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International Antitrust

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International Antitrust

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International Antitrust

I. Developments in Argentina*

A. LEGISLATIVE DEVELOPMENTS

A bill was submitted to the Argentine Congress on March 29, 2007, proposing amendments to the statute organizing the Tribunal Nacional de Defensa de la Competencia (TNDC) and to Argentina's merger control procedure.¹ In terms of organizational matters, the bill provides that the TNDC will be situated in Buenos Aires, although it will be able to hold meetings anywhere in the Argentine Republic.² The TNDC's seven members will be appointed by the Argentine Executive Branch for a term of six years, following completion of a public selection process involving examination by a special jury.³

With respect to merger control, the bill provides that the TNDC will be required to issue its decision on a proposed merger within forty days of receipt of a completed application⁴ (the current waiting period for CNDC review is forty-five days). If no decision is issued within this forty-day period, the transaction will be deemed authorized. The forty-day review period may be suspended if the TNDC requests additional documentation, but only on one occasion.⁵

The bill also provides that the TNDC's merger decisions will be communicated to the Secretary of Domestic Trade of the Ministry of Economy and Production.⁶ In cases where approval has been granted, the Secretary will have three days within which to recommend to the Ministry that the TNDC's decision be overruled and that proceedings be commenced. Circumstances in which such a recommendation can be made are limited to where the transaction involves specific sectors (public utilities, defense, energy, or mining) or where the transaction would result in a "significant" impact on employment and investment in Argentina.

B. MERGERS

The CNDC rendered decisions approving a variety of transactions in 2007, including in the telephone, food, media, cable, and electric power sectors. Of particular interest was a

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

1. Proyecto de Ley No. S-611/07, Mar. 29, 2007 (Arg.), http://www.senado.gov.ar/web/proyectos/verExpe.php?origen=S&tipo=PL&numexp=611/07&nro_comision=&tConsulta=3. The TNDC will replace the current Argentinean antitrust authority, known as the Comisión Nacional de Defensa de la Competencia (CNDC).

2. *Id.* art. 4.

3. *Id.* art. 5-6.

4. *Id.* art. 2.

5. *Id.*

6. *Id.*

transaction in the electric power sector that the CNDC declined to authorize. This transaction involved the proposed indirect acquisition by EP Primrose Spain S.L. (Primrose) of Compañía de Transporte de Energía Eléctrica en Alta Tensión Transener S.A. (Transener).⁷ Rather than conducting its own review of the transaction, the CNDC denied its approval on the basis that both the national electricity regulator and the Secretary of Energy were of the opinion that Primrose was not an appropriate purchaser because it had no experience in the electricity industry.⁸

C. CARTELS

The CNDC imposed a fine of \$250,000 (equivalent to approximately US\$79,000)⁹ on Shell Gas S.A. and Totalgaz Argentina S.A. for engaging in a market sharing agreement involving the sale of bottled liquefied petroleum gas (LPG).¹⁰ The parties' conduct was found to be contrary to Sections 1 and 2, subsection c of Argentina's Antitrust Law.¹¹ The market allocation agreement came to light after a customer of Shell Gas tried to purchase bottled LPG from Totalgaz and was told that it could not do so because it was a Shell Gas customer.

II. Developments in Australia*

A. LEGISLATIVE DEVELOPMENTS

1. *Trade Practices Amendment Bills*

Late in 2006, the Trade Practices Legislation Amendment Act (No. 1) of 2006 was passed, amending the Trade Practices Act of 1974 (TPA).¹² The key amendments, discussed in last year's publication, came into force on January 1, 2007.

On September 24, 2007, the Trade Practices Legislation Amendment Act (No. 1) of 2007 came into force.¹³ The key amendments to the TPA include: supplementing the existing rule against the misuse of market power by specifically prohibiting predatory pricing.

7. See EP Primrose Spain S.L., C.N.D.C. Dictamen No. 591 (2006) (Arg.), available at <http://www.mecon.gov.ar/cndc/dictamenes.htm>. Specifically, Primrose proposed to acquire the 50% interest in Transener held by Petrobras Energia S.A. (Petrobras).

8. Camara Nacional de Apelaciones Especial Civil y Commercial de la Capital Federal [CNEspecial Civ. Y Com.] [National Court in Federal Civil and Commercial Matters], 21/06/2007, "Petrobras Energia S.A. y Otro c/ Sec. Comercio Interior/ anticompetitive," La Ley [L.L.] (2007) (Arg.) (Denying Primrose's appeal of the CNDC's decision).

9. *Id.*

10. See Shell Cas, C.N.D.C. Dictamen No. 529 (2006), available at http://www.mecon.gov.ar/cndc/dictamenes/dictamen_mayol_shell_resumen.pdf.

11. See Law No. 25,156, Sept. 10, 1999, [LIX-D] A.D.L.A. 3942 ("To the extent the circumstances described in Section 1 are present, the following action, among others, comprises a restriction on competition: . . . (c) [h]orizontally distribute zones, markets, customers and sources of supplies").

* The contribution for Australia was written by Paul Schoff and Jackie Mortensen of Minter Ellison.

12. Trade Practices Legislation Amendment Act (No. 1), 2006 (Austl.), available at <http://www.comlaw.gov.au/comlaw/Legislation/Act1.nsf/0/35CFA305E5D5F195CA25722000110A55?OpenDocument>.

13. Trade Practices Legislation Amendment Act (No. 1), 2007 (Austl.), available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/asmade/bytitle/32F8360D719DA01ACA257369001E815E?OpenDocument>.

ing;¹⁴ providing further assistance to the Courts in determining whether a corporation has a substantial degree of power in a market;¹⁵ extending the application of Section 51AC of the TPA (unconscionable conduct in business transactions) from transactions of up to AUD3 million (approx. US\$2.75 million) to transactions of up to \$10 million (approx. US\$9.17 million);¹⁶ and adding a second Deputy Chairperson position to the Australian Competition and Consumer Commission (ACCC).¹⁷

On June 21, 2007, the Corporations (NZ Closer Economic Relations) and Other Legislation Amendment Act of 2007 came into force.¹⁸ The Act amends the TPA by setting out the circumstances in which the ACCC is authorized to provide information or documents that it has received in confidence or acquired by virtue of its statutory powers to foreign government bodies, including competition regulators.

2. *Broadcasting Services Amendment (Media Ownership) Act 2006*

The provisions of the Broadcasting Services Amendment (Media Ownership) Act of 2006, removing the restrictions on media proprietors from owning a combination of free-to-air television, radio, and newspapers came into force on April 4, 2007.¹⁹ Since these restrictions were removed, there have been several media mergers in Australia, particularly in relation to rural media services.²⁰

B. COURT DECISIONS

On May 29, 2007, the Federal Court handed down its decision in *Leahy*.²¹ The ACCC alleged the existence of a fuel price fixing cartel, tendering direct evidence and admissions from individual retailers as well as circumstantial evidence in the form of records of telephone calls made between the retailers and records of changes to the retail price of petrol. The Court dismissed the application, finding that the evidence was insufficient to prove the existence of a commitment, moral obligation, or obligation binding in honor to adhere to the agreement.

Following an appeal by the ACCC, the High Court handed down its decision in *Baxter Healthcare* on August 29, 2007.²² Overturning long-standing authority, the Court held that corporations dealing with the government are not protected from the operation of the TPA on the basis of derivative crown immunity.

14. *Id.* sched. 2, pt. 1, 1(A) (amending subsection 46(1)).

15. *Id.* sched. 2, pts. 1, 2-11.

16. *Id.* sched. 3, §§ 7, 8.

17. *Id.* sched. 1.

18. Corporations (NZ Economic Relations) and Other Legislation Amendment Act, 2006 (Austl.), available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/asmade/bytitle/A5E7C2A70456ECE2CA2573070000058C?OpenDocument>.

19. Broadcasting Services Amendment (Media Ownership) Act, 2006 (Austl.), available at <http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/D521B53B624EF88DCA2572200010B119?OpenDocument>.

20. See, e.g., Lyndal McFarland, *Fairfax is Ripe for Takeover Under New Rules*, WALL ST. J. (Eastern Edition), Apr. 12, 2007, at B.2.

21. Australian Competition & Consumer Comm'n v. Leahy Petroleum Pty Ltd. (2007) FCA 794, available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/federal_ct/2007/794.html?query=leahy.

22. Australian Competition & Consumer Comm'n v. Baxter Healthcare Pty Ltd. (2007) HCA 38, available at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2007/38.html?query=baxter>.

III. Developments in Belgium*

A. MERGERS

2007 was the first complete year of merger reviews conducted under the new Belgian Competition Act's²³ significant impediment to effective competition standard. This standard replaced the former dominance test.

Nearly all notified mergers in 2007 were cleared without commitments pursuant to the Competition Council's simplified merger notification procedure. This procedure requires a much less detailed information form to be submitted and can be used where: (i) the merging parties do not operate in the same markets; (ii) the combined market shares of the merging parties in any overlap markets do not exceed 25 percent; (iii) the parties acquire joint control over a joint venture with no or limited activities in Belgium; or (iv) a party acquires sole control over a company in which it already has joint control.²⁴ The Body of Auditors must provide a response within twenty working days.²⁵

Of more significant note was a decision of the Brussels Court of Appeal regarding a transaction that was originally completed in 1997.²⁶ This case involved the Kinopolis group of movie theatres, which was formed in 1997 subject to certain commitments imposed by the Competition Council. In April 2007, the Council ruled that Kinopolis no longer had to abide by its commitments due to changes in market circumstances, such as the entry of new theatres and strong competition from other forms of entertainment (e.g., television, DVDs, the Internet, etc.).²⁷ Several competitors of Kinopolis appealed this decision to the Brussels Court of Appeal, which granted an interim stay of the Council's decision on the basis that the Council had not established a change in circumstances sufficient to rescind Kinopolis' commitments.²⁸ The case is now pending a hearing on the merits.

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

23. Loi sur la Protection de la concurrence économique [Law on the Protection of Economic Competition], July 1, 1999, http://mineco.fgov.be/organization_market/competition/law_competition_fr_001.pdf (last visited Mar. 1, 2008).

24. See Competition Council, *Regles Specifiques D'Une Notification Simplifiee de Concentrations* [Rules on Simplified Notification of Concentrations] (Belg.), http://www.google.com/translate?u=http%3A%2F%2Fmineco.fgov.be%2Forganization_market%2Fcompetition%2Fhoe_fr.htm.&langpair=fr%7Cen&hl=en&ie=UTF8 (last visited Mar. 1, 2008).

25. Belgium's competition authorities consist of the Competition Council (an independent administrative authority with decision-making powers) and the Competition Service (a department of the Ministry of Economy which is responsible for investigations). The Body of Auditors forms part of the Competition Council. See *Loi sur la Protection de la concurrence économique*, *supra* note 22, art. 29.

26. See UGC et. al, Belgium Competition Council, Hof van Beroep te Brussel [Brussels Court of Appeals], Aug. 23, 2007, <http://cgsh.com/files/Publication/75b5fc0c-1eec-49db-bd53339009c14a3c/Presentation/PublicationAttachment/23517924-87f9-4a86-addf354957dba853/Apr%202007%20-%20National%20Competition%20Report.pdf> (last visited Mar. 1, 2008).

27. See Competition Council, Decision NO. 2007-CIC-12, April 16, 2007, http://economie.fgov.be/organization_market/competition/jurisprudence/122007cc12_verzoek_Kinopolis_opheffing_pub.pdf (last visited Mar. 1, 2008).

28. See UGC et. al Belgian Competition Council, Hof van Beroep te Brussel [Brussels Court of Appeal], Aug. 23, 2007, <http://www.cgsh.com/files/Publication/75b5fc0c-1eec-49db-bd53-339009c14a3c/Presentation/PublicationAttachment/23517924-87f9-4a86-addf354957dba853/Apr%202007%20-%20National%20Competition%20Report.pdf> (last visited Mar. 1, 2008).

B. CARTELS

The new Competition Act provides an express legal basis for Belgium's leniency program.²⁹ A revised program was issued on October 22, 2007, and now largely mirrors the program recommended by the European Competition Network.³⁰ Belgium's leniency program applies only to cartels and provides that a full or partial exoneration of fines can be granted when the party provides the Belgian competition authorities with evidence of the prohibited practice and permits them to identify the cartel's participants.

IV. Developments In Brazil*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

A bill to restructure the Brazilian System of Competition Defence (SBDC) is currently before Brazil's National Congress.³¹ Among other things, the bill would introduce important changes to Brazil's merger review system, such as the establishment of a mandatory waiting period within which a transaction could not close without approval. The waiting period would be a maximum of 130 days for complex cases. Currently, there is no obligation under Brazilian law to obtain approval for a notifiable merger transaction prior to closing. The bill is not expected to be voted on until the second half of 2008.

Efforts also continue to streamline the administration and enforcement of Brazilian competition law. For example, SDE and CADE's legal office (ProCADE) signed a cooperation agreement in July 2007 to promote joint procedures and reduce overlapping reviews.³² Legislation was also enacted in May 2007 to permit CADE and SDE to accept commitments or undertakings (known as TCCs) from companies under investigation for cartel practices. The legislation also authorizes CADE to impose fines for failure to comply with a TCC.³³

29. Loi sur la Protection de la concurrence economique, *supra* note 23, art. 49, § 2.

30. See Competition Council, Communication du Conseil de la concurrence sur l'exonération totale ou partielle des sanctions pécuniaires dans les affaires portant sur des ententes [Notice on immunity from fines and reductions of fines in cartel cases, OFFICIAL BELGIUM GAZETTE, October 22, 2007, p. 11503, available at http://mineco.fgov.be/organization_market/competition/press_releases/annex/Communication_clemence.pdf.

* The contribution for Brazil was written by Mário Nogueira, Ricardo Inglez de Souza, Bruno Drago, and Stefanie Schmitt of Demarest e Almeida.

31. See Proposição de Lei No. 3934/2004, http://www.camara.gov.br/sileiy/Prop_Detalhe.asp?id=260404. The SBDC consists of three agencies: CADE, the Brazilian competition authority; SEAE, the office of the Ministry of Finance responsible for economic investigations; and SDE, the office of the Ministry of Justice responsible for investigating anti-competitive conduct.

32. SDE and CADE, Termo De Accordo De Cooperaca Tecnico-Operacional ProCADE/SDE [Cooperation Agreement Between SDE and ProCADE], July 2007, <http://www.mj.gov.br/sde/data/Pages/MJ34431BE8ITE MID4F5AE714C24F47178996742E1EC1BE94PTBRIE.htm> (last visited Mar. 1, 2008).

33. See Lei No. 11.482 de 31 de Maio de 2007 (amending art. 53 of Lei No. 8.884/94), http://www.planalto.gov.br/ccivil/_Ato2007-2010/2007/Lei/L11482.htm#art16 (last visited Mar. 1, 2007).

B. MERGERS

In 2007, CADE approved important international and national transactions, such as the acquisition of Novelis Inc. by the Aditya Birla Group of India.³⁴ The latter transaction was approved without conditions. In another major transaction involving the gas distribution industry, however, CADE required the parties to delay closing pending the completion of the merger review process.³⁵

In August 2007, the Federal Court decided that CADE is competent to review mergers and acquisitions between banks.³⁶ Prior to this decision, it was believed that transactions between banks were subject to the exclusive jurisdiction of the Brazilian Central Bank.

Finally, the courts issued several decisions confirming that the obligation to file pre-merger notifications is triggered by the execution of the first binding document between the parties. This confirmation clarifies an important point for Brazil's merger review process since pre-merger notifications must be filed within fifteen business days of the triggering event.³⁷

C. CARTELS

There are approximately 180 cartel cases currently being investigated by SDE. Some of the most important ones involve air cargo, orange juice, and gas distribution.

There is also an emphasis being placed on prosecuting unlawful bid-rigging. For example, SDE established a new department to investigate misconduct in public tenders.³⁸ In September 2007, CADE fined participants in a bid-rigging scheme involving private security companies more than BRL50 million (approximately US\$29.3 million).³⁹ This case is also notable because it is the first time that CADE prosecuted a case on the basis of evidence that was disclosed through the application of its leniency program.⁴⁰

Finally, the Courts confirmed CADE's decisions in several leading cartel cases, such as the crushed stone cartel case.⁴¹ This is a very important case in SBDC's development

34. Novelis Inc, CADE [Conselho Administrativo de Defesa Economica] Processos Administrativos No. 08012.002813/2007-791 (2007), *available at* http://www.cade.gov.br/ASPintranet/andamento_frame.asp?pro_codigo=7806&tippro_codigo=4.

35. Ipiranga Group, CADE [Conselho Administrativo de Defesa Economica] Processos Administrativos No. 08012.002813/2007-91 (2007) (involving the acquisition of the Ipiranga Group, owners of a leading Brazilian gas distributor, by several competitors (Petrobrás, Braskem and Ultra)).

