

2012

International Antitrust

Sandy Walker

Maria Cecilia Andrade

Claire Green

Matthew Hall

Adriana C. Rocha

See next page for additional authors

Recommended Citation

Sandy Walker et al., *International Antitrust*, 46 INT'L L. 41 (2012)
<https://scholar.smu.edu/til/vol46/iss1/5>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in *International Lawyer* by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

International Antitrust

Authors

Sandy Walker, Maria Cecilia Andrade, Claire Green, Matthew Hall, Adriana C. Rocha, Lionel Tupman, Lucía Ojeda Cárdenas, John R. Ingrassia, Alicia Batts, Paul Schoff, Jackie Mortensen, Katrina Groshinski, Peter Wang, Yizhe Zhang, Pallavi S. Schroff, Arshad Paku Khan, Michael Clancy, Laurie-Anne Grelier, Eric Paroche, François Brunet, Susanne Zuehlke, Jan Komossa, German Zakharov, Vassily Rudomino, Eytan Epstein, Tamar Dolev-Green, Shiran Shabtai, Heather Irvine, and Christopher Kok

International Antitrust

SANDY WALKER, MARIA CECÍLIA ANDRADE, CLAIRE GREEN, MATTHEW HALL,
ADRIANA C. ROCHA, LIONEL TUPMAN, LUCIA OJEDA CÁRDENAS, JOHN R. INGRASSIA,
ALICIA BATTS, PAUL SCHOFF, JACKIE MORTENSEN, KATRINA GROSHINSKI, PETER
WANG, YIZHE ZHANG, PALLAVI S. SHROFF, ARSHAD (PAKU) KHAN, MICHAEL
CLANCY, LAURIE-ANNE GRELIER, ERIC PAROCHE, FRANÇOIS BRUNET, SUSANNE
ZUEHLKE, JAN KOMOSSA, GERMAN ZAKHAROV, VASSILY RUDOMINO, EYTAN EPSTEIN,
TAMAR DOLEV-GREEN, SHIRAN SHABTAI, HEATHER IRVINE, AND CHRISTOPHER KOK*

This article outlines the most important developments in key areas of antitrust enforcement in fourteen selected jurisdictions during 2011.¹ Prepared by antitrust law practitioners and the International Antitrust Law Committee, this article summarizes a detailed publication to be released in spring 2012 covering antitrust developments in almost fifty jurisdictions worldwide.²

I. Americas

A. BRAZIL

1. *Legislative Developments*

After almost a decade of intense debate, on November 30, 2011, the President of the Republic approved the new Brazilian Competition Law that will be fully enforced as of May 29, 2012. The new law introduces pre-merger notification to the Administrative Council for Economic Protection (CADE). This is required only if (i) one of the parties has revenue in Brazil of or above R\$400 million, and (ii) the other party had a revenue of or above R\$30 million in Brazil. As the notification threshold previously did not require consideration of both parties' revenues in Brazil, a reduction of approximately thirty percent in the volume of notifications is expected. The new law also sets out a narrower, more objective definition of when a concentration occurs, which will result in fewer trans-

1. For developments during 2010, see Bruno L. Peixoto et al., *International Antitrust*, 45 INT'L LAW. 39 (2011) [hereinafter Peixoto 2011]. For developments during 2009, see Bruno L. Peixoto et al., *International Antitrust*, 44 INT'L LAW. 45 (2010).

2. This 2011 report will be available online at http://www.americanbar.org/groups/international_law/committees.html.

actions potentially being subject to review. The timeline for merger review is set at 240 days with possible extensions of sixty days (at the parties' request) or ninety days (upon a court decision), with the maximum period being one year following notification. As to antitrust practices, the new law excludes excessive pricing from the illustrative list of antitrust violations, but also adds the exercise or abusive exploitation of industrial property rights, intellectual property, technology, or brands.

2. *Mergers*

CADE has reviewed a number of significant mergers in 2011, including that of the Brazilian airline group, TAM, and the Chilean airline group LAN.³ A few of these mergers were subject to orders preserving the reversibility of the transaction (APRO or Acordo de Preservação de Reversibilidade da Operação), until a final decision by CADE is made.⁴

CADE approved the creation of Brazil Foods through the merger into Perdigão of its counterpart Sadia, subject to extensive performance commitments (Termo de Compromisso de Desempenho).⁵ This decision is significant because of concerns about CADE's ability to monitor its implementation and because of the political nature of CADE's decision.

3. *Anticompetitive Practices*

CADE has been active in pursuing anticompetitive conduct, including abuse of dominance for differential treatment of customers and exclusivity.⁶

B. CANADA

1. *Administrative Developments*

On October 6, 2011, the Competition Bureau released revised Merger Enforcement Guidelines (MEGs).⁷ The revised MEGs deemphasize market definition, stating that it is not a required step in the Bureau's analysis but rather only an analytical tool in assessing competitive effects. In addition, they eliminate the two-year timeline for potential entry into a market, provide additional guidance on buyer power, and elaborate on the Bureau's treatment of minority interests and interlocking directors.

3. Press Release, CADE, CADE Autoriza Criação da Latam [CADE Authorizes Creation of Latam], <http://www.cade.gov.br/Default.aspx?291cca3ed74da36fbb88a0be8b>.

4. See Press Release, SEAE, SEAE Conclui Parecer Sobre AC No Mercado de Laranja [SEAE Concluded Opinion on AC Market in Orange] (Mar. 30, 2011), http://www.seae.fazenda.gov.br/noticias/copy_of_seae-conclui-analise-sobre-acs-no-varejo-de-bens-duraveis.

5. Press Release, Brasil Foods S.A., Relevant Fact Notice (June 30, 2009), <http://www.prnewswire.com/news-releases/relevant-fact-notice-97465014.html>.

6. Press Release, CADE, Cade Nega Recurso do BB em Créditos Consignados [CADE Denies Use of BB in Payroll Loans] (Sept. 11, 2011), <http://www.cade.gov.br/Default.aspx?e559a97f968b60a376c39db38f>.

7. *Merger Enforcement Guidelines*, COMPETITION BUREAU OF CANADA (Oct. 2011), available at [http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/\\$FILE/cb-meg-2011-e.pdf](http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf).

2. *Mergers*

In January 2011, the Bureau challenged the merger of CCS Corp., which operates secure landfills, and Complete Environmental Inc. (Complete), a small landfill company with holdings in northern British Columbia. The Bureau alleged that Complete was a potential entrant into the secure landfill market and the acquisition would therefore substantially prevent competition for the disposal of hazardous waste from the oil and gas industry. This case is notable as it involved a non-notifiable transaction and is the first pure “prevention of competition” case in Canada.⁸

In June, the Bureau filed an application to block a joint venture between Air Canada and United Continental Holdings, Inc. The Bureau asserted that the joint venture was a merger that would substantially lessen competition on numerous routes through the joint setting of prices, capacities, and schedules.⁹

3. *Cartels and Other Anticompetitive Practices*

The Bureau continued pursuing cartel activity, including a gasoline price-fixing conspiracy in Quebec.¹⁰ On December 15, 2010, the Bureau challenged certain practices of Visa and MasterCard as price maintenance. The practices challenged by the Bureau include dissuading merchants from encouraging customers to use forms of payment other than credit cards, and prohibiting charging surcharges for the use of high cost cards.¹¹

4. *Abuse of Dominant Position*

In June, the Bureau filed an application with the Competition Tribunal alleging the Toronto Real Estate Board (TREB) was abusing its position of dominance in the supply of residential real estate brokerage services in the Greater Toronto Area.¹² TREB has allegedly enacted and implemented restrictive rules and policies respecting the use of its Multiple Listing Service to discipline and exclude innovative brokers.

5. *Court Decisions*

An Alberta court awarded damages to a plaintiff in a civil action against joint operators of an oil field, Mobile and Husky, who agreed to sole source a contract from a competitor of the plaintiff.¹³ The court concluded that the agreement constituted a criminal conspir-

8. Press Release, Competition Bureau of Canada, Competition Bureau Challenges BC Landfill Merger (Jan. 26, 2011), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03343.html>.

