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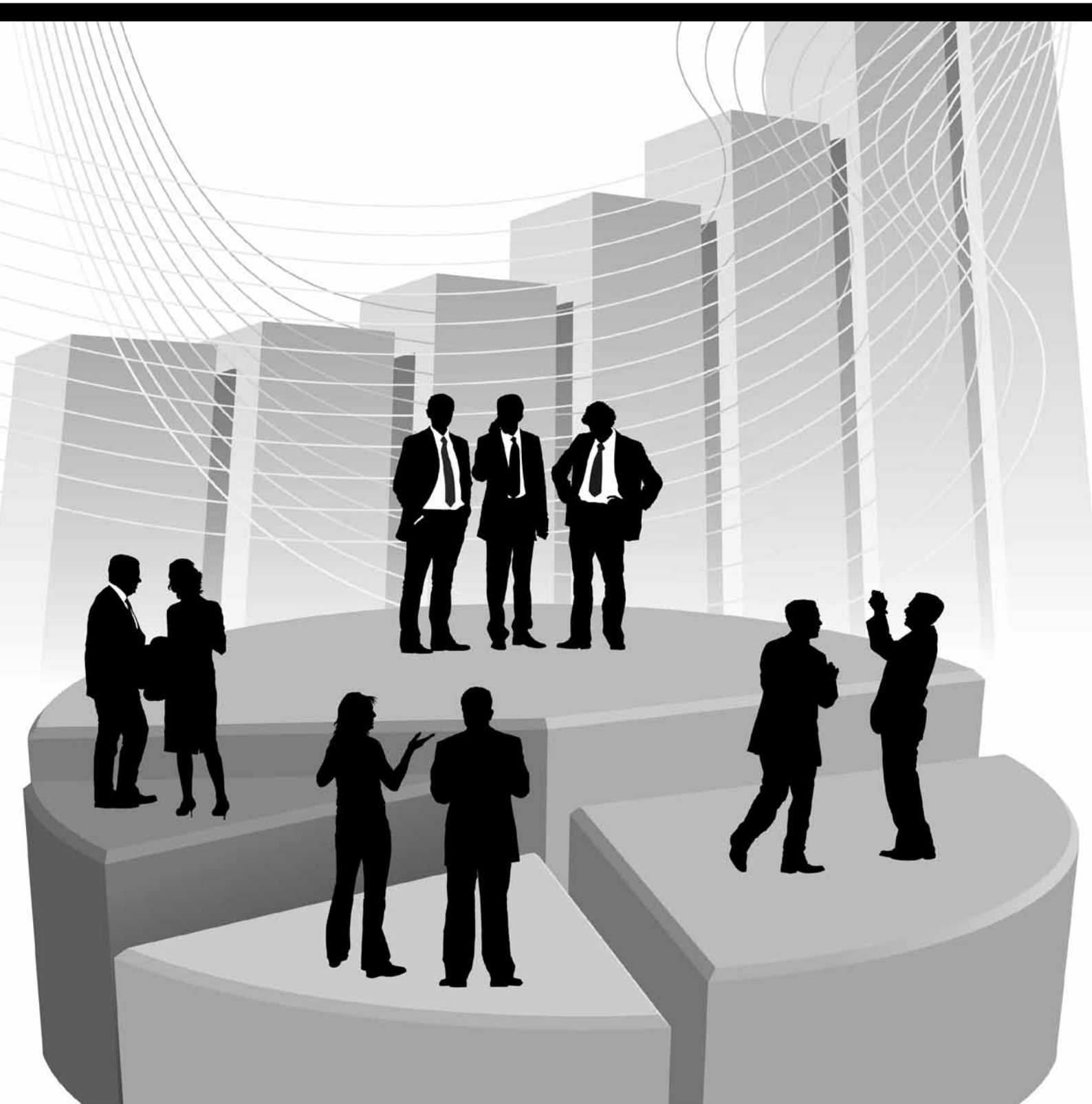

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A world of opportunity

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As the international economy struggles to recover from financial crisis and recession, antitrust continues to globalise. Competition laws are being introduced and amended on a regular basis, and competition agencies are in the spotlight as the enforcers of these laws.

The IBA's Antitrust Committee provides a unique professional opportunity for competition lawyers to collaborate, learn, network and influence policy development in this field around the world. We have had a very active year in 2010 and are expecting another.

Contributing to competition policy development

Working group submissions on policy issues remain a top priority in this changing environment. The Committee has recently completed submissions on the proposed French fining guidelines and the revised draft implementing regulations for India's long-awaited merger regime. Copies of these and other prior submissions are on the Committee's website page.

In Q2 we will have groups assessing collective redress in the EU and the recent consultation paper on the reform of the UK competition regime. Participation in working groups offers the opportunity to help shape the competition policy framework in collaboration with colleagues from diverse jurisdictions. We appreciate the many members who have contributed to the production of credible and influential submissions.

Leading edge programmes

Our conference session programmes provide in-depth learning and networking opportunities for Committee members:

- In March we had the privilege of co-venturing another bi-annual conference with the European Commission in Brussels. The theme of '20 Years of European Merger Control' was explored retrospectively but also with a strong emphasis on future directions. Vice-President Almunia noted in his opening remarks that he has asked his staff to examine whether any steps should be taken to close the 'gap' relating to acquisitions of minority shareholdings, and this issue was addressed in detail by a panel which examined the German and UK experiences with such reviews.
- The 15th anniversary of our flagship competition conference is set for 16-17 September in Florence. It will feature keynote addresses by European Commission Vice-President Almunia, Bundeskartellamt President Mundt and US FTC Commissioner Ramirez as well as an interview-format session with OFT and ICN head John Fingleton.
- Our roving conference was held in Rio de Janeiro in 2010 and will move to Asia for the first time in 2011. In collaboration with the Korean Bar Association, we have put together an outstanding programme of sessions for 28-29 April in Seoul. An outstanding faculty will cover domestic and international developments in abuse of dominance, cartel investigations, merger control and competition law enforcement.
- At the IBA's Annual Conference in Dubai (30 October – 4 November) the Committee will be presenting five sessions. We plan to address mergers, cartels, IP/unilateral conduct, joint venture issues with particular emphasis on the oil and gas sector, and sovereign wealth funds. Sovereign wealth funds and state enterprises are also the topic of this year's annual Antitrust and Trade Sections writing competition for lawyers under 35. The deadline is 2 May and full details can be found on the IBA website.

