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## International Antitrust

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# International Antitrust

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This article outlines important developments in key areas of antitrust enforcement in fourteen selected jurisdictions during 2012.<sup>1</sup> Prepared by antitrust law practitioners and the International Antitrust Law Committee, this article summarizes a detailed publication covering antitrust developments in more than thirty jurisdictions worldwide.<sup>2</sup>

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\* Marcelo den Toom, M. & M. Bomchil (Argentina) served as the overall committee editor for this article and editor of selected sections. Claire Green served as editor of the Asia-Pacific section. Sandy Walker served as editor of the North American section, and Matthew Hall served as editor of the European section. The authors were: Maria Cecilia Andrade and Ana Carolina Estevão, Mattos Muriel Kestener Advogados (Brazil); Sandy Walker, Fraser Milner Casgrain LLP (Canada); Lucía Ojeda Cárdenas, Sai Abogados (Mexico); John R. Ingrassia, Alicia J. Batts, and Courtney Devon Taylor, Proskauer Rose LLP (United States); Paul Schoff and Katrina Groshinski, Minter Ellison (Australia); Peter Wang and Yizhe Zhang, Jones Day (China); Vinod Dhall, Dhall Law Chambers (India); Michael Clancy and Laurie-Anne Grelrier, Covington & Burling LLP (European Union); François Brunet and Eric Paroche, Cleary Gottlieb Steen Hamilton LLP (France); Susanne Zuehlke and Tobias Kruis, Latham & Watkins LLP (Germany); Vassily Rudomino, Ludmila Merzlikina, and Elena Kazak, Alrud (Russia); Matthew Hall, McGuireWoods LLP (United Kingdom); Tal Eyal-Boger and Shira Gillat, Fischer Behar Chen Well Orion & Co. (Israel); Heather Irvine and Lara Granville, Norton Rose (South Africa).

1. For developments during 2011, see Maria Cecilia Andrade et al., *International Antitrust*, 46 INT'L LAW. 41 (2012). For developments during 2010, see Bruno L. Peixoto et al., *International Antitrust*, 45 INT'L LAW. 39 (2011).

2. INT'L Antitrust Law Comm., *Extended Editions of the Year in Review*, A.B.A., <http://apps.americanbar.org/dch/committee.cfm?com=IC722000> (last visited Mar. 6, 2013).

## The Americas

### I. Brazil

#### A. LEGISLATIVE DEVELOPMENTS

The new Brazilian Competition Law (Law 12,529/11), in force as of May 28, 2012, introduced the previous notification system for mergers and some new rules for anticompetitive conduct.<sup>3</sup> According to the new law, mergers shall be reported to the Administrative Council for Economic Defense (CADE) if (1) the combined Brazilian turnover of all undertakings of one economic group concerned was in the previous year equal to or greater than R\$750 million and (2) the combined Brazilian turnover of all undertakings of another economic group concerned was in the previous year equal to or greater than R\$75 million.<sup>4</sup>

#### B. MERGERS

CADE approved without restrictions the acquisition of Rapidão Cometa by Fedex Corporation<sup>5</sup> and the creation of a joint venture between local companies (Petrobras, Camargo Corrêa, Copersucar, Cosan, Odebrecht, and Uniduto) that will build Brazil's first ethanol pipeline. CADE's Superintendent General also approved without restrictions the joint venture between BMG and Itaú, two Brazilian banks related to the payroll-linked loan agreements market. In the airline sector, CADE approved with restrictions the landmark merger of Brazilian carrier TAM with Chile's LAN,<sup>6</sup> and the merger of local carriers Gol and Webjet.<sup>7</sup> But the acquisition of cement company Cimpor by Votorantim was prohibited by CADE<sup>8</sup>, while the part of the same deal that involved the sale of some Cimpor assets to competitor Camargo Corrêa was approved with restrictions.<sup>9</sup>

3. Lei No. 12.529, de 30 de Novembro de 2011, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 28.5.2012 (Braz.).

4. See *id.*; Maria Cecilia Andrade & Ana Carolina Estevão, *The Main Changes Introduced by the New Brazilian Competition Law*, A.B.A. INT'L MERGERS & ACQUISITIONS & JOINT VENTURES COMMITTEE 3-4 (Apr. 13, 2012).

5. Conselho Administrativo de Defesa Econômica [Administrative Council for Economic Defense], Process No. 08700.004030/2012-51 (Oct. 2, 2012) (Braz.), *available at* <http://www.cade.gov.br>.

6. Conselho Administrativo de Defesa Econômica [Administrative Council for Economic Defense], Process No. 08012.009497/2010-84 (Dec. 14, 2011) (Braz.), *available at* <http://www.cade.gov.br>.

7. Conselho Administrativo de Defesa Econômica [Administrative Council for Economic Defense], Process No. 08012.008378/2011-95 (Oct. 10, 2011) (Braz.), *available at* <http://www.cade.gov.br>.

8. Conselho Administrativo de Defesa Econômica [Administrative Council for Economic Defense], Process No. 08012.001875/2010-81 (July 10, 2012) (Braz.), *available at* <http://www.cade.gov.br>.

9. Conselho Administrativo de Defesa Econômica [Administrative Council for Economic Defense], Process No. 08012.001879/2010-60 (July 10, 2012) (Braz.), *available at* <http://www.cade.gov.br>; Conselho Administrativo de Defesa Econômica [Administrative Council for Economic Defense], Process No. 08012.002018/2010-07 (July 10, 2012) (Braz.), *available at* <http://www.cade.gov.br>; Conselho Administrativo de Defesa Econômica [Administrative Council for Economic Defense], Process No. 08012.002259/2012-18 (July 10, 2012) (Braz.), *available at* <http://www.cade.gov.br>.

### C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

CADE's Attorney General's Office issued a non-binding opinion recommending the application of sanctions to several cement companies for alleged collusive practices.<sup>10</sup> CADE fined Peróxidos do Brasil and some individuals over R\$16 million for operating a cartel in the hydrogen peroxide market.<sup>11</sup>

### D. ABUSES OF DOMINANCE

CADE and Banco do Brasil entered into a cease-and-desist commitment related to exclusivity clauses included in payroll-linked loan agreements executed between the bank and public officials. In addition to the termination of the exclusivity clauses, Banco do Brasil will pay a compensation of R\$65 million plus a penalty of over R\$34 million.<sup>12</sup> In an unrelated case, CADE adopted a preventive measure to hinder Cia. Siderurgica Nacional SA (CSN), Brazil's third largest steelmaker, from exercising its voting rights to appoint members to the Board of Directors and Audit Committee of steelmaker and competitor Usinas Siderurgicas de Minas Gerais SA (Usiminas).<sup>13</sup> CSN is also prevented from acquiring additional shares in its competitor, converting preferred shares into voting shares, or obtaining access to Usiminas' competitively sensitive information.

### E. COURT DECISIONS

CADE's 2005 decision convicting several pharmaceutical companies of cartel behavior in Brazil for alleged concerted actions to prevent entry of generic drugs was annulled by a lower court.<sup>14</sup>

## II. Canada

### A. LEGISLATIVE DEVELOPMENTS

The Competition Bureau (the Bureau) published revised Merger Review Process Guidelines that reflect current Bureau practices and provide guidance on the supplemen-

10. Conselho Administrativo de Defesa Economica [Administrative Council for Economic Defense], *Processo Administrativo* [Administrative Process] No. 08012.011142/2006-79 (Dec. 17, 2008) (Braz.), *available at* <http://www.cade.gov.br>.

11. Conselho Administrativo de Defesa Economica [Administrative Council for Economic Defense], *Processo Administrativo* [Administrative Process] No. 08012.004702/2004-77 (Aug. 27, 2009) (Braz.), *available at* <http://www.cade.gov.br>.

12. Conselho Administrativo de Defesa Economica [Administrative Council for Economic Defense], *Processo Administrativo* [Administrative Process] No. 08700.003070/2010-14 (July 28, 2010) (Braz.), *available at* <http://www.cade.gov.br>.

13. Conselho Administrativo de Defesa Economica [Administrative Council for Economic Defense], *Processo Administrativo* [Administrative Process] No. 08012.009198/2011-21 (April 11, 2012) (Braz.), *available at* <http://www.cade.gov.br>; see Juan Pablo Spinetto, *CSN Voting Rights in Usiminas Blocked by Brazilian Regulator*, BLOOMBERG (Apr. 11, 2012, 10:00 PM), <http://www.bloomberg.com/news/2012-04-11/csn-rights-over-usiminas-stake-suspended-by-brazil-s-cade-1-.html>.

