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International Antitrust

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International Antitrust

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2005 has been another important year for antitrust developments around the globe. In this article, the activities are broken down by broad category, generally, and include legislative, judicial, and enforcement actions on a country or regional economic unit integration basis, in alphabetical order.

I. Developments in Argentina^a

A. LEGISLATIVE INITIATIVES

An August 17, 2005 amendment to Antitrust Law 25,156 proposes to reduce the waiting period for merger clearance by the forthcoming Defense of Competition Tribunal¹ from forty-five to forty days. In addition, the amendment would grant the Ministry of Economy

*The 2005 Year in Review of the International Antitrust Committee of the ABA International Law Section was coordinated and edited by Fiona A. Schaeffer, Christopher V. Roberts, Idit Froim, Eric S. Hochstadt, and Marisa A. Leto of the New York Office of Weil, Gotshal & Manges LLP. Fiona is a partner in the New York Office of Weil, Gotshal & Manges LLP and is currently serving as a Vice-Chair of the International Antitrust Committee. Individual contributors will be referred to at the discussion of each relevant jurisdiction.

a. The contribution for Argentina was provided by Alfredo L. Rovira of Brons & Salas.

1. According to Antitrust Law 25,156, a new antitrust agency called the *Tribunal de Defensa de la Competencia* will be created. To date, however, the members of the Tribunal have not been appointed. The amendment proposes to nominate to the first Tribunal current members of the Argentina Antitrust Commission, which has been in charge of enforcing Antitrust Law 25,156, and two additional members nominated by the Executive Branch.

and Production authority to overrule, on national interest grounds, future merger decisions by the Tribunal in certain circumstances.

B. CARTEL ENFORCEMENT

By mid-2005, the Antitrust Commission closed antitrust investigations in the medical patient oxygen² and cement sectors.³ Both concluded with the application of severe penalties and are currently being appealed by the parties.

C. OTHER ANTITRUST INVESTIGATIONS

The Commission conducted investigations into whether anticompetitive conduct took place in several industries. In the supply of liquid natural gas the Commission found that the market has been adequately restructured to include a variety of suppliers, but should be subject to permanent scrutiny.⁴ In the tobacco industry the Commission found that pricing practices were generally supervised by the provincial governments. Since in some instances distortions to a fair and competitive market were detected, the Commission concluded that it would closely monitor future practices of the various market participants.⁵ In the urea supply for the agro-industry, the Commission's investigation focused on production and wholesale distribution practices in this industry from 2001 to 2004. It also scrutinized their relationships with natural gas suppliers.⁶ Finally, in studying production and distribution of round steel for construction, the Commission found that the domestic and global level steel industry is highly concentrated, with the ten largest global companies having 27 percent of production. It resolved to start summary proceedings to review price setting processes in the relevant domestic markets (e.g., distribution channels used by Acindar, the main domestic steel producer) in order to determine whether anticompetitive practices have occurred.⁷

II. Developments in Australia^b

A. LEGISLATIVE INITIATIVES

The Federal Parliament considered, but did not enact, a package of amendments to the Trade Practices Act 1974 that was first recommended in 2003.⁸ The bill provides additional

2. See Antitrust Commission Ruling #510 (July 8, 2005) in Dossier no. 064-011323/2001 (C.697) SV-EV/HS Minister of Economy and Production.

3. See Antitrust Commission Ruling #513 (July 25, 2005) in Dossier no. 064-12896/99 (C.506) MD-SB-FB-MP/HS former Minister of Economy and Public Works and Services.

4. See Antitrust Commission Ruling (Aug. 10, 2004). Scrutinized companies include: Total Austral SA, PBB Polisar SA, YPF SA, Shell CAPSA, Esso Argentina SRL, Pluspetrol SA, Pioneer Natural Resources, Petrobras SA, EG3 SA, and Pan American Energy LLC.

5. The parties involved have not been notified of a formal closing of this dossier.

6. See Antitrust Commission Ruling (Apr. 28, 2005). Scrutinized companies include the following: Profertil SA, Petrobras Energía SA, Agroservicios Pampeanos SA, Bunge Argentina SA, Cargill SA, Nidera SA, YPF SA, Agar Cross SA, Agrefert Argentina SA, Villa Nueva SA, and Pan American Energy LLC.

7. See Antitrust Commission Ruling (July 8, 2005). Scrutinized companies include the following: Acindar S.A., Sipar Aceros S.A., Acerbgrag S.A. and Aceros Zapla S.A.

b. The contribution for Australia was provided by Ezekiel Solomon, Richard Alcock, and Fiona Crosbie of the Sydney Office of Allens Arthur Robinson.

8. See Trade Practices Legislation Amendment Bill (No 1) 2005, *available at* [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/4DDEE38B459FCF6ACA256FB7001E2560/\\$file/05021b.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/4DDEE38B459FCF6ACA256FB7001E2560/$file/05021b.pdf).

avenues for merging parties seeking approval for transactions;⁹ proposes new joint venture defenses to some of the Act's per se prohibitions, and increases the maximum penalties for breaches of the antitrust provisions of the Act. The Government also foreshadowed the introduction of criminal penalties, including jail terms, for serious cartel behavior.¹⁰ It is unclear when these initiatives will next be considered by Parliament.

B. CARTELS AND ENFORCEMENT

In 2005, the Australian Competition and Consumer Commission introduced a new Immunity Policy for Cartel Conduct, replacing the policy that had operated from 2003.¹¹ The procedures for seeking immunity have been amended to encourage early applications. Unlike the previous policy, immunity is now available for those applicants satisfying the conditions unless the Commission has received written legal advice that it has sufficient evidence to commence proceedings against the cartel. Significantly, applicants for immunity will now be able to place a marker with the Commission to secure their place in the queue for immunity while they make internal inquiries to satisfy themselves that there has actually been a breach of the Act. The policy will operate alongside the Commission's existing cooperation policy that provides that wrongdoers who do not qualify for immunity may nevertheless qualify for lenient treatment (such as reduced penalties) if they are prepared to cooperate with the Commission.

C. MERGERS

In May 2005, the Australian Competition Tribunal published its reasons for authorizing a proposed alliance between Qantas and Air New Zealand, the two major airlines in Australia and New Zealand, overturning the Commission's prior decision.¹² The Tribunal endorsed a total welfare approach: it is legitimate to take into account benefits that flow not only to the ultimate consumers of the product but also to the parties and their shareholders. The Tribunal concluded that there would be little anticompetitive detriment flowing from the alliance because of the constraints imposed by two other competitor airlines.

D. MISUSE OF MARKET POWER AND EXCLUSIONARY PROVISIONS

In July 2005, the Federal Court held that a supplier of medical products had misused its market power in one instance in bundling two types of medical fluids in response to requests for tenders by state government purchasing bodies.¹³ The Court also held that the supplier

9. The bill would introduce a formal system for obtaining clearance from the Australian Competition and Consumer Commission that, unlike the current, informal system, would afford immunity from third-party action. It would also allow merging parties to apply directly to the Australian Competition Tribunal for authorization.

10. Press Release, Treasurer of the Commonwealth of Australia, Criminal Penalties for Serious Cartel Behaviour (Feb. 2, 2005) *available at* <http://www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp>.

11. See AUSTRALIAN COMPETITION AND CONSUMER COMMISSION, IMMUNITY POLICY FOR CARTEL CONDUCT (Aug. 26, 2005), <http://www.accc.gov.au/content/index.phtml/itemId/708758>.

12. See Qantas Airways Limited [2004] ACompT 9, Australian Competition Tribunal, Oct. 12, 2004, *available at* <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/ACompT/2004/9.html>.

13. See Australian Competition & Consumer Comm'n v. Baxter Healthcare Pty Ltd. [2005] FCA 581, *available at* http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/581.html.

had engaged in exclusive dealing for the purpose of lessening competition in the market for one of the bundled products. Despite these findings, the supplier escaped liability on the ground that it enjoyed derivative crown immunity because its customers were state government bodies immune from the operation of the Act and to hold otherwise would impair the ability of such customers to contract.

III. Developments in Brazil^c

A. LEGISLATIVE REFORM

Brazilian competition authorities (the Administrative Council for Economic Defense (CADE), the Secretariat of Economic Law (SDE), and the Secretariat for Economic Monitoring) have prepared a bill, *inter alia*, to change the institutional framework by creating a new agency called the Brazilian System of Competition Defense to replace the SDE.¹⁴ The bill also aims to adopt a pre-merger control system and to establish and enhance the institutional powers of CADE's investigative arm for cartel prosecution. It is expected that the bill will be enacted during 2006.

B. MERGER ACTIVITY

CADE has limited the scope of Brazil's pre-merger control system for international transactions. Before ADC Telecommunications' acquisition of Krone in January 2005, a filing was mandatory for all transactions involving companies that had a minimum worldwide turnover of the amount set by Law 8,884/94 (R\$400 million, approximately US\$170,000,000). But since CADE's decision in the ADC/Krone transaction, it has required a merger filing only if at least one of the parties has turnover in excess of R\$400 million in Brazil.

In a final decision on an administrative appeal by Nestlé, CADE confirmed its original decision denying clearance for Nestlé's acquisition of the Brazilian chocolate producer Garoto. CADE has required the parties to undo the transaction by following specified measures. The case is on appeal and, in the interim, an injunction has been issued suspending CADE's ruling.¹⁵

C. DEVELOPMENTS IN CARTEL ENFORCEMENT

In 2005, Brazilian authorities investigated the gravel industry in collaboration with Brazilian Federal Police, employing enforcement tools such as wire tapping and dawn raids. CADE condemned eighteen mining companies and fined them 15-20 percent of their respective turnovers, concluding that they had agreed to allocate the market, fix prices, and rig bids.¹⁶

c. The contribution for Brazil was provided by Mário Nogueira and Ricardo Inglês de Souza of the São Paulo office of Demarest e Almeida.

14. Bill No. 5877/2005, Sept. 19, 2005, *available at* http://www2.camara.gov.br/proposicoes/chamadaExterna.html?link=http://www.camara.gov.br/sileg/prop_detalhe.asp?id=299747.

15. See Ordinary Judicial Action No. 2005.34.00.015042-8, 4th District Court of the Federal Justice Court of the Federal District, *available at* <http://processual-df.trf1.gov.br/Processos/ProcessosSecaoOra/ConsProcSecaoopro.php?SECAO=DF&f=1&proc=200534000150428&data=091449> (last visited Dez. 15, 2005).

16. See Administrative Process No. 08012.002127/2002-14, *available at* http://www.cade.gov.br/ASPintranet/andamento.asp?pro_codigo=2434 (last visited Feb. 27, 2006).

In September 2005, CADE fined three of the largest steel companies in Brazil (Siderurgia Barra Mansa, Companhia Siderúrgica Belgo-Mineira, and Gerdau) up to 7 percent of their 1999 turnover.¹⁷ The companies, which constitute about 94 percent of the relevant market, were found guilty of price fixing and imposing abusive vertical restraints on distributors.

Finally, in October 2005, CADE concluded an investigation, initiated in 1999, against twenty major pharmaceutical laboratories for allegedly conspiring to eliminate the market for generic medicines in Brazil.¹⁸ CADE fined those companies 1 percent of their 1998 turnovers, concluding that there was an attempt to cartelize the market, albeit an unsuccessful one. Janssen-Cilag was fined 2 percent of its 1998 turnover because it was viewed as the cartel leader.

IV. Developments in Canada^d

A. LEGISLATIVE REFORM

Canada's Parliament was dissolved in November 2005 ahead of a general election in January 2006. Amendments to the Canadian Competition Act¹⁹ proposed by the Minister of Industry in November 2004, and further amendments proposed in October 2005,²⁰ were still under debate at the time of dissolution and, as a result, will not become law unless they are reintroduced in a subsequent Parliament.

B. EFFICIENCIES

The report of an advisory panel of business experts on efficiencies was publicly released on October 31, 2005,²¹ recommending that an efficiencies defense be retained and that the Canadian Competition Bureau give more consideration to efficiency gains as a factor in its merger reviews.

C. MERGERS

In April 2005, the Bureau released a backgrounder summarizing its review of a recent mobile wireless merger and articulating its views on coordinated behavior and maverick

17. See Administrative Process No. 08012.004086/2000-21, available at http://www.cade.gov.br/ASPIntranet/andamento.asp?pro_codigo=1637 (last visited Feb. 27, 2006).

18. See Administrative Process No. 08012.009088/1999-48, available at http://www.cade.gov.br/ASPIntranet/andamento.asp?pro_codigo=1554 (last visited Feb. 27, 2006).

d. The contribution for Canada was provided by Peter Franklyn and Steve Sansom of Osler, Hoskin & Harcourt LLP.

19. Competition Act, R.S.C. 1985, c. C-34, as amended; see also An Act to amend the Competition Act and to make consequential amendments to other Acts, Bill C-19 (2004), available at http://www.parl.gc.ca/common/Bills_House_Government.asp?Language=E&Parl=38&Ses=1 (last visited Feb. 13, 2006); Press Release, Industry Canada, Government Moves to Strengthen the Competition Act with Amendments to Bill C-19 (Oct. 27, 2005), available at <http://www.ic.gc.ca/cmb/welcomeic.nsf/ddb0aecf65375eb685256a870050319e/85256a5d006b9720852570a700552e3d!OpenDocument> [hereinafter Government Moves].

20. Government Moves, *supra* note 19.

21. See COMPETITION BUREAU, REPORT OF THE ADVISORY PANEL ON EFFICIENCIES (Aug. 2005), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1954&lg=e>; see also Press Release, Competition Bureau, Competition Bureau Releases Report on Consultations with International Competition Authorities (Apr. 29, 2005), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1305&lg=e>.

theory.²² The Bureau found that there were important market conditions and factors that effectively constrained coordination, including rapid growth of the mobile wireless services market, rapid and frequent product and service innovation, and a history of intense rivalry.