36. *See* T.R.F. Ap. No. 2002.34.00.033475-0, Reporting: Des. Selene Maria de Almeida, 30.08.2007 (Brazil).

37. For example, the Federal Court decision in reference to the fine imposed by CADE, regarding the submission of the transaction between Sino dos Alpes Alimentos Ltda. and Sesto Holdings N.V. (Concentration Act no 08012.000679/2003-61).

38. *See* Secretaria de Acompanhamento Economico [SDE], Ruling No. 1.077, General Coordination for Analysis of Violations in the Public Biddings Sector (May 30, 2007).

39. *See* CADE [Conselho Administrativo de Defesa Economica] Processos Administrativos No. 08012.001826/2003-10 (2003), *available at* <http://www.mj.gov.br/data/Pages/MJ34431BE8ITEMIDFAA7E815317F40FBA7BBFB53523D5716PTBRIE.htm>.

40. *Id.*

41. *See* Mendes Junior Engenhaira S/A, CADE [Conselho Administrativo de Defesa Economica] Processos Administrativos No. 08012.002127/2002-14 (2002), *available at* http://www.cade.gov.br/ASPintranet/andamento_frame.asp?pro_codigo=2434&tippro_codigo=22.

because it marks the first time that SDE used sophisticated investigative procedures, such as search and seizures.

V. Developments In Canada*

A. COMPETITION POLICY UNDER REVIEW

In July 2007, the Canadian government announced the establishment of a Competition Policy Review Panel (the "Panel") to examine the impact of Canada's competition and foreign investment laws on the country's domestic and international competitiveness.⁴² The specific issues the Panel intends to address in its report (due by June 30, 2008) are set out in a consultation paper that was released in October 2007.⁴³ The key competition-related questions in the Panel's consultation paper include: (i) how does Canada's competition policy affect Canadian competitiveness in an environment of globalization and free trade; (ii) what international best practices would strengthen Canadian competitiveness as a destination for foreign investment; and (iii) does Canada's approach to mergers strike the right balance between consumers' interest in vigorous competition and the creation of an environment from which Canadian firms can grow to become global competitors?

B. OTHER LEGISLATIVE DEVELOPMENTS

On June 22, 2007, amendments to Canada's principal federal transportation legislation, the Canada Transportation Act (CTA), came into force.⁴⁴ Among other things, the amendments establish a new "public interest" review process for mergers involving transportation undertakings falling under federal jurisdiction.⁴⁵ This new process supplements—and to some degree supersedes—the generally applicable merger review process conducted by the Competition Bureau (the "Bureau") under the Competition Act.⁴⁶ In brief, competition mergers that are considered to raise public interest issues will now be reviewed by the federal transportation regulatory body (the Canada Transportation Agency) as well as the Bureau, and the merger will require approval of the Federal Cabinet in order to proceed.

C. MERGERS

In March 2007, the Competition Tribunal (the "Tribunal") denied an application by the Bureau for an interim injunction to temporarily prohibit the acquisition by Labatt Brew-

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

42. See Press Release, Industry Canada, Canada's New Government Creates Competition Policy Review Panel (July 12, 2007), *available at* <http://www.ic.gc.ca/cmb/welcomeic.nsf/261ce500dfcd7259852564820068dc6d/c44dbc35890c40ef852573cc006ca6e0!OpenDocument>.

43. See Competition Policy Review Panel, *Sharpening Canada's Competitive Edge* (2007), *available at* http://www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00009e.html.

44. Canada Transportation Act, 2007 S.C., ch. 19 (Can.), *available at* http://www2.parl.gc.ca/content/hoc/Bills/391/Government/C-11/C-11_4/C-11_4.pdf.

45. Generally speaking, Canada's federal Parliament has jurisdiction over transportation undertakings that operate interprovincially as well as those entities that provide integrally related ancillary services.

46. Competition Act, R.S.C., ch. C-34 (1985) (Can.).

ing Company Ltd. of Lakeport Brewing, another Canadian brewery.⁴⁷ The Bureau argued that it required additional time (prescribed by statute) to complete its investigation into whether the proposed merger would prevent or lessen competition substantially. The Tribunal ruled that a temporary injunction was not appropriate given the circumstances. In particular, the Tribunal held that permitting the transaction to proceed would not “substantially impair” its ability to remedy any negative effects on competition should the Bureau successfully challenge the merger at a later date.⁴⁸ The Bureau has appealed the Tribunal’s decision even though the transaction was completed in August 2007.⁴⁹

D. CARTELS

On October 10, 2007, the Bureau released a revised version of its Information Bulletin on the granting of immunity from prosecution for criminal offenses under the Competition Act.⁵⁰ The purpose of the revisions is to clarify certain aspects of the Bureau’s immunity program and to achieve, where possible, consistency with the programs of other enforcement agencies. The Bureau’s immunity program, like amnesty/leniency programs in other jurisdictions, has been an effective tool in uncovering and prosecuting criminal anti-competitive conduct in Canada, particularly cartel activity.

E. ABUSE OF A DOMINANT POSITION

The last several years have witnessed ongoing litigation involving an application brought by the Bureau under the Competition Act’s abuse of dominance provisions to challenge a “loyalty program” offered by Canada Pipe Ltd. (Canada Pipe) to its customers. Canada Pipe, which manufactures cast iron drain, waste, and vent (DWV) products, succeeded at first instance before the Tribunal.⁵¹ The Tribunal’s decision was subsequently reversed by Canada’s Federal Court of Appeal and remanded to the Tribunal for re-determination.⁵² On May 10, 2007, the Supreme Court of Canada denied Canada Pipe’s application for leave to appeal the Federal Court of Appeal’s decision.⁵³ As a result, the matter will be re-heard by the Tribunal starting in February 2008.

47. *Comm’r of Competition v. Labatt Brewing Co. Ltd., et al.*, [Mar. 28, 2007] Competition. Tribunal Dec. No. 2007-003, available at <http://www.ct-tc.gc.ca/english/CaseDetails.asp?x=67&CaseID=282#387>.

48. The Bureau has the authority to challenge a merger within three years of closing. See Competition Act, *supra* note 45, § 2.

49. See Competition Bureau, Competition Bureau Appeals Decision in Labatt-Lakeport Merger (April 11, 2007), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02297e.html>.

50. Competition Bureau, Information Bulletin, Immunity Program Under the Competition Act (Oct. 2007), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02297e.html>.

51. *Comm’r of Competition v. Canada Pipe Company Ltd.*, [2005] 40 C.P.R. 453; Competition. Tribunal Dec. No. 2002-006, available at http://www.ct-tc.gc.ca/CMFiles/CT-2002-006_0079b_38KCZ-9272006-4715.pdf?windowSize=popup.

52. *Comm’r of Competition v. Canada Pipe Company Ltd.*, [2006] F.C. 233, available at <http://reports.fja.gc.ca/en/2006/2006fca233/2006fca233.html>

53. See Press Release, Competition Bureau, *Supreme Court Confirms Approach to Abuse of Dominance Cases* (May 10, 2007), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02328e.html>.

IV. Developments in Chile*

A. LEGISLATIVE DEVELOPMENTS

Congress is still considering a bill submitted by the Executive on June 20, 2006, the main objective of which is to strengthen the enforcement of the Antitrust Statute and increase the independence and impartiality of the Antitrust Court and its members.⁵⁴

On February 16, 2007, the Unfair Competition Law was published in the Official Gazette.⁵⁵ This is the first time that a statute specifically regulates unfair competition in Chile. The Unfair Competition Law provides that any conduct that seeks to mislead customers constitutes an act of unfair competition. Examples of conduct that would be considered unfair competition include comparative advertising and sham litigation.

B. MERGERS

The Antitrust Court approved, subject to conditions, the acquisition by GLR Chile Ltda. of Iberoamerican Radio Chile S.A., as well as interests in other corporations controlling domestic radio stations.⁵⁶ The conditions included the requirement that GLR Chile Ltda. consult the Antitrust Court prior to any further acquisitions of radio stations. The Antitrust Court also reduced the duration of the non-competition covenant that prevents Iberoamerican Group from entering the broadcast business in Chile to a term of two years. This is the first time the Antitrust Court has ruled on the duration of non-competition covenants.

C. CARTELS

The Antitrust Court recently dismissed a claim filed by the Antitrust Attorney General against private health insurance companies, alleging that they had conspired to reduce the coverage of certain health plans.⁵⁷ In a split decision, the Antitrust Court found that there was not enough evidence of collusion and, therefore, insufficient grounds for conviction. An appeal before the Supreme Court is pending.

D. ABUSE OF A DOMINANT POSITION

In a complaint filed by the Antitrust Attorney General against Lan Airlines S.A. and Lan Cargo S.A., the Antitrust Court found that the defendants had abused their dominant position in the customs warehousing and cargo storage market in the city of Punta Arenas

* The contribution for Chile was written by Claudio Lizana, Marcos Rios and María José Henríquez de Carey y Cia.

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

55. Law No. 20.169, Feb. 16, 2007 (Chile), *available at* <http://catalogo.bcn.cl/ipac20/ipac.jsp?session=QSP3990684234.32429&menu=search&aspect=subtab147&npp=10&ipp=10&spp=20&profile=bcn&ri=5&source=%7E%21horizon&index=GW&term=20169&aspect=subtab147#focus>.

56. See Iberoamerican Radio Chile S.A., Tribunal De Defensa De La Libre Competencia, Judgment No. 20/2007, *available at* www.tdlc.cl.

57. See Isapre ING S.A., Tribunal De Defensa De La Libre Competencia, Judgment No. 57/2007, *available at* www.tdlc.cl.

by charging additional fees for freighting to external storage rooms.⁵⁸ The Antitrust Court imposed a fine of 165 UTA (approximately US\$125,000) against both defendants. This decision was affirmed by the Supreme Court.⁵⁹

VII. Developments in China*

A. LEGISLATIVE DEVELOPMENTS

After thirteen years of intense debate,⁶⁰ on August 30, 2007, the Standing Committee of the National People's Congress passed China's new Anti-Monopoly Law (AML).⁶¹ The provisions of this new legislation are considered in detail in the report of the China Committee elsewhere in this issue.

B. MERGERS

Until the AML is implemented, merger review in China will continue to be governed by Sections 51-54 of the September 2006 Regulations for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the "Foreign M&A Regulations").⁶² As is evident from its title, this law applies only to acquisitions by foreign investors; purely domestic transactions are not currently subject to merger review in China.

The Foreign M&A Regulations are enforced by the Antimonopoly Office of the Ministry of Commerce (MOFCOM) and State Administration of Industry (SAIC). The Antimonopoly Law Office has increasingly resorted to second phase reviews of proposed transactions believed to raise significant competitive concerns. Among the cases that underwent second-phase hearings in 2007 were SEB's proposed acquisition of Supor⁶³ and Carlyle's proposed acquisition of Xuzhong Machinery.

Government enforcement of existing competition-related laws became more active in 2007, partly due to pressures from rapidly increasing prices. For example, the National Development and Reform Commission (NDRC) investigated and issued penalties in a series of price-fixing cases, notably in the food sector, including a widely reported case involving the Chinese Instant Noodle Association.⁶⁴ Private parties in China are also be-

58. See Lan Airlines S.A., Tribunal De Defensa La Libre Competencia, Judgment No. 55/2007, available at www.tdlc.cl.

59. See Lan Airlines S.A., Supreme Court, Judgment No. 55/2007, available at www.tdlc.cl.

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

60. THE ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA: INTERPRETATIONS AND APPLICATIONS, Foreword (Shang Ming ed., 2007).

61. Fan long duan fa [Anti-Monopoly Law] (promulgated by the Standing Comm. of the Nat'l People's Congr. on Aug. 30, 2007, effective Aug. 1, 2008), available at http://www.law-lib.com/law/law_view1.asp?id=212679 (last visited Mar. 1, 2008).

62. Guan yu wai guo tou zi zhe bing gou jing nei qi ye de gui ding, MOFCOM, State-Owned Asset Supervision and Administration Commission, State Administration of Taxation, SAIC, China Securities Regulatory Commission, State Administration of Foreign Exchange on Aug. 8, 2006, effective Sept. 8, 2006), arts. 51-54, available at <http://www.mofcom.gov.cn/column/print.shtml?b/c/200608/20060802839585>.

63. China View, *SEB Given Green Light to Acquire Majority Interest in China's Supor*, available at http://news.xinhuanet.com/english/2007-04/12/content_5967426.htm (last visited Mar. 1, 2008).

64. Xinhuanet, http://news.xinhuanet.com/fortune/2007-08/28/content_6617725.htm. *Food Group Slammed for Price Collusion*, CHINA DAILY, Aug. 17, 2007, available at <http://www.china.org.cn/english/business/221206.htm> (last visited Mar. 1, 2008).

ginning to use competition laws as a weapon against competitors. For example, Dongjin sued Intel for monopolization contrary to the Contract Law (the case was settled in May),⁶⁵ and Tsum's sued Sony for manufacturing digital cameras and recorders that are incompatible with non-Sony batteries in violation of the Anti-Unfair Competition Law (this case remains pending).⁶⁶

VIII. Developments In Colombia*

A. MERGERS

On March 31, 2007, Colombia's competition authority, the Superintendent of Industry and Commerce (SIC), gave its conditional approval to Postobon's purchase of 100 percent of the corporate capital of Projugos, a company controlled by Bavaria S.A.⁶⁷ Both Postobon and Bavaria are leading producers of sodas, waters, and fruit beverages in Colombia. Because of its concerns about the parties' combined market share in the fruit beverage market, the SIC made its approval conditional on the sale or licensing of Projugos' most important fruit beverage brand to an independent third party, together with other associated assets. The parties were also required to provide technical assistance to the purchaser or licensee and to comply with other behavioral remedies, such as a prohibition on exclusive agreements with customers.

On July 16, 2007, the SIC released its decision denying approval to the merger of Mexichen (a dominant producer of the resin used to fabricate PVC tubes) and PAVCO (one of the largest Colombian PVC manufacturers).⁶⁸ The SIC concluded that the merger would have inhibited competition and increased barriers to entry by giving the merged entity the ability to restrict access to PVC resin. The parties filed an appeal with the SIC, which then reconsidered its original decision and approved the proposed merger, subject to the following conditions: (i) the sale by PAVCO of a PVC industrial unit to an independent third party; and (ii) that Mexichen would (a) assure the supply of PVC resins to PAVCO's competitors at a fair price, and (b) not disclose to PAVCO information regarding its PVC resin sales to PAVCO's competitors.⁶⁹

On June 14, 2007, the SIC initiated an investigation against Telmex S.A., Superview S.A., TV Cable S.A., and TV Cable del Pacífico S.A. for not filing a mandatory pre-merger notification in respect of their proposed transaction.⁷⁰ If the SIC determines that

65. *Intel, China's Dongjin Close IPR Dispute*, CHINA DAILY, May 15, 2007, http://www.chinadaily.com.cn/china/2007-05/15/content_872737.htm. For history of the case, see http://tech.sina.com.cn/focus/intel_DJQ/index.shtml (last visited Mar. 1, 2008).

66. *Sony in Court for Battery Design*, PEOPLE'S DAILY ONLINE, Jan. 18, 2007, http://english.peopledaily.com.cn/200701/18/eng20070118_342432.html (last visited Mar. 1, 2008).

* The contribution for Colombia was written by Mary Elena Lares Colmenares of Munoz Tamayo & Asociados.

67. See Resolution SIC No. 09192 (Mar. 30, 2007), available at <http://www.sic.gov.co>.

68. See Resolution SIC No. 21345 (July 16, 2007), available at <http://www.sic.gov.co>.

69. See Resolution SIC No. 29154 (Sept. 14, 2007), available at <http://www.sic.gov.co>.

70. See Resolution SIC Nos. 17651 and 17652 (June 14, 2007), available at <http://www.sic.gov.co>. Colombia's antitrust legislation requires that a pre-merger notification be filed for acquisitions involving companies with: (i) a combined annual income in Colombia of greater than approximately US\$22 million and (ii) assets in Colombia with an estimated value of greater than US\$22 million.

the parties failed to give notice of the transaction prior to its implementation, it could declare the merger void and impose monetary fines.

B. ANTI-COMPETITIVE PRACTICES

On April 16, 2007, following a complaint filed by Heineken International of Colombia, the SIC initiated an antitrust investigation against Bavaria S.A. for alleged anti-competitive acts with respect to the marketing of its imported "Peroni" brand of beer.⁷¹ Heineken alleged that Bavaria had abused its dominant position in the beer market by prohibiting its customers from also selling Heineken products. Bavaria attempted to persuade the SIC to terminate its investigation by offering certain remedies. The SIC, however, rejected Bavaria's proposal, finding the suggested remedies were not sufficient to guarantee that the alleged anti-competitive practices would not continue in the future.⁷²

On March 9, 2007, the SIC initiated an investigation against thirteen sugar producers for allegedly entering into an agreement to fix the prices they would pay for their supplies of sugar cane.⁷³ The SIC's preliminary investigation produced evidence that the producers had adopted a uniform formula to determine the prices that they would pay. The SIC's decision is still pending at the time of writing.

