International Antitrust

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International Antitrust

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This article outlines the year's most important developments in key areas of antitrust enforcement in fourteen selected jurisdictions. Prepared by antitrust law practitioners and the International Antitrust Law Committee, this article summarizes a detailed publication to be released in spring 2011 covering antitrust developments in more than forty jurisdictions worldwide.1
Americas

I. Brazil

A. LEGISLATIVE DEVELOPMENTS

The Senate continues to debate a Bill approved by the House of Representatives which might substantially change Brazilian antitrust enforcement by merging the antitrust regulatory powers of the Secretariat for Economic Law ("SDE") and the Secretariat for Economic Monitoring ("SEAE") into one single antitrust agency, the Administrative Council for Economic Defense ("CADE").

To improve the functioning of its leniency program, SDE issued a new leniency regulation aimed at increasing the procedure's transparency. Among other things, it clarifies the procedures for oral applications and introduces a marker system.

B. MERGERS

CADE blocked the acquisition of concrete producer CimentoTupi by PolimixConcreto, ordering the parties to unwind the transaction, after concluding that the acquisition would result in market shares of up to eighty percent in local markets and would increase the probability of both unilateral effects and coordination.

In both Telefónica/Telco/Telecom Italia and Oi/Brasil Telecom, CADE made the approval of the transactions subject to the adoption of behavioral remedies to safeguard competition.

SEAE issued an economic opinion recommending that CADE require substantial divestitures in order to allow the merger of Brazil's leading food processors to proceed.

C. ANTICOMPETITIVE PRACTICES

CADE fined five industrial and medical gas manufacturers 2.3 billion reais (approximately US$1.35 billion) for collusion, price-fixing, market division, and bid-rigging, after finding that the cartel in question had been active since at least 1998. This fine is the highest one imposed in the history of antitrust enforcement in Brazil. Substantial fines were also imposed on the companies' executives.

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D. Abuses of Dominance

AmBev has challenged a CADE decision\(^8\) imposing a fine of approximately US$200 million for adopting a loyalty program of non-linear pricing and discounts which allegedly induced exclusivity and/or the acquisition of target quantities in the downstream market. AmBev has argued that (i) SDE violated its constitutional and procedural rights during the inspections conducted in the company's headquarters, and (ii) CADE failed to demonstrate actual harm or negative effects on competition and consumer welfare. A decision is pending.

E. Court Decisions

The Superior Court of Justice overturned a decision by the Federal Court of Appeals subjecting transactions in the banking and financial industry to antitrust scrutiny.\(^9\)

A number of recovery actions were filed against steel producers for customer allocation, resale price maintenance and price fixing in the steel rebar market, following a ruling by CADE.\(^10\) Associations of construction companies pressed ahead with a collective antitrust action against the steel rebars producers,\(^11\) seeking injunctive relief and damages.

A major collective action for injunctive relief and damages filed by associations of hospitals against an alleged cartel of suppliers of medical gases\(^12\) was resumed in 2010 after a decision by CADE that the defendants engaged in collusion, market division, and bid rigging.

II. Canada

A. Legislative Developments

The most significant development in 2010 was the implementation in March of the new per se conspiracy offense under the Canadian Competition Act ("the Act").\(^13\) The new offense prohibits competitors from entering into agreements that: "(i) fix, maintain, increase or control the price for the supply of a product; (ii) allocate sales, territories, customers or markets for the production or supply of a product; or (iii) fix, maintain, control, prevent, lessen or eliminate the production or supply of a product.\(^14\) The new offense does not require the prosecution to prove that the agreement in question had an undue impact on competition or resulted in an unreasonable increase in prices.

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\(^13\) Budget Implementation Act, 2009, S.C., c. 2, s. 45 (Can.).
\(^14\) Id.
Maximum penalties are now fourteen years of imprisonment and a CDN$25 million (approximately US$25 million) fine per count, up from the previous maximums of five years and CDN$10 million (approximately US$10 million) per count. Liability can be avoided under the new offense if it can be established that: (i) the impugned agreement is “ancillary to a broader or separate agreement that includes the same parties;” (ii) the impugned agreement is “directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement;” and (iii) the “broader or separate agreement, considered alone, does not contravene” the conspiracy offense.

