies now have a right to appeal judicial orders authorizing dawn raids before the First President of the relevant Court of Appeal, whereas previously only matters of form and procedure could be disputed directly before the French Civil Supreme Court. There will now also be a hearing officer, whose function is to ensure that the legal rights of companies involved in procedures before the Competition Authority are safeguarded, whether in merger control or an antitrust infringement investigation.⁷⁹

B. MERGERS

One hundred clearance decisions were issued in the first ten months of 2008, five of which were subject to undertakings, including one following an in-depth investigation (Phase II).

In the only Phase II case, the Ministry assessed the conglomerate effects of a transaction in the market for components of rolling shutters.⁸⁰ The Ministry found that the transaction would give the merged entity the incentive and ability to foreclose the market through tying and bundling strategies. But the Ministry cleared the transaction subject to behavioral remedies, including that the parties refrain from: (i) offering rebates for the simultaneous purchase of their products, and (ii) changing the technical characteristics of their products so as to make them incompatible with rival products.

The Ministry also condemned two failures to submit filings for notifiable transactions pursuant to Article L. 430-8 of the French Commercial Code. Both fines were moderate,

76. CODE DE COMMERCE [C. COM.] art. L. 430-5-II (modified by Law No. 2008-776, Aug. 4, 2008), available at <http://www.legifrance.gouv.fr>.

77. A merger between companies owning and managing retail outlets will be notifiable if the aggregate global turnover of the parties to the transaction exceeds €75 million (approximately US\$98 million), as opposed to the usual €150/US\$195 million threshold, and at least two of the parties have a turnover in France in excess of €15 million (approximately US\$20 million), as opposed to the usual €50 million/US\$65 million threshold.

78. *Ravon v. France*, Eur. Ct. H.R. [not yet listed in reporter] Application No. 18497/03 (2008), available at <http://cmiskp.echr.coe.int/tpk197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=68558&sessionId=15231671&skin=hudoc-en&attachment=true>.

79. CODE DE COMMERCE [C. COM.] art. L461-4 (created by Law No. 2008-776, Aug. 4, 2008), available at <http://www.legifrance.gouv.fr>. This is meant to follow the EU example.

80. See Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes re. Case C2007-171 Somfy v. Zurflüh-Feller No. 6 (Ministry of Econ., July 24, 2008), available at http://www.dgcrf.bercy.gouv.fr/boccrf/2008/08_06bis/c2007_171_somfy_zurfluhfeller.pdf.

as one failure to file was not deliberate⁸¹ and the other was the result of the urgency of the situation.⁸²

XI. Germany*

A. MERGERS

Transactions in which the parties have combined global revenues of more than €500 million (approximately US\$650 million)⁸³ can trigger German merger review if one of the parties has revenues greater than €25 million (approximately US\$32.5 million) in Germany, provided the other party has some more than de minimis nexus to Germany. A legislative proposal has been placed before Parliament to introduce a €5 million (approximately US\$6.5 million) domestic revenue threshold for the second party in a transaction. It is expected that this change will be enacted in 2009 and will significantly reduce the number of German merger notifications.⁸⁴

The Federal Cartel Office (FCO) also published a notice in which it clarified that transactions closed without a clearance will not be reviewed within the standard merger review procedure but will instead be subject to a “dissolution proceeding.”⁸⁵ If the result would otherwise have been a clearance, the proceeding will be completed by way of an informal or formal “no action letter.” If there would not have been a clearance, a dissolution order may be issued. The main consequence is that the strict merger review timeline does not apply and therefore reviews can take significantly longer. The new practice has also created a level of uncertainty as to the civil validity of acts of closing performed without the necessary FCO clearance, even if the FCO ultimately decides to take “no action.” Fines remain unchanged and are applied increasingly.

In one of the most notable cases of 2008, the FCO prohibited A-Tec’s acquisition of a thirteen percent share in competitor Norddeutsche Affinerie. The FCO concluded that the acquisition would give A-Tec a “competitively significant influence”⁸⁶ in Norddeutsche because A-Tec would have a blocking minority of twenty-five percent of the votes at Norddeutsche’s annual meeting. This decision is very relevant to publicly listed companies—where shareholder presence at annual meetings is often below fifty percent—since

81. See Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes re. Novatrans v. SNCF Participations No. 2 (Ministry of Econ., Feb. 28, 2008), available at http://www.dgccrf.bercy.gouv.fr/boccrf/2008/08_02bis/c2007_99_arrete_sncfparticipations_novatrans.pdf.

82. See Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes re. Case C2007-174 Arcadie Centre Est /Groupe Bigard No. 7 (Ministry of Econ., Sept. 25, 2008), available at http://www.dgccrf.bercy.gouv.fr/boccrf/2008/08_07bis/c2007_174_arrete_bigard_actifsarcadiefranceest.pdf.

* The contribution for Germany was provided by Dr. Andreas Weitbrecht and Susanne Zuehkle of Latham & Watkins LLP.

83. Based on November 25, 2008 noon exchange rate of EU\$1 = US\$1.30.

84. See generally MEG III, available at <http://www.bmwi.de/BMWi/Redaktion/PDF/Gesetz/meg-3-entwurf,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf> (forthcoming 2009). The remaining merger thresholds will remain unchanged.

85. See FCO, Mitteilung: *Keine nachträgliche Anmeldung Bereits Vollzogener Zusammenschlüsse*, http://www.bundeskartellamt.de/w/Deutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Mitteilung_zur_Behandlung_nachtraeglich_angemeldeter_Zusammenschluesse.pdf (last visited Feb. 17, 2009).

86. See FCO, Act Against Restraints on Competition, § 37, ¶ 1, No. 4, available at http://www.bundeskartellamt.de/w/Englisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

it was held that a shareholding below twenty-five percent could still result in a de facto blocking minority.⁸⁷

Other notable transactions reviewed by the FCO in 2008 include a major supermarket merger (cleared subject to a condition precedent), a planned merger between producers of locking systems (prohibited), and an acquisition by a major cable operator of additional cable assets (cleared).⁸⁸

B. ABUSE OF A DOMINANT POSITION

The FCO focused a significant portion of its efforts in 2008 on the energy sector. For example, the FCO created a new unit to deal with investigations of abuse of dominance in the energy sector. It also obtained commitments from twenty-nine of thirty-three gas suppliers under investigation for excessive pricing to refund €127 million (approximately US\$165 million) to consumers.⁸⁹ Finally, the Higher Regional Court in Düsseldorf confirmed the FCO's rules for gas supply contracts. Pursuant to these rules, contracts where the gas supplier fills more than eighty percent of a customer's requirements may not exceed two years in duration, and contracts that cover between fifty and eighty percent of the customer's requirements may not exceed four years in duration.⁹⁰

C. OTHER ENFORCEMENT ACTIONS

In 2008, significant fines for cartel activity were imposed in a number of sectors, including liquid gas, luxury cosmetics, branded drugstore products, pharmaceutical companies, and pharmacies, décor paper productions, and road salt production.⁹¹ In a highly publi-

87. Bundeskartellamt [Federal Cartel Office] Feb 27, 2008, B5-198/07, (appealed), *available at* <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B5-198-07.pdf?navid=73>.

88. Bundeskartellamt [Federal Cartel Office], June 30, 2008, B2-333/07, *available at* http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B2-333-07_Internet.pdf?navid=73; Bundeskartellamt [Federal Cartel Office], Nov. 5, 2008, B5-25/08, *available at* <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B5-25-08neu.pdf?navid=73>; Bundeskartellamt [Federal Cartel Office], Apr. 3, 2008, B7-200/07, *available at* <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion08/B7-200-07.pdf?navid=73>.

89. See Press Release, FCO, Price Abuse Proceedings Against Gas Suppliers Largely Completed (Dec. 1, 2008), *available at* http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2008/2008_12_01.php.

90. Higher Regional Court Duesseldorf, Decision of Oct. 4, 2007, VI-Kart 1/06 (V) – E.ON Ruhrgas (appealed), *available at* <http://www.bundeskartellamt.de>.

91. See Press Release, FCO, Bundeskartellamt imposes Millionenbußen against LPG Company (Dec. 19, 2007), *available at* http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2007/2007_12_19.php; see also Press Release, FCO, Bundeskartellamt Imposes Millionenbußen Against Mfrs. of Luxury Cosmetics Market Info. (July 10, 2008), *available at* http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2008/2008_07_10.php; see also Press Release, FCO, Bundeskartellamt Imposed Against Drugstore Millionenbußen Products Manufacturer (Feb. 20, 2008), *available at* http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2008/2008_02_20.php; see also Press Release, FCO, Bundeskartellamt Imposes Fines Against Orgs. and Pharm. Mfrs. Because of Calls to the Pharmacist, the Retail Prices Recommended by the Mfr. to Comply (Jan. 8, 2008), *available at* http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2008/2008_01_08.php; see also Press Release, FCO, Bundeskartellamt Imposes Fines Against Bayer Vital (May 28, 2008), *available at* http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2008/2008_05_28.php; see also Press Release, FCO, Bundeskartellamt Imposes Fines Against Decorative Paper Mfr. (Feb. 5, 2008), *available at* <http://www.bundeskartellamt.de/wDeutsch/archiv/>

cized and controversial move, the FCO also ruled against the planned central marketing of broadcasting rights for Bundesliga soccer matches. The planned system would have provided Pay TV with exclusive rights on late Saturday afternoons and evenings. The FCO found that this arrangement did not sufficiently benefit consumers.⁹²

XII. Hungary*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

The Hungarian Parliament passed a Bill in June 2008⁹³ to amend Hungary's Competition Act.⁹⁴ But the Bill is not yet in force because the President of the Republic of Hungary has sent the text to Hungary's Constitutional Court for review, on the grounds that certain of its provisions would violate the constitutional principles protecting the "presumption of innocence" and the "right to judicial review."

The proposed amendments in the Bill deal with the following areas: (i) sanctions against cartels; (ii) consequences for violating certain other provisions of the Competition Act; and (iii) the Economic Competition Office (the ECO), Hungary's competition authority.

With respect to cartels, the Bill extends the range of possible sanctions by providing that an executive officer implicated in a price fixing cartel will be prohibited from serving as an executive officer of another business association for a period of two years from the date of the final decision of the Competition Council or, in the case of an appeal, from the date of the decision of the Appellate Court.

The Bill also proposes to establish a legal presumption of harm applicable to civil damage claims in relation to cartels violating Article 81 of the EC Treaty or Section 11 of the Competition Act. This presumption, applicable only in the case of "hard core" cartels, would provide that the economic harm resulting from the cartel should be deemed to be an overcharge equivalent to ten percent of the price of the product, unless the defendant proves otherwise. The objective of this presumption is to lift the burden of proof from plaintiffs (unless they wish to claim that damages were higher than 10 percent of the actual price).

The Bill also codifies the main points of the ECO's leniency policy, although the ECO retains the right to issue further directives concerning the leniency policy pursuant to section 36(6) of the Competition Act.⁹⁵

PressemeldArchiv/2008/2008_02_05.php; see also Press Release, FCO, Bundeskartellamt fines Auftausalzhersteller (Nov. 12, 2008), available at http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2008/2008_11_12.php.

92. See Press Release, FCO, DFL Mktg. Model to TV Rights Does Not Conform to the Requirements of Antitrust Law (July 24, 2008), http://www.bundeskartellamt.de/wDeutsch/archiv/PressemeldArchiv/2008/2008_07_24.php.

* The contribution for Hungary was written by Kornelia Nagy-Koppány, LL.M of K&P LLP, Budapest.

93. See Bill T/5657, available at <http://www.parlament.hu/irom38/05657/05657.pdf>.

94. Act LVII of 1996 on the Prohibition of Unfair Trade Practices and Unfair Competition, available at <http://www.gvh.hu/domain2/files/modules/module25/5723964C09A66629.pdf>.

95. The ECO's leniency policy is currently set forth in Joint Directive No. 3/2003 of the President of the ECO and the President of the Competition Council. The consolidated version of the Directive's English text is available at http://www.gvh.hu/domain2/files/modules/module25/pdf/print_4212_h.pdf. Since the Direc-

With respect to other provisions of the Competition Act, the most important modification in the Bill is the introduction of the “substantial lessening of competition” (SLC) or “significant impediment to effective competition” (SIEC) test for assessing concentrations, which is consistent with the standard used by the European Commission.

The Bill also extends the ECO’s authority in several respects, including giving it jurisdiction over violations of the recently enacted prohibitions against unfair commercial practices and deceptive and comparative advertising.⁹⁶

B. CASES AND PROCEEDINGS

In 2008, the ECO continued to investigate the banking sector⁹⁷ and the retail sector, particularly the relationship between larger retail networks and their suppliers.⁹⁸

In June 2008, the Metropolitan Chartered Court of Appeal confirmed the judgment of the Metropolitan Court against three companies for collusion in the bidding phase of a public tender for road reconstruction work in violation of Section 11 of the Competition Act.⁹⁹ The companies were fined between HUF\$52 million (approximately US\$2.6 million) and HUF\$137 million (approximately US\$6.85 million).¹⁰⁰

XIII. Indonesia*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

In 2008, the Supervisory Commission on Business Competition (the KPPU) issued guidelines on the implementation of Article 50(a) of the Indonesian Law on Prohibition of Monopolistic Practice and Unfair Business Competition (Law 5/1999).¹⁰¹ Article 50(a) establishes an exemption from the prohibition against anticompetitive conduct and agree-

tive is non-binding, the Bill’s purpose is to codify its main elements in order to comply with the principles of legal certainty and the undertaking of the ECO within the framework of the European Competition Network.

96. Act XC VII of 2008 (the “UCP Act”) deals with unfair commercial practices. The UCP Act came into effect on September 1, 2008. The Hungarian text is *available at* <http://www.gvh.hu/domain2/files/modules/module25/5350079F73EC50C8.pdf>; Act XLVIII of 2008 on Essential Conditions of and Certain Limitations to Business Advertising, art. 24, § (2)-(3), *available at* <http://www.gvh.hu/domain2/files/modules/module25/5946837CDBA9C919.pdf>. The ECO has entered into a cooperation agreement with the National Consumer Protection Authority and the Hungarian Financial Supervisory Authority, which are responsible for prosecuting violations of the UCP.

97. The manuscript was dated April 28, 2008 and published on September 26, 2008. The manuscript is *available at* <http://www.gvh.hu/domain2/files/modules/module25/60783C124E3D9611.pdf>.

98. This document was dated June 9, 2008 and published on June 19, 2008. It is *available at* <http://www.gvh.hu/domain2/files/modules/module25/476789A146BC0AC7.pdf>.

99. The ECO decision was published on March 18, 2004. The Hungarian text of this decision is *available at* http://www.gvh.hu/gvh/alpha?do=2&pg=11&st=1&cm5_doc=3757.

100. The judgment in case Nr. 2.Kf.27.052/2007, which is dated June 11, 2008, is one of the largest fines ever imposed on Hungarian road construction companies. The Hungarian text of this decision is *available at* <http://www.gvh.hu/domain2/files/modules/module25/5021847AD6ACD66A.pdf>.

* The contribution for Indonesia was written by Widyawan and Ponco Prawoko of Widyawan & Partners.

101. Indonesia. Law No. 5 of 1999 (Mar. 5, 2000), *available at* [http://www.globalcompetitionforum.org/regions/asia/Indonesia/uu_monopoli_\(english\)1.pdf](http://www.globalcompetitionforum.org/regions/asia/Indonesia/uu_monopoli_(english)1.pdf).

ments in Law 5/1999.¹⁰² Conduct or agreements can be exempted pursuant to Article 50(a) if they are authorized by law or implementing regulation, and the agent engaging in the conduct or entering into the agreement is an agent formed or appointed by the Indonesian Government.