9. Press Release, Canadian Competition Bureau, Competition Bureau Seeks to Block Joint Venture between Air Canada and United Continental (June 27, 2011), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03386.html>.

10. Press Release, Canadian Competition Bureau, Two Individuals Plead Guilty in Quebec Gasoline Price-Fixing Cartel (June 10, 2011), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03382.html>.

11. Press Release, Canadian Competition Bureau, Competition Bureau Challenges Visa and MasterCard's Anti-competitive Rules (Dec. 15, 2010), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03325.html>.

12. Press Release, Canadian Competition Bureau, Competition Bureau Sues Canada's Largest Real Estate Board for Denying Services Over the Internet (May 27, 2011), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03379.html>.

13. 321665 Alberta Ltd. v. ExxonMobil Canada Ltd., [2011] ABQB 292 (Can.).

acy as it eliminated competition in the purchase of fluid hauling to the oilfield, despite the argument that Mobil and Husky's business should be considered a single entity. Significantly, an agreement between competitors relating to the purchase of a product would not be covered under the new criminal conspiracy provision.

C. MEXICO

1. *Legislative Developments*

After a long debate, the Mexican Congress approved significant amendments to Mexico's legal framework for competition.¹⁴ The amendments allow the Federal Competition Commission (FCC) to consider joint substantial power in cases involving "relative monopolistic practices" (i.e., abuse of dominance, monopolization, and rule of reason claims) and merger reviews. The obligation to obtain merger clearance from the FCC is now subject to new exemptions, including: corporate restructurings, certain acquisitions of shares of foreign companies, certain acquisitions by equity investment funds, and certain stock market transactions where the acquirer holds ten percent or less of the target.

In April 2011, Congress approved a bill regulating collective actions. While the reform allows in principle for collective actions for damages in competition matters, there is some uncertainty regarding the requirements for legal standing and the limitation period.

2. *Mergers*

During 2011, the FCC reviewed eighty-nine concentrations, only one of which was sanctioned. In the latter transaction which related to transportation, the FCC imposed a fine of 287,016.36 pesos for failure to notify in time.

3. *Cartels and Other Anticompetitive Practices*

In 2011, the FCC initiated four investigations regarding "absolute monopolistic practices" (i.e., hard-core cartels) involving (i) bids from the Mexican Social Insurance Institute, (ii) hospitals or health care, (iii) telecommunications/internet for final consumers, and (iv) natural gas distribution. In addition, in 2011, the FCC ruled against cartel participants in two cases and imposed fines. The cases related to price fixing in passenger maritime transportation service and agreements to fix prices, limit supply, and allocate markets in truck loading services.¹⁵

14. Reforms are focused mainly on the Federal Law on Economic Competition (FLEC); however, the Federal Civil Procedure Code (FCPC) and the Federal Penal Code were also amended.

15. See resolutions published by the FCC under File DE-020-2009 on June 2011, Raúl Magaña Carrillo y otros [Raúl Magaña Carrillo and Others], Diario Oficial de la Federación [DO], Junio de 2011 (Mex.), available at <http://resoluciones.cfc.gob.mx/DOCS/Asuntos%20Juridicos/V44/5/1491649.pdf>; see also Operadora Logística Ceos, S.A. de C. v., y otros [Logistics Operator Ceos, Inc. and Others], Diario Oficial de la Federación [DO], Junio de 2011 (Mex.), available at <http://resoluciones.cfc.gob.mx/DOCS/Asuntos%20Juridicos/V45/7/1524195.pdf>.

4. *Abuse of Dominant Position*

In 2011, the FCC commenced five investigations into relative monopolistic practices in various sectors, including liquefied petroleum gas storage and distribution,¹⁶ petroleum product,¹⁷ television, and telecommunications/internet.¹⁸ In addition, the FCC ordered fines against two companies relating to restrictions on interconnection in telecommunications markets.¹⁹

D. UNITED STATES

1. *Administrative Developments*

The Department of Justice (DOJ) revised its Antitrust Division guidelines on merger remedies with a focus on vertical mergers. There is a new emphasis on conduct remedies in vertical mergers, where such remedies are viewed as the most appropriate means to address anticompetitive issues. The guidelines avoid the need to choose between structural remedies or no remedy at all.

New Hart-Scott Rodino (HSR) rules call for additional reporting for private equity and other investment firms relating to investments in competing businesses. The new rules seek to bring within reach all entities under common operational or investment management of the filing party.

2. *Mergers*

In the merger context, there was close scrutiny of transactions that took a maverick out of the market. Aside from blockbuster deals like AT&T's attempted acquisition of T-Mobile, which remains subject to ongoing litigation,²⁰ other transactions were challenged where reduction in competition would likely lead to consumer harm. In some cases, post-consummation challenges were brought based on anticompetitive effects already seen in the marketplace.

Several other transactions involving consumer products and services were challenged this year, including the headline-grabbing H&R Block/TaxACT matter that the parties

16. File DE-019-2010 was initiated on January 2011. Investigación de Almacenamiento de Gas Licuado de Petróleo e Industria de Distribución [Investigation into Liquefied Petroleum Gas Storage and Distribution Industry], Diario Oficial de la Federación [DO], 17 de Enero de 2011 (Mex.), available at <http://resoluciones.cfc.gob.mx/DOCS/INVESTIGACIONES/V180/101/1463044.pdf>.

17. File DE-024-2011 was initiated on February 2011. Diario Oficial de la Federación [DO], Febrero de 2011 (Mex.), available at <http://resoluciones.cfc.gob.mx/DOCS/Secretaria%20Ejecutiva/V63/18/1476617.pdf>.

18. File DE-016-2010 was initiated on April 2011, Investigación de la Industria de Televisión [Investigation into Television Industry], Diario Oficial de la Federación [DO], 29 de Abril de 2011, available at <http://resoluciones.cfc.gob.mx/DOCS/INVESTIGACIONES/V194/1/1477384.pdf>.

19. See resolution published by the FCC under File DE-039-2007 on May 2011, Comisión Federal de Competencia [FCC Fines Ordered], Diario Oficial de la Federación [DO], Mayo de 2011, available at <http://resoluciones.cfc.gob.mx/DOCS/Asuntos%20Juridicos/V44/4/1485598.pdf>.

20. *Antitrust Case Filings: United States v. AT&T, Inc.*, DEP'T OF JUSTICE, <http://www.justice.gov/atr/cases/attnmobile.htm> (last visited Jan. 11, 2012).

ultimately abandoned.²¹ The Federal Trade Commission (FTC) and DOJ also brought challenges in oil and gas and industrial products.²² Transactions putting pharmaceuticals in play continued to generate interest, with a number of matters challenged and resulting in divestitures.²³ Generic pharmaceuticals continued to draw the agency's attention as well.²⁴

The agencies have also pursued conduct remedies, for example, in a joint venture between Comcast Corporation and NBC Universal, Inc., where the parties agreed to license programming to competitors.²⁵ Transactions not subject to HSR reporting were also subject to substantive antitrust enforcement this year.²⁶

3. *Cartels and Anticompetitive Conduct*

Google's expansion into adjacent businesses has generated significant interest, and there are now pending investigations at the DOJ of Google's attempted takeovers of display ad company Admeld and handset maker Motorola Mobility. The FTC is widely believed to be developing a case aimed at the company's search engine monopoly and its business practices.

The DOJ is also investigating the possibility of anti-competitive practices by third party airline ticket distributors amid allegations by the airlines that industry global distribution systems dominate the market for high-margin corporate accounts.

Although there were no record-breaking fines in the criminal antitrust arena this year, the DOJ continues to find and dismantle cartels, bid rigging, and kickback schemes. Cases were brought or completed this year in markets involving municipal bonds, compressors, real estate foreclosure auctions, air transportation services, liquid crystal display (LCD), color display tubes, power generation, ready-mix concrete, packaged ice, and environmental services.²⁷

21. *Antitrust Case Filings: United States v. H&R Block, Inc.*, DEP'T OF JUSTICE, <http://www.justice.gov/atr/cases/handrblock.html> (last visited Jan. 11, 2012).

