

International Antitrust

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This article outlines the year's most important developments in key areas of antitrust enforcement in a number of selected jurisdictions. It is a joint effort by antitrust law practitioners and the International Antitrust Law Committee and provides a condensed summary of a more detailed publication to be released in Spring 2010 covering antitrust developments in more than forty jurisdictions worldwide.¹

Americas

I. Brazil*

A. LEGISLATIVE DEVELOPMENTS

A bill before the Senate proposes to merge the antitrust powers of the Secretariat for Economic Law (SDE) and the Secretariat for the Economic Monitoring (SEAE) into the Administrative Council for Economic Defense (CADE), thus creating a single antitrust agency. In regards to merger control, it would abolish the market share threshold and establish mandatory *ex ante* notification.

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1. This report will be available at <http://www.abanet.org/dch/committee.cfm?com=IC722000>.

* The contribution for Brazil was written by Bruno L. Peixoto of Lanna Peixoto Advogados.

The SDE sought to introduce further transparency to antitrust proceedings and to improve the leniency program by issuing a new draft regulation for public consultation.²

B. MERGERS

The CADE ordered Coca-Cola to terminate a joint venture with Nestlé and transfer all its iced tea operations to the Swiss joint venture partner, Nestea, in order to obtain clearance for the acquisition of Leao Junior, the leading iced tea producer.³

In the merger between Perdigao and Sadia, Brazil's leading food processors, the CADE found that the transaction could lead to substantial concentration and *prima facie* anticompetitive effects. Thus, in view of the post-merger review system in force, CADE executed an agreement with the parties freezing the integration and information sharing among the companies and prohibiting them from implementing the transaction before the review was concluded.⁴

C. ANTICOMPETITIVE PRACTICES

Joining the DOJ and the European Commission (DG Comp) in the anti-cartel enforcement network established to carry out multi-jurisdictional investigations, the SDE raided refrigeration compressor producers in these authorities' first coordinated operation.⁵

D. ABUSES OF DOMINANCE

The CADE fined AmBev for adopting a non-linear pricing and discounts loyalty program that allegedly induced exclusivity and acquisition of target quantities.⁶ But the decision was immediately stayed after AmBev filed suit alleging that the CADE had failed to demonstrate harm to consumer welfare and that the SDE had violated due process during the investigation.⁷

2. *Joint Comments of the Am. Bar Ass'n Section of Antitrust Law, Section of Int'l Law, and Section of Criminal Justice on Pub. Consultation No. 16/2009 of Brazil's Sec'y of Econ. Law* (ABA, Chi., Ill.), Sept. 28, 2009, at 1, available at <http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/Antitrust.commentsSept2009.pdf>.

3. Recofarma Industria do Amazonas Ltda. [Coca-Cola Group] and Leao Junior S.A., CADE Concentration Review No. 08012.001383/2007-91, June 17, 2009, available at <http://www.cade.gov.br/Default.aspx?e75caa69bb59df29f818091cee22e63dd53513e021f5>.

4. Conselho Administrativo De Defesa Economico [Admin. Council for Econ. Def.], Revisão de Concentração de CADE, No. 08012.004423/2009-18 (June 8, 2009).

5. Press Release, Sec'y of Econ. Law of the Ministry of Justice, Int'l Joint Operation to Combat the Cartel (Feb. 18, 2009).

6. Conselho Administrativo De Defesa Economico, Processo Administrativo No. 08012.003805/2004-10 (July 24, 2009), available at <http://www.cade.gov.br>.

7. TRF-1, No. 2009.34.00.028766-7, Relator: 09.02.2009, R.T.R.F. (Braz.).

E. COURT DECISIONS

In *Nestlé-Garoto v. CADE*,⁸ the Federal Court of Appeals remanded the CADE's decision blocking the merger in question, ruling that the CADE should have reviewed new facts.

Associations of construction companies filed the first antitrust collective private action in Brazil's legal history,⁹ seeking injunctive relief and damages for recidivist cartelization by steel producers. A second collective action was filed by associations of hospitals against suppliers of medical gases¹⁰ following an SDE investigation.

II. Canada*

The year 2009 saw the enactment of several far-reaching amendments to Canada's Competition Act (the Act).¹¹

The Act's merger review process has been much more closely aligned with that of the United States. Thus, a notifiable transaction may not be completed until the expiry (or early termination) of a thirty-day waiting period following notification.¹² Before the expiry of this thirty-day period, the Competition Bureau (Bureau) may issue a supplementary request for information, in which case the proposed transaction may not be completed until thirty days after the requested information is provided.¹³

The "transaction size threshold" for pre-merger notification has been increased.¹⁴ Transactions will no longer be notifiable if the book value of the target's assets in Canada, or its annual gross revenues from sales in or from Canada, do not exceed CDN\$70 million (approximately US\$66.27 million¹⁵).¹⁶ This threshold will increase in subsequent years according to a formula linked to changes in the inflation rate.

Effective March 12, 2010, the amendments will repeal the Act's existing conspiracy offense and replace it with a per se criminal prohibition of hardcore infringements.¹⁷ Unlike the current conspiracy provision, the new offense will not require proof that the conspiracy, if implemented, would prevent or lessen competition unduly.¹⁸ Liability can be avoided, however, if the agreement is ancillary to a broader agreement that does not contravene the law and is necessary for giving effect to the objective of that broader agreement.¹⁹ Maximum penalties under the new offense are fourteen years imprisonment and a CDN\$25 million (approximately US\$23.69 million) fine per count, up from the current

8. TRF-1, No. 2005.34.00.015042-8, Relator: 24.05.2005, R.T.R.F. (Braz.).

9. TRF-1, No. 2009.34.00.035755-7, Relator: 21.10.2009, R.T.R.F. (Braz.).

10. TRF-1, No. 002409709934-5, Relator: 19.01.2010, R.T.R.F. (Braz.), available at http://www.tjmg.jus.br/juridico/sf/proc_resultado.jsp?listaProcessos=09709934&comrCodigo=24&numero=1.

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

11. Budget Implementation Act, 2009, S.C., ch. 2 (Can.).

12. *Id.*

13. *Id.*

14. *Id.*

15. The amounts in US\$ are based on November 30, 2009 exchange rates.

16. The previous threshold was CDN\$50 million (approximately US\$47.33 million).

17. Budget Implementation Act, 2009.

18. *Id.*

19. *Id.*

maximums of five years imprisonment and CDN\$10 million (approximately US\$9.47 million) per count.²⁰

Also effective March 12, 2010, all other agreements between competitors that have the effect of lessening or substantially preventing competition will be dealt with under a new civil provision.²¹ The Bureau will be able to apply to the Competition Tribunal under this new provision for an order to remedy the effects of such agreements.

III. Chile*

A. LEGISLATIVE DEVELOPMENTS

The Chilean Antitrust Statute²² was amended in October 2009. Noteworthy changes include greater investigative powers for the Antitrust Attorney General, with far-reaching instruments for the detection of cartels, a leniency program affording full fine immunity to the first cartel member that provides substantial information leading to collusion being shown, and fine reductions of up to fifty percent for subsequent informers.²³ In addition, cartel members now face increased fines, and the limitation period for horizontal agreements is raised from two to five years.²⁴ Congress is currently discussing a new bill²⁵ that would establish criminal penalties for individuals involved in collusive behavior, including up to five years imprisonment.

B. ANTICOMPETITIVE PRACTICES

In December 2008, the Antitrust Attorney General filed a claim against the three main pharmaceutical companies, Salcobrand, Cruz Verde, and FASA, alleging a conspiracy to increase prices.²⁶ The suspected agreement enraged consumers and led to political action, including several bills establishing criminal punishment for collusive behavior.²⁷ The case took an abrupt turn in March 2009, when FASA pleaded guilty and settled with the Antitrust Attorney General, while Salcobrand and Cruz Verde insisted on their innocence.²⁸ Although at the time of the settlement the Chilean Antitrust Law did not include a leniency mechanism, the Antitrust Court approved the agreement by which FASA was released from all charges and received a substantial fine reduction.²⁹ The final decision regarding Salcobrand and FASA is still pending.

20. *Id.*

21. *Id.*

* The contribution for Chile was written by Lorena Pavic and Juan Coeymans from Carey y Cía. Abogados.

22. Ley No. 20.361, de 13 Julio de 2009 (Chile).

23. *Id.*

24. *Id.*

25. Bill N. 6438-03, Apr. 2, 2009 (Chile), available at http://sil.congreso.cl/egi-bin/sil_tramitacion.pl?6832,D.

26. See Claim N°184-08, Apr. 1, 2009, Farmacias Ahumada S.A. and others, available at <http://www.tdlc.cl>.

27. *Id.*

28. *Id.*

29. *Id.*

C. ABUSES OF DOMINANCE

In July 2009, the Antitrust Court ruled against four sanitary companies³⁰ for imposing unjustified and abusive prices and conditions on consumers located outside their concession areas. The Court imposed fines of more than US\$1 million and proposed a legislative amendment by which sanitary companies defined as essential facilities should be forced to supply interconnections to other companies under a fixed-rate system.