The KPPU also issued guidelines on the implementation of Article 47 of Law 5/1999 regarding administrative sanctions.¹⁰³ The guidelines address, *inter alia*, the payment of damages to injured parties and the imposition of fines, which can range from IDR\$1 billion to IDR\$25 billion (approximately US\$100,000 to US\$2.5 million).¹⁰⁴ Additionally, the KPPU introduced draft guidelines on the implementation of Article 19 of Law 5/1999 on market dominance.¹⁰⁵ The draft guidelines include examples of monopolistic conduct and unfair competitive behavior and provide that fines for such conduct can range from IDR 1 billion to IDR 100 billion (approximately US\$100,000 to US\$10 million). Finally, the KPPU Secretariat is now authorized to handle certain conspiracy cases having a value of not more than IDR 10 billion (approximately US\$1 million), or any other case with the approval of the KPPU.¹⁰⁶

B. ANTICOMPETITIVE PRACTICES

In the *Manulife* case, the KPPU determined that there was no conspiracy in the auctioning of 40 percent of the shares owned by the bankrupt PT Dharmala Sakti Sejahtera in PT Asuransi Jiwa Manulife Indonesia (AJMI).¹⁰⁷ The KPPU noted that although the auction had only one bidder (The Manufacturers Life Insurance Company, which is an AJMI shareholder); it was carried out to implement that shareholder's pre-emptive right as set out in AJMI's articles of association. Therefore, the auction was in compliance with Indonesian company and bankruptcy laws.

In the *EMI* case,¹⁰⁸ the KPPU found a conspiracy among EMI Music South East Asia (EMISEA), PT EMI Indonesia, two individuals, and a popular Indonesian band in relation to the band changing record labels from PT Aquarius Musikindo to EMISEA. Confidential information (e.g., royalty rates, advances, and penalties) in the agreement between PT Aquarius Musikindo and the band was found to have been shared amongst the accused. EMISEA and PT EMI Indonesia were fined IDR 1 billion (approximately US\$100,000) and ordered to pay damages of approximately IDR 3.8 billion (approximately US\$380,000) to PT Aquarius Musikindo.

102. See KPPU DECISION, CASE No.253/KPPU/KEP/VII/2008 (JULY 31, 2008), available at http://www.kppu.go.id/docs/Pedoman/pasal_50a.pdf.

103. See KPPU Decision, Case No.252/KPPU/Kep/VII/2008 (July 31, 2008), available at http://www.kppu.go.id/docs/Pedoman/pasal_47.pdf.

104. US \$1=IDR 10,000.

105. Indonesian Legal Brief, General Corporate Issue No. 826 (Apr. 22, 2008), available at <http://www.hukumonline.com>.

106. See KPPU Reg. No. 2 (2008) (entered into effect on Feb. 12, 2008), available at http://www.kppu.go.id/docs/SK/SK_02_2008.pdf.

107. See KPPU Decision, Case No.17/KPPU-L/2007 (Apr. 10, 2008), available at http://www.kppu.go.id/docs/Putusan/putusan_manulife.pdf.

108. See KPPU Decision, Case No.19/KPPU-L/2007 (Apr. 24, 2008), available at http://www.kppu.go.id/docs/Putusan/putusan_EMI.pdf.

In two notable cases, the *Makassar Cargo* case¹⁰⁹ and the *Clean Water Management* case,¹¹⁰ the KPPU determined that the defendant companies had engaged in monopolistic practices and imposed fines of IDR\$1 billion (approximately US\$100,000) and IDR\$2 billion (approximately US\$200,000), respectively.

In the *Short Message Service* (SMS) case,¹¹¹ an interconnection agreement entered into by mobile telephone operators (XL, Telkomsel, Telkom, Bakrie, Mobile-8, and Smart) was found to fix prices for SMS messages. Fines imposed by the KPPU varied from IDR\$4 billion (approximately US\$400,000, for Bakrie) to IDR\$25 billion (approximately US\$2.5 million, for XL and Telkomsel).¹¹² Smart was not fined, as it was a new entrant with little bargaining power.

In the *Batam Taxi* case,¹¹³ certain taxi companies operating at seven seaports and an airport in Batam were found to have infringed Law 5/1999 by engaging in price fixing, market allocation, and monopolistic behavior, as well as by preventing competitors from operating at certain locations. The relevant taxi operators and a Batam Center seaport operator were jointly and severally fined IDR\$1 billion (approximately US\$100,000).

Also of note were KPPU decisions regarding discriminatory practices in the subsidized fertilizer sector¹¹⁴ and outdoor advertising sector.¹¹⁵

XIV. Ireland*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

The Irish government introduced emergency legislation on October 2, 2008, in response to ongoing turmoil in global inter-bank credit markets. The new legislation, the Credit Institutions (Financial Support) Act 2008 (the Act),¹¹⁶ has two principal functions. First, it allows the Minister for Finance (the Minister) to provide financial support (including guarantees) in respect of deposits in, and borrowings by, any credit institution designated by the Minister under the Act. Second, the Act modifies the Irish merger control rules applicable to any merger or acquisition involving an Irish-licensed credit institution, whether or not that institution has received or is receiving financial support from the State. In that regard, if the Minister is of the opinion that a proposed merger

109. See KPPU Decision, Case No.22/KPPU-L/2007 (May 22, 2008), available at http://www.kppu.go.id/docs/Putusan/putusan_Cargo_Makassar.pdf.

110. See KPPU Decision, Case No.11/KPPU-L/2008 (Oct. 13, 2008), available at http://www.kppu.go.id/docs/Putusan/putusan_ATB.pdf.

111. See KPPU Decision, Case No.26/KPPU-L/2007 (June 18, 2008), available at http://www.kppu.go.id/docs/Putusan/putusan_SMS.pdf.

112. Fines of IDR 5 billion and IDR 18 billion were levied against Mobile-8 and Telkom, respectively.

113. See KPPU Decision, Case No. 28/KPPU-L/2007 (June 18, 2008), available at http://www.kppu.go.id/docs/Putusan/putusan_Taksi_Batam.pdf.

114. See KPPU Decision, Case No. 10/KPPU-L/2008 (Aug. 19, 2008), available at http://www.kppu.go.id/docs/Putusan/putusan_Petrokimia.pdf.

115. See KPPU Decision, Case No. 02/KPPU-L/2008 (Aug. 19, 2008), available at http://www.kppu.go.id/docs/Putusan/putusan_Reklame.pdf.

* The contribution for Ireland was written by Philip Andrews, Gerald FitzGerald, and Úna Butler of McCann FitzGerald in Dublin, Ireland.

116. Credit Institutions (Financial Support) Act 2008 (Act No. 18/2008) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/acts/2008/a1808.pdf>.

involving an Irish-licensed credit institution is necessary to maintain the stability of the Irish financial system and that there would be a serious threat to the stability of that system if the merger did not proceed, then the power to review the transaction will lie with the Minister rather than with the Competition Authority (the Authority).¹¹⁷

The Authority issued sectoral reports in 2008 with respect to: groceries,¹¹⁸ veterinarians,¹¹⁹ and pharmaceutical products and services.¹²⁰ The Authority also welcomed the decision of the Irish Dental Council to review advertising restrictions on dentists, pursuant to the Authority's recommendation in 2007.¹²¹

B. MERGERS

The Authority had received thirty-three merger notifications in the first ten months of 2008. It prohibited only one of these transactions, the proposed acquisition by Kerry Group plc of Breeo Foods Limited and Breeo Brands Limited.¹²² The parties are two of Ireland's leading food companies, active in the distribution of many of the country's household names in consumer foods. The Authority found that the merger would substantially lessen competition in three markets: (i) rashers (i.e., uncooked bacon), (ii) non-poultry cooked meats, and (iii) processed cheese. This is only the third occasion on which the Authority has blocked a proposed merger since the entry into effect of the current Irish merger control legislation in January 2003. Kerry Group plc has lodged an appeal to the High Court against the Authority's decision.¹²³

117. *See id.* § 7.

118. *See* Press Release, Competition Auth., Competition Authority Publishes Study of the Grocery Sector (Apr. 9, 2008), http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=212; *see also* Press Release, Competition Auth., Competition Authority Report Finds Competition between Grocers is Ltd. by the Retail Planning System (Sept. 10, 2008), http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=225; *see also* Press Release, Competition Auth., Grocery Monitor: Report No. 3, Executive Summary (Sept. 10, 2008), *available at* http://www.tca.ie/controls/getimage.ashx?image_id=2137.

119. *See* Press Release, Competition Auth., Competition Auth. Finds Room for Improvement in Competition Between Vets (June 19, 2008), http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=217.

120. Press Release, Competition Auth., Enforcement Decision of Competition Authority Investigation: Alleged Anticompetitive Conduct by the Health Service Executive Relating to the Administration of the Community Drugs Schemes, ED/01/008 (Oct. 10, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=228.

121. *See* Press Release, Competition Auth., News Release, Competition Authority Finds a Lack of Competition in Dental Services is Pushing Up Prices in Ireland (Oct. 3, 2007), http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=203; *see also* Press Release, Competition Auth., Competition Authority Welcomes New Rules on Dentists Adver. (Aug. 6, 2008), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=223.

122. Determination in Merger No. M/08/009-Kerry/Breeo, Competition Auth. (Aug. 28, 2008), *available at* http://www.tca.ie/MergersAcquisitions/MergerNotifications.aspx?selected_item=399.

123. *See* Ciarán Hancock, *Kerry to Appeal Competition Authority Ruling on Breeo Sale*, IRISH TIMES, Sept. 30, 2008, <http://www.irishtimes.com/newspaper/finance/2008/0930/1222724571685.html>.

C. CARTELS

Several prosecutions were concluded in 2008 in relation to a price-fixing cartel run by the Citroen Dealers Association.¹²⁴ In May 2008, a Citroen car dealer based in the north-east of Ireland received a three-month suspended sentence and the company of which he was a director was fined €12,000 (approximately US\$15,000)¹²⁵ by the Circuit Criminal Court. In October 2008, another Citroen dealer based in the north-east of Ireland received a three-month suspended sentence and the company of which he was a director was fined €20,000 (approximately US\$25,000) by the same Court.¹²⁶ Several other prosecutions remain pending.

D. ABUSE OF A DOMINANT POSITION

In April 2008, the Irish High Court began hearing a damages action brought by the sugar importer ASI Sugar Limited (ASI) against Greencore Group plc (formerly the State-owned sugar company Irish Sugar plc (Irish Sugar)) for abusing its dominant position in the Irish sugar market.¹²⁷ The case represented the first “follow-on” antitrust private damages action in Ireland resulting from an enforcement decision of the European Commission. The proceedings were settled prior to the conclusion of the hearing, but the terms of the settlement have not been made public.

E. ANTICOMPETITIVE PRACTICES

In January 2008, the Authority closed its inquiry into a complaint by the publisher of the free newspaper, Metro, regarding the refusal of the Joint National Readership Survey (JNRS) to include the publication in the JNRS’ readership survey. The Authority concluded its inquiry after JNRS amended its admission criteria to permit free newspapers such as Metro to be included in its survey.¹²⁸

In November 2008, the European Court of Justice (the ECJ) ruled that an agreement concluded between the ten principal beef and veal processors in Ireland, and which required, among other things, a reduction of roughly twenty-five percent in processing capacity, had as its object the prevention, restriction, or distortion of competition within the meaning of Article 81(1) of the EC Treaty.¹²⁹ The matter had been referred to the ECJ

124. See *Ex-car Dealer Fined for Fixing Prices*, IRISH TIMES, May 9, 2008, <http://www.irishtimes.com/newspaper/finance/2008/0509/1210284926634.html>.

125. Based on November 25, 2008 noon exchange rate of EU\$1 = US\$1.30.

126. See Elaine Keogh, *Suspended Sentence and Fine for Fixing Prices of Citroen Cars*, IRISH TIMES, Oct. 29, 2008, available at <http://www.irishtimes.com/newspaper/ireland/2008/1029/1225197273487.html>.

127. ASI Sugar Ltd v. Greencore Group plc & Ors (Record No. 1996/8200P) (on file with authors).

128. See Press Release, Competition Auth., The Competition Authority welcomes the inclusion of free newspapers in the Joint National Readership (Jan. 30, 2008), http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=209.

129. Case C-209/07, Competition Auth. v. Beef Indus. Dev. Soc’y Ltd and Barry Brothers (Carrigmore) Meats Ltd., [not yet reported in E.C.R.], available at <http://curia.europa.eu/>.

by the Irish Supreme Court, which must now decide whether the agreement fulfils any of the conditions for exemption under Article 81(3) of the EC Treaty.¹³⁰

XV. Israel*

A. LEGISLATIVE DEVELOPMENTS

A proposed amendment to the Israeli Restrictive Trade Practices Law, 5748-1988 (the Antitrust Law)¹³¹ was introduced on June 19, 2008¹³² to broaden the scope of Section 50 of the Antitrust Law. Currently, Section 50 provides that a breach of the provisions of the Antitrust Law will constitute a tort for the purposes of civil liability. The proposed amendment provides that a breach of the instructions of the Director General or of the Antitrust Tribunal also will constitute torts for this purpose. The amendment also proposes to change the Antitrust Law's regulation of concentrated (oligopolistic) markets. It is generally acknowledged that the Antitrust Law's current definition of "concentration" is unclear in that it seeks to rely on the measure of competition between firms in a market, for which there exist no real empirical measures. It is proposed to revise the definition of "concentration" so that the focus of analysis will be on whether conditions exist in the market that facilitate or stifle effective competition, such as barriers to entry or cross-ownership structures.

B. MERGERS

The Director General's Guidelines Regarding the Process of Reporting and the Assessment of Mergers in Terms of the Antitrust Law, 1988 (the Guidelines) were enacted in 2008.¹³³ The Guidelines address in detail many aspects of merger reporting and assessment, including: what will be considered to be an early implementation of a merger, i.e., implementation of a merger without the required regulatory approval; when the Director General will regard control as having been de facto acquired; various issues related to the timing of notification of a merger; what will be considered to be an internal reorganization as opposed to a merger; the Director General's approach to an acquisition of the assets of a company as a merger; and what kinds of legal persons, such as individuals and foreign companies, will be considered to be "acquiring companies" for the purposes of merger control.

130. See Press Release, Competition Auth., Supreme Court Refers Question in Beef Industry Case to ECJ, Apr. 19, 2007, available at http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=193.

* The contribution for Israel was written by Eytan Epstein, Tamar Dolev-Green, and Michelle Morrison of Epstein, Chomsky, Osnat & Co.

131. Restrictive Trade Practices Law, 5748-1988, S.H. 128 (Isr.).

132. Proposed Amendment to the Antitrust Law (no. 11), 2008, available at <http://eng-archive.antitrust.gov.il> (search for Publication No. 5000968).

133. More information available at www.antitrust.gov.il, <http://www.antitrust.gov.il>.

C. ABUSE OF A DOMINANT POSITION

In a notable 2008 case, *Re: Bezeq, the Israel Telecomm. Corp.*,¹³⁴ the Commissioner found that Bezeq, the dominant supplier of telecommunications services in Israel and, until recently, a state-owned monopoly, had abused its monopoly in contravention of section 29A of the Antitrust Law. The case involved an illegal strike by Bezeq workers in 2006, as a result of which the reciprocal connection between Bezeq and HOT Telecoms (HOT), a small, upstart telecommunications provider, was disconnected for approximately thirty-four hours. During this time, HOT customers could not be connected with Bezeq customers. The Commissioner found that in the weeks leading up to the illegal strike, Bezeq management had willfully ignored indications that its employees had devised a strategy to further their grievances against the company by harming Bezeq's new competitors, thus exposing Bezeq to damaging antitrust litigation. Bezeq has appealed the Commissioner's decision.

XVI. Italy*

A. LEGISLATIVE DEVELOPMENTS

On November 15, 2007, the Italian Competition Authority (the ICA) issued two Resolutions¹³⁵ establishing procedural rules governing proceedings for unfair commercial practices and misleading and unlawful comparative advertising.¹³⁶ Among other things, proceedings must last no more than 120 days and there is no requirement for a "market test" phase if parties offer up commitments to resolve a matter.