In addition to our own programmes, we regularly collaborate with other committees and regional fora. Examples include the 22nd Annual Communications and Competition Law Conference (Vienna, 16-17 May), the Asia-Pacific Regional Forum Conference held in Tokyo in November 2010 (see the report in this newsletter), the recent Latin America Regional Forum Conference in Mexico and the inaugural Conference of the Americas (Miami, 5-6 May).

Analysis of international developments

The newsletter provides timely and focused reports on key cases, legislative changes and other developments. This edition includes

reports from over 20 countries. We plan to increase the frequency to three editions for 2011 and continue to expand coverage. If you are in a country that is not being covered, our editors would be delighted to receive a contribution!

Since its launch only a few years ago, the Competition Law International magazine-format journal has become a venue for analytical articles that focus on leading edge issues of direct relevant to competition law practitioners. A particularly notable example is the recent edition containing a diverse collection of articles on the challenging subject of remedies. The forthcoming September issue will address the 'boundaries of antitrust' in such areas as antitrust and trade, antitrust and IP, and antitrust and the media.

Geographic expansion

We believe that the Committee is uniquely placed to foster connections among the international bar as the competition law field evolves. To that end we have been emphasising geographic diversification in our working group, conference, publication and other activities. We have also appointed liaisons to help coordinate our activities in particular regions and our interactions with the counterpart regional fora in the IBA (see the list on the Antitrust Committee pages of the IBA website).

Getting involved

We encourage you to get involved in whatever activities of the Committee are of interest to you. We also would welcome any help you can provide in recruiting new members, as we all benefit from greater critical mass. A special note to those of you in IBA 'Group Member' law firms: did you know that every lawyer can join one committee free of charge, but many firms fail to take advantage of this?

We look forward to an active and fulfilling year ahead. We invite your input on things the Committee should do or could do better! Please speak to any of the officers or regional liaisons if you have suggestions.

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Conference report

Asia Pacific Regional Forum Conference
Tokyo, 17–19 November 2010

The IBA Antitrust Committee joined with the Asia Pacific Forum to present two highly successful panel sessions in the Merger Control group in the Asia Pacific Conference, co-chaired by Jacques Buhart of Herbert Smith and Dave Poddar and Antitrust Enforcement in the Asia Pacific group, co-chaired by Michael Reynolds of Allen and Overy and Kimitoshi Kabuki of Yabuki Law Offices.

The Antitrust Committee also participated in an event with the Japanese Bar Association in which Marc Reysen and Tom McQuail both of Howrey, Jaques Burhart and Dave Poddar gave a presentation to over 100 young lawyers on international legal developments in cartel and merger law from a global perspective. That session was well received as part of a tremendous Saturday training course chaired by Mr Kimitoshi Yabuki and Mr Osamu Ito of Allen and Overy.

The panel session on mergers was from both an Asia Pacific and global perspective by way of introduction from Mr Marc Reysen as to the number of merger control regimes and their growing reach and importance across Asia. As a means of highlighting merger control Mr Vinod Dhall, former Chair of the Indian Competition Commission, (now of Dhall Law Chambers), gave extremely interesting, short presentations on the proposed Indian merger control regime. Other presentations were by Mr Harumichi Uchida from Mori Hamada and Matsumoto on recent developments in Japan, Mr Kyung-Taek Jung from Kim and Chang in Korea on developments in Korea and Mr Andrew Ong of Rajah and Tann speaking on merger control in Singapore. Mr Michael Han of Freshfields, Bejiing then highlighted the increasing number of applications of Chinese merger control and the remedies that were being required by the Chinese merger regulator, MOFCOM with Mr Koya Uemura of Anderson Mori and Tomotsune then highlighting the application of Japanese merger law to global mergers as administered by the Japanese regulator.

The panel presentations from such a distinguished and insightful group of speakers and questions from the audience were highly interesting, particularly as to the application of merger control coordination and how to anticipate issues that may arise across Asia.

The second session Chaired by Michael Reynolds and Kimitoshi Yabuki also had a stellar cast of speakers both from external and internal counsel dealing with cartel and abuse of dominance enforcement across Asia. Mr Michael Yeh of Microsoft Bejiing opened the speakers sessions by highlighting the importance of guidance from competition agencies as to their enforcement approach so that corporations could seek to ensure their businesses complied with antitrust laws, and how businesses sought to address compliance across regions. This excellent presentation was followed by an equally impressive one from Mr Jim Jeffs of Intel. Leading antitrust lawyers from Australia, Mr Bill Reid from Blake Dawson, Mr Sai Ree Yun of Yulchon in Korea, Mr Akinori Uesugi of Freshfields in Japan, Mr Anand Prasad of Trilegal in India and Mr Carey Ramos from Paul Weiss, Rifkind Wharton and Garrison in New York, provided key enforcement issues from their jurisdictions as well as new developments that lawyers should be aware of when advising clients.

As with the mergers panel, the enforcement session highlighted the need for a clear understanding of cartel and dominance laws by corporations across key jurisdictions, and particularly in Asia given the coordination of enforcement agencies.

Argentina

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CNDC reinforces its approach towards anti-competitive investigations

The Comisión Nacional de Defensa de la Competencia (CNDC) has recently adopted a series of measures that reflect a change in approach towards anti-competitive investigations of recent years. In December 2010, the CNDC:

- launched a draft bill to implement a leniency programme;
- imposed various fines for instances of anti-competitive behaviour, and
- started to settle cases by accepting compromises by the parties.

On 15 December 2010, the CNDC issued Resolution No 157/2010, approving the draft Leniency Programme Bill which had been prepared by its Investigations and Audit Unit. The draft bill seeks to reform the antitrust law No 25,156 issued in 1999 by introducing a procedure that would allow the CNDC to either exempt a company or individual from the payment of a fine, or to reduce such amount, in certain cases and if certain requirements are met. According to the CNDC, the draft Leniency Programme was designed considering the OCDE, ICN and ECN models and recommendations. The Programme contemplates the possibility of the exemption only to the first one to provide relevant information to the CNDC and reductions of up to 50 per cent of the total fine to those who arrive later but provide relevant information. To become a law, the draft bill needs to be approved by the Secretary of Domestic Trade, the Minister of Economy and the President of Argentina. Once these authorities approve the draft bill, it will require approval by the National Congress.

Along with the launching of the draft Leniency Programme Bill, at least four sanctions have been imposed in December 2010. This number is higher than all the known fines imposed by the CNDC since it imposed the cartel fines to medicinal oxygen and cement companies in mid-2005. The fines imposed range from approximately US$ 100,000 to US$ 250,000. The sanctions were imposed on health-related entities. Two of the investigations were initiated in 1999 under the procedures of the 1980 antitrust law derogated that year by law No 25,156, and one of them is related to an agreement signed in 1994.