The Act also now contains a new civil provision that applies to agreements between competitors that have the effect of lessening or preventing competition substantially. Applications under this new provision are brought by the Commissioner of Competition to the Competition Tribunal. Relief is limited to an order requiring the parties to cease engaging in the impugned conduct or, on consent, to taking any other action.

B. MERGERS

The Competition Bureau (“the Bureau”) secured divestitures from a number of merging parties in 2010. For example, in June 2010, the Bureau announced that it reached an agreement with IESI-BFC Ltd. and Waste Services Inc. requiring divestitures of commercial waste collection assets of Waste Services Inc. in five Canadian cities as a condition for obtaining approval of the proposed merger. Divestitures were also secured by the Bureau in a number of international mergers, including: Ticketmaster/Live Nation, Nufarm/A.H. Marks, Teva/Ratiopharm, Novartis/Alcon, and The Coca-Cola Company’s acquisition of the North American business of its primary bottler, Coca-Cola Enterprises Inc.

15. Budget Implementation Act, s. 45.
16. Budget Implementation Act, s. 90.1.
III. Mexico

A. LEGISLATIVE DEVELOPMENTS

A Bill implementing the amendments to the Constitution regarding class actions was published. If enacted, it will modify various provisions of the Federal Code on Civil Procedures and the Federal Law on Economic Competition.\(^\text{23}\)

Additionally, the Mexican President submitted a bill to Congress to, among other matters, increase the amount of fines imposed for antitrust infringements, introduce criminal liability for cartel activity, provide for the possibility of applying interim measures, facilitate the inspection procedure, and provide for a more detailed regulation on joint dominance. The Bill requires the approval of both the House of Representatives and the Senate.\(^\text{24}\)

B. MERGERS

The Federal Competition Commission (“the FCC”) authorized the acquisition by the Mexican broadcasting company Televisa of thirty to forty percent of Nextel’s shares, as well as the indirect acquisition by AméricaMóvil of 71.5% of Teléfonos de México’s voting shares, and up to 100% of Telmex Internacional’s shares.\(^\text{25}\) It also authorized the Cydsa/Mexichem merger in the PVC market, subject to conditions.\(^\text{26}\)

C. ANTICOMPETITIVE PRACTICES

Four investigations were initiated in relation to the following markets: tortilla, freight services, air tickets, and flexible transmission means of alternating power sources.\(^\text{27}\)

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\(^\text{27}\) See generally Extracto Del Acuerdo por el que la Comisión Federal de Competencia Inicia La Investigación por Denuncia Identificada Bajo el Número de Expediente DE-014-2010, por la Posible Comisión de Prácticas Monopolísticas Absolutas en el Mercado de la Producción, Distribución y Comercialización de Masa y Tortillas de Maíz en el Municipio de Tuxtla Gutiérrez, Chiapas [Extract Agreement Federal Competition Commission Initiated the Investigation on Complaints Identified Under the File Number DE-014-2010, for the Commission of Absolute Monopolistic Practices in the Market Production, Distribution, and Marketing of Masa and Tortillas Corn in the Municipality of Tuxtla Gutiérrez, Chiapas] Diario Oficial de la Federacion [D.O.], 28 de Julio 2010 (Mex.); Presidencia y Secretaria Ejecutiva, Comision Federal de Competencia.
The FCC confirmed the decision finding pharmaceutical companies liable for bid rigging regarding the sale of insulin to a public Mexican Healthcare Institution\(^\text{28}\) and the imposition of fines on PCTV shareholders for refusing to provide acquired TV signals to its competitors and dividing up markets by allocating territories.\(^\text{29}\)

D. Abuses of Dominance

Seven investigations were initiated in relation to: home improvement products, airport services, beer, home furniture, advertising spaces regarding the marketing of real estate, local and domestic long-distance dedicated access services to carriers, and exported guava markets.\(^\text{30}\) The FCC reduced the fine imposed on Televisa in its decision of November