B. MERGERS

In December 2007, the ICA authorized the merger between *AEM S.p.A.* (AEM) and *ASM Brescia S.p.A.* (ASM). The transaction involved several markets: the production and supply of electrical energy and gas, waste management, heat management, facility management, and integrated water systems. The ICA cleared the merger after ASM undertook to terminate the structural links existing between itself and a major company in the wholesale market for electrical energy.¹³⁷

In January 2008, the ICA cleared the merger between Intesa SanPaolo and Cassa di Risparmio Firenze, subject to a number of conditions, including: (i) the divestiture of

134. Determination according to Paragraph 43(a)(5) of the Restrictive Trade Practices Law, 1988, *Re: Bezeq, the Israel Telecomm. Corp. – abuse of position in the market*, Dec. 12, 2007, available at <http://eng-archive.antitrust.gov.il/ANTItem.aspx?ID=37&FromSubject=&FromYear=2009&FromPage=0>.

* The contribution for Italy was written by Alberto Pera and Michele Carpagnano of Gianni, Origoni, Grippo & Partners.

135. Italian Competition Authority, Regulation on Procedures for Investigating Unfair Commercial Practices, Measure No. 17589 (Nov. 15, 2007), available at <http://www.agcm.it/eng/index.htm>; Italian Competition Authority, Procedures for Investigating Misleading & Unlawful Comparative Advertising, Measure No. 17590 (Nov. 15, 2007), available at <http://www.agcm.it/eng/index.htm>.

136. Italian Competition Authority, Legislative Decree No. 145 (Aug. 2, 2007), available at <http://www.agcm.it/eng/index.htm>; Italian Competition Authority, Legislative Decree No. 146 (Aug. 2, 2007), available at <http://www.agcm.it/eng/index.htm>.

137. ICA, 13 dec. 2007, Decision No. 17723, in case C8835, AEM/ASM Brescia.

twenty-nine retail bank branches to an unrelated third party, and (ii) the unwinding of a joint venture in the consumer credit sector. According to the ICA, the divestitures described under (i) above were necessary to maintain competition in the retail bank, asset management, financial services, savings management, and insurance markets, while the unwinding of the joint venture would prevent the creation of a dominant position in the consumer credit market.¹³⁸

In May 2008, the ICA cleared a merger between Monte dei Paschi di Siena and Banca Antonveneta. The clearance was subject to several conditions, including: (i) the divestiture by Monte dei Paschi di Siena of several retail bank branches, mainly located in Tuscany; (ii) the termination of relationships with major groups in the insurance sector through the unwinding of existing joint ventures and the termination of bank insurance agreements; and (iii) a commitment not to appoint anyone to the merged entity's Board of Directors or Supervisory Committee who also holds the same positions with a competing bank.¹³⁹

C. CARTELS

In September 2007, the ICA fined four companies active in the pharmaceutical distribution sector €24,915 (approximately US\$32,000)¹⁴⁰ for their collective refusal to supply over-the-counter (OTC) drugs to the so-called "*parafarmacie*" (i.e., shops that sell non-prescription drugs).¹⁴¹ In May 2008, the ICA sanctioned an agreement in the same sector carried out by the Teramo association of pharmacists that was aimed at setting the maximum level of discounts for OTC drugs. The association was fined €11,200 (approximately US\$14,000).¹⁴²

In October 2007, the ICA imposed a fine of approximately €10 million (approximately US\$13 million) on fifteen major operators in local public transport markets. The ICA found that the operators coordinated their behavior in responding to public bids for the assignment of public transport services. This conduct was designed mainly to divide up markets in order to preserve the position of incumbent operators and to raise barriers to entry for new competitors.

D. ABUSE OF A DOMINANT POSITION

In October 2008, the ICA fined Aeroporti di Roma S.p.A. (ADR) €1.6 million (approximately US\$2.1 million) for abuse of a dominant position.¹⁴³ ADR is the exclusive manager of the main commercial airports of Rome (Fiumicino and Ciampino). The conduct sanctioned by the ICA included the charging of "abusive" prices for refueling services, the leasing of space at almost twice the market rate, and charges for certain services (e.g.,

138. ICA, 17 jan 2008, Decision No. 17859, in case C8939, Intesa SanPaolo/Cassa di Risparmio di Firenze.

139. ICA, 7 may 2008, Decision No. 18327, in case C9182, Banca Monte dei Paschi di Siena/Banca Antonveneta.

140. Based on November 25, 2008 noon exchange rate of EURO 1=US\$1.30.

141. ICA, 20 sep. 2007, Decision No. 17362, in case I678, Distribuzione di farmaci senza obbligo di ricetta alle parafarmacie.

142. ICA, 29 may 2008, Decision No. 18421, in case I684, Federfarma Teramo-Sconti sui prezzi al pubblico.

143. ICA, 23 Oct 2008, Decision No. 19020, in case A376, Aeroporti di Roma-Tariffe Aeroportuali.

handling) in the “Fiumicino cargo city,” the area of the airport dedicated to the transport of goods.

XVII. Japan*

A. LEGISLATIVE DEVELOPMENTS

A bill to amend the Anti-Monopoly Act (the AMA) was submitted to the Diet in March 2008.¹⁴⁴ The bill proposes pre-closing notification for share acquisitions and a surcharge to be imposed on companies or individuals who engage in behavior deemed to be an unfair trade practice, including exclusionary types of private monopolization, a range of misleading representations, and abuse of a superior bargaining position. But the passage of the bill is uncertain due to developments in the Japanese political environment.

B. MERGERS

In March 2007, new merger guidelines came into effect which reflected the new way that the JFTC would analyze merger transactions subject to its review.¹⁴⁵ One of the most important features was to clarify that the JFTC could, where appropriate, expand the relevant geographic market beyond Japan when considering the possible effect of a proposed merger. The JFTC applied this expanded approach when it approved TDK Corporation’s acquisition from Alps Electric Co., Ltd. of assets used for the manufacturing of magnetic heads.¹⁴⁶ The JFTC held that the relevant market consisted of the global market for magnetic heads, based on its finding that magnetic head manufacturers sell their products at similar prices regardless of geographic origin.¹⁴⁷

Another significant development was the JFTC’s issuance of an order requiring BHP Ltd. to produce information relevant to BHP’s proposed take-over of Rio-Tinto.¹⁴⁸ In the past, the JFTC had not commenced investigations of share acquisitions until after closing given that share acquisitions are only subject to post-closing notification.

C. CARTELS

On November 11, 2008, the JFTC filed criminal complaints with the public prosecutor general against three steel companies—Nippon Steel & Sumikin Coated Sheet Corp., Nisshin Steel Co., Ltd. and Yodogawa Steel Works Ltd.—alleging that they had formed a

* The contribution for Japan was written by Shigeyoshi Ezaki of Anderson Mori & Tomotsune.

144. Press Release, Japan Fair Trade Comm’n, Submission of the Anti-Monopoly Act Amendment Bill to the Diet (Mar. 11, 2008), *available at* <http://www.jftc.go.jp/e-page/pressreleases/index08.html>.

145. See Press Release, Japan Fair Trade Comm’n, Policies Dealing With Prior Consultation Regarding Business Combination (Mar. 28, 2007), *available at* <http://www.jftc.go.jp/e-page/legislation/ama/MApriorconsultation.pdf>.

146. Press Release, Japan Fair Trade Comm’n, Major M&A cases during the fiscal year 2007, 39 (June 2008), *available at* <http://www.jftc.go.jp/pressrelease/08.june/08061301.pdf>.

147. *Id.* at 39.

148. Hidetaka Matsuyama, Sec’y Gen. of the Fair Trade Comm’n of Japan, Remarks at press conference of Sept. 3, 2008, *available at* http://www.jftc.go.jp/teirei/h20/kaikenkiroku080903.html#k080903_1.

cartel to fix prices for the sale of galvanized steel.¹⁴⁹ JFE Galvanizing and Coating Co., Ltd. was also allegedly involved in the cartel, but no complaint was filed against it because it had disclosed information regarding the cartel under the JFTC's leniency program.¹⁵⁰

On February 22, 2008, a JFTC investigation into an international cartel in the marine hose sector resulted in a cease-and-desist order being issued against one Japanese company and four foreign companies, as well as a surcharge payment in the amount of ¥2,380,000 being imposed on one Japanese company (approximately US\$23,800).¹⁵¹

XVIII. Korea*

A. LEGISLATIVE DEVELOPMENTS

An amended Enforcement Decree to the Monopoly Regulation and Fair Trade Act (the MRFTA) took effect on July 1, 2008.¹⁵² The amended Enforcement Decree increases the threshold level of assets or sales of the larger merging party needed to trigger the merger notification requirement from KRW\$100 billion (approximately US\$83 million) to KRW\$200 billion (approximately US\$167 million).¹⁵³ For mergers between two foreign companies or mergers that involve a domestic company acquiring a foreign company, notification is not required unless the turnover in Korea of each company and their respective affiliates exceeds KRW\$20 billion (approximately US\$17 million).¹⁵⁴

The National Assembly is currently considering several additional proposals to amend the MRFTA, including removing restrictions on holding companies, abolishing restric-

149. Press Release, Japan Fair Trade Comm'n, The JFTC Filed a Criminal Accusation on the Price-fixing Cartel Over Galvanized Steel Sheets (Nov. 11, 2008), *available at* <http://www.jftc.go.jp/pressrelease/20index.html>.

150. The JFTC's leniency program is an important part of its cartel enforcement arsenal. As of March 31, 2008, the JFTC had received 179 leniency applications since the program was introduced in January 2006. JAPAN FAIR TRADE COMM'N, ANNUAL REPORT OF FY 2007 2 (2008), *available at* http://www.jftc.go.jp/e-page/pressreleases/2008/September/080926_Annual_Report_FY2007.pdf. *See also* Kazuhiko Takeshima, Chairman of the Fair Trade Commission of Japan, Speech at The International Symposium on Enforcement of Antimonopoly Law of the People's Republic of China, Investigation Procedures and Techniques of Monopoly Cases 3-4 (Dec. 14, 2007), *available at* <http://www.jftc.go.jp/e-page/policyupdates/speeches/SAIC-Symposium2007.pdf>. As to the leniency program, *see* Anti-Monopoly Act, arts. 7-2, *available at* <http://www.jftc.go.jp/e-page/legislation/index.html>.

151. Press Release, Japan Fair Trade Commission, Cease and Desist Order and Surcharge Payment Order Against Marine Hose Manufacturers (Feb. 22, 2008), *available at* <http://www.jftc.go.jp/e-page/pressreleases/2008/February/080222.pdf>.

* The contribution for Korea was written by Sai Ree Yun, Youngjin Jung, and Sung Moo Jung of Yulchon.

152. Enforcement Decree of the Monopoly Regulation and Fair Trade Law, Presidential Decree No. 10267 of April 1, 1981 (last amended by Presidential Decree No. 20947 of July 29, 2008), *available at* <http://eng.ftc.go.kr/files/bbs/2008/MARFTA%20Enforcement%20Decree.doc>.

153. Conversions into dollars are based on an exchange rate of KRW 1200 = US\$1. *See* Enforcement Decree of the Monopoly Regulation and Fair Trade Law, Presidential Decree No. 10267 of April 1, 1981, art. 18.1, *available at* <http://eng.ftc.go.kr/files/bbs/2008/MARFTA%20Enforcement%20Decree.doc>. The threshold asset or sales level of the smaller party has not changed from KRW\$20 billion (approximately US\$17 million).

154. *See* Enforcement Decree of the Monopoly Regulation and Fair Trade Law, Presidential Decree No. 10267 of April 1, 1981, art. 18.3, *available at* <http://eng.ftc.go.kr/files/bbs/2008/MARFTA%20Enforcement%20Decree.doc>.

tions on maximum investments in affiliated companies, and introducing a U.S.-style consent order system.¹⁵⁵ The current requirement that a pre-merger notification, if required, be filed within thirty days of the execution of the merger agreement is also expected to be repealed and replaced by a requirement to file a notification at any time before a merger is consummated.¹⁵⁶

B. ANTICOMPETITIVE PRACTICES

In November 2007, the Korea Fair Trade Commission (the KFTC) issued corrective orders and imposed administrative surcharges on ten pharmaceutical companies (including several multinationals) for providing rebates to hospitals, pharmacies, and wholesalers with the intention of excluding competitors.¹⁵⁷ The fines collectively amount to KRW\$20 billion (approximately US\$17 million). Five of the companies are also facing criminal charges.

On June 4, 2008, the KFTC concluded a three-year long investigation by imposing corrective orders and imposing an administrative surcharge on Intel Corp., Intel Semiconductor Ltd., and Intel Korea (Intel) for abuse of market dominance.¹⁵⁸ The KFTC found that Intel had abused its dominant market position in the CPU market by providing financial inducements to Samsung Electronics and Sambo Computer, the two largest companies in the Korean PC market, not to purchase CPUs from Advanced Micro Devices Inc. (AMD). The KFTC determined that these acts were designed to exclude AMD from the market and thus in violation of Article 3-2(1)5 of the MRFTA dealing with “exclusion of competing enterprises.” The KFTC ordered Intel to cease all loyalty-inducing financial arrangements with local OEMs that were designed to exclude Intel’s competitors or maintain Intel’s share of OEMs’ CPU purchases above a certain level. The KFTC also imposed a surcharge of approximately KRW\$26 billion (approximately US\$22 million).

XIX. Mexico*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

At the end of 2007, a bill was introduced in Mexico’s Congress to amend Article 35 of the Federal Law on Economic Competition (the FLEC) to increase the fines that can be imposed by the Federal Competition Commission (FCC) for monopolistic practices.¹⁵⁹

155. See Bill No. 1800407 (July 24, 2008), available at http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_P0Q8A0B7M2I4P1L5E1S5M2B6Z6A4I9.

156. If any of the parties to a merger is a “large-scale company”, a pre-merger filing is required. “Large-scale company” means a company whose total assets or sales revenue, including that of its affiliates, exceeds KRW 2 trillion.

157. See 2007*kyungkyu*1859 for decision against Samil Pharm Co., Ltd., 2007*kyungkyu*1862 for decision against Choongwae Parma Corporation, 2007*kyungkyu*1865 for decision against Dong-A Pharmaceutical, and 2007*kyungkyu*1871 for decision against Hanall Pharmaceutical Inc (each on file with the authors).

158. Public version of the decision not yet available.

* The contribution for Mexico was written by Lucía Ojeda Cárdenas of SAI Abogados.

159. Que Reforma el Artículo 35 de la Ley Federal de Competencia Económica, a cargo del Deputado Alejandro Sanchez Camacho [Proposed Reform of Competition Law by Representative Alejandro Sanchez Camacho], Diario Oficial de la Federación [D.O.], 12 de abril de 2007, available at <http://gaceta.diputados.gob.mx/>.

The FCC withdrew its initial support for the bill¹⁶⁰ after several amendments were added with which the FCC disagreed.¹⁶¹

The Mexican Congress has not passed the bill yet. Nevertheless, public statements by legislators from different parties indicate that there is support for a new bill that would not only include the proposed amendment to Article 35, but also amendments to other articles of the FLEC that would provide the FCC with enhanced tools to impose and enforce fines for monopolistic practices.

Another important bill was introduced in the Mexican Congress in February 2008. This bill would amend Article 17 of the Mexican Constitution to establish the obligation to legislate procedures for collective redress (i.e., class actions).¹⁶² The FCC supports this proposal because it believes that allowing class actions would help deter anticompetitive conduct. The proposed amendment and implementing regulation are currently under discussion.

