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Recent important competition cases involving more than one country

Report by the UNCTAD secretariat*

Executive summary

This report reviews recent cases involving restrictive business practices, including mergers and acquisitions and concentrations in developed and developing countries and economies in transition. Some cases have cross-border aspects to the extent that they involve other countries or foreign firms that have operations in the country in question. From past experiences of case investigations and discussions during intergovernmental meetings, it is possible to show the need for increasing awareness of the benefits of cooperation between competition authorities from both developed and developing countries at the bilateral and regional levels. Cooperation may enhance case-handling capabilities in developing countries. Developing countries also continue to review approaches to competition enforcement, including the introduction of leniency programmes in cartel investigations. Some challenges facing developing countries emanate from structural weaknesses of competition legislation, while others stem from policy conflicts between competition and other government policies, for example, concurrent jurisdiction of sector regulators and competition authorities on competition matters. Approximately 30 cases of cross-border anticompetitive practices have been analysed, and the current report includes the experience of 11 examples of cooperation in case initiation, resolution and investigations between competition authorities, sector-specific regulators and other government agencies.

* This document was submitted on the above-mentioned date as a result of processing delays.

I. Introduction and overview

1. The current report is part of a continuous series reviewing competition cases prepared by the UNCTAD secretariat with a special focus on developing countries' progress in enforcing competition law. At its eighth session, the Intergovernmental Group of Experts on Competition Law and Policy requested the UNCTAD secretariat to prepare a document on recent important competition cases, with special reference to competition cases involving more than one country and taking into account information received from member States.

2. The cases reviewed in this report have been selected from materials provided by member States in response to a request for information by the UNCTAD secretariat and from other publicly available materials. Taking into account the relatively small number of cases involving developing countries for which it was possible to obtain information, a broad range of cases was selected for review, including those (a) affecting the markets of more than one country, including a developing country; (b) involving enterprises with their headquarters or other operations outside of the country where the case has been considered; or (c) originating in developed and developing countries and involving issues or sectors that are relevant internationally, particularly for developing countries.

3. The cases reviewed in this report show that, in a context of globalization and liberalization, competition law and policy are becoming a key element in some developing countries' economic policies. They also reveal that competition enforcement in many countries assists in addressing the anticompetitive practices that are prevalent in markets of developed and developing countries, including least developed countries and transition countries. However, the relatively small pool of cases and countries from which these samples were drawn suggests that more countries need to step up their efforts to adopt and effectively enforce competition laws and to create and/or strengthen a competition culture. Some of the cases reviewed demonstrate that anticompetitive practices such as collusion and abuse of dominant position occur in a variety of sectors and that in many instances such practices involve a mixture of vertical and horizontal illegal actions. Similarly, competition authorities are increasingly called to assess the potential anticompetitive effects of mergers, acquisitions and concentrations with either a domestic or an international dimension. The present report deals with implementation successes, conflict or coordination of various policies and challenges. However, there is still much room for improvement of enforcement techniques and coordination between countries with newly established competition authorities, particularly in developing and transition countries, and those of developed countries.

II. Anticompetitive practices

A. Thailand: compulsory licensing in the pharmaceutical sector

4. Thailand recently joined the ranks of nations that have taken advantage of the flexibilities in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), authorizing compulsory licenses for pharmaceutical patents to increase access to medicines in its health system. Between November 2006 and November 2007, the Ministry of Health granted licenses for patents on two antiretroviral drugs: Efavirenz, sold by Merck as Stocrin; and Lopinavir+Ritonavir, sold by Abbott as Kaletra. TRIPS authorizes public use licenses without negotiation with the patent holder. Other countries that have issued compulsory licenses for

AIDS medicines include Indonesia, Malaysia, Ghana, Eritrea, Mozambique, Zambia and South Africa.¹

5. When Thailand issued its compulsory license, Abbott was demanding \$2,200 for a one-year's supply of Kaletra, which corresponded to approximately 10 times the lowest generic price. Seeing that it would not be able to maintain adequate treatment for all who needed it at that price, Thailand attempted to negotiate lower prices for Kaletra and other needed drugs. When those negotiations failed, the Thai Government issued licenses to purchase generic products.

6. In March 2007, Abbott responded to the compulsory license for Kaletra by announcing it would no longer register new drugs for sale in Thailand. A refusal to sell the only heat stabilized version of a ritonavir-boosted protease inhibitor in a poor tropical country threatens many lives and, as described below, violates Thailand's Competition Act BE.2542. In response to Thailand's local and international law justified decision to issue a public health compulsory license for Kaletra and other medicines, Abbott announced that it would refuse to market a new heat-stabilized version of Kaletra, along with several other drugs, in Thailand. In April 2007, Thai treatment activists filed a complaint with the Trade Competition Commission, alleging that Abbott's withholding of its products violated Thailand's Competition Act. The law prohibits dominant companies engaged in commerce in the country from withholding provision of products without adequate pro-competitive justification.