IV. Colombia*

A. LEGISLATIVE DEVELOPMENTS

Law 1340, 2009, published on July 24, 2009 (the New Act), states that the Superintendency of Industry and Commerce (SIC) is the only antitrust authority with merger control jurisdiction, with the exception of transactions between financial institutions and commercial agreements between air transport companies, which are reviewed by the Finance Superintendency and the Air Transport Authority respectively.³¹

The New Act introduces mandatory notification for concentrations where the undertakings concerned carry on the same activity or participate in the same value chain and their turnovers or value of their assets in the fiscal year prior to the proposed transaction exceed the threshold set by the SIC.³² The threshold can be met by one party alone or both parties together.³³

But if the parties have a joint market share of less than twenty percent of the relevant market, the proposed operation is deemed to be automatically authorized by the SIC. Where this occurs, the parties must notify the SIC, and give a description of the transaction.³⁴

Where the parties' market share exceeds twenty percent, the procedure has changed substantially. There is now a thirty-day pre-evaluation period and a notice of the transaction must be published in any national newspaper, so that interested third parties may provide information within ten days after said publication.³⁵ The whole procedure may be extended by up to five months at the SIC's discretion.³⁶

In addition, in certain circumstances the competition authority may unwind a merger.

The New Act increases considerably the fines imposed on undertakings and individuals for breaches of the antitrust rules and establishes a leniency program which offers total or partial immunity from fines in return for cooperation with the SIC in infringement pro-

30. Rep. of Chile Court of Def. of Free Competition, Ruling 85/2009, July 2, 2009, *available at* [http://mail.web.fne.gob.cl/db/tabla.nsf/f34cb3b7c2bb5deb8425733e005faa18/f2eb24583daf2044842575c700761d29/\\$FILE/Sentencia%2085.pdf](http://mail.web.fne.gob.cl/db/tabla.nsf/f34cb3b7c2bb5deb8425733e005faa18/f2eb24583daf2044842575c700761d29/$FILE/Sentencia%2085.pdf).

* The contribution for Colombia was written by Mauricio Jaramillo of Gómez Pinzón Zuleta Abogados SA.

31. Ley No. 1,340 de 24 de Julio 2009 (Chile), *available at* http://www.sic.gov.co/Normatividad/Leyes/2009/Ley_1340_2009.pdf.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

ceedings. The leniency program is not restricted to cartels and covers any type of anticompetitive practice.

V. Mexico*

A. LEGISLATIVE DEVELOPMENTS

In 2009, three bills³⁷ were introduced before the Mexican Congress, aimed at amending antitrust regulation and granting the Federal Competition Commission (the FCC) new powers and tools to enable it to enforce competition law more effectively. The first bill proposes increasing fines for monopolistic practices, simplifying merger notification procedures, sanctioning per se conducts as a criminal offense, and widening the FCC's enforcement powers.³⁸ The other two bills foresee amending the Federal Penal Code in order to sanction per se violations as a criminal offense and the Federal Law on Consumers Protection in order to empower the Procuraduría Federal del Consumidor (PROFECO) to present class actions before the FCC.³⁹

B. MERGERS

In the first semester of 2009, seventy-three mergers were reviewed. Of these: (i) thirty-six were cleared; (ii) one was closed because the parties decided not to proceed; (iii) two were prohibited; and (iv) the remaining thirty-four were corporate restructurings. Two mergers are worth highlighting; the merger in the chemical industry between Mexichem and Cydsa was prohibited⁴⁰ but is now under appeal, while the merger between GM de México/Grupo Cinemex⁴¹ in the movie market was cleared without conditions.

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

37. Senators' Bills introduced by Senators Santiago Creel Miranda and Juan Bueno Torio. Senator Santiago Creel Miranda, SE TURNÓ A LAS COMISIONES UNIDAS DE COMERCIO Y FOMENTO INDUSTRIAL; Y DE ESTUDIOS LEGISLATIVOS, SEGUNDA, Senate Official Gazette No. 370, Apr. 21, 2009, available at <http://www.senado.gob.mx/gace61.php?ver=gaceta&sm=1001&id=13226&lg=60> [hereinafter Gazette No. 370]; Senator Juan Bueno Torio, SE TURNÓ A LAS COMISIONES UNIDAS DE JUSTICIA; DE COMERCIO Y FOMENTO INDUSTRIAL; Y DE ESTUDIOS LEGISLATIVOS DE LA CÁMARA DE SENADORES, Senate Official Gazette No. 18, July 2, 2008, available at <http://www.senado.gob.mx/gace.php?sesion=2008/07/02/1&documento=25> [hereinafter Gazette No. 18]; Senator Juan Bueno Torio, SE TURNÓ A LAS COMISIONES UNIDAS DE COMERCIO Y FOMENTO INDUSTRIAL; Y DE ESTUDIOS LEGISLATIVOS, PRIMERA, Senate Official Gazette No. 347, Mar. 11, 2009, available at <http://www.senado.gob.mx/gace.php?sesion=2009/03/11/1&documento=17> [hereinafter Gazette No. 347].

38. Gazette No. 370, *supra* note 37.

39. Gazette No. 18, *supra* note 37; Gazette No. 347, *supra* note 37.

40. Decision not yet published.

41. Press Release, Fed. Competition Comm'n, Larrea Cofeco Authorizing the Purchase of Cinemex (Dec. 16, 2008), available at http://201.161.46.75/index.php?option=com_content&task=view&id=6048&Itemid=206.

C. ANTICOMPETITIVE PRACTICES

During 2009, four investigations were initiated for alleged per se conduct. The markets involved were cathode ray tubes,⁴² hermetic compressors,⁴³ crystal panels and components,⁴⁴ and optical disc readers,⁴⁵ all initiated under the Leniency Program.⁴⁶

In June 2009, the FCC imposed an unprecedented maximum fine on Ferromex, Ferrosur, and their respective holding companies for price fixing.⁴⁷ In July 2009, the FCC fined thirty-three economic agents involved in the real estate market in Chapala.⁴⁸ This investigation is the first concluded under the Leniency Program.

D. ABUSES OF A DOMINANT POSITION

In July 2009, the FCC issued its first preliminary resolution considering Telmex to be the dominant operator in the market for local transit and leasing of dedicated transmission links.⁴⁹ In October 2009, the FCC issued a second resolution finding that Telmex has substantial power in the public switched voice transit market through a public telecommunications network for fixed local services that provides long-distance services to other authorized telecommunications networks.⁵⁰ The FCC will now be able to apply sector-specific obligations to dominant operators.

E. COURT DECISIONS

In September 2000, the FCC ordered the divestiture of a joint venture called Prestaciones Universales, set up by various supermarket chains for the joint issuance of food coupons.⁵¹

42. Diario Oficial de Mexico (DOF) [Official Government Gazette], Aug. 5, 2009.

43. Diario Oficial de Mexico (DOF) [Official Government Gazette], June 18, 2009.

44. Haddou Ruiz, OFFICIAL GOVERNMENT GAZETTE, Mar. 7, 2009, available at http://dof.gob.mx/nota_detalle.php?codigo=5097731&fecha=03/07/2009.

45. Haddou Ruiz, OFFICIAL GOVERNMENT GAZETTE, July 10, 2009, available at http://dof.gob.mx/nota_detalle.php?codigo=5113176&fecha=07/10/2009.

46. Ley Federal De Competencia Economica [Fed. Law on Econ. Competition], Diario Oficial de Mexico, 25 de April de 2006 (Mex.), available at <http://www.diputados.gob.mx/LeyesBiblio/pdf/104.pdf>.

47. Press Release, Fed. Competition Comm'n, CFC Fine Chapala Realtors (May 2009), available at http://201.161.46.75/index.php?option=com_content&task=view&id=6752&Itemid=204.

48. Press Release, Fed. Competition Comm'n, CFC Imposes Fines for 419.1 Million Pesos (Mar. 2009), available at http://201.161.46.75/index.php?option=com_content&task=view&id=6628&Itemid=204.

49. See FCC's Preliminary Resolution, Oct. 1, 2009, available at <http://www.cfc.gob.mx/images/stories/Documentos/resolucionessinbuscador/dc-04-2007.pdf>.

50. Haddou Ruiz, OFFICIAL GOVERNMENT GAZETTE, Oct. 14, 2009, available at http://dof.gob.mx/nota_detalle.php?codigo=5114350&fecha=14/10/2009.

51. FCC Cases DE-27-99 and RA-46-2000 Prestaciones Universales/Prestaciones Mexicanas/Almacenes Aurrerá/Gigante/Grupo Comercial Chedraui, available at http://201.161.46.75/images/stories/gacetas/gaceta_09/04_Investigaciones.pdf.