On November 30, 2007, the State Council, Colombia's supreme administrative court, confirmed the SIC's decision that certain gas station operators had fixed the prices charged for premium gasoline.⁷⁴ This case is of particular interest because the SIC inferred the existence of a price-fixing agreement between the parties based on their conduct, even in the absence of any evidence of a formal understanding to charge the same prices.

IX. Developments in the European Union*

A. MERGERS

In June 2007, the European Commission blocked Ryanair's proposed takeover of Aer Lingus, rejecting slot-related and other commitments offered by Ryanair.⁷⁵ This is the first merger blocked by the Commission since 2004. Ryanair has appealed the decision.⁷⁶

In July 2007, the European Court of First Instance (CFI) ruled partly in favor of Schneider Electric in a damage claim for losses sustained as a result of the Commission's conduct leading up to its decision prohibiting Schneider's acquisition of Legrand, a deci-

71. See Resolution SIC No. 23979 (Aug. 2, 2007), *available at* <http://www.sic.gov.co>.

72. See Resolution SIC No. 11304 (Aug. 5, 2007), *available at* <http://www.sic.gov.co>.

73. The measure was taken by the SIC through Resolution No. 6381 (Mar. 8, 2007), *available at* <http://www.sic.gov.co>

74. See Rama Judicial de Colombia, Consejo de Estado, First Section, case: Rafael Ortiz Mantilla (Estación de Servicio La Pedregosa). Consejero Ponente: Rafael Ostau de La Font Planeta.

* The contribution for the European Union was written by Gunnar Wolf and Michael Clancy of Covington & Burling.

75. Comp/M.4439, Ryanair/Aer Lingus (June 26, 2007), *available at* http://ec.europa.eu/comm/competition/mergers/cases/decisions/M4439_20070627_20610_en.pdf.

76. Case T-342/07, Ryanair Holdings Plc v. Comm'n, 2007 E.C.R.; Case T-411/07, Aer Lingus Group v. Comm'n, 2007 E.C.R. (another proceeding before the CFI when the Commission did not force Ryanair to dispose of its Aer Lingus shares).

sion that was later annulled by the CFI in 2002.⁷⁷ In the first successful action of this kind, the CFI held that Schneider's damages should include not only the expenses related to the re-examination of the transaction, but also a portion of the resulting reduction in the divestiture price.

B. CARTELS

The success of the Commission's leniency program, combined with increasing fines, has resulted in another record year for the Commission's cartel unit. As of November 28, 2007, the total fines imposed in 2007 reached EUR3.33 billion (an 80 percent increase over 2006, approximately US\$5.12 billion), including the largest ever cartel fine imposed (over EUR992 million or approximately US\$1.52 billion) and the largest ever fine imposed against a single cartel participant (over EUR479 million or approximately US\$736 million).⁷⁸ The costs of cartel offenses in Europe are likely to increase further due to tougher Commission fining guidelines, applicable to all antitrust fines decisions for which a Statement of Objections is issued after September 1, 2006,⁷⁹ and the Commission's push for increased private enforcement in the E.U.⁸⁰ The Commission is also seeking to free resources to pursue more cartels by implementing a proposed "settlement" system, whereby parties would receive a percentage reduction in their fines in exchange for their admission of liability and waiver of certain procedural rights.⁸¹

C. ABUSE OF A DOMINANT POSITION

In September 2007, the CFI upheld all substantive elements of the Commission's 2004 decision requiring Microsoft to offer an unbundled version of its Windows operating system without Windows Media Player and to license interoperability information to its competitors for the development of competing interoperable work group server operating systems.⁸²

77. Case T-351/03, *Schneider Electric SA v. Comm'n.*, 2007 E.C.R., <http://curia.europa.eu/en/actu/communiqués/cp07/aff/cp070048en.pdf> (last visited Mar. 1, 2008).

78. See Press Release, Europa, Competition: Commission Fines Members of Lifts and Escalators Cartels over €990 million (Feb. 21, 2007), available at <http://europa.eu/rapid/pressReleaseAction.do?reference=IP/07/209>.

79. See Press Release, Europa, Competition: Revised Commission Guidelines for Setting Fines in Antitrust Cases – Frequently Asked Questions (June 28, 2006), available at <http://europa.eu/rapid/pressReleaseAction.do?reference=MEMO/06/256>.

80. See Neelie Kroes, European Commissioner for Competition Policy, Remarks at Commission/IBA Joint Conference on EC Competition Policy: Reinforcing the Fight Against Cartels and Developing Private Antitrust Damage Actions: Two Tools for a more Competitive Europe, Commission/IBA Joint Conference on EC Competition Policy, Brussels, (Mar. 8, 2007), <http://europa.eu/rapid/pressReleaseAction.do?reference=SPEECH/07/128&format=HTML&aged=0&language=EN&guiLanguage=en> (last visited Mar. 1, 2008).

81. See Press Release, Europa, Antitrust: Commission Calls for Comments and Draft Legislation Package to Introduce Settlement Procedure for Cartels, Brussels (Oct. 26, 2007), available at <http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html>.

82. Case T-201/04, *Microsoft Corp v. Comm'n.*, 2007 E.C.R., <http://curia.europa.eu/en/actu/communiqués/cp07/aff/cp070063en.pdf> (last visited Mar. 1, 2008) (Microsoft decided not to appeal the CFT's judgment and to discontinue all other legal actions concerning the implementation of the Commission's 2004 decision and was subsequently found to be in compliance by the Commission); see also http://www.microsoft.com/Prespass/legal_newsroomarchive.msp?case=Europe%20Commission.

The Commission scored another victory before the Community Courts in early 2007 when the Court of Justice upheld the Commission's decision fining British Airways for granting travel agents retroactive rebates for year-on-year-sales targets.⁸³

D. ANTI-COMPETITIVE PRACTICES

In April 2007, the Commission issued a Statement of Objections against Apple and major record companies alleging that the distribution system, whereby consumers can only buy content from Apple's iTunes website in their country of residence, constitutes an illegal segmentation of the Community market.⁸⁴

The Commission was also very active in the energy sector. Among other things, the Commission published the results of an inquiry into this sector;⁸⁵ accepted commitments by the dominant Belgian gas supplier, Distrigas, addressing foreclosure concerns;⁸⁶ opened similar proceedings against the French and Belgian electricity suppliers EDF and Electrabel;⁸⁷ opened proceedings against Germany's E.ON and France's EDF for alleged market sharing and non-compete agreements;⁸⁸ opened proceedings against Italy's ENI and Germany's RWE, alleging that these companies use the control of their networks to disadvantage new entrants and other competitors;⁸⁹ and adopted a package of legislative proposals for the electricity and gas markets, *inter alia* aiming at unbundling production and supply from transmission (either by way of full unbundling or at least by way of creating an independent system operator).⁹⁰

E. OTHER DEVELOPMENTS

In September 2007, the CFI issued its judgment in *Akzo Nobel*, upholding previous case law that communications with in-house counsel are not protected by legal professional privilege in the context of EU competition law investigations.⁹¹

83. Case C-95/04, *British Airways v. Comm'n.*, 2007 E.C.R., <http://curia.europa.eu/en/actu/communiqués/cp07/aff/cp070023en.pdf> (last visited Mar. 1, 2008).

84. See Press Release, Europa, Competition: European Commission Confirms Sending a Statement of Objections Against Alleged Territorial Restrictions in On-Line Music Sales to Major Record Companies and Apple, *available at* <http://europa.eu/rapid/pressReleaseAction.do?reference=MEMO/07/126>.

85. Europa, Competition, Sector Inquiry—Energy, *available at* <http://ec.europa.eu/comm/competition/sectors/energy/inquiry/index.html>.

86. See Press Release, Europa, Antitrust: Commission Increases Competition in the Belgian Gas Market – Frequently Asked Questions (Oct. 11, 2007), *available at* <http://europa.eu/rapid/pressReleaseAction.do?reference=MEMO/07/407>.

87. See Press Release, Europa, Antitrust: Commission Initiates Formal Proceedings Against Electrabel and EDF for Suspected Foreclosure of Belgian and French Electricity Markets (July 27, 2007), *available at* <http://europa.eu/rapid/pressReleaseAction.do?reference=MEMO/07/313>.

88. See Press Release, Europa, Antitrust: Commission Opens Formal Proceedings Against E.ON and Gaz de France Concerning Suspected Market Sharing (July 30, 2007), *available at* <http://europa.eu/rapid/pressReleaseAction.do?reference=MEMO/07/316>.

89. See Press Release, Europa, Antitrust: Commission Initiates Proceedings Against RWE Group Concerning Suspected Foreclosure of German Gas Supply Markets (May 11, 2007), *available at* <http://europa.eu/rapid/pressReleaseAction.do?reference=MEMO/07/186>.

90. See Press Release, Europa, Energising Europe: A Real Market with Secure Supply (Sept. 19, 2007), *available at* <http://europa.eu/rapid/pressReleaseAction.do?reference=IP/07/1361>.

91. Cases T-125/03 & T-253/03, *Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v. Comm'n.*, 2007 E.C.R., <http://curia.europa.eu/en/actu/communiqués/cp07/aff/cp070062en.pdf> (last visited Mar. 1, 2008).

X. Developments in Finland*

A. LEGISLATIVE DEVELOPMENTS

A working group established by the Minister of Trade and Commerce is considering whether there is a need to reform the Finnish Act on Competition Restrictions.⁹² The working group is required to complete its study and issue any proposals for amendments to the legislation in the form of a Government Bill by the end of 2008.⁹³

B. MERGERS

All of the merger notifications received by the Finnish Competition Authority (FCA) in 2007 were cleared. Only one transaction was referred to an in-depth or Phase II investigation. It was eventually authorized after the merging parties decided to limit the scope of the proposed transaction to avoid competitive overlaps.⁹⁴

C. ABUSE OF A DOMINANT POSITION

In 2007, the FCA proposed that the Market Court impose fines on four regional telecommunications network operators for abuse of a dominant position.⁹⁵ In each case, the alleged abuse related to the dominant operator's pricing practices and rebate systems for network connection services, which restricted competition in the downstream market by preventing competitors from offering services through the dominant operator's network. These cases are now pending before the Market Court, and the proposed fines range from EUR40,000 to EUR100,000 (approximately US\$61,400 to US\$153,000).

D. ANTI-COMPETITIVE PRACTICES

In February 2007, the FCA decided not to bring proceedings against Finland's three largest roofing felt manufacturers, even though its investigation disclosed that they had engaged in anticompetitive information exchanges.⁹⁶ The FCA concluded that the infringement had occurred between 1996 and 2001, and that it was not clear whether the provisions of the Act applied at that time to prohibit exchanges of sales information between competitors.

* The contribution for Finland was written by Satu Rantala of White & Case LLP.

92. Finnish Act on Competition Restrictions (480/1992, as amended).

93. See Finnish Competition Authority, *Working Group to Investigate the Need to Reform the Competition Act* (June 19, 2007), available at <http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2007-06-19>; see also Press Release, Ministry of Trade and Commerce (June 19, 2007), <http://www.ktm.fi/index.phtml?i=2222&s=1878> (last visited Mar. 1, 2008).

94. Hankkija-Maatalous Oy/Lännen Tehtaat Oyj, No. 854/81/2006, available at http://www.kilpailuvirasto.fi/cgi-bin/suomi.cgi?luku=yrityskauppavalvonta/yrityskauppara+kaisut&sivu=ratk/r-2006-81-0854_2.

95. See FCA's Proposition to the Market Court in Oulun Putelin Oyj, No. 950/61/02 (May 24, 2007), available at <http://kilpailuvirasto.fi/tiedostot/ratk/r-2002-61-0950.pdf>; see also Finnish Competition Authority, *FCA Proposes Fines to Three Telecommunications Companies* (Oct. 24, 2007), available at <http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2007-10-24>.

96. Icopaol Oy, Katepal Oy, Lemminkäinen Oyj, Rakennustuoteteollisuus RTT No. 1011/61/2002 (Feb. 16, 2007), available at <http://www.kilpailuvirasto.fi/tiedostot/ratk/r-2002-61-1011.pdf>.

E. OTHER

On September 13, 2007, the Nordic competition authorities published a joint report on the operation of the Nordic electricity markets.⁹⁷ According to the report, concentration among electricity producers has increased in the Nordic region in recent years. The report recognizes that it is important to ensure that the strong position of electricity producers in individual countries does not adversely affect the functioning of the region's electricity market.

XI. Developments in France*

A. MERGERS

On August 21, 2007, the French Ministry of Economy (Ministry), which is responsible for merger control procedures, sanctioned a company for the first time for not respecting the commitments it gave in order to obtain authorization for a merger.⁹⁸ The Ministry had authorized the acquisition of Sonnenglut, owner of the TREFF chain of stores, by Carrefour, owner of the ED chain of stores, on the condition that Carrefour: (i) divest itself of either a TREFF or ED store located in the Belfort region of France; (ii) guarantee the sustainability of the business sold; and (iii) obtain the Ministry's approval of the buyer before selling the business. Carrefour proceeded to sell the TREFF store to a third party but failed to request the Ministry's approval and the store in question shut down subsequent to its sale. The Ministry decided that Carrefour had breached its commitment by: (i) selling the TREFF store, which was of questionable economic viability, instead of the ED store; (ii) not verifying whether the buyer was experienced and had sufficient financial resources to ensure the sustainability of the business; and (iii) failing to obtain the Ministry's approval of the buyer.⁹⁹ Carrefour has been ordered to sell the ED business in Belfort to a buyer approved by the Ministry and to pay EUR100,000 in fines (approximately US\$153,000).¹⁰⁰

B. CARTELS

On April 17, 2007, the French Competition Council published a revised procedural notice modifying its leniency program, thus becoming the first Member State of the E.U. to conform to the standards set out in the model leniency program proposed by the Euro-

97. See Finish Competition Authority, *A Level Playing Field Precondition for Sound Electricity Markets* (Sept. 13, 2007), available at <http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=news-archive&sivu=news/n-2007-09-13>. The entire Nordic report is available at <http://www.kilpailuvirasto.fi/tiedostot/Capacity-for-competition.pdf>.

* The contribution for France was written by Cyrille Couadou, Jérôme Fabre and Caroline Genevois of Weil, Gotshal & Manges LLP.

98. See Bulletin Officiel de la Concurrence, de la Consommation et de la Répression des Fraudes, *Arrêté du ministre de l'économie, des finances, et de l'industrie du 21 août 2007, relatif à l'inexécution par le groupe Carrefour de ses engagements déposés au titre du contrôle des concentrations*, No. 7 (Sept. 14, 2007), available at http://www.minefi.gouv.fr/directions_services/dgcrf/boccrf/2007/07_07bis/c2003_173_arreteinjonction_carrefour_treff.pdf.

99. *Id.* at 6-7.

100. *Id.* at 7.

pean Competition Network in September 2006.¹⁰¹ Most notably, the notice: (i) introduces a “marker” system to allow applicants to contact the Competition Counsel and obtain a priority ranking even before providing full evidence of the violation;¹⁰² and (ii) clarifies the requirements for obtaining full immunity or a reduction in fines, including the information that must be provided at the different stages of the procedure.¹⁰³

On June 29, 2007, the French Supreme Court ruled on an appeal by French mobile telephone operators Bouygues Télécom, Orange France, and SFR against a decision issued by the Paris Court of Appeal on December 12, 2006.¹⁰⁴ The Paris Court of Appeal had upheld the Competition Council’s decision in 2005 to fine the operators a total of EUR534 million (approximately US\$819.5 million) for engaging in concerted practices that had the effect of distorting competition in the French mobile telephone services market.

The Supreme Court upheld the Paris Court of Appeal’s finding that the three operators had coordinated their behavior in order to stabilize market shares. The Supreme Court, however, reversed the lower court’s ruling concerning exchanges of information that took place between 1997 and 2003. The Supreme Court held that the Paris Court of Appeal erred in holding that the fact these exchanges had occurred was alone sufficient to conclude that there had been a prohibited distortion of competition in the market.¹⁰⁵ Instead, the Supreme Court held that the Court of Appeal should have sought to establish, on the evidence, that the information exchanges had distorted competition by reducing the operators’ uncertainty about each other’s competitive behavior.¹⁰⁶ The Supreme Court’s decision establishes that exchanges of information among competitors are not per se illegal in France but that evidence will be required to demonstrate an anti-competitive effect.