7. According to a recent analysis,² Thailand may also consider other grounds for a competition-based complaint against Abbott in the refusal to license generic versions of Kaletra to supply Thailand's market prior to the public issuance of the license. This could be added to the existing public health grounds for the compulsory license which, under the TRIPS agreement, would permit penalizing Abbott through lower (including zero) royalties as well as authorization of unlimited exports of compulsory licensed products. Abbott's refusal to license generic products may violate section 25(1) of Thailand's Competition Act, which prohibits "unreasonably fixing or maintaining purchasing or selling prices of goods or fees for services". It may also violate section 29, which prohibits "any act which... has the effect of... impeding or restricting business operation of other business operators or preventing other persons from carrying out business".

8. In December 2007, the Trade Competition Commission concluded that the defendant's withdrawal of its drug registration application did not violate the Trade Competition Act for the following reasons:

- (a) Notification to the Trade Competition Commission was required for business operators with market dominance, defined as the sale of any goods or services with market share in the previous year of over 50 per cent and at least 1 billion baht (approximately \$32 million). However, Abbott Laboratories had turnover of less than that. Besides, its action was not deemed to suspend, reduce or restrict distribution, deliveries or importation without justifiable reasons in order to reduce the quality to that lower than the market demand;
- (b) The company's withdrawal of registration with the Food and Drug Administration did not constitute intent to cause harm to Thai consumers.

¹ www.cptech.org/ip/health/cl/recent-examples.html.

² www.wcl.american.edu/pijip/thai_comp_licenses.cfm.

Commentary

9. Many competition laws, including Thailand's, prohibit dominant companies engaged in commerce from withholding provision of products without adequate pro-competitive justification. Abbott was refusing to offer the version of its Kaletra product that is needed by the poorest consumers.³ The case shows the importance given by the Thai commission to challenges made by activists who regarded anti-poor market segmentation strategies to be anticompetitive under the refusal to supply doctrine. Although the case against Abbott was unsuccessful, in view of the fact that the case is now in the public domain, it might still act as a deterrent to other enterprises that are dominant and hold intellectual property rights from abusing their dominant position in the market. Also, it enhances the application of competition law in compulsory licenses for medicines and other life-saving products. Another example was the South Africa Treatment Action Campaign, which in 2001 filed a complaint with the South Africa Competition Commission against GSK and BI for excessive pricing of first-line AIDS drugs. In 2003, the commission ruled that the companies were dominant in their respective markets and had abused their dominance by excessive pricing and refusing to license generics.

B. South Africa: price fixing and market allocation in the food sector

10. Since February 2007, the South African Competition Commission has pursued investigations into price fixing and market allocation in the bread industry by Pioneer Foods (Sasko and Duens Bakeries), Premier Foods (trading as Blue Ribbon Bakery) and Tiger Brands (Albany Bakeries) after it received telephone complaints from several independent bread distributors in the Western Cape. The commission extended its investigation nationwide and also initiated a separate investigation into various practices in the milling industry. Some bread companies had been granted immunity under the leniency programme during a previous investigation in the sector. A leniency programme is a recent introduction into the detection of cartels and it accords protection to members of a cartel who blow the whistle in collaboration with the competition agency during the investigation.

11. In January 2008, the South African Competition Commission threatened to withdraw immunity granted to bread and milling companies if it found they had colluded over the latest bread price increases. The commission argued that there was a need for continuous investigation into price increases in the bread and milling industries. Premier was granted immunity from prosecution because of its cooperation with the investigation and its confession of its role in the cartel. Tiger Brands also decided to cooperate with the commission, culminating in its admission of participation in the cartel and a fine of approximately \$13 million.

12. Recently, Tiger Brands began charging excessively for a loaf of Albany bread. Pioneer Foods and Premier Food also increased their prices. Foodcorp also pushed up the price of its Sunbake bread in November 2007 without the market taking much notice. The four food giants account for more than 65 per cent of an estimated 7 million loaves of bread sold daily throughout the country. Reacting to the price increase, the commission argued that "this blatant profiteering is an insult to the nation, particularly the poor. It demonstrates that the collusion is continuing or the

³ Another potentially analogous situation is when an energy firm responding to public utility rate-making decisions it does not like pulls applications for building new, improved transmission lines and generating plants, and capping all output at existing levels, thereby restricting access to energy to a growing population. These kinds of decisions by dominant suppliers of essential goods appear to "suspend, reduce or restrict services, production, purchase, distribution, deliveries, or importation without justifiable reasons".

cartel members are acting to maintain the artificially high margins they achieved by acting unlawfully”.⁴

13. Bread producers have argued that the price increases are a response to rising input costs, particularly in the case of wheat, the main ingredient, that had almost doubled in price in the past year. According to the commission’s enforcement and exemption division, the price of bread had been artificially maintained through collusion and prices should have stayed constant, not increased. Moreover, bakers wanted to maintain profit margins. The commission is asking for explanations from the bakers and was investigating whether rising input costs had led to justified increases in the bread price. It could retract immunity if it found that companies had once again engaged in cartels for which they had been given immunity.

14. In 2007, input costs increased at the same rate and in some instances even faster than the wheat price. Given that, among others, most Southern Africa Customs Union (SACU) members buy bread products from South Africa, these price increases have a cross-border effect within the customs union.

