

Unilateral Conduct Committee E-Bulletin
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The Unilateral Conduct Committee's monthly E-Bulletin is intended to offer the antitrust community updates and information on the latest developments relating to monopolization law and policy. If you have any comments or suggestions on the E-Bulletin, please e-mail [Jay Modrall](#), [Tanya Dunne](#), [Adam Nyhan](#), [Tracey Topper Gonzalez](#), [Mitchell Stoltz](#), and [Daniel Streeter](#).

U.S. DECISIONS

GEORGIA COURT GRANTS SUMMARY JUDGMENT FOR DEFENDANT MEDICAL ASSOCIATIONS ON DEVICE MANUFACTURER'S ACTUAL AND ATTEMPTED MONOPOLIZATION CLAIMS

Neotonus, Inc. v. Am. Med. Ass'n, 2007 WL 2258723 (N.D. Ga. Aug. 3, 2007). The plaintiff, Neotonus, Inc., manufactures a device (NeoControl) used to treat female urinary incontinence. 2007 WL 2258723, at *1. Defendant American Medical Association (AMA) is the United States' largest professional association of physicians. Defendant American Urological Association (AUA) is an association of physicians who provide urological care.

In 2000, Neotonus petitioned the AMA to list one of its products in the AMA's "Current Procedural Terminology" (CPT) catalog. *Id.* at *4. Device manufacturers covet listings in the CPT, a standardized system by which insurers report the products that they cover, because it facilitates insurers' use of the products and therefore presumably increases sales. *Id.* at *2, *4. Citing insufficient peer-approved evidence of the efficacy of Neotonus' product, the AMA refused to list it in the CPT. *Id.* at *4-*5. The AMA's evaluation included an assessment by the AUA finding that the product provided no long-term efficacy. Based on these facts, Neotonus alleged that the AUA monopolized and/or attempted to monopolize the market for the treatment of female urinary incontinence nationwide in violation of Section 2 of the Sherman Act. Neotonus also alleged that both defendants conspired to restrain trade in violation of Section 1 of the Sherman Act, in addition to several state law claims. *Id.* at *6. The defendants moved for summary judgment.

The court held that Neotonus could not prove monopoly power in the relevant market. *Id.* at *10. In the market defined by Neotonus, which the court accepted for purposes of summary judgment, the court held that there are at least eleven competing types of treatment ranging from surgery to non-invasive muscle exercises. Urologists, the AUA's members, comprise only 7% of that market. Alternatively, Neotonus argued that the AUA had monopoly power by virtue of its "*de facto* standard-setting authority" and consequent alleged ability to influence the AMA's decisions on listing products in the CPT. *Id.* at *10. The court held that the AMA had acted unilaterally in denying Neotonus' petition, however, and therefore rejected this theory of monopoly power.

The court also held that Neotonus could not show that the AUA engaged in anticompetitive or predatory conduct, because its negative assessment of the device was consistent with the views of almost every other medical organization that had reviewed the same device. *Id.* at *11. Accordingly, the court granted summary judgment for the defendants on all claims. *Id.*

NEW JERSEY COURT DENIES DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON SECTION 2 CLAIMS BASED ON PLAINTIFF'S DEFINITIONS OF THE RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

Med Alert Ambulance, Inc. v. Atl. Health Sys., Inc., 2007 WL 2297335 (D. N.J. Aug. 6, 2007). Plaintiff Med Alert Ambulance, Inc. (Med Alert) was a private ambulance services company operating in various New Jersey counties from 1984 until 2004 when it went out of business. *Id.* at

*1. Med Alert provided specialty care transport (SCT), which is typically used to transport critically ill or injured patients from a sending hospital to a tertiary care facility for specialized care. *Id.* SCT requires care to be furnished by one or more healthcare professionals during the transport. It is distinguishable from basic life support (BLS) transport services based on the increased level of care required during SCT. *Id.*