14. Conselho Administrativo de Defesa Economica [Administrative Council for Economic Defense], *Processo* No. 08012.009088/1999-48 (Jan. 25, 2005) (Braz.), *available at* <http://www.cade.gov.br>. As of April 2012, CADE's appeal No.2007.34.00.044314-6 is pending before the First Federal District Court.

tary information request issuance process and the use of timing agreements.<sup>15</sup> In September 2012, the Bureau issued updated Enforcement Guidelines on the Abuse of Dominance Provisions that are considerably less detailed than predecessor versions but do offer some guidance on the Bureau's enforcement approach to assessing abuse of dominance cases, including issues such as joint dominance.<sup>16</sup>

## B. MERGERS

In July 2012, the Bureau advised that it did not intend to make an application to the Competition Tribunal to challenge Maple Group's bid to acquire TMX Group (which owns the Toronto Stock Exchange).<sup>17</sup> In the same month, the Bureau concluded its review of United Technology Corporation's proposed acquisition of Goodrich Corporation, and issued a "no action" letter, relying on remedial orders issued by U.S. and European antitrust authorities.<sup>18</sup>

## C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In January 2012, the Bureau obtained its first conviction under Canada's amended conspiracy law.<sup>19</sup> In response, Visa and MasterCard challenged the decision concerning their so-called "merchant restrictions" under the price maintenance provision of the Competition Act with the Commissioner of Competition (Commissioner) in May and June of 2012.<sup>20</sup> The Competition Tribunal has not yet issued a decision.

## D. ABUSES OF DOMINANCE

Following the Commissioner's abuse of dominance case against the Canadian Real Estate Association in 2010 (which was settled), the Commissioner challenged the conduct of another real estate organization, the Toronto Real Estate Board (TREB).<sup>21</sup> The Commissioner alleged that the TREB abused its dominant position in the supply of residential real estate brokerage services in the Greater Toronto Area.

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15. Press Release, Can. Competition Bureau, Competition Bureau Publishes Revised Merger Review Process Guidelines (Jan. 11, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03080.html>.

16. Press Release, Can. Competition Bureau, Competition Bureau Issues Abuse of Dominance Guidelines (Sept. 20, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03500.html>.

17. Press Release, Can. Competition Bureau, Competition Bureau Completes Review of Proposed Maple-TMX Transaction (July 4, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03480.html>.

18. Press Release, Can. Competition Bureau, Competition Bureau Statement Regarding United Tech. Corp.'s Acquisition of Goodrich Corp (July 26, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>.

19. Press Release, Can. Competition Bureau, Competition Bureau Sends Signal to Price-Fixers with \$12.5 Million Fine (Jan. 6, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01353.html>.

20. Press Release, Can. Competition Bureau, Competition Bureau Alleges Anti-Competitive Conduct by Visa and MasterCard: Hearing Starts Today (May 8, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03465.html>.

21. Press Release, Can. Competition Bureau, Competition Bureau's Case Against Canada's Largest Real Estate Board: Hearing Starts Today (Sept. 10, 2012), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03495.html>; Press Release, Can. Competition Bureau, Final Agreement Paves Way for More Competition in Canada's Real Estate Market (Oct. 24, 2010), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03305.html>.

## E. COURT DECISIONS

An Ontario court dismissed claims asserted by franchisees against a franchisor under the price maintenance provision of the Competition Act.<sup>22</sup> The court concluded that the price maintenance rule does not apply to prohibit a supplier from increasing its price to a reseller who is free to sell the product at whatever price it chooses.

## III. Mexico

### A. LEGISLATIVE DEVELOPMENTS

In November 2012, an amendment to the internal regulations of the Mexican Federal Competition Commission (FCC) was published, clarifying the FCC's powers, including those of the Plenum (FCC's supreme collegiate decision organ) to authorize dawn raids in investigations of monopolistic practices.<sup>23</sup>

### B. MERGERS

During 2012, the FCC completed fifty-six merger reviews, forty-nine of which were initiated this year.<sup>24</sup> Included in this sum is the acquisition by Delta Airlines of 3.5 percent of Grupo Aeroméxico's shares,<sup>25</sup> along with the approval of Grupo Televisa's acquisition of 50 percent of GSF Telecom Holdings (GSF),<sup>26</sup> both authorized with undertakings.

### C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The FCC began to investigate three cases of "absolute monopolistic practices" (term identifying hard-core cartels) in 2012 relating to the auto parts business, which stemmed from international cartel investigations.

### D. ABUSES OF DOMINANCE

In 2012, the FCC initiated investigations in the markets of (1) distribution of printed magazines in Mexico City—for alleged restrictions on resale prices, refusal to deal, dis-

22. *Class Actions Update: Ontario Court Dismisses Competition Act Claims in Tim Hortons Case*, CAN. COMPETITION & REGULATORY L., <http://www.ipvancooverblog.com/2012/03/class-actions-update-ontario-court-dismisses-competition-act-claims-in-tim-hortons-case/> (last visited Feb. 25, 2013).

23. See generally *Reglamento Interior de la Comisión Federal de Competencia* [Internal Regulations of the Federal Competition Commission], as amended, *Diario Oficial de la Federación* [DO], 2 de Noviembre de 2012 (Mex.).

24. See generally *Resoluciones y Opiniones*, Secretaría De Economía, <http://www.cfc.gob.mx/index.php/publicacionesinformes> (last updated Dec. 27, 2012).

25. *Comisión Federal de Competencia* [Federal Commission of Competition], *Delta Air Lines, Inc. y Grupo Aeroméxico SAB*, Report No. CNT-004-2012 (Mex.), available at <http://www.cfc.gob.mx/cfcre resoluciones/DOCS/Concentraciones/V420/7/1651632.pdf>.

26. *Comisión Federal de Competencia* [Federal Commission of Competition], *Resolution No. RA-043-2012* (Mex.), available at <http://www.cfc.gob.mx/cfcre resoluciones/DOCS/Asuntos%20Juridicos/V51/16/1649226.pdf>.

crimination, and increase of costs or reduction of supply;<sup>27</sup> and (2) commercialization of television content—for alleged refusal to supply and actions aimed at increasing costs of products or services or reducing the demand faced by competitors.<sup>28</sup> The most significant abuse cases included:

- The FCC investigated Sabritas for (1) making sales subject to restrictions to purchase from third parties and (2) the refusal to sell products. The case was resolved after Sabritas made commitments to discontinue the allegedly abusive practices.<sup>29</sup>
- With respect to construction materials, the FCC imposed a fine of approximately US \$783,000 on Cemex México S.A. de C.V. for preventing the entry of a ship into Tampico's port.<sup>30</sup>
- With respect to interconnection services on mobile networks, the FCC initially imposed a fine on Telcel of approximately US \$858.8 million for artificially elevating costs, the highest ever imposed in Mexico. Ultimately, the FCC concluded that commitments offered by the company restored competition and decided not to impose penalties.<sup>31</sup>

#### E. COURT DECISIONS

A constitutional challenge against the approval of the merger of Grupo Televisa and GSF was made by a civil rights association on the basis that it harmed the rights of freedom of speech and information, and was admitted by the court.<sup>32</sup>

On June 2011, the Republic's Attorney General submitted an action of unconstitutionality against a law imposing that supermarkets and convenience stores may only be established in certain areas of the capital city.<sup>33</sup> The action asserted that the law violates, among others, the right to free economic competition enshrined in Article 28 of the Mexican Constitution.

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27. Comisión Federal de Competencia [Federal Commission of Competition], Report No. DE-026-2009 (Mex.), available at <http://www.cfc.gob.mx/cfcresoluciones/DOCS/INVESTIGACIONES/V252/26/1653548.pdf>.

28. Comisión Federal de Competencia [Federal Commission of Competition], Resolution No. DE-002-2012 (Mex.), available at <http://www.cfc.gob.mx/cfcresoluciones/DOCS/INVESTIGACIONES/V252/26/1653324.pdf>.

29. Comisión Federal de Competencia [Federal Commission of Competition], Resolution No. DE-148-2008 (Mex.), available at <http://www.cfc.gob.mx/cfcresoluciones/DOCS/INVESTIGACIONES/V238/10/1617438.pdf>.

30. Comisión Federal de Competencia [Federal Commission of Competition], Resolution No. DE-017-2006 (Mex.), available at <http://www.cfc.gob.mx/cfcresoluciones/DOCS/Asuntos%20Juridicos/V49/12/1626944.pdf>.

31. Comisión Federal de Competencia [Federal Commission of Competition], Resolution No. RA-007-2011 (Mex.), available at <http://resoluciones.cfc.gob.mx/DOCS/Asuntos%20Juridicos/V50/15/1641725.pdf>.