Deschamiento por Expediente No. DE-020-2010 (Oct. 6, 2010); Extracto Del Acuerdo por el que la Comisión Federal de Competencia Inicia La Investigación por Denuncia Identificada Bajo el Número de Expediente DE-004-2010, por la Posible Comisión de Prácticas Monopólicas Absolutas en el Mercado de Prestación, Producción, Distribución y Comercialización de Insumos y Servicios para la Reserva y Venta de Boleos de Transporte Aéreo de Pasajeros en el Territorio Nacional [Extract of the Agreement by Which the Federal Competition Commission Initiated Complaint Investigation Identified Under the File Number DE-004-2010, for the Commission of Absolute Monopolistic Practices in the Market for the Provision, Production, Distribution, and Marketing of Inputs and Services for Booking and Ticketing of Air Travel in the Country], Diario Oficial de la Federacion [D.O.], 13 de Mayo 2010 (Mex.); Extracto del Acuerdo por el que la Comisión Federal de Competencia inicia la investigación de oficio identificada bajo el número de expediente IO-002-2010, por la posible comisión de prácticas monopólicas absolutas en el mercado de la producción, procesamiento, distribución y comercialización de sistemas flexibles de transmisión de corriente alterna en el territorio nacional [Extract of the Agreement by Which the Federal Competition Commission Began an Official Investigation Identified Under the File Number IO-002-2010, for the Commission of Absolute Monopolistic Practices in the Market for the Production, Processing, Distribution, and Marketing Systems Flexible Alternating Current Transmission in the Country], Diario Oficial de la Federacion [D.O.], 19 de Febrero 2010 (Mex.).


2009 for the refusal to supply its open TV signals. In January, the FCC declared that TELCEL was an economic agent with significant market power in the national mobile telephone market.


E. COURT DECISIONS

The Supreme Court granted constitutional relief to Coca Cola FEMSA against the FCC resolution finding it liable for exclusionary conduct.\textsuperscript{33} The FCC was ordered to issue a new resolution taking into account evidence put forward by the defendant that was not properly admitted and assessed in the previous proceeding.\textsuperscript{34}

IV. United States

A. ADMINISTRATIVE DEVELOPMENTS

The Department of Justice ("DOJ"), Antitrust Division and the Federal Trade Commission ("FTC," together the "Agencies") jointly released Revised Merger Guidelines\textsuperscript{35} to reflect actual practices.

The FTC also released a study\textsuperscript{36} demonstrating the costs of "pay-for-delay" agreements between pharmaceutical companies and continues to urge Congress\textsuperscript{37} to enact legislation to limit this practice that delays entry of generic versions of branded drugs, especially in the face of continuing setbacks in court.\textsuperscript{38}

B. MERGERS

This year, an increasing number of mergers played out in the bankruptcy context,\textsuperscript{39} the Agencies continued to challenge several consummated mergers,\textsuperscript{40} and international coor-
dition facilitated the efficient resolution of mergers affecting multiple jurisdictions.\textsuperscript{41} Two mergers\textsuperscript{42} also required behavioral remedies, despite the Agencies' preference for structural remedies. Google/AdMob was cleared without conditions.\textsuperscript{43}

The FTC continues to challenge\textsuperscript{44} Ovation Pharmaceutical's January 2006 acquisition of the drug NeoProfen despite a district court decision that the merger was not anticompetitive because the drugs were not in the same product market.\textsuperscript{45}

C. ANTCOMPETITIVE PRACTICES

Although criminal enforcement was not as dramatic as last year, the DOJ succeeded for the first time in extraditing a foreign defendant on antitrust charges.\textsuperscript{46}

In civil enforcement, health care remains a priority.\textsuperscript{47} The DOJ also revived its scrutiny of the payment cards industry, challenging merchant rules imposed by American Express, Visa, and MasterCard.\textsuperscript{48}

The FTC charged U-Haul with violating Section 5 of the FTC Act by inviting Budget to fix prices on truck rentals, even though no agreement had been reached.\textsuperscript{49}

D. ABUSES OF DOMINANCE

The FTC settled charges against Intel for allegedly engaging in "anticompetitive tactics to cut off rivals' access to the marketplace" in violation of Section 5 of the FTC Act.\textsuperscript{50}


E. Court Decisions

The Supreme Court decided two important antitrust cases. In *American Needle v. National Football League*, the Court refused to treat a joint venture as a single entity immune from violating Section 1 of Sherman Act.\(^{51}\) In *Stolt-Nielsen SA et al. v. Animalfeeds International*, the Court held that class arbitration proceedings against several shipping companies could not proceed when the arbitration agreements were silent as to class arbitration.\(^{52}\)

Asia/Pacific

V. Australia

A. Mergers

In 2010, the Australian Competition and Consumer Commission ("ACCC") indicated that its focus would be on mergers that directly affect "consumer's hip pockets," particularly in industries like petrol and telecommunications. Since December 2009, it has publicly opposed five mergers.\(^{53}\)