Med Alert alleged, *inter alia*, that defendant Atlantic Health System, Inc. (AHS), a non-profit health care system that operates two community hospitals and a tertiary care facility in New Jersey, violated Section 2 of the Sherman Act. In 2001, AHS entered the ambulance services business with the creation of its own ambulance company, Atlantic Ambulance Corp. (AAC). *Id.* at *2. Med Alert maintained that, corresponding with the entry of AHS and AAC into the market, Med Alert and other SCT competitors experienced a sharp decrease in the number of runs they made between sending hospitals and tertiary care facilities. *Id.* Med Alert also alleged that the defendants engaged in other actions, which it deemed “dirty tricks” to eliminate competition in the SCT market. *Id.*

The defendants moved for summary judgment on Med Alert’s Section 2 claims, arguing that: (1) Med Alert failed to establish relevant product and geographic markets, and (2) the number of ambulance companies in New Jersey increased during the relevant time period. *Id.* at *14.

The court reviewed the test for determining the relevant product market. First, the court found, the industry or public recognizes SCT as a separate economic entity, not interchangeable with any other transport services such as BLS. *Id.* at *11. Second, SCT has “peculiar characteristics and uses,” since the level of care required for the patient being transported determines whether SCT or BLS is used. *Id.* (quoting *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962)). Third, the court found that SCT requires specialized vendors: ambulance companies that can provide two EMTs and a registered nurse and an ambulance equipped to provide a certain level of care. *Id.* Finally, the court determined that SCT has distinct customers, since SCT service can only be ordered by sending hospitals and patients. *Id.* Based on the specialized nature of SCT, the court found that there was a genuine issue of material fact as to the relevant product market. *Id.*

As to the relevant geographic market, the court reviewed the medical protocols governing SCT. First, the court found that when a patient requires SCT service, his choices are driven by his current location and the location of the tertiary care hospital. *Id.* at *12. A decision as to which tertiary hospital will best serve the patient’s needs is also made, prior to determining which SCT vendor will be used. *Id.* Thus, the court found that a genuine issue of material fact existed as to the relevant geographic market. *Id.*

Finally, the court examined the defendants’ assertion that the number of ambulance services in New Jersey actually increased, not decreased, during the relevant time period. The court stated, “[t]he evidence that the number of ambulance companies that provide any level of transportation grew for the entire state is not sufficient to derail the plaintiff’s monopoly claims because it addresses too broad a market definition, i.e., SCT and BLS ambulance services.” *Id.* at * 14.

Having found genuine issues of material fact as to the relevant product and geographic markets, and having determined that the additional BLS entries into the New Jersey market were “not relevant,” *id.*, the court denied the defendants’ motion for summary judgment as to Med Alert’s Section 2 claims.

NEW YORK COURT GRANTS SUMMARY JUDGMENT FOR DEFENDANTS IN REAL ESTATE LISTINGS CASE

***Klickads, Inc. v. Real Estate Board of New York*, 2007 WL 2254721 (S.D.N.Y. Aug. 6, 2007).** The plaintiff, Klickads, Inc., is a “listings management IT vendor” that provides information technology products and services to real estate brokers, including storing real estate listings data. The defendants are Real Estate Board of New York (REBNY), a trade association of New York area real estate

brokers, several individual brokers, and two competing listings management IT vendors, RealPlus LLC (RealPlus) and On-Line Residential, Inc. (OLR). 2007 WL 2254721 at *1. Defendant RealPlus created an electronic system for sharing listings data between brokers, each of whom used different internal listings management systems, including the plaintiff's product. Defendant REBNY mandated the use of the RealPlus system for all members who wished to share listings data. RealPlus created interfaces between its system and the systems used by several of the plaintiff's competitors, but refused to design an interface to the plaintiff's system. *Id.* at *1-3. The plaintiff sued, alleging that defendants RealPlus and OLR monopolized, attempted to monopolize, and conspired to monopolize the Manhattan listings IT services market. The plaintiff alleged the same three Section 2 claims against individual brokers in the Manhattan residential brokerage services market. The plaintiff also alleged violations of Section 1 of the Sherman Act and New York's Donnelly Act. *Id.* at *1. The defendants moved for summary judgment on all of the claims. *Id.*