B. MERGERS

On December 2007, the FCC granted conditional approval to the acquisition by Televisa, the most important media company in Latin America, of 49 percent of the capital stock of Cablemás, a cable company operating in several Mexican states.¹⁶³ Commissioner Miguel Flores issued a dissenting opinion with respect to the resolution adopted by the FCC, arguing that the transaction should not be approved.¹⁶⁴ The FCC's conditions for approval included the obligation of Televisa to: (i) offer its free (non-pay) TV channels on a non-discriminatory basis to all pay TV service providers in Mexico (must offer); and (ii) transmit, through its pay TV systems, the non-pay TV content of all other transmitters on a non-discriminatory basis (must carry). On May 12, 2008, the FCC determined that Televisa had fulfilled its "must offer" and "must carry" obligations and that the concentration with Cablemás could proceed.¹⁶⁵

160. FCC Opinion PRES-10-096-2007-171 (Sept. 14, 2007), *available at* http://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/opiniones/op.pdf.

161. FCC Opinion PRES-10-096-2008-048 (Mar. 5, 2008), *available at* http://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/opiniones/20080305_reserva%20art%2035.pdf. *See also* Press Release, FCC, Legislators Propose Some Decrease in the Federal Competition for Monopolies (Mar. 6, 2008), *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=4581&Itemid=204.

162. Sen. Murillo Karam Jesús, Address to Mexican Senate, Draft Decree Adds Article 17 of the Constitution of the United Mexican States Concerning Collective Actions (Feb. 7, 2008), http://www.pri.senado.gob.mx/index.php?ido=4&opc=2&senador=Murillo%20Karam%20%20Jes%FA&obj_id=1133&tabla_id=Iniciativa (last visited Feb. 20, 2009).

163. *See* FCC Files CNT-18-2007 and RA-26-2007 *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=3773&Itemid=175.

164. Comisión Federal de Competencia [FCC], Recurso de reconsideración [Resource of Consideration], RA/26/2007, *available at* http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=4809&Itemid=120.

165. Press Release, FCC, Cumple Televisa Condiciones de la CFC, Otorga Acceso A Contenidos [It Fulfills and Televises Conditions of the CFC, Grants Access to Contents] (May 13, 2008), http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=4895&Itemid=204. The obligations on Televisa are permanent and must continue to be complied with following closing.

C. ANTICOMPETTITIVE PRACTICES

The FCC initiated five investigations in 2008 for alleged monopolistic practices. Three of these investigations were initiated on the basis of third party complaints and two ex officio by the FCC. The markets involved were: (i) the market for distributing and dealing in tickets to play in draw and gambling games,¹⁶⁶ (ii) the market for fixed internet interconnection services,¹⁶⁷ (iii) the market for inter-urban long distance commuted voice traffic,¹⁶⁸ (iv) the market for anesthesiology services within Mexico,¹⁶⁹ and (v) the market for real estate advisory services in Mazatlán, Sinaloa.¹⁷⁰

In September 2008, the FCC decided to close its investigation of alleged monopolistic practices in the market for public notary services in Mexico. The FCC had initiated the investigation at the end of 2007. The FCC closed the investigation without any finding against the parties.¹⁷¹

XX. THE NETHERLANDS*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

1. *De minimis Safe Harbor*

The present Dutch Competition Act contains a “safe harbor” for cartel infringements that do not significantly affect the Dutch market.¹⁷² This “safe harbor” is applied if a turnover threshold or, alternatively, a market share threshold is met.¹⁷³ A legislative proposal now pending before Parliament aims to amend the market share threshold to require that the aggregate market share held by the parties not exceed ten percent in any of the relevant markets affected by the agreement or concerted practice (the current threshold is five percent).¹⁷⁴ This is similar to the threshold in the *de minimis* Notice of the European Commission,¹⁷⁵ with one important difference: unlike the EC *de minimis* Notice, the Dutch Competition Act also allows “hard core” infringements to fall under the *de minimis* rule.

166. FCC File DE-17-2008.

167. FCC File DE-39-2007.

168. FCC File IO-02-2008.

169. FCC File DE-40-2007.

170. FCC File IO-01-2008.

171. FCC FILE IO-02-2007.

* The contribution for the Netherlands was written by Winfred Knibbeler and Nima Lorjé of Freshfields Bruckhaus Deringer LLP, Amsterdam.

172. Agreements or concerted practices which comply with the “safe harbor” criteria do not fall under the Competition Act’s cartel prohibition. *See* Act of 22 May 1997, Providing New Rules for Economic Competition (Competition Act), *Staatsblad van het Koninkrijk der Nederlanden* [Stb.] 2004, 345, Art. 7.

173. The turnover threshold requires that the agreement or concerted practice a) involve not more than eight undertakings, which b) achieve an aggregate turnover of not more than €5.5 million (approximately US\$7.2 million) if the activities of all parties concern mainly trade in goods or €1.1 million (approximately US \$1.4 million) for all other activities. *Id.*

174. *See Tweede Kamer der Staten-Generaal* [TK] [House of Representatives], 31354, 2007-2008, no. 2.

175. *See* Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), 2001 O.J. (C 368) 7, ¶ 7(a).

2. *Rules of Conduct for Public Undertakings*

Another pending amendment to the Competition Act is designed to remove competitive distortions between public and private undertakings in markets where both public and private undertakings offer goods and services (e.g., public transport or waste collection). The proposal would require public undertakings, inter alia, to sell their products in accordance with the “market economy investor principle”, i.e., they should include direct and indirect costs in their sale prices unless this has a negative impact on public functions.¹⁷⁶

3. *NMa Guidelines*

The Dutch Competition Authority (the NMa) issued new guidelines clarifying its policy for the issuance of simplified decisions in merger cases. The NMa will issue a simplified decision, inter alia, when: there is no need for a second phase or remedies, there is no conflicting advice on the merger from another regulator, and there are no third party complaints.¹⁷⁷ The NMa also published guidelines for mergers in the healthcare, agriculture, postal, and energy sectors¹⁷⁸ and guidelines on acceptable forms of cooperation between undertakings.¹⁷⁹

B. MERGERS

In 2008, the NMa again dealt with a considerable number of mergers in the hospital sector. The *Ziekenhuis Walcheren – Oosterscheldeziekenhuizen* case is of particular interest. This proposed merger of ZIEKENHUIS WALCHEREN AND OOSTERSCHELDEZIEKENHUIZEN would have resulted in a post-merger share of nearly 100 percent in the market for general hospital services in the south-west of the Netherlands. The parties argued that the merger would lead to efficiencies that benefited consumers, but the NMa was not convinced. The transaction is currently subject to a second phase investigation.¹⁸⁰

In the *Evean Groep–Philadelphia–Woonzorg Nederland* case, the NMa considered a merger in the nursing home market. It allowed the merger to proceed, subject to the divestiture of eleven nursing homes.¹⁸¹

176. See TK 31531, 2007-2008, No. 2.

177. Staatscourant [Stcrt.] 172, p.18.

178. NMa, Leidraad voor zorginstellingen met fusie- of overnameplannen [Guiding Principle for Care Institutions with Fusions or Adopting Plans], available at http://www.nmanet.nl/Images/Leidraad%20zorginstellingen_tcm16-113990.pdf (only available in Dutch).

179. Richtsnoeren Samenwerking Ondernemingen [Guidelines cooperation ventures], available at http://www.nmanet.nl/Images/Richtsnoeren%20Samenwerking%20Ondernemingen_april%202008_tcm16-75276.pdf (only available in Dutch).

180. Ziekenhuis Walcheren/Oosterscheldeziekenhuizen, De Nederlandse Mededingingsautoriteit [NMa], 23 July 2008, Case No. 6424/46 (Neth.). The same transaction had been investigated by the NMa in 2005. The NMa considered a second phase investigation necessary at that time. Although the notifying parties submitted an application for a license (a second phase decision), they withdrew it just before the final decision came out and the merger did not proceed. The current review is based on a new first phase notification submitted by the parties on June 25, 2008.

181. Evean Groep & Philadelphia/Woonzorg Nederland, De Nederlandse Mededingingsautoriteit [NMa], 1 Apr 2008, Case No. 6141.

C. CARTELS

In 2008, the NMa decided the last remaining appeal cases involving cartels in the construction sector. In June 2008, for example, the NMa fined five suppliers of traffic lights and traffic management installations a total of €400,000 (approximately US \$520,000)¹⁸² for engaging in cartel activities (MAINLY BID RIGGING) between January 1998 and December 2003.¹⁸³

In September 2008, the NMa fined two cartels in the homecare sector €3 million (approximately US\$3.9 million) and €4.8 million (approximately US\$6.2 million) respectively.¹⁸⁴ In both cases, homecare institutions had entered into market allocation agreements following enactment of the new Healthcare Act, which was designed to introduce greater competition in the healthcare sector. The NMa reduced the parties' fines by twenty-five percent because it did not want to prejudice their financial viability and also because budget and pricing restrictions meant that excessive pricing by the cartels was unlikely.

2008's most notable judicial decision was issued by the Trade and Industry Appeals Tribunal (the Tribunal) in *Associations of Psychologists*.¹⁸⁵ In this case, the Tribunal overruled the NMa's finding that the associations had breached the cartel prohibition in Article 6 of the Competition Act by circulating price recommendations to members. The Tribunal held that the NMa had failed to take into account the specific market circumstances affecting psychologists, namely that price is not a relevant competitive factor because patients are referred to psychologists by their doctors based on expertise and quality rather than price.

XXI. Nepal*

A. INTRODUCTION

On January 14, 2007, Nepal's long-awaited competition law, the Competition Promotion and Market Protection Act 2007 (the Act), came into force.¹⁸⁶ The Act is the first comprehensive law in Nepal that deals exclusively with anticompetitive activities, including multinational corporations doing business in Nepal. The Act governs a broad range of conduct, including mergers and acquisitions, anticompetitive agreements, abuse of a dominant position, and other anticompetitive activities such as exclusive dealing, bid rigging, collusive bidding, market restriction, and tied selling. The Act provides for the for-

182. Based on November 25, 2008 noon exchange rate of EU\$1 = US\$1.30.

183. Verkeersregeltoestellen en verkeersregelinstallaties, De Nederlandse Mededingingsautoriteit [NMa], Report, 27 June 2008, Case No. 5697. This was the last cartel which qualified for the special simplified sanction procedure that was established to deal with cartels in the construction sector. Under this simplified procedure, parties agreed not to contest the facts and to waive the right to be heard individually. In addition, one alleged cartel participant represented all other alleged cartel members.

184. Kennemerland, De Nederlandse Mededingingsautoriteit [NMa], 19 Sept. 2008, Case No. 6108; Thuiszorg 't Gooi, De Nederlandse Mededingingsautoriteit [NMa], 19 Sept. 2008, Case No. 5851.

185. *Associations of Psychologists c.s. College van Beroep voor het Bedrijfsleven* [CBB], Oct. 6, 2008, LJN: BF8820.

* The contribution for Nepal was written by Devendra Pradhan of Pradhan & Associates.

186. Competition Promotion and Market Protection Act, No. 35 (2007), available at <http://www.parliament.gov.np/Legislation.htm>.

mation of a statutory competition authority, the Competition Promotion and Market Protection Board (the Board), to promote and protect competition in the country.¹⁸⁷

B. MERGERS

The Act restricts mergers or acquisitions that are designed solely to create a monopoly in the relevant market or to encourage restrictive practices in the relevant market.¹⁸⁸ A merger or acquisition that results in a greater than forty percent share in the relevant market for the production or distribution of a product or service in the country is presumed to create a monopoly in the relevant market, and thus to encourage restrictive practices in the market.¹⁸⁹ Merger reviews are undertaken by the Office of the Company Registrar under the Companies Act and not by the Board.

C. CARTELS

The Act prohibits forms of anticompetitive agreements—including market sharing agreements, pricing agreements, output restriction agreements, bid rigging, and collusive bidding—that aim to restrict or limit competition for the production, supply, and distribution of goods or services in a market.¹⁹⁰ All anticompetitive agreements contravening the Act are considered void.¹⁹¹

D. ABUSE OF A DOMINANT POSITION

The Act prohibits entities that hold a dominant position in a market from abusing that position by restricting competition in respect of the production or distribution of goods or services.¹⁹² An entity is deemed to be in a “dominant position” if, acting solely or together with similar entities, it accounts for at least forty percent of annual production or distribution in a relevant product market in Nepal or is otherwise in a position to act unilaterally in the market.¹⁹³ The Board publishes a list of entities holding a dominant position.

E. ENFORCEMENT

The Act empowers both Market Protection Officers and the Board to investigate anticompetitive activities. Charges under the Act are brought by the State as plaintiff. Entities found to have engaged in anticompetitive activities are subject to civil penalties. A person acting in-chief on behalf of an entity (e.g., a corporation) is deemed to be responsible for any such penalties. Private claimants are also entitled to seek damages from a person or entity engaged in anticompetitive activities.

187. *Id.* § 12.

188. *Id.* § 5. Although the Act does not specifically define the term “market,” a relevant market will generally include a product market and a geographic market.

189. *Id.*

190. *Id.* § 3.

191. *Id.*

192. *Id.* § 4.

193. *Id.*

XXII. New Zealand*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

In March 2008, the New Zealand Government released the Commerce Amendment Bill,¹⁹⁴ which proposes extensive reform of the regulatory control provisions of the Commerce Act 1986 (Parts 4, 4A, and 5) that make up the key economic regulation of businesses that do not face competition or the threat of competition. The amendments are designed to provide greater certainty on regulatory scope, in an effort to facilitate increased infrastructure investment by regulated businesses, while preventing the exercise of market power.

In July 2008, the Australian and New Zealand Governments signed a treaty on trans-Tasman Court Proceedings and Regulatory Enforcement.¹⁹⁵ This treaty will result in greater harmonization of Australasian competition law and will serve to increase the reach and effectiveness of Australian and New Zealand competition regulators. Its immediate practical effect will be to remove the bar against the New Zealand Commerce Commission (the Commission) enforcing penalties against Australian companies and directors, and the Australian Competition and Consumer Commission enforcing penalties against New Zealand companies and directors.

In September 2008, Parliament introduced a bill to extend the scope of the Commission's powers of cooperation with other international competition regulators.¹⁹⁶ More specifically, it provides the Commission with the ability to provide investigative assistance and "compulsorily-acquired information to overseas regulators."¹⁹⁷ The Bill is only at its First Reading stage and will not be considered by Parliament again until 2009.

B. MERGERS

The Commission received fourteen applications for voluntary merger clearances between January 1 and October 31, 2008. Eleven of these mergers were cleared, two were declined, and one was withdrawn.¹⁹⁸

The most high profile merger decision in 2008 was the Court of Appeal's judgment in *Commerce Commission v. Woolworths Ltd. & Ors*, overruling the High Court's decision de-

* The contribution for New Zealand was written by Andrew Peterson and Troy Pilkington of Russell McVeagh.

194. To see the full text of the Bill, refer to the New Zealand parliament website. Commerce Amendment Act 2008, 2008 S.N.Z. No. 70 available at http://www.parliament.nz/en-NZ/PB/Legislation/Bills/d/0/4/00DBHOH_BILL8440_1-Commerce-Amendment-Bill.htm.

195. To view the current status of the treaty, refer to the New Zealand Ministry of Foreign Affairs and Trade's website, Treaties and International Law, <http://www.mfat.govt.nz/Treaties-and-International-Law/03-Treaty-making-process/International-Treaties-List/12-Private-International-Law.php> (last visited Apr. 3, 2009).

196. Commerce Commission (International Corporation and Fees) Bill, 2008, Bill [293-1], available at http://www.parliament.nz/en-NZ/PB/Legislation/Bills/c/8/2/00DBHOH_BILL8756_1-Commerce-Commission-International-Cooperation.htm.