15. On 5 May 2008, the Competition Commission found that Pioneer Foods (Pty) Ltd. and Foodcorp (Pty) Ltd. had contravened the Competition Act of 1998, and presented their findings to the tribunal for adjudication. Based on the actions between the competing firms and in view of the fact that their behaviour was most detrimental to the poorest strata of society, the commission referred the findings of its investigations into cartel activity nationally in the bread baking industry and consequently requested that the tribunal (a) declare that Pioneer and Foodcorp have contravened sections 4(1) (b) (i) and (ii) of the act; (b) direct that Pioneer and Foodcorp desist from fixing bread prices and allocating markets; (c) levy an administrative penalty on each of the first and second respondents of 10 per cent of their annual turnover for the 2006/07 financial year; and (d) seek any further or alternative relief it may consider appropriate.

Commentary

16. In order to be effective, immunity needs to be applied with certain conditions. More rigorous reporting requirements are needed in the case of companies that contravene the law, particularly when evidence of cartel activity has been found. In view of the number of cases involving price fixing and market allocation, a major goal of the South African competition authorities is to challenge cartel activity. In this regard, proposed amendments to corporate leniency policy aim at creating a more effective tool to detect and prosecute cartels, which are criminal in many parts of the world.

17. Considerations to amend the current leniency programme included (a) tightening discretion to provide immunity guarantees and widening the leniency to all members of a cartel; (b) making submissions orally rather than in writing; and (c) adopting a “marker” system, whereby a firm could establish beforehand whether leniency would be available to it and reserve its place in the line. This case shows that, in situations where immunity is granted to companies engaged in cartel activities, then follow-up and compliance actions need to be initiated in order to ensure that the companies do not engage in further cartel activities.

⁴ See www.fin24.co.za/articles/default/display_article.aspx?ArticleId=1518-25_2255314.

C. Republic of Korea: abuse of dominance in the mechanical engineering sector

18. On 17 January 2007, the Korea Fair Trade Commission (KFTC) imposed corrective measures and a surcharge of 23 billion Won (approximately \$23.5 million) on Hyundai Motor Company for its abuse of dominance, particularly in restricting its sales agents from relocating or expanding their stores, and employing sales representatives while forcing sales agents to fulfil excessive sales quotas. The company increased its market power in the domestic auto market following the acquisition of KIA Motors. Based on complaints filed about the company with KFTC, and facts gathered through KFTC's own initiative, the competition authority on five occasions conducted on-site investigations into Hyundai Motor Company and its sales agents.

19. Initial investigations by KFTC revealed that the company was engaged in the following activities: (a) restricting its sales agents from relocating their stores; (b) signing an agreement with its labour union to place limitations on sales agents in hiring sales representatives, a limitation that local affiliates of the labour union demanded the company to maintain and strengthen; and (c) setting annual sales quotas and allocating them among local headquarters.

20. KFTC found the company in violation of the Monopoly Regulation and Fair Trade Act for committing the following anticompetitive practices: (a) abuse of market dominance to restrict its sales agents from relocating stores; (b) abuse of market dominance to limit sales agents' new employee recruitment; and (c) obstruction of competitors' business prohibited in article 3-2, (1), 3 and abuse of market dominance defined in article 23, (1), 4 by forcing excessive sales quotas onto its sales agents.

21. KFTC imposed corrective measures on the company to eliminate the restriction on store relocation and new recruitment, and imposition of excessive sales quotas. In addition, the company was ordered to modify or eliminate some of the contract terms signed with its sales agents within 60 days and to cancel or modify the agreement with its labour union, including local affiliates. Along with the corrective measures, KFTC imposed a surcharge 23 billion Won (approximately \$23.5 million), based on the relevant turnover created during the legal violations.

Commentary

22. With the purpose of promoting consumer welfare, KFTC's decision against the company enforced competition law against the abuse of market dominance and unfair business practices in the highly concentrated domestic auto market. Another point to note is the need for competition authorities to put in place a framework where mergers consummated in the market can be re-evaluated, to make sure that merged entities do not abuse their position in the market, and the conditions for approval if any are fulfilled. This would save on resources of the competition agencies by preventing abuse of dominance. Since Hyundai and KIA, like many other transnational enterprises, have subsidiaries all over the world, it would be in the interest of competition authorities to learn from the approach adopted and the ways this case was solved, and apply similar methods to other related cases.

D. Zimbabwe: exclusive agreements in the nickel mining industry

23. In April 2007, the Zimbabwean Competition and Tariff Commission received a complaint alleging the existence of an unfair export marketing agreement between Bindura Nickel Corporation (BNC), the Minerals Marketing Corporation of Zimbabwe (MMCZ) and a Swiss company called Glencore International AG. The complaint was investigated in terms of section 28 of the Competition Act (chapter

14:28) as a restrictive practice, which is defined in the act to include agreements that restrict competition to a material degree.

24. BNC is presently the only producer of nickel in Zimbabwe. The company used to have four nickel-producing mines (Epoch Mine, Madziwa Mine, Shangani Mine and Trojan Mine), but only two are active at the moment (Shangani and Trojan). The two active mines are, however, not operating at full capacity, due to viability challenges. Although Zimbabwe Platinum Mines (Zimplats) produce some nickel as a by-product from its production of other base metals, it is in the form of white mat that is sent to South Africa for further processing before being exported. MMCZ is a statutory body that was established by an act of Parliament as the sole marketing agent for all minerals produced in Zimbabwe, with the exception of gold and silver. It markets the minerals on behalf of the producing companies. Glencore International is a global buyer of nickel.