The court granted summary judgment as to all of the plaintiff's Section 2 claims. *Id.* at *8-10. The court held that the plaintiff's monopolization claims in the listings IT services market were based on a "shared monopoly" theory of liability, which is not recognized in the Second Circuit. *Id.* at *8 (citing *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989)). The court held that *H.L. Hayden* specifically barred claims of actual and attempted monopolization based on "shared monopoly." *Id.* at *8-9. As for the conspiracy to monopolize claim, the court noted that no district court in the Second Circuit or other circuits had specifically barred conspiracy claims based on a shared monopoly theory, but that several district courts had rejected such claims. *Id.* The court held that where the goal of the conspiracy was not to form a single entity with market power, or otherwise to lessen competition between the defendants, no Section 2 conspiracy claim exists. *Id.* at *9.

On the Section 2 claims against the defendant real estate brokers, in which the plaintiff alleged Manhattan residential brokerage services as the relevant market, the court held that as the plaintiff was neither a consumer nor a competitor in that market, the plaintiff lacked standing, and that even if the plaintiff had standing, these claims, too, employed a "shared monopoly" theory and thus must fail. *Id.* at 9-10.

FLORIDA COURT REFUSES TO DISMISS SECTION 2 COUNTERCLAIMS IN AIRPORT SECURITY BIN CASE

***SecurityPoint Media, LLC v. The Adason Group, LLC*, 2007 WL 2298024 (M.D. Fla. Aug. 7, 2007).** The plaintiff, SecurityPoint, seeks to provide security bins to airport security checkpoints with advertising placed on the bins, pursuant to a Transportation Security Administration (TSA) program. The defendants, the Adason Group and the Conner Group, are also seeking to provide security bins, with advertisements, to the TSA. 2007 WL 2298024, at *1. The plaintiff holds a patent on a process for using bins, with advertising attached, to screen airline passengers. *Id.* The plaintiff sued the defendants for infringing the patent. The defendants responded with nine counterclaims, including monopolization and attempted monopolization under Section 2 of the Sherman Act (the other counterclaims were not identified). *Id.* The plaintiff moved to dismiss the counterclaims. *Id.* at *2.

In their counterclaims, the defendants alleged that the plaintiff was "falsely representing the nature and scope of its patent rights," and threatening the defendants' prospective buyers with infringement lawsuits, and that as a result prospective buyers chose not to deal with the defendants. The defendants alleged that "security bins" are the relevant product market, the United States is the relevant geographic market, and that the plaintiff has a 70% share of that market. *Id.* In moving to dismiss the Section 2 claims, the plaintiff argued that it does not participate in the market for "security bins" but rather acquires bins from a third party and integrates them into a patented process, and therefore the defendants had not alleged a relevant product market. *Id.* at *3. The plaintiff also argued that the alleged market was not viable because it did "not include available substitutes." *Id.* Finally, the plaintiff argued that monopolization claims arising from a patent lawsuit are subject to *Noerr-Pennington* immunity and that the defendants had not met the heightened pleading requirements of

Franchise Realty Interstate Corp. v. San Francisco Local Joint Exec. Bd. of Culinary Workers, 542 F.2d 1076, 1082 (9th Cir. 1976), which the plaintiffs argued were necessary to overcome *Noerr-Pennington* immunity using the sham exception. *Id.* at *4.