B. Anticompetitive Practices

The ACCC continues to take action against airlines in the air cargo industry, bringing proceedings against Korean Air Lines, Malaysian Airline System, Malaysia Airlines Cargo, Japan Airlines, and Air New Zealand. The ACCC has brought fifteen proceedings against airlines, six of which have settled.\(^{54}\) Significant financial penalties for cartel conduct, ranging from $1 million (approximately US$990,000) to $9.2 million (approximately US$9.1 million), were imposed in four other proceedings.\(^{55}\)

C. Abuses of Dominance

Two companies, Baxter Healthcare\(^{56}\) and Cabcharge Australia Limited,\(^{57}\) were required to pay penalties of $8.5 million (approximately US $8.3 million) and $15 million (approximately US$14.8 million), respectively, for their misuse of market power. The Cabcharge

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53. The ACCC opposed Breville Group's proposed acquisition of GUD Holdings, Caltex Australia's proposed acquisition of Mobil Oil Australia's retail assets, Cargill Australia's proposed acquisition of Goodman Fielder's edible fats and oils business, Link Market Services' proposed acquisition of Newreg, and National Australia Bank's proposed acquisition of AXA Asia Pacific Holdings.
54. Proceedings involving Société Air France, KoninklijkeLuchtvaartMaatschappij, Martinair Holland, Qantas, and British Airways have settled. Proceedings against Singapore Airlines Cargo, Cathay Pacific Airways, Emirates, PT Garuda Indonesia, and Thai Airways International remain active.
55. APRIL Fine Paper Trading and a related company, DRS C3 Systems, four, foreign-based suppliers of marine hose, and penalties were imposed on seventeen companies and twenty-two individuals involved in an air conditioning cartel.
penalty is the highest imposed in misuse of market power proceedings brought by the ACCC and was based, in part, on the first application of higher penalties which apply to conduct engaged in after January 1, 2007.

VI. China

A. Legislative Developments

Over the last year, several implementing regulations and guidelines have been issued to address: (i) procedural rules for non-merger investigations;\(^{58}\) (ii) turnover calculation in the review of mergers between financial enterprises;\(^{59}\) (iii) market definition;\(^{60}\) and (iv) merger control rules regarding notification,\(^{61}\) review,\(^{62}\) and remedies.\(^{63}\)

B. Mergers

The Ministry of Commerce ("MOFCOM"), which is responsible for merger control, handled more than 140 pre-merger notifications through June 2010,\(^{64}\) with one third entering second phase review and five percent ultimately being either prohibited or given conditional clearance. Beyond the statutory review periods, MOFCOM often requires additional information before accepting the filing and starting the initial waiting period. Most cases take three months from initial filing to clearance, but more difficult ones have taken over nine months.

MOFCOM has blocked one transaction, Coca-Cola’s proposed acquisition of Huiyuan,\(^{65}\) and has conditionally approved six others: InBev-Anheuser-Busch, Mitsubishi-Lucite, GM-Delphi, Pfizer-Wyeth, Panasonic-Sanyo, and Novartis-Alcon. These seven published MOFCOM merger decisions demonstrate increasing transparency but reflect an emphasis on market shares and a somewhat skeptical view of vertical relationships.

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C. ANTICOMPETITIVE PRACTICES

The National Development and Reform Commission ("NDRC"), which is responsible for price-related conduct, announced enforcement actions against several cartels during 2010, including: (i) rice noodle producers;66 (ii) green bean distributors;67 and (iii) a trade association for requiring local companies to offer refrigeration services to garlic distributors at a fixed price. These resulted in fines of between RMB20,000 (approximately US$3,000) and RMB1 million (approximately US$150,000).68 Although the cases were brought under the earlier Price Law, they also shed light on likely cartel enforcement trends under the Anti-Monopoly Law ("AML").

D. COURT DECISIONS

The courts have accepted over ten civil AML cases so far.69 Nearly all cases involved allegations of abuse of a dominant market position. One-third were settled, while the others were unsuccessful, mainly due to insufficient evidence.

VII. India

A. LEGISLATIVE DEVELOPMENTS

The Competition (Amendment) Ordinance, 2009 and the Competition (Amendment) Act, 2009,70 dissolved the Monopolies and Restrictive Trade Practices ("MRTP") Commission, bringing an end to the delayed repeal of the MRTP Commission provided for in the Competition Act, 2002 ("Competition Act"). All cases pending before it are to be transferred either to the Competition Appellate Tribunal ("COMPAT") or the National Commission established under the Consumer (Protection) Act, 1986, depending on the subject matter.