25. BNC, MMCZ and Glencore International had reached an agreement on the sale to Glencore International of the entire production of nickel produced from BNC's mines in Zimbabwe. The agreement would be for an initial period of 20 months, renewable thereafter. Under the agreement, MMCZ reserved the right to retain 15 per cent of BNC's monthly production of nickel for specific customers, provided that the terms and conditions of such sales were no worse than sales to Glencore International, and that the specific customers were outside Glencore's exclusive markets.

26. All the nickel produced by BNC is exported. The product is used in a number of specialized industrial processes that are presently not being carried out in Zimbabwe, such as in the stainless steel industry, the aerospace industry and the automobile spare parts manufacturing industry. There is therefore no local demand for the product. In 2006, nickel exports contributed 35.8 trillion Z\$ (approximately \$1.2 billion) to Zimbabwe's exports earnings, second only to gold exports, which contributed Z\$53.7 trillion (approximately \$1.8 billion). On the international market, since the end of March 2007, there had been a surge in the world prices of metals, particularly nickel and platinum, with nickel prices touching new six-year highs of \$50,342 per ton, up 100 per cent from 2001. However, BNC, through MMCZ, is an insignificant player, with its total output being less than 1 per cent of the world market.

27. In explaining the rationale behind the exclusive marketing agreement between BNC, MMCZ and Glencore International, it was submitted that BNC was currently not producing at full capacity and needed some materials for toll treatment. The raw materials needed to be combined with local materials for toll treatment did not originate in Zimbabwe, and there was therefore need for a foreign company with foreign currency to help in the procurement of the materials. Without such financing, BNC could not produce and market the nickel. MMCZ had therefore identified three such foreign companies, including Glencore International, which was found to be the most suitable and offered the best terms. Glencore International agreed to finance the exercise in exchange for exclusive access to the final product. Without Glencore International's pre-financing, BNC could not produce at a profit as it would incur high production costs.

28. BNC also submitted that the reason for the agreement was that, in order to economically operate the huge Bindura smelting and refinery operations, the company had always obtained nickel concentrate from South Africa and Botswana. Nickel concentrate was external material that accounted for over 40 per cent of total annual production of nickel. Imported nickel concentrate must, however, be paid for in advance of delivery, and BNC did not have the capacity to make such payments in foreign currency. The commission noted that – even though the nickel marketing

agreement between BNC, MMCZ and Glencore International was restrictive – its competitive effects were felt more on foreign markets than on the local Zimbabwean market, where BNC was the sole nickel producer and the product was not consumed. The agreement therefore had no effect on competition on the local market, and as such, fell outside the jurisdiction of the Competition Act (chapter 14:28).

Commentary

29. In this case, it should be noted that the Competition Act only applies to economic activities “within or having an effect within the Republic of Zimbabwe”. The commission noted that, even if the agreements were within the jurisdiction of the Competition Act, it would generate numerous public interest benefits, not only in the form of guaranteed export earnings and financing of the imports of an essential commodity, but also in the form of increased nickel production efficiencies in Zimbabwe, which would outweigh the adverse effects of its restrictiveness.

30. In view of the importance of the nickel for the Zimbabwean economic development and the increasing potential demand, the case shows the importance of competition law and policy in monitoring and challenging anticompetitive conduct. One could also infer how competition law and policy can complement industrial policy in those markets where the demand for the product is not local but foreign. Also, it shows the increasing need for competition law at the regional or international level in tackling cross-border anticompetitive effects.

E. Croatia: direct application of the European Commission’s decision on Microsoft

31. In this case, there was no formal proceeding initiated before the Croatian Competition Agency. However, there was a commitment signed by Microsoft upon the request of the Competition Agency. In the latter, Microsoft obliged itself to respect the competition rules in the territory of Croatia, in compliance with the conditions and obligations imposed by the European Commission in its decision 2007/53 EC of 24 March 2004, which was upheld by the judgment of the Court of First Instance on 17 September 2007.

32. The decision of the European Commission that addressed Microsoft stated that the company had refused to supply interoperability information. The commission found that, by holding back that information, Microsoft hindered the development and distributing of work group server operating system products. Furthermore, it stated that Microsoft made the availability of the Windows Client PC Operating System conditional on the simultaneous acquisition of Windows Media Player. Due to its great market share for server operating systems, the dominance requirements set out by the European Commission were fulfilled. These circumstances of an exceptional nature led to the conclusion that Microsoft’s refusal constituted an unjustified abuse of a dominant position incompatible with article 82 of the European Commission Treaty.

33. Referring to this European Commission decision, the Croatian Competition Agency obliged Microsoft to ensure the disclosure of the relevant Windows Server Protocol specifications to all companies in the market within the territory of Croatia on the basis of non-discriminatory use and on equal terms applicable to the companies within the European Union. Furthermore, it was required that the existing Windows XP and Windows Vista operating systems without Windows Media Player could be obtained in all languages accessible in the European Union in a non-discriminatory manner by offering two versions of Windows at the same price, and that the availability of a new Croatian version of Windows XP and Windows Vista operating systems without Windows Media Player was ensured.