197. *Id.*

198. This data reflects merger clearance activity during the period January 1, 2008 to October 31, 2008. A full register of clearance applications received by the Commerce Commission is available at <http://www.comcom.govt.nz/PublicRegisters/mergersacquisitions-clearances.aspx>.

nying clearances to two separate proposed acquisitions of up to 100 percent of The Warehouse, a large general merchandise retailer and recent entrant into the grocery industry.¹⁹⁹ Notably, the Court of Appeal held that the High Court had misinterpreted the Commission's role in merger clearances. The High Court had interpreted the relevant statutory test as requiring the Commission to grant clearance unless satisfied that a substantial lessening of competition is likely. The Court of Appeal stated that this inverted the proper standard, and that the Commission should grant clearance only if it is satisfied that a substantial lessening of competition is not likely; in all other cases, clearance should be denied.²⁰⁰

The Court of Appeal's May 2008 decision in *Commerce Commission v. New Zealand Bus Ltd.*²⁰¹ was expected to provide guidance on the test for accessory liability in the merger context. Unfortunately, the decision offers two potentially inconsistent tests for when a vendor may be considered liable as an accessory for a business acquisition that contravenes the Act. While there must be knowledge of the essential facts, two inconsistent overlays were applied to this: "dishonest participation" and "knowledge of a real risk of contravention."²⁰² Neither of these overlays is particularly certain in its application and parties should be careful to satisfy themselves that they do not attract liability under either test.

In July 2008, the Commission commenced a consultation process to seek feedback on draft process guidelines and a revised application form for businesses seeking clearance for a merger or acquisition.²⁰³ The impetus for this consultation process stems largely from the lengthy timeframes for determination of clearance applications. Under the draft guidelines, the Commission will encourage merging parties to participate in informal and confidential pre-filing discussions with the Commission.

C. CARTELS

In late 2007, the Commission commenced proceedings "against a New Zealand company, its Australian parent and four executives for alleged cartel behaviour in the New Zealand corrugated fiber packaging industry."²⁰⁴ In July 2008, the Commission also filed proceedings against two pathology service providers, alleging that, starting in 2003, the companies had agreed not to compete against each other in a particular region pending a proposed merger of their operations that never materialized.²⁰⁵

199. *Commerce Comm'n v. Woolworths Ltd. & Ors*, [2008] NZCA 276 (C.A.). The proposed acquirers were Woolworths and Foodstuffs, both among New Zealand's leading supermarket chains.

200. *Id.* at 95, 107.

201. *Commerce Comm'n v. New Zealand Bus Ltd.*, [2007] NZCA 502 (C.A.).

202. *Id.*

203. To view the guidelines in full, refer to the Commerce Commission's website, *available at* <http://www.comcom.govt.nz/BusinessCompetition/MergersAcquisitions/ClearanceProcessGuidelines/clearanceprocessguidelines.aspx>.

204. Press Release, Commerce Comm'n, Commerce Commission initiates legal action against alleged cartel (Nov. 22 2007), *available at* <http://www.comcom.govt.nz/BusinessCompetition/Anti-competitivePractices/commercecommissioninitiateslegalac1.aspx>.

205. Press Release, Commerce Comm'n, Commerce Commission files proceedings against Waikato pathology service providers (July 17, 2008), *available at* <http://www.comcom.govt.nz/BusinessCompetition/Anti-competitivePractices/commercecommissionfilesproceedings.aspx>.

XXIII. Norway*

On June 20, 2008, the Norwegian Competition Act (the Act) was amended to include a suspensory obligation for notifiable mergers and acquisitions. Effective from July 1, 2008, mergers and acquisitions that are required to be reported in accordance with the Act are prohibited from being implemented before they have been notified to and reviewed by the Norwegian Competition Authority (the NCA).²⁰⁶ Certain changes were also introduced to the information requirements for notifications.²⁰⁷

B. MERGERS

On February 1, 2008, the NCA approved the acquisition of specific assets of YX Energi Norge AS by AS Norske Shell, subject to the condition that Shell not acquire two YX gas stations in the southern part of Norway.²⁰⁸ On May 30, 2008, the NCA approved the acquisition of Lidl Norge GmbH by the grocery chain REMA 1000 AS, on the condition that a retail store in Nordfjordeid be offered to a competitor, either in the form of a sale, or in the form of a rental contract.²⁰⁹ On July 5, 2008, the NCA gave its approval to the acquisition of Lantmännen Analycen AB by Eurofins Danmark A/S (Eurofins) on the condition that Eurofins divest one of its subsidiaries, in order to avoid any negative impact in the market for analysis of foodstuffs and corn.²¹⁰

Also of note is that on October 21, 2008, the Commission of the European Union conditionally approved the acquisition of ConocoPhillips' network of "Jet" fuel stations in Scandinavia by the Norwegian oil and gas company StatoilHydro, following an in-depth investigation. In order to gain approval, StatoilHydro committed to carry out several remedies, including divestiture of all forty "Jet" fuel stations in Norway.²¹¹

C. ANTICOMPETITIVE PRACTICES

On February 28, 2008, and then subsequently on March 14, 2008, the NCA imposed fines against Borregaard Industries Limited and Brenntag Nordic AS, respectively, for illegal market sharing in the market for technical acetic acid.²¹² Borregaard was fined

* The contribution for Norway was written by Trygve Norum and Gaute Sletten of Advokatfirmaet Haavind Vislie AS, Oslo, Norway.

206. See Act of 5 March 2004 No. 12 (The Competition Act of 2004), § 18.

207. See *id.* §§ 18-21, 26, 27.

208. See NCA Case No. 2008/3, available at <http://www.konkurransetilsynet.no/iKnowBase/Content/429104/V2008-3%20AS%20NORSKE%20SHELL.PDF> (available only in Norwegian).

209. See NCA Case No. 2008/10, available at http://www.konkurransetilsynet.no/iKnowBase/Content/430137/V2008-10_REMA_LIDL.PDF (available only in Norwegian).

210. See NCA Case No. 2008/12, available at http://www.konkurransetilsynet.no/iKnowBase/Content/430420/V2008-12_EUROFINS_ANALYCEN_OFFENTLIG.PDF (available only in Norwegian).

211. Press Release, European Union, Mergers, Commission clears StatoilHydro's proposed acquisition of Jet Scandinavia, subject to conditions (Oct. 21, 2008), available at <http://europa.eu/rapid/press>.

212. See NCA Cases No. 2008/4, available at http://www.konkurransetilsynet.no/iKnowBase/Content/429314/V2008-4_BORREGAARD.PDF (available only in Norwegian); see also NCA Cases No. 2008/5, available at <http://www.konkurransetilsynet.no/iKnowBase/Content/429326/V2008-5%20BRENNTAG%20-%20OFFENTLIG%20VERSJON.PDF> (available only in Norwegian).

NOK\$1.6 million (approximately US \$224,000) and Brenntag Nordic was fined NOK \$1.3 million (approximately US\$182,000).²¹³

On October 13, 2008, the Oslo District Court began hearings to review the fine of NOK\$45 million (approximately US\$6.3 million) that the NCA had imposed on TINE BA in 2007. The NCA concluded that TINE AB had abused its dominant position by negotiating (or attempting to negotiate) exclusive supply arrangements with Norwegian grocery chains for the supply of certain types of cheese. The NCA found that TINE had intended to exclude its main competitor in Norway, Synnøve Finden.²¹⁴ No decision on appeal had been rendered as of the writing of this article.

On October 17, 2008, the NCA announced that the Norwegian Public Roads Administration had settled a damages claim against the construction firms Selmer Skanska AS and Veidekke ASA. The Administration also started proceedings against two other firms operating in the market, NCC Construction AS and Reinertsen Anlegg AS. The Administration alleges that the four entrepreneurs engaged in market sharing and illegal tendering on public projects from 1994 through 2000.²¹⁵

XXIV. Peru*

A. LEGISLATIVE DEVELOPMENTS

In order to implement the recent Free Trade Agreement entered into between Peru and the United States of America, the Executive Branch of the Peruvian Government was delegated the authority to legislate on diverse subject matters.²¹⁶ Pursuant to this authority, Peru's Executive Branch enacted two legislative decrees in June 2008 that govern anticompetitive conduct: (i) Legislative Decree 1034, the Law Against Anticompetitive Conduct;²¹⁷ and (ii) Legislative Decree 1044, the Law Against Unlawful Competition.²¹⁸ The purpose of both decrees is to promote economic efficiency and investment in Peru by suppressing, prohibiting, and sanctioning practices whose actual or potential effect is to hinder the proper operation of a competitive market.

213. Based on November 25, 2008 noon exchange rate of NOK\$1 = US \$0.14.

214. See NCA Case No. 2007/2, available at http://www.konkurransetilsynet.no/iKnowBase/Content/425898/V2007-2_TINE.PDF (available only in Norwegian); see also Press Release, Norwegian Competition Authority, Konkurransetilsynet moter TINE i Oslo tingrett [TINE Competition meetings in Oslo Court] (Oct. 13, 2008), available at <http://www.konkurransetilsynet.no/no/Aktuelt/Nyheter/Konkurransetilsynet-moter-TINE-i-Oslo-tingrett/>.

215. Press Release, Norwegian Competition Authority, Private damages claim in Norwegian cartel case (Oct. 17, 2008), available at <http://www.konkurransetilsynet.no/en/news/archive/Private-damages-claim-in-Norwegian-cartel-case/>.

* The contribution for Peru was written by Oscar Arrús of Estudio Rubio, Leguia, Normand y Asociados, with the assistance of Diego Harman.

216. Law No. 29157.

217. Decreto Legislativo que aprueba la Ley de Represión de Conductas Anticompetitivas [Decree approving the Law Against Anticompetitive Conduct], El Peruano [Official Gazette], June 25, 2008.

218. Decreto Legislativo que aprueba la Ley de Represión de la Competencia Desleal [Decree approving the Law Against Unlawful Competition Official Gazette], El Peruano [Official Gazette], June 26, 2008.

1. *The Law Against Anticompetitive Conduct*

The Law Against Anticompetitive Conduct replaces the Law Against Monopolistic, Controlling and Restrictive Practices of Free Competition, which had been in effect for 15 years. One of the most significant and novel measures introduced by the new legislation is the possibility of sanctioning extraterritorial conduct, provided that it has anticompetitive effects within Peru.

The new law also establishes new powers for the Technical Secretariat of the Peruvian Competition Agency, which is an autonomous part of the National Institute for the Defense of Competition and Intellectual Property (INDECOPI). The Technical Secretariat is responsible for all administrative investigations, has authority to impose fines and other sanctions, and issue opinions regarding the existence of anticompetitive acts. Concerns have been expressed that the new roles established for the Technical Secretariat will concentrate authority unduly in the hands of one person.

2. *The Law Against Unlawful Competition*

The Law Against Unlawful Competition unifies, in a single text, the provisions governing unlawful competition and commercial advertising, which were formerly governed by two separate laws. The integration of these regulatory provisions is significant in that improper commercial advertising is one of the more common forms of unlawful competition in Peru. This law also offers the advantage of providing more detailed explanations of the various types of unlawful acts that it covers, rather than merely listing them as was the case in the previous law.

3. *Changes to INDECOPI*

The June 2008 series of decrees also included Legislative Decree 1033, which enacted various changes to the structure of INDECOPI.²¹⁹ One of the most important innovations is the addition of more courts to INDECOPI's organizational structure. This should improve the efficiency of INDECOPI's decision making process.

XXV. Portugal*

A. LEGISLATIVE DEVELOPMENTS

Decree-Law No. 18/2008 of January 29, 2008²²⁰ amended the Competition Act²²¹ by establishing a new ancillary sanction. Under the new regime, the Portuguese Competition Authority (the PCA) may, in addition to levying fines, deprive infringing undertakings of the right to participate in public tenders. This new ancillary sanction only applies

219. El Peruano, June 25, 2008, *supra* note 215.

* The contribution for Portugal was written by António Vitorino and Stéphanie Sá Silva of Gonçalves Pereira, Castelo Branco & Associados.

220. Decree-Law No. 18/2008, Jan. 29, 2008, *available at* [http://digestoconvidados.dre.pt/Digesto/\(jueghv5535vdmvn3tmursr45\)/Paginas/DiplomaDetalhado.aspx?claint=229997](http://digestoconvidados.dre.pt/Digesto/(jueghv5535vdmvn3tmursr45)/Paginas/DiplomaDetalhado.aspx?claint=229997).

221. Decree-Law No. 18/2003, D.R. No. 28 (Series I-A), Feb. 3, 2003, *available at* <http://www.anacom.pt/render.jsp?contentId=106189> [hereinafter Competition Act].

to undertakings that have been found to breach competition rules within the scope of public tenders and has a maximum duration of two years.

B. MERGERS

On June 26, 2008, the PCA decided not to oppose the merger between Galp Energia Group and the Liquid Bulk Terminal of the Port of Sines.²²² This concentration raised two interesting issues: (i) the need to assess the competitive implications of the concentration at both upstream and downstream levels; and (ii) the need to take into account the governing regulatory framework.

C. CARTELS

On May 21, 2008, the Lisbon Court of Commerce²²³ overruled the PCA's decision of October 31, 2007²²⁴ condemning Aeronorte and Helisul for having executed an agreement to fix prices and other commercial conditions in a public tender launched by the Civil Protection National Service in 2005. The judgment condemned the PCA's lack of evidence in support of its decision and underscored that, when assessing public tenders, the PCA must consider the scope and object of the tenders as well as the impact of potential competitors. Additionally, the Court stated that the PCA had failed to prove that the agreement had, as its object or effect, the prevention, restriction, or distortion of competition.

D. ABUSE OF A DOMINANT POSITION

On September 1, 2008, PT Comunicações, S.A. (PTC), the former national telecommunications operator, was fined €2.1 million (approximately US \$2.7 million)²²⁵ by the PCA for abuse of a dominant position in the wholesale markets for circuit leasing, in breach of both national and community competition laws.²²⁶ The PCA found that PTC had breached Article 6 of the Portuguese Competition Act and Article 82 of the EC Treaty by applying a discriminatory discount system that favored the companies of the PTC Group and adversely affected its competitors. The PCA's decision exemplifies the recent evolution of the telecommunications sector towards increased competition.

222. Autoridade Da Concorrência [Competition Authority], Decision AC-I-Ccent. 78/2007 GALP/TGLS, available at http://www.concorrenca.pt/download/2007_78_final_net.pdf.

223. Lisbon Court of Commerce, Case No. 48/08.7TYLSB (on file with authors).

224. Autoridade Da Concorrência [Competition Authority], Notice No. 19/2007, Oct. 31, 2007, available at http://www.concorrenca.pt/download/comunicado2007_19.pdf.

225. Based on November 25, 2008 noon exchange rate of EU\$1 = US\$1.30.

226. Autoridade Da Concorrência [Competition Authority], Notice No. 15/2008, Sept. 1, 2008, available at http://www.concorrenca.pt/download/comunicado2008_15.pdf.

XXVI. Serbia*

A. LEGISLATIVE DEVELOPMENTS

The Serbian Ministry of Trade and Services has produced a draft amendment (the Draft) to the Serbian Law on Protection of Competition.²²⁷ The Draft was to have been debated and adopted by the Government of the Republic of Serbia by the end of 2008 and should be adopted by the Serbian Parliament in 2009.²²⁸ The content of the Draft is not yet available to the public. But it is expected that this legislation will closely resemble EU competition legislation, consistent with the 2007 Action Plan for Harmonization of Serbian Legislation with the Legislation of the European Union.²²⁹

B. MERGERS

One of the most significant problems with Serbia's current antitrust legislation is that the threshold for reviewable concentrations (mergers) is too low.²³⁰ Concentrations that exceed this threshold must be approved by the Commission for Protection of Competition (the Commission).²³¹ The low threshold has resulted in a large number of requests for approval being submitted to the Commission, which has significantly slowed the Commission's decision-making process since it does not possess sufficient personnel to review all of the submitted requests.²³²

One of the Commission's most significant merger decisions (delivered at the end of 2007) involved the controversial merger between Primer C d.o.o. and C market a.d., two grocery store chains that sought to merge in December 2005. The Commission did not approve the merger initially. But the decision was appealed to the Supreme Court of Serbia, which ordered the Commission to re-examine its decision.²³³ The Commission did so, and decided once again to deny approval.²³⁴ This case has generated significant

* The contribution for Serbia was written by Olga Cvetkovic of Belgrade, Serbia.