In October 2005, the Bureau issued a draft Information Bulletin on Merger Remedies in Canada for public comment.²³ The draft bulletin (likely to be finalized in 2006) is intended to reflect the Bureau's approach to remedies, including a preference for structural (as opposed to behavioral) remedies, short divestiture deadlines, coordination with non-Canadian antitrust authorities, no minimum price provisions, and, when necessary, the divestiture of crown jewels.

In May 2005, the Competition Tribunal rescinded a consent agreement in connection with the acquisition by RONA Inc. of Reno-Dept Inc on the basis that the planned opening of a Home Depot in Sherbrooke rendered the consent agreement no longer necessary.²⁴

D. CRIMINAL MATTERS

In October 2005, the Bureau issued a series of responses to frequently asked questions (FAQ) about its immunity program.²⁵ The FAQ describes the Bureau's marker process that provides the first immunity applicant with a limited period of time, usually thirty days, to supply details of the illegal activity, the effects in Canada, and supporting evidence. The FAQ also indicates that immunity applicants will be required to disclose all competition law offenses, or risk disqualification from eligibility for immunity and possible criminal obstruction charges.

E. CIVIL MATTERS

In February 2005, the Tribunal dismissed the Commission's abuse of dominance case against Canada Pipe Company Limited.²⁶ This was the first contested abuse of dominance case that the Bureau lost, and the first finding by the Tribunal that a practice of exclusive dealing by a dominant firm (Canada Pipe had an 80-90 percent market share) was not anticompetitive. The Bureau has appealed the decision to the Federal Court of Appeal.²⁷

In a long-running patent infringement dispute between Eli Lilly and Apotex Inc., a Federal Court determined that an assignment of intellectual property that is authorized by the Patent Act cannot constitute an undue lessening of competition under the Competition Act.²⁸

22. See Competition Bureau, Acquisition of Microcell Telecommunications Inc. by Rogers Wireless Communications Inc. (Apr. 2005), <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=257&lg=e>.

23. See Press Release, Competition Bureau, Competition Bureau Seeks Comments on Draft Merger Remedy Bulletin (Oct. 19, 2005), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1983&lg=e>.

24. See *Rona Inc. v. Canada (Comm'r of Competition)* [2005] 42 C.P.R. (4th) 53.

25. See Competition Bureau, Immunity Program Responses to Frequently Asked Questions, <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1980&lg=e> (last updated Oct. 18, 2005). The Bureau is currently reviewing its immunity program and plans to initiate public consultations in the near future.

26. Press Release, Competition Bureau, Competition Bureau Appeals Decision in Canada Pipe Case (Mar. 7, 2005), available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=192&lg=e>.

27. See *Canada (Comm'r of Competition) v. Canada Pipe Co. Ltd.* [2005], 40 C.P.R. (4th) 453.

28. See *Eli Lilly & Co. v. Apotex Inc.* [2004], 35 C.P.R. (4th) 155 (F.C.C.), *rev'd*, [2005] 35 C.P.R. (4th) 155. Apotex appealed the federal court decision to the Federal Court of Appeal and the Commissioner intervened on the appeal. On November 2, 2005, the Federal Court of Appeal allowed Apotex's appeal.

V. Developments in Chile^e

A. NEW LEGAL FRAMEWORK

The Antitrust Act²⁹ underwent significant amendments through the enactment of Law No. 19,911 of 2004 (2004 Amendment),³⁰ effective February 12, 2004, which created, *inter alia*, the *Tribunal de Defensa de la Libre Competencia* (Antitrust Court). The goal of the 2004 Amendment was to strengthen the agency in charge of resolving antitrust matters. The former *Comisiones Preventivas* (preventive commissions) and *Comisión Resolutoria* (resolution commission) (collectively, the Antitrust Commissions) were replaced by the Antitrust Court that now exercises the antitrust preventive and consultation functions previously held by the *Comisiones Preventivas* and the antitrust judicial and dispute-resolving functions previously held by the *Comisión Resolutoria*. The 2004 Amendment eliminated the Antitrust Attorney General's technical and administrative assistance to the Antitrust Commissions (now the Antitrust Court), leaving the Attorney General solely with the authority to investigate and prosecute violations of competition law. The 2004 Amendment also eliminated criminal antitrust penalties, but increased the potential amount of fines, and made directors and managers jointly and severally liable for corporate antitrust violations.

B. ANTITRUST COURT DECISIONS

During its first year, the Antitrust Court decided thirty adversarial cases and ten non-adversarial matters.³¹ The Court's most important rulings relate to horizontal mergers and acquisitions and abuse of a dominant position. The Court has maintained the criteria previously established by the Antitrust Commissions for review of horizontal integration and abuse of dominance cases, under which such conduct must be analyzed under the rule of reason.³²

In most cases, the Antitrust Court has considered the relevant geographic market to be no broader than the Chilean national territory. But in Judgment No. 10/2005, regarding the commercialization of rose hips in Chile and abroad,³³ the Court found that the relevant

e. The contribution for Chile was provided by Claudio Lizana, Marcos Ríos, and Lorena Pavic of Carey Y Cía.

29. Decree Law No. 211 of 1973, as amended.

30. Law No. 19,911, which established the Antitrust Court, was published on November 14, 2003 and is currently effective since February 12, 2004.

31. An adversarial proceeding deals with the review and resolution of adversarial matters, as requested by private parties or by the Antitrust Attorney General. In non-adversarial proceedings, the Antitrust Court issues general instructions and proposes the amendment, enactment, or repeal of legal rules and/or regulations.

32. See Resolución No. 01/2004, Consulta sobre fusión de Metrópolis Intercom S.A. y VTR S.A. [Resolution No. 01/2004, Merger of Metrópolis Intercom S.A. and VTR S.A.]. The Court approved the transaction based on the cost reductions that the merger would generate in allowing the merged company to expand its network in order to provide cable TV service and other related services (i.e., broadband connections and phone services) and to reach unattended customers. See also Resolución No. 02/2005, Consulta sobre toma de control de BellSouth Comunicaciones S.A. y BellSouth Inversiones S.A. por parte de Telefónica Móviles S.A. de España [Resolution No. 02/2005, Acquisition of BellSouth Chile Inc. and BellSouth Chile Holdings Inc. (together BellSouth) by Telefónica Móviles S.A.]. The Court approved the transaction based on the efficiencies that the integration would create, despite the existence of entry barriers in a highly concentrated market.

33. Sentencia No. 10/2005, Avocación en Recurso de Reclamación de Coesam S.A. contra el Dictamen No. 1.248 de la Comisión Preventiva Central, [Judgment No. 10/2005, *Recurso de Reclamación* filed by Comercializadora y Envasadora Santa Magdalena S.A. before the Antitrust Court against Ruling No. 1284 issued on Jan. 30, 2004 by the former Preventive Commission regarding the commercialization of rose hips in Chile and abroad].

geographic market was international, because the product was exported to several countries. The Court has also considered the existence of barriers to market entry and growth (market contestability). Chilean antitrust authorities have usually held that the risks of monopolistic abuses are considerably lower in markets without any legal or natural barriers to entry and horizontal mergers are viewed more favorably in growing markets.³⁴ In Resolution No. 01/2004, Merger of Metrópolis Intercom S.A. and VTR S.A.,³⁵ the Court concluded that sunk costs and irrecoverable investments were clear barriers to entry. The Antitrust Court has also considered market structure, concentration levels, and actual and potential efficiencies of the operation.

The Antitrust Court has given special attention to anti-cartel enforcement procedures and collusion cases. In Judgment No. 18/2005, the Court absolved certain fuel distribution firms that had been accused of tacit coordination, finding no relevant evidence of collusion.³⁶ Finally, the greater specialization and technical knowledge of the Antitrust Court has improved its efficiency: the average timeframe to resolve an antitrust claim or request has been reduced from approximately eighteen months under the Antitrust Commissions to eight months.

VI. Developments in China^f

A. INTRODUCTION

Provisions addressing competition issues in China remain scattered among several laws and regulations. Some provisional rules have been issued in recent years to provide interim regulation of specific areas of antitrust and competition issues. But the forthcoming Anti-Monopoly Law is expected to bring broader coverage and clarity.

B. INTERIM MERGER CONTROL REGULATION

China's current antitrust merger review is generally perceived as rudimentary—essentially a set of procedural rules on top of the foreign investment laws. The current regime, which is China's first, was promulgated as part of the Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.³⁷ The Provisional Rules regu-

34. See, e.g., Resolution No. 01/2004; Resolution No. 02/2005.

35. Resolución No. 01/2004, Consulta sobre fusión de Metrópolis Intercom S.A. y VTR S.A. [Resolution No. 01/2004, Merger of Metrópolis Intercom S.A. and VTR S.A.]; see also Judgment No. 09/2005, Association of Suppliers v. Supermarket Chains, *Sentencia No. 09/2004, Consulta de AGIP A.G. sobre conducta de Supermercados Líder en perjuicio de proveedores y consumidores en general*.

36. *Sentencia No. 18/2005, Requerimiento del Fiscal Nacional Económico en contra de empresas distribuidoras de combustibles líquidos* [Judgment No. 18/2005, Antitrust Attorney Gen. v. Fuel Distrib. Cos.] (Rendered on June 10, 2005, aff'd by the Supreme Court on Oct. 26, 2005). Two other cartel cases are currently pending before the Antitrust Court. One case involves five private health insurance companies accused of collusion to fix health plan prices, and the other involves certain medical oxygen providers accused of market distribution and price fixing agreements.

f. The contribution for China was provided by Jack J.T. Huang, John Lin, and Dannie Liu of the Taipei Office of Jones Day.

37. Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (Apr. 2003). For a summary of the principal contents of the rules, see <http://www.sfsk.com.hk/English/watch/2003/20030412domesticenterprises.htm>.

late not only onshore mergers, but also notably require reporting of proposed offshore mergers if any of five conditions are met.³⁸ Since the term overseas merger (i.e., offshore transaction) is not defined in the Provisional Rules, the reporting requirements for offshore transactions appear to require notification of transactions involving one party with a substantial China presence even if the acquisition bears no relationship to China.

C. INTERIM MONOPOLISTIC PRICING REGULATION

The Provisional Rules for Prevention of Monopoly Pricing lay down the first Chinese principles for prohibiting abuses of market dominance.³⁹ These Provisional Rules, however, leave various important terms ambiguous or undefined and have not been actively enforced. For example, the key term market dominance is undefined, and possession of market dominance apparently is to be inferred from market share in the relevant market, substitutability of relevant products, and the existence and extent of entry barriers to new entrants. Such ambiguities could lead to undesirable and excessive government intervention on antitrust grounds, even where no genuine competitive issue exists.

D. DRAFT ANTI-MONOPOLY LAW

In October 2005, more than ten years after drafting began in 1994, the draft Anti-Monopoly Law was again set for submission to the National People's Congress for formal legislative review, with the hope of becoming law in 2006. The draft law seeks to address four types of anticompetitive conduct: monopoly agreements, abuses of market dominance, mergers, and, uniquely for China, administrative monopoly. Unlike the Provisional Rules, the draft law makes no distinction between domestic and foreign conduct.

In the latest widely circulated revised draft of the Anti-Monopoly Law (July 27, 2005), the proposed definition of relevant market now incorporates both relevant product and geographic markets.⁴⁰ Horizontal agreements, vertical (resale price-fixing) agreements, and bid-rigging would be prohibited unless specified exemptions apply.⁴¹ Proposed prohibited abuses of dominant market position include, *inter alia*, some controversial types of conduct such as setting monopoly prices and also predatory pricing, defined as pricing below cost.⁴² Proposed concentrations (mergers) meeting certain threshold levels,⁴³ which are based on assets or revenues rather than market share percentages, would be required to be notified to a newly constituted Anti-Monopoly Authority for review and approval.⁴⁴ Last, a revised

38. Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, art. 21. The five conditions are: (i) one party's assets in China exceed RM133 billion (approximately US\$362 million); (ii) one party's annual sales exceed RM1.5 billion (approximately US\$180 million); (iii) one party's market share in China exceeds 20%; (iv) the parties' combined post-merger market share will exceed 25%; or (v) one party will hold, post-merger, equity interests in more than fifteen Foreign Invested Enterprises in related industries.

39. Provisional Rules for Prevention of Monopoly Pricing (Nov. 2003).

40. Draft Anti-Monopoly Law, art. 4 (Revised Draft of July 27, 2005).

41. *Id.* at arts. 8-11.

42. *Id.* at art.18.

43. *Id.* at art. 20. Threshold levels are generally either: (i) an aggregate of RMB3 billion worldwide assets or turn-over with one party's China-wide assets or turn-over of RMB1.5 billion or (ii) a transaction value over RMB300 million.

44. *Id.* at arts. 19-26.

prohibition against abuse of administrative powers now more clearly covers state owned enterprises as well as government administrative organs.⁴⁵

VII. Developments in the European Union^g

A. SECTOR INVESTIGATIONS

The European Commission has always had the power to conduct sector investigations but has undertaken such investigations on only a few occasions. Neelie Kroes, the new Competition Commissioner, has attributed greater importance to sector investigations as a tool for unearthing anticompetitive behavior and has indicated that a number of sectors "where competition does not appear to be functioning as well as it might" may be targeted.⁴⁶ In 2005, the Commission announced sector investigations into competition in the European Union (EU) gas and electricity markets and in the areas of retail banking and business insurance.⁴⁷

B. POLICY REVIEW OF ARTICLE 82 OF THE EC TREATY

Commissioner Kroes has initiated a reform of the EU's competition rules that prohibit the abuse of a dominant position, seeking to create a modernized framework in which any theories of harm are predicated on "a sound economic assessment" for the most frequent types of abusive behavior.⁴⁸ The Commission is expected to publish a discussion paper before the end of 2005 and later issue guidelines similar to those it has already published regarding collusive behavior under article 81 of the EC Treaty.