32. *Newsletter Search*, INT'L L. OFF., <http://www.internationallawoffice.com/newsletters/Default.aspx?c=Mexico&fy=2011&fm=2&fd=8&s=1> (last visited Feb. 25, 2013).

33. Ruben Mosso, *Revisa la Suprema Corte Protección a Mercados Públicos* [Supreme Court Reviews the Public Markets Protection], MILENIO (Sept. 17, 2012), <http://www.milenio.com/cdb/doc/noticias2011/64346adc04d78af50bf575d54f07f5ed>.



## IV. United States

### A. LEGISLATIVE DEVELOPMENTS

The U.S. Federal Trade Commission (FTC) proposed an expansion of the Hart-Scott-Rodino (HSR) reporting requirements for certain pharmaceutical licenses.<sup>34</sup> Under the proposed rule, patent holders that retain the exclusive right to manufacture a product covered by the patent for a licensee will be subject to premerger reporting requirements, resulting in approximately thirty additional transactions per year being subject to review.<sup>35</sup>

### B. MERGERS

In *FTC v. Phoebe Putney Health System*, the Eleventh Circuit affirmed a lower court decision holding that the merger of two private hospitals, likely creating a monopoly, was immune from antitrust scrutiny under the “state action doctrine.”<sup>36</sup> The decision is being appealed to the Supreme Court.<sup>37</sup>

In *Polypore International v. FTC*, the Eleventh Circuit upheld an earlier FTC divestiture order against battery components manufacturer Polypore International after it acquired its competitor, Microporous.<sup>38</sup> The transaction was determined not only to substantially lessen competition but to prevent competition with respect to products into which the target was trying to expand.<sup>39</sup>

### C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The U.S. Department of Justice (DOJ) continued its investigation into price fixing and bid rigging in the Japanese automobile parts industry, with nine companies and eleven executives pleading guilty (or agreeing to plead guilty).<sup>40</sup> The companies were sentenced to pay a total of more than US \$790 million in criminal fines, while executives who pled guilty to the scheme were sentenced to criminal fines and jail sentences,<sup>41</sup> including the longest jail terms ever imposed on a foreign national voluntarily submitting to U.S. jurisdiction for a Sherman Act antitrust violation.<sup>42</sup>

The DOJ filed a civil lawsuit against Apple and five book publishers alleging that they conspired to fix the price of e-books.<sup>43</sup> Sixteen states and certain U.S. territories also filed

34. Premerger Notification; Reporting and Waiting Period Requirements, 77 Fed. Reg. 50,057 (Aug. 20, 2012) (to be codified at 16 C.F.R. pt. 801).

35. *Id.*

36. Fed. Trade Comm’n v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369 (11th Cir. 2011), *cert. granted*, 133 S. Ct. 28 (2012).

37. Petition for Writ of Certiorari, Fed. Trade Comm’n v. Phoebe Putney Health Sys., 133 S. Ct. 28 (2012) (No. 11-1160), 2012 WL 985316.

38. Polypore Int’l, Inc. v. Fed. Trade Comm’n, 686 F.3d 1208, 1218-19 (11th Cir. 2012).

39. *Id.* at 1219.

40. Press Release, U.S. Dep’t of Justice, Japanese Automobile Parts Manufacturer Agrees to Plead Guilty to Price Fixing and Obstruction of Justice (Oct. 30, 2012), <http://www.justice.gov/opa/pr/2012/October/12-at-1298.html>.

41. *Id.*

42. *Id.*

43. Complaint at 2, United States v. Apple, Inc., 2012 WL 1193295 (S.D.N.Y. April 12, 2012) (No. 12 Civ. 2826).

a *parens patriae* action with similar allegations.<sup>44</sup> Three of the publishers entered into a court approved settlement with the DOJ that did not require monetary payments or the admission of liability or wrongdoing, but required the adoption of certain business and compliance practices.<sup>45</sup> Three of the publishers also entered into a proposed settlement with the United States for US \$69 million in addition to the adoption of business practices, which remains subject to court approval.<sup>46</sup>

#### D. COURT DECISIONS

In *In re American Express Merchants Litigation*, the Second Circuit held for the third time that an arbitration clause with a class action waiver was unenforceable because it precluded plaintiff merchants from asserting federal antitrust claims.<sup>47</sup> The Supreme Court will consider the case, and will likely determine under what circumstances class action waivers are enforceable in the federal antitrust context.

### Asia-Pacific

#### V. Australia

##### A. LEGISLATIVE DEVELOPMENTS

On June 6, 2012, a specific prohibition of anti-competitive price signaling and information disclosure came into force.<sup>48</sup> The provision prohibits both the private disclosure to competitors of information that relates to price, discount, allowance, rebate, or credit, and any disclosure (public or private) of information that relates to these items where the purpose of the disclosure is to substantially lessen competition.

##### B. MERGERS

In 2012, the Australian Competition and Consumer Commission (ACCC) indicated that it will focus on mergers that result in markets having only two competitors, and identified supermarket, liquor, banking, and energy as sectors that would come under the spotlight.<sup>49</sup>

44. Complaint, *Texas v. Penguin Grp. (USA) Inc.*, No.1:12-cv-00324 (W.D. Tex. April 11, 2012).

45. *United States v. Apple, Inc.*, No. 12 Civ. 2826, 2012 WL 3865135 (S.D.N.Y. Sept. 5, 2012); Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Three of the Largest Book Publishers and Continues to Litigate Against Apple Inc. and Two Other Publishers to Restore Price Competition and Reduce E-book Prices (Apr. 11, 2012), <http://www.justice.gov/opa/pr/2012/April/12-at-457.html>.

46. Press Release, Md. Attorney Gen., AG Gansler Secures \$69 Million Agreement with Major U.S. Publishers Over E-book Price-Fixing Allegations (Aug. 29, 2012), <http://www.oag.state.md.us/Press/2012/082912a.html>.

47. *In re Am. Express Merch. Litig.*, 667 F.3d 204 (2d Cir. 2012), *cert. granted*, 133 S. Ct. 594 (2012).

48. *Competition and Consumer Act 2010* (Cth) pt. 4, div. 1A (Austl.).

49. Press Release, Austl. Competition & Consumer Comm'n, ACCC Releases New Compliance and Enforcement Policy (Feb. 21, 2013), <http://www.accc.gov.au/media-release/accc-releases-new-compliance-and-enforcement-policy>.

### C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The ACCC has continued to pursue proceedings against airlines relating to an alleged price fixing cartel in respect of airfreight services. Since 2008, the ACCC has now brought fifteen proceedings against airlines. As of December 2012, thirteen of those proceedings have settled, resulting in penalties totalling AUD \$98.5 million.<sup>50</sup>

The ACCC commenced proceedings against Flight Centre, a major Australian travel agent, for attempting to engage in ticket-price fixing with airlines for direct sales via the Internet.<sup>51</sup> In late 2011, Ticketek, the leading event ticketing company in Australia, admitted that it refused to include in its ticketing system a discounted price type that was to be promoted exclusively by Lastix, a competitive supplier of last minute event tickets. The court found that the actions of Ticketek were a breach of the Competition and Consumer Act (2010) (Cth) and ordered Ticketek to pay a penalty of AUD \$2.5 million.<sup>52</sup>

## VI. China

### A. LEGISLATIVE DEVELOPMENTS

Additional implementing regulations and guidelines under China's Anti-Monopoly Law (AML) were issued in 2012, including Provisional Measures on the Investigation and Handling of Concentrations of Undertakings not Notified in Accordance with the Law<sup>53</sup> (addressing merger non-filing), Rules by the Supreme People's Court on Certain Issues relating to Application of Laws for Hearing Civil Disputes Arising Out of Monopoly Conduct<sup>54</sup> (addressing AML litigation), and draft Anti-Monopoly Enforcement Guidelines involving Intellectual Property Rights (addressing AML-IP issues).<sup>55</sup>

50. Press Release, Austl. Competition & Consumer Comm'n, Thai Airways to Pay \$7.5 Million in Penalties for Price Fixing (Dec. 17, 2012), <http://www.accc.gov.au/media-release/thai-airways-to-pay-75-million-in-penalties-for-price-fixing>.

51. See Austl. Competition & Consumer Comm'n v *Flight Centre Ltd.* (2012) FCA 1161 (Austl.); see also Press Release, Aust. Competition & Consumer Comm'n, ACCC Takes Court Action Against Flight Centre Limited (Mar. 9, 2012), <http://www.accc.gov.au/media-release/accc-takes-court-action-against-flight-centre-limited>.