The CNDC has also started to analyse the cease of conduct compromises proposed by the parties. This instrument has not been used before by the CNDC and once the agreements are accepted there is a monitoring mechanism that lasts for three years. The CNDC has accepted at least two of these proposals in December 2010. However, in another case, the CNDC not only rejected the agreement but it also imposed a sanction on the investigated entity. The reason for not accepting the compromise was that the investigation was almost over and the sanction was about to be imposed. Thus, the CNDC understood that it was too late to propose such an agreement. The investigation into conduct took place in 2001.

The three measures described above reflect the new political objective of the CNDC. In fact, the CNDC stated in its Resolution 157/2010 that the CNDC has increased its efforts to combat all types of anti-competitive behaviours and, especially, cartels as a goal for the next few years.

Sarah Barker and **Katrina Alidenes**
Australasian Competition Law Group, Minter Ellison

Australia

Pragmatism or populism? Proposals to reform price signalling regulation

On 12 December 2010, the Australian Federal Government released an exposure draft bill to introduce two new civil prohibitions against anti-competitive 'price signalling'. A breach of the proposed prohibitions would attract significant penalties. The Exposure Draft was released as part of a wider package of reforms to the banking sector, and follows the introduction of a private member's bill by the opposition at the end of November 2010.

The proposals for reform come amid significant debate in Australia over whether the anti-competitive conduct prohibitions under the Competition and Consumer Act 2010 (and its predecessor, the Trade Practices Act 1974) are adequate enough to regulate anti-competitive price signalling (or 'price facilitation' or 'tacit collusion') – particularly in the banking sector – and whether, from a competition policy perspective, such conduct should even be the subject of targeted regulation.

The vigour of this debate exemplifies the regulatory difficulty facing all jurisdictions in attempting to draw a clear line between legitimate commercial communication and anti-competitive collusion: between conduct that is an independent business response to competitive market conditions, and an anti-competitive facilitating practice that makes it easier for parties to co-ordinate price where there is no evidence of express collusion between those competitors.

Current Australian law

Currently, the cartel provisions under the Competition and Consumer Act prohibit (amongst other conduct) contracts, arrangements or understandings between competitors to fix control or maintain price (price fixing).

In a series of unsuccessful price fixing prosecutions in the middle of the last decade, the Federal Court interpreted an 'arrangement or understanding' between competitors as requiring not only the communication of pricing information, but the commitment or obligation of a party qua the other(s). A 'hope or expectation' that a competitor would set their prices in accordance with the communication is not sufficient. The Australian Competition & Consumer Commission (ACCC) has since been a vocal advocate of the need to amend the law to plug a perceived gap for anti-competitive 'tacit collusion'.

The issue gained political momentum towards the end of 2010, with the heads of a number of Australia's 'Big 4' banks publicly stating that they foresaw interest rates rising beyond the official cash rate announced by the Reserve Bank of Australia. ACCC Chairman, Graeme Samuel, criticised these disclosures as an anti-competitive 'public semaphoring' of the bank's intentions, that the ACCC was powerless to prevent under the current law.

The Exposure Draft

The Exposure Draft, developed in consultation with the ACCC, proposes two new civil prohibitions in relation to the anti-competitive disclosure of pricing and other information, with a new concept of 'private disclosures'. The prohibitions would apply only to classes of goods or services that are prescribed by the Regulations (which, at the time of publication, have not been released), which may be defined by the kind of supplier, industry or circumstances of supply.

First, the disclosure of information relating to price, discounts, allowances, rebates or credits would be prohibited where this is a 'private disclosure to competitors'. A 'private disclosure to competitors' would occur if the disclosure was to one or more competitors or potential competitors, and was not to any other person.

Second, the disclosure of information relating to price, discounts, allowances, rebates or credits, or 'capacity to supply or acquire or commercial strategy', would be prohibited where that disclosure has the 'purpose of substantially lessening competition'. The relevant purpose may be

ascertained by inference from conduct or other relevant circumstances.

The likely anti-competitive effect is not an element of either offence.

Under the Exposure Draft the prohibitions on 'price signalling' would not apply to disclosures of information:

- authorised by or under a law (including, for example, stock exchange continuous disclosure obligations);
- due to an accident, the default of a person other than the corporation or some other cause beyond the control of the corporation; or
- formally authorised by the ACCC.

There are additional exceptions to the prohibition on private disclosure to competitors in relation to a supply or acquisition for the purpose of re-supply, disclosures between joint venture participants, disclosures to 'unknown competitors' and disclosures in connection with the acquisition of shares or assets. Interestingly, however, the exceptions do not include private disclosures to competitors who might purchase goods or services for their own use or transformation, rather than re-supply.

Where to from here?

Submissions to date on the Exposure Draft have expressed concern with the ability of the proposed legislation to achieve its regulatory aim – and raised the more fundamental question as to whether such regulation is warranted from a competition policy perspective. Issues include the following:

- Whether amendment to the current law is necessary given that communication of price information to a competitor may be prosecuted as an attempt to enter into an understanding to fix, control or maintain price under the prevailing price-fixing provision.
- Whether the application of the new law to only some sections of the business community is consistent with the policy underlying competition regulation, which should apply consistently across all sectors of the economy.
- Whether there will be unintended adverse consequences, with the prohibitions applying to a significant amount of competitively neutral or pro-competitive conduct.

At the time of releasing the Exposure Draft, the Government indicated it will introduce the reforms to the Competition and Consumer Act in the first sitting of Parliament in 2011. However, no bill was introduced in the first sitting in February.

Regardless of the final legislative outcome, it is clear that the debate is far from over on whether a universal bright line can – or should – be drawn in relation to price signalling under Australian competition law.

Belgium

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Recent developments in competition law and enforcement

The Belgian Competition Act provides for an appeal procedure against decisions of the Belgian Competition Council, but excludes the right of the Competition Council to defend its decisions at the appeal level. In a reference for a preliminary ruling, the appellate body (the Brussels Court of Appeal) asked whether this system is in line with the requirements of Regulation 1/2003.

In a judgment on 7 December 2010, the Court of Justice held that a regime which does not allow a national competition authority to participate, as a defendant or respondent, in judicial proceedings brought against a decision from that authority does not comply with Article 35 of Regulation 1/2003 (Case C-439/08, VEBIC). The Court noted that other provisions of Regulation 1/2003 to which the Brussels Court of Appeal had referred were irrelevant in the debate.