B. MERGERS

The merger control provisions are not yet in force. However, certain unofficial reports indicate that they may become effective shortly. Further, the existing provisions may be modified to: (i) increase the existing turnover thresholds; (ii) add additional thresholds


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regarding the size of the target; and (iii) reduce the time for reaching a clearance decision to a maximum of 180 days.

C. COURT DECISIONS

1. *Competition Commission v. Steel Authority*71

In its first decision on the Competition Act, the Supreme Court decided several important questions related to operation of the Competition Act. It held that (i) the COMPAT does not have jurisdiction to hear appeals from orders based on provisions not specifically contained in the Competition Act; (ii) parties have no affirmative right to be heard before the Competition Commission of India ("CCI") orders a detailed investigation by its Director General ("DG"); (iii) the standard of proof that must be satisfied before interim relief may be granted in the event of a competition law infringement is much higher than that required to show a *prima facie* case in order for an investigation to be initiated by the DG; and (iv) the CCI must give reasons for its orders. The Supreme Court also issued directions with respect to confidentiality and the timetable for completing the investigation(s).

2. *Kingfisher Airlines v. Competition Commission*72

Kingfisher Airlines and Jet Airways announced a cooperation agreement on, *inter alia*, code sharing, joint fuel management, and common ground handling in October 2008 that was challenged as being anticompetitive. The Bombay High Court decided that the CCI’s jurisdiction extended to cover all anticompetitive agreements in force in India after the relevant provisions of the Competition Act73 became effective, regardless of when those agreements were first entered into. More recently, the CCI fined Kingfisher Airlines Rs.10,000,000 (approximately US$220,000) for failing to provide information requested by the DG during the investigation.74

3. *Other Decisions*

The CCI has published several decisions closing cases on the basis that no *prima facie* case existed without going into any in-depth substantive analysis under the Competition Act. The reasons for taking such action include: (i) failure to supply sufficient information;75

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(ii) the other party is a government ministry and therefore not an enterprise;76 (iii) the action arose before the relevant provisions of the Competition Act came into force;77 (iv) the action complained of was a sovereign function of government;78 and (v) the CCI was not the appropriate forum.79

Europe

VIII. European Union

A. Mergers

During a year of lower merger activity, of particular note are the ongoing reviews of the proposed intra-Greek combination of flag carrier Olympic Air and Aegean Airlines,80 which is reminiscent of the blocked intra-Ireland Ryanair/Aer Lingus merger (upheld on appeal), and the European Commission’s unconditional clearance of Oracle’s acquisition of Sun Microsystems (following public pledges by Oracle to support Sun’s open-source database software).81

B. Anticompetitive Practices

The Commission imposed high fines on companies found guilty of anti-competitive behavior. These included fines imposed on cartels in the bathroom equipment and prestressing steel sectors of €622 million and €458 million (approximately US$870 million and US$640 million) respectively.82 The Commission also improved the efficiency of its

prosecution efforts by successfully using its new settlement procedure in two cases.\textsuperscript{83} In the pharmaceutical sector, following the conclusion of the sectoral inquiry, the Commission initiated infringement proceedings against several companies and continued its practice of monitoring patent settlement agreements.

C. ABUSES OF DOMINANCE

In the realm of abuse of dominance, the Commission’s focus continued to be on the behavior of companies in the high-tech industry, with two cases against IBM regarding mainframe computers,\textsuperscript{84} as well as an investigation into Apple’s iPhone policies, which closed after Apple changed its practices to remove the Commission’s concerns.\textsuperscript{85}

D. COURT DECISIONS

The Commission secured a significant victory in the EU General Court, which upheld its 2005 decision against AstraZeneca for actions taken to hinder the entry of generic competitors.\textsuperscript{86} In a disappointing judgment for the business community, the Court of Justice held that internal communications with in-house lawyers are not covered by legal professional privilege, and thus are discoverable in the course of a competition law investigation.\textsuperscript{87}

IX. France

A. MERGERS

The French Competition Authority (“the Authority”), which replaced the Minister of Economic Affairs as the authority in charge of merger control in March 2009, issued its first ever phase-two clearance decision in connection with the acquisition by TF1 (the main free-to-air TV channel in France) of NT1 and TMC (two free digital TV channels in France). The Authority held that despite the relatively small NT1 and TMC market shares (less than five percent in all affected markets), the transaction would strengthen TF1’s dominant position in the market for television advertising and increase its bargain-


ing power with respect to the purchase of broadcasting rights. The clearance decision was made subject to strict behavioral commitments from TF1.