The court held that the defendants had sufficiently alleged a relevant market and that the plaintiff participated in that market. *Id.* at *3. The court reasoned that while there may be a distinction between supplying security bins and supplying a process of which security bins are a part, that distinction was a question of fact. *Id.* As to whether the defendants had alleged a viable product market definition, the court believed that the plaintiff had raised “important concerns” regarding whether participation in the TSA program sufficiently defined a market. Citing *Bell Atl. Corp. v. Twombly*, 127 S.Ct 1955 (2007), however, the court held that resolving the question required “factual determinations.” *Id.* Regarding the plaintiff’s *Noerr-Pennington* argument, the court rejected *Franchise Realty* and held that no heightened pleading standard was necessary to survive a motion to dismiss on *Noerr-Pennington* grounds. The court held that the defendants had sufficiently pled the “sham litigation” exception to *Noerr*. *Id.* at *5. Having rejected the plaintiff’s arguments on market definition and the *Noerr-Pennington* defense, the court denied the plaintiff’s motion to dismiss the Section 2 counterclaims.

CALIFORNIA COURT GRANTS MOTION FOR JUDGMENT ON THE PLEADINGS IN SILICON WAFER CASE BASED ON THE NOERR-PENNINGTON DOCTRINE

***Sumitomo Mitsubishi Silicon Corp. v. MEMC Electronic Materials, Inc.*, 2007 WL 2318903 (N.D. Cal. Aug. 13, 2007).** Plaintiffs Mitsubishi Materials Silicon Corp., Mitsubishi Silicon America Corp., Sumitomo Mitsubishi Silicon Corp., SUMCO USA Corp., and SUMCO USA SALES Corp. (collectively, SUMCO) filed suit against MEMC Electronic Materials, Inc. (MEMC), alleging, *inter alia*, that MEMC attempted to monopolize the domestic low-defect wafer silicon market by pursuing a patent infringement lawsuit in a related case, *MEMC Electronic Materials, Inc. v. Mitsubishi Materials Silicon Corp., Inc.*, Case No. CV 01-04925 SBA (the Related Case). *Id.* at *8. That case concerned a patent relating to “pure” or “perfect” silicon, which is used in the manufacturing of silicon wafers. SUMCO and MEMC both supply silicon wafers to the semiconductor industry.

MEMC moved, *inter alia*, for judgment on the pleadings as to SUMCO’s attempted monopolization claim, on the grounds that it was immune from antitrust liability under the *Noerr-Pennington* doctrine. The *Noerr-Pennington* doctrine states that a patent owner who brings a suit for infringement, without more, is generally exempt from the antitrust laws for that action. *Id.* at *6. However, the patent owner may be subject to antitrust liability for the anticompetitive effects of such suit if the accused infringer proves either that: (1) the asserted patent was obtained through “knowing and willful fraud” (known as *Walker Process* fraud); or (2) that the infringement suit was “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor.” *Id.*

The court first analyzed six specific claims that SUMCO contended gave rise to a triable issue of fact as to whether MEMC committed *Walker Process* fraud on the U.S. Patent and Trademark Office (PTO). *See id.* at *9-12. These claims concerned various alleged false disclosures and omissions that MEMC made to the PTO about aspects of the patent in question. After reviewing SUMCO’s claims, the court acknowledged that while the claims, if proven, might have shown that the patent in question was invalid, “SUMCO presents no evidence that MEMC intentionally misrepresented facts to the PTO with the fraudulent intent requisite to show *Walker Process* fraud.” *Id.* at *12.

Next, the court examined SUMCO’s argument that the litigation in both the instant case and the Related Case was a sham. SUMCO’s premise was what the court referred to as the “erroneous equation” of MEMC’s failure to demonstrate a triable issue of fact in the Related Case with the legal determination that MEMC’s claims were “objectively baseless” and therefore a sham. *Id.* at *13. The court reviewed the procedural posture of the Related Case and the instant case, noting that both this

court and the Federal Circuit determined that MEMC's lawsuit "cannot be characterized as frivolous or unjustified." *Id.* at *14. The court then held that "MEMC's infringement lawsuit was not 'objectively baseless' and, therefore, *Noerr-Pennington* immunity applies to SUMCO's antitrust claims." *Id.*