XII. Developments in Germany*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

The German Ministry for Economics has produced a draft amendment to Germany’s Act Against Restraints on Competition (ARC).¹⁰⁷ Among other things, the draft amendment proposes to make decisions of the Federal Cartel Office (FCO) relating to abuses of

101. Conseil de la Concurrence, République Française, *Procedural Notice Relating to the French Leniency Program* (Apr. 17, 2007), available at <http://www.conseil-concurrence.fr/doc/leniency17april2007.pdf>.

102. *Id.* at 6.

103. *Id.* at 3-4.

104. Arrêt de la Cour de Cassation n 255 du 29 juin 2007, available at http://www.courdecassation.fr/jurisprudence_publications_documentation_2/actualite_jurisprudence_21/chambres_mixtes_assemblee_pleniere_22/arrets_travaux_preparatoires_23/chambres_mixtes_25/br_arret_10578.html.

105. *Id.*

106. *Id.*

* The contribution for Germany was written by Susanne Zuehlke of Latham & Watkins LLP.

107. Siebtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, [Federal Law Gazette], BGBl. 2005, Part. I, 1954 -1969, last amended by Gesetz zur Beschleunigung der Umsetzung von Öffentlich-Privaten Partnerschaften und zur Verbesserung gesetzlicher Rahmenbedingungen für Öffentlich-Private Partnerschaften, BGBl. 2005, Part I, 2676-2681. A non-official English version of the GWB is available at <http://www.bundeskartellamt.de/wEnglisch/CompetitionAct/CompAct.shtml>.

dominance effective immediately, i.e., appeals would not have a suspensory effect.¹⁰⁸ This would align practice in Germany with practice in the European Union. The draft also contains specific proposed amendments relating to competition in the energy and grocery sectors.

Also under consideration is a potential revision to the German merger threshold that would reduce the large number of notifications that are triggered by transactions that have no or very limited effects in Germany because the buyer alone exceeds the relevant threshold.¹⁰⁹ At the time of writing, no decision had yet been made in this regard.

B. MERGERS

At the time of writing, the FCO had issued more than twenty Phase II merger decisions in 2007, five of which resulted in decisions to prohibit the transactions in question.¹¹⁰ The most significant of the FCO's prohibition decisions related to the proposed Phonak/GN ReSound transaction, in which the FCO prohibited a foreign-to-foreign transaction, the clear focus of which was outside Germany.¹¹¹ The FCO found that the transaction would strengthen an existing oligopoly in the German hearing aids market. The FCO also decided that principles of international law and comity did not oblige it to limit its ruling to the German aspects of the transaction, particularly because the competitive issues related to GN ReSound's non-German R&D and production capabilities.¹¹²

Also of importance is the decision of the German Federal Supreme Court (BGH) in the Sulzer/Kelnix merger.¹¹³ The BGH's decision clarifies the scope of the *de minimis* market exception under German merger control law, pursuant to which mergers are exempt from review if they relate to markets that have been in existence for at least five years and for which total demand does not exceed EUR15 million (approximately US\$23 million). The FCO's practice had been to calculate the EUR15 million threshold based on European demand; the BGH has now confirmed that the threshold should be determined according to demand in Germany. The effect of the judgment will be to broaden the applicability of the *de minimis* exception.

108. See Press Release, German Ministry for Economics, *Glos zur Verabschiedung des Energiepakets durch das Kabinett* (Apr. 25, 2007), available at <http://www.bmwi.de/BMWi/Navigation/Presse/pressemitteilungen,did=200652.html>.

109. Under the current rules, a merger filing will be required in Germany where the acquiring party has more than EUR500 million in global turnover and more than EUR25 million in German turnover. In these circumstances, it is not necessary that the target have any presence in Germany at all.

110. The five prohibited transactions were: RWE Energie/Saar Ferngas (March 12, 2007); Cargotec/CVS Ferrari (August 24, 2007); LBK Mariahilf (June 6, 2007); Sulzer/Kelmix (February 14, 2007); and Phonak/GN ReSound (April 11, 2007). The texts of these decisions (in German) are available at <http://www.bundeskartellamt.de>.

111. Bundeskartellamt, 3rd Decision Division, B3 578/06, Phonak/GN ReSound (Apr. 11, 2007) (F.R.G.), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/entscheidungen/07_Phonak_e.pdf.

112. Other foreign-to-foreign transactions that have been prohibited are Sulzer/Kelmix and Coherent/Excel (under appeal). Press releases (in English) and the texts of these decisions (in German) are available at <http://www.bundeskartellamt.de>.

113. See Bundesgerichtshof [BGH-KUR] [German Federal Supreme Court], 9/07, Sulzer/Kelmix (Sept. 25, 2007) (F.R.G.) (not yet published).

C. PRIVATE ENFORCEMENT

The most important private case currently pending before the German courts is a collective damages action brought by Cartel Damages Claims SA (CDC) against the members of a German cement cartel that was fined by the FCO in 2003. This is the first collective action for damages brought against a cartel in Germany. On February 21, 2007, the Regional Court in Düsseldorf issued an interim judgment holding that CDC had standing to bring the claim and that the action could proceed.¹¹⁴ This judgment is now under appeal to the Higher Regional Court in Düsseldorf. It is expected that the Regional Court will commence oral hearings on the merits in December 2007.

XIII. Developments in Hong Kong*

A. LEGISLATIVE DEVELOPMENTS

At present, only two business sectors are regulated by competition laws in Hong Kong—the telecommunications and broadcasting industries. Following a consultation process initiated in late 2006, however, the Government announced on March 19, 2007, that it would start the drafting process for a new competition law of general application.¹¹⁵ The Government subsequently appointed legal advisers to consult further with stakeholders and to prepare draft competition legislation.¹¹⁶ At the time of writing, the draft had not yet been released for comment. Current indications are that the Government proposes to enact the new competition legislation by July 2008.

B. MERGERS

The Telecommunications Authority (TA) issued two merger decisions in 2007.¹¹⁷ The first decision involved a transaction in which Connect Holdings, the parent company of Asia Netcom Hong Kong Limited (Asia Netcom), proposed to acquire 2,250,000 ordinary

114. Landgericht Duesseldorf, Trial Court, 147/05, Case 34 O (Kart) (Feb. 21, 2007) (F.R.G); *see also* Landgericht Duesseldorf, Schadensersatzprozess Um Zementkartellwirdfortgesetzt, (Feb. 21, 2007), *available at* <http://www.lg-duesseldorf.nrw.de/press/dokument/02-07.pdf>. CDC had purchased the claims from customers of the cement cartel.

* The contribution for Hong Kong was written by Simon Powell and Brian Pong of Jones Day.

115. Press Release, Gov't of Hong Kong Info. Servs., Cross-Sector Competition Law Backed (Mar. 19, 2007), *available at* <http://www3.news.gov.hk/ISD/ebulletin/en/category/businessandfinance/070315/html/e0cldffe-8751-407a-874a-823db24e0a4e.htm>.

116. *See* Press Release, Gov't of Hong Kong Info. Servs., Competition Law Consultants Appointed (June 5, 2007), *available at* <http://www3.news.gov.hk/ISD/ebulletin/en/category/businessandfinance/070605/html/070605en03005.htm>. *See also* GOV'T OF HONG KONG, CONSULTATION PAPER, PROMOTING COMPETITION—MAINTAINING OUR ECONOMIC DRIVE, (Nov. 2006), *available at* http://www.edlb.gov.hk/edb/eng/papers/compete/Booklet_Eng.pdf; GOV'T OF HONG KONG, CONSOLIDATED REPORTS, *available at* http://www.edlb.gov.hk/eng/press/ue_press/com_upload/P505/Consultation_Report_eng.pdf.

117. Section 7P of the Telecommunications Ordinance (TO) authorizes the TA to investigate and regulate any “change” in the shareholding or ownership of a licensee if it finds that such change has, or is likely to have, the effect of substantially lessening competition in any relevant telecommunications market. *See* Telecomm. Ordinance, (2004) 106, § 7P (H.K.).

shares of Pacific Internet Limited (PacNet).¹¹⁸ The TA undertook a preliminary competition assessment and, in a decision released on February 16, 2007, concluded that a further investigation was not necessary because the transaction was unlikely to increase the market power of any of the parties or the risk of collusion in the external bandwidth services market.

In their second decision, the TA also declined to undertake a full investigation of the acquisition by General Electric Capital Corporation (GECC) of an interest in Asia Satellite Telecommunications Holdings Limited (AsiaSat Holdings) and its wholly-owned subsidiary, Asia Satellite Telecommunications Company Limited (AsiaSat). In a decision issued on May 4, 2007, the TA concluded that there was no competitive overlap between GECC and AsiaSat and that, in any event, GECC did not appear to be an active player in the telecommunications market in Hong Kong or elsewhere.¹¹⁹

C. OTHER DEVELOPMENTS

On May 7, 2007, the TA issued a public consultation document in relation to a new set of draft Competition Guidelines that, if adopted, will replace the current set of Competition Guidelines originally issued in June 1995.¹²⁰ The new draft Competition Guidelines aim to provide a focused explanation of how the TA proposes to determine whether particular conduct by a licensee harms competition and how licensees can effectively comply with the law.

XIV. Developments in Hungary*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

The principal legal instrument of Hungarian competition law is Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act).¹²¹ There were no amendments of significance to the Competition Act in 2007. Rather, the only changes resulted from amendments required to implement E.U. procedures for coordinating the activities of national authorities responsible for consumer protection.¹²²

Of more importance was the issuance of the first Joint Communiqué of the President of the Economic Competition Office (ECO) and the President of the Competition Council

118. See OFFICE OF THE TELECOMM. AUTH., REPORT ON THE COMPETITION IMPACT OF THE ACQUISITION OF INTEREST IN PACIFIC INTERNET (HONG KONG) LIMITED BY THE PARENT COMPANY OF ASIA NETCOM HONG KONG LIMITED (Feb. 16, 2007), CAB Ref. No. CDN0208.

119. See OFFICE OF THE TELECOMM. AUTH., REPORT ON THE COMPETITION IMPACT OF THE ACQUISITION OF INTEREST IN ASIA SATELLITE TELECOMMUNICATIONS HOLDINGS LIMITED BY GENERAL ELECTRIC CAPITAL CORPORATION (May 4, 2007), CAB Ref. No. CDN0209.

120. See OFFICE OF THE TELECOMMUNICATIONS AUTHORITY, DRAFT COMPETITION GUIDELINES: FURTHER PUBLIC CONSULTATION (May 7, 2007), available at <http://www.ofta.gov.hk/en/report-paper-guide/paper/consultation/20070507.pdf>. The consultation period closed on July 6, 2007 and the results are pending.

* The contribution for Hungary was written by Kornelia Nagy-Koppány of K & P Attorneys.

121. The Competition Act (Act LVII of 1996), 2006 (Hung.), available at www.gvh.hu/domain2/Files/modules/module25/pdf/Competition_Act.pdf.

122. Parliament adopted the legislation on March 19, 2007, to become effective May 1, 2007.

regarding the assessment of fines under the Competition Act (Communiqué).¹²³ Although the Communiqué is not a legal instrument, it is intended to serve as a guideline for future cases. According to the Communiqué, fines imposed under the Competition Act are supposed to serve the following objectives: (i) to deter violations of the Competition Act; (ii) to penalize parties that have breached the Competition Act; and (iii) to reinforce the concept of fair market conduct. The Communiqué also lists the mitigating and aggravating conditions that the Competition Council will evaluate in the fine assessment phase. The current maximum fine for violations of the Competition Act is limited to 10 percent of the annual turnover of the subject company (or group of companies) in the business year preceding the issuance of the decision.¹²⁴ Fines in excess of 5 percent of annual turnover are still considered unusual.

The ECO also continued to investigate the conduct of various industries in 2007.¹²⁵ For example, on October 17, 2007, ECO investigators raided the offices of seven wine-producing companies that were alleged to have fixed the price of white wine grapes.¹²⁶

B. DECISIONS

In 2007, the Competition Council published a precedent setting decision involving allegations by the ECO of false and misleading product claims by a major company engaged in the business of selling personal body care products directly to consumers.¹²⁷ In its decision, the Competition Council held that the use of "skin rejuvenation" claims is false and misleading because skin aging can be slowed down but not stopped or reversed. The ECO subsequently warned other companies in the cosmetics market against making similar claims.

XV. Developments in Indonesia*

A. LEGISLATIVE DEVELOPMENTS

The Indonesian Government has issued a draft Government Regulation (Draft GR) concerning the notification of mergers, consolidations, or acquisitions under the Indonesian Law on Prohibition of Monopolistic Practices and Unfair Business Competition (Law 5/1999).¹²⁸ The Draft GR proposes to establish reporting requirements to the Business

123. Pursuant to the authorization of Section 36(6) of the Competition Act, Joint Communiqué No. 1 of 2007 was published on October 15, 2007.

124. The Competition Act, *supra* note 121, art. 78.

125. Ruling No. AV-1/2007, issued on February 7, 2007, available at http://www.gvh.hu/domain2/files/modules/module25/pdf/av_1_2007.pdf. See also Ruling No. AV-2/2007, issued on July 24, 2007, available at http://www.gvh.hu/domain2/files/modules/module25/pdf/aktualis_av_media_indito_vegzes_2007_07_24.pdf. Earlier sectoral investigations covered the electric energy (2006), mortgage loans (2005), and mobile telecommunication (2002) industries.

126. *Id.*

127. Vj-112/2006, issued on April 12, 2007, available at http://www.gvh.hu/domain2/files/modules/module25/pdf/print_Vj112-2006_m.pdf.

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

128. Indonesian Legal Brief, General Corporate Issue No. 607 (June 14, 2007), available at <http://hukumon-line.com>.

Competition Supervisory Commission (KPPU) when a merger, consolidation, or acquisition involves companies that operate in the same relevant market and, as a result, at least one of the companies has total assets in Indonesia of more than IDR100 billion (approximately US\$10.9 million) or total sales in Indonesia of more than IDR500 billion (approximately US\$54.5 million).¹²⁹

Notifiable transactions will only be required to be reported to the KPPU post-closing, although parties may voluntarily submit their notifications pre-closing for a non-binding opinion from the KPPU. The penalty for failure to report will be IDR1 million (approximately US\$109) for every working day the failure to report persists. The KPPU will be authorized to deny approval to a merger, consolidation, or acquisition if it determines that the transaction is likely to result in monopolistic or unfair business practices.

B. ANTI-COMPETITIVE PRACTICES

During 2007, the KPPU's decisions were dominated by cases involving collusion in responding to public sector tenders for the procurement of goods and/or services (i.e., bid rigging). These cases involved tenders, e.g., for: the construction of medium voltage transmission cables;¹³⁰ the acquisition of high pressure sodium 70-Watt and 150-Watt lamp components;¹³¹ the acquisition of hospital equipment;¹³² the acquisition of public lighting;¹³³ the construction of a court building;¹³⁴ and the excavation of a naval canal.¹³⁵ Penalties imposed by the KPPU included fines and orders prohibiting the parties from participating in future tenders for a designated period of time (up to two years).

The KPPU's September 2007 decision involving tenders for the procurement of fogging machines¹³⁶ within the DKI Jakarta Province is typical. The KPPU found that some participants in the tender process had colluded in the preparation of the tender documents (they were all prepared by the same persons) and by agreeing to offer to supply only one

129. *Id.*

130. KPPU [Business Competition Supervisory Commission] Decision No.16/KPPU-L/2006 (June 27, 2007), available at http://www.kppu.go.id/docs/Putusan/putusan_SKTM.pdf.

131. KPPU [Business Competition Supervisory Commission] Decision No.17/KPPU-L/2006 (July 4, 2007), available at http://www.kppu.go.id/docs/Putusan/putusan_PJU_Jaksel.pdf.

132. KPPU [Business Competition Supervisory Commission] Decision, No.02/KPPU-L/2007 (July 19, 2007), available at http://www.kppu.go.id/docs/Putusan/putusan_RSUD_Wahab.pdf.

133. KPPU [Business Competition Supervisory Commission] Decision No. 08/KPPU-L/2007 (Aug. 28, 2007), available at <http://www.kppu.go.id/new/source.php?idy=314&URLEncryptCode=10%2F11%2F07%2C02%3A10%3A34>.

134. KPPU [Business Competition Supervisory Commission] Decision No.03/KPPU-L/2007 (Aug. 31, 2007), available at <http://www.kppu.go.id/new/source.php?idy=315&URLEncryptCode=10%2F11%2F07%2C02%3A10%3A34>.

135. KPPU [Business Competition Supervisory Commission] Decision No. 05/KPPU-L/2007 (Sept. 19, 2007), available at <http://www.kppu.go.id/new/source.php?idy=317&URLEncryptCode=10%2F11%2F07%2C02%3A10%3A34>.