B. A N T I C O M P E T I T I V E P R A C T I C E S

The Authority fined eleven banks a total of €385 million (approximately US$511 million) for colluding on interbank fees for checks. The collusive arrangements were designed and agreed upon when a new digital system for processing and clearing checks was introduced, and had been in force for a number of years.

A small French company, NavX, which sells databases containing the locations of speed cameras, filed a complaint alleging abusive practices after Google refused its advertisements and suspended its AdWords account on the grounds that its products did not comply with Google’s internal content policies. Google undertook to restore NavX’s AdWords account and to clarify both the scope of its AdWords traffic devices policy in France and the procedure that may lead to suspension of AdWords accounts for violation of Google’s traffic devices policy in France. Following a market test, the Authority concluded that these commitments were sufficient to remove the competition concerns raised during the procedure.

C. C O U R T D E C I S I O N S

The Paris Court of Appeals drastically reduced the fines imposed by the Authority on several steel producers for horizontal anticompetitive practices from a total of €575 million (approximately US$764 million) to €75 million (approximately US$99 million), on the grounds that the fines were disproportionately high given the ongoing economic crisis, the infringement had only a moderate impact on the market, and the Authority did not sufficiently individualize the level of the fines imposed. Although this judgment was considered to be a “serious blow” to the Authority, it was not appealed by the Minister of Economic Affairs, who decided instead to set up an expert committee to review the meth-


odology for calculating antitrust fines. In its report, this committee presented several recommendations to strengthen safeguards of due process rights in proceedings before the Authority and suggested adopting guidelines for the method of calculating antitrust sanctions.92 The Authority issued such guidelines at the end of 2010.

The Supreme Court reversed a ruling of the Paris Court of Appeals upholding the Authority's decision to suspend the exclusivity period granted to Orange over the sale of iPhones in France. The Supreme Court held that the Paris Court of Appeals had not only failed to assess whether Orange's competitors had alternatives to the iPhone and could therefore offer a competing solution to their customers, but also overestimated the revenues that Orange would receive as a result of the exclusivity period.93 However, Orange had already undertaken to waive its exclusive rights to the iPhone in France when this judgment was issued.94

X. Germany

A. Legislative Developments

In January 2010, Germany's Federal Ministry of Economics published controversial draft legislation proposing amendments to the Act against Restraints of Competition, which would confer on the Federal Cartel Office ("FCO") the ability to order dominant undertakings to divest certain parts of their businesses, even in the absence of an abuse of their market position or any other anticompetitive behavior.95 The draft Bill raises significant policy and constitutional concerns. Discussion of this proposed legislation is expected to continue through 2011 or 2012.

B. Mergers

In the merger field, the FCO prohibited the automotive component supplier Magna from acquiring Karmann's European convertible roof systems business on the grounds of


collective dominance. The FCO had found that there were only three competitors left in the European market for convertible roof systems and ruled that Magna and Karmann were likely to act in a coordinated manner given their similar size and the transparency of the market.

C. CARTELS AND ABUSES OF DOMINANCE

Fines were imposed for price fixing on coffee roasters (€30 million, approximately US$40.76 million) and manufacturers of ophthalmic lenses (€115 million, approximately US$156.28 million), while Alstom was fined for bid rigging in relation to the sale of utility steam generators (€91 million, approximately US$123.66 million).

In January 2010, the FCO ordered Scandlines Deutschland GmbH, the owner of the Puttgarden ferry port, to provide other ferry companies with access to the port facilities in return for adequate remuneration, so they could establish an additional ferry service on the Puttgarden-Rødby route.

D. COURT DECISIONS

In October 2009, the Berlin Kammergericht held that direct and indirect purchasers could bring damages claims, and ruled the defendant in the case in question had not proved the existence of passing on. However, in a June 2010 judgment, the Karlsruhe Higher Regional Court went significantly further, rejecting the passing-on defense on legal grounds. The court also ruled that indirect purchasers did not have legal standing to bring claims against cartel members, mainly because it would be impossible to resolve the ensuing claims between direct and indirect purchasers. Both cases have been appealed to the Federal Supreme Court.