In its judgment, the Court emphasised the need for effective application of EU

competition law. According to the Court, the effective application of Articles 101 and 102 TFEU would be jeopardised if a national competition authority, which is under an obligation to apply these provisions, was not entitled to defend its case upon appeal. The Court referred in that context to the risk that the appellate body would become 'wholly captive' to the pleas and arguments put forward by the undertakings concerned.

The Court added that it is for the national competition authority to assess the extent to which its intervention at the appeal level is necessary. However, the Court warned that the effectiveness of Articles 101 and 102 TFEU would be jeopardised if the national competition authority was to consistently fail to intervene in the appeal procedures.

Finally, the Court stated that in the absence of EU rules on the subject, EU Member States remain competent to designate the body of the national competition authority which may participate in the appeal procedure. Within the current Belgian institutional framework, this could be the Directorate-General for Competition, the Competition Council or the Prosecutor's Office (Auditorat).

As a result of this judgment, the Belgian Competition Act will have to be amended. The current regime, whereby the Minister of Economic Affairs has a right to intervene before the Brussels Court of Appeal, does not meet the standard set by the Court of Justice. At this stage, it is not clear how the Act will be brought in line with the Court's judgment.

Competition Council confirms football rights remedies

At the time of the acquisition of the Flemish pay-TV activities of Canal+ by the cable operator Telenet, the Belgian Competition Council had imposed a number of remedies. On the basis of one of the remedies, Telenet committed to make the premium content of the target pay-TV channel available to alternative distribution platforms. The premium content included live broadcasting of Belgian football matches.

The remedy package had been imposed for an unlimited period of time, with the option for Telenet to request modifications to the Competition Council. In March 2008, upon a request by Telenet, the Competition Council adapted the notion of premium content, and held that Telenet was no longer required to give access to the live broadcasting of the football matches in the Belgian premier league. This decision was subsequently annulled by the Brussels Court of Appeal, which referred the case back to the Competition Council.

In a decision of 29 November 2010, the Belgian Competition Council came back on its earlier decision, and held that the premium content remedy would continue to apply to live broadcasting of Belgian football matches. However, the remedy will only apply to the extent that Telenet acquires the rights to all live premier league (Jupiler Pro League) matches on an exclusive basis. In that context, the Competition Council pointed to potential exclusionary effects that would result from a combination of a strong position of Telenet's distribution platform with exclusive rights over important content.

The remedy package remains unlimited in terms of time. However, the Council noted that the market is in full evolution, and that Telenet can request at any time a modification of the remedy package.

The decision has a limited scope, and only relates to the specific remedy package that applies to one operator. However, in a more sweeping statement, the Competition Council warns against the potential anti-competitive nature of the exclusive selling of football rights.

Recommended minimum fees for real estate agents

In a decision of 26 August 2010, the Belgian Competition Council prohibited the practice of recommending minimum fees by the Institute of Real Estate Agents (BIV) to its members. The recommended minimum fees were explicitly labelled as non-binding. However, the Competition Council explained at length why the recommendations had to be viewed as restrictive. In the discussion of the legal and factual context, the Council referred to factors such as the wording of the BIV communications, the potential impact of the recommendations on the BIV members and the fact that membership of the BIV is mandatory. The Council added that the practice had to be considered as a restriction by object.

In view of the historic nature of the practice, which was discontinued in 2004, the Competition Council did not impose a pecuniary sanction.

Canada

New Year, new guidance, new focus, new powers – what's new in competition law?

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Introduction

As a new year begins, there continues to be new developments in all areas of Canadian competition law. The most recent developments include:

- the release of new guidance on the timing and procedural details associated with the review of mergers by the Competition Bureau (the 'Bureau');
- consultations on possible amendments to the Bureau's Merger Enforcement Guidelines (MEGs), particularly in light of the recent amendments to the US Horizontal Merger Guidelines;
- major new enforcement actions initiated by the Commissioner of Competition (the 'Commissioner'); and
- the potential amendment of the Competition Act to grant the Commissioner additional powers to investigate industry sectors.

Newly updated merger process guidance

Major amendments to the merger review process in Canada came into force in March 2009. These amendments created a merger review process that closely mirrors the process in the US. In Canada, transactions exceeding certain thresholds now cannot be completed until the expiry of an initial 30-day waiting period, during which time the Commissioner can issue a Supplementary Information Request (SIR). If an SIR is issued, the transaction cannot close until the expiry of a second 30-day waiting period that begins when the Commissioner receives all of the information requested in the SIR. Following the introduction of the amendments, in September 2004 the Bureau released Merger Review Process Guidelines setting out its approach to certain aspects of the new merger review process.[1]

The Bureau completed its implementation of the 2009 amendments to the merger review process with the release of three revised guidance documents on 22 October 2010.[2] The revised documents provide guidance on the Bureau's policies regarding the timing and procedural details of merger reviews.

The new guidelines revise the Bureau's non-statutory service standard for the timing of merger reviews in transactions formerly classified as either 'complex' or 'very-complex' to reflect, in part, the statutory timelines set out in the 2009 amendments. First, the complex and very-complex designations have been combined into a single category for 'complex' transactions. Second, the Bureau's standard for the review of complex transactions is now 45 days or, if an SIR is issued, 30 days following the day the Commissioner receives the requested information. While these revisions are an improvement, Bureau policy on the timing of its merger reviews remains inconsistent with the statutory timeframe; parties should note that, in the absence of an SIR, they remain legally entitled to complete a transaction immediately following the expiry of the initial 30-day waiting period.

The guidelines also update the list of information that must be submitted to start the clock on the applicable service standard and they formalise the Bureau's policy of encouraging the parties in cross-border transactions to provide waivers to foreign competition authorities, allowing them to share information from their review with the Bureau.

Finally, the guidelines introduce a 'pull-and-refile' concept for merger notifications that, consistent with the practice of the enforcement agencies in the United States, allows parties in certain circumstances to withdraw a notification and resubmit it in order to update the information in the filing for completeness or accuracy or to restart the applicable waiting period.

New Canadian merger enforcement guidelines?

On 7 September 2010, the Competition Bureau announced that it would carry out consultations on possible revisions to its MEGs.[3] The purpose of which is to assess whether the MEGs continue to accurately

reflect the Bureau's practices and to assess the potential impact of the revised Horizontal Merger Guidelines issued by the US Department of Justice and the Federal Trade Commissioner on 19 August 2010.[4] On 30 September 2010, the Bureau released a discussion paper that sets out in greater detail the focus of the consultations, which includes:

- the relative importance of market definition and competitive effects in the review process;
- the types of evidence discussed in the MEGs and the weight given to each kind (including diversion ratios, partial interests, and price/cost margins);
- the relevant concentration thresholds; and
- the two-year timeframe generally used in the analysis of potential entry.