52. Austl. Competition and Consumer Comm'n v *Ticketek Pty Ltd.* (2011) FCA 1489 (Austl.).

53. See Zhonghua Renmin Gongheguo Shangwubu Ling Nian di Hao Wei Yifa Shenbao Jingying Zhe Jizhong Diaocha Chuli Zan Hang Banfa (中华人民共和国商务部令 未依法申报经营者集中调查处理暂行办法) [Provisional Rules on the Investigation and Handling of Concentrations between Undertakings not Notified in Compliance with the Law] (promulgated by the Chinese Ministry of Commerce, Dec. 30, 2011, effective Feb. 1, 2012), available at [http://www.gov.cn/jfjg/2012-01/05/content\\_2037379.htm](http://www.gov.cn/jfjg/2012-01/05/content_2037379.htm) (China).

54. See You Zuigao Renminfayuan Ruogan Wenti de Youguan Tingzhenghui de Longduan Xingwei Suo Chansheng de Minshi Jiufen Anjian Shiyong Falu Ruogan Wenti de Guiding (由最高人民法院若干问题的有关听证会的垄断行为所产生的民事纠纷案件适用法律若干问题的规定) [Rules by the Supreme People's Court on Certain Issues relating to Application of Laws for Hearing Civil Disputes Arising Out of Monopoly Conduct] (promulgated by the Supreme People's Court, May 3, 2012, effective June 1, 2012) Fa Shi, May 4, 2012, at 5 (China), available at [http://www.court.gov.cn/qwfb/sfjs/201205/t20120509\\_176785.htm](http://www.court.gov.cn/qwfb/sfjs/201205/t20120509_176785.htm).

55. See AM. BAR ASS'N, JOINT COMMENTS ON THE SAIC DRAFT GUIDE ON ANTI-MONOPOLY LAW ENFORCEMENT IN THE FIELD OF INTELLECTUAL PROPERTY RIGHTS (2012), available at [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_salsipsil\\_saic.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsipsil_saic.authcheckdam.pdf).

## B. MERGERS

As of November 27, 2012, MOFCOM had imposed conditions on five cases during 2012. These cases related to: (1) a joint venture between Henkel and Tiande Chemical for the production of an industrial chemical in which MOFCOM required ongoing non-discriminatory supply by Tiande to unaffiliated downstream customers competing with the JV;<sup>56</sup> (2) *Western Digital/Hitachi*, in which the parties were ordered to hold themselves separate for two years and divest certain 3.5 inch HDD assets of Hitachi; (3) *Google/MMI*, requiring that Google maintain Android as a free and open source for five years and provide FRAND licensing for MMI's essential patents; (4) *UTC/Goodrich*, in which MOFCOM ordered divestiture of certain power generation assets of Goodrich; and (5) *Walmart/Newbeight*, in which Walmart was prohibited from engaging in value added telecommunication services via the controlled entity.<sup>57</sup>

## C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2012, the National Development and Reform Commission (NDRC) investigated fifteen cases involving price-related monopoly conduct. The NDRC publicized one cartel in the local sea sand mining sector in Guangdong province, in which a company that provided important evidence to the NDRC was granted a 50 percent fine reduction.<sup>58</sup> The local Development and Reform Commission in Hubei also published actions relating to several local price cartels involving soybean products and real estate agency service fees.<sup>59</sup>

In addition, the State Administration for Industry and Commerce (SAIC), which is responsible for non-price related conduct violations under the AML, prescribed penalties in two cases in 2012. In one publicized case involving market allocation between second hand car traders, the illegal gain of ¥1,468,202 was confiscated and a fine of ¥264,920 was imposed.<sup>60</sup> Another case investigated by SAIC reportedly involved thirteen construction materials companies and their trade association in Liaoning province and resulted in a total fine of ¥15 million.<sup>61</sup>

56. See Press Release, Ministry of Commerce of China, Announcement No. 6 of 2012 (Feb. 9, 2012), <http://english.mofcom.gov.cn/article/policyrelease/domesticpolicy/201203/20120308033072.shtml>.

57. See Press Release, Ministry of Commerce of China, MOFCOM Held Special Press Conference on "Anti-monopoly Work Progress in 2012" (Jan. 8, 2012), <http://english.mofcom.gov.cn/article/newsrelease/press/201301/20130108513014.shtml>.

58. See Press Release, Nat'l Dev. Reform Comm'n, Guangdong Investigated Sea Sand Price Monopoly Cases to Ensure the Smooth Constr. of Key Nat'l Projects (Nov. 26, 2012), [http://jjs.ndrc.gov.cn/gzdt/t20121026\\_510834.htm](http://jjs.ndrc.gov.cn/gzdt/t20121026_510834.htm).

59. See Press Release, Nat'l Dev. Reform Comm'n, Hubei Province Price Bureau Exposure 9 Cases of Illegal Price Cases (May 5, 2012), [http://www.ndrc.gov.cn/zjgx/t20120525\\_481706.htm](http://www.ndrc.gov.cn/zjgx/t20120525_481706.htm).

60. See Press Release, State Admin. of Indus. & Commerce of China, Sharpen Elite Troops Care Fair - Henan Province, Industry and Commerce Auths. to Investigate and Deal with the Nation's First Case of Second-hand Car Market Monopoly Documentary (Oct. 11, 2012), [www.saic.gov.cn/jgzf/fldyfbzljz/201210/t20121011\\_130111.html](http://www.saic.gov.cn/jgzf/fldyfbzljz/201210/t20121011_130111.html).

61. See *SAIC Criminal Investigation Cases, 16 Cases of Suspected Monopoly*, LEGAL DAILY (Aug. 14, 2012, 7:08 AM), [http://www.legaldaily.com.cn/index\\_article/content/2012-08/14/content\\_3768640.htm?node=5955](http://www.legaldaily.com.cn/index_article/content/2012-08/14/content_3768640.htm?node=5955).

## D. COURT DECISIONS

In one vertical agreement case, plaintiff Rainbow sued Johnson & Johnson alleging re-sale price maintenance regarding medical equipment and wrongful termination of its distributor agreement after Rainbow sold below the specified minimum resale price. The court of first instance ruled in favor of the defendant, finding that Rainbow had failed to prove anticompetitive effects.<sup>62</sup>

## VII. India

### A. LEGISLATIVE DEVELOPMENTS

The Competition Commission of India (CCI) amended its Merger Regulations in February 2012.<sup>63</sup> The threshold for notifying the CCI of the acquisition of shares or voting rights was raised from 15 percent to 25 percent to bring it in line with stock market regulations.<sup>64</sup> The CCI also partly corrected an anomaly in its regulations by exempting filing requirements for mergers or amalgamations of wholly-owned subsidiaries within a group. The CCI also introduced a regulation stating that where the assets are transferred to another enterprise to be acquired by another entity, the turnover and assets of the transferring enterprise shall be attributed to the enterprise that was transferred. The filing fees were also increased substantially.

### B. MERGERS

The CCI has not blocked any mergers so far. In 2012, it cleared several mergers, including the acquisition of control by Reliance Industries Ltd. of the media company Network18,<sup>65</sup> and the acquisition by Newscorp of Disney's interest in sports broadcaster ESPN-Star Sports.<sup>66</sup>

### C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The CCI imposed a penalty of US \$1.148 billion (based largely on circumstantial evidence) on eleven cement manufacturers for colluding to limit the production and supply

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62. See Liu Jianqiang Gu Ying-sheng, *Huge Johnson Claim was Rejected The First Trial of the Vertical Monopoly Disputes*, LEGAL DAILY (May 18, 2012, 1:51 PM), [www.legaldaily.com.cn/legal\\_case/content/2012-05/18/content\\_3582970.htm?node=33808](http://www.legaldaily.com.cn/legal_case/content/2012-05/18/content_3582970.htm?node=33808).

63. See The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combination) Amendment Regulations, 2012, Gazette of India (Feb. 23, 2012), available at [http://www.cci.gov.in/images/media/Regulations/CCI\\_Combinations\\_Amendment\\_Regulations\\_2012\\_23\\_02\\_2012.pdf](http://www.cci.gov.in/images/media/Regulations/CCI_Combinations_Amendment_Regulations_2012_23_02_2012.pdf).

64. *Id.*

65. See COMPETITION COMM'N OF INDIA, COMBINATION REGISTRATION No. C-2012/03/47 (May 28, 2012), available at <http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-03-47.pdf>.