136. KPPU [Business Competition Supervisory Commission] Decision No.04/KPPU-L/2007 (Nov. 9, 2007), available at <http://www.kppu.go.id/new/source.php?idy=333&URLEncryptCode=11%2F23%2F07%2C01%3A11%3A40>.

type of product. The guilty parties were fined and banned for a period of two years from participating in any tender put out by the provincial government of DKI Jakarta.¹³⁷

In November 2007, the KPPU ordered Temasek Holdings Pte. Ltd., a Singapore company (Temasek), and eight of Temasek's affiliates to divest their shareholdings in two competing Indonesian mobile operators, Telekomunikasi Selular (Telkomsel) and PT Indosat, Tbk. (Indosat).¹³⁸ The KPPU found that Temasek's shareholdings allowed it to control both Telkomsel and Indosat, which had a combined market share of 89.61 percent. KPPU also found that Telkomsel had been able to charge customers supra-competitive prices as a result of this dominant market position. In addition to requiring the shares to be divested (within two years), the KPPU ordered Temasek and its affiliates not to exercise their rights to vote and rights to appoint directors in Telkomsel or Indosat pending the divestiture. Temasek, Temasek's eight affiliates, and Telkomsel were each also fined IDR25 billion (approximately US\$615 million). Finally, Telkomsel was ordered by the KPPU to reduce its rates by at least 15 percent.

XVI. Developments in Ireland*

A. LEGISLATIVE DEVELOPMENTS

In 2007, new legislation was introduced narrowing the class of media mergers that are subject to mandatory notification to the Irish Competition Authority (the "Authority").¹³⁹ As of May 1, 2007, only the following classes of mergers must give notice to the Authority regardless of the turnovers involved: (i) mergers in which two or more of the undertakings involved carry on a media business in Ireland and (ii) mergers in which one or more of the undertakings involved carries on a media business in Ireland and one or more of the undertakings involved carries on a media business elsewhere.¹⁴⁰

B. MERGERS

The most high profile transaction to come before the Authority during 2007 was the acquisition of three Irish radio stations by Communicorp, a large Irish media group.¹⁴¹ The Authority is currently undertaking a Phase 2 investigation of the transaction and is obliged to make a decision before January 2008. In three other merger cases decided in 2007, the Authority launched Phase 2 investigations but ultimately cleared each transac-

137. KPPU [Business Competition Supervisory Commission] Decision No.06/KPPU-L/2007 (Sept. 20, 2007), *available at* <http://www.kppu.go.id/new/source.php?id=318&URLEncryptCode=10%2F11%2F07%2C02%3A10%3A34>.

138. KPPU [Business Competition Supervisory Commission] Decision No. 07/KPPU-L/2007 (November 19, 2007), *available at* <http://www.kppu.go.id/new/source.php?id=333&URLEncryptCode=11%2F23%2F07%2C01%3A11%3A40>.

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

139. Competition Act 2002 (§§ 18(5) and (6)) Order 2007 (S.I. No. 122 of 2007) (Ir.), *available at* <http://www.entemp.ie/publications/sis/2007/si122.pdf>.

140. *Id.*

141. See Press Release, Competition Auth., Competition Authority to Conduct Full Investigation of the Proposed Acquisition by Communicorp Group Ltd of SRH Radio Stations (Nov. 9, 2007), *available at* http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=205.

tion unconditionally.¹⁴² In another case, the Authority cleared the Premier Foods/RHM merger following the submission of divestiture commitments by the parties.¹⁴³ This was the first time that the Authority had agreed to a significant divestiture package as a condition of clearance.

On February 9, 2007, the Central Criminal Court imposed a twelve-month suspended sentence and a fine of EUR30,000 (approximately US\$46,000) on an individual convicted of aiding and abetting an alleged price-fixing cartel involving Ford motor car dealers in Ireland.¹⁴⁴

In 2006, the Director of Public Prosecutions secured fifteen criminal convictions with respect to a price-fixing cartel in the home heating oil sector in the west of Ireland, with one individual becoming the first defendant in Europe to be tried by jury for a competition offense.¹⁴⁵ Additional convictions were secured in 2007. The founder of the largest company involved in the cartel was fined EUR10,000 (approximately US\$15,400), and the company itself was fined EUR15,000 (approximately US\$23,000).¹⁴⁶

D. ANTI-COMPETITIVE PRACTICES

In May 2007, the Irish Supreme Court handed down its first substantive ruling on a competition law issue in an appeal by the Irish League of Credit Unions (ILCU) against a High Court ruling in favor of the Authority.¹⁴⁷ The dispute centered on ILCU's savings protection scheme (SPS), a fund of some EUR70 million (approximately US\$ 107.5 million) that had been built up by contributions from ILCU credit union members over many years. A number of credit unions had established a rival representative association, which complained to the Authority about ILCU's refusal to extend the SPS to its members. The High Court found that ILCU had abused its dominant position by tying the provision of the SPS to ILCU membership. On appeal, the Supreme Court stated that a pre-condition to the application of any "tying" analysis was that the general representation services and the SPS provided by ILCU to its members should be separate products.¹⁴⁸ The Supreme Court found that the Authority had not established that the SPS constitutes a separate product market. Consequently, the Authority's allegation that ILCU had abused a dominant position by tying these two products was unsustainable..

142. Applied Materials/Brooks Software (February, Ir. Competition Auth., No. M/06/087 (Feb. 6, 2007), available at http://www.tca.ie/MergersAcquisitions/MergerNotifications/MergerNotifications.aspx?selected_item=351; Galco/Sperrin, Ir. competition Auth., No. M/07/031 (Oct. 2, 2007), available at http://www.tca.ie/MergersAcquisitions/MergerNotifications/MergersNotifications.aspx?selected_item=352.

143. Premier Foods/RHM, Ir. Competition Auth., No. M/06/098 (2007) available at http://www.tca.ie/MergersAcquisitions/MergerNotifications/MergerNotifications.aspx?selected_item=319.

144. See Barry Roche, *Cartelism "Rife" in Motor Trade, Court Hears*, IRISH TIMES, Feb. 10, 2007, available at <http://www.ireland.com>.

145. See Press Release, Competition Auth., Opening Statement by the Chairperson of the Competition Authority, Mr. Bill Prasifka, to the Joint Oireachtas Committee on Enterprise and Small Business (Oct. 25, 2006), available at http://www.tca.ie/NewsPublications/NewsReleases/NewsReleases.aspx?selected_item=177.

146. See *Corrib Oil Fined €15,000 for Role in Price-Fixing Cartel*, IRISH TIMES, Jan. 24, 2007, available at <http://www.ireland.com>.

147. Competition Auth. v. O'Regan, [2007] IESC 22 (Ir.).

148. *Id.* at ¶ 116.

XVII. Developments in Israel*

A. MERGERS

In April 2007, the Antitrust Tribunal rejected an appeal of the General Director's decision to block a merger between two manufacturers of steel ingots, one of which was insolvent at the time of the acquisition.¹⁴⁹ The General Director had blocked the merger on the grounds that the two firms were the only competitors in the market with facilities for melting scrap metal and were also the most significant purchasers of steel scrap metal in Israel. The Antitrust Tribunal agreed with the General Director's finding that the merger would give the combined entity monopsony power over the purchase of scrap metal. It also held that the merged entity's monopsony power in the market for the purchase of steel scrap metal might provide it with downstream market power in the sale of steel ingots, at least during periods when domestic melting is preferable over the alternative of importing steel ingots.

In May 2007, the Antitrust Tribunal issued temporary orders in relation to an unreported merger between Prinir and Milos, two out of the three major competitors in Israel in several markets for tomato products.¹⁵⁰ An investigation launched by the General Director revealed that Prinir had purchased slightly less than 25 percent of its competitor's shares and was involved in the management of the latter's business. The General Director claimed that merger notifications should have been submitted and asked the Antitrust Tribunal to require Prinir to divest its equity stake on the ground that the two entities held an aggregate share of more than 50 percent in the relevant market. The General Director also requested interim orders preventing Prinir from being involved in Milos's business. The Antitrust Tribunal issued the interim orders on consent, pursuant to a settlement between the General Director and the parties, according to which, *inter alia*, the purchased shares would be held by an independent trustee under the supervision of the General Director pending resolution of the main proceeding.

B. CARTELS

In July 2007, the Jerusalem District Court convicted several paper envelope manufacturers and their managers for engaging in illegal cartel conduct between 1995 and 2002.¹⁵¹ The Court determined that three of the manufacturers—Gvar'Am, Dafron, and Amka—had conspired to allocate customers (governmental and major commercial institutions) and cooperate on bids. The same three parties also entered into a non-import agreement with another competitor, Orek, pursuant to which Orek received payments from the other manufacturers in return for not importing envelopes into Israel.

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

149. ATF [Anti Trust Filing] (Jer.) 8006/03 Yehuda Pladot Ltd. v. The Antitrust Director General [2007], available at www.antitrust.gov.il (publication no. 5000581).

150. ATF [Anti Trust Filing] (Jer.) 407/07 The Antitrust Director General v. Prinir Hadas (1987) Ltd. [2007], Civil Motion 317/07, available at www.antitrust.gov.il (publication no. 5000587).

151. CF [Criminal Filing] (Jer.) 377/04 The State of Israel v. Yaron Wall [2007], available at www.antitrust.gov.il (publication no. 5000691).

In October 2007, Israel's Supreme Court overturned a decision of the Jerusalem District Court and convicted Tnuva and Meir Ezra, competitors in the marketing of food products, for illegal cartel conduct in relation to the importation of frozen kosher meat.¹⁵² In its decision at first instance, the District Court determined that the cooperation between the parties had amounted to a restrictive arrangement that prevented competition, but the Court acquitted them on the grounds that they had consulted with their legal advisors and had proceeded on what turned out to be a bona fide mistake regarding the legal situation.¹⁵³ On appeal, the Supreme Court held that the bona fide mistake defense was not available because the defendants had failed to take all reasonable steps to ensure the legality of their acts. The Supreme Court based this conclusion on its findings that: (i) the defendants were aware of the prohibition against engaging in restrictive arrangements; (ii) the legal opinions were given orally rather than in writing and were not adequately explained; (iii) the General Director of the Israel Antitrust Authority had expressed doubts as to the legality of the planned cooperation during a meeting with one of the defendants prior to the arrangement; and (iv) the other defendant had been convicted in an earlier cartel case, whose facts resembled the current case.¹⁵⁴

XVIII. Developments In Italy*

A. LEGISLATIVE DEVELOPMENTS

In February 2007, the Italian Competition Authority (ICA) published procedural rules for its leniency program.¹⁵⁵ The new set of procedural rules follows the reform of Law No. 287/90 (the "Competition Act") in 2006,¹⁵⁶ pursuant to which the ICA, in accordance with E.U. Regulation No. 1/2003,¹⁵⁷ was authorized to implement a leniency program.

On September 21, 2007, Legislative decrees No. 145/07 and No. 146/07 came into force. These decrees implement E.U. Directives 2006/114/EC¹⁵⁸ and 2005/29/EC¹⁵⁹ on unfair business-to-consumer commercial practices and misleading advertising. Both decrees assign the power to apply these new rules to the ICA, whose investigative powers are also substantially extended. The sanctions for both misleading and comparative advertising as well as unfair business-to-consumer commercial practices were also modified and strengthened.¹⁶⁰

152. CrimA 845/02 *The State of Israel v. Tnuva* [2007], available at www.antitrust.gov.il (publication no. 5000700).

153. CF [Criminal Filing] 149/96 *The State of Israel v. Tnuva*, available at www.antitrust.gov.il (publication no. 3013591).

154. *Id.*

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

155. See ITALIAN COMPETITION AUTH., ICA DECISION NO. 16472, *DELIBERA SULLA NON IMPOSIZIONE E SULLA RIDUZIONE DELLE SANZIONI AI SENSI DELL'ARTICOLO 15 DELLA LEGGE 10 OTTOBRE 1990*, n. 287, [ICA Bulletin No 6/2007].

156. Law No. 248/2006 [It.].

157. Council Regulation No. 1/2003, 2003 O.J. (L1) 1 (EC).

158. Council Directive 2006/114/EC, 2007 O.J. (L376) 21.

159. Council Directive 2005/29/EC, 2005 O.J.

160. See Decree-Law 145/07, Gazz. Uff. 207/07. art. B (IT); Decree-Law 146/07. Gazz. Uff. 207/07 (It.).

B. MERGERS

The ICA cleared several transactions involving financial institutions in 2007. For example, in December 2006, the ICA approved the merger between San Paolo IMI and Banca Intesa, subject to a number of significant conditions, including the divestiture of 197 retail bank branches; the unwinding of a joint venture in the wealth management sector; and the divestiture of a business unit active in the insurance sector.¹⁶¹ Other transactions involving financial institutions approved by the ICA included the merger between Società Interbancaria per l'Automazione and Società per i Servizi Bancari,¹⁶² the merger between the London Stock Exchange and Borsa Italiana,¹⁶³ and the acquisition of Capitalia by UniCredit.¹⁶⁴

C. CARTELS

The most significant development in the ICA's practice in 2007 was the extensive use of its new power (introduced in 2006) to close investigations without a formal decision on the basis of commitments provided by the parties. In May 2007, for example, the ICA closed its investigation into a cartel involving the wood chipboard panel manufacturing industry.¹⁶⁵ One of the eight participants, the Trombini Group, benefited from the ICA's recently enacted leniency rules and was not fined. The other seven participants, although fined, received a reduction of 30 percent in the base amount of the fines due to their cooperation with the ICA during the investigation.

D. ABUSE OF A DOMINANT POSITION

The ICA also utilized its settlement power in several abuse of dominance cases. For example, the ICA resolved two major abuse of dominance cases in March 2007 when it accepted remedies proposed by the investigated firms. In the first case, the ICA closed an investigation against ENI for the alleged abuse of a dominant position in its management and use of a regasification plant in exchange for ENI's commitment to sell four billion cubic meters of gas at below market prices.¹⁶⁶ In the second case, the ICA accepted a commitment from Merck to grant free licences for an active ingredient so as to remove

161. See Banca Intesa/SanPaolo IMI, Italian Competition Auth., ICA Decision No 16249, C 8027, [2007] [Bulletin No 49/2006].

162. See Società per i Servizi Bancari – SSB/Società Interbancaria per l'Automazione – Cedborsa, Italian Competition Auth., ICA Decision No 16641, C8190 [2007] [Bulletin No 12/2007]. The parties were obliged to provide commitments aimed at reducing the risk of foreclosure in the downstream markets for clearing and processing as well as facilitating the entry of a new operator in the upstream market for connectivity services.

163. See London Stock Exchange Group/Borsa Italiana, Italian Competition Auth., ICA Decision No 17132, C8699 [2007] [Bulletin No 30/2007]. The ICA concluded that there was no horizontal overlap between the parties.

164. See Unicredito Italiano/Capitalia, Italian Competition Auth., ICA Decision No 17283, C8660 [2007] [Bulletin No 33/2007]. UniCredit committed to divest about 150 branches; to significantly reduce, and in specific cases to terminate, fees charged to customers for cash withdrawals from ATMs belonging to other banks; and to reduce its stake in another bank, Mediobanca, by giving up participation equal to 9.9%.

165. See Italian Competition Auth., ICA Decision No 16835, I 649, Produttori di pannelli truciolari in legno [2007] [Bulletin No 20/2007].

166. See Italian Competition Auth., ICA Decision No 16530, A 371, Gestione ed utilizzo della capacità di rigassificazione [2007] [Bulletin No 8/2007].

obstacles and boost competition in the production of certain pharmaceuticals using this ingredient.¹⁶⁷

XIX. Developments In Japan*

A. MERGERS

The Japan Fair Trade Commission's (JFTC) revised merger guidelines (Merger Guidelines) came into effect on March 28, 2007.¹⁶⁸ The revised Merger Guidelines: (i) amend the "safe harbour" rules; (ii) adopt the so-called "small but significant and non-transitory increase in price" test for the purpose of analyzing demand and supply substitution when defining relevant markets; and (iii) provide for additional factors to be considered in the analysis of transactions subject to merger review. Notably, the revised Merger Guidelines clarify that the relevant geographic market may be wider than Japan, depending upon the nature of the relevant business.¹⁶⁹

B. CARTELS

The JFTC was particularly active in the area of cartel enforcement in 2007. This effort was aided by the JFTC's leniency program, which came into effect in January 2006. Since that time, the JFTC has received over 150 applications for leniency.¹⁷⁰

In one high profile case in 2007, the JFTC was able to use information provided by a leniency applicant to successfully prosecute several large Japanese general construction companies for bid-rigging on a subway construction project for the Transportation Bureau of the City of Nagoya.¹⁷¹ On October 10, 2007, the Nagoya District Court imposed a fine against each of Obayashi Corporation, Kajima Corporation, Shimizu Corporation, Okumura Corporation, and Maeda Corporation for participation in this bid-rigging scheme. Employees of the companies were also fined, with one person sentenced to a three year jail term that was suspended for five years.¹⁷² Subsequently, the JFTC issued cease and desist orders on November 14, 2007, against thirty-three companies and im-

167. See Italian Competition Auth., ICA Decision No 16597, A 364, Merck-Principiattivi [2007] [Bulletin No 11/2007].

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

168. See Press Release, Japan Fair Trade Comm'n, Policies Dealing with Prior Consultation Regarding Business Combination Plans (Mar. 28, 2007), available at <http://www.jftc.go.jp/e-page/legislation/ama/MAprior-consultation.pdf>.