C. POSSIBLE MERGER POLICY REVIEW

Following the reform of the Merger Regulation in 2004,⁴⁹ which introduced a refined system for case referrals between the Commission and the Member States, Commissioner Kroes has indicated that she may propose additional changes to the Regulation's jurisdictional thresholds.⁵⁰ The Commissioner has expressed concern that the Regulation no longer

45. *Id.* at arts. 27-31.

g. This contribution for the European Union was provided by Martin Bechtold and Kaarli Eichhorn of the Brussels Office of Clifford Chance.

46. Neelie Kroes, Member, European Commission in Charge of Competition Policy, Speech at the International Bar Association/European Commission Conference 'Anti-trust reform in Europe: a year in practice': Taking Competition Seriously—Anti-Trust Reform in Europe (Mar. 10, 2005), http://europa.eu.int/comm/competition/speeches/index_2005.html.

47. See Press Release, European Commission, IP/05/716, Competition: Commission Opens Sector Inquiry into Gas and Electricity (June 13, 2005), [available at](http://europa.eu.int/comm/competition/press_releases/) http://europa.eu.int/comm/competition/press_releases/; Press Release, European Commission, IP/05/719, Competition: Commission Opens Sector Inquiries into Retail Banking and Business Insurance, (June 13 2005) [available at](http://europa.eu.int/comm/competition/press_releases/) http://europa.eu.int/comm/competition/press_releases/.

48. Neelie Kroes, Member, European Commission in Charge of Competition Policy, Speech at the Fordham Corporate Law Institute, New York: Preliminary Thoughts on Policy Review of Article 82 (Sept. 23, 2005), http://europa.eu.int/comm/competition/speeches/index_2005.html.

49. See Council Regulation No. 139/2004, 2004 O.J. (L 24) 1 (EC) (the EC Merger Regulation) (on the control of concentrations between undertakings).

50. See, e.g., Tobias Buck, Companies Europe: Brussels Faces Power Struggle Over Mergers, *FIN. TIMES*, Nov. 17, 2005.

reflects an appropriate allocation between the Commission and the Member States, because certain large cross-border mergers are able to escape review by Brussels.

D. CASES OF INTEREST

In 2004, the Commission fined Microsoft €497 million for violating article 82 of the EC Treaty by bundling various products.⁵¹ Microsoft has appealed to the Court of First Instance (CFI) and a judgment is not expected for up to three years. Meanwhile, the Commission has objected to the manner in which Microsoft is remedying the abuse established by the decision and has clarified what it believes the company's obligations are.⁵² Microsoft has lodged an application with the CFI⁵³ claiming that the Commission is imposing obligations that go beyond the original decision and illegally deprive it of intellectual property rights.

In 2005, the Commission investigated an agreement between the German Football Federation (DFB), MasterCard, and the Fédération Internationale de Football Association (FIFA) to sell tickets for the 2006 Football World Cup.⁵⁴ It concluded that the agreement violated article 81 of the EC Treaty because ticket sale arrangements discriminated against consumers not situated in Germany by forcing them to buy tickets through a route controlled by a single credit card operator, unless consumers held a German bank account or used an international bank transfer at additional expense. In response, the FIFA and the DFB agreed to accept additional payment methods and to facilitate payments in local currency.

In September 2005, the CFI affirmed the prohibition of the acquisition of Gas de Portugal (GDP) by Energias de Portugal (EDP) and the Italian energy company, ENI. The proposed merger would strengthen EDP's position in the wholesale and retail electricity markets in Portugal and also GDP's dominant position in the gas market.⁵⁵ This was the first Commission prohibition decision in three years and the first merger to be blocked by Commissioner Kroes.⁵⁶

The Commission also conditionally cleared the acquisition of Swiss Air by Lufthansa in 2005.⁵⁷ The acquisition represents the largest merger in the European aviation sector since the Air France/KLM transaction. The parties were required to divest a number of airport slots to remedy competition concerns on certain routes.

51. See Commission of the European Communities, Commission Decision of March 24, 2004, relating to a proceeding under article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft).

52. Following the Commission's Mar. 24, 2004 Decision, Microsoft is required to disclose specifications for certain Windows protocols in order to ensure interoperability with Windows. The Commission declared in its June 1, 2005 letter that Microsoft is under an obligation to permit distribution to third parties—non-licensees—in source code form of software developed by competitors on the basis of the disclosed Windows protocol specifications unless the software includes an invention by the applicant satisfying criteria of novelty and inventiveness.

53. See Case T-313/05, *Microsoft Corp. v. Comm'n*, 2005 O.J. (C 257) 16.

54. See Press Release, European Commission, IP/05/519, Competition: Commission Welcomes Improved Access to Tickets for the 2006 World Cup (May 2, 2005), available at http://europa.eu.int/comm/competition/press_releases/.

55. See Case T-87/05, *Energias de Portugal S.A. v. Comm'n*, [2005] 5 C.M.L.R. 23.

56. See Commission Decision of Dec. 9, 2004, 2005 O.J. (L 302) 69 (EEC) (declaring a concentration to be incompatible with the common market (Case No. COMP/M.3440—EDP/ENI/GDP)).

57. See Commission Decision of July 4, 2005, 2005 O.J. (C 204) 3 (EC) (declaring a concentration to be compatible with the common market (Case No. COMP/M.3770—Lufthansa/Swiss)).

The European Court of Justice (ECJ) recently affirmed the CFI's 2002 decision⁵⁸ to quash the Commission's 2001 prohibition of a conglomerate merger between Tetra Laval and Sidel. While the courts did not dismiss the Commission's conglomerate effects theory, they held that the Commission did not have sufficient evidence to support its claim. The ECJ emphasized that the quality of evidence is particularly important in mergers where anticompetitive leveraging is "dimly discernible, uncertain and difficult to establish."⁵⁹ In 2005, the Commission also cleared, subject to divestitures, the acquisition of Gillette by Procter & Gamble (P&G).⁶⁰ The Commission's reluctance to advance a conglomerate effects theory in P&G/Gillette may reflect the impact of the Tetra Laval/Sidel judgment.

In September 2005, the Commission fined thread producers from Germany, Belgium, The Netherlands, France, Switzerland, and the United Kingdom a total of €43.497 million for operating cartels in the market for industrial thread, with the largest fine imposed on Coats UK Ltd. (UK) (€15.05 million).⁶¹ In October 2005, the Commission also found that French car manufacturer Peugeot had violated article 81(1) by obstructing exports of new cars from The Netherlands to other Member States between 1997 and 2003.⁶² The Commission imposed a fine of €49.5 million.

VIII. Developments in France^h

A. LEGISLATIVE INITIATIVES

French procedural rules on anti-competitive agreements and abuses of a dominant position have been adapted to EU competition law, including by introducing an equivalent to the EU's commitment procedure.⁶³ Under this new procedure, a company facing enforcement proceedings may offer commitments and undertake to amend its behavior in the future to meet the concerns of the French Competition Council. The Competition Council, if it deems the commitments satisfactory, may then decide to end the enforcement proceeding by issuing a commitment decision. Since its implementation in November 2004 until December 31, 2005, the Competition Council has used the commitments procedure six times.

In addition, merger control legislation was amended to allow for notification of a concentration to the French Ministry of Economy as soon as the parties have agreed on the main terms of the transaction, entered into a memorandum of understanding or letter of

58. See Case T-5/02, *Tetra Laval BV v. Comm'n*, 2002 E.C.R. II-4381.

59. See Case C-12/03, *Comm'n v. Tetra Laval BV*, 2005 E.C.R. I-987, at ¶ 44.

60. See Commission Decision of July 15, 2005, 2005 O.J. (C 239) 12 (declaring a concentration to be compatible with the common market (Case No. COMP/M.3732—Procter & Gamble /Gillette)).

61. See Press Release, European Commission, IP/05/1140, Competition: Commission Fines Producers of Industrial Thread a Total of €43.497 Million for Cartels (Sept. 14 2005), available at http://europa.eu.int/comm/competition/press_releases/.

62. See Press Release, European Commission, IP/05/1227, Competition: Commission Imposes a €49.5 Million Fine on Peugeot for Obstructing New Car Exports from the Netherlands (Oct. 5 2005), available at http://europa.eu.int/comm/competition/press_releases/.

h. This contribution for France was provided by Cyrille Couadou, Maria Trabucchi, and Jérôme Fabre of the Paris Office of Weil, Gotshal & Manges LLP.

63. See Ordinance 2004-1173 of 4 Nov. 2004, adapting French law to the procedural requirements posed by EC Council Regulation 1/2003 of 16 Dec. 2002 on the implementation of articles 81 and 82 of the EC Treaty.

intent, or announced a public bid.⁶⁴ This change will allow French merger control review to commence well before the execution of binding agreements, consistent with EU merger control procedure.

B. MERGER ENFORCEMENT

For the first time, in the Cegid/CCMX transaction in the information technology software and services sector, the French administrative Supreme Court (*Conseil d'Etat*) made use of its power to issue a preliminary injunction against the implementation of a merger authorized by the French Ministry of Economy.⁶⁵ The injunction was issued more than seven months after the Ministry of Economy's merger clearance decision, pursuant to an action for annulment brought by a competitor. Injunctive relief was justified because, given the high post merger market shares of Cegid/CCMX, the Ministry's decision would have affected the markets in a way that would have been difficult to reverse, and because of serious doubts about the legality of the decision. The *Conseil d'Etat* also took into account the fact that the merger had not yet been fully implemented. On July 20, 2005, the *Conseil d'Etat* decided that, prior to ruling on the merits, the advice of the Competition Council should be sought, which will considerably extend the period of uncertainty for the merging parties.

C. CARTEL ENFORCEMENT

On November 30, 2005, the Competition Council imposed record fines of €534 million on three mobile telephone service companies: Orange (a subsidiary of France Télécom group), SFR (a subsidiary of Vivendi Universal group), and Bouygues Télécom.⁶⁶ The Council concluded that the companies violated article L. 420-1 of the French Commercial Code and article 81 of the EC Treaty over a six year period by sharing new subscription and cancellation information, and entering into a non-aggression agreement designed to stabilize their respective market shares.

D. CONDUCT CASES

The Competition Council fined France Télécom €80 million for abuse of a dominant position by preventing its rivals from accessing the wholesale broadband Internet (ADSL)

64. See Act No. 2004-1343 of 9 Dec. 2004, Journal Officiel de la Republique Francaise [J.O.] [Official Gazette of France], Dec. 10, 2004.

65. See Decision of the Ministry of Economy of 19 Oct. 2004, case C2004-122, Cegid / CCMX, available at http://www.minefi.gouv.fr/dgcrf/bocrf/05_04/a0040007.htm; Order of the Conseil d'Etat, No. 279697, of 19 May 2005, Société Fiducial informatique / Société Fiducial Expertise, available at http://www.conseil-etat.fr/ce/jurispd/index_ac_ld0527.shtml.

66. See Competition Council Decision of 30 Nov. 2005, decision No. 05-D-65, relative to practices implemented in the mobile telephone services sector, available at <http://www.conseil-concurrence.fr/pdf/avis/05d65.pdf>; see also Press Release, Competition Council, Anticompetitive Agreements in the Mobile Telephony Market (Dec. 1, 2005) available at http://www.conseil-concurrence.fr/user/standard.php?id_rub=160&id_article=502.

market between 1999 and 2002.⁶⁷ In February 2000, in response to a complaint from a competitor, Neuf Télécom, the Competition Council ordered France Télécom to offer a new technical and commercial access solution that would enable other operators to compete effectively in the ADSL market.⁶⁸ In May 2004, the Competition Council observed that France Télécom had failed to comply with the injunction, and fined the company a total of €20 million.⁶⁹ The fine was subsequently doubled by the Paris Court of Appeal.⁷⁰ In light of the seriousness and duration of the abuses concerned (1999–2002) and the subsequent damage to the economy, the Competition Council decided to fine France Télécom €80 million for preventing its competitors from accessing the ADSL market until October 2002. This record fine represents 0.4 percent of France Télécom's revenues in France.

IX. Developments in Germanyⁱ

A. FUNDAMENTAL REFORM OF GERMAN COMPETITION LAW

Following the modernization of EU competition law in Regulation 1/2003, the German legislature has now overhauled the Act against Restraints of Competition (ARC).⁷¹ Article 1 of the ARC, which originally applied only to restrictions on competition between competitors, now replicates article 81(1) of the EC Treaty and article 2 of the ARC now mirrors Article 81(3) of the EC Treaty. The German provisions addressing unilateral conduct (articles 19 and 20 of the ARC) are being retained. Other major changes include: (i) the right of the Federal Cartel Office (FCO) to take commitment decisions and to decide that there is no reason to intervene; (ii) the abolition of non-merger conduct clearance decisions by the FCO, in line with EU law, leaving companies to self-assess their compliance with EU and German competition law; (iii) an increase in maximum fines to up to 10 percent of a company's global revenues in the last financial year; (iv) amended rules on private suits and damages, including the explicit prohibition of the passing-on defense; (v) a grant of res judicata status to final decisions of EU or EU Member States' competition authorities on the existence of an infringement; and (vi) an amendment of article 19(2) of the ARC clarifying that a relevant geographic market can be larger than Germany.

67. See Competition Council Decision of 7 Nov. 2005, decision No. 05-D-59, relative to practices implemented by the company France Télécom in the broadband Internet sector, *available at* <http://www.conseil-concurrence.fr/pdf/avis/05d59.pdf>; see also Press Release, Competition Council, ADSL Broadband Internet Access—The Conseil de la concurrence fines France Télécom 80 million Euros for abuse of a dominant position (Nov. 9, 2005), *available at* http://www.conseil-concurrence.fr/user/standard.php?id_rub=160&id_article=495.

68. See Competition Council Decision of 18 Feb. 2000, decision No. 00-MC-01, relative to a request for interim measures brought by Neuf Télécom, *available at* <http://www.conseil-concurrence.fr/pdf/avis/00mc01.pdf>.