As can be seen from the focus of the consultations, it is the revisions to the US Horizontal Merger Guidelines that appear to have been the catalyst for many of the changes being explored by the Bureau.

A variety of individuals and stakeholder groups have participated in the Bureau's consultation. While a wide range of views have been expressed on many of the possible changes, one point that has been repeatedly stressed is the need for caution in proceeding with any revisions, particularly where these are motivated by changes made in the US.5 First, while they are not binding as a matter of law, businesses and their counsel rely on the MEGs to accurately reflect both the Bureau's approach and Canadian merger and merger-related jurisprudence. Major revisions that are not justified by changes in both these areas may reduce the transparency and predictability of merger reviews in Canada. Second, the MEGs are relied on not just by merging parties and their counsel but also by the Bureau in guidance issued outside the mergers sphere and by courts in non-merger cases.[6] The effect that changes to the guidelines will have in these areas should also be considered before any revisions are made.

Roundtables have been held across Canada and consultations closed on 31 December 2010. It is expected that the Bureau will next release a draft version of the revised MEGs for comment before finalising its revisions. It is not known at this time when this process will be completed.

New focus on enforcement actions

Since her appointment as Commissioner in August 2009,[7] Commissioner Melanie Aitken has repeatedly stressed that she 'intend[s] to proceed vigorously'[8] and to 'bring forward responsible cases to clarify the law'.[9] Following through on this pledge, the Commissioner has recently settled one major enforcement action she undertook after a long investigation and has initiated two others.

Canadian Real Estate Association

A Consent Agreement between the Commissioner and the Canadian Real Estate Association (CREA) was registered with the Competition Tribunal (the 'Tribunal') on 25 October 2010.[10] CREA is one of the largest single-industry trade associations in Canada, representing more than 96,000 members and operating the Multiple Listing Service (MLS), which is used to list properties involved in the vast majority of real estate transactions in Canada. Prior to the Commissioner's enforcement action, real estate agents were required to comply with certain CREA rules, including restrictions on the service options they could offer to consumers, before listing a property on the MLS. Most prominently, CREA's rules prohibited agents from allowing consumers simply to pay a fee to list their property on the MLS system or from offering other fee-for-service arrangements. Instead, the rules required agents only to offer listings or certain other services in connection with the purchase of a defined set of services that included the presentation of offers and negotiation of a final deal. The Bureau had been investigating CREA for three years.[11]

In February 2010, the Commissioner brought an application at the Tribunal alleging that CREA, through its members, had abused its dominant position in the market for residential real estate brokerage services throughout Canada.[12] In particular, the Commissioner alleged that:

- CREA had substantial or complete control over the supply of residential real estate brokerage services throughout Canada;
- it used its control of MLS to impose exclusionary restrictions on the use of the MLS;
- it imposed these restrictions with the intention of adversely affecting real estate brokers offering only partial brokerage services; and

- these restrictions were lessening or preventing competition substantially in the market for residential real estate services in Canada.

The application sought to strike down these rules to allow real estate agents the ability to offer a wider range of pricing and service options.

An agreement in principle on the terms of a Consent Agreement was reached between CREA and the Commissioner on 30 September 2010, which was the day on which CREA was first required to produce documents to the Commissioner.[13] The agreement was subsequently ratified by CREA's members and then registered with the Tribunal on 24 October. The Agreement resolved the Commissioner's concerns with CREA's MLS rules under the abuse of dominance provisions of the Competition Act by, among other things, prohibiting CREA from imposing rules that discriminate against brokers who provide fee-for-service arrangements or listing-only services to consumers. The Agreement will continue in force for ten years.

Visa and MasterCard

On 15 December 2010, the Commissioner filed an application with the Tribunal to prohibit Visa and MasterCard from continuing to enforce certain rules contained in their agreements with merchants. Visa and MasterCard are the two largest credit card networks in Canada. The application comes after an investigation that began in April 2009, following complaints from some merchants to the Bureau.[14]

The Commissioner's application seeks a prohibition order that would prevent the companies from enforcing rules that impede or limit the ability of merchants to:

- engage in any practice that discriminates against or discourages the use of particular credit cards in favour of other cards or methods of payment;
- apply surcharges or set prices based on the particular credit card being used; or
- refuse to accept particular credit cards.[15]

The Commissioner's application is being made under the civil price maintenance provision in Section 76 of the Competition Act, which was introduced in March 2009. It is the first action to be brought under this provision and, if it proceeds through the litigation process, will become a landmark decision in Canadian competition law.

Chatr

On 19 November 2010, following a two-month investigation, the Commissioner initiated proceedings in the Ontario Superior Court of Justice against Rogers Communications Inc. In the proceedings, the Commissioner is alleging that Rogers contravened the misleading advertising provisions of the Competition Act by claiming that users of its Chatr mobile service would experience 'fewer dropped calls than new wireless carriers'.[16]

The Commissioner is seeking an order from the Court that would require Rogers to stop the impugned campaign immediately; to not engage in similar campaigns; to pay an administrative monetary penalty of CAD 10 million; to pay restitution to customers who made purchasing decisions based on the advertisements; and to issue a correction and a public notice regarding the order made against it.

New sectoral inquiry powers?

On 3 March 2010, a Private Members Bill (Bill C-452)[17] was introduced in Canada's House of Commons that would give the Bureau broad powers to make an inquiry into an entire industry sector even in the absence of any specific evidence of conduct contrary to the Competition Act. Private Members Bills rarely become law in Canada, but this one has been adopted at the Committee stage and will now be reported back to the House of Commons, where it may soon be subject to a final vote. Even if passed by the House, however, the Bill is likely to face serious problems in passing Canada's Senate.

The Bill would allow the Bureau to use its broad powers to seize and compel evidence, which are currently available only in connection with an investigation of conduct believed to be contrary to the Competition Act, in connection with broad inquiries into an industry sector where there are no grounds to believe the Act has been violated. The Bureau's predecessor agency, the Restrictive Trade Practices Commission, formerly held this power but the power was eliminated in part due to concerns about its cost and effectiveness. The Bureau has indicated that it does not need these additional powers.

It remains to be seen when this Bill might come up for a vote in the House of Commons and, if it does, whether it will eventually become law.