169. *Id.*

170. See Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947, amended by Act No. 35 of 2005, available at http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf.

171. See Press Release, Japan Fair Trade Comm'n, Cease and Desist Order and Surcharge Payment Order Against Corporate Bidders for the Subway Construction Project Commissioned by the City of Nagoya (Nov. 14, 2007), available at <http://www.jftc.go.jp/e-page/pressreleases/2007/November/071114.pdf> [hereinafter Cease and Desist Order].

172. Nagoya District Court decision (October 10, 2007). See also Yoniuri Shinbun (October 16, 2007), available at http://chubu.yoniuri.co.jp/news_top07/016_2.htm.

posed a surcharge against fourteen companies totaling close to 2 billion yen (approximately US\$19.7 billion).¹⁷³

C. REVISED INTELLECTUAL PROPERTY GUIDELINES

On September 28, 2007, the JFTC issued new Guidelines for the Use of Intellectual Property under the Antimonopoly Act (that “New IP Guidelines”).¹⁷⁴ The New IP Guidelines: (i) expand the scope of their coverage to include all intellectual property relating to technology; (ii) introduce a “safe harbour” for conduct (roughly 20 percent or less market share); and (iii) describe the JFTC’s approach to situations where technology holders refuse to license their technologies.

XX. Developments in Korea*

A. LEGISLATIVE DEVELOPMENTS

Amendments to the Monopoly Regulation and Fair Trade Act (MRFTA), and the accompanying Enforcement Decree to the MRFTA, took effect on November 4, 2007.¹⁷⁵ The key aspects of the amendments are described below.

1. *Improvements in Merger Notification Standards*

Prior to the amendments, the MRFTA required pre-merger notification when the total assets or sales of one of the merging parties, including that of its affiliates, exceeded KRW100 billion (approximately US\$10.4 million) and the total assets or sales of the other party, including affiliates, exceeded KRW3 billion (approximately US\$3.1 million).¹⁷⁶ Under the amended Enforcement Decree, the latter threshold has been increased to KRW20 billion (approximately US\$22 million). In regards to foreign-based companies, notification is not required unless the Korean turnover of both the acquiring company and the acquired company exceed KRW20 billion.

Changes were also made to the parties that are subject to the notification obligation. Under the prior version of the MRFTA, where two or more companies formed a new company, any party with a greater than 20 percent interest in the newly formed company was obliged to submit a notification.¹⁷⁷ Under the amended MRFTA, only the investor with the largest interest is obliged to submit a merger notification, regardless of the proportion of the investment.

173. See Cease and Desist Order, *supra* note 172.

174. See Press Release, Japan Fair Trade Commission, Publication of new IP Guidelines (Sept. 28, 2007), available at http://www.jftc.go.jp/e-page/pressreleases/2007/September/070928_IP_Guideline.pdf.

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

175. See Monopoly Regulation and Fair Trade Act (2005), available at http://www.ftc.go.kr/eng/laws/statutes_lists.php [hereinafter MRFTA].

176. See Enforcement Decree of MRFTA, art. 18-2, available at http://www.ftc.go.kr/eng/laws/statutes_lists.php.

177. See MRFTA, arts. 7(4), 12(1), available at http://www.ftc.go.kr/eng/laws/statutes_lists.php.

2. *Presumptions for Cartels*

Prior to the amendments, the MRFTA permitted an unlawful cartel to be inferred on the basis of parallel conduct without requiring actual proof of an agreement among the parties.¹⁷⁸ The amendments have changed the standard of proof for finding an unlawful agreement by requiring that there be additional circumstantial evidence ("plus factors"), e.g., the frequency and form of contact between the parties, economic rationale for the conduct, nature of the products/services in question, and the effects of the conduct.

B. CARTELS

In February 2007, the Korean Free Trade Commission (KFTC) imposed fines and corrective measures on four domestic oil refineries for jointly fixing prices for gasoline, kerosene, and diesel fuel during the period of April to June 2004.¹⁷⁹ This marks the first time that the KFTC has imposed corrective measures and fines in the retail gasoline sector. The case is currently being litigated in the Seoul High Court.¹⁸⁰

In April 2007, the KFTC terminated the hearing of four dynamic random access memory (DRAM) manufacturers that were being investigated for price fixing.¹⁸¹ The KFTC concluded that there was insufficient evidence of an effect on the Korean market.

C. OTHER DEVELOPMENTS

On October 10, 2007, Microsoft withdrew its appeal of the KFTC's corrective order against it of June 24, 2006. The withdrawal of the appeal means that Microsoft is now obliged to comply with all of the terms of this order.¹⁸²

XXI. Developments in Mexico*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

On October 12, 2007, new regulations to Mexico's Federal Law on Economic Competition (FLEC) were published in the Mexican Official Gazette (*Diario Oficial de la Federación*).¹⁸³ The new regulations include several changes to aspects of the Federal Competition Commission's (FCC) proceedings, including: (i) when abbreviated proceedings for pre-merger notifications will be available and (ii) the criteria to be used by the FCC to determine the existence of predatory pricing. The new regulations also provide

178. *Id.* art 19-5.

179. See Press Release, KFTC, 4 Domestic Oil Refineries Jointly Increase Price (Feb. 22, 2007), *available at* http://www.ftc.go.kr/new_content/allim_013v.php?ymd=2007-02-22&no=0001 (not available in English).

180. GS Coltex, Seoul High Court, case number 2007nu24175.

181. See KFTC, Termination of review for DRAM price fixing (April 26, 2007), *available at* http://www.ftc.go.kr/new_content/allim/allim_013v.php?ymd=2007-04-26&no=0001 (not available in English).

182. See KFTC, The Finding of the Microsoft Case, Dec. 7, 2005, http://ftc.go.kr/data/hwp/microsoft_case/pdf.

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

183. Ley Federal de Competencia Económica [L.F.C.E.] [Competition Law], *Diario de la Federación* [D.O.], 12 de Octubre de 2007 (Mex.).

further details regarding the FCC's leniency program, including setting out the timelines for leniency applications.

B. MERGERS

On October 11, 2007, the FCC rejected the proposal by one of Mexico's main airlines (Mexicana) to acquire the other main airline (Aeroméxico). The FCC denied its approval even though Mexicana offered to abandon routes and divest airport slots as a means of addressing competition concerns.¹⁸⁴

The FCC also initially rejected Coca-Cola's proposed acquisition of Jugos del Valle, the second largest producer of packaged juices, nectars, and fruit flavored beverages in Mexico. The FCC, however, subsequently reconsidered its decision and permitted the transaction to proceed subject to the fulfillment of a series of commitments by Coca-Cola, including: (i) to not pay rebates to retailers in exchange for exclusivity arrangements; (ii) to not offer joint volume discounts that have the effect of "tying" sales of carbonated drinks and juices; (iii) to divest the "Jugo del Valle" trademark for carbonated drinks sold in Mexico; and (iv) to provide retailers with in-store refrigerators that allow competitors' products to be placed alongside Coca-Cola products.¹⁸⁵

C. ANTI-COMPETITIVE PRACTICES

The FCC initiated several investigations into alleged monopolistic practices in 2007, including with respect to public notaries,¹⁸⁶ television broadcasting,¹⁸⁷ wire products,¹⁸⁸ cordless telephones,¹⁸⁹ and switched call termination services.¹⁹⁰

In an important decision, the 13th Circuit Court dismissed an appeal by Coca-Cola of the FCC's determination that fifty-five Coca-Cola bottlers had engaged in monopolistic practices by entering into exclusivity contracts with retailers. The court also confirmed the MXN10.5 million (approximately US\$970,000) fine imposed by the FCC on each bottler, for a total fine of MXN477.5 million (approximately US\$44 million).¹⁹¹ In a subsequent decision, the Mexican Supreme Court also rejected a challenge by Coca-Cola to the constitutionality of the relevant FLEC provisions.¹⁹²

184. See FCC Press Release 09-2007, available at <http://www.cfc.gob.mx>.

185. See FCC Press Release 07-2007 (July 18, 2007), available at <http://www.cfc.gob.mx>.

186. See File 10-02-2007, available at http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=3773&Itemid=391.

187. See File DE-22-2007, available at http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=4534&Itemid=29.

188. See File DE-29-2005, available at http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=3045&Itemid=29.

189. See File DE-32-2004-I, available at http://www.cfc.gob.mx/images/stories/resoluciones/extractos_de_resoluciones/denuncia/De-32-2004-I.pdf.

190. See File DC-07-2007 available at, http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=4448&Itemid=29.

191. See FCC Press Release 05-2007, available at www.cfc.gob.mx.

192. See File 00418/2007-00 (Oct. 24, 2007), available at <http://www2.scjn.gob.mx/primerasala/listanotificacionlasala/buscar.asp?nexp=20070041800&asunto=2.15>.

XXII. Developments in New Zealand*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

The Ministry of Economic Development (MED) issued a Discussion Document outlining its consideration of potential changes to the clearance and authorization procedures in the Commerce Act 1986.¹⁹³ Proposals canvassed in the Discussion Document include introducing an informal pre-merger process, increasing the statutory timeframe for merger clearance determinations, replacing the High Court with a specialist competition tribunal, and introducing a clearance process for trade practices. In the coming year, it will be revealed which, if any, of the proposals outlined in the Discussion Document will be adopted into New Zealand's competition law framework.

In July 2007, the New Zealand Commerce Commission (the "Commission") signed a cooperation agreement with the Australian Competition and Consumer Commission (ACCC) that will make it easier for the two commissions to coordinate activities and cooperate with each other.¹⁹⁴ The agreement reflects an increasing desire by the Commission to cooperate with the ACCC.

B. MERGERS

Continuing the trend of the previous three years, the Commission did not receive any applications for authorization of mergers, although it did receive eighteen applications for voluntary clearance. Of the eighteen applications received in the period January 1 to October 1, 2007, nine mergers were approved, three were declined, one was withdrawn, and five decisions were still pending at the time of writing.¹⁹⁵

The most high profile merger in 2007 involved separate clearance applications by New Zealand's leading supermarket chains, Woolworths (approximately 44 percent market share) and Foodstuffs (approximately 56 percent market share), to purchase The Warehouse, a large general merchandise retailer and recent entrant into the grocery industry.¹⁹⁶ After considering the applications for almost 100 days, the Commission declined both of them on the grounds that: (i) an acquisition would remove an actual and potential competitor from the market; (ii) the Warehouse was the only alternative competitor with a suitable property portfolio to compete; and (iii) the return to two competitors would increase

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

193. Review of the Clearance and Authorisation Provisions Under the Commerce Act 1986, Discussion Document (May 2007) *available at* <http://www.med.govt.nz/upload/46918/discussion-document.pdf>.

194. Australian Competition and Consumer Commission, Cooperation Agreement Between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, *available at* <http://www.accc.gov.au/content/item/phtml?itemId=79449&nodeId=9931605c95603fbc65af294d7c1c286c&fn=ACCC%20-%20NZCC%20cooperation%20agreement.pdf>.

195. This data reflects merger clearance activity during the period January 1, 2007, to October 1, 2007. A full register of clearance applications received by the Commerce Commission is *available at* <http://www.comcom.govt.nz/PublicRegisters/mergersacquisitions-clearances.aspx>.

196. Commerce Commission, Decision Nos. 606 & 607 (June 8, 2007); Foodstuffs (Auckland) Ltd., Foodstuffs (Wellington) Co-operative Society Ltd and Foodstuffs (South Island) Ltd., and Woolworths Ltd. and The Warehouse Group Ltd., *available at* <http://www.comcom.govt.nz/PublicRegisters/ContentFiles/Documents/PUBLIC%20VERSION%20Decision%20606%20and%206070.pdf>.

the likelihood of coordinated effects.¹⁹⁷ Woolworths and Foodstuffs successfully appealed the Commission's decision to the High Court.¹⁹⁸ However, the Commission has appealed further to the Court of Appeal, citing the important precedent the decision represents.

The Commission also declined the proposed acquisition by Transpacific Industries of rival waste management firm Envirowaste.¹⁹⁹ The Commission's decision illustrates that it is now looking at vertical effects more closely than in the past. In considering the vertical aspects of this transaction, the Commission stated that it will assess whether an acquisition will provide the merged entity with increased incentives and ability to leverage its market power in one functional level to another functional level.²⁰⁰ In the *Transpacific/Envirowaste* case, the Commission concluded that there could be a substantial lessening of competition arising from vertical effects involving the markets for refuse transfer stations and/or landfills on the one hand and waste collection on the other.

C. OTHER DEVELOPMENTS

The March 2007 decision of the High Court in the continuation of the *Koppers Arch* litigation represents a subtle but significant broadening of the scope of extra-territoriality in New Zealand.²⁰¹ This decision suggests that New Zealand courts need not consider the location of specific acts or omissions said to give rise to a breach on the part of an individual defendant. Instead, they may simply ask whether the defendant is liable for a "course of conduct" that was ultimately implemented in New Zealand.

XXIII. Developments In Norway*

A. MERGERS

There was substantial merger activity in Norway in 2007. Below are some of the more notable transactions considered by or involving the Norwegian Competition Authority (NCA):

On January 17, 2007, the Ministry of Government Administration and Reform instructed Falck to sell Viking Redningstjeneste in accordance with a September 2006 decision of the NCA. The NCA blocked the merger of these companies because it considered that the concentration would create a significant restriction on competition for different road rescue services.²⁰²

197. *Id.*

198. The High Court's decision is available at <http://jdo.justice.govt.nz/jdo/Introduction.jsp>.

199. Commerce Commission, Decision No. 604 (May 30, 2007); Transpacific Industries Group (NZ) Ltd. and Ironbridge Capital Pty Ltd., May 30, 2007, available at http://www.comcom.govt.nz/PublicRegisters/ContentFiles/Documents/PUBLIC%20Transpacific%20Enviro%20Waste%20Decision%20604%20Final_1.pdf.

200. *Id.*

201. *Commerce Commission v. Koppers Arch Wood Protection (NZ) Ltd.*, [2007] 2 N.Z.L.R. 805 (High Court); *Commerce Commission v. Koppers Arch Wood Protection (NZ) Ltd.*, [2006] 11 T.C.L.R. 581 (High Court). The High Court's initial decision is discussed in YIR 2006.

* The contribution for Norway was written by Trygve Norum of Advokatfirmaet Haavind Vislie AS.

202. See NCA Case No. 2006/490.

On June 11, 2007, the NCA conditionally approved a merger involving certain Norwegian major regional daily newspapers. The conditions aim to secure customers and competitors' essential access to printing services for several years.²⁰³

On July 5, 2007, the NCA gave its conditional approval to the vertical merger between Bankenes Betalingssentral (BBS) and Teller, involving the markets for international payment card transactions and the supply of point of sale terminals. The conditions aim to ensure competitors access to essential infrastructure owned by BBS.²⁰⁴

B. ANTI-COMPETITIVE PRACTICES

On February 19, 2007, the NCA imposed a fine of NOK45 million (approximately US\$8.7 million) on dairy producer TINE BA for abusing its dominant position by negotiating an exclusive supply arrangement with the REMA 1000 grocery chain for certain types of cheese during their annual negotiations in 2004.²⁰⁵ TINE also attempted to reach a similar agreement with the RIMI grocery chain. The NCA concluded that this was part of an effort by TINE to exclude its main competitor in Norway, Synnve Finden. TINE has appealed the NCA's decision to the Oslo District Court.²⁰⁶

XXIV. Developments in Perú*

A. ANTI-COMPETITIVE PRACTICES

On September 14, 2007, the Peruvian competition agency, the National Institute for the Defence of Competition and Intellectual Property (INDECOPI), issued its decision in a complaint filed by the Association of Tourist Agencies of Cusco against a consortium providing transportation services to Machu Picchu (Consettur).²⁰⁷ Consettur is the only company authorized to provide transportation services to Machu Picchu. The complaint alleged that Consettur had abused its dominant position by raising the fee charged for transporting foreign adults to Machu Picchu. INDECOPI dismissed the claim on the grounds that it does not have the authority to prohibit allegedly excessive pricing.²⁰⁸ The decision has been appealed to INDECOPI's Court for the Defence of Competition.