69. See Competition Council Decision of 13 May 2004, decision no. 04-D-18, concerning the execution of decision 00-MC-01 of 18 Feb. 2000, *available at* <http://www.conseil-concurrence.fr/pdf/avis/04d18.pdf>.

70. See decision of the Paris Court of Appeals of 11 Jan. 2005, *available at* http://www.finances.gouv.fr/dgccrf/boccrf/05_06/a0060012.htm.

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

71. See Siebentes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, 7 July 2005, Bundesgesetzblatt (BGBl. I 2005, 1954, 12 July 2005; consolidated version published in BGBl. I 2005, 2114, 20 July 2005. The German version is *available at* <http://www.bundeskartellamt.de>.

B. ANTITRUST ENFORCEMENT

The FCO continued to prosecute cartels vigorously and imposed a number of significant fines. In 2005, seventeen industrial insurers were fined €150 million for allegedly agreeing to certain practices, such as not reducing insurance contributions, not making any backdated insurance adjustments, concluding only contracts with opt-out clauses, and consulting each other on competitive cases.⁷²

In 2005, the FCO put pressure on gas suppliers to modify certain long-term supply contracts to facilitate the opening of gas markets. The FCO has taken the position that long-term contracts between established transmission companies and municipal utilities and regional providers have prevented the opening of the gas markets to competition.⁷³

German jurisprudence on private damages for cartel offenses is still relatively underdeveloped despite a long history. In a case concerning a damages claim by a direct customer of a vitamin cartel, the Regional Court Dortmund (LG Dortmund) held that a damages claim exists in principle, but can be rebutted if the defendant shows that damages were passed on. Since the defendant had not shown (or argued) which part of the cartel price had been passed on, the court granted the damages sought by plaintiff. The judgment is on appeal.⁷⁴

C. MERGER CONTROL

Out of a total of 2778 mergers notified in 2003 and 2004, fourteen were prohibited. In the first eleven months of 2005, there were twenty-three second phase decisions, five of which were prohibitions.⁷⁵

The acquisition of minority shareholdings of 25 percent or more is subject to clearance by the FCO. Even the acquisition of smaller holdings may require clearance by the FCO if the shareholding is competitively relevant (i.e., if there is a competitive relationship between the parties and the shareholding may lead to influence over, or coordination with, the target).⁷⁶ In 2005, this was an issue in a number of cases where shareholdings ranged from 9 percent to 24.9 percent.

72. See Press Release, Federal Cartel Office, Bundeskartellamt Imposes 130 million Euro fine against Industrial Insurers (Mar. 23, 2005), available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_03_23.shtml; Press Release, Federal Cartel Office, Bundeskartellamt Imposes Multi-million Fines Millions against Public Industrial Insurers (Sept. 15, 2005), available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_09_15.shtml.

73. See Press Release, Federal Cartel Office, Bundeskartellamt Pushes ahead with Competition in the Gas Market (Jan. 28, 2005), available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_01_28.shtml; Press Release, Federal Cartel Office, First Results in Proceedings against Gas Sector (Apr. 6, 2005), available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_04_06.shtml; Press Release, Federal Cartel Office, The Liberalization of Long-Term Gas Supply Contracts will come (Sept. 13, 2005), available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_09_13.shtml; Press Release, Federal Cartel Office, No Agreement with E.ON Ruhrgas on Opening up Long-Term Gas Supply Contracts (Sept. 27, 2005), available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2005/2005_09_27.shtml.

74. See Regional Court Dortmund (LG Dortmund), Judgment of Apr. 1, 2004, 13 O 55/02—*Vitaminpreise Dortmund*, DE-R 1352; see also Regional Court Mainz (LG Mainz), Judgment of Jan. 15, 2004, 13 O 56/02 KART—*Vitaminpreise Mainz*, DE-R 1349.

75. See Bundeskartellamt, <http://www.bundeskartellamt.de> (last visited Feb. 27, 2006).

76. See Act against Restraints of Competition, art. 37(1) No. 4.

In 2004, the Federal Supreme Court overruled jurisprudence that the geographic market could never be larger than Germany—the so-called *Staubsaugerbeutelmarktbeschluss*.⁷⁷ Subsequent amendments to the ARC clarified that economic principles should be used to define the relevant geographic market; but the FCO has neither the necessary investigative powers nor the resources to investigate the impact of a merger on the European level. This change in geographic market approach is also likely to have an impact on the scope of the exception from merger filings for transactions in de minimis markets of less than €15 million since many markets are larger than Germany, and thus more likely to exceed the limit.

X. Developments in Hong Kong

A. APPLICATION OF THE NEW MERGERS & ACQUISITIONS COMPETITION PROVISIONS⁷⁸

On April 1, 2005, the Telecommunications Authority (TA) published its first decision⁷⁹ under the new M&A Provisions, determining that a proposed acquisition by China Netcom Communications Group of a 20 percent stake in PCCW Limited would not substantially lessen competition. A second decision was published on July 5, 2005,⁸⁰ relating to PCCW's proposed acquisition of a 59.87 percent stake in the share capital of SUNDAY Communications Limited, a mobile operator in Hong Kong. The TA found that the transaction met the safe harbor test in its Guidelines on Mergers and Acquisitions,⁸¹ and that there was no potential loss of independent entry by PCCW as a mobile operator. In both transactions, the TA determined that a full investigation under the M&A Provisions was not warranted. The decisions contain useful guidance as to the TA's future merger control approach.

Both of the above assessments were undertaken by the TA on its own initiative. In contrast, on November 9, 2005, China Mobile (Hong Kong) Limited became the first entity to seek to take advantage of the prior consent provisions of the M&A Provisions⁸² by lodging an application for prior consent with the TA for its proposed acquisition of shares in China Resources Peoples Telephone Company Limited. The TA has indicated that it will consult with carrier licensees and any other interested persons⁸³ in assessing the proposed transaction under section 7(P)(7). The TA will issue a consultation paper shortly.

B. RECENT CASE LAW ON POWERS OF COMPETITION APPEALS BOARD

In July 2005, Hong Kong's Court of Final Appeal issued an important judgment⁸⁴ holding that the Competition Appeal Board (the tribunal set up under the Telecommunications

77. See Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 5, 2005, KVR 14/03—DE-R 1355 (F.R.G.).

j. The contribution for Hong Kong was provided by Simon Powell and Joanna Tan of the Hong Kong Office of Jones Day.

78. Telecommunications Ordinance (July 2004) cap. 106, § 7P (H.K.).

79. See Office of the Telecommunications Authority, Report on the Competition Impact of the Acquisition of Shares in PCCW by China Netcom, CAB Ref No. CDN0190 (2005) <http://www.ofa.gov.hk/en/report-paper-guide/report/investigation.html>.

80. See Office of the Telecommunications Authority, Report on the Competition Impact of the Acquisition of Shares in SUNDAY by PCCW, CAB Ref No. CDN0196 (2005) <http://www.ofa.gov.hk/en/report-paper-guide/report/investigation.html>.

81. Telecommunications Authority Guidelines: Mergers and Acquisitions in Hong Kong Telecommunications Markets, Ref. No. GN-04/2004 (May 3, 2004).

82. Telecommunications Ordinance, *supra* note 78, § 7P(6).

83. *Id.* § 7P(8).

84. PCCW-HKT Telephone Limited v. The Telecommunications Authority [2005] 3 HKLRD 235.

Ordinance to hear appeals from decisions of the TA relating to competition) has the power to suspend a decision of the TA while an appeal of the decision is pending. The case came before the Court of Final Appeal as an appeal by PCCW-HKT of a contrary decision of the Hong Kong Court of Appeal.

C. ONGOING DEVELOPMENTS

A number of competition related consultations and proposals are ongoing. In June 2005, the Government set up an independent committee, the Competition Policy Review Committee, to consider the Government's competition policy.⁸⁵ The Committee, which is chaired by non-officials and includes members from different sectors of the community, will consider whether a comprehensive and cross-sector law on fair competition should be introduced, and, if so, the scope and application of such a law. In addition, in July 2005, the Government's Competition Policy Advisory Group commissioned an independent consultant to assess the competition situation in the auto-fuel retail market in Hong Kong and to determine if the oil companies involved have engaged in anti-competitive conduct.⁸⁶ The consultant has been asked to advise on means to enhance competition and lower auto-fuel prices in Hong Kong, including the possibility of introducing sector-specific competition legislation. The study was expected by the end of 2005.

XI. Developments in Ireland^k

A. LEGISLATION

In November 2005, the Minister for Enterprise, Trade and Employment announced his intention to repeal a Ministerial Order dating from 1987 that prohibits various practices in the grocery sector, including below-cost selling, hello money (whereby suppliers pay for in-shop shelf space), and the payment of advertising allowances by suppliers to retailers.⁸⁷ While it is clear that the ban on below-cost selling is going to be repealed, it appears that new legislative measures will be introduced to preserve some of the other restrictions in the current Order, which remains in force until the new legislation is enacted (likely in early 2006).⁸⁸

B. MERGERS

In two cases, the Irish Competition Authority imposed wide-ranging conditions designed to address concerns relating to cross-ownership issues in the television sector and account-

85. See generally The Government of the Hong Kong Special Administrative Region, The 2005-2006 Policy Address, <http://www.policyaddress.gov.hk> (last visited Feb. 27, 2006).

86. See generally COMPETITION POLICY ADVISORY GROUP, 2004-2005 ANNUAL REPORT, <http://www.compag.gov.hk/report/2004.pdf>.

k. The contribution for Ireland was provided by Gerald FitzGerald and Philip Andrews of the Dublin Office of McCann FitzGerald.

87. See News Release, The Competition Authority, The Competition Authority Welcomes Government Decision to Remove Anti-Consumer Law (Nov. 8, 2005), *available at* <http://www.tca.ie/press/146.pdf>.

88. See Press Release of the Department of Trade, Enterprise and Employment, Minister Publishes Legislation to Revoke the Groceries Order, *available at* <http://www.entemp.ie/press/2005/20051212.htm> (last visited Jan. 31, 2006). A copy of the Competition (Amendment) Bill is *available at* <http://www.entemp.ie/publications/commerce/2005/competitionbill.pdf> (last visited on Jan. 31, 2006).

ing separation and transparency of cost allocation issues within the dominant telecoms operator.⁸⁹ These conditions, which are largely behavioral rather than structural, represent a departure from the Authority's previous practice in conditional merger clearances. In addition, the Authority published its new Form M merger notification form.⁹⁰

C. CRIMINAL CARTELS

In 2004, the Director of Public Prosecutions initiated criminal prosecutions against a total of twenty-four dealers in the home heating oil industry for alleged price-fixing.⁹¹ None of the cases has gone to trial, but in November 2005, one of the dealers pled guilty to some charges and is expected to be sentenced in March 2006.⁹²

D. CONDUCT CASES

In February 2005, following an investigation of a regional newspaper publisher, the Authority clarified its approach in predatory pricing investigations.⁹³ The Authority will first establish whether the undertaking under investigation is dominant. It will then follow a structured rule of reason approach involving an examination of: the plausibility of the alleged predation; possible business justifications; the feasibility of recoupment; and the existence of pricing below cost, which is determined pursuant to EU competition law criteria.⁹⁴

The Authority continued in 2005 to target trade associations and professional bodies. In early 2005, the Authority commenced enforcement proceedings against the Irish Dental Association, following allegations that it orchestrated a collective boycott of a private dental insurance scheme introduced in Ireland by a private health insurer.⁹⁵ In a settlement, the Association acknowledged that dentists must manage their own commercial affairs individually and agreed that it would not issue any communications to its members instructing individual dentists to adopt a policy of non-cooperation with private dental insurance providers.

The Authority also investigated the negotiation procedures of the Irish Hospital Consultants Association (IHCA) for fees received by hospital consultants for the treatment of

89. See News Release, The Competition Authority, The Competition Authority Attaches Conditions to the Purchase of NTL by UPC Ireland (Nov. 4, 2005), available at <http://www.tca.ie/press/145.pdf>; News Release, The Competition Authority, The Competition Authority Approves eircom's Purchase of Meteor (Nov. 18 2005), available at <http://www.tca.ie/press/148.pdf>.

90. See The Competition Authority, Form for the Notification of Mergers and Acquisitions Pursuant to Sections 18(1) and 18(3) of the Competition Act 2002, available at http://www.tca.ie/mergers/tca_merger_notification_form.pdf (last visited Feb. 27, 2006).

91. See Competition Press, the Irish Business Journal of Competition and Regulatory Affairs, Vol. 12, Edition 8, at page 174, Director of Public Prosecutions launches his first-ever competition prosecution.

92. See News Alert, Competition, The Irish Business Journal of Competition and Regulatory Affairs, Western heating oil cartel accused pleads guilty (Nov. 14 2005).

93. See Competition Authority Enforcement Decision, No. E/05/001, Case COM/05/03 of 7 Dec. 2004, *The Alleged Predation by the Drogheda Independent Company Limited in the Market for Advertising in Local Newspapers in the Greater Drogheda Area*, available at http://www.tca.ie/decisions/enforcement/e_05_001.pdf.

94. See, e.g., Case C62/86, AKZO v. Comm'n, 1991 ECR I-3359.

95. See News Release, The Competition Authority, The Competition Authority Accepts Commitments Offered by Irish Dental Association to Settle High Court Case (Apr. 28, 2005), available at <http://www.tca.ie/press/132.pdf>.

patients covered by private health insurance.⁹⁶ The Authority decided that the object and/or effect of the IHCA's collective negotiations on behalf of its members was to fix, directly or indirectly, the fees paid to consultants by health insurers. While the IHCA denied that it breached the Irish Competition Act, it nonetheless entered into an undertaking with the Authority in which it agreed, *inter alia*, not to organize any agreement between consultants or issue decisions or recommendations regarding the fee levels sought from health insurers by groups of consultants or to discourage members from negotiating individually with health insurers.