Finally, SUMCO alleged that MEMC entered into a patent-pooling agreement with Shen Etsu Handotai, Ltd. (Shen Etsu), under which both parties agreed not to sue the other on the basis of their respective patents, for the anticompetitive purpose of "neutralizing" Shen Etsu in the United States and developing an all-encompassing patent domain on low-defect silicon. *Id.* MEMC argued that this claim should fail because courts have held that patent pooling agreements are actually pro-competitive. *Id.* The court relied on precedent holding that if the antitrust plaintiff had the opportunity to license patent rights included in a pooling agreement independently from individual owners, then the pooling agreement was not a restraint of trade under the Sherman Act. Here, MEMC officially presented SUMCO with the opportunity to obtain an individual license, but SUMCO rejected all MEMC's offers. "Thus, the patent-pooling agreement was not anticompetitive." *Id.* at *15. In addition, the court stated that SUMCO offered no evidence of anticompetitive effects from the patent-pooling, thus finding that "SUMCO has failed to raise a genuine issue of material fact with regard to the alleged anti-competitive effects of the pooling agreement." *Id.*

Based on the foregoing, the court granted MEMC's motion for judgment on the pleadings.

CALIFORNIA COURT DISMISSES SECTION 2 COUNTERCLAIMS IN ANIMAL FEED CASE

***Cargill Inc. v. Budine*, 2007 WL 2506451 (E.D. Cal. Aug. 30, 2007).** Cargill, Inc., one of the plaintiffs, produces animal feed. CAN Technologies, Inc., a Cargill subsidiary and the second plaintiff, formulates animal feed for dairy farmers who buy feed from Cargill. 2007 WL 2506451 at *1. The defendants are Progressive Dairy Solutions and several of its employees. Progressive also formulates animal feed for farmers but does not sell feed. *Id.* In a lawsuit on other grounds, the defendants raised Section 2 counterclaims against the plaintiffs, including monopolization, attempted monopolization, and conspiracy to monopolize, as well as restraint of trade under Section 3 of the Clayton Act. *Id.* The defendants alleged that the plaintiffs had "purchased essentially the entire" supply of beef blood meal, a necessary ingredient in feed for dairy cows, in the western United States. *Id.* By "corner[ing] the market," the defendants alleged, plaintiff Cargill could charge a higher price for feed to those customers who did not use plaintiff CAN's feed formulating services. The plaintiffs moved to dismiss, *Id.* at *2.

The court addressed the issues of antitrust standing, market definition, and market share. *Id.* at *4. Regarding antitrust standing, the court applied the factors of *Associated Gen. Contractors of Cal., Inc., v. Cal. State. Council of Carpenters*, 459 U.S. 519, 519 (1983). The court held that the defendants had alleged an injury of the type the antitrust laws were designed to prevent, because the defendants alleged that plaintiff Cargill had "eliminated alternate sources [of beef blood meal] in the product and geograph[ic] markets" by purchasing the entire available supply of that ingredient. 2007 WL 2506451 at *4. The court also held, however, that the defendants did not participate or suffer injury in the market where the anticompetitive conduct occurred. *Id.* at *4-5. The defendants argued that, although they were not buyers or sellers of animal feed, they suffered an injury in the related market of nutritional consulting. *Id.* at *5. The court noted that, under the case of *American Ad Management, Inc. v. General Tel. Co. of California*, 190 F.3d 1051, 1057-58 (9th Cir. 1987), an antitrust injury may be suffered by an indirect purchaser, potential entrant, supplier, licensor or dealer. *Id.* at *5. Nonetheless, the court determined that a nutritional consultant is not a participant in the beef blood meal market for antitrust purposes, particularly here where the defendants' injury – losing consulting clients – occurred in a different market. *Id.* Similarly, the court held that the defendants' injury was too remote to give rise to antitrust standing, because "both the competitors [of Cargill's

feed business] and the purchasers [of feed] are in the better legal position to raise antitrust claims against Cargill.” *Id.* at *6.