VI. United States*

A. LEGISLATIVE DEVELOPMENTS

The Obama Administration has signaled a more aggressive stance to antitrust enforcement. Notably, under Christine A. Varney, the new Assistant Attorney General for Antitrust at the Department of Justice (DOJ), the DOJ's Antitrust Division has withdrawn its September 2008 report regarding Section 2 of the Sherman Act, which regulates single firm conduct.⁵² According to Ms. Varney, the report "raised many hurdles to Government Antitrust Enforcement."⁵³ Two months later, the DOJ, reversing its prior position, joined the Federal Trade Commission (FTC) in criticizing reverse payment settlements in pharmaceutical patent disputes.⁵⁴ The DOJ's recent investigations of Google and IBM, and the FTC's investigation of Intel, demonstrate the agencies' increasing attention to high-tech and Internet-based markets.⁵⁵

B. MERGERS

The FTC and DOJ have announced plans to revise their joint Merger Guidelines to reflect more accurately today's business and legal environment.⁵⁶

Several consummated, non-reportable deals were challenged, including Microsemi/Semicoa (semiconductors),⁵⁷ and Carillon Clinics (outpatient medical clinics).⁵⁸ Many other mergers required divestitures, including Merck/Schering-Plough (pharmaceuticals)⁵⁹ and Pfizer/Wyeth (pharmaceuticals).⁶⁰ Other notable transactions that were

* The contribution for the United States was written by Claire Webb and Ausra O. Pumputis of Weil, Gotshal & Manges.

52. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

53. Christine A. Varney, Assistant Attorney Gen., U.S. Dep't of Justice Antitrust Div., Vigorous Antitrust Enforcement in this Challenging Era (May 12, 2009), available at <http://www.usdoj.gov/atr/public/speeches/245777.htm>.

54. See Brief for the US in Response to the Court's Invitation, Ark. Carpenters Health and Welfare Fund v. Bayer AG, No. 05-2851(2d Cir. July 6, 2009), available at <http://www.usdoj.gov/atr/cases/f247700/247708.htm>.

55. See, e.g., Statement of Interest of the U.S. Regarding Proposed Class Settlement, Authors Guild, Inc. v. Google, Inc., No. 05 Civ. 8136 (S.D.N.Y. 2009), available at <http://www.usdoj.gov/atr/cases/f250100/250180.htm>; see also Ashlee Vance & Steve Lohr, *US Begins Antitrust Inquiry of IBM*, N.Y. TIMES, Oct. 8, 2009, at B1, available at <http://www.nytimes.com/2009/10/08/technology/companies/08antitrust.html>; see also Diane Bartz, *US Closer to Filing Complaint Against Intel: Sources*, REUTERS, Oct. 23, 2009, available at <http://www.reuters.com/article/newsOne/idUSTRE59M4WM20091023>.

56. Press Release, Dep't of Justice, Dep't of Justice and Federal Trade Comm'n to Hold Workshops Concerning Horizontal Merger Guidelines (Sept. 22, 2009), available at http://www.usdoj.gov/atr/public/press_releases/2009/250236.htm.

57. Press Release, Dep't of Justice, Justice Dep't Reaches Settlement with Microsemi Corp. (Aug. 20, 2009), available at http://www.usdoj.gov/atr/public/press_releases/2009/249246.htm.

58. Press Release, Fed. Trade Comm'n, Comm'n Restores Competition Eliminated by Carillon Clinic's Acquisition of Two Outpatient Clinics (Oct. 7, 2009), available at <http://www2.ftc.gov/opa/2009/10/carillon.shtm>.

59. Press Release, Fed. Trade Comm'n, FTC Order Restores Competition Lost Through Schering-Plough's Acquisition of Merck (Oct. 29, 2009), available at <http://www.ftc.gov/opa/2009/10/merck.shtm>.

60. Press Release, Fed. Trade Comm'n, FTC Order Prevents Anticompetitive Effects from Pfizer's Acquisition of Wyeth (Oct. 14, 2009), available at <http://www.ftc.gov/opa/2009/10/pfizer.shtm>.

cleared with consent orders include Hexion/Huntsman (epoxy)⁶¹ and BASF/Ciba Holdings (high performance pigments).⁶² Oracle/Sun Microsystems was cleared without conditions.⁶³

The FTC sought and obtained a preliminary injunction to block CCC/Mitchell.⁶⁴ The FTC has challenged several other mergers, including Thoratec/HeartWare (left ventricular devices)⁶⁵ and Talecris/CSL (plasma-derivative protein therapies),⁶⁶ resulting in the merger plans being abandoned.

A district court provided guidance on the degree of permissible information exchange with a competitor during merger negotiations in *Omnicare, Inc. v. UnitedHealth Group, Inc.*⁶⁷

C. CRIMINAL ENFORCEMENT

Criminal antitrust penalties, both fines and prison terms, significantly increased in 2009. U.S. criminal antitrust fines exceeded one billion dollars in 2009, and the DOJ sentenced an executive to a forty-eight month prison term—the longest prison term ever imposed on an individual in the United States for a single antitrust charge.⁶⁸

D. COURT DECISIONS

In contrast to the agencies' heightened enforcement efforts, the Supreme Court has continued to narrow the scope of substantive antitrust claims. Most recently, the Court ruled in favor of a private antitrust defendant (for the tenth consecutive time in the past five years) and rejected a price squeezing claim in *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*⁶⁹ The Court held that in the absence of an antitrust duty to deal, AT&T, which was both a retail competitor and a wholesale supplier of DSL service, was under no duty to sell wholesale services to its competitors at any particular price.

In January 2010, the Court heard arguments in *Am. Needle v. Nat'l Football League* regarding the treatment of joint ventures under antitrust law—specifically, the scope of single entity immunity from Sherman Act Section 1 violations.⁷⁰

61. Press Release, Fed. Trade Comm'n, FTC Intervenes in Hexion's Proposed Acquisition of Huntsman Corp. (Oct. 2, 2008), available at <http://www.ftc.gov/opa/2008/10/hexion.shtm>.

62. Press Release, Fed. Trade Comm'n, FTC Intervenes in BASF's Proposed \$5.1 Billion Acquisition of Ciba Holding Inc. (Apr. 2, 2009), available at <http://www.ftc.gov/opa/2009/04/basf.shtm>.

63. Press Release, Dep't of Justice, Dep't of Justice Antitrust Div. Issues Statement on the European Comm'n Decision Regarding the Proposed Transaction Between Oracle and Sun (Nov. 9, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/251782.htm.

64. See *FTC v. CCC Holdings et al.*, No. 08-2043 (D.D.C. 2009).

65. Press Release, Fed. Trade Comm'n, FTC Authorizes Suit to Stop CSL's Proposed \$3.1 Billion Acquisition of Talecris Biotherapeutics (May 27, 2009), available at <http://www.ftc.gov/opa/2009/05/talecris.shtm>.

66. *Id.*

67. See *Omnicare, Inc. v. UnitedHealth Group, Inc.*, 594 F. Supp. 2d 945 (N.D. Ill. 2009).

68. See Press Release, Dept. of Justice, Former Shipping Executive Sentenced to 48 Months in Jail for His Role in Antitrust Conspiracy (Jan. 30, 2009), available at http://www.usdoj.gov/atr/public/press_releases/2009/242030.htm.

69. See *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109 (2009).

70. See *Am. Needle, Inc. v. Nat'l Football League*, No. 08-661 (S. Ct. argued Jan. 13, 2010). The DOJ and FTC have submitted an amicus brief urging the Court to adopt a two-step analysis evaluating the extent of

Asia/Pacific

I. Australia*

A. LEGISLATIVE DEVELOPMENTS

On July 24, 2009, two new criminal offenses⁷¹ and two recast civil prohibitions⁷² on “cartel provisions” were introduced into the Trade Practices Act 1974 (the TPA).

Individuals found guilty of engaging in cartel conduct now face up to ten years’ imprisonment and fines of up to AUD\$500,000 (approximately US\$457,375). Companies face fines up to the greater of (i) AUD\$10 million (approximately US\$9.11 million), (ii) three times the value of the benefit attributable to the cartel as a whole, or (iii) where the value cannot be determined, ten percent of the corporation’s annual turnover.⁷³

B. ANTICOMPETITIVE PRACTICES

The Australian Competition and Consumer Commission (ACCC) has brought a total of eleven proceedings against airlines for alleged price fixing in the air cargo industry and has foreshadowed more. Some airlines have settled. In February 2009, three airlines were fined AUD\$16 million (approximately US\$14.6 million) for breaching the price fixing provisions of the TPA.⁷⁴ Combined with fines imposed on Qantas and British Airways, the total penalties ordered to date, in respect to the alleged cartels, totals AUD\$41 million (approximately US\$37.87 million).⁷⁵ Some penalties have been contested.

Since December 2008, the ACCC has commenced five contested proceedings against airlines for alleged price fixing contraventions in relation to fuel surcharges applied to international carriage of cargo.⁷⁶

the merger of operations and the effect on competition between the parties outside of the merged operations to determine whether the single entity treatment is qualified.