The Authority also settled a civil case in May 2005 against the publicans' representative body, the Vintners Federation of Ireland (VFI), for allegedly price-fixing the sale of alcoholic drinks.⁹⁷ The VFI committed that it would not recommend to members prices/margins or increases in prices/margins on the sale of alcoholic beverages to the public.

E. SECTORAL STUDIES

In 2005, the Authority published a number of sectoral studies. Although the Authority did not identify any specific breaches of the Irish Competition Act, it concluded in its review of the banking and insurance sectors that competition was not robust and issued recommendations to facilitate competition.⁹⁸ The Authority also recommended that the legal profession be regulated by a new Legal Services Commission composed of a majority of non-lawyers and further recommended abolishing other restrictions in the profession.⁹⁹

XII. Developments in Italy¹

A. INSTITUTIONAL CHANGES AND REFORM

In March 2005, Mr. Antonio Catricalà entered Office as the new President of the Italian Competition Authority (ICA), succeeding Mr. Tesauro, the former ICA President and Advocate General at the European Court of Justice.

As of yet, no legislative reform has been passed to formally adapt the Italian Competition Act¹⁰⁰ to the new Community legislative framework, provided for by the enactment of the Modernization Regulation 1/2003. But the ICA has conformed its decisional practices, such as the repeal of the notification system in relation to agreements between market operators, to the EU's new enforcement system.

96. See News Release, The Competition Authority, The Competition Authority Accepts Commitments from Irish Hospital Consultants Association to Settle Legal Action (Sept. 28, 2005), *available at* <http://www.tca.ie/press/143.pdf>.

97. See News Release, The Competition Authority, The Competition Authority Accepts Commitments Offered by the Vintners Federation of Ireland to Settle High Court Case (May 11, 2005), *available at* <http://www.tca.ie/press/133.pdf>.

98. See THE COMPETITION AUTHORITY, COMPETITION IN THE NON-INVESTMENT BANKING SECTOR IN IRELAND, (Sept. 2005), http://www.tca.ie/banking/banking_report_final.pdf.

99. See THE COMPETITION AUTHORITY, STUDY OF COMPETITION IN LEGAL SERVICES (Feb. 24, 2005), http://www.tca.ie/professions/legal_preliminary_report.pdf.

1. The contribution for Italy was provided by Alberto Pera of Gianni, Origoni, Grippo & Partners.

100. See Competition and Fair Trading Act, Law No. 287 of October 10, 1990.

B. INTERIM MEASURES: THE MERCK COMPULSORY LICENSING CASE

The ICA issued its first-ever decision against a dominant company by forcing Merck to license to another chemical company the rights to manufacture and stock a specific active pharmaceutical ingredient, while awaiting the final decision on an alleged breach of article 82.¹⁰¹

C. CARTELS: THE BABY MILK CASE

In October 2005, the ICA closed its investigation into whether the principal Italian baby milk market operators breached article 81 of the EC Treaty.¹⁰² Based on the extremely high prices applied in the Italian baby milk markets, the ICA decided that there was an unlawful price-fixing agreement and fined the major players €10 million.

D. ABUSE OF DOMINANCE: THE MOBILE VIRTUAL NETWORK OPERATORS CASE

On February 23, 2005, the ICA launched an investigation into potential violations of articles 81 and 82 of the EC Treaty by TIM, Vodafone, and Wind, the three main mobile network operators in Italy.¹⁰³ The ICA has alleged that these operators abused their dominant position pursuant to article 82 by refusing to deal with traffic resellers and Mobile Virtual Network Operators. The ICA is also investigating whether the alleged abusive practice stems from an express agreement or concerted practice allegedly in violation of article 81 between the major mobile network operators, regarding application of homogeneous tariffs, and/or refusals to deal.

E. MERGER CONTROL

On June 22, 2005, the ICA adopted a Notice aimed at introducing a pre-notification procedure in national merger control proceedings.¹⁰⁴ The Notice, which became effective July 1, 2005, proposes that parties to a concentration that meet both turnover thresholds envisaged by the Italian Competition Act¹⁰⁵ may engage in pre-notification talks with the ICA. Although the Notice is not mandatory, notifying parties are strongly encouraged to abide by it.

In June 2005, the ICA cleared the take-over of Mellin S.P.A. by Koninklijke Numico N.V. in the Italian baby food industry after Numico proposed behavioral remedies to ad-

101. See Decision No. 14388, in case A 364, Merck—Active ingredients, published in Bulletin No. 23 of June, 2005.

102. See Decision No. 14775, in case I 623, Formulated Milk Prices, published in Bulletin No. 40 of October, 2005.

103. See Initiation of proceedings Decision No. 14045, in case A 357, Tele2/TIM/Vodafone/Wind, published in Bulletin No 8 of March, 2005.

104. See Notice on certain procedural issues pertaining to concentration control proceedings pursuant to Law No. 287, 1990, Resolution No. 14391 of June 22, 2005, published in ICA's Bulletin No. 22 of June 20, 2005.

105. Pursuant to the latest update to article 16 of the Competition Act, a concentration must be notified to the ICA either when the aggregate Italian turnover of all the interested entities exceeds €421 million, or when the target entity's Italian turnover exceeds €42 million.

dress the ICA's objection that the takeover would risk collective dominance on the baby food markets by reducing the number of competitors from five to four.¹⁰⁶

On August 4, 2005, following a second phase proceeding, the ICA authorized the acquisition of Terna by Cassa Depositi e Prestiti (CDP), subject to commitments.¹⁰⁷ ICA feared that CDP, which holds a 10 percent share in Enel, might favor Enel in the management of the transmission grid, and required CDP to divest its stake in Enel within four years. In the interim, CDP must appoint a majority of independent directors to Terna's board.

XIII. Developments in Japan^m

A. INTRODUCTION OF A LENIENCY PROGRAM

During 2005 there were significant antitrust developments in Japan, including an amendment to the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, also called the Antimonopoly Law (AML), which introduced an immunity and leniency program starting in January 2006.¹⁰⁸ The Japanese Fair Trade Commission (JFTC) has also published certain supplementary rules and requirements in connection with the leniency program.¹⁰⁹ Under the supplementary rules, the JFTC is adopting a modified version of the initially proposed all-paper system. The initial contact with the JFTC must be made by facsimile, albeit in a simplified form, but the JFTC may to a certain extent agree to the rest of the procedure being conducted orally, including providing evidence as to the subject, manner, and duration of the infringement.

Alongside the new leniency program, the JFTC has increased the surcharges for cartel behavior as follows:¹¹⁰

Type of Enterprise	Previous Surcharge		New Surcharge from January 2006	
	Large enterprises	Small/medium enterprises	Large enterprises	Small/medium enterprises
Manufacturers	6%	3%	10%	4%
Wholesalers	1%	1%	2%	1%
Retailers	2%	1%	3%	1.2%

The amendments to the AML¹¹¹ also change the hearing procedures for accused cartel violators, removing the recommendation system whereby the JFTC made a recommendation to the accused as to their conduct, leaving the accused free to challenge that rec-

106. See Decision No. 14390, in case C 6941, Koninklijke Numico/Mellin published in Bulletin No. 23 of June 2005.

107. See Decision No. 14542, in case C7065, CDP/Terna, published in Bulletin No. 29 of August 2005.

m. The contribution for Japan was provided by Shigeyoshi Ezaki and James Minamoto of Anderson Mori & Tomotsune.

108. Act No. 54 of 1947, amended by Act No. 35 of 2005.

109. Fair Trade Commission, Rule No. 7 of 2005.

110. Act No. 54 of 1947, amended by Act No. 35 of 2005.

111. *Id.*

ommendation under the JFTC's own (adversarial) hearing procedures. Surcharge orders were only issued after a final and conclusive remedial order was made. Under the new system, the JFTC gives the accused enterprise prior notice and an opportunity to rebut the charges (although not in an administrative hearing at this stage) before issuing simultaneous remedial and surcharge orders. If the remedial or surcharge order is appealed, the case then moves to an administrative hearing where, as in the current system, a decision can be appealed to the courts.

While the JFTC already has fairly wide-ranging powers with respect to administrative investigations, the AML amendments will give it similar powers with respect to criminal investigations as well as some additional ones, such as increased penalties for those found to be obstructing investigations.

B. EMERGING TRENDS IN MERGER CONTROL?

Last year, the JFTC published Guidelines to the Application of the Antimonopoly Act Concerning Review of Business Combinations (the New Merger Guidelines).¹¹² This was the latest in a series of responses to requests from business groups and the Ministry of Economics, Trade and Industry to make more transparent and predictable the process by which companies considering a merger engage in prior consultation with the JFTC (in which the JFTC effectively renders a binding decision on the lawfulness of the merger). In the past, the JFTC has often been viewed as relatively lenient in its merger decisions, with the approval of the Japan Airlines and Japan Air Systems merger in 2002, and the business transfer of RJR Nabisco's tobacco business (excluding the US division) to Japan Tobacco in 1999 often being cited as examples. But on January 24, 2005, the JFTC announced that it had withheld its approval to Tokai Carbon and Mitsubishi Chemicals to integrate their carbon black businesses. Under the New Merger Guidelines, the integration would result in a substantial restraint of competition.¹¹³ The JFTC took a similar stance with respect to PS Japan Corporation and Dai-Nippon Ink's plan to integrate their polystyrene businesses this year.¹¹⁴

XIV. Developments in Korea^a

A. LEGISLATIVE AMENDMENTS

The Monopoly Regulation and Fair Trade Act (MRFTA) was amended effective April 1, 2005.¹¹⁵ Among other matters, the amendment implemented a revised leniency program for informants of a violation of the MRFTA that provides automatic leniency for the first informant to come forward and report to the Korea Fair Trade Commission (KFTC).¹¹⁶ The applicant will receive full leniency if (i) it was the first and sole provider of evidence necessary to prove a cartel; (ii) the KFTC has not received any information prior to the

112. May 31, 2004, Fair Trade Commission.

113. January 24, 2005, Fair Trade Commission.

114. April 1, 2005, Fair Trade Commission.

n. The contribution for Korea was provided by Sai Ree Yun and Youngjin Jung of Woo Yun Kang Jeong & Han.

115. See Monopoly Regulation and Fair Trade Act, Legislation No. 7315 (Dec. 31, 2004).

116. See *id.* at Revision to article 22-2 and the corresponding Presidential Decree.

report or has yet to obtain sufficient evidence necessary to prove the cartel; (iii) it reports with completeness and provides full cooperation to the KFTC by providing relevant materials throughout the KFTC's investigation; and (iv) it has terminated its part in the illegal activity. In addition, the KFTC has adopted a monetary reward program for individuals reporting and providing supporting evidence for certain conduct that violates the Act.¹¹⁷ The KFTC's goal is to encourage all market participants, including consumers, to monitor actively and to ensure compliance with the MRFTA by businesses.

In addition, major changes were made to the reporting requirements for business combinations. Finally, the amendment codified the authority (and enforcement practice) of the KFTC to apply Korean competition law extraterritorially.¹¹⁸

B. CARTEL ENFORCEMENT

In the past, it was commonly understood that cartels are per se illegal, obviating the need for a detailed market analysis. In 1999, amendments were made to article 19:1, the cartel provision in the MRFTA, regarding the standard for ascertaining illegality of cartel activities—from a substantial lessening of competition in the relevant market to an unfair restriction of competition. Many commentators construed such a legislative change as a clear indication that the MRFTA adopted the per se illegality standard for cartel behavior. But on January 27, 2005, the Supreme Court of Korea rejected a strict application of per se rule to cartel behaviors,¹¹⁹ strongly suggesting that courts should take into consideration a number of factors that might mitigate the anticompetitive effects of the behavior at issue.

In contrast, the KFTC appears to take the position that article 19:1 of MRFTA has adopted per se illegality of cartel behaviors and cartel enforcement by the KFTC has been more pronounced than in the previous years. In 2005, the KFTC strengthened its enforcement activities to regulatory sectors such as telecommunications and financial industries—notably in the Korea Telecom (KT) investigation.¹²⁰ The case involved certain agreements reached on telephone service subscription rates between KT, which traditionally has monopolized the local Korean telecommunications market, and Hanarotelecom, a relative newcomer to the market. Specifically, just prior to the launching of the local phone number transferability service in 2003, KT and Hanarotelecom reached an agreement to reduce the difference in the two companies' service subscription rates. As a result of the price collusion charges, the KFTC imposed administrative fines on both KT and Hanarotelecom. Hanarotelecom sought refuge under the KFTC's Leniency Program and obtained a 49 percent reduction in the amount of the administrative fine originally imposed on it.

C. MERGER ENFORCEMENT

The first case in which the KFTC determined that conglomerate integration would restrict competition involved the acquisition of Jinro Co., Ltd, a soju (Korean wine) manufacturer, by Hite Co., Ltd., a beer manufacturer.¹²¹ The main issues in the case were (i)

117. See *id.* at art. 64-2.

118. See *id.* at art. 2-2.

119. See 2002 DA 42605.

120. See Press Release, KFTC (May 26, 2005).

121. See Press Release, KFTC (Oct. 28, 2005).

whether soju and beer were substitutable products and (ii) whether there would be an anticompetitive effect due to the fact that the two products utilized the same distribution channel (i.e., liquor wholesalers). On the former issue, the KFTC found that soju and beer were not in the same product market. On the issue of the anticompetitive effect of the contemplated transaction, however, the KFTC concluded that the combination of the two dominant companies would greatly restrict potential competition because the conglomerate companies may abuse their dominant power in downstream sales to consumers as well as in upstream wholesale markets. While approving the transaction, the KFTC adopted the following corrective measures, *inter alia*, to address the potential anticompetitive effect against Hite: (i) an order barring Hite from raising the retail price of soju and beer beyond the consumer price inflation rate over the next five years, and instructing Hite to consult with the KFTC in advance should it wish to raise the price; and (ii) an order to manage separately the two companies' sales divisions for the next five years.