22. *United States v. General Elec. Co.*, No. 1:11-cv-01549 (D.D.C. Aug. 29, 2011) (Competitive Impact Statement for Plaintiff), available at <http://www.justice.gov/atr/cases/f274500/274519.pdf>.

23. *Action: In the Matter of DaVita Inc.*, FED. TRADE COMM'N, <http://www.ftc.gov/os/caselist/1110103/index.shtm> (last visited Jan. 11, 2012).

24. *Action: In the Matter of Perrigo Co. & Paddock Labs, Inc.*, FED. TRADE COMM'N, <http://www.ftc.gov/os/caselist/1110083/index.shtm> (last visited Jan. 11, 2012).

25. *United States v. Comcast Corp.*, No. 11-106 (RJL) (D.D.C. Sept. 1, 2011) (memorandum opinion), available at <http://www.justice.gov/atr/cases/comcast.html> (last visited Jan. 11, 2012).

26. *Action: In the Matter of Cardinal Health, Inc.*, FED. TRADE COMM'N, <http://www.ftc.gov/os/caselist/0910136/index.shtm> (last visited Jan. 11, 2012).

27. See *Antitrust Case Filings: U.S. v. Panasonic Corp.*, DEP'T OF JUSTICE, <http://www.justice.gov/atr/cases/panasonic.html> (last visited Jan. 11, 2011); *Antitrust Case Filings: U.S. v. Samsung SDI Co., Ltd.*, DEP'T OF JUSTICE, <http://www.justice.gov/atr/cases/samsungsd.html> (last visited Jan. 11, 2011); *Antitrust Case Filings: U.S. v. Horizon Lines, LLC*, DEP'T OF JUSTICE, <http://www.justice.gov/atr/cases/horizon.html> (last visited Jan. 11, 2011); *Antitrust Case Filings: U.S. v. EVA Airways Corp.*, DEP'T OF JUSTICE, <http://www.justice.gov/atr/cases/evair.html> (last visited Jan. 11, 2011).

II. Asia-Pacific

A. AUSTRALIA

1. *Legislative Developments*

On January 1, 2011, the Trade Practices Act 1974 (Cth) was renamed the Competition and Consumer Act 2010 (Cth) (CCA).

2. *Mergers*

On December 8, 2010, the Australian Competition and Consumer Commission (ACCC) challenged the acquisition by Metcash Trading Ltd., a supplier of groceries to independent supermarkets in Australia, of supermarket chain Interfrank Group Holdings Pty Ltd. from Pick n Pay Retailers. The Federal Court of Australia dismissed the ACCC's proceedings.²⁸ The ACCC has appealed the decision.

In March 2011, the ACCC determined not to oppose the acquisition by Asahi Holdings (Australia) Pty Ltd., the owner of Schweppes Australia Pty Ltd., of P&N Beverages Australia Pty Ltd. after Asahi provided court enforceable undertakings to the ACCC.²⁹

3. *Anticompetitive Practices*

Since late 2009, the ACCC has pursued proceedings against airlines for alleged involvement in fixing fuel surcharges applying to the international carriage of air cargo. Eight of the fifteen proceedings brought by the ACCC have now settled, resulting in penalties totaling \$46 million (approximately US\$45.9 million).

In November 2011, the Federal Court imposed penalties against three construction companies for price fixing, including cover pricing.³⁰ Cover pricing involves two companies that both intend to bid for a particular tender. The company that does not want to win the tender (Company A) contacts the other company (B) to obtain its tender price. Company A then submits a 'cover price' higher than B's tender price with B's knowledge. The court found that this was cartel conduct as it amounted to control of the price.³¹

In February 2011, penalties of \$4.2 million (approximately US\$4.19 million) were imposed on a Singapore company and a related Indonesian company for fixing the price of photocopy and folio paper to Australian customers.³² The ACCC stated that this case

28. *ACCC v. Metcash Trading Ltd.* [2011] FCA 967 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2011/967.txt/cgi-bin/download.cgi/download/au/cases/cth/FCA/2011/967.rtf>.

29. Press Release, ACCC, ACCC Not to Oppose the Proposed Acquisition of P&N by Asahi (Aug. 11, 2011), <http://www.accc.gov.au/content/index.php/ml/itemId/1002254/fromItemId/2332>.

30. *ACCC v. TF Woollam & Son Pty. Ltd.* [2011] FCA 973 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2011/973.txt/cgi-bin/download.cgi/download/au/cases/cth/FCA/2011/973.rtf>.

31. Press Release, ACCC, ACCC Exposes Construction Bid Rigging (Aug. 25, 2011), <http://www.accc.gov.au/content/index.php/ml/itemId/1004424/fromItemId/2332>.

32. *ACCC v. April Int'l Mktg. Servs. Australia Pty Ltd. (No 8)* [2011] FCA 153 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/FCA/2011/153.txt/cgi-bin/download.cgi/download/au/cases/cth/FCA/2011/153.rtf>.

sends a strong message to foreign companies that engage in cartel conduct causing harm to Australian consumers.³³

4. *Abuse of Dominant Position*

The new ACCC chairman has indicated that it will be closely monitoring firms (including in the supermarket, telecommunication, and airport sectors) with significant market power.³⁴

B. CHINA

1. *Legislative Developments*

Numerous implementing regulations and rules under the Anti-Monopoly Law (AML)³⁵ were issued in 2011: (i) National Development and Reform Commission (NDRC) Anti-Price Monopoly Rules,³⁶ (ii) NDRC Rules on Administrative Enforcement Procedures for Anti-Price Monopoly,³⁷ (iii) State Administration for Industry & Commerce (SAIC) Rules on the Prohibition of Monopoly Agreement,³⁸ (iv) SAIC Rules on the Prohibition of Abuse of Dominant Market Position,³⁹ (v) SAIC Rules on the Prohibition of Abuses of Administrative Power to Eliminate or Restrict Competition,⁴⁰ and (vi) Ministry of Com-

33. Press Release, ACCC, \$4.2 Million Penalty for Photocopy Paper Price Fixing Club (Feb. 28, 2011), <http://www.accc.gov.au/content/index.phtml/itemId/975295>.

34. Rod Sims, *Law Institute of Victoria Breakfast Series: Some Compliance and Enforcement Issues*, AUSTRALIAN COMPETITION & CONSUMER COMM'N (Oct. 25, 2011), <http://www.accc.gov.au/content/item.phtml?itemId=1014098&nodeId=19e390f37e28f4162412d52635bela4&fn=Some>.

35. Zhong Huá Rén Mǐn Gòng Hé Guó Fān Lǒng Duàn Fǎ [中华人民共和国反垄断法] [Anti-Monopoly Law] (promulgated by Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) (China), available at http://www.npc.gov.cn/wxzl/gongbao/2007-10/09/content_5374672.htm. Enforcement of the AML is handled by the Anti-Monopoly Law Enforcement Authority (the AMEA), the functions of which are shared by three pre-existing government agencies: the Ministry of Commerce (the MOFCOM), responsible for merger review; the National Development and Reform Commission (the NDRC), responsible for price-related conduct, including price-fixing cartels; and the State Administration for Industry and Commerce (SAIC), responsible for non-price monopoly agreements, abuses of dominance, and administrative abuses.

36. Fān Jià Gé Lǒng Duàn Guī Ding [反价格垄断规定] [Anti-Price Monopoly Provisions] (promulgated by the Nat'l Dev. & Reform Comm'n, Dec. 29, 2010, effective Feb. 1, 2011) (China), available at <http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/W020110104330950438166.pdf>.

37. Fān Jià Gé Lǒng Duàn Xíng Zhèng Zhī Fǎ Chéng Xù Guī Ding [反价格垄断行政执法程序规定] [Provisions on the Administrative Procedures for Law Enforcement against Price Fixing] (promulgated by the Nat'l Dev. and Reform Comm'n, Dec. 29, 2010, effective Feb. 1, 2011) (China), available at <http://www.ndrc.gov.cn/zcfb/zcfbl/2010ling/W020110104333527987891.pdf>.

38. Gōng Shāng Xíng Zhèng Guān Lǐ Jī Guān Jīn Zhì Lǒng Duàn Xié Yì Xíng Wéi De;Dì;Dí Guī Ding [工商行政管理机关禁止垄断协议行为的规定] [SAIC Rules on Prohibition of Monopoly Agreements] (promulgated by the State Admin. for Indus. & Commerce, Jan. 7, 2011, effective Feb. 1, 2011) (China), available at http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103266.html.