66. See COMPETITION COMM'N OF INDIA, COMBINATION REGISTRATION No. C-2012/07/64 (Sept. 20, 2012), available at <http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-07-64.pdf>.

of cement and fixing its price.<sup>67</sup> The CCI also imposed a penalty of US \$30 million on forty-eight LPG cylinder manufacturers for bid-rigging in tenders issued by the Indian Oil Corporation.<sup>68</sup> A fine of US \$57.76 million was imposed on three companies for bid-rigging in a tender for the supply of aluminum phosphide tablets used for preservation of food grains by the Food Corporation of India.<sup>69</sup>

#### D. ABUSES OF DOMINANCE

The automotive spare parts industry is currently under investigation by the CCI. The CCI imposed a penalty of US \$1.01 million on Schott Glass India Pvt. Ltd. for abuse of its dominant position in the upstream markets for amber and clear glass by offering dissimilar discounts and unfair conditions.<sup>70</sup>

### Europe

## VIII. The European Union

#### A. LEGISLATIVE DEVELOPMENTS

The European Commission (EC) released new guidance on the application of the EU antitrust rules in the motor vehicles sector,<sup>71</sup> and continued its review of the rules applicable to technology transfers.<sup>72</sup> It has also been working on a legislative proposal concerning private antitrust damages claims.<sup>73</sup>

67. See COMPETITION COMM'N OF INDIA, IN RE: ALLEGED CARTELIZATION BY CEMENT MANUFACTURERS, CASE No. RTPE 52 OF 2006 (July 30, 2012), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/522006.pdf>.

68. See COMPETITION COMM'N OF INDIA, IN RE: SUO MOTU CASE AGAINST LPG CYLINDER MANUFACTURERS, CASE No. 3/2011 (Feb. 24, 2012), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/LPGMainfeb2.pdf>.

69. See COMPETITION COMM'N OF INDIA, ALUMINIUM PHOSPHIDE TABLETS MANUFACTURERS, CASE No. 02/2011 (Apr. 23, 2012), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/Case2of2011MainOrder.pdf>.

70. See COMPETITION COMM'N OF INDIA, KAPOOR GLASS PRIVATE LIMITED V. SCHOTT GLASS INDIA PRIVATE LIMITED, CASE No. 22/2010 (2012), *available at* <http://www.cci.gov.in/May2011/OrderOfCommission/Case22of2010MainOrder.pdf>.

71. See Press Release, European Comm'n, Antitrust: Comm'n Publishes Guidance on Application of Competition Rules in Car Sector (Aug. 27, 2012), [http://europa.eu/rapid/press-release\\_IP-12-915\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-12-915_en.htm?locale=en).

72. *Revision of the Rules for the Assessment of Licensing Agreements for the Transfer of Technology Under EU Competition Law*, EUROPEAN COMMISSION, [http://ec.europa.eu/competition/consultations/2012\\_technology\\_transfer/index\\_en.html](http://ec.europa.eu/competition/consultations/2012_technology_transfer/index_en.html) (last visited Feb. 3, 2012) (see consultation documents).

73. *Follow-up to the White Paper and Green Paper on Antitrust Damages Actions*, EUROPEAN COMMISSION, <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> (last visited Feb. 3, 2012) (see materials).

## B. MERGERS

The EC blocked the proposed merger between Deutsche Börse and NYSE Euronext due to concerns regarding European financial derivatives traded on exchanges.<sup>74</sup> It opened an in-depth investigation into airline Ryanair's third attempt to take over competitor Aer Lingus.<sup>75</sup> In the ICT sector, the EC gave its approval to Google's proposed acquisition of Motorola Mobility, noting that potential concerns regarding the use of standard-essential patents were not merger-specific.<sup>76</sup> The EC also cleared the proposed merger between Universal and EMI Music, subject to a commitment package that included the divestment of various record labels.<sup>77</sup>

## C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The total amount of fines imposed by the EC for cartel infringements in 2012 was almost €1.9 billion.<sup>78</sup> The EC used its settlement procedure for the sixth time, resolving a cartel case concerning water management products. Outside the settlement process, the EC imposed cartel fines in cases involving window mounting producers and freight forwarders.<sup>79</sup>

The EC issued formal statements of objections to investigations into reverse payment patent settlements concerning, among others, Lundbeck and Servier.<sup>80</sup>

## D. ABUSES OF DOMINANCE

The EC investigated alleged abuses by Google concerning search and advertising services.<sup>81</sup> It also launched investigations into litigation by Samsung and Motorola concerning standard essential patents in the telecommunications sector.<sup>82</sup> In the energy sector,

74. See Press Release, European Commission, Mergers: Commission Blocks Proposed Merger Between Deutsche Börse and NYSE Euronext (Feb. 1, 2012), [http://europa.eu/rapid/press-release\\_IP-12-94\\_en.htm](http://europa.eu/rapid/press-release_IP-12-94_en.htm).

75. See Press Release, European Comm'n, Mergers: Comm'n Opens in-depth Investigation into Proposed Acquisition of Aer Lingus by Ryanair (Aug. 29, 2012), [http://europa.eu/rapid/press-release\\_IP-12-921\\_en.htm](http://europa.eu/rapid/press-release_IP-12-921_en.htm).

76. See Press Release, European Comm'n, Mergers: Comm'n Approves Acquisition of Motorola Mobility by Google (Feb. 13, 2012), [http://europa.eu/rapid/press-release\\_IP-12-129\\_en.htm](http://europa.eu/rapid/press-release_IP-12-129_en.htm).

77. See Press Release, European Comm'n, Mergers: Comm'n Clears Universal's Acquisition of EMI's Recorded Music Business, Subject to Conditions (Sept. 21, 2012), [http://europa.eu/rapid/press-release\\_IP-12-999\\_en.htm](http://europa.eu/rapid/press-release_IP-12-999_en.htm).

78. EUR. COMM'N COMM. ON COMPETITION, CARTEL STATISTICS (Dec. 5, 2012), available at <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>.

79. *Cartels: Cases*, EUROPEAN COMMISSION, <http://ec.europa.eu/competition/cartels/cases/cases.html> (last updated Jan. 8, 2012) (see information about EC cartel cases).

80. *Competition: Pharmaceuticals: What's New?*, EUROPEAN COMMISSION, <http://ec.europa.eu/competition/sectors/pharmaceuticals/news.html> (last updated Jan. 31, 2012) (see information about EC pharmaceutical cases).

81. See Press Release, Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, Statement of VP Almunia on the Google Antitrust Investigation (May 21, 2012), [http://europa.eu/rapid/press-release\\_SPEECH-12-372\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-12-372_en.htm?locale=en).

82. *Competition: Information Communication Technologies (ICT): What's New?*, EUROPEAN COMMISSION, <http://ec.europa.eu/competition/sectors/ICT/news.html> (last updated Dec. 5, 2012) (see information about EC telecommunications cases).

the EC launched an investigation into potential abuses by Gazprom, triggering a strong reaction from the Russian government.<sup>83</sup>

## E. COURT DECISIONS

The EC had a relatively successful year in front of the EU courts, including its decisions against Microsoft (periodic penalty payment) and MasterCard (multilateral interchange fees) being upheld.<sup>84</sup> One setback was the partial reversal by the General Court of the EC's cartel decision concerning E.ON on the grounds that the EC erred concerning the duration of the infringement, which resulted in a fine reduction of €466 million.<sup>85</sup> In addition, the Court of Justice clarified the rules applicable to selective distribution systems in the motor vehicles sector.<sup>86</sup>

## IX. France

### A. LEGISLATIVE DEVELOPMENTS

On February 10, 2012, the French Competition Authority (FCA) released two sets of guidelines.<sup>87</sup> The settlement procedure guidelines provide for a 10 percent reduction in fines for companies that waive their right to reply to a statement of objections issued by the FCA in competition law infringement cases.<sup>88</sup> They also provide for an additional fine reduction for companies that make certain commitments as part of the settlement procedure. The compliance program guidelines explain how to build credible compliance programs and how the FCA will consider these programs when setting the level of fines in a settlement procedure.

### B. MERGERS

On July 23, 2012, the FCA approved two mergers regarding Canal Plus.<sup>89</sup> Acquisitions of two free-TV channels were approved subject to commitments by Canal Plus aimed at

83. See Press Release, European Commission, Antitrust: Commission Opens Proceedings Against Gazprom (Sept. 4, 2012), [http://europa.eu/rapid/press-release\\_IP-12-937\\_en.htm](http://europa.eu/rapid/press-release_IP-12-937_en.htm).

84. See *Microsoft v. Comm'n*, No. T-167/08, 2012 E.C.R. 243, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:243:0013:0014:EN:PDF>; *MasterCard v. Comm'n*, No. T-111/08, 2012 E.C.R. 243, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008TJ0111:EN:HTML#Footnote\\*](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008TJ0111:EN:HTML#Footnote*).

85. *General Court Slashes Energy Market-Sharing Fines*, GLOBAL COMPETITION REV. (July 2, 2012), <http://www.globalcompetitionreview.com/news/article/32040/general-court-slashes-energy-market-sharing-fines/>.