Commentary

34. Since European Union law does not apply to the Croatian market as such, the direct extraterritorial implementation of the European Commission's decision on the Microsoft case on abuse of dominance is of particular interest. One should thereby note the way in which European jurisdiction influences competition authorities abroad in the way they treat similar cases. One should not forget, however, that in the Croatian case a high degree of congruence between the national and the European jurisdiction with regard to a future European Union membership is in the interest of the country. The implementation of the European standpoint on the Croatian market as well as the way KFTC addressed the same issue in 2005 shows that this interpretation about the accessibility of interoperability information and the impact of bundling on secondary markets gains support outside the jurisdiction of the European Union. The link between the scenarios for Croatia and the Republic of Korea is the fact that developing countries with limited resources can apply decisions from larger jurisdictions to their own situations.

F. Portugal: abuse of dominance in the telecommunications sector

35. In 2007, the Portuguese Competition Authority (PCA) imposed a fine of €38 million (approximately \$59 million) to PT Comunicações for abuse of dominant position in breach of article 6 (1) and (3) b) of the National Competition Act and article 82 of the European Commission Treaty. The case was initiated in 2003 by a complaint lodged by TvTel, followed by another complaint by Cabovisão in 2004 – both market competitors – arguing that PT Comunicações was refusing access to its underground conduit network.

36. During the investigations, unannounced inspections were carried out on PT Comunicações premises. The PCA found evidence that PT Comunicações – the national telecom incumbent – had denied to its competitors in downstream markets TvTel and Cabovisão access to its underground conduit network, which was an essential infrastructure. Due to a refusal to grant access to the essential infrastructure, PT Comunicações competitors were unable to install their cable network to around 73,000 homes, thus limiting the offer of cable television, broadband Internet and fixed-line telephone services. The PCA concluded that PT Comunicações held a dominant position in the market for access to infrastructure for the laying of cables and infrastructure for electronic communication networks, as well as on the relevant downstream markets. As a result, 73,000 homes were unable to choose a cable television provider other than CATVP-TV Cabo Portugal, a company whose majority shareholder was the PT Group. Furthermore, PT Comunicações foreclosed market access to some important urban areas in Portugal.

37. PT Comunicações' behaviour had thus the object and effect of preventing, restricting or distorting competition in the market, infringing both national and European Commission competition laws. The affected markets were the pay-television services, retail broadband Internet and retail fixed-line telephone markets. In Portugal, only the abuse of a dominant position, and not holding that position in itself, is prohibited under the law, namely article 6 of the National Competition Law – Law 18/2003, 11 June – in similar terms as those prescribed by article 82 of the European Commission Treaty.

38. According to the Portuguese Competition Law, there is a dominant position when (a) a company is active in a market in which it faces no significant competition or in which it predominates over its competitors – single dominant position; or (b) two or more companies act in concert in a market in which they face no significant competition or in which they predominate over third parties – collective dominant position (article 6 (2) of Law 18/2003).

39. The Portuguese Competition Law declares as an abuse “the refusal, upon appropriate payment, to provide any other undertaking with access to an essential network or other infrastructure which the first party controls, when, without such access, for factual or legal reasons, the second party cannot operate as a competitor of the undertaking in a dominant position in the market upstream or downstream, always excepting that the dominant undertaking demonstrates that, for operational or other reasons, such access is not reasonably possible” (article 6 (3) b).

Commentary

40. The case was considered an infringement of the Portuguese competition law and the Treaty of the European Union. In order to avoid similar situations, the competition agency has established a list of frequently asked questions which clarify all elements concerning an abuse of dominant position. Denying access to essential network facilities, thus blocking competition on a secondary market, has been central in European cases based on article 82 of the European Commission Treaty. This includes cases such as (a) the 2007 judgment of the European Court of First Instance in the Microsoft case; (b) the Magill case (involving television programme listings which are – unusually – copyrightable in Ireland, the country where the dispute originated); and (c) the IMS Health case (involving a copyrighted method for organizing data about pharmaceutical sales in Germany, which had become the de facto standard). In its decision, the PCA confirmed this legal conception.

G. Indonesia: terms of contract in the wholesaling sector

41. The Indonesian Commission for the Supervision of Business Competition (Komisi Pengawas Persaingan Usaha (KPPU)) completed an investigation according to the applied regulation and made a decision on case No. 02/KPPU-L/2005. This case concerns an alleged violation of Indonesian Law No. 5/1999 regarding Prohibition of Monopoly Practice and Unfair Business Competition, related to an agreement of trading terms applied to suppliers of goods by Carrefour Indonesia, headquartered in France. The Commission Council found that Carrefour had conducted business relations of purchasing and selling products with its suppliers using written agreements that listed trading terms to be negotiated with every supplier such as listing fees, fixed rebates, minus margins, terms of payment, regular discounts and common assortment costs. As mentioned in their report, suppliers deemed that the trading terms were difficult to apply, particularly on items requiring listing fees and minus margins.