39. Gōng Shāng Xíng Zhèng Guān Lǐ Jī Guān Jīn Zhì Lǎn Yòng Shì Chāng Zhì Pèi De Wéi Xíng Wéi De;Dì;Dí Guī Ding [工商行政管理机关禁止滥用市场支配地位行为的规定] [SAIC Regulations on Prohibiting the Abuse of a Dominant Market Position] (promulgated by the State Admin. for Indus. & Commerce, Jan. 7, 2011, effective Feb. 1, 2011) (China), available at http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103267.html.

40. Gōng Shāng Xíng Zhèng Guān Lǐ Jī Guān Zhì Lǎn Yòng Xíng Zhèng Quǎn Lì Páì Chú, Xiàn Zhì Jīng Zhēng Xíng Wéi De;Dì;Dí Guī Ding [工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定] [Rules of Administration of Industry

merce People's Republic of China (MOFCOM) Provisional Provisions on the Assessment of Effect of Concentrations on Competition.⁴¹

2. Mergers

Three conditional approval decisions were published by the MOFCOM in 2011: Silvinit-Uralkali,⁴² Alpha V-Savio,⁴³ and GE-Shenhua.⁴⁴

In 2011, China established a new national security review process,⁴⁵ which requires approval of acquisitions of Chinese companies by foreign investors where national security is affected. The potential range of industry sectors is wide, including defense, agriculture, energy, and transportation, as well as key technologies and equipment manufacturing.

and Commerce on Prohibition of Abuse of Administrative Power for the Purposes of Eliminating or Restricting Competition] (promulgated by the State Admin. for Indus. & Commerce, Jan. 7, 2011, effective Feb. 1, 2011) (China), *available at* http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103268.html.

41. Guan Yú Píng Gu Jíng Yíng Zhē Jí Zhōng Jíng Zhēng Yíng Xiāng de Zàn Xíng Guì Dìng [关于评估经营者集中竞争影响的暂行规定] [Interim Provisions for the Assessment of the Effect of the Concentration of Business Operators on Competition] (promulgated by the Ministry of Commerce of the P.R.C., Sept. 5, 2011, effective Sept. 5, 2011) (China), *available at* http://www.gov.cn/zwgk/2011-09/02/content_1939083.htm.

42. Zhōng Huá Rén Mǐn Gōng Hé Guó Shàng Wù Bù Gōng Gào[2011]nián dì 33hào, Gōng Bù Guān Yú Fù Tiáo Jiàn Pí Zhūn Wù Lā ěr Kāi Fàng Xíng Gu Fèn Gōng Sī Xī Shǒu Hé Bì ng Xiè ěr Wéi Ní Tè Kāi Fàng Xíng Gu Fèn Gōng Sī Fān Lóng Duàn Shēn Chá Jué Dìng de Gōng Gào [中华人民共和国商务部公告[2011]年第33号·公布关于附条件批准乌拉尔开放型股份公司吸收合并谢尔维尼特开放型股份公司反垄断审查决定的公告] [MOFCOM Announcement [2011] No. 33, Conditional Anti-Monopoly Clearance of the Combination of Open Joint Stock Company Uralkali and Open Joint-Stock Company Silvinit] (promulgated by the Ministry of Commerce of the P.R.C., June 2, 2011, effective June 2, 2011) (China), *available at* <http://fldj.mofcom.gov.cn/aarticle/ztxx/201106/20110607583288.html>.

43. Zhōng Huá Rén Mǐn Gōng Hé Guó Shàng Wù Bù Gōng Gào[2011 nián]dì 73 Hào (Guān Yú Fù Tiáo Jiàn Pí Zhūn Pèi Nèi Luò Pǔ Yǒu Xiàn Zé Rèn Gōng Sī Shǒu Gōu Sà Wéi ào Fāng Zhì Jí Xiè Gu Fèn Yǒu Xiàn Gōng Sī Fān Lóng Duàn Shēn Chá Jué Dì ng de Gōng Gào) [中华人民共和国商务部公告[2011]年第73号(关于附条件批准佩内洛普有限责任公司收购萨维奥纺织机械股份有限公司反垄断审查决定的公告)] [MOFCOM Announcement [2011] No. 73 (regarding Conditional Approval for the Acquisition of Savio Macchine Tessili S.P.A. by Penelope Company Limited)] (promulgated by the Ministry of Commerce of the P.R.C., Oct. 31, 2011, effective Oct. 31, 2011) (China), *available at* <http://fldj.mofcom.gov.cn/aarticle/zcfb/201111/20111107809156.html>.

44. Shàng Wù Bù Gōng Gào 2011 Nián Dì 74 Hào Guān Yú Fù Tiáo Jiàn Pí Zhūn Tōng Yòng Diàn Qì (Zhōng Guó) Yǒu Xiàn Gōng Sī Yǔ Zhōng Guó Shēn Huà; Huá Méi Zhì Yǒu Huà Gōng Yǒu Xiàn Gōng Sī Shè Lì Hé Yíng Qì Yè Fān Lóng Duàn Shēn Chá Jué Dìng de Gōng Gào [商务部公告 2011 年第 74 号 关于附条件批准通用电气(中国)有限公司与中国神华煤制油化工有限公司] [MOFCOM Announcement [2011] No. 74 Regarding the Anti-Monopoly Review Decision for Conditional Clearance of the Contemplated Joint Venture between GE (China) Co., Ltd. and China Shenhua Coal to Liquid and Chemical Co., Ltd.] (promulgated by the Ministry of Commerce of the P.R.C., Nov. 10, 2011 effective Nov. 10, 2011) (China), *available at* <http://fldj.mofcom.gov.cn/aarticle/zcfb/201111/20111107824342.html>.

45. Guó Wù Yuàn Bàn Gōng Tíng Guān Yú Jiàn Lì Wài Guó Tóu Zì Zhē Tóu Zì Zhē Bì ng Gòu Jīng Nèi Qì Yè ān Quǎn Shēn Chá Zhì Dù de Tōng Zhì Tōng Zhì Guó Bàn Fā; Fà Fā; Fà 2011fā; Fà 6hào [设立合营企业反垄断审查决定的公告] 国务院办公厅关于建立外国投资者并购境内企业安全审查制度的通知 国办发〔2011〕6号 [Circular of the General Office of the State Council on the Establishment of Security Review System Regarding Merger and Acquisition of Domestic Enterprises by Foreign Investors, Guo Ban Fa [2011] No. 6] (promulgated by the General Office of the State Council, Feb. 3, 2011, effective Mar. 5, 2011) (China), *available at* http://www.gov.cn/zwgk/2011-02/12/content_1802467.htm.

3. *Anticompetitive Practices*

The NDRC has been actively investigating cartels under the AML and the PRC Price Law. Unilever was fined RMB 2 million (approximately US\$312,000) for spreading rumors of price increases and disturbing market order,⁴⁶ while a Chinese pharmaceutical company was fined RMB 6.5 million (approximately US\$1 million) for abusing its dominant market position.⁴⁷ In early 2011, the SAIC imposed a fine of RMB 200,000 (approximately US\$31,000) on a trade association of concrete manufacturers in the Jiangsu Province for market allocation.⁴⁸

4. *Court Decisions*

The Chinese Supreme People's Court (SPC) reported that twenty-nine of the forty-three of the first instance civil AML cases accepted by the courts between August 1, 2008, and the end of 2010, have been concluded.⁴⁹ The Chinese courts appear to have placed high burdens of proof on complainants and relatively lower burdens on defendants on issues such as the existence of a dominant position and valid justifications for allegedly abusive conduct. The draft Rules on Civil Litigation will likely ease plaintiffs' burden of proof, leading to an increase in civil AML litigation.

Because of resource and procedural constraints, the merger clearance process in China is unlikely to accelerate significantly in the near future. However, enforcement against non-merger conduct violations under the AML is gaining momentum with increasing fines. Private litigation has been surprisingly active and is likely to receive a boost when the SPC releases its final rules on private antitrust litigation.