227. Zakon o zaštiti konkurencije [ZZK] [Law on Protection of Competition] Službeni glasnik Republike Srbije, No. 79/05 (on file with the author). The Law on Protection of Competition was enacted in 2005.

228. Milosavljević: *Zakon o zaštiti konkurencije do kraja 2008*, DANAS, Oct. 13, 2008, available at http://www.danas.rs/vesti/ekonomija/milosavljevic_zakon_o_zastiti_konkurencije_do_kraja_2008.4.html?news_id=142393.

229. Vlada Srbije - Kancelarija za Evropske integracije, Akcioni plan za uskladjivanje zakona Republike Srbije sa propisima EU 2007, at 1, available at http://web.uzzpro.sr.gov.yu/kzpeu/harmonizacija/ap_2007.pdf.

230. The current notification threshold is that the combined annual income in Serbia of all parties to the transaction exceeds an amount in CSD equivalent to €10 million (approximately US \$13 million), the combined worldwide income of the parties exceeds €50 million (approximately US \$65 million), and that at least one of the parties is registered in Serbia.

231. Zakon o zaštiti konkurencije [ZZK] [Law on Protection of Competition] Službeni glasnik Republike Srbije, No. 79/05, art. 23 (on file with the author).

232. Komisija za zaštitu konkurencije, Godišnji izveštaj o radu komisije za zaštitu konkurencije za 2007 godinu, at 1, available at <http://www.kzk.org.yu/download/Izvestaj%20KZK%20%202007.pdf>.

233. Vrhovni sud Srbije [VSS] [Supreme Court of Serbia], U. 4466/06 (on file with the author).

234. Komisija za zaštitu konkurencije [KZK] [Commission for the Protection of Competition], 6/0-02-138/07-15, Nov. 26, 2007 (on file with the author).

debate among competition professionals about the most appropriate way to determine market shares.²³⁵ The case also has attracted considerable public attention.²³⁶

C. ANTICOMPETITIVE AGREEMENTS

Five proceedings regarding restrictive agreements were brought to the Commission in 2008. All of these proceedings are still ongoing and the Commission's decisions are pending.²³⁷

D. ABUSE OF A DOMINANT POSITION

The Commission issued one decision in 2008 holding that an undertaking was abusing its dominant position.²³⁸ In this decision, the Commission concluded that the Danube Food Groups BV (DFG) had abused its dominant position in the market for the purchase of raw milk by unfairly dictating terms to Serbian dairy farmers.

DFG, based in the Netherlands, is the majority shareholder in the three largest dairy processors in Serbia and purchases more than forty-seven percent of the raw milk produced in the country. The Commission found that farmers have no ability to negotiate or influence terms of agreement because of their lack of economic strength and alternative options. For example, the price schedule is set by DFG, can be changed at its sole discretion, and has been changed in DFG's favor in the past. The Commission imposed several remedial measures on DFG, including requiring that prices be set according to certain criteria, and that farmers receive notice of any price changes.

235. For more about this issue, see Prof. Miroljub Labus, *Uporedna analiza relevantnog tržišta: koncept i primena* [Comparative analysis of relevant markets: the concept and application], EKONOMIKA PREDUZEĆA, Jan.-Feb. 2008; Prof. Dragan Đurićin & Dr Dragan Lončar, Dr Vesna Rajić, *Merenje koncentracije tržišta: primer sektora prebrambene maloprodaje Beograda* [Measuring the concentration of markets: food retail sector example of Belgrade], EKONOMIKA PREDUZEĆA, Jan.-Feb. 2008 (each on file with the author).

236. See generally The Anti-Corruption Council, Report on the Company C Market, available at <http://www.antikorupcija-savet.sr.gov.yu/eng/view.jsp?articleId=579>.

237. Telephone interview with a representative of the Commission for Protection of Competition in Serbia (Nov. 13, 2008).

238. Komisija za zaštitu konkurencije [KZK] [Commission for the Protection of Competition], Jan. 25, 2008, available at <http://www.kzk.org.yu/download/Resenje%20-%20Danube%20Foods%20Group.pdf> at 2-3 (The Commission is also currently reviewing another two abuse of dominance cases); Telephone interview with a representative of the Commission for Protection of Competition in Serbia (Nov. 13, 2008).

XXVII. Spain*

A. LEGISLATIVE DEVELOPMENTS

Regulation 261/2008 (the Regulation) came into force on February 28, 2008.²³⁹ The Regulation implements some of the most important features of the new Spanish Antitrust Law (Law 15/2007).²⁴⁰

Of particular importance is the introduction of a leniency procedure in Spain, which had been delayed until the Regulation came into force.²⁴¹ Under this procedure, the first party requesting leniency is entitled to full immunity, provided that the information it supplies is sufficient to allow the CNC to open an investigation. Companies that have already received a statement of objections, and cartel ring leaders, cannot claim immunity. They can, however, request a reduced fine if they produce evidence that significantly helps the investigation. The granting of leniency is also subject to the requesting party's complete and ongoing cooperation with the CNC throughout the procedure.

The Regulation also adopts criteria for identifying *de minimis* conduct, i.e., conduct that is not considered capable of affecting competition. The Regulation largely follows EU law in this regard.²⁴² The other major element of the Regulation is its adoption of two model forms for merger notifications, one "full" and the other "short."²⁴³ The "full" form is similar to the "Form CO" used for notifications to the European Commission. The "short" form requires considerably less information and is intended to be used for mergers that are unlikely to raise issues, e.g., where the parties do not compete in the same product and geographic markets.

B. MERGERS

As of the writing of this article (November 11, 2008), seventy-five transactions had been notified to the antitrust authorities in 2008.²⁴⁴ Only four of these transactions were re-

* The contribution for Spain was written by Susana Cabrera and Konstantin Jörgens of GARRIGUES. 239. Reglamento de Defensa de la Competencia [Antitrust Regulation] (B.O.E. 2008, 3646), available at <http://www.boe.es/boe/dias/2008/02/27/pdfs/A11575-11604.pdf>.

240. Defensa de la Competencia [Anitrust Law] (B.O.E. 2008, 12946), available at <http://www.boe.es/g/es/>. See generally Press Release, CNC, Approval of the Royal Decree that Implements the Competition Regulations (Feb. 22, 2008), available at <http://www.cncompetencia.es/pdfs/novedades/85ing.pdf>.

241. Leniency applications are made to the Cartel Unit, which forms part of the Investigation Directorate of the National Competition Commission (*Comisión Nacional de la Competencia* or "CNC"). See Press Release, CNC, The CNC's Introduction of the Leniency Programme is a Success. The CNC Receives the First Applications on the First Day After it Comes Into Force (Feb. 29, 2008), available at <http://www.cncompetencia.es/pdfs/novedades/87ing.pdf>.

242. The CNC may publish guidelines to further develop and specify the criteria for defining *de minimis* conduct.

243. Antitrust Regulation, *supra* note 239, Annex II and III.

244. See CNC, Merger Control Resolutions and Pending Cases under the new Act 15/2007 (Resoluciones y Expedientes en trámite Control de Concentraciones), <http://www.cncompetencia.es/index.asp?m=50&p=47> and <http://www.cncompetencia.es/index.asp?m=41&p=11>. This compares to eighty-seven notifiable transactions over the same period in 2007.

ferred to a “second phase” in-depth investigation, two of which were subsequently abandoned.²⁴⁵

C. CARTELS

The CNC has opened an investigation into whether Spanish insurance companies have colluded by offering uniform premiums in connection with ten-year construction defects insurance.²⁴⁶ There was also an increased level of dawn raid activity in 2008, targeting companies in industries such as waste management,²⁴⁷ Jerez sherry,²⁴⁸ iron,²⁴⁹ and cosmetics.²⁵⁰ There were complaints about the manner in which some of these raids were conducted, but the CNC has defended its practices.

D. ANTICOMPETITIVE PRACTICES

As of November 11, 2008, sixty-five resolutions had been adopted in cases involving anticompetitive practices.²⁵¹ In one such case, the CNC ruled on an appeal filed by Ges-tevisión Telecinco (T5) against the former Spanish Antitrust Service’s (Servicio de Defensa de la Competencia) decision to close its file on T5’s complaint that the tariffs charged by the entity managing the intellectual property rights of artists, interpreters, and performers in Spain were abusive.²⁵² The CNC Council upheld T5’s appeal and ordered that the investigation be re-opened. The CNC also imposed fines on companies in 2008

245. The only second phase decision adopted so far in 2008 relates to Case C/0022/07 Repsol/BP Oil JV, which was notified last year and ultimately approved without conditions, *available at* <http://www.cncompetencia.es/index.asp?pag=29&menu=0&m=50&p=47>.

246. Press Release, CNC, Ten Year Construction Defects Insurance (Jan. 31, 2008), *available at* <http://www.cncompetencia.es/PDFs/novedades/73ing.pdf>. The CNC also found one of the insurance companies under investigation guilty of obstruction. CNC, Resolucion Expt. SNC/02/08, CASER-2SNC, July 24, 2008, *available at* <http://www.cncompetencia.es/PDFs/resoluciones/2008/2314.pdf>.

247. Press Release, CNC, The CNC Investigates Various Companies in the Waste Management Sector (Feb. 7, 2008), *available at* <http://www.cncompetencia.es/PDFs/novedades/77ing.pdf>.

248. Press Release, CNC, The CNC has Launched an Investigation Into a Possible Market-Sharing and Price-Fixing Cartels in the Jerez Sherry Sector (July 17, 2008), *available at* <http://www.cncompetencia.es/PDFs/novedades/109ing.pdf>.

249. Press Release, CNC, The Comisión Nacional de la Competencia (CNC) is Investigating a Possible Agreement to Fix Trading Conditions in the Iron Sector (July 9, 2008), *available at* <http://www.cncompetencia.es/PDFs/novedades/107ing.pdf>.

250. Press Release, CNC, The CNC Initiates the Investigation of Three Possible Price Agreements in the Cosmetic Sector (June 19, 2008), *available at* <http://www.cncompetencia.es/PDFs/novedades/105ing.pdf>.

251. Resolutions are available at CNC, <http://www.cncompetencia.es> (follow “*resoluciones*.”). This is lower than the previous year, when ninety-six resolutions were adopted, of which just two were under the new law.

252. *See* CNC Decision of February 4, 2008, Case R 714/07 Telecinco/AIE, *available at* <http://www.cncompetencia.es>; *see also* Press Release, CNC, The CNC will Continue to Investigate the Supposed Abuse of a Dominant Position by the Intellectual Property Rights Management Entity AIE (Feb. 6, 2008), *available at* <http://www.cncompetencia.es/PDFs/novedades/74ing.pdf>.

for anticompetitive practices in a variety of sectors, including: electricity,²⁵³ container haulers,²⁵⁴ and media rights for football games.²⁵⁵

XXVIII. Sweden*

A. LEGISLATIVE DEVELOPMENTS

Sweden's amended Competition Act (the 2008 Competition Act) came into force on November 1, 2008.²⁵⁶ Among other amendments, the 2008 Competition Act contains new merger notification thresholds and a new substantive test for transactions, i.e., whether they "significantly impede" effective competition or the development thereof.²⁵⁷

The 2008 Competition Act also introduces a provision making pre-merger notification mandatory. No action may be taken to implement the concentration during the initial review period.²⁵⁸ There are no direct sanctions for failure to notify or for breach of the standstill obligation. But the Swedish Competition Authority (the SCA) may issue a decision requesting that a notification be submitted or prohibiting the parties from implementing a notifiable concentration, and impose fines for failure to comply with the decision.

Additional minor amendments and clarifications to the merger review process include the automatic extension of the SCA's initial review period (Phase I) from twenty-five to thirty-five working days if commitments are offered by the parties to the concentration.

The 2008 Competition Act also aligns Swedish rules for calculating administrative fines more closely with EC rules, taking into account the gravity of the infringement and its duration. These amendments are expected to increase predictability for undertakings.

As regards leniency, the relevant provisions of the Competition Act have been amended to permit undertakings that had the leading role in a cartel to receive full immunity. Only undertakings that have coerced other undertakings to participate in a cartel are barred from full immunity.

253. See CNC Decision of February 14, 2008, Case 624/07 Iberdrola, available at <http://www.cncompetencia.es>; see also Press Release, CNC, The CNC Imposes a Fine of €15.4 million on Iberdrola Generación for Abuse of a Dominant Position on the Electricity Generation Market (Feb. 15, 2008), available at <http://www.cncompetencia.es/PDFs/novedades/79ing.pdf>; see also Press Release, CNC, The CNC has sanctioned Gas Natural €1.5 million for abuse of dominant position in the electricity generation markets (Apr. 26, 2008), available at <http://www.cncompetencia.es/PDFs/novedades/96ing.pdf>.

254. Press Release, CNC, The CNC Fines the Cartel of Container Hauliers in the Port of Barcelona (Apr. 4, 2008), available at <http://www.cncompetencia.es/PDFs/novedades/93ing.pdf>.

255. Press Release, CNC, Press Release on Case S/0006/07 (Football Rights) (Apr. 9, 2008), available at <http://www.cncompetencia.es/PDFs/novedades/94ing.pdf>.

* The contribution for Sweden was written by Per Karlsson of Vinge's EU & Competition Practice Group in Stockholm, Sweden and Emma Dufva of the EU & Competition Practice Group at Vinge's office in Brussels, Belgium.

256. Konkurrenslag [Competition Act] Svensk författningssamling [SFS] 2008:579 (Swed.).

257. *Id.* According to the new thresholds, a mandatory notification is triggered in Sweden if: (i) the parties to the concentration generate a combined turnover in Sweden exceeding SEK\$1 billion (approximately US\$148.1 million or €108.1 million); and (ii) each of at least two of the parties generates a turnover in Sweden exceeding SEK\$200 million (approximately US\$29.6 million or €21.6 million).

258. In order to extend the standstill obligation beyond the initial review period, the SCA must request the Stockholm City Court to issue an order prohibiting implementation until final clearance is granted.

B. CARTELS

In September 2008, the Market Court delivered its judgment in a case involving a car retailer cartel, imposing a fine of SEK\$21.2 million (approximately US\$3.2 million) on eight car retailers.²⁵⁹ The Court found that the car retailers had, over a four-year period: (i) engaged in price fixing by agreeing on the sales price for new cars, (ii) agreed on rebates for new cars, (iii) shared and allocated markets for sales of new cars, (iv) agreed on the purchase and sales prices for used cars, and (v) engaged in market sharing by agreeing that different rebates would be applicable within and outside their districts.

C. ABUSE OF A DOMINANT POSITION

In February 2008, the Swedish Supreme Court delivered an intermediate judgment in a case between ferry operator BornholmsTrafikken and Ystad Hamn (a harbor in southern Sweden).²⁶⁰ BornholmsTrafikken brought a claim against Ystad Hamn in 2002 in the District Court alleging, inter alia, that Ystad Hamn had abused its dominant position by charging excessive prices for port services. The intermediate judgment of the District Court was appealed to the Court of Appeal, which found that Ystad Hamn controlled a dominant position in the relevant market, which it defined as the supply of port services in Ystad Hamn to ferry operators who perform ferry services for passengers and vehicles on the Ystad-Rönne route.²⁶¹ The Swedish Supreme Court subsequently upheld the interim findings of the Court of Appeal. The principal case on the merits is still pending before the District Court.

An abuse of dominance case is currently pending in the European Court of Justice (the ECJ) following a request by the Swedish Market Court for a preliminary ruling.²⁶² At issue is whether Stim (a copyright collection society that administers and licenses rights to music and text) is abusing its dominant position by applying a certain payment model for the right to broadcast copyright-protected music. An oral hearing was held before the ECJ in June 2008. The Advocate General subsequently issued its opinion on September 11, 2008 and the ECJ's judgment will be released on December 11, 2008.²⁶³

XXIX. Switzerland*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

The Swiss Federal Council (the SFC) is expected to submit a report to the Swiss parliament in early 2009 evaluating the effectiveness of Switzerland's competition legislation

259. Regeringsrättens årsbok [RA] [Supreme Administrative Court] 2008-9-10 ref 12, *available at* <http://www.marknadsdomstolen.se/avgoranden/avgoranden2008/Dom2008-12.pdf>.