* The contribution for Australia was written by Paul Schoff and Jing Chua of Minter Ellison.

71. See Trade Practices Act, 1974, §§ 44ZZRF, 44ZZRG (Austl.), available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/81A2BC15858A9C61CA257678008115E2/\\$file/TradePrac1974Vol1_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/81A2BC15858A9C61CA257678008115E2/$file/TradePrac1974Vol1_WD02.pdf).

72. *Id.* §§ 44ZZRJ, 44ZZRK.

73. Trade Practices Act § 79; see also §§ 44ZZRF, 44ZZRG, 44ZZRJ, 44ZZRK. Individuals who breach the criminal provisions face fines of up to AUD\$220,000 (approximately US\$201,234).

74. See Press Release, Austl. Competition & Consumer Comm’n, Court Orders Airlines to Pay a Total of \$16 Million in Penalties for Price Fixing (Feb. 16, 2009) (Société Air France & Koninklijke Luchtvaart Maatschappij NV paid AUD\$16 million (approximately US\$5.4 million), Martinair Holland NV, AUD\$5 million and Cargolux International Airlines S.A. paid AUD\$5 million (approximately US\$4.7 million)), available at <http://www.accc.gov.au/content/index.php/html/itemId/861037/fromItemId/142>.

75. *Id.*

76. Since December 2008, the ACCC has brought proceedings against Singapore Airlines Cargo Pte Ltd., Cathay Pacific Airways Ltd., Emirates, PT Garuda Indonesia Ltd. and Thai Airways. See Press Release, Austl. Competition & Consumer Comm’n, ACCC Institutes Proceedings Against Thai Airways for Alleged Price Fixing of Air Freight (Oct. 28, 2009), available at <http://www.accc.gov.au/content/index.php/html/itemId/899383/fromItemId/142>.

II. China*

A. LEGISLATIVE DEVELOPMENTS

The first year of China's new Anti-Monopoly Law (AML)⁷⁷ has seen significant progress in terms of both legislation and enforcement. Three government agencies share responsibility for AML enforcement: the Ministry of Commerce (MOFCOM), responsible for merger review; the State Administration for Industry and Commerce (SAIC), responsible for non-merger, non-price-related monopoly agreements, abuses of dominance, and administrative abuses; and the National Development and Reform Commission (NDRC), responsible for price-related conduct. An Anti-Monopoly Commission (AMC) oversees and coordinates enforcement by the three agencies.

Several implementing regulations and guidelines have been issued or have been published for public comments.

B. MERGERS

MOFCOM blocked Coca-Cola's proposed acquisition of Chinese juice maker Huiyuan,⁷⁸ and conditionally approved five others: InBev-Anheuser-Busch,⁷⁹ Mitsubishi-Lucite,⁸⁰ GM-Delphi,⁸¹ and Pfizer-Wyeth.⁸² All but Coca-Cola involved offshore transactions not focused on China.

MOFCOM's analysis has become increasingly sophisticated, but concerns unrelated to competition, such as the protection of domestic competitors, also play an important part in the review process. Structural remedies involving divestitures appear to be favored.

Between August 2008 and June 2009, MOFCOM received more than 100 merger notifications and formally accepted fifty-eight, of which forty-six were decided. Approximately ten percent of these decisions were either prohibited or given conditional clearance. Other cases are understood to have been subjected to a second-phase review, but then approved without conditions being attached.

MOFCOM's review procedures remain relatively non-transparent and unpredictable. Parties must allow additional time for "acceptance" of a filing as complete before the thirty-day initial review period begins. Second-phase reviews may take up to ninety additional days (extendable by another sixty days).

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

77. Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), *translated in CHINA.ORG.CN* (last visited Feb. 2, 2010) (P.R.C.).

78. Press Release, Ministry of Commerce, Announcement No. 22, Coca-Cola (Mar. 18, 2009), *translated in WALL ST. J.*, Mar. 18, 2009, *available at* <http://blogs.wsj.com/chinarealtime/2009/03/18/china%E2%80%99s-statement-blocking-coca-cola-huiyuan-deal/>.

79. Press Release, Ministry of Commerce, Announcement No. 95, Inbev (Nov. 18, 2008), *available at* <http://fdj.mofcom.gov.cn/aarticle/zxxx/200811/20081105899216.html>.

80. Press Release, Ministry of Commerce, Announcement No. 28, Mitsubishi/Lucite (Apr. 24, 2009), *available at* <http://fdj.mofcom.gov.cn/aarticle/zxxx/200904/20090406198805.html>.

81. Press Release, Ministry of Commerce, Announcement No. 76, GM/Delphi (Sept. 28, 2009), *available at* <http://fdj.mofcom.gov.cn/aarticle/zxxx/200909/20090906540211.html>.

82. Press Release, Ministry of Commerce, Announcement No. 77, Pfizer/Wyeth (Sept. 29, 2009), *available at* <http://fdj.mofcom.gov.cn/aarticle/zxxx/200909/20090906541443.html>.

C. CARTELS AND ANTICOMPETITIVE PRACTICES

No formal enforcement actions have yet been reported by either the SAIC or the NDRC, although the SAIC disclosed in July that it had already received over fifty complaints,⁸³ and rumors exist of NDRC investigations into airfare pricing.⁸⁴

D. COURT DECISIONS

The *Shanda-Sursen*⁸⁵ case, the first judgment under the AML, provides an indication of how Chinese courts will weigh the evidence in deciding whether a defendant has a dominant market position, when considering allegations of abuse of dominance. The court also appeared open to hearing possible justifications for such alleged abuses of dominance.

III. India*

A. LEGISLATIVE DEVELOPMENTS

Earlier this year, the Competition Act, 2002 (the Act), which replaced the Monopolies and Restrictive Trade Practices Act, 1969, was partially brought into force.⁸⁶ Other than the merger control provisions, which have not yet entered into force, the sections of the Act dealing with anti-competitive agreements and abuses of dominance have become law.

The new regime under the Act is administered and enforced by the Competition Commission of India (CCI). CCI orders can be appealed to the Competition Appellate Tribunal and ultimately to the Supreme Court of India, while the jurisdiction of the civil courts has been specifically excluded.

Under the Act, any agreement that causes, or is likely to cause, an appreciable adverse effect on competition (AAEC) in India is void. Horizontal agreements that, for example, determine prices or limit production are presumed to cause an AAEC. This presumption, however, is not applicable to efficiency-enhancing joint ventures between competing enterprises or other horizontal cooperation agreements, which would be assessed by applying a rule of reason analysis.

Also, vertical agreements are subject to the same rule of reason analysis under the Act and are only prohibited if they cause an AAEC in India. The Act also prohibits the abuse of a dominant position.

83. See Sang Lin, Dir. of the Anti-Monopoly Div., Anti-Monopoly and Anti-Unfair Competition Bureau of the State Admin. for Indus. and Commerce Enforcement Bureau, 6th Int'l Symposium on Competition Law and Policy (July 4, 2009).

84. See TravelSky Technology under NDRC Investigation About Airfare Pricing Monopoly, SINA.COM (P.R.C.), May 15, 2009, <http://finance.sina.com.cn/roll/20090515/22566233643.shtml>.

85. *Shanghai First Anti-Monopoly Suit Tried*, NTD INTELL. PROP. NEWSL., July 10, 2009, <http://www.chinantd.com/en/en-newsshow.asp?id=1055>.

* The contribution for India was written by Pallavi S. Shroff and Harman Singh Sandhu of Amarchand & Mangaldas & Suresh A. Shroff & Co.

86. The Competition (Amendment) Act, 2002, No. 12, Acts of Parliament, 2003, available at http://www.cci.gov.in/images/media/competition_act/act2002.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00. Notification numbers 770, 771, & 772 issued by the Government of India, published in the Official Gazette of India of May 15, 2009.

B. ANTICOMPETTIVE PRACTICES

The CCI is currently investigating several complaints, including allegations that the Multiplex Owners Association of India is a cartel,⁸⁷ the interoperability of set-top boxes provided by the Direct-to-Home service providers,⁸⁸ a complaint against a code-sharing agreement between Kingfisher Airlines and Jet Airways,⁸⁹ and competition aspects of pre-payment charges on home loan borrowers.⁹⁰

Europe

I. European Union*

A. LEGISLATIVE DEVELOPMENTS

In 2009, the European Commission adopted a new draft Insurance Block Exemption Regulation and reviewed its existing rules applicable to vertical agreements, motor vehicle distribution and after-sales services, and the exemption for liner shipping consortia.⁹¹ The Commission also published its final report following its inquiry into the pharmaceutical sector, finding, *inter alia*, that market entry of generic drugs is delayed due to the actions of originator companies and the regulatory framework.⁹² Its attempt to boost private enforcement stumbled in the home stretch, when the draft directive was taken off the schedule for a meeting of Commissioners following resistance from Commission President Barroso and some Members of the European Parliament.⁹³

B. MERGERS

The overall number of merger cases dealt with by the European Commission decreased significantly in 2009 compared to the crest of the merger wave in 2007. Of the five second-phase reviews that the Commission initiated in 2009, the Lufthansa acquisitions of

87. Case No. 1/2009 [not yet listed in reporter]; see Moumita Bakshi & Chatterjee Varada Bhat, *Multiplex Association Approaches Competition Commission Against Producers*, HINDU BUS. LINE, May 28, 2009, <http://www.thehindubusinessline.com/2009/05/29/stories/2009052950881100.htm>.