In another case, however, INDECOPI found an abuse of dominance by Ferrocarril Trasandino S.A. for refusing to rent certain railway equipment to a competitor.²⁰⁹ INDECOPI fined Ferrocarril Trasandino an amount equivalent to approximately US\$190,900. Similarly, INDECOPI ruled in favor of a complaint filed by the Association of Peruvian Gas Packaging Companies against state-owned Petróleos del Perú for refus-

203. See NCA Case no. 2007/13.

204. See NCA Case no. 2007/17.

205. See NCA Case no. 2007/2.

206. See NCA Case no. 2007/2.

* The contribution for Peru was written by Oscar Arrús Bellido of Estudio Rubio, Leguia, Normond & Assoc.

207. See Resolution No. 052-2007-INDECOPI/CLC (Sept. 14, 2007).

208. *Id.*

209. See Resolution No. 1122-2007/TDC-INDECOPI, issued in the action brought by Ferrocarril Santuario Inca Machu Picchu S.A.C., the Free Competition Bureau of INDECOPI and the Supervising Entity of Investment in Infrastructure for Public Transport-OSITRAN against Ferrocarril Trasandino S.A.

ing to rent terminal space to a competitor for the storage of liquid petroleum gas. IN-DECOPI fined Petroperú an amount equivalent to approximately US\$177,100.²¹⁰

XXV. Developments in Poland*

A. LEGISLATIVE DEVELOPMENTS

On April 21, 2007, a new law on competition and consumer protection entered into effect in Poland.²¹¹ Ordinances of the Council of Ministers (so called “execution acts”) were also issued to replace previously applicable regulations, including new regulations dealing with merger control,²¹² leniency proceedings,²¹³ and block exemptions.²¹⁴

The new law introduces some important changes, most notably to the merger control regime. The aggregate worldwide turnover threshold was increased from EUR50 million to EUR1 billion and a new turnover threshold of EUR50 million was added specifically in relation to operations in Poland. The new law also clarifies that, insofar as the target is concerned, only its turnover and that of its subsidiaries are taken into account in determining whether a particular threshold is exceeded, rather than the turnover of the entire vendor group.

B. MERGERS

The Polish competition authority (the “Polish Authority”) issued a number of merger control decisions in 2007 (partially under the previously applicable law). In most cases, the Authority cleared the mergers without conditions. This was the case, for example, in one of the most significant mergers that the Polish Authority dealt with in 2007, namely the acquisition of a leading aircraft producer in Poland, Polskie Zakłady Lotnicze Sp. z o.o., by a company from United Technologies group.²¹⁵ On other occasions, however, the Polish Authority granted its clearance subject to conditions. For example, the Authority only approved Carrefour Nederland B.V.’s acquisition of the chain of medium-sized supermarkets operated in Poland by Ahold Polska Sp. z o.o. on the condition that Carrefour divest nine of its own supermarkets in Poland.²¹⁶

210. See Resolution No. 0454-2007/TDC-INDECOPI (Mar. 30, 2007).

* The contribution for Poland was written by Lech Najbauer of Hogan & Hartson.

211. Act on Competition and Consumers Protection, Journal of Laws of 2007, No. 50 item 331 (Pol.), available at http://www.vokik.gov.pl/en/legal_resolutions/national_legal_acts/general_legal_regulations/.

212. Ordinance of the Council of Ministers on Submission of Undertakings Concentration Intention, Journal of Laws of 2007, No. 50 item 937 (Pol.).

213. Ordinance of the Council of Ministers on Proceedings in the Event of an Entrepreneurs’ Motion for Refraining from Penalties Submitted to the President of the Office for Competition and Consumers Protection, Journal of Laws 2007, No. 134 item 938 (Pol.).

214. Ordinance of the Council of Ministers on the Exemption of Certain Categories of Technology Transfer Agreements from the Prohibition of Agreements Restricting Competitions, Journal of Laws of 2007, No. 137 item 964 (Pol.).

215. See Decision of March 12, 2007 (No. DOK 32/2007).

216. See Decision of June 28, 2007 (No. DOK 86/2007).

C. ABUSE OF A DOMINANT POSITION

On October 25, 2007, the Polish Authority issued its decision that EmiTel (controlled by Telekomunikacja Polska SA), the dominant provider of TV and radio channels distributed in Poland, abused its dominant position by imposing unfair prices for its services, applying discriminatory terms in equivalent transactions, and imposing onerous contractual conditions.²¹⁷ EmiTel was fined PLN19 million (approximately US\$8.2 million).

XXVI. Developments In Spain*

A. LEGISLATIVE DEVELOPMENTS

On September 1, 2007, new Spanish competition legislation came into force (Ley de Defensa de la Competencia (LDC)).²¹⁸ The LDC introduced a variety of changes designed to modernize the enforcement of competition law in Spain.

From an institutional perspective, one of the principal changes is that the two former competition agencies, the Tribunal de Defensa de la Competencia (TDC) and the Servicio de Defensa de la Competencia (SDC), have been merged into a single national authority, the Comisión Nacional de Competencia (CNC). The CNC is comprised of both an adjudicative arm and an investigative arm.²¹⁹ As a result of these changes, the Spanish Government is no longer the ultimate decision-making body with respect to merger control and is only authorized to intervene on general "public interest" grounds when the CNC decides to block a merger or clear it subject to conditions.

The LDC also introduced several important substantive changes. In the merger control area, the market share threshold for pre-merger notifications has been raised from 25 percent to 30 percent.²²⁰ Cartel enforcement was also enhanced with the establishment of a leniency program, pursuant to which immunity from fines is available for the first undertaking or individual providing the CNC with evidence that enables it to start an investigation or prove the existence of a cartel. Fine reductions are also available for any subsequent party that provides additional evidence of value. Finally, it is no longer necessary for parties to obtain an individual exemption for certain vertical and horizontal agreements; undertakings will be required to self-assess whether their agreements and practices comply with the LDC.²²¹

One of the most important merger transactions reviewed in 2007 was the acquisition of Buquebús by Balearia, both of which are shipping line companies.²²² The TDC approved the transaction notwithstanding that it would reduce two the number of parties providing ferry services on the Algeciras-Ceuta route from three to. The TDC concluded that the

217. See Decision of October 25, 2007 (No. DOK 95/07).

* The contribution for Spain was written by Susana Cabrera and Vera Sopena of Garrigues & Andersen.

218. Published in the Spanish Official Gazette BOE No. 159, of July 4, 2007, p. 2884, available at <http://www.cncompetencia.es/pdfs/legislacion/47ingpdf> [hereinafter LDC].

219. *Id.* art. 12(1).

220. *Id.* art. (8)(1).

221. *Id.* arts. 1(3)-(4).

222. See Balearia/Buquebús, Decision of the Council of Ministers of Sept. 17, 2007, BOE No. 216, p. 39916 (Oct. 2, 2007); see also Balearia/Buquebus, Report of SDC, Case N-07052; Balearia/Buquebus, TDC report Case 104/07, available at: <http://www.cncompetencia.es/index.asp?m=38&p=46>.

acquisition would not lessen competition because its primary effect was to make Balearia a more effective competitor against Trasmediterránea, the remaining shipping company operating on this route. The TDC's decision was upheld by the Council of Ministers, subject to conditions.

C. ANTI-COMPETITIVE PRACTICES

There were two significant cartel cases in 2007. In *Aceites*, the TDC imposed fines totalling EUR3.7 million (approximately US\$5.7 million) on SOS Cuétara and eight other retail companies for fixing the prices of two different olive oil brands sold in their outlets.²²³ In *Cajas de Aborro Vascas y Navarra*, the recently created CNC imposed fines ranging from EUR4 million to EUR7 million (approximately US\$6.2 million to US\$10.74 million) on four savings banks in Spain's northern region. The banks agreed to coordinate their behavior over a fifteen year period.²²⁴

The TDC also dismissed two abuse of dominance complaints in 2007 against Telefónica, Spain's national telephone company. In *Tarjetas de Pago de Telefónica*, the TDC refused to condemn Telefónica for abuse of a dominant position in the pre-pay phonecard market, finding that Telefónica's dominant position had not been proven nor was there proof of any restrictive effects in the market resulting from Telefónica's behavior.²²⁵ In *Jazztel/Telefónica*, the CNC ruled that Jazztel, a competitor of Telefónica, had failed to prove an abuse of dominance in the ADSC market.²²⁶

Certain TDC decisions were also overturned by the Spanish courts in 2007. In one such case, *Gas Natural*, the Spanish National Appellate Court annulled a TDC resolution imposing a fine of EUR8 million (approximately US\$12.3 million) on Spain's national gas company, holding that the impugned behavior (contracting for capacity reserves) could be justified on objective and rational business grounds.²²⁷

XXVII. Developments in Sweden*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

The Competition Act Review Inquiry submitted its report entitled "A New Competition Law" (*sw. En ny konkurrenslag*) to the Swedish government in November 2006.²²⁸

223. See TDC Resolution of June 21, 2007, Case 612/06, *Aceites 2*, available at <http://www.cncompetencia.es/PDFs/resoluciones/2007/2193.pdf>.

224. See TDC Resolution of Oct. 18, 2007, Case 617/06, *Cajas Vascas y Navarra*, available at <http://www.cncompetencia.es/PDFs/resoluciones/2007/2230.pdf>.

225. See TDC Resolution of Mar. 1, 2007, Case 610/06 *Tarjetas*, available at <http://www.cncompetencia.es/PDFs/resoluciones/2007/2172.pdf> (last visited on Oct. 15, 2007).

226. See Resolution of Oct. 22, 2007, Case 620/06, *Jazztel/Telefónica*, available at <http://www.cncompetencia.es/PDFs/resoluciones/2007/2172.pdf>.

227. See Gas Natural Judgment of the National Appellate Court (Audiencia Nacional), Sala de lo Contencioso-administrativo, Sección 6ª, S de 13 Mar. 2007 Appeal n. 471/2005.

* The contribution for Sweden was written by Jakob Lundström and Irina Göransson of White & Case LLP.

228. See Statens Offentliga Utredningar [SOU] 2006:99, Till Statsrådet och chefen för Näringsdepartementet [government report series] (Swed.), available at <http://www.regeringen.se/content/1/c6/07/33/11/6fb9b5ee.pdf>.

The report rejects the notion that breaches of Swedish competition law should be criminalized. Instead, the report suggests, *inter alia*, that the Swedish Competition Authority (SCA) be authorized to impose administrative fines for certain infringements. The report also suggests that individuals found to have participated in violations of the law be disqualified from serving in corporate management. The SCA has voiced its support for the Review Inquiry's recommendations.²²⁹ The report is still being considered by other Swedish government bodies.

The government is also still considering a report issued by the SCA in October 2006 regarding Sweden's merger notification thresholds. The SCA recommends in this report that new thresholds be introduced to reduce the number of notifications the SCA now receives for transactions that do not raise competition issues.²³⁰ Finally, the SCA has proposed that it adopt a leniency program in accordance with the ECN Model Leniency Program.²³¹

B. CARTELS

In July 2007, the Stockholm District Court delivered its judgment in an asphalt cartel case, imposing a fine of SEK460 million (approximately US\$75 million) on nine asphalt suppliers.²³² This is the highest fine imposed for a cartel violation in Sweden. The Court found that the four major defendants had agreed to allocate public procurement contracts among themselves and to coordinate prices for the tenders, in violation of Section 6 of the Swedish Competition Act. Among other things, the Court found that a procedure had been put in place whereby large companies contacted the smaller ones and paid them to not submit tenders.

C. ABUSE OF A DOMINANT POSITION

In March 2007, the SCA concluded its investigation into the exclusive arrangements between Ticnet AB, a dominant provider of event and travel tickets in Sweden, and event promoters and ticket resellers. The SCA's investigation did not support the allegation that these exclusive arrangements constituted an abuse of a dominant position by foreclosing competition.²³³

229. See Swedish Competition Auth. Statement, Dnr 743/2006 (Swed.), available at http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/yttrande_06-0743.pdf.

230. Swedish Competition Auth. Report, Konkurrensverkets Rapportserie 2006:3 (Swed.), available at http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap_2006-3.pdf.

231. The Swedish Competition Authority's proposal is available at <http://www.konkurrensverket.se/upload/filer/ENG/Publications/aran.eng2006.pdf>.

232. Konkurrensverket./Kvalitetsasfalt I Mellansverige, Tingsratl (TR) [Stockholm District Court] 2007-07-10 ref T5467-03 (Swed.).

233. Swedish Competition Auth. Decision, dnr 444/2005, available at http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/beslut_05-0444.pdf.

D. SECTOR INVESTIGATIONS/REPORTS

The SCA has published a report with regard to Sweden's pharmaceutical monopoly.²³⁴ The report recommends that the pharmaceutical monopoly be phased out to enhance competitive efficiency and benefit both consumers and the economy. As a first step, the SCA proposes to allow non-prescription drugs to be sold in regular convenience stores.

The SCA also investigated the competitive situation in the Swedish electricity market. In particular, the agency examined whether the joint ownership of Sweden's nuclear power facilities by the state utility Vattenfall AB and private utilities such as E.ON Sweden AB and Fortum Oy breach Swedish competition law.²³⁵ Although the SCA did not find any evidence of actual violations of the law, it urged the Swedish government to end this co-ownership situation because of the considerable risk of information being unlawfully exchanged between the competing enterprises.²³⁶

XXVIII. Developments in Switzerland*

A. LEGISLATIVE DEVELOPMENTS

On July 2, 2007, the Swiss Competition Commission (ComCo) published an amended Notice regarding the Treatment of Vertical Restraints under Swiss Competition Law (the "Vertical Restraints Notice"), which will enter into force on January 1, 2008.²³⁷ According to ComCo, the objective of the amendment is to bring the legal situation in Switzerland in line with current practice in the E.U. and the amended Federal Act on Cartels (ACart).²³⁸ The position taken in the Vertical Restraints Notice, however, is stricter than the approach in the E.U., particularly with regard to price recommendations. Furthermore, the Notice states that parties cannot justify vertical restrictions solely on the basis that interbrand competition exists in the particular market.

234. Swedish Competition Authority Report, Rapportserie 2007:1 Avveckla apoteksmonopolet med konsumentnyttan i fokus! (Swed.), available at http://www.kkv.se/upload/Filer/Trycksaker/Rapporter/rap_2007-1.pdf.

235. See Press Release, Swedish Competition Authority, End Co-Ownership of Nuclear Power! (2007), available at http://www.kkv.se/t/NewsPage____2472.aspx.

236. *Id.*

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

237. See Bekanntmachung über die wettbewerbsrechtliche Behandlung vehkoler Abreden [Notice on the Competition Law Treatment of Vertical Agreement] July 2, 2007, available at <http://www.weko.admin.ch/publikationen/00213/index.html?lang=de&PHPSESSID=a273bbd16bf009ab7f67c2c261b555b7> (in German) and <http://www.weko.admin.ch/imperia/md/images/weko/43.pdf> (in English).

238. See Swiss Competition Comm'n, Annual Report 2006 of the Competition Commission Accordance with Article 49(2) ACart, available at <http://www.weko.admin.ch/publikationen/00188/Jahresbericht-2006-E.pdf?lang=en&PHPSESSID=3d18cb9>. For an unofficial English translation of the ACart, see <http://www.weko.admin.ch/imperia/md/images/weko/lcart-english-120107.pdf>.

B. MERGERS

On September 4, 2007, ComCo cleared Migros's acquisition of Denner, subject to conditions.²³⁹ Migros is Switzerland's largest retailer while Denner is its third largest food retailer. The conditions included that: (i) Denner retain its independent brand presence in the market; (ii) Migros and Denner not combine their purchasing; and (iii) Migros not acquire any other food-retailer in Switzerland without ComCo's approval.²⁴⁰ The conditions must be adhered to for a period of two to seven years and will be monitored by an independent auditor to be appointed by ComCo. Migros may request that the conditions be amended or rescinded if market circumstances change, including if German retailers Aldi and Lidl increase their presence in Switzerland by a material degree.

C. ANTI-COMPETITIVE PRACTICES

On February 5, 2007, ComCo held that Swisscom Mobile, the largest mobile phone provider in Switzerland, abused its dominant position in the Swiss mobile phone market by charging consumers an excessive termination fee for routing calls from other providers into their own mobile phone networks.²⁴¹ ComCo imposed a fine of over CHF333 million (approximately US\$326 million) on Swisscom Mobile, which is by far the largest fine ever imposed in Switzerland for a competition violation. Swisscom Mobile has appealed ComCo's decision to the Federal Administrative Court.