The plaintiffs also argued that the defendants had not properly defined the relevant market and had not properly alleged “market share.” *Id.* at *7. Regarding market definition, the court held that the defendants had “identified a geographic and product market,” and that any closer inquiry into this definition would be “best answered after the benefit of discovery.” *Id.* As to market share, the court held that it was not sufficient for the defendants to simply allege that plaintiff Cargill purchase “all,” “essentially all,” or “much if not all” of the beef blood meal in the western United States. *Id.* at *8. The court held that the defendants’ allegation of market share did not meet the “plausibility” requirement of *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). The court dismissed all of the defendants’ Sherman Act counterclaims, with leave to amend.

ILLINOIS COURT GRANTS MOTION TO DISMISS MONOPOLIZATION CLAIMS BROUGHT BY REALTOR ALLEGING BOYCOTT BY OTHER REALTORS

Hackman v. Dickerson Realtors, Inc., 2007 WL 2570297 (N.D. Ill. Aug. 31, 2007). The plaintiff is a realtor in Rockford, Illinois. 2007 WL 257297 at *1. The plaintiff alleges that other realtors, encouraged by the Illinois Association of Realtors (IAR) and the Rockford Association of Realtors (RAAR), collectively shut him out of the Rockford real estate market. *Id.* The plaintiff alleges that because he decided to charge a lower commission than other realtors, the defendant realtors refused to present offers from the plaintiff’s clients and disparaged the plaintiff. *Id.* Based on these allegations, the plaintiff asserted several causes of action against the other realtors and against IAR and RAAR, including claims under Sections 1 and 2 of the Sherman Act.

IAR and RAAR moved to dismiss the antitrust claims, arguing that: (1) the Sherman Act should not apply to non-profit organizations; and (2) the plaintiff failed to allege that they did anything more than “encourage” alleged anticompetitive activity. *Id.* at *7. The court rejected the argument that the Sherman Act does not apply to non-profit organizations, finding that the plaintiff had sufficiently alleged that IAR and RAAR engaged in some sort of anticompetitive activity, making their non-profit status irrelevant. *Id.* The court did, however, accept the argument that the plaintiff must allege that IAR and RAAR did more than simply “encourage” anticompetitive conduct. *Id.* The court stated that the plaintiff did not allege that IAR or RAAR agreed or conspired to monopolize the market, only that other defendants used their position in these organizations to obtain a monopoly. Accordingly, the court granted the organizations’ motion to dismiss. *Id.*

The court also considered a motion to dismiss filed by the realtor defendants. *Id.* at *10. The realtor defendants argued that the plaintiff failed to allege facts suggesting the existence of a monopoly. Applying the standard laid out by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955 (2007), the court stated that the plaintiff must do more than make conclusory allegations, but must allege enough factual matter to suggest an agreement to monopolize the market. *Id.* The court determined that the plaintiff’s bare allegations of an agreement to boycott him because he charged lower fees were not enough to adequately allege that defendants conspired to monopolize the market under Section 2. *Id.* at *11. Accordingly, the court granted the realtor defendants’ motion to dismiss the plaintiff’s antitrust claims.

EUROPEAN ANTITRUST ENFORCEMENT AGENCIES

EUROPEAN COMMISSION ACCUSES RAMBUS OF UNREASONABLE ROYALTIES IN PATENT AMBUSH CASE

On July 30, the Commission sent a Statement of Objections (SO) to Rambus, an American developer and licensor of high bandwidth chip connection technologies, for abuse of a dominant position. The SO outlines the Commission's preliminary view that Rambus charged unreasonable royalties for use of certain patents for dynamic random access memory chips (DRAMs), a type of electronic memory primarily used in computer systems. The U.S.-based standard setting organization JEDEC has adopted standards applicable to DRAMs. Since Rambus asserts patent rights that cover technology contained in JEDEC's standards, DRAM manufacturers must either acquire Rambus licenses or face potential patent litigation from Rambus.