88. Case No. 2/2009 [not yet listed in reporter].

89. Case No. 4/2009 [not yet listed in reporter]; see Press Trust of India, *Code Sharing Pact Between Jet, Kingfisher Under CCI Scanner*, BUS. STANDARD, Aug. 21, 2009, <http://www.business-standard.com/india/news/code-sharing-pact-between-jet-kingfisher-under-cci-scanner/71435/on>.

90. Case No. 5/2009 [not yet listed in reporter]; see Press Trust of India, *Banks Under CCI Scanner for Pre-payment Penalty on Home Loans*, BUS. STANDARD, Nov. 2, 2009, <http://www.business-standard.com/india/news/banks-under-cci-scanner-for-pre-payment-penaltyhome-loans/77372/on>.

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

91. See European Comm'n, *Legislation*, <http://ec.europa.eu/competition/antitrust/legislation/legislation.html> (last visited Feb. 2, 2010).

92. See EUROPEAN COMM'N, *FINAL REPORT ON THE COMPETITION INQUIRY INTO THE PHARMACEUTICAL SECTOR (2009)*, available at <http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html>.

93. See Jim Brunsten, *Kroes Hopeful of Deal on Compensation Claims*, EUROPEAN VOICE, Oct. 10, 2009, <http://www.europeanvoice.com/article/imported/kroes-hopeful-of-deal-on-compensation-claims/66055.aspx>.

both Brussels Airlines and Austrian Airlines and Oracle's acquisition of Sun Microsystems stand out.⁹⁴

C. ANTICOMPETITIVE PRACTICES

The Commission made it repeatedly clear that the best way out of the severe economic crisis is through robust and rigorous enforcement of the competition rules.⁹⁵ Thus, the Commission continued its trend of imposing high fines on companies found to infringe the competition laws, including a €1.06 billion fine imposed on Intel for allegedly providing anticompetitive loyalty rebates and a €1.106 billion (approximately US\$1.59 billion) fine on E.ON and GDF Suez—€553 million (approximately US\$831.7 million) each—for involvement in a market-sharing agreement.⁹⁶

D. COURT DECISIONS

The Commission's victories before the European Court of Justice further increased its power to impose fines, as the Court upheld the Commission's ability to presume that a parent company is liable for the acts of its subsidiaries,⁹⁷ and confirmed that one meeting amongst competitors can amount to concerted action in violation of EC competition law.⁹⁸

II. France*

A. LEGISLATIVE DEVELOPMENTS

On March 2, 2009, the French Competition Authority (the Authority) began executing its regulatory functions, instituting a new French Competition Law regime in line with the law on the modernization of the economy of August 4, 2008⁹⁹ and the Order of November 13, 2008 concerning the modernization of competition regulation.¹⁰⁰ The Authority now has almost exclusive jurisdiction to enforce competition law in France. The primary powers retained by the French Ministry of the Economy are: (i) the power to

94. See European Comm'n, Merger Decisions, <http://ec.europa.eu/competition/mergers/cases/> (last visited Feb. 2, 2010).

95. Neelie Kroes, European Comm'r for Competition Policy Antitrust and State Aid Control, European Comm'n, The Lessons Learned at 36th Annual Conference on International Antitrust Law and Policy (Sept. 24, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/408>.

96. See European Comm'n, Antitrust Decisions, <http://ec.europa.eu/competition/antitrust/cases/index.html> (last visited Feb. 2, 2010).

97. Case C-97/08 P, Akzo Nobel v. Comm'n (Sept. 10, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:267:0017:0017:EN:PDF>.

98. Case C-8/08, T-Mobile Neth. v. Comm'n (June 4, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:180:0012:0013:EN:PDF>.

* The contribution for France was written by François Brunet and Eric Paroche of Cleary, Gottlieb, Steen & Hamilton.

99. Law No. 2008-776 of August 4, 2008, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Aug. 5, 2008, at 12471, available at <http://www.journal-officiel.gouv.fr/frameset.htm>.

100. Order No. 2008-1161 of November 13, 2008 Journal Officiel de la République Française [J.O.] [Official Gazette of France], Nov. 14, 2008, at 17391, available at <http://www.journal-officiel.gouv.fr/frameset.html>.

request the Authority to carry out a phase-two investigation with respect to a merger transaction authorized by the Authority in phase one, (ii) the power to overrule, for general interest purposes, a negative phase-two decision, and (iii) the power to enforce settlements in response to anticompetitive practices affecting “a market of a local dimension” in France.¹⁰¹

B. MERGERS

Between March 2, 2009 and November 24, 2009, the Authority issued sixty clearance decisions,¹⁰² three of which were subject to commitments. The most interesting case was a phase-one decision issued on June 22, 2009, which cleared the merger between French-based mutual banks Caisse d'Épargne and Banque Populaire, subject to commitments concerning the Reunion Island.¹⁰³ Because the parties would have struggled to find a suitable purchaser in the event of any remedy requiring divestments, the Authority accepted the parties' commitment to keep their respective Reunion Island branch networks strictly separate from a legal and operational perspective for five years.

C. ANTICOMPETITIVE PRACTICES

Having imposed total fines of €575.4 million (approximately US\$863.1 million) for a cartel in the steel industry in December 2008,¹⁰⁴ the Authority fined Manpower, Adecco, and VediorBis a total of €94.4 million (approximately US\$141.5 million) on February 2, 2009, for exchanging price information in the French temporary employment services market.¹⁰⁵ On September 29, 2009,¹⁰⁶ the Paris Court of Appeals refused to grant a reduction in fines for firms who had suffered solely from declining revenues in the context of the current economic crisis, and lowered fines for just two companies, one of which was in receivership and the other in liquidation.

D. COURT CASES

On February 4, 2009, the Paris Court of Appeals confirmed the “serious blow” suffered by Orange in December 2008 when the Authority granted interim relief suspending Or-

101. *The New French Competition Authority and Competition Law Regime*, CLEARY GOTTLIEB, Mar. 30, 2009, <http://www.cgsh.com/files/News/dc09bfac-a979-44fb-a8cb-4c5bc0183032/Presentation/NewsAttachment/ca1ea536-105a-48f1-b3fe-53badfe4fe0f/CGSH%20Alert%20-%20New%20French%20Competition%20Authority.pdf>.

102. All of these were phase-one decisions.

103. Décision n. 09-DCC-16 du 22 juin 2009 relative à la fusion entre les groupes Caisse d'Épargne et Banque Populaire [Decision No. 09-DCC-016 on the Merger of the Banque Populaire and Caisse d'Épargne Groups] (June 22, 2009), available at <http://www.autoritedelaconurrence.fr/pdf/avis/09DCC16decisionversionpublication.pdf>.

104. Décision n. 08-D-32 du 16 décembre 2008 relative à des pratiques mises en oeuvre dans le secteur du négoce des produits sidérurgiques [Decision No. 08-D-32 on Practices in the Steel Trading Industry] (Dec. 16, 2008), available at <http://www.autoritedelaconurrence.fr/pdf/avis/08d32.pdf>.

105. Décision n. 09-D-05 du 2 février 2009 relative à des pratiques mises en oeuvre dans le secteur du travail temporaire [Decision No. 09-D-05 on Practices in the Temporary Employment Sector] (Feb. 2, 2009), available at <http://www.autoritedelaconurrence.fr/pdf/avis/09d05.pdf>.

106. Cour d'appel [CA] Paris, Pôle 5 ch. 5-7, Sept. 29, 2009, R.G. No. 2008/12495, available at <http://fsfrance.org/news/arret-ca-paris-16.09.2009.pdf>.

ange's exclusivity for the distribution of the current iPhone and reduced Orange's exclusivity for the distribution of future models to three months.¹⁰⁷ Apple and Orange appealed but the Paris Court of Appeals considered these measures to be justified and proportionate, particularly because the specific investments made by Orange for the launch of Apple's iPhone in France had been largely recouped.

Apple and Orange made commitments, however, to the Authority within the framework of the procedure on the merits on November 3, 2009. Apple undertook not to enter into contracts containing exclusivity clauses with French mobile phone companies or distributors of the iPhone—save for the distribution of future models—on the understanding that exclusivity would be limited strictly to three months. Orange undertook not to claim exclusivity on the distribution of the current iPhone, and to resist the introduction of exclusivity clauses exceeding three months in distribution contracts for future models. These 3-year commitments are currently being market tested.