42. A listing fee pursuant to Carrefour was the fee paid by suppliers to supply new products to Carrefour with a guarantee if the products were not sold out. The listing fee was only determined once and was not refundable. The fee amounts were different between small and large suppliers, and those listing fees were not applied to all suppliers. Carrefour’s revenue from this listing fee term in 2004 amounted to 25 billions rupiahs (approximately \$2.7 million). A minus margin was the suppliers’ guarantee to Carrefour that their product selling price was the lowest selling price. It stated that if Carrefour obtained written evidence that its competitor could sell the same product at a cheaper price than Carrefour’s purchasing price, Carrefour would have the right to ask compensation from suppliers amounting to the difference in prices between Carrefour’s purchasing prices and competitor’s actual selling price. This invoice deduction was calculated by multiplying the price difference with the amount of the suppliers’ remaining product in the Carrefour shop. Carrefour’s objective was to keep cheaper selling prices among its competitors. Carrefour’s revenue from applying the minus margin sanction from 99 suppliers in 2004 amounted to 1.9 billion rupiahs (approximately \$200,000).

43. The KPPU considered in this case the relevant market to be the retail hypermarket which competed directly in Jakarta, Tangerang, Bandung, Surabaya and Medan for household necessity product such as food and beverage products in instant packages, staple foods, fresh products, household products and electronics. Carrefour competitors in the hypermarket retail sector were Giant, Hypermart and Clubstore. The Commission Council found that Carrefour had significant market power compared to Hypermart, Giant and Clubstore, since it had the greatest number of shops strategically located with high convenience and facility completeness levels. Given its dominant market position, local suppliers who wanted their products to be sold and displayed in hypermarkets were dependent on Carrefour facilities.

44. The KPPU decided that Carrefour had abused its bargaining power to make suppliers accept unfavourable trading terms. The forms of pressure included holding payments due, which broke the cooperation of one side not to sell suppliers' products. The Commission Council urged Carrefour in carrying out its business activity to pay closer attention to the fact that every item of trading terms applied to suppliers should provide added value for both Carrefour and suppliers, and to avoid imposing restrictive terms on suppliers, particularly small and medium-sized businesses. Finally, based on the results of the investigation of this case, the Commission Council decided that the reported party was legally and convincingly proven to have violated article 19 of Law No. 5/1999. It instructed the reported party to terminate the abusive conduct of applying minus margin terms to suppliers and in addition it imposed a sanction to the reported party of 1.5 billion rupiahs (approximately \$150,000).

Commentary

45. The case of Carrefour provides an example of asymmetric negotiation problems that involve multinational corporations headquartered in industrialized countries, on the one hand, and small and medium-sized suppliers and/or customers in developing countries on the other. Carrefour, as the second-largest retail group worldwide, has the appropriate means to penetrate the Indonesian market strategically by imposing restrictive trading terms on local suppliers who rely on its infrastructure after other competitors have been repelled. This case exemplifies the progress made by some developing countries with regard to the efficient enforcement of their competition law and policy. It remains open to question, however, whether the provisions in the national laws of developing countries leave enough space to appropriately address those abusive conducts – that is, whether the imposed fines are high enough to have an effect of deterrence, particularly in cases involving multinational companies.

II. Mergers and acquisitions

A. Brazil: merger in the pharmaceutical sector

46. The only Brazilian merger operation that does not involve the agriculture sector was recently approved with restrictions by CADE (Conselho Administrativo de Defesa Econômica) in its ordinary session of 4 October 2006. The case was a merger between two European companies, Axalto Holding (Netherlands) and Gemplus International (Luxembourg), which produce plastic security cards and commercialized software, hardware and related services. The analysis was mainly based on the impact of the dominance of technological resources on competition. As per the Reporting Commissioner description, the companies that act in this market can be divided in two strategic groups: (a) companies such as Axalto and Gemplus, that hold technological resources to compete by innovation, and receive revenues not only from the sale of cards but also from technology licensing; and (b)

companies that compete on the cards sales, which are based not on innovation but on cost reduction.

47. The case was also analyzed by the European Competition Authorities, who verified that the companies held a large portfolio of patents in Europe. Based on this fact, European Union authorities decided to approve the merger, but only under the commitment that the companies license their intellectual property rights, since their dominance on such essential assets could block access to the cards market. This decision, however, is valid only on the European territory.

48. In Brazil, CADE found out that the use of patent is not so relevant to the Brazilian market, considering the low number of patents granted (approximately 1 per cent of European patent protection). On the other hand, the control of Axalto and Gemplus over the valid patents and the ones which can be potentially protected in Brazil due to international intellectual property rights treaties could sustain a dominant position for the parties. Based on this, CADE imposed a commitment to the companies under which they are obliged to license their patents deposited in Brazil, related to subscriber identity module (SIM) cards to any interested parties that operate in the Brazilian market by any form, under fair, reasonable, and non-discriminatory basis.

Commentary

49. The above case provides an example of the improved enforcement capacities and policies in developing countries seeking to reduce anticompetitive effects of an external merger. According to the effects doctrine, it can be justified under public international law to apply national merger control law to a concentration between companies based abroad when it is foreseeable it will have a substantial effect in a given State's territory, in this case the Brazilian market for plastic security cards. Consequently, even though both companies were headquartered in the European Union, the Brazilian Competition Authority imposed certain conditions on the merger in order to avoid anticompetitive effects on the Brazilian market. In addition, one should note that the Brazilian Competition Authority carefully considered the severity of the impact, taking into account the intellectual property held by the two parties to the merger.

B. Chile: merger proposal in the retail sector

50. The Chilean anti-monopoly tribunal has ruled against a merger of two of the nation's top retailers, denying the creation of a company that would be worth some \$15 billion, which would have become Latin America's second-largest retail group. Falabella, Chile's leading department store chain, was planning to buy the country's biggest supermarket chain, D&S.