86. *Press Releases*, CT. OF JUSTICE OF THE EUROPEAN UNION, [http://curia.europa.eu/jcms/jcms/Jo2\\_16799/?annee=2012](http://curia.europa.eu/jcms/jcms/Jo2_16799/?annee=2012) (last visited Feb. 3, 2013) (see EU Court judgments and corresponding press releases).

87. See *Framework-Documents of 10 February 2012 on Antitrust Compliance Programmes*, FRENCH COMPETITION AUTHORITY (Feb. 10 2012), [http://www.autoritedelaconurrence.fr/doc/framework\\_document\\_compliance\\_10february2012](http://www.autoritedelaconurrence.fr/doc/framework_document_compliance_10february2012); FRENCH COMPETITION AUTHORITY, *RELEASE PROCEDURE FEBRUARY 10 ON NON-CONTEST PROCEDURE (2012)*, available at [http://www.autoritedelaconurrence.fr/doc/communiquenecg\\_10fevrier2012.pdf](http://www.autoritedelaconurrence.fr/doc/communiquenecg_10fevrier2012.pdf).

88. See *Release Procedure*, *supra* note 87.

89. French Competition Authority, Decision No. 12-DCC-101, July 23, 2012, Relating to the Acquisition of Sole Control of the Company Direct 8, Direct Star, Direct Productions, Direct Digital Intermedia and Bolloré by Vivendi Canal Plus Group 89, available at <http://www.autoritedelaconurrence.fr/pdf/avis/>



limiting its ability to leverage from pay-TV, where Canal Plus is super-dominant, into free-TV. The second decision concerned the buy-out of TPS by Canal Plus. The FCA had previously withdrawn the authorization of this merger after Canal Plus breached the commitments subject to which the transaction was cleared in 2006.<sup>90</sup> The FCA found Canal Plus' proposed revised commitments unsatisfactory and imposed its own obligations.

### C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On December 8, 2011, the FCA imposed €360 million in fines on Unilever, Procter & Gamble, Henkel, and Colgate Palmolive for price fixing regarding laundry detergents.<sup>91</sup> For the first time, the FCA used its 2011 guidelines to calculate fines. On March 13, 2012, the FCA imposed €95 million in fines on German and French millers for a cartel aimed at limiting imports of flour between France and Germany.<sup>92</sup>

### D. COURT DECISIONS

On May 15, 2012, the French Supreme Court clarified that the ten year statute of limitations provided by a 2008 law only applied to FCA decisions issued after its entry into force in 2008.<sup>93</sup>

## X. Germany

### A. LEGISLATIVE DEVELOPMENTS

On March 28, 2012, the German Government published the long awaited draft of the 8th Amendment to the German Act against Restraints of Competition, which is expected to enter into force on January 1, 2013.<sup>94</sup> The amendment aligns the German substantive merger review test with EU law and introduces several changes to cartel enforcement and control of abusive practices.

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12DCC100decision\_version\_publication.pdf; French Competition Authority, Decision No. 12-DCC-100, July 23, 2012, Relating to the Acquisition of Sole Control of TPS and Canal Satellite by Vivendi and Canal Plus Group 148, *available at* [http://www.autoritedelaconurrence.fr/pdf/avis/12DCC101decision\\_version\\_publication.pdf](http://www.autoritedelaconurrence.fr/pdf/avis/12DCC101decision_version_publication.pdf).

90. French Competition Authority, Decision No. 11-D-12, Sept. 20, 2011, Compliance with Commitments Contained in the Decision Authorizing the Acquisition of TPS and Canal Satellite Vivendi Universal and Canal Plus Group 44, *available at* <http://www.autoritedelaconurrence.fr/pdf/avis/11d12.pdf>.

91. French Competition Authority, Decision No. 11-D-17, Dec. 8, 2011, Practices Implemented in the field of Detergents, at 172, *available at* <http://www.autoritedelaconurrence.fr/pdf/avis/11d17.pdf>.

92. French Competition Authority, Decision No. 12-D-09, Mar. 13, 2012, Relative to Practices Implemented in the Flour Food, at 179, *available at* <http://www.autoritedelaconurrence.fr/pdf/avis/12d09.pdf>.

93. Cour de cassation [Cass.] [supreme court for judicial matters] com., May 15, 2012, Bull. civ. IV, No. 507 (Fr.).

94. BUNDESRAT DRUCKSACHEN [BR] 176/12 (Ger.).

## B. MERGERS

On March 29, 2012, the Federal Cartel Office (FCO) published its revised Guidance on Substantive Merger Control.<sup>95</sup>

At the time of writing, the FCO had prohibited three transactions in 2012. Haspa was stopped from acquiring a minority interest in Kreissparkasse Lauenburg due to concerns about the creation of a dominant position in a regional market for retail giro accounts.<sup>96</sup> The FCO prohibited H+H from acquiring Xella due to concerns about the creation of a dominant position in the regional markets for aerated concrete blocks in northern and western Germany.<sup>97</sup> Finally, the FCO blocked a merger between two hospitals because it considered the merger would lead to the creation of a dominant market position in emergency hospital services in Worms, Germany.<sup>98</sup>

## C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On June 1, 2012, the FCO announced the start of a new anonymous whistleblowing system that aims to improve the FCO's cartel investigation activities by allowing informers to contact the FCO via a secure electronic mailbox that guarantees their anonymity.<sup>99</sup>

The FCO also engaged in a number of sector enquiries. On October 1, 2012, it published its final report on the sector enquiry into the rolled-asphalt market.<sup>100</sup>

The FCO fined TTS Tooltechnic, a manufacturer of electric tools, €8.2 million for resale price maintenance.<sup>101</sup>

## D. COURT DECISIONS

The most high-profile court decision in 2012 was the decision of the Local Court of Bonn following the judgment of the Court of Justice of the European Union (ECJ) in *Pfleiderer AG v. Bundeskartellamt*.<sup>102</sup> Carrying out the balancing test required by the ECJ,

95. BUNDESKARTELLAMT [GER. FED. CARTEL OFFICE], GUIDANCE ON SUBSTANTIVE MERGER CONTROL (Mar. 28, 2012), available at [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29\\_Guidance\\_final\\_neu.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/2012-03-29_Guidance_final_neu.pdf).

96. See Press Release, Ger. Fed. Cartel Office, Bundeskartellamt Prohibits Haspa from Acquiring a Stake in Kreissparkasse Lauenburg (Feb. 29, 2012), [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-02-29\\_PR\\_Haspa\\_E.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-02-29_PR_Haspa_E.pdf).

97. See Press Release, Ger. Fed. Cartel Office, Bundeskartellamt Prohibits Xella from Acquiring Danish Aerated Concrete Mfr. H+H (Mar. 15, 2012), [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-03-15\\_PR\\_Xella\\_E.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-03-15_PR_Xella_E.pdf).

98. See Press Release, Ger. Fed. Cartel Office, Bundeskartellamt Prohibits Hosp. Merger in Worms (Sept. 6, 2012), [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/20120906\\_PR\\_KH\\_Worms\\_E\\_Final.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/20120906_PR_KH_Worms_E_Final.pdf).

99. Press Release, Bundeskartellamt, Bundeskartellamt Installs Anonymous Whistleblowing System (June 1, 2012), [http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2012/2012\\_06\\_01.php](http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2012/2012_06_01.php).

100. See Press Release, Ger. Fed. Cartel Office, Co. Interlocks on Trial - Bundeskartellamt Publishes Final Report on Sector Inquiry into Rolled Asphalt Industries (Oct. 1, 2012), [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-10-01\\_PR\\_SU\\_Walzasphalt\\_E.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-10-01_PR_SU_Walzasphalt_E.pdf).

101. See Press Release, Ger. Fed. Cartel Office, Bundeskartellamt Fines TTS Tooltechnic for Vertical Price Fixing (Aug. 20, 2012), [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-08-20\\_PR\\_Festool-E-neu.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/2012/2012-08-20_PR_Festool-E-neu.pdf).

102. See BUNDESKARTELLAMT [GER. FED. CARTEL OFFICE], June 14, 2011, Case C-360/09 (Ger.).

the court refused to grant a claimant for private damages access to leniency documents filed with the FCO.<sup>103</sup> The court held that due to the particular circumstances of the case, the need for effective investigation of cartels outweighed the interests of the claimant.

## XI. Russia

### A. LEGISLATIVE DEVELOPMENTS

The end of 2011 and the start of 2012 saw significant amendments to the Russian competition legislation. The amendments to the Competition Law<sup>104</sup> relate to merger control, cartels, vertical agreements, concerted practices, and powers of the competition authorities. Changes were also made to the Code of Administrative Offences and Criminal Code with regard to the liability for breach of competition legislation.