III. Germany*

A. LEGISLATIVE DEVELOPMENTS

A new domestic turnover threshold for merger notifications to the Federal Cartel Office (FCO) was introduced. Since March 25, 2009, transactions now require prior notification to the FCO if, during the previous business year, the parties have combined global revenues of more than €500 million (approximately US\$749.5 million), at least one party has revenues in Germany of more than €25 million (approximately US\$37.4 million), and—the new requirement—one other party has revenues in Germany of more than €5 million (approximately US\$7.4 million).¹⁰⁸ As expected, the new threshold has led to a significant decrease in merger notifications.¹⁰⁹

B. MERGERS

Substantial fines for violating the standstill obligation continue to be applied. On February 13, 2009, the FCO imposed a fine of €4.1 million (approximately US\$6.1 million) on the publishing house Druck-und Verlagshaus Frankfurt am Main GmbH for failure to notify of the acquisition of the publishing company Frankfurter Stadtanzeiger GmbH in 2001.¹¹⁰

107. No. 08-MC-01 (Interim Measures Decision on practices engaged in by Orange and Apple for iPhone sales in France of December 17, 2008) Cour d'appel [CA] Paris, 1e ch., Feb. 4, 2009, R.G. No. 2008/23828 and 2009/00003.

* The contribution for Germany was written by Susanne Zuehkle and Dr. Jan Philipp Komossa of Latham & Watkins.

108. See Act Against Restraints of Competition, July 15, 2005 BGBl. I at 2114, §35 para. 1 (F.R.G.), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0911_GWB_7_Novelle_E.pdf.

109. Based on discussions with FCO officials [detailed figures not yet available].

110. See Press Release, Bundeskartellamt, Publishing House Druck- und Verlagshaus Frankfurt am Main GmbH Fined for Violating the Prohibition of Putting a Concentration into Effect (Feb. 13, 2009), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/090213_DuV-Bussgeld_e.pdf.

The FCO published the interim results of its fuel sector inquiry,¹¹¹ which started in 2008. The FCO found that high vertical and horizontal concentration prevails in the fuel sector, seriously impeding further competition. The FCO's first post-inquiry measure was to prohibit the proposed takeover of OMV petrol stations by the German oligopolist Total Deutschland.¹¹²

Other notable transactions reviewed by the FCO in 2009 include a major airline merger (cleared), a merger between two sugar producers (cleared subject to a condition precedent) and a proposed merger between two holding companies in the hospital sector (prohibited).¹¹³

C. ANTICOMPETITIVE PRACTICES

The FCO imposed fines totaling €41.4 million (approximately US\$61 million) on Westfalen AG and Propan Rheingas GmbH & Co. KG for restraining competition in the market for tank and bottled gas through customer protection agreements and accompanying price agreements, from at least 1997 until May 2005.¹¹⁴ Fines were also imposed on hearing aid and contact lens manufacturers for using undue pressure to ensure that retailers applied the recommended retail price.

On June 26, 2009, the Düsseldorf Higher Regional Court significantly reduced the fines imposed by the FCO on five cement manufacturers for concluding long-term quota agreements. The Court almost halved the fines, from €649 million (approximately US\$973 million) to €328.5 million (approximately US\$492.5 million).¹¹⁵

111. See Press Release, Bundeskartellamt, Bundeskartellamt Publishes Interim Report on Fuel Sector Inquiry (July 2, 2009), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/PM_Zwischenbericht_Kraftstoffe_E.pdf.

112. See Press Release, Bundeskartellamt, Bundeskartellamt Takes First Measures Following its Fuel Sector Inquiry and Prohibits Total from Acquiring 59 OMV Petrol Stations (Apr. 29, 2009), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/090429_Total-OMV_final_engl.pdf.

113. See Press Release, Bundeskartellamt, Bundeskartellamt Clears Acquisition of TUIfly's City-Carrier Business by Air Berlin (Sept. 8, 2009), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/090908_PM_AirBerlin_TUIFly_E.pdf; Press Release, Bundeskartellamt, Nordzucker May Only Acquire Danisco Sugar Without the Anklam Production Site (Feb. 17, 2009), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/090217_Nordzucker-Danisco_e.pdf; Press Release, Bundeskartellamt, Bundeskartellamt Prohibits Merger Between Municipal Hospitals in Hesse (June 16, 2009), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/090618_KH_Nordhessen_Presseerklaerung_E.pdf.

114. See Press Release, Bundeskartellamt, Bundeskartellamt Imposes Multi-million Fines Against Further Liquefied Gas Suppliers (Apr. 15, 2009), available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2009/2009_04_15.php.

115. See Press Release, Bundeskartellamt, Düsseldorf Higher Regional Court Confirms Bundeskartellamt Decision in Fine Proceedings against Cement Manufacturers (June 29, 2009), available at http://www.bundeskartellamt.de/wEnglisch/download/pdf/Presse/090629_OLG_Zement.pdf.

D. PRIVATE ENFORCEMENT

Private companies frequently file antitrust suits in German courts¹¹⁶ and such actions were boosted on April 7, 2009, when the German Supreme Court confirmed that “bundled” damages claims brought by a single plaintiff are permissible under German law.¹¹⁷ In March 2009, the Cartel Damage Claims (CDC) brought another action against the alleged members of the hydrogen peroxide cartel. According to press reports, Degussa, who applied for leniency, has already settled with the CDC, which would be the first settlement of its kind.¹¹⁸

IV. Italy*

A. LEGISLATIVE DEVELOPMENTS

In July 2009, new rules entered into force concerning collective damages actions for consumers and final users who are the victims of unfair trade practices or anti-competitive conduct.¹¹⁹

B. MERGERS

In March 2009, the Italian Competition Authority (ICA) cleared the takeover by Istituto Centrale delle Banche Popolari Italiane (ICBPI) of SI Holding in the market for credit card marketing, after accepting ICBPI’s commitments.¹²⁰

C. ANTICOMPETTITIVE PRACTICES

The ICA accepted the commitments proposed by the parties following investigations into possible anti-competitive conducts concerning (i) the sector for payment services,¹²¹ (ii) the market for liquefied petroleum gas trading and logistics,¹²² and (iii) automotive sporting events and competitions management.¹²³

116. See, e.g., Kammergericht Berlin [Appellate Judgment] Oct. 1, 2009, Case 2 U 10/03 [not yet published] (relating to a follow-on claim concerning a Berlin transport cement that was fined on October 25, 1999 by the FCO. The court awarded approximately €650,000 (approximately US\$974,000) in damages.).

117. See also Alexander Rinne & Tatjana Muhlbach, MONDAQ.COM, Sept. 24, 2009, [http://74.125.95.132/search?q=cache:iq4fVU1ixqYJ:www.mondaq.com/article.asp%3Farticleid%3D86490+Federal+Supreme+Court+\[Order\]+Apr.+7,+2009,+Case+KZR+42/08&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a](http://74.125.95.132/search?q=cache:iq4fVU1ixqYJ:www.mondaq.com/article.asp%3Farticleid%3D86490+Federal+Supreme+Court+[Order]+Apr.+7,+2009,+Case+KZR+42/08&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a).

118. See *Degussa Settles CDC’s Hydrogen Peroxide Damage Claim*, MLEX, available at <http://www.mlex.com/Content.aspx?ID=72860> (last visited Mar. 29, 2010).

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

119. See Consumer Code, [CC], Sept. 6, 2005, Official Gazette (Oct. 8, 2005, No. 235), art. 140-bis, Legislative Decree No. 206, as amended Law No. 99, July 23, 2009, Official Gazette (July 31, 2009, No. 176), art. 49 (Italy).

120. Italian Competition Authority [hereinafter ICA], Mar. 26, 2009, n. C9817, Decision No. 19689, Istituto Centrale delle Banche Popolari Italiane/Si Holding.