On February 6, 2007, the Swiss Federal Court (SFC) confirmed ComCo's decision prohibiting the so-called "Sammelrevers" system for book pricing in Switzerland.²⁴² Under this system, bookshops were requested not to deviate from resale prices fixed by publishers. For example, approximately 90 percent of the German language books sold in Switzerland were subject to this system. The SFC held that the agreement could not be justified on the grounds of economic efficiency.²⁴³ The publishers and booksellers thereafter applied to the Swiss Federal Council for an exceptional authorization on grounds of overriding public interests under Article 8 ACart. This request was rejected by the Federal Council on May 7, 2007.²⁴⁴

239. See Competition Comm'n Auflagen zum Zusammenschluss Migros/Denner (Auszug), *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00294/Auflagen_Migros-Denner.pdf?lang=de (in German).

240. *Id.*

241. The decision in German is *available at* http://www.weko.admin.ch/news/00008/Verfuegung_Mobilfunk.pdf?lang=de. A summary in French is *available at* http://www.weko.admin.ch/publikationen/pressemitteilungen/00271/Pressekonferenz_f_SwisscomMobile_Zusammenfassung-Entscheid.pdf?lang=fr.

242. Bundesgerichtsentscheid (BGE) [Federal Court] Feb. 6, 2007, 2A.430/2006 Entscheidung des Schweizerischen Bundesrichters [BGE], *available at* http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=06.02.2007_2A.430/2006 (in German).

243. *Id.*

244. Schweizerischen Bundesrat [Federal Council] May 7, 2007 (Switz), *available at* <http://www.weko.admin.ch/publikationen/00212/RPW2007-2.pdf?lang=de> (in German).

XXIX. Developments in Ukraine*

A. MERGERS

Merger control in Ukraine continues to grow in importance as the number of merger clearance applications received by the Antimonopoly Committee of Ukraine (AMCU) increases each year.²⁴⁵

One of the most notable merger cases of 2007 involved the acquisition of Smart Holding by System Capital Management, the largest holding company in Ukraine.²⁴⁶ The transaction raised concerns about the merged entity acquiring a dominant position in the supply of raw iron in Ukraine. Following numerous complaints by Ukrainian metal companies, the AMCU agreed to clear the merger on the condition that one of Smart Holding's subsidiaries, Inhuletskay Ore Enrichment plant, be required to sell its raw iron ore products to all customers at equal prices.²⁴⁷

B. ANTI-COMPETITIVE PRACTICES

The Kyev Commercial Court of Appeals issued a decision in October 2007 reversing a judgment of the Commercial Court of the City of Kyev and affirming the AMCU's total fine of UAH17.2 million (approximately US\$3.4 million) against seven wholesale sugar traders for agreeing to increase wholesale sugar prices.²⁴⁸

The AMCU also fined the European Consulting Agency (ECA) UAH875,500 (approximately US\$173,405) for abuse of a dominant position in the provision of electronic information services for state procurements.²⁴⁹ Among other things, the ECA, which is Ukraine's only Internet service provider certified to publish state procurement announcements, forced procuring entities to use a complimentary consulting service for excessively high fees. The ECA also obstructed the AMCU's investigation.

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

245. See Results of AMCU activity for 2006 (Feb. 27, 2007), *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=62414&cat_id=61944; Article 42 of the Constitution of Ukraine provides for the protection of fair competition and prohibits the abuse of a monopoly position. See Constitution of Ukraine No. 254K/96BP (June 28, 1996) *available at* <http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=254%EA%2F96%2D%E2%FO>; Chapter 3 of the Commercial Code of Ukraine and Law of Ukraine No. 22-10 On Protection of Economic Competition (Jan. 11, 2001) is the key competition legislation in Ukraine and include the regulation of merger transactions.

246. See Press Release, AMCU, Oct., 15, 2007 *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=79653&cat_id=60177.

247. *Id.*

248. See Press Release, AMCU, Oct. 4, 2007, *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=64634&cat_id=64109.

249. See Press Release, AMCU, July 17, 2007, *available at* http://www.amc.gov.ua/amc/control/uk/publish/article?art_id=75369&cat_id=64110.

XXX. Developments in the United Kingdom*

A. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

In parallel with similar work being done by the European Commission on private enforcement (with the Green Paper in 2005 and a White Paper expected in early 2008), the U.K. Office of Fair Trading (OFT) published a discussion paper on facilitating effective redress for consumers and businesses that have been harmed by breaches of competition law.²⁵⁰ The OFT has suggested that to increase the incentives for compliance with competition law, private actions should be possible both on a stand-alone basis and as follow-on actions.

B. MERGERS

The Secretary of State for Trade and Industry (SoS) referred BSKyB's acquisition of a 17.9 percent stake in ITV to the Competition Commission.²⁵¹ This followed the first ever intervention by the SoS in an investigation by the OFT on grounds of public interest in media ownership. The Competition Commission subsequently published its provisional findings that BSKyB's acquisition of a 17.9 percent stake in ITV constitutes a merger situation and restricts competition.²⁵²

C. CARTELS

In August 2007, British Airways was fined a record GBP121.5 million (approximately US\$245 million) after it admitted colluding with Virgin Atlantic to raise fuel surcharges on tickets between August 2004 and January 2006.²⁵³ Virgin Atlantic received immunity from fines as the whistleblower on the cartel, in line with the OFT's Leniency Policy.²⁵⁴ This example illustrates a clear policy shift to much larger fines. The OFT also conducted an on-site search at a private address for the first time as part of its criminal investigation into the alleged marine hoses cartel.²⁵⁵

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

250. Office of Fair Trading, *Private Actions in Competition Law: Effective Redress for Consumers and Business* (2006), available at http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf. As part of the 2007 pre-budget report, the U.K. Finance Minister announced that the U.K. government intended to consider measures to facilitate redress of losses flowing from breaches of competition law.

251. See Press Release, Department of Trade and Industry (National), British Sky Broadcasting/ITV Statement (May 24, 2007), available at <http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=286812&NewsAreaID=2>.

252. Competition Commission, *Acquisition by British Sky Broadcasters PLC of 17.9 Per Cent of the Shares in ITV PLC Provisional Findings Report*, Oct. 4, 2007, available at http://www.competition-commission.org.uk/inquiries/ref2007/itv/pdf/prov_find_report.pdf.

253. See Press Release, Office of Fair Trading, British Airways to Pay Record £121.5m Penalty in Price Fixing Investigation (Aug. 1, 2007), available at <http://www.offt.gov.uk/news/press/2007/113-07>.

254. *Id.*

255. See Press Release, Office of Fair Trading, OFT Launches Criminal Investigation into Alleged International Big Rigging, Price Fixing and Market Allocation Cartel (May 3, 2007), available at <http://www.offt.gov.uk/news/press/2007/70-07>.

Finally, the OFT also issued a statement of objections to five major supermarkets and certain dairy producers setting out a provisional finding that they colluded to raise the price of dairy products between 2002 and 2003 by sharing commercially sensitive pricing information. The OFT estimated that this alleged infringement cost consumers approximately GBP270 million (approximately US\$545 million).²⁵⁶

D. ANTI-COMPETITIVE PRACTICES

The OFT launched new market investigations in 2007 into retail bank pricing,²⁵⁷ personal current accounts,²⁵⁸ distribution of medicines in the UK,²⁵⁹ and the house building industry.²⁶⁰ The Competition Commission also launched an investigation into the leasing of rolling stock for franchised passenger services.²⁶¹ In addition, the Competition Commission published its emerging thinking in relation to the inquiry into the supply of groceries by retailers in the UK.²⁶²

E. COMPETITION LITIGATION

In the first case of its kind, a representative action for damages on behalf of consumers was initiated by a consumer association before the Competition Appeal Tribunal (the "CAT"). The matter involves an action against JJB Sports, which was found guilty of fixing prices of replica football kits.²⁶³ Purchasers of electrical and mechanical carbon and graphite products also filed a claim at the CAT for damages against the members of the price-fixing and market-sharing cartel relating to carbon and graphite products.²⁶⁴ The CAT is also now dealing with an action for damages brought by JJ Burgess & Sons following the CAT's decision that a funeral company had abused its dominant position by refusing the claimant access to a crematorium that the former owned and maintained.²⁶⁵ The

256. See Press Release, Office of Fair Trading, OFT Issues Provisional Decision Against Supermarkets and Dairies over Price Fixing (Sept. 20, 2007), *available at* <http://www.offt.gov.uk/news/press/2007/134-07>.

257. See Press Release, Office of Fair Trading, OFT Announces 'Quick Fix' on Bank Charges will Disadvantage Customers (Mar. 29, 2007), *available at* <http://www.offt.gov.uk/news/press/2007/54-07>.

258. See Office of Fair Trading, OFT Launches Market Study into Personal Current Accounts (Apr. 26, 2007), <http://www.offt.gov.uk/news/press/2007/67-07>; *see also* Office of Fair Trading, Personal Current Accounts in the UK (2007), http://www.offt.gov.uk/shared_offt/reports/financial_products/oft918.pdf.

259. See Office of Fair Trading, Distributions of Medicine in the UK (2007), http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft914.pdf.

260. See Office of Fair Trading, OFT Launches Groundbreaking Study into UK Housebuilding Market (June 22, 2007), <http://www.offt.gov.uk/news/press/2007/90-07>; *see also* Office of Fair Trading, Home Building- Reasons for a Market Study (2007), http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft934.pdf.

261. See Press Release, Competition Commission, Rolling Stock Market Investigation—Issues Statement (Aug. 17, 2007), *available at* http://www.competition-commission.org.uk/press_rel/2007/aug/pdf/49-07.pdf.

262. Competition Commission, Groceries Market Investigation Emerging Thinking, (2007), http://www.competitioncommission.org.uk/inquiries/ref2006/grocery/pdf/emerging_thinking.pdf.

263. Consumers' Association v. JJB Sports, (2007) 078/7/9/07, Notice of Claim, *available at* <http://www.catribunal.org.uk/documents/Note1078Consumers050307.pdf>.

264. Emerson Electric v. Morgan Crucible, (2007) 1077/5/7/07, Application, *available at* <http://www.catribunal.org.uk/documents/Application1077Emerson090207.pdf>.

265. JJ Burgess & Sons v. Stevenage Ltd., (2007) 1088/5/7/07 Notice of Claim for Damages, *available at* http://www.catribunal.org.uk/documents/Notice_Appeal1088Burgess230807.pdf.

claimant is requesting damages for loss of revenues and costs incurred as a result of this abuse of a dominant position.

XXXI. Developments in the United States*

A. SUPREME COURT DECISIONS

The U.S. Supreme Court released four antitrust judgments in 2007, each of which was decided in favor of the defendants.

In *Twombly*,²⁶⁶ the Court held that a conspiracy claim under Section 1 of the Sherman Act should be dismissed under the Federal Rules of Civil Procedure unless it includes "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement," thereby moving a claim "across the line from conceivable to plausible."²⁶⁷ As the lower courts begin to grapple with the implications of the *Twombly* decision, it is noteworthy that this higher threshold for notice pleadings will potentially impact other types of allegations as well, both antitrust and non-antitrust.²⁶⁸

In *Leegin*, the Court, in a five to four decision, overruled a ninety-five-year-old rule that it is per se illegal under Section 1 of the Sherman Act for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods and held that all vertical price restraints are now to be judged under the rule of reason.²⁶⁹ The Court emphasized that economic literature is "replete" with pro-competitive justifications for vertical price-restraints, including the reduction of intra-brand competition among retailers in order to increase inter-brand competition among manufacturers.²⁷⁰

Continuing its trend of deference to specific regulatory regimes, the Court held in *Credit Suisse Securities* that U.S. securities laws implicitly preclude the application of U.S. antitrust laws to challenged conduct involving initial public offerings.²⁷¹

Finally, in *Weyerhaeuser*, the Court unanimously held that the stringent, two-part standard for liability used in predatory selling cases, as articulated in a 1993 Supreme Court decision, should also apply in predatory buying cases ("predatory bidding").²⁷² This standard requires proof that the predatory bidding caused the firm to lower its prices below

* The contribution for the United States was written by Fiona Schaeffer, Marisa Leto, David Yolkut and Justin Wagner of Weil, Gotshal & Manges, LLP.

266. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1961 (2007) (holding that a conspiracy claim under Section 1 of the Sherman Act should be dismissed when it alleges only parallel conduct, absent "some factual context suggesting agreement.").

267. *Id.* at 1965, 1974.

268. *See, e.g., Iqbal v. Hasty*, 490 F.3d 143, 157 (2d. Cir. 2007) (noting "conflicting signals" resulting in "some uncertainty" as to the scope of the *Twombly* decision, but averring that "we are reluctant to assume that [*Twombly*] . . . applies only to section 1 allegations based on competitors' parallel conduct or, slightly more broadly, only to antitrust cases").

269. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007) (overruling the per se rule set forth in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

270. *Id.* at 2714-15 (citing economic studies, and noting that "[r]esale price maintenance . . . has the potential to give consumers more options").

271. *Credit Suisse Securities (USA, L.L.C. v. Billing*, 127 S.Ct. 2383 (2007).

272. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S.Ct. 1069 (2007). *See* YIR 2006 for a further discussion of this case.

some measure of its costs and that the firm had a dangerous probability of recouping its losses upon its rival's exit from the market.

B. LEGISLATIVE AND ADMINISTRATIVE DEVELOPMENTS

The Department of Justice and the Federal Trade Commission (the "Agencies") issued a joint report on April 17, 2007 on the Agencies' enforcement approach to the antitrust issues that arise from the exercise of intellectual property rights (the "2007 Report").²⁷³ The 2007 Report affirms that, among other things: mere unilateral, unconditional refusals to license patents should not result in antitrust liability; timely unilateral announcement of price or licensing terms to a standard-setting organization (SSO) is not a violation of Sherman Act Sections 1 or 2; and including substitute patents in a pool does not render the pool per se or presumptively anti-competitive. In addition, the 2007 Report indicates the Agencies will apply a rule of reason analysis to the following conduct: joint ex ante collaboration on licensing terms by SSO participants; tying arrangements involving intellectual property; and most agreements with the potential to extend market power conferred by a patent beyond its expiration.²⁷⁴

C. MERGERS

In August 2008, Whole Foods Market, Inc., acquired Wild Markets, Inc., after a failed attempt by the Federal Trade Commission (FTC) to block the acquisition. The district court denied the FTC's motion for a preliminary injunction to enjoin the merger during the pendency of an administrative proceeding, despite evidence displaying anti-competitive intent behind the merger.²⁷⁵ The court found that the FTC had failed to demonstrate a likelihood of success in establishing that the merger's effects would be to substantially lessen competition or would tend to create a monopoly in the relevant product and geographic markets.²⁷⁶

Similarly, the FTC lost a motion for a preliminary injunction to block a proposed merger in the refining industry when the district court ruled that the two companies did not compete directly against one another and operated in a competitive marketplace.²⁷⁷ Of note, the defendant in this case used the FTC's own pricing studies as affirmative evidence in support of the proposed merger and, as in the Whole Foods acquisition, was able to prevail in spite of an unflattering internal document produced by the company.²⁷⁸

273. U.S. Dep't of Justice and FTC., Report, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007), available at <http://ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

274. *Id.*

275. See *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007).

276. *Id.* at 49-50. The District of Columbia Circuit Court subsequently denied the FTC's motion for an injunction pending appeal of the district court's decision. See *FTC v. Whole Foods Market, Inc.*, No. 07-5276, 2007 U.S. App. LEXIS 20539 (D.C.C. Aug. 23, 2007). The FTC's appeal before the D.C. Circuit Court of Appeals is pending as of the time of writing.

277. See *FTC v. Foster*, No. CIV 07-352 JB/ACT, 2007 U.S. Dist. LEXIS 47866 (D.N.M. May 30, 2007).

278. *Id.* at *109-112.

The FTC subsequently voted narrowly to dismiss their administrative complaint against this merger.²⁷⁹

D. CONDUCT

In the area of standard setting, the Third Circuit found that a patent holder's false promise to license essential technology within a standard-setting organization can constitute anti-competitive behavior under the Sherman Act if the organization relies on the promise and the patent holder ultimately breaches.²⁸⁰

Broadening the defenses available to defendants facing Robinson-Patman litigation, the Sixth Circuit affirmed a grant of summary judgment to defendants in a case involving loyalty discounts, relying primarily on the functional availability doctrine.²⁸¹

Finally, the Ninth Circuit found that the exclusionary conduct element of a Sherman Act Section 2 claim cannot be satisfied in the context of "bundled discounts," unless the discounts result in pricing below a specific measure of costs.²⁸² This decision appears to create a circuit split in light of a disparate holding of the Third Circuit in *LePage's Inc. v. 3M*.²⁸³ The issue of how to distinguish anti-competitive from lawful product bundles is now ripe for Supreme Court review.

279. See Press Release, FTC, Statement of the Commission Concerning Dismissal of the Administrative Complaint (Oct. 4, 2007), available at <http://www.ftc.gov/os/adjpro/d9323/071003statement.pdf>.

280. See *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007).

281. See *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 872 (6th Cir. 2007).

282. See *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895, 914 (9th Cir. 2007).

283. *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).