### B. MERGERS

The new merger control thresholds for foreign-to-foreign transactions are aimed at reducing the number of reportable transactions in Russia. The latest amendment proposal is a complete withdrawal of post-transaction notification requirements. If this proposal is implemented, only transactions currently requiring pre-closing notifications (more significant from a competition perspective) will be left reportable.

### C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Cartel detection and enforcement continued to be one of the Federal Antimonopoly Service's (FAS) priorities. The amendments introduced the legal definition of "cartel" and separated cartels from other anticompetitive behavior.<sup>105</sup>

### D. ABUSES OF DOMINANCE

This area still includes most cases investigated by the competition agency. Following the trend for liberalization and streamlining of existing regulations, the FAS was granted powers to issue warnings before the actual initiation of proceedings against dominant undertakings.<sup>106</sup> Regarding compliance matters, the FAS issued decisions and recommenda-

103. Amtsgericht Bonn [District Court of Bonn], Jan. 18, 2012, 51 Gs 53/09 (Ger.).

104. О защите Конкуренции No.135-ФЗ (с изменениями и дополнениями) [On Protection of Competition No. 135-FZ, as amended], *Sobranie Zakonodatel'stva Rossiiskoi Federatsii* [SZ RF]. 2006. No. 31 (1 ч). Ст. 3434 [Russian Federation Collection of Legislation] 2006, No. 31 (1 p.). Art. 3434 (Russ.).

105. The definition of "cartel" was included under Article 11 of the Competition Law, while a new Article 11.1 regulates concerted practices. *See id.* art. 11.1.

106. *See id.* art. 39.1. The FAS emphasizes the deterrent effect of the warnings, claiming that in around 74 percent of the cases dominant companies comply with the warnings. Press Release, Fed. Antimonopoly Serv. of the Russ. Fed'n, The Head of FAS Igor Artyemyev: The Institute of Warnings Showed Good Results (Sept. 24, 2012), [http://en.fas.gov.ru/news/news\\_32478.html](http://en.fas.gov.ru/news/news_32478.html).

tions to cause dominant undertakings to draft precise contractual conditions in an effort to prevent ungrounded refusals to enter into contracts.<sup>107</sup>

## E. COURT DECISIONS

In 2012, courts considered remarkable cases against oil companies, chemical and pharmaceutical companies, and credit and insurance organizations. For example, in November 2012, the Cassation Court reversed the decisions of lower courts and confirmed the validity of a FAS decision concerning pharmaceutical companies R-Pharm CJSC and Irvin 2 LLC, which had been declared in violation of the Competition Law by bid-rigging in the procurement of medicines.<sup>108</sup> In another case, courts refused to satisfy the claim of Gazprom OJSC to reverse a fine imposed by the FAS for an alleged refusal of access to its gas transportation system.<sup>109</sup>

But there are certain cases in which the courts have found FAS' decisions unlawful, as for example in the claims brought by Kaustik OJSC and Chympek CJSC regarding a certain vertical agreement entered into by the companies,<sup>110</sup> or by Suek OJSC, Russian Coal OJSC, and StroyService LLC, challenging a decision finding them part of a price-fixing and market division cartel in the coal sector.<sup>111</sup>

## XII. United Kingdom

### A. LEGISLATIVE DEVELOPMENTS

On March 15, 2012, the U.K. government published its intended changes to the U.K. competition regime.<sup>112</sup> These include a merger of the Office of Fair Trading (OFT) and Competition Commission (CC) to form the Competition and Markets Authority. At the time of writing, the proposals were going through the legislative process.

On April 24, 2012, the U.K. government published a consultation document on methods to promote private sector challenges to anti-competitive practices.<sup>113</sup> This is intended to cover actions by businesses seeking to stop anticompetitive behavior as well as actions for damages by consumers and businesses.

107. By the end of 2012, large companies such as Novo Nordisk, Pharmstandard, OĤ-BP, Magnitogorsk Iron and Steel Works OJSC, and Ural Steel had drafted and published their commercial policies following those guidelines, many of them on their own initiative.

108. Press Release, Fed. Antimonopoly Serv. of the Russ. Fed'n, FAS Russia Proved that Pharmaceutical Companies were Involved in Bid-Rigging (June 27, 2011), [http://en.fas.gov.ru/news/news\\_31498.html](http://en.fas.gov.ru/news/news_31498.html).

109. Press Release, Fed. Antimonopoly Serv. of the Russ. Fed'n, The Courts of Two Instances Once Again Supported FAS Against a Monopolist (Nov. 8, 2012), [http://en.fas.gov.ru/news/news\\_32564.html](http://en.fas.gov.ru/news/news_32564.html).

110. ОАО "Каустик" v. Федеральная антимонопольная служба РФ [JSC Caustik v. Fed. Antimonopoly Serv. of the Russ. Fed'n], Федеральный арбитражный суд [FAS] [Federal Arbitration Court] 2012, No. A40-33828/11-154-238 (Russ.).

111. See *Antitrust Watchdog to Challenge Judgment in Coal Price Ring Case*, RUSS. LEGAL INFO. AGENCY, [http://rapsinews.com/judicial\\_news/20120209/260081725.html](http://rapsinews.com/judicial_news/20120209/260081725.html) (last updated Feb. 9, 2012).

112. *A Competition Regime for Growth: A Consultation on Options for Reform*, U.K. DEP'T FOR BUS. INNOVATION & SKILLS, <http://www.bis.gov.uk/Consultations/competition-regime-for-growth> (last visited Feb. 18, 2013).

113. *Private Actions in Competition Law – A Consultation on Options for Reform*, U.K. DEP'T FOR BUS. INNOVATION & SKILLS, <http://www.bis.gov.uk/Consultations/competition-regime-for-growth> (last visited Feb. 18, 2013).

On September 10, 2012, the OFT published new guidance on how it will set fines for breaches of competition law.<sup>114</sup> The new guidance sets the starting point for a fine at a figure that can be up to 30 percent of the company's relevant annual turnover.<sup>115</sup> This brings the OFT into line with the approach of the EC.

## B. MERGERS

On June 15, 2012, the OFT referred the completed acquisition by airline Ryanair of a minority interest in Aer Lingus to the CC for a detailed second-stage review.<sup>116</sup> Ryanair made a full offer for Aer Lingus on June 19, 2012, which falls within the jurisdiction of the EC, and then challenged the CC's decision to continue its investigation.<sup>117</sup> The Competition Appeal Tribunal (CAT) rejected this appeal on August 8, 2012.<sup>118</sup> At the time of writing, the CC had not finished its investigation.

## C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The OFT's investigation into the pricing of passenger fuel surcharges ended on April 19, 2012 when it fined British Airways £58.5 million.<sup>119</sup> Virgin Atlantic Airways received no fine because it was the whistleblower.<sup>120</sup>

## D. COURT DECISIONS

On July 5, 2012, an English court awarded damages to a private litigant for a competition law infringement.<sup>121</sup> The case followed a 2008 OFT decision finding that Cardiff Bus had abused a dominant position by engaging in predatory pricing.<sup>122</sup>

114. Press Release, U.K. Office of Fair Trading, New Guidance on Penalties for Breaching Competition Law (Sept. 10, 2012), <http://www.offt.gov.uk/news-and-updates/press/2012/78-12>.

115. *See id.*

116. Press Release, U.K. Office of Fair Trading, OFT Refers Ryanair's Minority Stake in Aer Lingus to Competition Commission (June 15, 2012), <http://www.offt.gov.uk/news-and-updates/press/2012/47-12>.

117. *See* Ryanair Holdings PLC v. Competition Commission, [2012] EWCA (Civ) 1632, [38] (Eng.), *available at* <http://www.bailii.org/ew/cases/EWCA/Civ/2012/1632.html>.

118. Ryanair Holdings PLC v. Competition Commission, (2012) 1196/4/8/12 (Competition Appeal Tribunal) (U.K.), *available at* <http://www.catribunal.org.uk/238-7708/Judgment.html>.

119. Press Release, U.K. Office of Fair Trading, British Airways to pay £58.5 million penalty in OFT fuel surcharge decision (Apr. 19, 2012), <http://www.offt.gov.uk/news-and-updates/press/2012/33-12#.URM12KU0V8E>.

120. *Id.*

121. 2 Travel Group PLC v. Cardiff City Transport Services Ltd., (2012) 1178/5/7/11 (Competition Appeal Tribunal) (U.K.) *available at* <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/CAT/2012/19.html&query=cardiff+and+bus&method=boolean>.

122. *Cardiff Bus: Summary of the Infringement*, U.K. OFF. OF FAIR TRADING, <http://www.offt.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/cardiffbus> (last visited Feb. 18, 2013).