121. ICA, Apr. 9, 2009, n. I704, Decision No. 19726, Assegni Mav-Commissioni Interbancarie.

122. ICA, May 20, 2009, n. C1707, Decision No. 19886, FVH-Liquigas-Butangas-Quiris/I.Pe.M.

123. ICA, June 11, 2009, n. A396, Decision No. 19946, Gargano Corse/Aci.

The ICA imposed fines in different infringement cases: (i) coordination relating to the provision of general cashier services by a group of Italian banks;¹²⁴ (ii) price fixing for the provision of container-handling services in ports;¹²⁵ (iii) price fixing among Italian pasta producers;¹²⁶ and (iv) anti-competitive arrangements in the lead battery recycling industry.¹²⁷ The ICA closed the investigation into the market for public auction sales for lack of evidence of anticompetitive practices.¹²⁸

D. ABUSES OF A DOMINANT POSITION

To date, there has been only one ICA decision in 2009 concerning abuse of a dominant position in the market for dry docks supply services in the port of Naples.¹²⁹ Among the pending cases, it is worth highlighting the investigation of an alleged abuse by Google Italy regarding the provision of online search services.¹³⁰

E. COURT DECISIONS

The Council of State stated that the mere acquisition of a commercial license does not automatically constitute a “concentration” under the Italian Competition Act. Mere licenses would not constitute “an undertaking or a part of an undertaking” to which market turnover can be clearly attributed (March 2009).¹³¹

The Lazio Regional Administrative Court quashed the decision on anti-competitive conduct by which the ICA accepted the commitments submitted by some motorway management companies,¹³² considering that the measures rendered binding by the ICA were disproportionate to the antitrust concerns raised during the investigation held in May 2009.¹³³

124. ICA, Dec. 11, 2008, n. I686, Decision No. 19251, Inail/Affidamento Servizio di Cassa.

125. ICA, Jan. 29, 2009, n. I685, Decision No. 19462, Costa Container Lines/Sintermar-Terminal Darsena Toscana.

126. ICA, Feb. 25, 2009, n. I694, Decision No. 19562, Listino Prezzi Della Pasta.

127. ICA, Apr. 29, 2009, n. I697, Decision No. 19814, Riciclaggio Delle Batterie Esauste.

128. ICA, Sept. 23, 2009, n. I705, Decision No. 20318, Case d’asta.

129. ICA, Oct. 28, 2009, n. A405, Decision No. 20412, La Nuova Meccanica Navale/Cantieri del Mediterraneo.

130. ICA, Aug. 26, 2009, n. A420, Decision No. 20224, Fieg-Federazione Italiana Editori Giornali/Google.

131. Council of State Judgment, Mar. 31 2009, n. 1894, Lidl (quashing the first instance ruling of Lazio Regional Administrative Court Judgment, Mar. 19, 2008, N. 2478 and the ICA’s initial decision); *see also* ICA, May 10, 2007, n. C8094, Decision No. 16809, Lidl, Italia/Rami d’azienda.

132. ICA, Oct. 23, 2008, n. A391, Decision No. 19021, Servizi di soccorso autostradale.

133. Lazio Regional Administrative Court, May 8, 2009, Judgment n. 4994.

V. Russia*

A. LEGISLATIVE DEVELOPMENTS

In 2009, the Russian Competition Law (Competition Law),¹³⁴ the Code of Administrative Offenses of Russia (Code of Administrative Offenses),¹³⁵ and the Criminal Code of Russia (Criminal Code)¹³⁶ underwent significant changes. The amendments introduced are known as “the Second Antimonopoly Package.”¹³⁷

Particularly, these amendments extend the scope of the Competition Law to agreements executed or actions taken outside Russia and broaden the powers of the Federal Antimonopoly Service (the FAS) of the Russian Federation.¹³⁸

In addition, an undertaking can now be declared dominant with a market share of less than thirty-five percent, provided it has a larger share than other undertakings and it can significantly influence competition in Russia.¹³⁹ The Competition Law introduces new definitions of monopolistic prices, setting detailed criteria for determining when prices are monopolistic.¹⁴⁰ The limitation period for breach of the Competition Law is also extended from one to three years.¹⁴¹

With regards to merger control, the thresholds for transactions subject to preliminary antimonopoly clearance or post-transaction notification have been almost doubled.¹⁴² Furthermore, the list of documents and information to be submitted to the FAS has been extended to include, *inter alia*, information on the ultimate (beneficial) owners of the acquirer.¹⁴³

In accordance with amendments introduced to Article 14.32 of the Code of Administrative Offenses, execution of and participation in restrictive agreements, engaging in concerted practices, and coordination of economic activity are subject to fines of one to fifteen percent of the company’s turnover in the market where the violation occurred.¹⁴⁴ Amended Article 178 of the Criminal Code imposes criminal liability, such as fines of up to RUR1 million (approximately US\$34,200) and up to seven years imprisonment for

* The contribution for Russia was written by Vassily Rudomino from Alrud.

134. Federal Law on Protection of Competition, No. 135-FZ, 2006, as amended (initially published in Ros. gaz. No. 162, July 27, 2006), available at <http://base.garant.ru/12148517.htm>.

135. Code of Administrative Offenses, No. 195-FZ, as amended (initially published in Ros. gaz. No. 256, 2001), available at <http://base.garant.ru/12125267.htm>.

136. Ugolovnyi Kodeks [UK] [Criminal Code] No.245-FZ, as amended (initially published in Ros. gaz. No.113, June 18, 1996, No. 114, June 19, 1996, No. 115, June 20, 1996 and No. 118, June 25, 1996), available at <http://base.garant.ru/10108000.htm>.

137. Yevgeny Voeyodin, *Second Antimonopoly Package*, CMS, Sept. 2009, <http://www.cmslegal.ru/Hubbard.FileSystem/files/Publication/197de408-af19-4d16a2340c1344ff256f/Presentation/PublicationAttachment/9cca7bd5629449779f67113a5a088c81/CMS%20newsletter%20Second%20Antimonopoly%20Package.pdf>.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. Eugenia Borzilo, *No. 61 Enhanced Administrative and Criminal Liability for Violations of the Anti-Monopoly Legislation*, GOLTSBLAT, Aug. 10, 2009, <http://www.gblplaw.com/news/legal/417/>.

prevention, restriction, and elimination of competition if such actions have caused serious damage to citizens, companies, and the state or involved large-scale profit-making.¹⁴⁵

According to new leniency provisions, only the first company notifying the FAS will obtain immunity.¹⁴⁶ Other cartel members will face turnover fines, and criminal liability may be imposed on senior management of the offending companies.¹⁴⁷

B. ANTICOMPETTITIVE PRACTICES

The FAS imposed a fine of RUR25,269,000 (approximately US\$864,000) on one of the largest operators in the oil products wholesale market in several regions for engaging in concerted practices.¹⁴⁸ The FAS established that Gazpromneft-Kuzbass CJSC and Tomsknefteproduct VNK OJSC “maintained the same price level and simultaneously increased retail prices for motor petrol and diesel fuel in the Tomsk oil products retail market.”¹⁴⁹ On June 3, 2009, the Federal Arbitration Court of the Moscow District confirmed the FAS’s decision.¹⁵⁰

C. ABUSE OF A DOMINANT POSITION

In November 2009, the FAS found that Lukoil OJSC and a number of companies in its group had abused their dominant position in the wholesale markets for motor petrol, diesel fuel, and aviation kerosene. The FAS imposed a fine of RUR6.545 million (approximately US\$223,000).¹⁵¹

VI. Turkey*

A. LEGISLATIVE DEVELOPMENTS

Two new Regulations, one on leniency¹⁵² and the other on fines imposed for anticompetitive activities,¹⁵³ were published in 2009. Although not previously defined in the Protection of Competition Act No. 4054,¹⁵⁴ leniency was applied in practice in similar terms to those now set out in the Regulation. With regards to the Fines Regulation, it aims to increase transparency but will change little in practice.

145. Kiran S. Desai & Elena Klonitskaia, *Russian Federation: Russia Introduces Criminal Sanctions for Breaches of Competition Law*, MONDAQ, Dec. 7, 2009, <http://www.mondaq.com/article.asp?articleid=90176>.

146. See Voeyodin, *supra* note 137.

147. *Id.*

148. See Press Release, FAS (Sept. 8, 2009), *available at* http://www.fas.gov.ru/english/news/n_26421.shtml.

149. *Id.*

150. *Id.*

151. See Press Release, FAS (Nov. 5, 2009), *available at* http://www.fas.gov.ru/english/news/n_27693.shtml.

* The contribution for Turkey was written by Selin Beceni of Luther Karasek Köksal.

152. Regulation on Active Cooperation for Detecting Cartels, No. 27142, Official Gazette, Feb. 15, 2009, (Turk.), *available at* <http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik8.pdf>.

153. Regulation on Fines in Cases of Agreements, Concerted Practices, and Decisions Limiting Competition, and Abuses of a Dominant Position, No. 27142, Official Gazette, Feb. 15, 2009, (Turk.), *available at* <http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik9.pdf>.

154. Protection of Competition Act, No. 4054, Dec. 7, 1994, Official Gazette No. 22140, Dec. 13, 1994, (Turk.), *available at* <http://www.rekabet.gov.tr/dosyalar/belgeler/belge7/kanun.pdf>.

B. MERGERS

In 2008 and until October 2009, the Competition Board issued eighty-three decisions¹⁵⁵ reflecting a significant decrease in the number of transactions. Many decisions concern international transactions that have an indirect effect on Turkey through the parties' subsidiaries.¹⁵⁶

C. ANTICOMPETITIVE PRACTICES

In the telecommunications sector,¹⁵⁷ Turk Telekom A.S. (the incumbent telecommunications operator) and its subsidiary TT Net A.S. (an internet service provider) were fined approximately US\$8 million for abuse of a dominant position in the internet broadband market.¹⁵⁸ Turk Telekom was found to have engaged in price squeezing by selling broadband internet access services, while TTNET, a subsidiary of Turk Telekom, was involved in predatory pricing in the downstream market.¹⁵⁹

The Competition Board also ruled on usufruct rights in the oil business.¹⁶⁰ It decided that a usufruct agreement with a term of more than five years, which was standard practice in the industry, amounted to a *de facto* illegal non-compete clause.¹⁶¹ The term of the usufruct right was reduced to the legal limit for non-compete agreements, namely five years.¹⁶²

VII. United Kingdom*

A. LEGISLATIVE DEVELOPMENTS

The Office of Fair Trading (OFT) published the final version of its new jurisdictional and procedural guidance on mergers in June 2009,¹⁶³ which reflects its practices since the

155. Rekabet Kurumu, *Competition Board Decisions*, REKABET.GOV, <http://www.rekabet.gov.tr> (last visited Mar. 29, 2010).