C. INDIA

1. *Legislative Developments*

In March 2011, the Ministry of Corporate Affairs issued notifications bringing into force merger control provisions under the Competition Act, 2002, No. 12 of 2003 (as amended) (Competition Act).⁵⁰ In May 2011, the Competition Commission of India

46. Press Release, Nat'l Dev. & Reform Comm'n, 联合利华散布涨价信息扰乱市场秩序受到严厉处罚 [Unilever Fined for Spreading Price Hike Information and Disrupting Market] (May 6, 2011) (China), http://jjs.ndrc.gov.cn/gzdt/t20110506_410563.htm.

47. Press Release, Nat'l Dev. & Reform Comm'n, 两医药公司垄断复方利血平原料药受到严厉处罚 [Two Pharmaceutical Companies to Monopolize Compound Reserpine API to be Severely Punished] (Nov. 15, 2011) (China), http://jjs.ndrc.gov.cn/gzdt/t20111115_444599.htm.

48. Press Release, State Admin. for Indus. & Commerce, 签订协议分割市场 名为自律实为垄断 工商机关第一起予以行政处罚垄断案件结案 [The First Enforcement Action Under the AML Against Market Allocation Concluded] (Jan. 26, 2011) (China), http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201101/t20110126_103772.html.

49. Xian-Ming Zhang (本报记者张先明 最高法院知识产权庭负责人就司法解释征求意见稿答记者问 [Q&A with the SPC on Draft Rules on Civil Anti-Monopoly Law Litigation], PEOPLE'S COURT DAILY (Apr. 26, 2011), http://rmfyb.chinacourt.org/paper/html/2011-04/26/content_26384.htm.

50. Ministry of Corporate Affairs (Notification S.O. 479(E)), 2011, Gazette of India, section II(3)(ii) (Mar. 4, 2011).

(CCI) adopted the final version of the regulations establishing the procedure for implementing the India merger control regime.⁵¹

2. *Mergers*

As of November 25, 2011, the CCI had issued six merger control decisions, all of which were cleared unconditionally.⁵²

3. *Anticompetitive Practices*

In May 2011, the CCI ordered the United Producers/Distributors Forum ("Forum") to refrain from engaging in anti-competitive practices and cartel-like conduct.⁵³ Each member of the Forum was fined INR 100,000 (approximately US\$2,209.70). In October 2011, the CCI found certain conduct by travel trade associations, including a boycott of Singapore Airlines, violated the Competition Act.⁵⁴ They were fined INR 100,000 (approximately US\$2,209.70) each.

4. *Abuse of Dominant Position*

On June 23, 2011, the CCI held the National Stock Exchange of India Ltd. (NSE) abused its dominant position in the currency derivatives segment.⁵⁵ NSE was fined five percent of its average turnover for the last three years. NSE is appealing the decision.

On August 12, 2011, the CCI held realty company DLF Ltd. (DLF), abused its dominant position and imposed a seven percent penalty on DLF's average turnover for the last three years.⁵⁶ DLF has appealed the decision.

III. Europe

A. EUROPEAN UNION

1. *Mergers*

In a case reminiscent of the failed intra-Irish combination of Ryanair and Aer Lingus, the European Commission (EC) decided to block the proposed intra-Greek merger be-

51. See The Competition Comm'n of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011, (No. 3 of 2011) (May 11, 2011), *available at* <http://www.cci.gov.in/images/media/Regulations/CombinationRegulation110511.pdf>.

52. See Orders of the Commission, COMPETITION COMM'N OF INDIA, http://www.cci.gov.in/index.php?option=com_content&task=view&id=171 (last visited Mar. 7, 2012).

53. FICCI—Multiplex Association of India v. United Producers/Distributors Forum and Others, Case No. 01/2009 (May 25, 2011) (India), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/FICCI-Order260511.pdf>.

54. *In re* Uniglobe Mod Travels Private Ltd. v. Travel Agents Fed'n of India, No. 03/2009, ¶¶ 68.9.6–68.9.9 (Oct. 4, 2011) (India), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/UniGlobeMainOrder071011.pdf>.

55. MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., Case No. 13/2009, ¶ 33.1 (June 23, 2011) (India), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/MCXMainOrder240611.pdf>.

56. *Belaire Owner's Ass'n v. DLF Ltd.*, No. 19/2010, ¶¶ 13.4, 13.6 (Aug. 12, 2011) (India), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/DLFMainOrder110811.pdf>.

tween Aegean Airlines and Olympic Air.⁵⁷ The EC also conducted two in-depth reviews of proposed mergers concerning hard disk drives, which have raised the issue of the “priority rule,” whereby the second deal faces tougher scrutiny due to the assumed increase in sector concentration arising from the first deal. On the policy side, the EC and the national competition authorities agreed on best practices for mergers, requiring clearance in several European Union (EU) countries and not qualifying for EC review.⁵⁸

2. *Cartels and Other Anticompetitive Practices*

In comparison with previous years, the EC was relatively quiet in 2011. The total amount of fines imposed in cartel cases at the time of writing was only EUR 452 million, significantly lower than in the recent past.⁵⁹ However, the EC made efficient use of its settlement procedure to resolve cases concerning washing powder detergents and CRT glass, in exchange for a standardized ten percent fine reductions⁶⁰ that can, in appropriate cases, be combined with a reduction under the EC’s leniency program.

In the pharmaceutical sector, the EC continued to attack agreements intended to keep generics off the market, including new investigations against Cephalon and Teva concerning their patent settlement over a treatment for sleeping disorders, and against Johnson & Johnson and the generic branch of Novartis for contractual arrangements concerning a painkiller.

The EC also took steps to increase the transparency of its operations. In particular, the EC provided a revised set of best practices applicable to competition law proceedings, reinforced the ability of the Hearing Officer to resolve procedural disputes, and provided additional guidance on the submission of economic evidence.⁶¹

3. *Abuse of Dominant Position*

The EC continued its investigation into Google, with formal complaints now submitted to the EC by nine separate companies, including Microsoft. Also in the IT sector, the EC started investigating potential abusive enforcement of essential patents for mobile telephony by Apple and Samsung.

57. Press Release, Europa, Mergers: Commission Blocks Proposed Merger between Aegean Airlines and Olympic Air (Jan. 26, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/68&format=HTML&aged=0&language=EN&guiLanguage=en>.

58. See Press Release, Europa, Best Practices on Cooperation between EU National Competition Authorities in Merger Review (Nov. 8, 2011), http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf.

59. See *Cartel Statistics*, EUROPEAN COMM’N, <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (last visited Jan. 15, 2012).

60. The EC’s settlement procedure is available online. *Legislation: Settlements*, EUROPEAN COMM’N: COMPETITION, <http://ec.europa.eu/competition/cartels/legislation/settlements.html> (last visited Jan. 15, 2012).

61. Press Release, Europa, Commission Reforms Antitrust Procedures and Expands Role of Hearing Officer (Oct. 17, 2011), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1201&format=HTML&aged=0&language=EN&guiLanguage=en>.

4. *Court Decisions*

Key judgments by the EU courts in 2011 included one by the Court of Justice holding that the inclusion of an absolute territorial restriction in a satellite broadcasting license will generally violate EU competition law because such a restriction artificially segments the EU market.⁶² Separately, the Court held that absolute prohibitions on online sales by distributors and retailers will also generally violate EU competition law.⁶³

Plaintiffs seeking damages for competition law infringements also won an important victory, as the Court of Justice refused to guarantee the secrecy of leniency submissions made to national competition authorities, and instead left to the national courts the task of balancing public and private enforcement objectives.⁶⁴

B. FRANCE

1. *Legislative Developments*

On May 16, 2011, for the first time, the French Competition Authority (FCA) issued a notice describing how it sets fines in competition law cases.⁶⁵ The basic amount of a fine will be up to thirty percent of the sales generated by the infringing company within the market in France affected by the infringement (and a minimum of fifteen percent for cartels), and will depend on the seriousness of the infringement and the damage it caused. The final amount of the fine may not exceed ten percent of the company's annual worldwide group turnover.