## Middle East and Africa

### XIII. Israel

#### A. LEGISLATIVE DEVELOPMENTS

In May 2012, a major legislative amendment to the Restrictive Trade Practices Law 1988 (the Law) was enacted, granting authority to the General Director of the Israeli Antitrust Authority (IAA) to impose significant monetary sanctions on corporations and individuals for a range of violations of the Law through an administrative proceeding.<sup>123</sup> The IAA adopted accompanying guidelines to address the violations subject to monetary sanctions and the level of those sanctions.<sup>124</sup>

In August 2012, the IAA published a draft block exemption for non-horizontal arrangements without price restrictions.<sup>125</sup> This block exemption is expected to introduce a self-assessment regime on a wide-range of restrictive arrangements that do not cause significant harm to competition and are currently subject to prior approval from the Antitrust Tribunal or a specific exemption from the General Director.

#### B. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In August 2012, the IAA indicted several leading bakeries and their executives over cartel allegations.<sup>126</sup> In recent cartel investigations, preliminary stages have often included arrests of executives to avoid the risk of obstruction of investigative proceedings.

In June 2012, the Tribunal amended parts of the General Director's decision on an appeal submitted by major Israeli banks.<sup>127</sup> The General Director's decision concerned alleged restrictive arrangements concerning exchanges of information. According to the Tribunal, the decision must refer to concrete and specific matters that were the subject of a hearing process.

Also in June 2012, the Jerusalem District Court accepted a claim of selective enforcement and decided to erase parts of an indictment filed by the IAA against the Association of Contractors in Israel concerning cartel allegation in tenders.<sup>128</sup>

123. See TAMAR DOLEV GREEN ET AL., *Country Chapters: Israel*, in *THE EUROPEAN ANTITRUST REVIEW* 2013, at 100 (2013).

124. Press Release, General Dir. of the Israel Antitrust Auth., The IAA's Guidelines on the Enforcement Proceedings of Monetary Sanctions (July 24, 2012), <http://archive.antitrust.gov.il/ANTItem.aspx?ID=11385&FromSubject=100036&FromYear=2012&FromPage=0>; Press Release, General Dir. of the Israel Antitrust Auth., The General Director's Considerations in Determining the Level of a Monetary Sanction (July 24, 2012), <http://archive.antitrust.gov.il/ANTItem.aspx?ID=11386&FromSubject=100036&FromYear=2012&FromPage=0>.

125. ISRAEL ANTITRUST AUTH., *BLOCK EXEMPTION FOR NON-HORIZONTAL ARRANGEMENTS WITHOUT PRICE RESTRICTIONS DRAFT RULES* (2012).

126. Press Release, Israel Antitrust Authority, Antitrust Authority Filed an Indictment Against Bakeries Bread for the Aggravated Cartel (Aug. 29, 2012), <http://archive.antitrust.gov.il/ANTItem.aspx?ID=11424&FromSubject=100203&FromYear=2012&FromPage=0>.

127. RT (Jer) 42214-03-10 *United Mizrahi Bank Ltd. v. IAA* [2012] (Isr.).

128. CrimC (Jer) 22847-12-10 *Antitrust Authority v. Boubllil*, [2012] (Isr.).

In March 2012, the Tribunal approved a settlement agreement between the IAA and Israeli credit card companies concerning an interchange credit card agreement regarding the Visa and MasterCard brands, effective until 2018.<sup>129</sup>

#### XIV. South Africa

##### A. LEGISLATIVE DEVELOPMENTS

No legislation or regulations were enacted in 2012, and the Competition Amendment Act 1 of 2009 has still not been brought into effect, despite having been signed into law in 2009.<sup>130</sup>

##### B. MERGERS

Public interest issues were a focus of merger review in 2012. These issues were dealt with in the Pioneer-Pannar<sup>131</sup> and *Kansai-Freeworld* mergers.<sup>132</sup> Wal-Mart's acquisition of 50 percent of South African retailer Massmart Holdings was ultimately approved by the Competition Appeal Court (CAC), subject to conditions that the merging parties contribute R200 million to a local supplier development fund, avoid any retrenchments for two years, and reinstate over 500 retrenched workers.<sup>133</sup>

##### C. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The Competition Commission successfully prosecuted cartels in the mining roof bolts,<sup>134</sup> plastic pipes,<sup>135</sup> and wire mesh industries,<sup>136</sup> with the Competition Tribunal imposing fines totaling almost R57 million. Respondents in a number of other cartel cases concluded settlements with the Commission resulting in penalties of approximately R428 million being imposed.<sup>137</sup> The Commission also made two referrals to the Tribunal alleging cartel conduct, one in the steel manufacturing sector<sup>138</sup> and the other in the diesel market.<sup>139</sup>

129. RT (Jer) 610/06 Bank Leumi le-Israel Ltd. v. General Director [2012] (Isr.).

130. See Competition Amendment Act 1 of 2009 (S. Afr.).

131. *Pioneer Hi-Bred Int'l Inc. v. Competition Commission of South Africa* 2011 81/AM/DEC10 (Competition Tribunal) (S. Afr.).

132. *Kansai Paint Co. Ltd. v. Freeworld Coatings Ltd.* 2012 53/AM/Jul11 (Competition Tribunal) (S. Afr.).

133. *Minister of Economic Development v. Competition Tribunal* 2012 110/CAC/Jun11 (Competition Appeal Court) (S.Afr.).

134. *Competition Commission v. Aveng Ltd.* 2010 65/CR/Sep09 (Competition Tribunal) (S. Afr.).

135. *Competition Commission v. DPI Plastics Ltd.* 2012 15/CR/Feb09 (Competition Tribunal) (S. Afr.).

136. *Competition Commission v. Aveng Ltd.* 2012 84/CR/Dec09 (Competition Tribunal) (S. Afr.).

137. See S. AFR. COMPETITION COMM'N, ANNUAL REPORT 2011/2012, 42 (2012) (graph depicting settlements reached and value of settlements).

138. Press Release, Competition Tribunal of South Africa, Steel Producers to Face Collusion Charges in Tribunal (April 2, 2012), <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/FINAL-MEDIA-RELEASE-steel-producers.pdf>.

139. Press Release, Competition Tribunal of South Africa, Competition Commission Refers a Case of Collusion Against Oil Companies (Oct. 24, 2012), <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Competition-Commission-refers-a-case-of-collusion-against-oil-companies.pdf>.

## D. ABUSES OF DOMINANCE

The Commission secured a major victory against Telkom, the dominant fixed-line telecommunications operator in South Africa, when the Tribunal held that Telkom leveraged its upstream monopoly in the network facilities market to benefit its own subsidiary in the downstream competitive value-added network market, and imposed a penalty of R449 million.<sup>140</sup>

## E. COURT DECISIONS

There were numerous important court decisions in 2012 dealing with the Commission's power to expand its complaint referral to include parties who were not cited in the original complaint. The Commission unsuccessfully applied to the Constitutional Court for direct access in two of these cases, *Competition Commission v. Yara South Africa*<sup>141</sup> and *Competition Commission v. Loungefoam*.<sup>142</sup> The CAC granted leave to appeal its decision to the Supreme Court of Appeal in the *Yara* matter.<sup>143</sup> The Constitutional Court held in *Competition Commission v. Senwes*<sup>144</sup> that the Tribunal could find a contravention not specifically identified in the Commission's referral document. The CAC also addressed the issue of access to leniency documents to answer a Commission referral.<sup>145</sup> It found that the leniency document was confidential, but not necessarily privileged, and the Tribunal could determine access in the same way as it does in other confidentiality applications. Finally, in the Supreme Court of Appeal, the validity of the Commission's Corporate Leniency Policy was affirmed.<sup>146</sup>

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140. See *Competition Commission v. Telkom S. Afr. Ltd.* (2012) No. 11/CR/Feb04, para. 194 (Competition Tribunal of S. Afr.).

141. *Competition Commission v. Yara South Africa Ltd.* 2012 ZACC 14 (CC) (S. Afr.).

142. *Competition Commission v. Loungefoam* 2012 ZACC 15 (CC) (S. Afr.).

143. *Competition Commission v. Yara South Africa Ltd.* 2012 ZACC 14 (CC) (S. Afr.).

144. *Competition Commission v. Senwes Ltd.* 2012 ZACC 6 (CC) (S. Afr.).

145. *Arcelormittal South Africa Ltd. v. Competition Commission* 2012 103/CAC/Sep10 (Competition Appeal Court) (S. Afr.).

146. *Agri Wire Ltd. v. Commissioner of the Competition Commission* 2012 660/2011 (SCA) (S. Afr.).