51. Through generating synergies for greater development of retail, the two companies – controlled by the Solari, Cuneo, Del Rio and Ibanez families – were expected to add up to a market capitalization of over \$15 billion. The controllers of Falabella and D&S had approved the merger of both companies and their respective business areas – department stores, supermarkets, home improvement, financial retail services and shopping centres. By means of a material event communication filed with the Superintendence of Securities and Insurance, the boards of both companies reported on the agreement that will involve the merger of all the businesses currently developed by Falabella and D&S, both in Chile and abroad.

52. As a result of the transaction, the shareholders of both companies were expected to become shareholders of the new business conglomerate. The would-be new Falabella–D&S holding would become the most important department store chain in South America, with presence in Chile, Peru, Argentina and Colombia, and

the main food retailer in Chile, Lider. Additionally, this new company would incorporate the home improvement, Saitec real estate, CMR, Presto, Falabella Bank, San Francisco and Tottus business units. Each business unit was expected to continue operating with no major changes. The whole operation entailed a merger of companies, combining the equity of both companies. No public offering was planned since all shareholders of each company will participate under the same conditions and will benefit from the integration. The merger would provide suppliers with easier access to international markets, improvement and greater efficiencies in the distribution network, with a reduction in logistical costs. Since there was no overlapping in geographic markets, competition would not have been affected. In January 2008, the Chilean tribunal decided to reject the proposal for the following reasons: (a) the effective implementation of the operation would have entailed enormous changes in market structure, by creating a dominant (integrated) company in the retail sector controlling all segments – e.g. department stores, housing and rent – while creating barriers to entry; (b) the merger would entail substantial and constant competition problems (e.g. impact on prices, quantity and quality) of products which are key for Chilean consumers, which would also impact outside consumers; and (c) it appears that anticompetitive effects supersede benefits supposedly derived from the merger. Compensation measures are not sufficient to mitigate risks involved in this operation.

Commentary

53. Although the business model of integrated retailing is becoming more and more frequent, it is important to establish a difference between a big retail business resulting from competition in the market from that resulting from a merger of the main retailer and its most important competitor. This type of merger involving different products and reducing the number of independent players is likely to create problems in the market rather than bringing benefits. Additionally, given the size of the Chilean market, internal growth opportunities are scarce. It is therefore important for a Competition Agency to adopt effective policies at the right time. It is also important to note that merging parties will always have valid reasons in their view for effecting a merger. It is the role of a competition agency to test their validity against the law.

C. Germany: merger in the market for hearing aids

54. One interesting transnational merger case was decided in 2007 by the German Competition Authority, the Bundeskartellamt. On 10 November 2006, it received a notification that Phonak Holding AG, situated in Stäfa, Switzerland, planned to purchase from GN Store Nord (A/S), situated in Ballerup, Denmark, the enterprises GN ReSound A/S, GN ReSound GmbH Hörtechnologie, and GN US Holdings Inc. The enterprises to be purchased are situated in Ballerup, Germany; Münster, Germany; and Minnesota, United States. They comprise GN Nord A/S's hearing aid business and are active in the development, manufacture and sale of hearing aids and hearing aid accessories, as well as audiological diagnostic equipment. Phonak is one of the world's leading producers of hearing aids. The other two main producers are Siemens and the Danish company William Demant/Oticon.

55. The Bundeskartellamt prohibited the planned concentration in a decision issued on 11 April 2007. In the Bundeskartellamt's view, the acquisition of GN ReSound would have led to a collective dominant oligopolistic position of Siemens, Phonak and Oticon. These companies were already closely linked by a number of business relations. In addition, they cooperated in the area of basic patents and custom-designed technologies, and had installed an extensive market information system via the central association of the electronics and technical industry (Zentralverband Elektrotechnik und Elektrotechnikindustrie E.V., ZVEI). Stable

supply and demand conditions, the almost market-wide listing of all the oligopolists with hearing aid retailers and transparency on the time of launch of new products already facilitate parallel conduct between the oligopolists. Furthermore, the average prices of hearing aids charged by Siemens, Phonak and Oticon to hearing aid retailers did not differ significantly.

56. The Bundeskartellamt found that the already weak competition within the oligopoly would have become insignificant after the merger, since the joint market share would have increased to approximately 90 per cent. By taking over the technological and productive potential of GN ReSound and securing by further acquisition the oligopoly's leading position in the enabling technology sector, the oligopoly would have succeeded in eliminating the little competition potential that remained in the market. The merger would have further weakened innovation and price competition, ultimately to the detriment of the consumer.

57. Even though the merger project was initiated abroad, the Bundeskartellamt assumed its prohibitory power based on section 130 (2) of the German Act against Restraints of Competition (ARC). Pursuant to this provision, the ARC shall apply to all restraints of competition having an effect within the scope of its application, also if they were caused outside this scope of application (the so-called effects doctrine). The domestic effect of the project was undisputed and the turnover threshold requirements were also fulfilled.