The Commission believes that Rambus engaged in a "patent ambush," deceptively failing to disclose patents during the standard-setting process that it now claims are relevant to the standard. This strategy has allegedly allowed Rambus to claim unreasonable royalties for the use of its DRAM patents. The Commission believes that Rambus should charge reasonable and non-discriminatory royalty rates to remedy the situation (see [MEMO/07/330](#)). This is the first time the Commission has dealt with a patent ambush under EC antitrust law.

The Commission's preliminary view, as outlined in the SO, parallels a recent Federal Trade Commission (FTC) order that found Rambus to have illegally monopolized the DRAM market in the United States (see [order](#)). The FTC imposed a remedy applicable to US patents and foreign patents that cover goods imported into or exported from the US. The Commission considers its action appropriate because Rambus is active globally and can, despite the FTC's decision, enforce its patents against companies employing the relevant European standards. Rambus had nine weeks to respond.

PORTUGUESE COMPETITION AUTHORITY FINES TELECOM €38 MILLION FOR ABUSE OF A DOMINANT POSITION

On August 2, the Portuguese Competition Authority fined PT Comunicações, a subsidiary of PT Telecom, €38 million for abuse of its dominant position in the market for access to essential infrastructure for the laying of cables and infrastructure for electronic communications networks in violation of Portuguese competition law and Article 82 EC. This refusal to supply restricted the access of PT's competitors to downstream markets such as cable television, broadband Internet, and fixed-line telephony. As a result, consumers across much of Portugal had no alternative provider to TV Cabo Portugal, in which the PT Group is the majority shareholder. PT reaped benefits from this anticompetitive practice in the form of very high market shares and the absence of price competition. This is the first time the Portuguese Competition Authority has issued a decision on abuse of a dominant position (see [press release](#)).

DANISH COMPETITION AUTHORITY FINDS POST DANMARK A/S ABUSED ITS DOMINANT POSITION IN MAGAZINE MARKET

On August 30, the Danish Competition Council ruled that Post Danmark A/S abused its dominant position in the national subscription-based magazine market in 2004 and 2005 in violation of Danish competition law and Article 82 EC. In its decision, the Council maintained that Post Danmark's cumulative or retroactive price and rebate practices effectively prevented customers from switching to rival distributors. Post Danmark's behavior foreclosed the subscription-based magazine market, thereby preventing the entry of new competitors. The Council also found that Post Danmark's pricing practices discriminated between competing customers without cost justifications, thereby placing certain customers at a competitive disadvantage. Although no fine was imposed, the Council ordered Post Danmark to amend its price and rebate scheme to bring it in line with Danish and European competition law by January 1, 2008 at the latest (see [press release](#)).

ITALIAN COMPETITION AUTHORITY FINES TELECOM COMPANIES FOR ABUSE OF THEIR RESPECTIVE DOMINANT POSITIONS IN THE WHOLESALE MARKETS FOR TERMINATION SERVICES ON THEIR NETWORKS

On August 3, the Italian Antitrust Authority fined Telecom Italia and Wind, two Italian telecommunications companies, for abusing their respective dominant positions in the wholesale markets for termination services in violation of Article 82 EC. The Authority found both companies discriminated against competing providers by extending more favorable technical and/or economic conditions to their own commercial divisions for termination services than to those offered to other providers. According to the Authority, these discriminatory practices were aimed at excluding competitors from the wholesale termination services markets and the downstream fixed line-mobile services markets for business customers. As a result, these companies blocked any alternative wholesale supply of termination services, thus preventing competing providers from offering alternative downstream fixed-line mobile services for business customers.

Both telecoms were ordered immediately to cease their discriminatory practices. The Authority imposed a larger fine on Telecom Italia than on Wind—€20 million as compared to €2 million—because Telecom Italia was dominant in both the upstream and downstream markets and a repeat offender. Although the Authority initially alleged a collective dominant position of mobile operators in the wholesale market for access services to mobile network infrastructure, it concluded in its decision that there was insufficient evidence to support this claim (see [press release](#)).

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