XV. Developments in Mexico^o

A. LEGISLATIVE INITIATIVES

A bill to amend the Federal Law on Economic Competition proposed the following changes: (i) giving the President of Mexico the power to set minimum prices across the economy; (ii) creating a presumption that firms anyhow connected in illegal anticompetitive conduct shall be jointly liable; (iii) complying a joint dominance test similar to the EU competition law test for tacit collusion; (iv) codifying certain vertical exclusionary practices such as predatory pricing, price discrimination, cross-subsidization, discounting tied to exclusive dealing, and a broad concept of raising rival's costs; (v) adopting a concept of related markets, in an effort to broaden the relevant market analysis in merger and conduct cases; and (vi) codifying a procedure currently set out only in the implementing regulations that charges the Federal Communications Commission (FCC) with the responsibility of gathering evidence in cases based on private complaints similar to government cases. The bill faces intense opposition and no changes are expected for at least several months.

B. MERGERS AND ACQUISITIONS

The FCC cleared Grupo Bimbo's acquisition of La Corona's facilities and brands.¹²² The parties overlapped in several candy products at the Mexican level. But the FCC concluded that the merger would not have adverse effects and that the transaction was within the FCC's safe harbors because no relevant market in Mexico had a post-transaction HHI greater than 2000 and a large number of competitors remained with the merger. The FCC also cleared the Procter & Gamble/Gillette merger.¹²³ Post-merger concentration levels were high only in the electric powered toothbrushes segment and the transaction was not expected to have a negative effect on competition. The FCC rejected a portfolio effects anticompetitive theory because direct purchasers, such as big chain-retailers, have bargaining power and competitors have wide portfolios and substantial financial resources.

o. The contribution for Mexico was provided by Gabriel Castañeda of Castañeda y Asociados.

122. For information related to this decision, *see* Federal Commission on Competition, <http://www.cfc.gob.mx>.

123. *Id.*

The FCC cleared UFJ Bank's acquisition of an indirect interest in Bank of Tokyo-Mitsubishi Mexico.¹²⁴ The parties' had a marginal share in the relevant market of credit provided by commercial banks in Mexico and there were a substantial number of competitors.

The FCC issued a favorable opinion in the acquisition of the stock of Comunicaciones Mtel (CMTel) by an individual.¹²⁵ CMTel's concession title requires FCC approval for any modification in CMTel's stock structure. CMTel's concession allows it to provide one-way/two-way paging services, vehicle tracking, and telemetry services, using the narrow band of the radio spectrum. The FCC found that one-way/two-way paging services have been diminishing since 1999 (cellular phones offer similar services), and that the other services are provided by several companies using other frequencies. Furthermore, the individual acquirer did not have any interest in other telecom companies in Mexico.

XVI. Developments in New Zealand^p

A. MERGER ACTIVITY

Continuing last year's trend, the New Zealand Commerce Commission did not receive any new applications for authorization of mergers. It did, however, receive a number of applications for voluntary clearance. Of the twenty-three applications for voluntary clearance received, eighteen were cleared, three were declined and two were withdrawn.¹²⁶ In most cases the Commission has taken longer than the ten working days provided in section 66(3) of the Commerce Act 1986 to determine clearance applications. If parties believe that there might be a potential competition issue as a result of an acquisition, the Commission encourages them to apply for a formal clearance prior to entering into an unconditional agreement, rather than an informal approach that is not provided for in the Commerce Act. Applications for clearance will take priority and it may be some time before Commission staff can consider any material informally provided.

In *Gallagher Holdings Limited/Tru-Test Corporation Limited*,¹²⁷ the Commission adopted a new framework for assessing divestiture undertakings, based on the approach used by the United Kingdom Competition Commission. The Commission will consider whether or not the scope of the divestiture package may be too constrained, or not appropriately configured, to attract a suitable purchaser, or whether it may not allow a purchaser to operate effectively and viably in the market. It will also consider the risks that a suitable purchaser will not be available; that the merger parties would divest to a weak or otherwise inappropriate purchaser; or that the competitive capability of a divestiture package will deteriorate prior to the divestiture (e.g., through loss of customers or key members of staff).

In *PPCS Limited/Venison Rotorua Limited*,¹²⁸ the Commission clarified its approach to situations when an acquiring party with an existing shareholding acquires a majority or the

124. *Id.*

125. *Id.*

p. The contribution for New Zealand was provided by Andrew Peterson and Julia Turnbull of Russell McVeagh.

126. See Commerce Commission, Public Registers, <http://www.comcom.govt.nz/PublicRegisters/mergersacquisitions-clearances.aspx> (last visited Feb. 27, 2006).

127. See Commerce Commission Decision No. 545 (Feb. 23, 2005), *Gallagher Holdings Limited/Tru-Test Corporation Limited*, available at <http://www.comcom.govt.nz/PublicRegisters/mergersacquisitions-clearances.aspx>.

128. See Commerce Commission Decision No. 550 (May 12, 2005), *PPCS Limited/Venison Rotorua Limited*, available at <http://www.comcom.govt.nz/PublicRegisters/mergersacquisitions-clearances.aspx>.

balance of the shares in the target company. The Commission concluded that if one associated entity acquires another, the acquisition can be likened to an internal transfer, and the merger may not create a significant change in the state of competition.

B. ENFORCEMENT ACTION

In its Statement of Intent for 2005-2006, the Commission stated that its first strategic priority is to maximize the effectiveness of its enforcement activity in relation to anticompetitive, false, and misleading behavior.¹²⁹ A particular area of focus for the Commission is the investigation of cartels. The Commission has stated that, on average, it has up to ten cartel investigations open at any one time.¹³⁰ The Commission introduced a new Leniency Policy in 2004 specifically to tackle anticompetitive cartel behavior. The policy appears to be having the desired effect—the Commission received two applications the day after the policy was launched and an additional two shortly thereafter.¹³¹

In *Koppers Arch Wood Protection (NZ) Limited*,¹³² the New Zealand High Court interpreted the Commission's authority pursuant to section 98 of the Commerce Act to issue a notice requiring an overseas resident to attend an interview before the Commission. The High Court held that an Australian resident director of a New Zealand company who derives no income from his directorship is not carrying on business in New Zealand, and therefore a Commission notice requiring attendance for an interview with the Commission is not properly served if sent to the director at the New Zealand company's offices. In addition, the High Court held that the Commission can formally deem that the New Zealand company represents its director and then serve the director by leaving the notice at the company's offices. If the Commission deems that the company represents an individual, that individual is able to bring judicial review proceedings to review the Commission's decision. The Commission also issued proceedings for non-compliance with a section 98 Notice, imposing fines close to the maximum available under the Act.¹³³

XVII. Developments in South Africa^q

A. LEGISLATIVE REFORM

The Trade and Industry Department has published certain current competition policy proposals for legislative amendments as part of a long-awaited strategy document on import

129. See Commerce Commission Statement of Intent 2005-2006, <http://www.comcom.govt.nz/Publications/annualplans.aspx>.

130. Paula Rebstock, Speech at ACCC Cartel Conference: Cartel Enforcement in New Zealand (Nov. 24, 2004), <http://www.accc.gov.au/content/item.php?itemId=566510&nodeId=file42e5bc19d6334&fn=Session%201%20-%20Paula%20Rebstock%20-%20NZCC.pdf>.

131. Paula Rebstock, Institute of Directors Briefing (Mar. 15, 2005).

132. *Koppers Arch Wood Protection (NZ) Ltd. v. Commerce Comm'n* (High Court, Auckland, CIV 2004 404 3868, Nov. 16, 2004, Williams J); *Koppers Arch Wood Protection (NZ) Ltd. v. Commerce Comm'n* (High Court, Auckland, CIV 2004 404 3868, Nov. 26, 2004, Williams J).

133. Press Release, Commerce Commission, *Koppers Arch and GM Fined for Commerce Act Breaches* (June 3, 2005), available at <http://www.comcom.govt.nz/MediaCentre/MediaReleases/2004/koppersarchandgmfindeforcommerceac.aspx>.

q. The contribution for South Africa was provided by Vani Chetty of Edward Nathan (Proprietary) Limited.

parity pricing¹³⁴—the practice of setting prices in line with what it would cost to import, as opposed to produce, commodities have the South African Government is seeking to ensure greater monitoring and transparency in pricing in the steel industry—that may result in an amendment to the existing Competition Legislation. The Department has identified high input costs as a possible constraint hampering the development of downstream industries. Major steel producers in South Africa have come under fire for import parity pricing.

B. MERGER ACTIVITY

Setting precedent on the issue of “change in control,” the Competition Appeal Court overturned the Competition Tribunal’s decision in Harmony’s hostile bid for Goldfields, a competing gold producer.¹³⁵ The Competition Appeal Court found that the acquisition of 34.9 percent of Goldfields’ shares would allow Harmony to influence materially the strategic position of Goldfields, and therefore the transaction was notifiable as a merger for competition purposes. The Competition Appeal Court further confirmed that the Tribunal had jurisdiction to grant the requested interdict that prohibited Harmony from acquiring any of Goldfields’ shares.

In the *Uhambo Joint Venture* case, the Commission recommended that the Competition Tribunal conditionally approve a transaction that would create South Africa’s largest liquid fuels business. In July 2004, Sasol, the South African fuel giant and Petronas, a Malaysian based global energy company, announced a proposed merger of Sasol’s liquid fuel business with Engen, Petronas’ 80 percent owned subsidiary. The Commission found that the proposed transaction raised vertical and horizontal competition issues and was likely to lessen competition in the petrol industry because of certain constraints on other petrol companies’ ability to ship products inland. To alleviate these concerns, the Commission had originally recommended certain conditions, including that Uhambo would supply competitors in the inland market until a pipeline connecting Durban, Johannesburg, and Pretoria was built. The Commission referred the matter to the Competition Tribunal as required in terms of the legislation.

In February 2006 the Tribunal prohibited the merger without imposing any conditions. It found that Uhambo’s power to foreclose the market would result in a reconstituted cartel which would eliminate competition already introduced and greater competition promised with further deregulation of the industry. The Tribunal also found that the anti-competitive effect of the proposed merger could not be outweighed by the public interest and efficiency gains proposed by the parties.

C. ANTI-COMPETITIVE CONDUCT AND ABUSE OF DOMINANCE

Overturning decisions of the Tribunal and Appeal Court, the Supreme Court of Appeal set important precedent on both procedural and substantive aspects of the Competition Act

134. Import parity pricing is a policy adopted by suppliers of a good for their sales to domestic customers, according to which price is set at the opportunity cost of a unit of an imported substitute good. As such, price is set equal to the world price converted into Rand, plus any transport, tariff, and other costs the customer would bear if importing.

135. *Harmony Goldmining Co. Ltd v. Goldfields Ltd. & Others* 2005 (1) CPLR 97 (CAC).

in *ANSAC v. BOTASH*.¹³⁶ The Supreme Court of Appeal held that appeals from the Competition Appeal Court are not barred by the Competition Act and that the Supreme Court has jurisdiction to hear such appeals. The Supreme Court of Appeal further held that a rule of per se illegality cannot automatically apply to activities of bona fide joint ventures among competitors, and evidence to characterize the conduct at issue must be considered. The Supreme Court of Appeal also held that the Competition Act applies to all economic activity within, or having an effect within, the Republic.

In *SAA/Nationwide*,¹³⁷ the Tribunal imposed a fine of ZAR45 million, the largest fine to date, on South African Airways (SAA) for abusing its dominant position in the domestic airline market. The Tribunal held that two incentive schemes that SAA operated with travel agents breached the Competition Act. These incentive schemes were found to give travel agencies a compelling commercial incentive to sell SAA tickets in preference to those of its rivals. The Tribunal also found that the Explorer scheme, a system of rewarding travel agency staff with SAA tickets on the basis of the number of SAA tickets they sold, reinforced the exclusionary effects of the incentive schemes.

In *Nationwide Poles/Sasol Oil*,¹³⁸ the Tribunal held that a complaint of price discrimination must show that: (i) the respondent is dominant in the relevant market; (ii) the conduct is "likely to have the effect of substantially preventing or lessening competition"; (iii) the conduct is in respect of equivalent transactions (meaning transactions of a similar nature); and (iv) the conduct is related to price. The Tribunal held that it was unnecessary for the complainant to show actual anti-competitive effects, however, the Competition Appeal Court reversed this finding holding that proof of such anti-competitive effect is necessary to sustain the complaint. The Tribunal found that Sasol charged its largest customers significantly less than its smallest customers. This judgment must be viewed in light of the objectives of South Africa's competition law that include maintaining competition to ensure that small and medium businesses have an opportunity to participate fairly in the economy. The Competition Appeal Court overturned the Tribunal's findings, having found that although a price differential did exist, this did not affect Nationwide's ability to compete within the market.

XVIII. Developments in Spain^r

A. LEGISLATIVE DEVELOPMENTS

On January 20, 2005, a White Paper on the reform of the Spanish competition rules was published, proposing to unify the *Servicio de Defensa de la Competencia* (SDC) and the *Tribunal de Defensa de la Competencia* (TDC) into a single body and giving them greater independence.¹³⁹ But it proposed maintaining the power of the Council of Ministers to veto

136. *Am. Natural Soda Ash Corp. & Another v. Competition Comm'n of South Africa & Others* 2005 (1) CPLR 1 (SCA).

137. *Competition Comm'n v. South African Airways (Pty) Ltd.* 2001 Case 18/CR/Mar01, available at <http://www.comptrib.co.za/decidedcases/pdf/18CRMAR01final.pdf>.

138. *Nationwide Poles v. Sasol Oil (Pty) Ltd.* 2005 (1) CPLR 156 (CT).

r. The contribution for Spain was provided by Susana Cabrera and Vera Sopeña of Garrigues.