In the case of recidivism, the fine may be increased by an amount between five and fifty percent, although the FCA will ignore infringements that are more than fifteen years old.

2. *Mergers*

On September 21, 2011, the FCA withdrew its 2006 approval of the merger between CanalSat and TPS, the two main pay-TV operators in France, and imposed a fine of EUR 30 million.⁶⁶ The fine was due to serious breaches of certain commitments contained in the approval decision. As a result, the parties were forced to re-notify the transaction; the

62. Press Release, Europa, Judgment in Cases C-403/08 and C-429/08 Football Ass'n Premier League & Others v. QC Leisure & Others (Oct. 4, 2011), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-10/cp110102en.pdf>.

63. Press Release, Europa, Judgment in Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v. Président de l'Autorité de la Concurrence & Others (Oct. 13, 2011), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-10/cp110110en.pdf>.

64. Case C-360/09, Pfleiderer v. Bundeskartellamt, 2011 E.C.R. ___, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-360/09>.

65. Press Release, L'Autorité de la Concurrence [The Competition Authority], Communiqué Relatif à la Méthode de Détermination des Sanctions Pécuniaires [Draft Notice on the Method of Setting Fines] (Jan. 17, 2011) (Fr.), http://www.autoritedelaconcurrence.fr/doc/projet_communique_sp_17janvier2011.pdf.

66. Décision n° 11-D-12 du 20 septembre 2011 relative au respect des engagements figurant dans la décision autorisant l'acquisition de TPS et CanalSatellite par Vivendi Universal et Groupe Canal Plus [Decision No. 11-D-12: On Compliance with Commitments Contained in the Decision Authorizing the Acquisition of TPS by Vivendi & Canal Satellite Universal & Canal Plus Group] (L'Autorité de la Concurrence [The Competition Authority] Sept. 20, 2011) (Fr.), available at <http://www.lefigaro.fr/assets/pdf/canal-plus.pdf>.

FCA will be conducting a new competition analysis taking into account any market changes since 2006.

3. *Cartels and Other Anticompetitive Practices*

Because of the vacancy in the FCA's Hearing Officer position for several months in 2011, the FCA issued far fewer decisions than in previous years.

After imposing fines totaling EUR 385 million in 2010 on the eleven main French banks for colluding on interbank checking fees,⁶⁷ on July 7, 2011, the FCA closed its investigation concerning the interchange fees applied by banks to Carte Bleue (CB) card payments, ATM withdrawals, and cash withdrawals at the counter. This followed an offer by the syndicate of banks that issues CB payment cards of commitments to lower interchange fees.⁶⁸ But the FCA is keeping a close eye on the banking sector, and it has parallel proceedings open concerning the fees applied by banks to other card payment systems and concerning other means of payment.

4. *Court Decisions*

"On June 30, 2011, the Tribunal Correctionnel (Criminal Court) of Nantes ordered suspended prison sentences ranging from three to ten months, and fines ranging from EUR 20,000 to EUR 50,000, on nine individuals who participated in a cartel in the road sign sector."⁶⁹ This judgment is one of very few in France to impose criminal sanctions on individuals for infringing competition law.

On June 16, 2011, the French Supreme Court issued a decision that suggests its support of the current practice of the FCA, which usually seizes all of the contents of e-mail accounts and computers, regardless of whether they contain privileged files and/or private documents. However, this issue is likely to be debated again soon, as a report submitted in another pending case suggests that the FCA's method is "disproportionate."

C. GERMANY

1. *Legislative Developments*

On November 10, 2011, the Federal Ministry of Economics and Technology (MET) issued a draft amendment to the German Act against Restraint of Competition.⁷⁰ The

67. Décision n° 10-D-28 du 20 septembre 2010 relative aux tarifs et aux conditions liées appliquées par les banques et les établissements financiers pour le traitement des chèques remis aux fins d'encaissement [Decision No. 10-D-28: Relating to Rates and Conditions Applied by Banks and Related Financial Institutions in Processing Checks for Collection] (L'Autorité de la Concurrence [The Competition Authority] Sept. 20, 2010) (Fr.), available at <http://www.autoritedelaconcurrency.fr/pdf/avis/10d28.pdf>.

68. Décision n° 11-D-11 du 7 juillet 2011 relative à des pratiques mises en œuvre par le Groupement des Cartes Bancaires [Decision No. 11-D-11: Relating to Practices Implemented by the Bank Card] (L'Autorité de la Concurrence [The Competition Authority] July 7, 2011) (Fr.), available at <http://www.autoritedelaconcurrency.fr/pdf/avis/11d11.pdf>.

69. France, NAT'L COMPETITION REPORT (Cleary Gottlieb, New York, N.Y.), June 2011, at 4, <http://www.cgsh.com/files/Publication/75ebe29a-10d7-4807-9972-537340418c50/Presentation/PublicationAttachment/815bf175-f645-449e-af6a-5a6bea2d5f4f/National%20Competition%20Report%20Q2%202011.pdf>.

70. Referentenentwurf [Draft Bill], (Achttes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen) [Eighth Law Amending Law against Restrictions on Competition Authority], BMWi [Fed.

new law is expected to enter into force in January 2013. The most significant proposed change concerns merger control. In particular, the current “market dominance test” would be replaced with the Significant Impediment to Effective Competition (SIEC) test, as used in EU merger control.

2. *Mergers*

On July 21, 2011, the Federal Cartel Office (FCO) published draft guidance on the substantive analysis of mergers.⁷¹ This shows a move towards a more economics-based analysis instead of the FCO’s traditional, market-structure orientated approach. It seems unlikely, however, that the current enforcement policy of the FCO will change as a result of the guidance.

In its only merger prohibition decision in 2011, the FCO stopped Germany’s two largest private television channel owners, RTL Group and ProSiebenSat.1, from launching a catch-up platform on which internet users would be able to watch a selection of recently-aired television programs.⁷² The FCO found that the joint venture would further strengthen the existing duopoly of the companies in the market for television advertising in Germany and would also be likely to result in “spill-over effects.”

3. *Cartels and Other Anticompetitive Practices*

The vast majority (if not all) of the FCO’s cartel investigations that ended in 2011 were concluded on the basis of a settlement. These included investigations into: manufacturers of fire-fighting vehicles (fine of EUR 20.5 million);⁷³ manufacturers of consumer goods (EUR 38 million);⁷⁴ manufacturers of chipboard and other wood-based products (EUR 42 million);⁷⁵ and companies in the milling industry (EUR 23.8 million).⁷⁶

4. *Court Decisions*

In June 2011, the German Federal Civil Court clarified two important questions regarding cartel damages litigation in Germany. First, both indirect and direct purchasers

Ministry of Econ. & Tech.], Nov. 10, 2011 (Ger.), available at <http://www.bmwi.de/BMWi/Redaktion/PDF/G/gwb-8-aenderung-referentenentwurf,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf>.

71. Press Release, Fed. Cartel Office, Draft Guidance on Substantive Merger Control (July 21, 2011), http://www.bundeskartellamt.de/wEnglisch/download/pdf/20110721-Guidance_Merger_Control.pdf.

72. Ragnhild Kjetland, *German Antitrust Regulator Rejects RTL-ProSiebenSat.1 Plan*, BLOOMBERG (Mar. 17, 2011), <http://www.bloomberg.com/news/2011-03-18/german-antitrust-regulator-rejects-rtl-prosiebensat-1-plan-1-.html>.

73. Press Release, Fed. Cartel Office, Bundeskartellamt Imposes Multi-Million Euro Fines against Mfrs. of Firefighting Vehicles (Feb. 10, 2011), http://www.bundeskartellamt.de/wEnglisch/News/press/2011_02_10.php.

74. Press Release, Fed. Cartel Office, Multi-Million Fines Imposed on Mfrs. of Consumer Goods on Account of Exchange of Anti-Competitive Info (Mar. 17, 2011), http://www.bundeskartellamt.de/wEnglisch/News/press/2011_03_17.php.

75. Press Release, Fed. Cartel Office, Bundeskartellamt Imposes Multi-Million Fines on Manufacturers of Chipboard, OSB Panels and Other Wood-Based Products (Sept. 20, 2011), http://www.bundeskartellamt.de/wEnglisch/News/press/2011_09_20.php.