58. The parties to the merger, however, claimed that the Bundeskartellamt had no prohibitory power because, pursuant to article 25 of the Constitution, the principle of nonintervention as a general rule of international law had higher status than the rules of the ARC. In their view, the effects doctrine is only in accordance with the principle of nonintervention if the application of domestic law and the measures based thereon are limited to these domestic effects. They argued that, if the merger project was not divisible into a domestic and a foreign part, prohibitory power was inapplicable. The Bundeskartellamt rejected these arguments in its decision and pointed out that the general rules of international law included not only the prohibition of interference, but also the effects doctrine. Since in the given case the merger was not divisible, the Bundeskartellamt therefore assumed in accordance with the prevailing view that there was a general prohibitory power for the merger as a whole in order to apply the purpose of section 36 (1) of the ARC. The parties to the merger appealed against the decision to the Düsseldorf Higher Regional Court. The case is still pending.

Commentary

59. Under public international law, it may be justified to apply national merger control law to a concentration between companies based abroad when it is foreseeable that a proposed concentration will have a substantial effect in a given State's territory. This effects doctrine is the basis for enforcement of antitrust law not only in Germany, but in other important jurisdictions. Consequently, this enhances the necessity of developing countries to establish a well-functioning competition law and policy, as well as an enforcement institution, in order to provide the ground for such legal interventions. In cases where an extraterritorial merger severely affects the local market, as in the one described above, developing countries in particular should be able to interfere, especially when – as in this case – a sector essential for a vulnerable part of society is concerned.

D. Colombia: enterprise integration in the market for tube systems/PVC

60. The Colombian Superintendencia de Industria y Comercio (SIC) reported an operation carried out in March 2007 where MEXICHEM would strengthen its

leadership by integrating PAVCO S.A., Amanco Ltda, PVM S.A., Petroquímica Colombiana (PETCO) and Mexiquem Colombia S.A.; by controlling PETCO, MEXICHEM would also control PAVCO (subsidiary of Armanco Holding Inc). The operation would have effects in the national territory. This acquisition would strengthen MEXICHEM's position in Latin America in resin production and commercialization and give it the critical mass necessary to maintain its regional leadership in polyvinyl chloride (PVC) resins.

61. Following the analysis carried out by the Colombian Competition Authority, it was found that PETCO, the sole supplier of resin PVC, imposes a higher price at the internal market than to the foreign ones. As regards the relevant market, there is a need to first refer to the market for resins PVC which are used to produce tubes and accessories made of PVC, i.e. the primary (product) market or upstream. Given their characteristics, prices and potential use, there are no substitutes in the market; as regards the geographic market, the production of the above-mentioned resins PVC is circumscribed to the national territory. Secondly, in the relevant market for the tube systems made of PVC (secondary market), the geographic market or downstream for tube systems PVC is the national territory as well. Having analyzed the affected markets (i.e. primary market and tube systems), the superintendence found that they are highly concentrated. Enterprises willing to enter into the market of resins PVC require high levels of investment and long experience in the business. Imports represent additional costs for consumers due to high tariffs, freights and transport insurance. As regards tube systems PVC, PAVCO is the leader in the market. The markets of accessories and tubes in general are also highly concentrated.

62. Regarding the way the proposed integration affects the conditions of competition, it was found that, in case the merger is accepted, the enterprise leader may restrict or suspend providing inputs for secondary markets. These inputs are (a) a high percentage of resins PVC in the costs of production of tube systems PVC, where MEXICHEM has a dominant position; (b) scarce alternatives to provide other sources due to high tariff and transport costs; (c) difficulties in obtaining technical and service assistance in the case of imported products; and (d) low competitiveness in the market.

63. If PETCO and PAVCO become one entity through the proposal for integration, they would control the primary market and, indirectly, the costs of PAVCO's competitors in the secondary market (tubes PVC). Furthermore, MEXICHEM would be informed of the quantities, prices and other details of primary inputs acquired by PAVCO's competitors. Moreover, PAVCO would benefit from raw materials obtained at the costs produced by MEXICHEM. This would increase PAVCO's market power and the other competitors would have two choices – either buy raw materials at the conditions offered by PAVCO or, alternatively, import them or establish a different enterprise producing resin. This would necessarily increase costs.

64. Citing concerns that the merger would be bad for competition and consumes' welfare, Colombia's SIC (July 2007) issued a statement disapproving the deal. However, the decision was appealed and in September 2007 SIC reconsidered the case and authorized the integration of PAVCO into the operations of MEXICHEM in Colombia, subject to the following conditions: (a) a structural condition consisting of selling assets for the production of tube systems PVC to a third party; and (b) behavioural conditions by which PETCO would supply to local clients proper selling conditions, prices, delays in the delivering, etc. A major issue would also be to keep information as confidential, particularly vis-à-vis PAVCO. An auditing service would monitor the effective compliance of these conditions and an insurance policy was issued to ensure fulfilment with the agreed obligations.

Commentary

65. Following the appeal from MEXICHEM (PETCO) and PAVCO, the operation was finally approved subject to conditions established by the Colombian Competition Authority. The case shows that, even in cases where an operation is approved after an appeal, the competition authority could still impose obligations that need to be respected in order to avoid a negative impact of the operation. Due to MEXICHEM's strengths in the region, the SIC should monitor compliance with the agreed companies. The operation represents a jurisprudential precedent for analysis of merger cases in other countries with similar conditions.