139. See Ministerio de Economía y Hacienda, *Libro Blanco para la Reforma del Sistema Español de Defensa de la Competencia* (Jan. 20, 2005), http://www.dgdc.meh.es/LibroBlanco/Libro_Blanco%20-Reforma-Def-Competencia.pdf.

mergers on public interest grounds. The White Paper also emphasized the need to guarantee the effectiveness of interim remedies and the ability to terminate restrictive practices by settlement. The White Paper proposed that commercial courts should have jurisdiction to hear competition-related cases (restrictive agreements and abuses of a dominant position) and recommended replacing the individual exemption system with a self-assessment method. Finally, the White Paper recommended the introduction of a leniency program, similar to EU competition law, to aid in the investigation of cartels. Despite the enthusiastic reactions of interested parties to the White Paper, the reform process is presently in a hiatus, pending the government's next step. Draft legislation is not expected before mid-2006.

Legislation also decentralized the enforcement of Spanish competition law by creating several regional competition courts in Madrid, the Basque Country, Galicia, and Extremadura, in accordance with Law 1/2002 and a 1999 Judgment of the Spanish Constitutional Court.¹⁴⁰

B. MERGER CONTROL

As of December 31, 2005, there was a slight increase in the number of mergers notified to the antitrust authorities.¹⁴¹ Only six cases were referred to a second phase from a total of 115 notifications. The TDC and the Council of Ministers authorized two mergers involving high market shares. In Arehucas/Artemi, the merger was approved without conditions, notwithstanding a post-merger market share of between 60-80 percent.¹⁴² The Disa/Shell Peninsular/Shell Atlantica merger that resulted in a post-merger market share of 50 percent, was approved subject to conditions.¹⁴³ The geographic market in both cases was the Canary Islands.

C. ANTI-COMPETITIVE AGREEMENTS AND ABUSE OF DOMINANCE

As of November 1, 2005, there was a small reduction in the number of resolutions adopted in anticompetitive practices cases—87 compared to 119 in 2004.¹⁴⁴ Interestingly, a settlement agreement was reached between the SDC, Correos, and ASEMPRE to terminate infringement proceedings.¹⁴⁵ This is only the second case resolved using this pro-

140. Law 1/2002, of February 21, on the coordination of the jurisdiction of the State and the Autonomous Communities for the defense of competition, BOE No. 46, of February 22, 2002, p. 7148, adopted following the Ruling No. 208/1999 of the Constitutional Court of November 15, 1999 that declared unconstitutional several dispositions of Law 16/1989, of July 17, on defense of competition, BOE No. 170, of July 18, 1989, p. 22747, that gave exclusive jurisdiction to the State on competition cases.

141. See Ministerio de Economía y Hacienda, *Concentraciones Notificadas*, http://www.dgdc.meh.es/control_concentra.html (last visited Dec. 31, 2005).

142. See Decision of the Council of Ministers of Apr. 8, 2005, BOE No. 112, p. 16041 (May 11, 2005), available at http://www.dgdc.meh.es/Acuerdos%20Consejo%20Ministros/ACM_04083.pdf; see also Report of the SDC, Case C 87/05, Arehucas/Artemi (Jan. 11, 2002), available at <http://www.dgdc.meh.es/Informes%20SGC/N04083INFWEB.pdf>.

143. See Decision of the Council of Ministers of Jan. 21, 2005, BOE No. 53, p. 7571 (Mar. 3, 2005) available at <http://www.boe.es/boe/dias/2005-03-03/pdfs/A07571-07572.pdf>; see also Report of the SDC, Case C 86/04, DISA/Shell Peninsular/Shell Atlántica (Oct. 25, 2004), available at <http://www.dgdc.meh.es/Informes%20SGC/N04073INFWEB.pdf>.

144. See Tribunal de Defensa de la Competencia, <http://www.tdcompetencia.es/> (last visited Dec. 31, 2005).

145. See Settlement Agreement, Case 2485/03, ASEMPRE/CORREOS (Sept. 15, 2005), available at http://www.dgdc.meh.es/Acuerdos%20Consejo%20Ministros/2005-09-15_NotaPrensa_AcuerdoCorreosAsempre_.pdf.

cedure since its introduction in 1999. In addition, the TDC imposed a fine of €8 million on Gas Natural for abuse of a dominant position in the regasification infrastructure market.¹⁴⁶ Correos, the state postal service, was also fined in the amount of €900,000 for applying discriminatory and unfair prices.¹⁴⁷

D. INDIVIDUAL EXEMPTIONS

The TDC rejected requests for individual exemptions for the establishment of interchange fees by 4B, Servired, and Euro 6000, respectively, based on the European Commission's findings in *Visa International—Multilateral Interchange Fees*.¹⁴⁸ The TDC declined to exempt the first two systems of interchange and revoked the individual exemption previously granted for the *Sistema Euro 6000* system of interchange fees.

E. INCREASED ROLE FOR JUDICIARY

Spanish courts are playing an increasing role in the interpretation and application of antitrust law. The Supreme Court partially upheld Telefónica's appeal against a TDC resolution imposing a €3.49 million fine and reduced it to €1.8 million.¹⁴⁹ Furthermore, following an appeal brought by the Council of Real Estate Agents, the Supreme Court decided that article 1 of the LDC (concerning restrictive agreements) cannot be applied without assessing the actual effect of the specific practice in the market.¹⁵⁰ Likewise, the Supreme Court found that the requisite intent had not been established by the TDC.

XIX. Developments in Taiwan^s

A. INTRODUCTION

The Taiwan Fair Trade Law (FTL) governs antitrust enforcement of monopolistic conduct, combinations (mergers), and concerted action. The FTL also covers unfair trade practices such as false advertising, price maintenance, counterfeiting and passing-off, damaging business reputation of others, illegal multi-level sales activities, and other deceptive or unfair conduct that might injure trade.

B. PROPOSED FURTHER AMENDMENTS TO THE FTL

In 2004 and 2005, the Fair Trade Commission proposed amendments to the FTL that seek to introduce: (i) a leniency policy that will reduce or eliminate a violator's administrative and criminal liability where the violator has voluntarily reported the conduct to the Commission and assisted its investigation; (ii) exemptions for certain types of concerted

146. See TDC Resolution of June 16, 2005, Case 580/04, *Gas Natural*.

147. See TDC Resolution of June 16, 2005, Case 584/04, *Prensa / Correos*.

148. See TDC Resolution of April 11, 2005, Case A 314/02, *Tasas Intercambio Sistema 4B*; TDC Resolution of April 11, 2005, Case A 318/02, *Tasas Intercambio Servired*; Order opening notification or revocation file of April 11, 2005, Case 287/00, *Sistema Euro 6000*.

149. See Judgment of the Supreme Court of Mar. 23, 2005, Case 4777/2002.

150. See Judgment of the Supreme Court of Mar. 23, 2005, Case 3895/2002.

s. The contribution for Taiwan was provided by Jack J.T. Huang, John Lin, and Dannie Liu of the Taipei Office of Jones Day.

action modeled upon the U.S.-styled Antitrust Safety Zone and the European-styled Block Exemptions; and (iii) a set of principles for substantive review of mergers that will advance Taiwan's culture, industries, and economy.¹⁵¹ But no schedule has been set for formal legislative review.

C. COMBINATIONS (MERGER CONTROL)

The Commission announced new Handling Principles for Application for Merger in the Civil Aviation Transportation Industries on March 15, 2005, in anticipation of probable mergers among domestic airline operators due to soaring petroleum prices and the expected imminent arrival of the Taiwan High Speed Rail. There are about twenty-eight flight routes in Taiwan operated by only four airlines—a highly concentrated market. Under the Handling Principles,¹⁵² the Commission's review of combinations within the civil aviation industry will take into consideration market definition, effects on competition, effects on economic efficiency, and remedial measures. Significantly, the Handling Principles take a broad approach to market definition, focusing on Citi-Pairs, as well as flight routes to nearby cities, rail, highway, and water transportation alternatives. They also consider whether the combination would lower operational costs, provide reasonable networks, effectively use natural resources, and promote competition by saving failing businesses.¹⁵³

D. UNAUTHORIZED CONCERTED ACTIONS

The Commission punished two major petroleum companies in Taiwan, Chinese Petroleum and Formosa Petrochemical, for over twenty instances of unauthorized concerted action in raising petrol prices.¹⁵⁴ In July 2005, the Commission found that the two companies had engaged in concerted action, but not by explicit agreement. Instead, the companies signaled their intentions to increase prices through public media, resulting in a silent consensus to increase prices by the same amounts at the same times. Because the Taiwan petroleum market is an oligopoly, such unauthorized concerted actions were anti-competitive and violated the FTL. The Commission fined each company NT\$6.5 million (approximately US\$197,000). The companies are currently appealing.

XX. Developments in the United Kingdom^t

A. LEGISLATIVE INITIATIVES

To bring the UK's competition regime into line with EU competition law, the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000 was repealed effective May 1, 2005.¹⁵⁵ Under this Order, non-price vertical agreements were excluded from

151. T.L. Huang, Chairman of the Fair Trade Commission, Address to the Legislative Yuan (Oct. 2005).

152. Handling Principles for Application for Merger in the Civil Aviation Transportation Industries, March 15, 2005.

153. *See id.* at article 4.

154. *See* Fair Trade Commission Disposition No. 094079 (July 25, 2005).

t. The contribution for the United Kingdom was provided by Dr. Thomas Heide and Siân East of SJ Berwin LLP.

155. *See* The Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004, Statutory Instrument 2004, No. 1260, available at <http://www.opsi.gov.uk/si/si2004/20041260.htm>.

the chapter I prohibition of the Competition Act.¹⁵⁶ These agreements will now require assessment under the UK and/or EU competition rules.

The Office of Fair Trading (OFT) published its interim note on leniency applications and no-action letters.¹⁵⁷ It supplements guidance already issued by the OFT and aims to make seeking leniency more attractive. The OFT also published draft guidelines on the involvement of complainants and other third parties in Competition Act investigations.¹⁵⁸

B. CARTEL/CRIMINAL ENFORCEMENT

Three cartel decisions, *Replica Football Kits*,¹⁵⁹ *Argos and Littlewoods*,¹⁶⁰ and *Flat Roofing Contractors*¹⁶¹ were substantially upheld on appeal by the Competition Appeal Tribunal (CAT)—the UK court with special jurisdiction over competition matters. The *Replica Football Kits* judgment was the first instance in which the CAT increased a penalty set by the OFT.

In relation to the international carbon products cartel, the UK Home Secretary approved the extradition to the United States of Ian Norris, the former chief executive of Morgan Crucible, to face seven counts of conspiracy to defraud and two counts of perverting the course of justice in the United States. He may be the first Briton extradited to the United States to face criminal antitrust charges. The Extradition Act 2003,¹⁶² which removed the need for the United States to show a prima facie case against the person whose extradition is sought, is undergoing judicial review in this case.

C. MERGER ENFORCEMENT

In *Unichem v. OFT*, the CAT quashed the OFT's decision not to refer the merger between Phoenix Healthcare Distribution Limited and East Anglian Pharmaceuticals to the Competition Commission—the body to which potentially problematic transactions are referred.¹⁶³ This is only the second occasion in which the OFT has had to reconsider its decision not to refer a case to the Competition Commission.

156. See Competition Act 1998, c. 41, § 2, available at <http://www.opsi.gov.uk/acts/acts1998/19980041.htm>.

157. Office of Fair Trading, Leniency and No-Action, The OFT's Interim Note on Handling of Applications, July 14, 2005 (OFT 803), available at <http://www.offt.gov.uk/NR/rdonlyres/FE4F98BF-D8C5-48FB-9F7E-D6133F907538/0/offt803.pdf>.

158. Office of Fair Trading, Involving Third Parties in Competition Act Investigations, Nov. 24, 2005 (OFT 451), available at <http://www.offt.gov.uk/NR/rdonlyres/DB4B3133-72A5-4158-84E0-A5899704A9F2/0/offt451.pdf>. Until now the involvement of complainants and other third parties has been considered on a case-by-case basis.

159. Umbro/Manchester United/JJB & Allsports v. OFT, [2005] CAT 22, available at <http://www.catribunal.org.uk/documents/Jdg1021Football190505.pdf>.

160. Argos Ltd. & Littlewoods Ltd. v. OFT, [2005] CAT 16, available at <http://www.catribunal.org.uk/documents/Rule1014Argos290405P.pdf>.

161. Richard W. Price (Roofing contractor) Ltd. v. OFT, [2005] CAT 5, available at <http://www.catribunal.org.uk/documents/Jdg1033Price240205.pdf>.

162. See Extradition Act 2003, ch. 41, available at <http://www.opsi.gov.uk/acts/acts2003/20030041.htm>.

163. Unichem v. OFT, [2005] CAT 8, available at <http://www.catribunal.org.uk/documents/Jdg1049Unichem01042005.pdf>.

The Competition Commission rendered its first divestiture decision under the Enterprise Act 2002¹⁶⁴ in *Emap/ABI Building Data*.¹⁶⁵ Divestiture was required because the merged entity was found to account for roughly 70 percent of the UK market for construction project information and contract data. No other supplier accounted for more than 5 percent of sales, and the merging parties had been able to effect price increases in recent years.