Notes

1 Canada, Competition Bureau, Merger Review Process Guidelines, 18 September 2009.
2 Competition Bureau, Fees and Service Standards Policy for Mergers and Merger-Related Matters (22 October 2010); *Competition Bureau, Fees and Service Standards Handbook for Mergers and Merger-Related Matters* (22 October 2010); and *Competiton Bureau, Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act* (22 October 2010).
3 Canada, Competition Bureau, News Release, 'Competition Bureau to Consult on Merger Enforcement Guidelines' (7 September 2010).
4 United States, Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (19 August 2010).
5 See e.g. Canadian Bar Association, National Competition Law Section, Submission on Merger Enforcement Guidelines Consultation (December 2010) and Calvin S Goldman, Julie Soloway, and Dustin Kenall, 'Contemporary Canadian Merger Review: New Challenges in Multi-Jurisdictional Transactions' (Paper presented to the IBA Annual Conference, Vancouver, Canada, 5 October 2010).
6 See eg Competition Bureau, *Competitor Collaboration Guidelines* (23 December 2009); Competition Bureau, *Predatory Pricing Enforcement Guidelines* (July 2008); *B-Filer Inc et al v The Bank of Nova Scotia*, 2006 Comp Trib 42; and *R v Clarke Transport Canada Inc* (1995).
7 Industry Canada, News Release, 'Melanie Aitken Appointed to the Competition Bureau Canada' (5 August 2009).
8 Melanie Aitken, Keynote Dinner Address (Remarks to the 2010 Competition Law and Policy Conference, Cambridge, Ontario, 3 February 2010).
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11 Steven Laudurantaye, 'What's at stake in Competition Bureau's MLS fight' Globe and Mail (10 February 2010).
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14 Canada, Competition Bureau, News Release, 'Competition Bureau Challenges Visa and MasterCard's Anti-competitive Rules' (15 December 2010).
15 Commissioner of Competition, Notice of Application (CT-2010-010).
16 Canada, Competition Bureau, News Release, 'Competition Bureau Takes Action Against Rogers Over Misleading Advertising' (19 November 2010).
17 Bill C-452, 40th Parl, 3d Sess.

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Colombia

New merger control requirements

Colombia's Superintendence of Industry and Commerce (SIC), the government body responsible for antitrust and merger control, has established through a new resolution[1] new conditions for companies that have the duty to inform the SIC on the domestic merger transactions they intend to carry out.

This resolution has changed the procedural provisions for merger control, which set down the procedures to be carried out to seek an authorisation from the Superintendence on a merger, acquisition or any of such business transactions carried out among companies operating in Colombia.

As Law 1340 of 2009 had already modified the rules for business mergers it was therefore necessary to adapt the procedure to the new legislation. The new ruling specifies, among other aspects, which types of businesses are exempt from the obligation to inform or give prior notice to the Superintendence on a merger, spin-off or acquisition transaction. It also describes the type of information the participants must submit at each stage of the process. From 12 July 2010, entrepreneurs who have projected merger operations must inform the SIC when they comply with the following conditions:

- both companies are involved in the same activity or in the same value chain;
- for the fiscal year preceding the planned operation, jointly or individually considered, they report an operating income or assets of over 150,000 times monthly legal minimum wages (approximately US$ 43 million).

The new regulation also establishes that companies complying with these conditions but jointly have less than 20 per cent of the relevant market shall be obliged to notify the SIC on the operation in a document defining the percentage of their market share. The SIC may perform ex-post investigations regarding these operations.

The advantage of this new procedure is that it focuses on the significance of the operation, to determine whether the transaction is subject to a comprehensive review for approval or not. It also substantially increases the thresholds so that the local competition agency may focus only on those operations that are significant and may really affect the market. If after pre-assessing the basic documents, the entity estimates that the proposed merger does not produce significant effects on competition, it is then approved. On the other hand, if the examination indicates that such a merger could have a significant effect on competition, a second stage commences, during which detailed market research is carried out before issuing an opinion.

In its new regulation, the SIC provides the possibility for companies to be exempt from making the publication of the merger application in a national circulation newspaper (one of the requirements set for approval) due to public safety reasons, which must be claimed simultaneously with the application submission for a merger pre-evaluation.

The SIC ruling also states that any person may supply relevant information to the control entity that will grant it with more elements to make an objective decision on the proposed transaction after this publication has been made. Within a period of 30 days of completion of this term, the SIC shall issue a decision through an administrative act. After taking this step, the SIC must notify the relevant regulatory, surveillance and control authorities, requesting a technical concept that must be sent by these within ten days.

The resolution also includes:

- a guide for companies on the procedures to be followed, the information to be supplied and the documents to be provided during each stage of the process, when reporting their plans for a business merger; and
- a standard form that must be completed and attached to all applications for merger approval sent to the SIC for evaluation.

Likewise, the SIC warned that companies which do not comply with the duty to report may be subject to sanctions for the violation of antitrust regulations. Notwithstanding the above, the SIC may additionally order the reversal of the merger operation.

Note

1 Superintendence of Industry and Commerce, Resolution 35006, 12 July 2010.

Croatia

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Government adopts regulations on fines and leniency programmes

The new Croatian Competition Act (the 'Act') came into force on 1 October 2010. Falling short of complete transformation of the Croatian competition law, the Act introduces various noteworthy changes especially with respect to the powers of the Croatian Competition Agency (the 'Agency') and enforcement of competition law rules. While certain novelties are designed to increase enforcement efficiency and bring Croatian law more in line with EU competition law (further alignment of the Croatian law with relevant EU rules was one of the proclaimed goals of the Act), there are equally numerous problematic changes such as new wording of the presumption of dominant position and missed reform opportunities (for example maintenance of 'tacit' merger control approval) that might hinder successful development in this legal field.

Arguably, the greatest innovations come in the area of competition law enforcement. Most notably, the Act introduces leniency programmes in the Croatian competition law system and, in contrast with the previous utterly inefficient system of levying fines, provides for the power of the Competition

Agency to directly levy fines. Details of these two new changes are set out in regulations recently adopted by the Croatian Government.

Regulation on criteria for setting fines ('Fines Regulation')

The Fines Regulation sets out rules that the Agency should follow when exercising its new power of levying fines for infringement of competition law rules. Prior to the Act, the Agency was only empowered to establish the infringement while the fines were being imposed in separate proceedings before Misdemeanor Courts. Such a system was grossly inadequate and inefficient.