101. Higher Regional Court Karlsruhe, Case 6 U 118/05 Kart (June 11, 2010) (Ger.), available at http://snipurl.com/1byywd; see Recent Developments in Competition Law, supra note 96, at 4.
XI. Russia

A. LEGISLATIVE DEVELOPMENTS

During the first half of 2010, a significant milestone in Russian antitrust legislation was reached with the adoption and implementation of the Second Antimonopoly Package. This package encompasses amendments to the Federal Law on the Protection of Competition ("the Competition Law"), the Code of Administrative Offenses, and the Criminal Code of the Russian Federation.

The Second Antimonopoly Package introduced a new approach to the scope of the Competition Law. The changes affect the agreements and actions of both Russian firms and foreign businesses operating in Russia, or any activity which has an effect on the state of competition in Russia.

In the sphere of merger control, the thresholds for transactions subject to antimonopoly clearance or notification were almost doubled. According to the amended Competition Law, the Federal Antimonopoly Service of the Russian Federation ("FAS Russia") can consider a company with a market share of less than thirty-five percent to be dominant, provided that: (i) its market share exceeds that of any other company, and (ii) it can influence significantly the circulation of goods and services in the market. A new regulation was also issued for vertical and horizontal agreements.

The legislation still suffers from certain defects, in particular its unreasonable severity and, in some instances, excessive regulation. The Third Antimonopoly Package, aimed at eliminating these shortcomings, has already been submitted for consideration to the Government of the Russian Federation and is expected to be approved by the Russian Parliament in spring 2011. The revised provisions on extraterritoriality, direct and indirect control, restrictive agreements and concerted practices, merger control, and liability are expected to increase the efficiency of antitrust regulation and hopefully improve the quality of antitrust enforcement in Russia.

XII. United Kingdom

A. ADMINISTRATIVE DEVELOPMENTS

On October 14, 2010, the Secretary of State for Business, Innovation and Skills issued proposals to merge the competition and market investigation functions of the Competition Commission ("CC") and the Office of Fair Trading ("OFT"). The merger is unlikely to be completed until 2012.
B. MERGERS

Only two notified mergers were referred to the CC,\(^{107}\) with one subsequently abandoned.\(^{108}\) The Secretary of State for Business, Vince Cable, has issued a European Intervention Notice in relation to News Corp’s proposed acquisition of the shares it does not already own in BSkyB. The intervention has been made in order to protect so-called legitimate interests, in this case sufficient plurality of persons with control of media enterprises. In parallel, the European Commission is investigating the impact of the proposed acquisition under the EU Merger Regulation.

On September 16, 2010, the OFT and the CC published new joint OFT/CC Substantive Merger Assessment Guidelines.\(^ {109}\)

C. ANTICOMPETITIVE PRACTICES

April 2010 saw the imposition by the OFT of a record total fine of £225 million (approximately US$360.5 million), on two tobacco manufacturers and ten retailers.\(^ {110}\) Ian Norris, former head of Morgan Crucible engineering group, was extradited to the United States on March 23, 2010 to face obstruction of justice charges after his attempts to have his case heard by the European Court of Human Rights failed. In May 2010, the OFT dropped its criminal cartel prosecution of four current and former executives of British Airways.\(^ {111}\) In June 2010, the OFT released revised guidance on Competition Disqualification Orders in competition cases.\(^ {112}\)

D. ABUSES OF DOMINANCE

The OFT announced that Reckitt Benckiser has agreed to pay a fine of £10.2 million (approximately US$16.3 million) for abuse of dominance in relation to the Gaviscon drug.\(^ {113}\) In February 2010, the fine imposed on National Grid in 2008 in an abuse of

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dominance decision was further reduced by the Court of Appeal to £15 million (approximately US$24 million).\textsuperscript{114}

E. \textbf{Court Decisions}

In \textit{Cooper Tire v. Dow Deutschland}, the Court of Appeal confirmed the position that an English-domiciled person may anchor a private follow-on competition damages claim in England despite not being addressees of the European Commission's decision.\textsuperscript{115} In December 2009, the Competition Appeal Tribunal ("CAT") issued its first substantive judgment in a follow-on action under section 47A of the Competition Act 1998.\textsuperscript{116}