For the first time since the introduction of the Enterprise Act, the Competition Commission reversed its own provisional findings of a substantial lessening of competition and cleared the *British Salt/ New Cheshire Salt works* merger.¹⁶⁶

D. MARKET STUDIES AND INVESTIGATIONS

In the first market investigation references made under the Enterprise Act, the Competition Commission conducted investigations into markets for the supply of store cards and related insurance services, domestic bulk liquefied petroleum gas, the supply of home credit, classified directory advertising services, and personal current account banking services in Northern Ireland.¹⁶⁷ Provisional findings and notices of possible remedies have been published in the store card and related insurance services and domestic bulk liquefied petroleum gas investigations. The OFT has also initiated market studies to examine perceived competition problems in the property search market and the UK's drug pricing scheme.¹⁶⁸

E. CONDUCT CASES

The OFT investigated multi-lateral interchange fees in the Visa and MasterCard networks.¹⁶⁹ It has accepted commitments (i.e., negotiated solutions to infringement proceedings where the company under investigation is able to avoid the potential for adverse publicity and fines) in cases involving TV advertising and newspapers.¹⁷⁰ The OFT is also

164. See Enterprise Act, 2002, ch. 40, available at <http://www.opsi.gov.uk/acts/acts2002/20020040.htm>.

165. See Competition Commission, Remedies Notice No. 2 of 2005, *Emap/ABI Building Data Ltd., Competition Commission Acceptance of Final Undertakings*, available at <http://www.competition-commission.org.uk/inquiries/completed/2005/abi/index.htm>.

166. See News Release, Competition Commission, Salt Merger Would Reduce Competition (Sept. 5, 2005), available at http://www.competition-commission.org.uk/press_rel/2005/sep/pdf/55-05.pdf; News Release, Competition Commission, Salt Merger Cleared (Sept. 6, 2005), available at http://www.competition-commission.org.uk/press_rel/2005/nov/pdf/71-05.pdf.

167. For an updated list of market investigation references, see Office of Fair Trading, Market Investigation References, <http://www.oft.gov.uk/Business/references/default.htm>.

168. See Press Release, Office of Fair Trading, Chance to Reform Property Search Market Better Access and More Competition Required, Says OFT (Sept. 21, 2005), available at <http://www.oft.gov.uk/News/Press+releases/2005/174-05.htm>; Press Release, Office of Fair Trading, OFT to Study Drug Pricing Scheme (Sept. 13, 2005), available at <http://www.oft.gov.uk/News/Press+releases/2005/171-05.htm>.

169. See Press Release, Office of Fair Trading, Mastercard Agreement Anti-competitive, Rules OFT (Sept. 6, 2005), available at <http://www.oft.gov.uk/news/press+releases/2005/168-05.htm>; Press Release, Office of Fair Trading, OFT Issues Statement of Objections on Visa Agreement (Oct. 19, 2005), available at <http://www.oft.gov.uk/News/Press+releases/2005/195-05.htm>.

170. See Press Release, Office of Fair Trading, TV Eye Agrees to Revise Advertising Arrangements Following Competition Concerns (Jan. 21, 2005), available at <http://www.oft.gov.uk/News/Press+releases/2005/7-05.htm>; Press Release, Office of Fair Trading, Way Clear for New London Afternoon Newspaper (Apr. 7, 2005), available at <http://www.oft.gov.uk/News/Press+releases/2005/66-05.htm>.

considering whether current distribution agreements for newspapers and magazines are likely to satisfy the criteria for exemption under section 9 of the Competition Act.¹⁷¹

The CAT set aside the OFT's decision that the collective sale of media rights by forty-nine race courses to Attheraces amounted to an infringement of the UK competition rules.¹⁷² This is the first time the CAT has overturned an OFT decision in its entirety, stating that there was no reliable evidence to support the OFT's opposition to the proposed collective selling of rights.

The first damages actions under section 47A of the Competition Act, which followed the European Commission's 2001 Vitamins Cartel decision, were settled and dismissed.¹⁷³

XXI. Developments in the United States^a

A. LEGISLATIVE INITIATIVES

Two noteworthy statutes were signed into law recently. First, the Class Action Fairness Act¹⁷⁴ expanded the jurisdiction of federal courts to cover state-law class actions that have a significant interstate component. Significantly, the Act will apply to (and thus allow for the consolidation of) many state-law indirect purchaser antitrust actions that are generally not permitted under federal law. Second, the Antitrust Criminal Penalty Enhancement and Reform Act¹⁷⁵ increased maximum Sherman Act corporate fines from \$10 million to \$100 million and maximum jail terms from three years to ten years. It also enhanced the Antitrust Division's criminal amnesty policy by reducing the civil liability of applicants who provide cooperation to plaintiffs in private civil suits against other participants in an antitrust violation.¹⁷⁶

B. APPLICATION OF THE FEDERAL ANTITRUST LAWS TO FOREIGN COMMERCE

On remand from the Supreme Court's 2004 decision in *F. Hoffman-La Roche Ltd v. Empagran S.A.*,¹⁷⁷ the D.C. Circuit Court of Appeals concluded that civil plaintiffs could not overcome *Empagran's* general rule that no subject matter jurisdiction exists under the Sherman Act over foreign injuries by alleging that foreign price-fixing conduct could not have occurred without price-fixing in the United States.¹⁷⁸ The court held that a mere "but for"

171. See Press Release, Office of Fair Trading, Newspaper Agreements Likely to Get Green Light But Magazine Agreements Likely to Need Change (May 19, 2005), available at <http://www.of.gov.uk/News/Press+releases/2005/88-05.htm>.

172. The Racecourse Ass'n & Others v. Office of Fair Trading [2005] CAT 29, available at http://www.catribunal.org.uk/documents/Jdg1035_1041RCA020805.pdf.

173. See *BCL Old Co Ltd. v. Aventis SA*, [2005] CAT 2, Cases 1028/5/7/04 and 1029/5/7/04. Further references available at <http://www.catribunal.org.uk/judgments/default.asp> (last visited Feb. 27, 2006).

u. The contribution for the United States was provided by Fiona A. Schaeffer, Christopher V. Roberts, and Eric S. Hochstadt of the New York Office of Weil, Gotshal & Manges LLP.

174. Pub. L. No. 109-2, 119 Stat. 4 (2005) (to be codified at 28 U.S.C. §§ 1332(d), 1453, 1711-15).

175. Pub. L. No. 108-237, tit. II, § 201, 118 Stat. 661, 665 (2004) (to be codified at 15 U.S.C. §§ 1-3, 16).

176. In particular, the Act limits the liability of these applicants to single, not treble, damages and further limits their damages to those caused by their commerce, not the total amount of commerce done by all the conspirators under joint and several liability principles.

177. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

178. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1043 (2006).

causal link between the United States and foreign injury does not confer subject matter jurisdiction over foreign injury; there must be a more direct, proximate link. Several other courts reached similar conclusions, and are now under appeal.¹⁷⁹

C. CARTEL/CRIMINAL ENFORCEMENT

Significant fines in the DRAM investigation highlighted the Antitrust Division's continued aggressive prosecution of international cartel conduct.¹⁸⁰ In addition, a Supreme Court decision had wide-reaching significance for all criminal sentencing. In *United States v. Booker*,¹⁸¹ the Supreme Court held it unconstitutional to use the Federal Sentencing Guidelines' procedures for exceeding maximum criminal penalties unless the facts underlying the enhancement were found by a jury beyond a reasonable doubt (rather than by a judge under a lesser preponderance of the evidence standard, as contemplated in the Guidelines). But the Court also held that judges may use the Guidelines' procedures in an advisory capacity. Criminal antitrust defendants may view these cases as limiting the Division's ability to seek criminal fines that exceed the statutory maximums, but the Division believes there will be no such widespread impact.¹⁸²

In *Stolt-Nielsen, S.A. v. United States*,¹⁸³ the Third Circuit Court of Appeals permitted the Division to proceed with its first-ever attempt to revoke an amnesty grant under its Corporate Leniency Program. The district court had enjoined the Division from indicting Stolt-Nielsen Transportation Group. The Third Circuit held that such extraordinary relief was not justified where Stolt-Nielsen could move to dismiss any indictment based on the Division's asserted breach of the amnesty agreement at issue.

D. MERGER ENFORCEMENT

In the Federal Trade Commission's first challenge to a hospital merger since 1997, an Administrative Law Judge found that the merger of several Chicago-area hospitals in 2000 substantially lessened competition, causing the price of health care services to rise and ordered divestiture of the previously acquired hospital.¹⁸⁴ An appeal is pending before the full Commission.

179. See, e.g., *In re Monosodium Glutamate Antitrust Litig.*, 2005 WL 2810682, at *3 (D. Minn. Oct. 26, 2005); *Latino Quimica-Amtex SA v. Akzo Nobel Chems. BV*, 2005 WL 2207017, at *7-13 (S.D.N.Y. Sept. 8, 2005).

180. See Press Release, Dep't of Justice, Samsung Agrees to Plead Guilty and to Pay \$300 Million Criminal Fine for Role in Price-fixing Conspiracy (Oct. 13, 2005), available at <http://www.usdoj.gov/atr/public/press-releases/2005/212002.pdf>.

181. *United States v. Booker*, 543 U.S. 220 (2005).

182. See Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Address before the American Bar Association, Section of Antitrust Law, Spring Meeting, Washington, D.C.: Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants, (Mar. 30, 2005), <http://www.usdoj.gov/atr/public/speeches/208354.pdf>.

183. *Stolt-Nielsen, S.A. v. United States*, 352 F. Supp. 2d 553, 560 (E.D. Pa. 2005), *rev'd and remanded*, 2006 WL 722160, at *8 (3d Cir. Mar. 23, 2006).

184. See Press Release, Federal Trade Commission, Administrative Law Judge Orders Evanston Northwestern Healthcare Corporation to Sell Highland Park Hospital (Oct. 21, 2005), available at <http://www.ftc.gov/opa/2005/10/evanston.htm>.

Increased merger scrutiny by state regulators was demonstrated in Federated Department Stores' acquisition of May Stores. State regulators required divestitures in twenty-six overlapping store locations even though the FTC had taken no enforcement action.¹⁸⁵

In addition, the Antitrust Division's case against Dairy Farmers of America, Inc. challenging its 2002 acquisition of a non-controlling interest in Southern Belle Dairy Co., LLC was reinstated for trial. The Sixth Circuit held that "a lack of control influence" does not preclude a finding that the effect of the transaction may be to substantially lessen competition.¹⁸⁶ The Division applied this reasoning in its challenge of an aspect of UnitedHealth Group's acquisition of PacifiCare Health Systems pertaining to United's network rental arrangement with Blue Shield of California.¹⁸⁷

E. CONDUCT CASES

The United States Supreme Court and several federal courts limited the *per se* liability risks of joint ventures and clarified the scope of liability for tying arrangements and price discrimination.¹⁸⁸ In an enforcement action brought by the Antitrust Division, the Third Circuit¹⁸⁹ held that a prefabricated artificial teeth maker possessed monopoly power and

185. See Assurance between Federated Department Stores, Inc. and the States of California, Maryland, Massachusetts, New York, and Pennsylvania (Aug. 30, 2005), <http://ag.ca.gov/newsalerts/cms05/05-071-0a.pdf?PHPSESSID=86009f12cd94cf3009f8d8f981aceaf4>; Press Release, Federal Trade Commission, Statement of the Commission, Federated Department Stores, Inc./The May Department Stores Company (Aug. 30, 2005), available at <http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf>.

186. See *United States v. Dairy Farmers of Am., Inc.*, No. Civ.A. 03-206KSF, 2004 WL 2186215 (E.D. Ky. Sept. 7, 2004), *rev'd and remanded*, 426 F.3d 850, 860 (6th Cir. 2005).

187. See *United States v. UnitedHealth Group Incorporated*, No. 1:05 CV 02436 (D.D.C.) (Complaint filed Dec. 20, 2005), at ¶¶ 44-53, available at <http://www.usdoj.gov/atr/cases/f213800/213815.pdf>; *United States v. UnitedHealth Group, Inc.*, No. 1:05 CV 02436 (D.D.C.) (Competitive Impact Statement filed Mar. 3, 2006) at pp. 13-14 (explaining behavioral and structural relief concerning network rental arrangement in proposed consent decree). The other main aspect of the Antitrust Division's enforcement proceeding and proposed consent decree arose out of its concern that the merged entity would have alleged monopsony power in upstream markets for the purchase of physician services in the Metropolitan Statistical Areas of Tucson, Arizona, and Boulder, Colorado.

188. See, e.g., *Texaco Inc. v. Dagher*, 126 S. Ct. 1276, 1280-81 (2006) (joint venture: holding that "the pricing policy challenged [by plaintiffs] was not subject to *per se* scrutiny because it involves a core activity of the economically integrated joint venture at issue and, thus, 'amounts to little more than price setting by a single entity albeit within the context of a joint venture and not a pricing agreement between competing entities with respect to their competing products'"); *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006) (tying: holding that a patent does not create or give rise to a presumption of market power); *Volvo Trucks N.A., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006) (price discrimination: holding, *inter alia*, that a "discriminated" dealer failed to state a claim against Volvo under the Robinson-Patman Act, 15 U.S.C. § 13(a), where it did not compete with "favored" Volvo dealers for the same customer); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (joint venture: holding that restraints on prices for products or services outside the scope of the venture imposed by joint venture partners are not subject to *per se* scrutiny); *U.S. Philips Corp. v. Int'l Trade Comm'n*, 424 F.3d 1179, 1187-93 (Fed. Cir. 2005) (patent pool: holding that the tying of "essential" and "nonessential" patents under a package licensing arrangement was not *per se* illegal); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1076 (11th Cir.), *petition for cert. filed*, 74 U.S.L.W. 3130 (Aug. 29, 2005) (No. 05-273) (patent infringement settlement: holding that payments by a brand drug manufacturer to a generic drug manufacturer to refrain from selling an allegedly infringing product are not subject to *per se* scrutiny); *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370, 389-91 (2d Cir. 2005) (same).

189. See *United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005).

had excluded competition by anticompetitive exclusive dealing, notwithstanding the short term nature of its contracts with dental dealers, in violation of section 2 of the Sherman Act. Finally, the Ninth Circuit¹⁹⁰ held that the predatory pricing standard—sales below a measure of cost and a dangerous probability of recouping losses—did not apply to predatory purchasing.

190. See *Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.*, 411 F.3d 1030, 1034-35 (9th Cir 2005), *petition for cert. filed* (U.S. Sept. 23, 2005).