260. Case T 2808-05 [not yet reported in NJA] [SUPREME COURT] 2008-2-19.

261. CASE T 2094-03, STATE OF DENMARK THROUGH BORNHOLMSTRAFIKKEN/.YSTAD HAMN LOGISTIK AKTIEBOLAG (JUNE 2, 2005) (ON FILE WITH AUTHORS).

262. Case C-52/07, Kanal 5 Ltd. and TV4 AB v. The Swedish Performing Rights Society (Stim) (Dec. 11, 2008) [not yet reported in E.C.R.], *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007J0052:EN:HTML>.

263. The opinion of the Advocate General is available at <http://curia.europa.eu/index.htm>.

* The contribution for Switzerland was written by Dr. Patrick Sommer, Stefan Brunnschweiler, and Marquard Christen of CMS von Erlach Henrici.

(the ACart).²⁶⁴ This review is mandated by Article 59A of the ACart and has been ongoing since 2007. Potential topics to be addressed in the report include: the institutional setting of the Swiss competition authorities, international cooperation with other competition authorities,²⁶⁵ sanctions against natural persons for competition law violations, possibilities for facilitating private enforcement of competition law, the assessment of vertical restraints, an amendment of the merger notification thresholds, and the substantive test to be applied to merger reviews.

B. MERGERS

Several merger decisions of the Swiss Competition Commission (ComCo) in 2008 demonstrate ComCo's willingness to use behavioral remedies to address its concerns. On May 17, 2008, for example, ComCo allowed Switzerland's second largest retailer, Coop, to acquire the Carrefour stores in Switzerland run by Distributis subject to certain conditions, including: (i) an obligation that Coop not impose exclusivity on any of its distributors, (ii) a prohibition on the acquisition of any other food retailer in Switzerland within the next six years, and (iii) an obligation to offer an aggregate sales area of 20,000 m² to competitors in particularly concentrated markets.²⁶⁶

ComCo also gave conditional approval to the acquisition of Steffen-Ris Holding Ltd. by Fenaco, the largest company in the Swiss agricultural sector.²⁶⁷ The concentration led to significant increases in Fenaco's market share in the wholesale market for consumer and industry potatoes as well as in the wholesale market for seed potatoes. ComCo therefore made the clearance subject to Fenaco's commitment not to impose any purchase or supply obligations on potato farmers.

C. ANTICOMPETITIVE PRACTICES

In July 2008, ComCo concluded its investigation of Documed Ltd., which publishes information on pharmaceutical products.²⁶⁸ ComCo alleged that Documed had abused its

264. For an unofficial English translation of the ACart, see <http://www.weko.admin.ch/dokumentation/00160/index.html?lang=en>.

265. In June 2008, for example, the president of the Swiss Competition Commission called for greater cooperation with European competition authorities. See Interview by NZZ am Sonntag with Professor Walter Stoffel, President, ComCo, *Rad nicht Zurückdrehen* NZZ ONLINE (Switz.), June 1, 2008, at 27, available at http://www.nzz.ch/nachrichten/Wirtschaft/aktuell/rad_nicht_zurueckdrehen_1.747979.html. Meetings are to be held with the European Commission in this regard. See Simon Thoenen, *Kartellwächter suchen Hilfe in Brüssel*, HANDELSZEITUNG (Switz.), Sept. 17, 2008, at 19, available at http://www.handelszeitung.ch/artikel/Unternehmen-Kartellwaechter-suchen-Hilfe-in-Bruessel_397666.html.

266. Press release, ComCo, Weko bewilligt die Übernahme von Carrefour durch Coop unter Auflagen [Weko authorize the acquisition of Carrefour by Coop at Auflagen Conditions] (Mar. 27, 2008), available at <http://www.news-service.admin.ch/NSBSubscriber/message/de/17948>. For further details on the acquisition of Distributis by Coop, see 2007 Antitrust Year in Review, at 87.

267. COMCO, LAW AND POLICY ON COMPETITION 290-337 (2008), available at http://www.weko.admin.ch/dokumentation/00157/index.html?lang=de#sprungmarke0_3; See also Press Release, ComCo, Weko lässt Zusammenschluss von Fenaco und Steffen-Ris Holding AG unter Auflagen zu [Weko concentration of leaves fenaco and Steffen-Ris AG, subject to compliance] (Mar. 13, 2008), available at [HTTP://WWW.NEWS-SERVICE.ADMIN.CH/NSBSUBSCRIBER/MESSAGE/DE/17769](http://WWW.NEWS-SERVICE.ADMIN.CH/NSBSUBSCRIBER/MESSAGE/DE/17769).

268. ComCo Decision No. 32-0178 of July 7, 2008, available at <http://www.weko.admin.ch/aktuell/00162/index.html?lang=de>. See also Press Release, ComCo, Weko beendet Untersuchung gegen Documed AG

dominant position in the market by: (i) imposing unreasonable prices for the publication of this information, and (ii) refusing to enter into contractual negotiations with competitors. Documed subsequently abandoned its practices during the course of the investigation. As a result, and having regard to Documed's cooperation with the investigation, ComCo only imposed a fine of CHF\$50,000 (approximately US\$42,000).²⁶⁹

ComCo also initiated several investigations and procedures in 2008 that are still ongoing. For example, ComCo is investigating whether Swiss importers of French books into Switzerland have a dominant position in the Swiss market and, if so, whether they are imposing unreasonable prices on bookshops.²⁷⁰

On November 12, 2008, the Secretariat of ComCo submitted an application to ComCo to impose sanctions against Switzerland's largest telecommunications provider, Swisscom.²⁷¹ According to the Secretariat, Swisscom is abusing its allegedly dominant position in the market for ADSL services by overpricing ADSL set-up services to the detriment of competing internet service providers.

Finally, on January 31, 2008, ComCo started proceedings against several electric installation companies and trade associations for alleged bid rigging, which is one of ComCo's enforcement priorities.²⁷² ComCo initiated the investigation by conducting dawn raids on the offices of various target companies.

XXX. Taiwan*

A. LEGISLATIVE DEVELOPMENTS

In October 2008, J.C. Tang, Chairman of Taiwan's Fair Trade Commission (the Commission), reported to the Legislature that the Commission has prepared a preliminary draft bill to amend the Fair Trade Law.²⁷³ The proposed amendments, among other things, will aim to: (i) introduce a leniency program, (ii) exempt certain joint research and

[Comco completed investigation against Documed AG] (July 17, 2008), *available at* [HTTP://WWW.NEWS-SERVICE.ADMIN.CH/NSBSubscriber/MESSAGE/DE/20189](http://www.news-service.admin.ch/NSBSubscriber/message/de/20189).

269. Based on the November 25, 2008 noon exchange rate of CHF\$1 = US\$0.84.

270. PRESS RELEASE, COMCO, DIE WETTBEWERBSKOMMISSION ERÖFFNET EINE UNTERSUCHUNG GEGEN DIE VERTREIBER FRANZÖSISCHER BÜCHER IN DER SCHWEIZ [THE COMPETITION COMMISSION OPENED AN INVESTIGATION AGAINST THE DISTRIBUTOR OF FRENCH-LANGUAGE BOOKS IN SWITZERLAND] (MAR. 17, 2008), *available at* <http://www.news-service.admin.ch/NSBSubscriber/message/de/17839t>.

271. Press Release, ComCo, Antrag des Sekretariats in Untersuchung zugestellt [Request the Secretariat to study delivered] (Nov. 13, 2008), *available at* <http://www.news-service.admin.ch/NSBSubscriber/message/de/22795>.

272. Press Release, ComCo, Weko eröffnet Untersuchung betreffend Abreden im Bereich Elektroinstallationen [Comco opened investigation concerning agreements in the electrical field] (Feb. 1, 2008), *available at* <http://translate.google.com/translate?hl=en&sl=de&u=http://www.news-service.admin.ch/NSBSubscriber/message/de/17127&ei=JUOpSd7ZH4jBnQfRhZ3dDw&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3Dhttp://www.news-service.admin.ch/NSBSubscriber/message/de/17127%26hl%3Den%26client%3Dfirefox-a%26rls%3Dorg.mozilla:en-US:official%26hs%3D8ea>.

* The contribution for Taiwan was written by John Lin of Jones Day.

273. The Fair Trade Law, first promulgated on February 4, 1991, became effective on February 4, 1992, and was last amended on February 6, 2002, *available at* <http://law.moj.gov.tw/Eng/Fnews/FnewsContent.asp?msgid=170&msgType=en&keyword=the+fair+trade+law>. The Fair Trade Law is Taiwan's primary competition legislation addressing issues such as monopolistic conduct, combinations (mergers), and concerted actions (cartels).

development activities from the prohibition against concerted actions, (iii) give the Commission search and seizure powers to better facilitate the investigation of concerted actions, and (iv) better differentiate the various types of violations and their respective administrative liabilities to provide more transparency and predictability of enforcement of the Fair Trade Law to the general public.²⁷⁴

B. MERGERS

In Taiwan, 2008 was an active year again for mergers and acquisitions. As of the end of September 2008, the Commission had reviewed filings for a total of fifty-one mergers, twenty-nine of which were allowed to proceed, two of which were prohibited, and the rest of which either remain ongoing or were actually below the filing thresholds.

One notable decision, rendered in April 2008, involved the proposed merger between Cashbox Partyworld Co., Ltd. (Cashbox) and Holiday Group Co., Ltd. (Holiday),²⁷⁵ the two largest audio-visual singing (a.k.a. karaoke or KTV) businesses in Taiwan. The combined businesses were estimated to have a share of over fifty percent in the karaoke market nationwide and an over ninety percent market share in Taipei, the nation's capital. Moreover, the market shares of remaining competitors would not individually exceed one percent. As a result, the Commission decided to prohibit the transaction on the grounds that it would seriously lessen competition to the detriment of consumers and suppliers. The Commission took this view even though the two companies had covenanted, as part of the transaction, not to raise prices or close down operating locations for a period of time after the merger.

C. ANTICOMPETITIVE PRACTICES

The Commission rendered a total of ten administrative decisions against anticompetitive conduct and ninety decisions against unfair trading practices in the first nine months of 2008.²⁷⁶

One of the more noteworthy cases was the Commission's investigation of two domestic airlines, TransAsia Airways Corporation (TransAsia) and Uni Airways Corporation (UniAir).²⁷⁷ The two airlines entered into a "Revenue Pooling Agreement," pursuant to which they agreed to: (i) allocate the number of seats provided per week on the Kaohsiung-to-Magong route and the Kaohsiung-to-Kinmen route, and (ii) distribute the revenue in accordance with certain pre-agreed percentages. In reviewing this agreement, the Commission took into account that TransAsia and UniAir are the only two airline companies providing flight services on the Kaohsiung-to-Magong and Kaohsiung-to-Kinmen

274. FAIR TRADE COMM'N, COMMISSION REPORT TO THE LEGISLATURE ON POLICY EXECUTION AND BUDGETS FOR YEAR 2009 (Oct. 13, 2008), (on file with authors). The Commission has had several internal discussions over the last few years regarding proposed amendments to the Fair Trade Law, but none of these resulted in draft legislation being submitted to the legislature for consideration.

275. Commission Decision Gong-Chie-Tzi No.097002, *available at* <http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=781&docid=1737>.

276. Statistics as of September 30, 2008 (published by the Commission), *available at* <http://www.ftc.gov.tw/EnglishWeb/20000101299912311136.htm>.

277. Commission Disposition Gong-Chu-Tzi No. 097084, *available at* <http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=283&docid=2489>.

routes, and that the two companies had failed to obtain prior approval from the Ministry of Transportation and Communications. The Commission decided that the revenue pooling arrangement had resulted in a lessening of competition between 2003 and 2007 and fined each of the companies NT\$1,000,000 (approximately US \$30,000).

XXXI. Ukraine*

A. LEGISLATIVE DEVELOPMENTS

The Antimonopoly Committee of the Ukraine (the AMC) has prepared draft legislation to amend the thresholds for merger notification in the Law on Protection of Economic Competition, 2001.²⁷⁸ The draft legislation proposes to quadruple the existing thresholds, which are among the lowest of any national competition laws, including the CIS states. The draft legislation is currently being considered by the Cabinet of Ministers in the Ukraine and must be passed by the Ukrainian Parliament before it comes into force.²⁷⁹

B. MERGERS

In October 2007, the AMC prohibited the acquisition by IBE Trade Corporation of IBE Stirol (Ukraine). The AMC found that the proposed transaction would potentially result in the monopolization of the market for mineral fertilizers.²⁸⁰ On the other hand, the AMC approved Bayer HealthCare's acquisition of the assets of Sagemel Group, a leader in the manufacturing and distribution of over-the-counter medications in the Ukraine, despite the significant market share held by the companies in the Ukraine (more than 25 percent).²⁸¹

C. ANTICOMPETITIVE PRACTICES

In October 2008, the AMC fined four advertising companies UAH\$605,000 (approximately US\$92,000) for collusion in responding to a tender for the procurement of services related to a national tourism advertising campaign.²⁸² Among other improprieties, the companies agreed on the terms of their responses to the tender, ensuring that one com-

* The contribution for Ukraine was written by Denis Lysenko and Mariya Nizhnik of Vasil Ksil & Partners.

278. Law No. 22-10 On Protection of Economic Competition ("Economic Competition Act"), 2001, art. 24, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2210-14>.

279. See Anti-Monopoly Comm'n of Ukraine, Law on Amendments to Economic Competition Act—Draft, available at http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=109212&cat_id=45722. See also Press Release, AMC, Antimonopoly Committee Proposes Improved Merger Control for Companies (Aug. 11, 2008), available at http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=109241&cat_id=59331.

280. See Press Release, AMC, Antimonopoly Committee does not allow market monopolization of fertilizer (Oct. 17, 2007), available at http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=79993&cat_id=64110.

281. See Press Release, AMC, About the Decision and Order of the Antimonopoly Committee of the Ukraine (AMC) (Apr. 17, 2008), available at http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=107048&cat_id=91184.

282. See Press Release, AMC, Now on Sale of State Conspirator Wait "Clean" Antitrust Laws (Oct. 7, 2008), available at http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=110591&cat_id=91184.

pany (Grand Print Ukraine, LLC) would win.²⁸³ This is likely the first time that the AMC has imposed a fine on companies for anticompetitive concerted actions in the context of a public procurement.

D. ABUSE OF A DOMINANT POSITION

In March 2008, the AMC fined Kernel-Trade LLC and SSE Suntrade UAH\$60 million (approximately US\$9.1 million) per company for abusing their jointly-held dominant position in the Ukrainian sunflower oil market by imposing a non-justified increase in the wholesale price of sunflower oil.²⁸⁴ This was the largest fine imposed by the AMC since its establishment. The AMC subsequently reduced the fines to UAH\$1 million each (approximately US\$151,000) after the two companies decreased their wholesale prices by almost 15 percent.²⁸⁵

XXXII. United Kingdom*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

In July 2008, the U.K. Office of Fair Trading (the OFT) published its response to the European Commission's White Paper on Damages actions for breach of the EC Antitrust Rules.²⁸⁶ The OFT welcomed the Commission's proposal to adopt final decisions by National Competition Authorities²⁸⁷ (NCAs) or final judgments by review courts²⁸⁸ on Articles 81 and 82 of the EC Treaty as irrefutable proof of infringement in subsequent civil antitrust damages cases relating to the same parties. The OFT considers that providing for such a binding effect is important for providing parties with increased certainty, reducing litigation costs, and reducing burdens on the claimant.