The Fines Regulation details the mechanics for calculating and levying fines within the limits set out in the Act (up to ten per cent of the turnover of the undertaking concerned). Essentially, the process is divided in two steps:

- Step 1. The Agency will determine the 'basic amount' of fines as a percentage of the undertaking's annual turnover (generally only the turnover within the relevant market is taken into account). The turnover percentage should take into account the gravity of the infringement but should typically not exceed 30 per cent. This percentage is then multiplied by the number of years of infringement. In certain cartel cases, the basic amount of fine will be increased to a further 15 to 25 per cent of the undertaking's turnover.
- Step 2. The Agency may adjust the basic amount by taking into account the mitigating circumstances (eg cooperation with the Agency, immediate termination of the infringement, etc.); or aggravating circumstances (eg role of instigator, repeated offense, refusal to cooperate, etc.) of the specific case. Also, the Agency may reduce the fine to an undertaking facing severe financial difficulties and even impose a mere symbolic fine if it establishes that the infringement was not significant or that it had no significant negative impact on the market.

Regulation on the criteria for immunity from fines or reduction of fines ('Leniency Regulation')

For the first time in Croatian competition law practice, the Act opened a possibility for the leniency applications. The Leniency Regulation further elaborates criteria that should be taken into account by the Agency when deciding on immunity from fines or on reduction of fines.

The Agency may grant immunity from fines to: the undertaking which is the first to submit information and evidence that enables the Agency to initiate cartel investigation; or to the undertaking which is the first to submit evidence that enables the Agency to find an infringement after the procedure has already started but the Agency did not have enough evidence. An undertaking that initiated a cartel or coerced other undertakings to join the cartel may not benefit from the leniency programme. It may, however be eligible for a reduction in fines if it fulfills relevant requirements.

The Agency may reduce fines to undertakings which do not meet criteria for full immunity if they provide it with additional conclusive evidence of the infringement.

There are certain additional criteria which have to be cumulatively met for both full and partial immunity. These include:

- full cooperation with the Agency;
- immediate termination of participation in the cartel (unless the Agency requests otherwise); and
- complete disclosure of available data and evidentiary materials.

Finally, the Leniency Regulation addresses procedural and technical details of the leniency programs (eg, first contacts with the Agency, content of the leniency application, markers, etc.).

Obviously, the Fines Regulation and the Leniency Regulation are closely modeled on the relevant EU instruments (*Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003* and *Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases*) respectively. However, it remains to be seen how these instruments will be applied by the Agency especially bearing in mind they are completely new to Croatian legal practice.

Czech Republic

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Predatory pricing sanctioned for the first time

In November 2010, the Czech Antitrust Office handed down its important first decision. This was to penalise the predatory pricing of the dominant operator of public passenger bus services between the two largest Czech cities of Praha and Brno. The decision to issue a fine for the amount of about €250,000 was confirmed during administrative appeal proceedings but may still be appealed against at the administrative court. The investigation took more than two years to complete.

The practice covered a time span of only three months in which time Student Agency reduced the journey fare of more than 200km to approximately €2 one-way (for the cheapest way of buying tickets) after a competitor threatened to increase its market position by offering very low introductory fares (also of €2) to gain market awareness. The fare charged by Student Agency was increased back to its previous level once the competitor had left the particular route.

To ascertain whether Student Agency had established a dominant position on the Praha-Brno passenger transport market, the Antitrust Office first had to find that rail passenger transport from Praha to Brno constituted a different market from the coach passenger transport, even though Czech Railways also participated in a price war for passengers on this key connection in the Czech Republic.

The Czech Antitrust Office then was able to prove from Student Agency's internal e-mails that the fare reduction, which was below cost, on this particular route was aimed at pushing the much smaller and less financially strong competitor out of the market. It eventually succeeded.

The Czech Antitrust Office decided to issue the fine in unusually long proceedings. The decision has yet to come into legal force as it has to be confirmed by the courts.

Nevertheless, this is the first case in which the Czech Antitrust Office has penalised predatory pricing. Ironically the company that was punished had in the past to fight its way against the old monopolies and now competes with the much bigger Czech railways, not only on the Brno route.

Denmark

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Increased criminal law enforcement of competition law infringements

The Danish Competition and Consumer Authority (the 'Authority') is to an increasing extent handing over cases to the Public Prosecutor for Serious Economic Crime for the instigation of criminal indictment. The tendency reflects a somewhat strategic change as to the enforcement of competition law in Denmark.

The vast majority of Danish competition law cases are handled through the Authority and through the Competition Council and may result in orders to bring the detrimental effects of any anti-competitive practices to an end. The Danish Act on Competition does, however, also provide for fines to be imposed on any party who intentionally or by gross negligence infringes certain provisions of the Act. Such criminal proceedings will be initiated by the Authority handing over the case to the Public Prosecutor for Serious Economic Crime. Statistics from the website of the Authority show a significant increase

in the number of cases handed over for criminal indictment. In 2002, only one case was handed over for criminal indictment. However, this rose to nine cases in 2008 alone. In 2009 and through to May 2010, seven cases have been handed over.

According to the Authority itself, this development is partially attributable to the strengthening of the investigations into cartels in recent years. Also of relevance is the Authority's adoption of a strategic change in 2007, warranting an increased focus on the most serious offences and specifically on offences which have detrimental effects. This in turn, and according to the Authority, has resulted in a higher number of inspections ('dawn raids') and also a higher number of cases being handed over for criminal indictment.

The sanctioning of competition law infringements may well see further development as the Danish Minister for Economic and Business Affairs has established a commission to assess the prospect of making Danish competition regulation more effective. Among other things, the commission is considering the possibility of introducing a prison sentence for competition law infringements. The commission is expected to publish its findings in the spring of 2011.

As to the level of the fines imposed, the fines are still well shy of those imposed by the European Commission. According to the preparatory documents of the relevant amendment act, the base amounts are to be between DKK 10,000 (approximately €1,300) and DKK 400,000 (approximately €54,000) for minor infringements; between DKK 400,000 and DKK 15 million (approximately €2 million) for serious infringements; and more than DKK 15 million for very serious infringements. In accordance with EU competition law, a distinction is made between infringements of short, medium and long duration and the amount of the fine may be increased by up to ten per cent for each year the infringement has taken place.

The highest fines imposed by a court are DKK 5 million (approximately €671,000) for a corporate entity and DKK 25,000 (approximately €3,400) for an individual. Subject to the admission of guilt and to the agreement of the offender, fines may also be imposed administratively through a fixed-penalty notice. The highest fines imposed as a fixed-penalty notice are DKK 4 million (approximately €537,000) for a corporate entity and DKK 100,000 (approximately €13,000) for an individual.