76. Press Release, Fed. Cartel Office, Bundeskartellamt Imposes First Multi-Million Fine in Mills Case (Oct. 25, 2011), http://www.bundeskartellamt.de/wEnglisch/News/press/2011_10_25.php.

are entitled to seek damages from cartel members. Second, cartel members can use the “passing-on” defense.⁷⁷

In August 2011, the Federal Civil Court issued a remarkable order on questions of successor liability for fines for infringements of competition law.⁷⁸ Under German law, undertakings cannot “commit” the infringement themselves but can only be held liable for infringements committed by their executives. The court held that on an acquisition the acquirer can only be held liable for an infringement committed by executives of the target company if the acquirer is the target’s successor in title and the target’s assets would account for the vast majority of the assets of the acquirer. This finding might open a loophole for companies facing competition law fines in Germany.

D. RUSSIA

1. *Legislative Developments*

On December 5, 2011 the Russian President signed the Bill on Amendments to the Competition Law and other laws (the Third Antimonopoly Package), which will become effective thirty days after the day of its official publication. The amendments aim to liberalize the Russian antimonopoly legislation, bringing it into line with EU and international standards.⁷⁹

The Third Antimonopoly Package covers almost all aspects of Russian competition law, including amendments concerning: adoption of the “effects doctrine”; a definition of cartels that will reduce the agreements that are per se illegal; liberalization of the rules respecting vertical agreements (e.g., permitting the setting of maximum prices for the resale of goods); a new merger control threshold based on turnover in the Russian market; and criteria for the clearance of foreign-to-foreign transactions.

2. *Mergers*

During the course of 2011, FAS reviewed a number of significant mergers. In February 2011, the FAS approved the application of Bank VTB on acquisition of Bank of Moscow subject to several conditions, including maintaining operations of the bank in particular regions of Russia for a year and a half and providing reasons for closing the bank’s operations to the FAS.⁸⁰

3. *Cartels and Other Anticompetitive Practices*

FAS is prioritizing the investigation of cartels and anticompetitive practices and has been actively prosecuting cartels. The new powers of the FAS regarding unannounced inspec-

77. Bundesgerichtshof [KZR] [Federal Civil Court] June 28, 2011, not yet published; *see also* Press Release, Fed. Civil Court, Cartel Members are also Liable Indirectly to Injured Party for Damages (June 29, 2011), <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2011&Sort=3&nr=56711&pos=1&anz=119>.

78. Bundesgerichtshof [KRB] [Federal Civil Court] Aug. 10, 2011, not yet published.

79. Press Release, President of the Russian Fed’n, Amendments to Law on Protecting Competition and other Legislative Acts (Dec. 5, 2011), <http://eng.kremlin.ru/news/3167>.

80. See the Russian version of the decision at the official site of the FAS (http://www.fas.gov.ru/solutions/solutions_31966.html).

tions (dawn raids) and copying documents during such inspections have become important instruments in the fight against cartels.

Currently several cartel proceedings have been initiated. One of them is against the large coal companies, SUEK, Russky Ugol, and Stroysservice, who supply power-generating coal.⁸¹

4. *Abuse of Dominant Position*

In July 2011, the FAS charged the pharmaceutical producer Novo Nordisk with abusing its dominant position in the market by refusing to supply certain distributors. The FAS admitted that the manufacturers have the right to settle certain terms of supply for distributors, provided that these terms are well defined and based on reasonable criteria.⁸²

5. *Court Decisions*

In February 2011, the Supreme Arbitration Court reversed other courts' rulings on the Gazprom Neft claim, upholding the FAS decision that in 2009 Gazprom abused its dominance in the oil products market and should pay 4.67 billion Rubles to the federal government.⁸³

In another significant case involving Kuzbass Alcohol Union, Garantia Kachestva, and RSA Ltd., the Supreme Arbitration Court made two significant determinations: entering into an anticompetitive agreement itself, not necessarily the execution thereof, will be seen as violating competition law; and an anticompetitive agreement need not necessarily be a finalized contract.⁸⁴

E. UNITED KINGDOM

1. *Legislative Developments*

On March 16, 2011, the UK Department for Business, Innovation, and Skills published a consultation paper on options for reforming the UK competition regime.⁸⁵ The proposals include merging the competition functions of the Office of Fair Trading (OFT) and the Competition Commission (CC) to create a single Competition and Markets Authority (CMA), ways to improve the current voluntary merger notification scheme in the United Kingdom, and altering the current requirement under the "cartel offence" (that provides for individual criminal penalties) for an individual's action to be "dishonest."

81. Press Release, FAS, FAS Russia Fined "SUEK" and "Russky Ugol" (Sept. 20, 2011), http://en.fas.gov.ru/news/news_31716.html.

82. Press Release, FAS, FAS Russia Fined "Novo Nordisk" Over 85 Million Rubles for Unlawfully Evading Contracts for Supplies of Medicines (Jan. 24, 2011), http://en.fas.gov.ru/news/news_31180.html.

83. See the Russian version of the Supreme Court decision (http://kad.arbitr.ru/data/pdf/7c70efac-126e-4852-a271-f5ec295ee2cc/A56-62505-2009_20110215_Reshenija+i+postanovlenija.pdf).

84. Press Release, FAS, The Presidium of the Supreme Arbitration Court of the Russian Federation Reversed the Rulings of the Courts of Three Instances & Confirmed the Rightness of FAS Russia (Dec. 23, 2010), http://en.fas.gov.ru/news/news_31116.html.

85. *A Competition Regime for Growth: A Consultation on Options for Reform*, DEP'T FOR BUS., INNOVATION & SKILLS, (Mar. 16, 2011), <http://www.bis.gov.uk/Consultations/competition-regime-for-growth>.

2. *Mergers*

In 2011, the OFT referred eleven cases to the CC for a detailed second-stage review. Amongst other cases, airline Ryanair's acquisition of a stake in Aer Lingus gave rise to a unique situation. The European Commission (EC) investigated the public bid and decided to prohibit it in June 2007 under the EU Merger Regulation (EUMR). The EU General Court ruled in July 2010 that in the case of a blocked merger, the EC does not have the ability to require divestment of minority shareholdings that do not confer "decisive influence" under the EUMR. The OFT subsequently commenced a UK merger investigation,⁸⁶ which Ryanair appealed. The Competition Appeal Tribunal (CAT) concluded on July 28, 2011 that the OFT was "in-time" to review the acquisition.⁸⁷

3. *Cartels and Other Anticompetitive Practices*

On August 10, 2011, the OFT fined four UK supermarkets and five UK dairy processors a total of GBP 49.51 million for a "hub-and-spoke"/A-B-C cartel infringement.⁸⁸ The coordination was achieved by supermarkets indirectly exchanging retail pricing intentions with each other via the dairy processors.

On January 13, 2011, the OFT announced that seven insurance companies and two IT software and service providers had provisionally agreed to limit the data they exchange between them after the OFT raised competition law concerns.⁸⁹ The proposals followed an OFT investigation that identified an increased risk of price coordination among motor insurers using a specialist market analysis tool.

4. *Abuse of Dominant Position*

On April 13, 2011, the OFT fined Reckitt Benckiser GBP 10.2 million for abusing its dominant position by withdrawing National Health Service packs of its Gaviscon Original Liquid medicine from the NHS prescription channel. Although the product's patent had expired, the generic name was not yet published, which meant more prescriptions for its alternative product, Gaviscon Advance Liquid, would be issued.

5. *Court Decisions*

Private competition law litigation continued to develop in the United Kingdom. In a key judgment on March 21, 2011, the CAT ruled on an application by Mersen UK Portslade Ltd. to dismiss certain claims for damages against it on the ground that it was not mentioned in the EC's cartel decision (in the carbon products cartel). The CAT held there was indeed no infringement decision of the EC on which the claimants could base

86. Press Release, Office of Fair Trading, OFT Statement on its Investigation of Ryanair's Minority Shareholding in Aer Lingus (Oct. 29, 2010), <http://www.of.gov.uk/news-and-updates/press/2010/112-10>.