B. MERGERS

In September 2008, the Competition Appeal Tribunal (the CAT) published its judgment on the joint appeals by BSkyB and Virgin against the Competition Commission's report, and the subsequent final decision of the Secretary of State, on BSkyB's acquisition

283. *Id.*

284. See Press Release, AMC, Antimonopoly Committee has 120 MLN. Grn. Culprit high prices on oil (Mar. 3, 2008), available at http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=103769&cat_id=91184. See also Economic Competition Act, No. 12 (2001) (Ukr.), art. 24, available at <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=2210-14>.

285. See Press Release, AMC, Antimonopoly Committee at 2 million. Grn. Increase the Treasury of the State Oil (May 16, 2008), available at http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=107422&cat_id=91184.

* The contribution for United Kingdom was written by Stephen Kon, Dr. Gordon Christian, and Anna Rampling of SJ Berwin LLP.

286. OFFICE OF FAIR TRADING, RESPONSE TO THE EUROPEAN COMMISSION'S WHITE PAPER, DAMAGES ACTIONS FOR BREACH OF THE EC ANTITRUST RULES (2008), available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments/oft_en.pdf.

287. Decision that has been accepted by the addressees (by virtue of their having refrained from appealing the decision) or which has been upheld upon appeal. See *id.*

288. A judgment by a court competent to review the decisions of an EU National Competition Authority under the laws of that authority's Member State. See *id.*

of a 17.9% shareholding in ITV plc.²⁸⁹ The CAT dismissed BSKyB's appeal, holding that the Competition Commission was entitled to conclude that: (i) the acquisition created a relevant merger situation, and (ii) this gave rise to a substantial lessening of competition. The CAT also upheld the Competition Commission's order that BSKyB partially divest its shareholding in ITV to a level below 7.5 percent. But the CAT did order the Competition Commission to reconsider its conclusion that the merger would have no adverse effect on media plurality.

C. CARTELS

In June 2008, custodial sentences were imposed on three UK businessmen found guilty of cartel conduct under the Enterprise Act affecting the global marine hose market.²⁹⁰ These are the first prosecutions that have been brought in the UK under the criminal "cartel offense" provisions of the Enterprise Act since the legislation came into force on June 20, 2003. In addition, all three individuals were disqualified from serving as a company director for between five and seven years under the Company Directors Disqualification Act of 1986, and are subject to confiscation orders under the Proceeds of Crime Act of 2002.

The OFT also concluded early resolution agreements with six companies under investigation for unlawful practices in relation to fixing the retail prices of tobacco products in the UK, leading to total fines of £132.3 million (equivalent to US\$197.5 million).²⁹¹ The use of this early resolution procedure is still a relatively novel one for the OFT, having been applied in only three OFT investigations to date, but it is likely to become more commonplace in the future.

Finally, the first ever representative action brought on behalf of consumers was settled in January 2008. The action was for damages suffered as the result of an agreement to fix the price of certain replica football uniforms during the period 2000 to 2001.²⁹² Despite the claim being settled in the early stages of proceedings, it nevertheless represented an important step in the recognition of the potential for the development of collective actions.

D. ANTICOMPETITIVE PRACTICES

The Competition Commission published its final report on the supply of groceries in the U.K. on April 30, 2008.²⁹³ Whilst the OFT acknowledged that "in many important respects, competition in the UK groceries industry is effective and delivers good outcomes for consumers," it also identified several problems related to the strong market positions

289. *British Sky Broad. Group plc and Virgin Media, Inc. v. Competition Commission et al.*, [2008] CAT 25, available at http://www.catribunal.org.uk/files/1/Judg_revised_BSKyB_1095_Virgin_Inc_1096_290908.pdf.

290. See Press Release, Office of Fair Trading, Three imprisoned in first OFT criminal prosecution for bid rigging (June 11, 2008), available at <http://www.of.gov.uk/news/press/2008/72-08>.

291. See Press Release, Office of Fair Trading, OFT reaches early resolution agreements in tobacco case (July 11, 2008), available at <http://www.of.gov.uk/news/press/2008/82-08>.

292. See Press Release, JJB to make payments to consumers for replica football shirts (Jan. 9, 2008), available at <http://www.which.co.uk/news/2008/01/jjb-to-pay-fans-over-football-shirt-rip-off-128985.jsp>.

293. Competition Comm'n, Market Investigation into The Supply of Groceries in the UK (Apr. 30, 2008), available at http://www.competition-commission.org.uk/rep_pub/reports/2008/538grocery.htm.

held by large grocery retailers: (i) the use of restrictive covenants and/or exclusivity arrangements to prevent entry by competitors, and (ii) the ability to transfer excessive risk and unexpected costs to their suppliers.²⁹⁴ The supermarkets concerned are now in lengthy consultation with the Competition Commission over the remedies that it has proposed to address these issues.

Other industries in which parties are under investigation include construction (alleged bid rigging),²⁹⁵ energy (abuse of dominance in Scotland),²⁹⁶ and airports (restrictive practices related to common ownership of airports).²⁹⁷

XXXIII. United States*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

On September 8, 2008, the DOJ released its report on unilateral conduct under section 2 of the Sherman Act (the Report).²⁹⁸ The Report examines issues such as dominance, general conduct standards, specific types of unilateral conduct, remedies, and international cooperation and convergence in dealing with unilateral conduct. Key recommendations in the Report include:

- adopting a market share safe harbor for companies with less than a fifty percent market share, and an inference of monopoly power for market shares over sixty-six percent;²⁹⁹
- overruling the per se prohibition against tying;³⁰⁰ and
- that exclusive dealing be per se legal if less than 30 percent of existing customers or distribution is foreclosed.³⁰¹

B. MERGERS

Several notable transactions were cleared in 2008 with minimal remedies or without any conditions. Included among these was the DOJ's approval of Delta Air Lines' acquisition of Northwest Airlines, clearing the way for the creation of the world's largest air car-

294. *Id.*

295. See Press Release, Office of Fair Trading, OFT issues statement of objections against 112 construction companies (Apr. 17, 2008), available at <http://www.of.gov.uk/news/press/2008/52-08>.

296. See Information Note, OFGEM, OFGEM launches Competition Act investigation into Scottish Power Limited and Scottish and Southern Energy plc (Apr. 8, 2008), available at <http://www.ofgem.gov.uk/Media/PressRel/Documents1/Ofgem%2012.pdf>.

297. COMPETITION COMMISSION, BAA Airports Market Investigation: Provisional Findings Report (Aug. 20, 2008), available at http://www.competition-commission.org.uk/inquiries/ref2007/airports/pdf/prov_find_report.pdf.

* The contribution for the United States was written by Fiona Schaeffer, Christopher Roberts, Jonathan Sickler, Claire Webb, and Robin Cook of Weil, Gotshal & Manges, LLP, New York.

298. U.S. DEPT OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>. Interestingly, three of the four sitting FTC Commissioners jointly issued a statement disagreeing with much of the Report shortly after it was issued; the FTC Chairman issued a separate statement. The FTC statements are available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.

299. *Id.* at 24, 30.

300. *Id.* at 90.

301. *Id.* at 141.

rier,³⁰² and the DOJ's clearance of Sirius Satellite Radio's acquisition of XM Satellite Radio, representing a combination of the only two satellite radio service providers.³⁰³

Other transactions were challenged. For example, the DOJ challenged the proposed JBS S.A./National Beef Packing Company deal, which would combine two of the largest four U.S. beef packers.³⁰⁴

In the *Whole Foods* case, the U.S. Court of Appeals for the D.C. Circuit reversed a lower court decision denying the FTC's request for a preliminary injunction to block Whole Foods' acquisition of the Wild Oats grocery chain.³⁰⁵ The D.C. Circuit held that the lower court had erred by defining the relevant market too broadly. The Court placed significant weight on pricing and other economic data, as well as the companies' internal documents and studies, to show that there was a unique market for premium, natural, and organic supermarkets.

C. CARTELS

The Antitrust Division of the DOJ obtained criminal plea agreements in several major cartel investigations, including large fines for corporations and fines and prison sentences for culpable executives. In November 2008, for example, the Division announced guilty pleas by three manufacturers of liquid crystal display (LCD) panels, who agreed to pay a total of US\$585 million for conspiring to fix LCD panel prices over a five-year period.³⁰⁶ The largest of these fines (US\$400 million), imposed on LG Display Co., Ltd. is the second-largest criminal fine ever imposed by the Division.³⁰⁷ The Division's investigation into a conspiracy to fix rates for international air cargo shipments, which began in 2007 in coordination with numerous foreign enforcement agencies, led to guilty pleas by several airlines and individual executives.³⁰⁸ The Division also obtained guilty pleas from participants (including individuals) in the marine hose cartel.³⁰⁹

In November 2007, a district court dismissed criminal indictments against Stolt-Nielsen S.A. and two company executives on the grounds that the amnesty agreement between

302. Press Release, U.S. Dep't of Justice, Statement of the Department of Justice's Antitrust Division On Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airline Corporation (Oct. 29, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/238849.htm.

303. Press Release, U.S. Dep't of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holding Inc.'s Merger With Sirius Satellite Radio Inc. (Mar. 24, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/231467.htm.

304. *United States v. JBS S.A.*, No. 08 Civ. 5992 (N.D. Ill. filed Oct. 20, 2008), available at <http://www.usdoj.gov/atr/cases/f238300/238388.htm>. As of this writing, the litigation is ongoing.

305. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028 (D.C. Cir. 2008).

306. Press Release, U.S. Dep't of Justice, LG, Sharp, Chunghwa agree to plead guilty, pay total of US\$585 million in fines for participating in LCD price-fixing conspiracies (Nov. 12, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/239349.htm.

307. Fines were also imposed on Sharp Corp. (US\$120 million) and Chunghwa (US\$65 million).

308. Fines have been imposed on British Airways plc (US\$300 million), Qantas Airways Limited (US\$61 million), Japan Airlines (US\$110 million), SAS Cargo Group A/S (US\$52 million), Cathay Pacific Airways Limited (US\$60 million), Martinair Holland N.V. (US\$42 million), and Air France-KLM (US\$350 million). Individual employees of British Airways, Qantas, and SAS have also pleaded guilty and agreed to penalties including fines and jail time.

309. Press Release, U.S. Dep't of Justice, Italian marine hose manufacturer and marine hose executives agree to plead guilty to participating in worldwide bid-rigging conspiracy (July 28, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/235515.htm.

Stolt and the Antitrust Division barred any criminal prosecution.³¹⁰ In light of the district court's dismissal of the indictments, the Division announced that it was dropping its case.³¹¹ This brought to an end the five-year battle between the Antitrust Division and Stolt-Nielsen over the terms of the amnesty agreement, which commenced when the Division took the extraordinary step in 2003 of attempting to revoke Stolt's amnesty for alleged misrepresentation.

D. MONOPOLIZATION

There were several significant decisions under section 2 of the Sherman Act for monopolization or attempt to monopolize. Of particular note was the D.C. Circuit Court of Appeal's decision in *Rambus Inc. v. FTC*,³¹² where it held that the defendant's failure to disclose the ownership of a patent to a standard-setting organization of which the defendant was a member did not cause competitive harm, even though this allowed the defendant to acquire monopoly power over four technologies. The Court found that there was not sufficient evidence that the standard-setting body would not have used the defendant's patent but for the deception, and that there was thus no basis to impose antitrust liability. The Court left open the question of whether deception could constitute monopolization when there is a proven anticompetitive effect.

XXXIV. Vietnam*

A. INTRODUCTION

The Law on Competition was passed on December 3, 2004 and took effect on July 1, 2005.³¹³ The law is comprehensive and addresses economic concentrations and unfair practices, as well as practices in restraint of competition. The key enforcement bodies are the Competition Council, which is responsible for adjudicating complaints of restrictive practices, and the Vietnam Competition Administration Department (VCAD), which is the investigatory branch with responsibility for the review of mergers, exemption applications, and the sanctioning of acts that are considered unfair competition.

In addition to the law itself, detailed implementation guidelines have been produced dealing with issues relating to the Competition Council and providing further details on the provisions of the Competition Act.

B. CAPACITY BUILDING/ADVOCACY

Until recently, it appeared that the primary focus of VCAD was on capacity building, advocacy, and consulting activities designed to increase awareness of competition law within Vietnam. VCAD and the Ministry of Industry and Trade have received considera-

310. Press Release, U.S. Dep't of Justice, Justice Department will not appeal Stolt-Nielsen decision (Dec. 21, 2007), *available at* http://www.usdoj.gov/atr/public/press_releases/2007/228788.htm.

311. *Id.*

312. *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

* The contribution for Vietnam was written by David Fruitman of DFDL Mekong.

313. ORDER NO. 23/2004/L - CTN OF DECEMBER 14, 2004 THE PROMULGATION OF LAW, *available at* http://www.adb.org/documents/others/ogc-toolkits/competition-law/documents/vn_order_23_2004.pdf.

ble international support for capacity-building activities. For example, a Letter of Intent relating to capacity building was signed with the Netherlands in 2008.³¹⁴

On June 4, 2008, VCAD signed a Memorandum of Understanding with the Health Inspectors to enhance enforcement of competition law in the health sector in Hanoi. The main terms of the MOU are available on VCAD's web site.³¹⁵

VCAD has also recently been involved in "outreach" seminars dealing with issues related to control of economic concentrations in Hanoi and Ho Chi Minh City.³¹⁶

VCAD faces considerable difficulties in these efforts as Vietnam has not fully transitioned to a market economy and government agencies and industry groups still frequently take measures to protect against "unhealthy competition" and promote co-operative activities to support specific industrial sectors or the economy as a whole. Earlier this year, for example, the Vietnam Banking Association, the State Bank of Vietnam, and even the Ministry of Industry and Trade were all involved in activities to regulate interest rates and promote programs that raised competition law concerns.³¹⁷

C. INVESTIGATIONS

While VCAD has received competition complaints, it has provided little information with respect to investigations or remedies either on its website or in response to enquiries. Of particular interest, however, is the opening of an investigation into the actions of sixteen insurance companies, after they raised car insurance premiums.³¹⁸ Additionally, it is possible that VCAD has opened an investigation into a reported agreement by members of the Vietnam Steel Association to fix prices. This has been widely reported in Vietnam-related news services,³¹⁹ although no information has been provided on VCAD's website as of the date of writing and VCAD declined to provide any information with respect to this matter other than to confirm that it was collecting information.³²⁰

314. See Press Release, Vietnam Competition Administration Department, The Ministry of Industry and Trade of Vietnam and The Ministry of Foreign Affairs of The Netherlands Signing of Letter of Intent on Cooperation on Capacity Building in The Field of Competition Law (Mar. 17, 2008), available at [http://www.qlct.gov.vn/Web/Content.aspx?distid=676&lang=en-US](http://www qlct.gov.vn/Web/Content.aspx?distid=676&lang=en-US).

315. See Press Release, Vietnam Competition Administration Department, VCAD and Health Inspectors signing MOU on cooperation in enforcement of competition law in health sector (Sept. 17, 2008), available at <http://www.qlct.gov.vn/Web/Content.aspx?distid=970&lang=en-US>.

316. See Press Release, Vietnam Competition Administration Department, Seminar "Economic concentration - practices in Vietnam and international experience" in Hochiminh city (Nov. 6, 2008), available at <http://www.qlct.gov.vn/Web/Content.aspx?distid=1245&lang=en-US>.

317. See Press Release, VietNamNet Bridge, Banks Not Allowed to Offer Promotion Programmes (Apr. 28, 2008), available at <http://english.vietnamnet.vn/biz/2008/04/780558/>.

318. See Press Release, Global Competition Review, Vietnam investigates insurers (Dec. 1, 2008), available at <http://www.globalcompetitionreview.com/news/article/12115/Vietnam-investigates-insurers>.

319. See Press Release, ThanhNien News, Steel Price Fix under Antitrust Probe (Oct. 20, 2008), available at <http://www.thanhniennews.com/business/?catid=2&newsid=42994>.

320. It is possible that, despite the implication of the English language reports, VCAD has not yet actually begun a preliminary investigation. For example, it appears that the Vietnamese-language *Vietnam Economic Times* reported that VCAD is only weighing the option of opening an investigation.