\textbf{Middle East And Africa}

\textbf{XIII. Israel}

\textbf{A. Legislative Developments}

The Government recently introduced a draft bill proposing extensive regulation of oligopolistic markets.\textsuperscript{117} Another proposed bill would for the first time authorize the Director General of the Israeli Antitrust Authority ("IAA") to impose fines for violating the Restrictive Trade Practices Law 1988.\textsuperscript{118} The IAA also published draft guidelines regarding the analysis of horizontal mergers.\textsuperscript{119}

\textbf{B. Mergers}

The Director General blocked two horizontal mergers: (i) a merger that would have resulted in a perfect monopoly in the development and supply of real-time stock information systems,\textsuperscript{120} ruling that such systems were a distinct relevant market for professional investors (distinct from private investors), into which prompt and effective entry by new competitors was unlikely; and (ii) a "4-to-3" merger in the interlocking paving stones

market, concluding that the merger might have aggravated perceived coordinated effects. In the latter case, the parties sought to invoke a failing firm defense, arguing that the target company had decided independently to exit the market. The argument was rejected in order not to encourage the engineering of transactions so as to circumvent the merger control rules.

C. Anticompetitive Practices

An indictment was filed against the leading food chain, Shufersal Ltd., and its managers for attempting to reach a restrictive arrangement with its distributors and for infringing the conditions imposed on Shufersal in connection with the Shufersal/Clubmarket merger. Allegedly, Shufersal decided to stop purchasing from suppliers who would not comply.

D. Court Decisions

The District Court of Jerusalem convicted Mudgal (the monopolist producer of plumbing equipment in Israel), its distributors, and the latter's managers of minimum price fixing in the market for pipe fittings. The court rejected the argument that Mudgal had only introduced recommended prices, ruling that price recommendations in the framework of a joint meeting with its distributors actually led to an agreement between the participants, albeit tacitly, to adopt the recommendation.

XIV. South Africa

A. Legislative Developments

In March 2010, the Competition Commission (“the Commission”) published new service standards for merger reviews, to replace the previous 2001 standards. The standards are intended to help the Commission become "a high performance regulatory agency with realistic, predictable and achievable service standards in finalizing merger cases." The new standards establish three categories of mergers, depending on the complexity of investigation required: non-complex, complex, and very complex mergers. The Commission intends to help the Commission become "a high performance regulatory agency with realistic, predictable and achievable service standards in finalizing merger cases."
mission also published guidelines on the information required for each category of filing.\textsuperscript{126}

B. Mergers

The Commission reported a marked decrease in large and intermediate merger notifications in 2010. Of this type of mergers, most were found to raise few competition concerns, and were approved unconditionally or with minor conditions. The Commission noted that several mergers notified during this period involved firms in financial distress. Many of these transactions raised employment concerns\textsuperscript{127} and the Commission accordingly focused on formulating conditions to ameliorate these effects.

C. Anticompetitive Practices

The Commission continued to focus on cartel investigations in 2010 and referred a significant number of complaints to the Competition Tribunal for prosecution. Over the past year, the Commission has investigated price fixing, customer and market allocation, and setting of trading conditions in the following industries: milling, bicycle, airline, scrap metal, and tire. The most important cartel case in 2010 was the Pioneer Foods bread cartel case in which the Tribunal imposed a fine of R195,718,614 (approximately US$27,812,425), which constitutes ten percent of the turnover of Pioneer Foods' baking division in the 2006 financial year.\textsuperscript{128} Pioneer Foods and the Commission appealed to the Competition Appeal Court. The appeals were withdrawn by both parties after Pioneer concluded a settlement agreement with the Commission, which also related to alleged anticompetitive conduct by Pioneer in the milling, poultry, and egg industries. Eighteen complaints were settled in 2010 through consent orders confirmed by the Tribunal.

D. Court Decisions

There were two important decisions by the Supreme Court of Appeal on competition law issues in 2010: first, the Telkom case\textsuperscript{129} involving the exercise of concurrent jurisdiction by the telecommunication authority, ICASA, and the competition authorities; and second, the procedural decision in the milk cartel case,\textsuperscript{130} which examined the power of the Commission to initiate its own complaints into potentially anti-competitive conduct.


\textsuperscript{127} Maarten van Hoven, Merger Review, Competition Comm'n (S. Afr.), 10 (June 2010), http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/June-2010-newsletter-Final-Draft.pdf.