87. Press Release, Office of Fair Trading, OFT Welcomes Competition Appeal Tribunal Judgment in Ryanair/Aer Lingus Merger Case (July 28, 2011), <http://www.of.gov.uk/news-and-updates/press/2011/86-11>.

88. Press Release, Office of Fair Trading, OFT Fines Certain Supermarkets and Processors Almost [GBP] 50 Million in Dairy Decision (Aug. 10, 2011), <http://www.of.gov.uk/news-and-updates/press/2011/89-11>.

89. Press Release, Office of Fair Trading, Motor Insurers Agree to Limit Data Exchange after OFT Investigation (Jan. 13, 2011), <http://www.of.gov.uk/news-and-updates/press/2011/04-11>.

their claims and that such a decision is necessary. On October 11, 2011, the plaintiffs were granted leave to appeal the CAT judgment.

IV. Middle East and Africa

A. ISRAEL

1. *Legislative Developments*

In July 2011, the Knesset (the Israeli parliament) approved an amendment to the Israeli Restrictive Trade Practices Law (the Antitrust Law).⁹⁰ The amendment grants the Israeli Antitrust Authority (IAA) and the Antitrust Tribunal far-reaching supervisory and operative powers. This includes the power to order a person or an entity that is part of a declared 'concentration group' (an oligopoly) to sell its holdings (entirely or partly) in another entity if the sale would prevent significant injury to competition or would significantly strengthen the competition. The definition of a concentration group was amended to focus on the market conditions that may facilitate or stifle effective competition (such as barriers to entry or cross-ownership structures in the relevant market). Also, a breach of the provisions of the Antitrust Law will now constitute a tort for purposes of civil liability. In addition, the IAA may now impose financial sanctions on those who violate non-criminal antitrust law.

With respect to mergers, the IAA published guidelines regarding the substantive analysis of horizontal mergers⁹¹ and possible remedies to apply for mergers that may cause significant harm to competition.⁹²

2. *Mergers*

The IAA was active in blocking a number of mergers this year, prohibiting a horizontal merger in the financial and accountant calculators' software market and in the market for the manufacture of tin cans.⁹³

3. *Anticompetitive Practices and Court Decisions*

In March 2010, the Jerusalem District Court sentenced three Israeli sound amplification and lightning companies and their managers and owners,⁹⁴ following convictions for

90. Israeli Restrictive Trade Practices Law, Amend. XII, (The Antitrust Law), 5771-2011 (Isr.).

91. Press Release, Israeli Antitrust Authority, Horizontal Merger Guidelines (Jan. 23, 2011), <http://archive.antitrust.gov.il/files/10690/01-11.pdf>.

92. General Director Opinion, Israeli Antitrust Authority, Guidelines Regarding Remedies for Merger that Raise Reasonable Grounds of Competitive Concern (July 2011), <http://archive.antitrust.gov.il/files/10918/2-11.pdf>. The Remedies Guidelines draft was introduced for public consultation in January 2011. See General Director Opinion, Israeli Antitrust Authority, Draft Guidelines for Public Consultation Regarding Remedies for Merger that Raise Reasonable Grounds of Competitive Concern (Jan. 2011), <http://archive.antitrust.gov.il/files/10691/Scan%20001.pdf>.

93. The ISA objected to a merger between Caniel Packaging Indus., Ltd., Caniel Beverage Packaging, Ltd., and Lagen Packaging Indus., Ltd. See Publication No. 5001709, ISA (Jan. 16, 2011), <http://archive.antitrust.gov.il/files/10689/8182.pdf> (explaining the ISA's rationale).

94. Press Release, Israeli Antitrust Authority, Publication No. 5001683 (Oct. 31, 2010), <http://archive.antitrust.gov.il/files/10794/11-2011.pdf>.

engaging in cartel activities during the years 2000, 2001, and 2004. The Court approved the fines included in the plea agreements for the companies and most of the managers, and sentenced one manager to six months community service.

Over the past two years, the IAA opened a number of investigations concerning bid rigging and anticompetitive courses of action by industry associations, including bread bakeries, gypsum manufacturers, water meter manufacturers, and insurance appraisers.

B. SOUTH AFRICA

1. *Legislation/Regulations*

The *Competition Amendment Act of 2009*, not yet in effect, would introduce fines up to R\$500,000 or imprisonment up to ten years for directors and managers engaging in price fixing and market allocation. Further, it would enable the Competition Commission (the Commission) to investigate firms in concentrated industries who conduct their business in a “consciously parallel” or coordinated manner, and to apply to the Competition Tribunal for remedies.

2. *Mergers*

Following a previously quiet period, the Commission reported an approximate twenty percent increase in notifications of mergers in its 2010/2011 Annual Report, reflecting increased M&A activity in South Africa. 229 merger transactions were notified, of which 200 were unconditionally approved, fourteen approved with conditions, two were prohibited, and four were withdrawn.⁹⁵ Significantly, a number of the conditions imposed related to concerns raised by employees or trade unions about the effect of proposed mergers on the public interest (including employment levels and labor agreements) in South Africa—a factor that the South African competition law authorities are required to consider.⁹⁶

The Commission prohibited the merger between Pioneer Hi-Bred International, a U.S.-based multinational, and Pannar Seed, a local seed company, on the basis that it would eliminate an effective competitor and raise barriers to entry, despite the parties’ argument that there would be technological, efficiency, and pro-competitive gains with the introduction of breeding technologies.⁹⁷ This decision is being appealed.

The Commission dealt with five cases in which parties had implemented their mergers prior to obtaining approval from the competition authorities. An administrative penalty was imposed in only one case, but it was more than double the previous highest fine imposed by the Tribunal for this offense.⁹⁸

95. *Annual Report 2010/2011*, COMPETITION COMM’N OF S. AFR., <http://www.compcom.co.za/assets/Publications/Annual-Reports/CC-Final-Annual-Report-2010-2011-lowres3.pdf>.

96. *See* Reasons for Decision, S.Afr. Competition Tribunal, Acquisition by Wal-Mart Stores, Inc. of Massmart Holdings Ltd., Case No. 73/LM/Nov10 (June 29, 2011).

97. Peixoto 2011, *supra* note 1, at 61.

98. *Id.*

3. *Anticompetitive Practices*

The Commission referred twenty-one complaints to the Competition Tribunal for adjudication in the 2010/2011 period under review,⁹⁹ most of which (eighteen) were cartel-related.¹⁰⁰ The Commission received thirty-three leniency applications in cartel cases, the majority being applications in the food and agro-processing industry.¹⁰¹

4. *Exemptions*

In 2011, the Commission considered thirteen exemption applications. Exemptions were granted to a health professionals association, a hospital network relating to collective negotiation with medical schemes, and the Petroleum Industry Association. Although it rejected the Law Society of South Africa's exemption application,¹⁰² the Commission recognized that in principle, restrictions on competition might be necessary to maintain professional standards or to protect the public.¹⁰³

5. *Court Decisions*

The Competition Appeal Court clarified the factors that must be taken into account when calculating fines in cartel cases in halving the fine for price fixing in the *Southern Pipeline Contractors v. Competition Commission* case.¹⁰⁴ In addition, this year saw a number of the Commission's complaint referrals being challenged on procedural grounds in light of previous superior court decisions relating to the procedure adopted by the Commission when initiating, investigating, and prosecuting complaints.¹⁰⁵

99. *Id.*

100. *Id.*

101. *Id.*

102. Press Release, Competition Commission of S. Afr., Commission Rejects Law Society of South African Application for Exemption (Mar. 14, 2011), <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/LSSAFinal-Statement.pdf>.

103. *Id.*

104. *S. Pipeline Contractors & Conrite Walls Ltd. v. The Competition Comm'n*, Case No. 105/CAC/Dec10 (Aug. 4, 2011), available at www.comptrib.co.za.

105. See *Loungefoam Ltd. & Vitafoam Ltd. v. Competition Comm'n*, Case No. 100, 101 & 102/CAC/Jun10 (June 5, 2011) (S.Afr.); *Yara S. Afr. & Omnia Fertilizer Ltd. v. Competition Comm'n*, 93/CAC/Mar10 (Mar. 14, 2011) (S. Afr.).