156. Decision 09-33/762-182 Wyeth Inc.–Pfizer Inc. (July 15, 2009); Decision 09-31/678-159 Chrysler LLC–Fiat S.p.A. (July 1, 2009); Decision 09-14/320-84 Austrian Airlines AG - Deutsche Lufthansa AG, (Apr. 13, 2009); Decision 09-01/3-3 Siemens AG–Fujitsu Limited, (Jan. 8, 2009), *available at* <http://www.rekabet.gov.tr/index.php?Sayfa=kararenliste>.

157. Decision 09-07/127-38 Türk Telekom Inc., (Feb. 18, 2009), *available at* <http://www.rekabet.gov.tr/dosyalar/kararlaren/kararen68.doc>.

158. OECD, Policy Roundtables: Regulating Market Activities by the Public Sector, 243 (2004), *available at* <http://www.oecd.org/dataoecd/61/5/34305974.pdf>.

159. *Id.*

160. Decision 09-09/186-56 Pol-Pet Petroleum Products Tourism Accommodation and Recreation Facilities Co. Ltd, (Mar. 3, 2009), *available at* <http://www.rekabet.gov.tr/dosyalar/kararlaren/kararen70.doc>.

161. *Id.*

162. *Id.*

* The contribution for the United Kingdom was written by Stephen Kon, Gordon Christian, and Jai Bhakar of SJ Berwin.

163. See Press Release, OFT, OFT publishes revised guidance on Merger jurisdiction and procedure (June 30, 2009), *available at* <http://www.of.gov.uk/news/press/2009/76-09>.

Enterprise Act 2002 came into force. In addition, merger fees payable to the OFT have been doubled.¹⁶⁴

B. ANTICOMPETITIVE PRACTICES

September saw the conclusion of the OFT's long-running construction cartel inquiry. The OFT fined 103 companies a total of £129.5 million (approximately US\$213 million) for bid-rigging between 2000 and 2006.¹⁶⁵ The bid-rigging was mainly carried out through the practice of cover pricing in order to create the misleading impression of competition for contracts.¹⁶⁶ In a separate cartel case relating to the construction recruitment sector, the OFT fined six companies £39.27 million (approximately US\$64.6) for engaging in anti-competitive behavior by excluding a new market entrant.¹⁶⁷

Four former British Airways executives were also prosecuted for their alleged participation in a cartel with Virgin Atlantic that fixed prices for fuel surcharges on long-haul passenger flights.¹⁶⁸ If found guilty, the four could face up to five years in prison, unlimited fines, director disqualification orders, and confiscation of any unlawfully gained assets.¹⁶⁹

C. COURT DECISIONS

The Competition Commission (CC) has lost two court cases this year regarding the proportionality of remedies following market investigations. In another market investigation case, BAA has appealed¹⁷⁰ against the CC's remedy requiring airport divestitures after the CC decided that BAA's ownership of airports throughout the UK raised significant competition issues.¹⁷¹

In competition litigation developments, Ian Norris, the former CEO of Morgan Crucible, is due to appear in the High Court to appeal against his extradition to the United States to face charges that he obstructed the U.S. Department of Justice's investigation into a cartel in which he was allegedly involved. The extradition was ordered notwithstanding a House of Lords' judgment that Mr. Norris could not be extradited only for price fixing charges brought in the United States, as this was not a criminal offense in the UK at the relevant time.¹⁷²

164. Statement, OFT, OFT Merger Fee Statement (Sept. 2009), available at http://www.ofg.gov.uk/advice_and_resources/publications/guidance/mergers/merger-fees.

165. Press Release, OFT, Construction firms fined for illegal bid-rigging (Sept. 22, 2009), available at <http://www.ofg.gov.uk/news/press/2009/114-09>.

166. *Id.*

167. Press Release, OFT, OFT Fines Recruitment Agencies for a Collective Boycott and Price Fixing Cartel (Sept. 30, 2009), available at <http://www.ofg.gov.uk/news/press/2009/119-09>.

168. See Press Release, OFT, OFT Announces Criminal Charges in Airline Fuel Surcharges Cartel Case (Aug. 7, 2008), available at <http://www.ofg.gov.uk/news/press/2008/93-08>.

169. *Id.*

170. Summary of Application Under Section 179 of the Enterprise Act 2002 (May 22, 2009) Competition Appeal Tribunal, Case Number 1110/6/8/09, available at http://www.catribunal.org.uk/files/1110_BAA_Judgment_21.12.09.pdf.

171. Press Release, CC, BAA Ordered to Sell Three Airports (Mar. 19, 2009), available at http://www.competition-commission.org.uk/press_rel/2009/mar/pdf/11-09.pdf.

172. See *Ian Norris v. Gov't of the United States of America* [2009] EWHC 995.

On the subject of representative actions, two flower importers have appealed to the Court of Appeal from the High Court's decision opposing the inclusion of a representative element in their damages claim against British Airways in relation to an alleged air cargo cartel case.

Africa

I. South Africa*

A. LEGISLATIVE DEVELOPMENTS

Significant amendments to the Competition Act 1998 (the Act) were signed into law in August 2009.¹⁷³ These amendments include a prohibition on conduct by firms in a complex monopoly and the introduction for the first time in South Africa of criminal liability for directors and managers who are personally responsible for, or even knowingly acquiesce in, hardcore antitrust infringements.¹⁷⁴

Increases in the monetary thresholds for compulsory merger filings led to a reduction in the number of transactions notified to the competition authorities as intermediate and large mergers. The CC also published new guidelines on the notification of small mergers, which request parties to small merger transactions to notify the Commission in certain cases.¹⁷⁵

B. MERGERS

The vast majority of transactions were approved by the CC, mostly without conditions. A number of transactions were approved subject to conditions intended to ameliorate their effect on employment in South Africa.

The CC prohibited the proposed intermediate merger between Masscash Holdings (Pty) Ltd and Finro Enterprises (Pty) Ltd (trading as Finro Cash & Carry), however, on the basis that it would substantially prevent and/or lessen competition in the market for the wholesaling of grocery products in the Port Elizabeth region and surrounding areas.¹⁷⁶

C. ANTICOMPETITIVE PRACTICES

A significant number of cartel cases resulted from applications for leniency under the Commission's Corporate Leniency Policy (CLP). The Commission initiated investigations into anticompetitive conduct in the South African construction sector (particularly

* The contribution for South Africa was written by Heather Irvine of Deneys Reitz.

173. Competition Amendment Act 1 of 2009, Government Gazette 32433 of Aug. 28, 2009, available at <http://www.info.gov.za/view/DownloadFileAction?id=106306>.

174. *Id.* § 73A.

175. See The Competition Commission Website, Guideline on the Notification of Small Mergers, <http://www.compcom.co.za/how-to-file-a-merger-link/> (last visited Feb. 2, 2010).

176. See Press Release, CC, Competition Commission Blocks Masscash and Finro Merger (May 25, 2009), available at <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/25-May-09-Competition-Commission-blocks-Masscash-and-Finro-merger.pdf>.

involving collusive tendering)¹⁷⁷ and the petroleum value chain;¹⁷⁸ price fixing by bicycle retailers;¹⁷⁹ and practices engaged in by the major South African supermarket chains.¹⁸⁰

In addition, the Competition Tribunal decided cases about abuses of dominance in the grain, flat steel, and tobacco industries, among others.¹⁸¹

177. See Press Release, CC, Competition Commission Requests Fines for Steel Companies and Initiates Construction Sector Investigation (Sept. 1, 2009), *available at* <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/01-Sept-09-Competition-Commission-requests-fines-for-steel-companies-and-initiates.pdf>.

178. See Press Release, CC, Competition Commission Initiates Complaints in Piped Gas and Petroleum Products (Jan. 19, 2009), *available at* <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/19-Jan-09-Competition-Commission-initiates-complaints-in-piped-gas-and-petroleum-products.pdf>.

179. See Press Release, CC, Competition Commission Uncovers Bike Retailer Cartel (Mar. 5, 2009), *available at* <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/05-Mar-09-Competition-Commission-uncovers-bike-retailer-cartel.pdf>.

180. See Press Release, CC, Competition Commission to Probe the Supermarket Industry (June 29, 2009), *available at* <http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/29-June-09-Competition-Commission-to-probe-the-supermarket-industry.pdf>.

181. See The Competition Tribunal South Africa, <http://www.comptrib.co.za> (last visited Mar. 28, 2010).