Website of the Danish Competition and Consumer Authority: **www.konkurrencestyrelsen.dk/en/**

Statistical information is available – in Danish - at the website of the Danish Competition and Consumer Authority: **www.konkurrencestyrelsen.dk/konkurrenceomraadet/konkurrencesager-i-tal/#c57553**

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European Union

Commission revamps its rules on the application of competition rules to vertical and horizontal arrangements

The Commission has overhauled its block exemptions and guidance on the application of the Treaty on the Functioning of the European Union (TFEU) to vertical and horizontal arrangements. The new block exemptions and guidelines have replaced the existing block exemptions and guidelines which expired in 2010.

Article 101 TFEU prohibits agreements and concerted practices between undertakings which have the object or effect of distorting competition within the internal market. However, Article 101(3) allows

this general prohibition to be declared inapplicable where broadly speaking, the restrictions on competition are outweighed by benefits to consumers.

To facilitate the application of Article 101(3) TFEU, the Commission has enacted block exemptions. Subject to market share thresholds, these exemptions provide safe-harbours for particular types of agreements or arrangements, which, although restrictive of competition, are considered to be beneficial.

To assist companies and their advisers to make a self-assessment of the competition law implications of proposed arrangements, the Commission has also published guidance on the application of Article 101 TFEU to both vertical agreements (between undertakings present at different levels of the supply chain) and horizontal agreements (between competitors). These guidelines help in the assessment of whether an agreement falls within a block exemption as well as addressing agreements which fall outside the scope of the block exemptions, either because the parties' market shares exceed the acceptable thresholds, or because the content of the agreement does not benefit from the relevant safe-harbour. While the guidelines are not binding on the Commission or European Courts, in practice they can be relied upon by companies.

Vertical agreements

On 20 April 2010, the Commission adopted a new vertical block exemption and vertical guidelines which together came into force on 1 June. While they have been updated, both the block exemption and guidelines remain broadly similar to those which they have replaced. There are, however, a few developments which merit attention:

- new rules and guidance have been introduced regarding internet sales (reflecting the dramatic growth in such sales since the previous guidelines);
- a new market share threshold removes the benefit of the block exemption from agreements where the purchaser has more than a 30 per cent market share on the purchasing market; and
- further guidance has been provided regarding category management.

Furthermore, although retail price maintenance (RPM) remains hardcore under the new rules, the guidelines now give further guidance on the anti- and pro-competitive effects of RPM, with a view to assisting companies to understand when in limited circumstances RPM may be acceptable.

The new guidance provides that internet sales should generally be viewed as 'passive' and that, consequently, such sales cannot be precluded by agreement. Inevitably, however, exceptions are provided. Most notably, an outright ban on online sales may be justified where this is objectively necessary, for example in order to protect public health. Certain conditions may also be imposed on internet sellers: websites may be subject to quality standards equivalent to those imposed on bricks and mortar shops; and selective distributors may be required to have at least one bricks and mortar shop to reduce the risk of free-riding. The final exception relates to the categorisation of internet sales as 'passive'. Where marketing e-mails are sent to potential customers, or banner advertising targets a particular type of consumer, any resultant sales would be viewed as 'active'. In the context of an exclusive distribution system, such sales into another's exclusive territory or to another's exclusive customer group may be prohibited. It is evident that the Commission will consider carefully in reviewing agreements whether restrictions on internet sales are justifiable.

The 30 per cent market share threshold already applied to the supplier's market share. Its extension to the purchaser's market share reflects the Commission's concern that it is just as likely that powerful distributors may impose anti-competitive conditions on suppliers as the reverse. Since the Commission has not provided guidance on how such entities should calculate their distributors' market shares, this additional evaluative step has proved problematic for suppliers assessing the compliance of their distribution systems.

The new vertical rules helpfully provide some guidance on category management. The guidelines indicate that although category management may restrict competition, it can also lead to efficiencies and will therefore fall within the block exemption as long as the companies fall within the market share thresholds. The guidance will also be helpful to cases where the market share thresholds may be exceeded.

In practice in recent years, the Commission has spent relatively little time considering individual vertical cases, relying on parties to

self-assess based on the guidelines. Instead, increasingly, national competition authorities and courts in the EU Member States are handling vertical cases. While the guidelines apply when EU competition law is applied at national level, the application of national competition law to vertical arrangements may be stricter.

Non-horizontal agreements

On 14 December 2010, the Commission adopted new horizontal guidelines, in conjunction with new block exemptions for both research and development agreements and standardisation agreements.

The two new block exemptions retain their previous framework and market share thresholds albeit that the 20 per cent specialisation block exemption threshold now applies not only to the specialisation product market, but also to any downstream product markets for which the specialisation product is an intermediary.

The horizontal guidelines have been expanded to provide substantive guidance on information exchanges and standard setting.

The Commission has provided helpful guidance on its treatment of information exchanges between competitors. It has clarified the factors that will be taken into account when reviewing the likely object and effect of such an exchange:

- companies are more likely to achieve a collusive outcome in markets which are sufficiently transparent, concentrated, non-complex, stable and symmetric;
- the exchange of strategic data (for example prices, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes) is more problematic than exchanges of other types of information;
- the exchange of information must cover a sufficiently large part of the relevant market to have restrictive effects;
- exchanges of genuinely aggregated data are much less likely to lead to restrictive effects on competition than exchanges of company level data;
- the exchange of historic data is unlikely to be indicative of the competitors' future conduct or to provide a common understanding on the market and is therefore unlikely to lead to a collusive outcome – whether data is historic depends upon the industry in question;
- frequent exchanges of information that facilitate both a better common understanding of the market and monitoring of deviations increase the risks of a collusive outcome; and
- exchanges of 'genuinely public information' are unlikely to constitute an infringement. Genuinely public information is equally accessible in terms of costs of access to all competitors and customers.

The Commission has also specified that private exchanges between competitors of individualised data regarding intended future prices or quantities will be considered a restriction of competition by object. The significance is that such exchanges will, in future, be deemed hardcore infringements that probably be viewed as cartels and will be highly unlikely to benefit from exemption under Article 101(3) TFEU.

Whilst the guidance is in line with existing case law, it is helpful for the Commission to set this guidance out in a single document given the importance of legitimate information exchanges to many industries.

In relation to standard setting arrangements, the Commission recognised that standards are becoming increasingly important in facilitating innovation (in particular in the IT sector). Its new guidelines therefore aim to ensure that in standard-setting agreements, specific benefits are realised and passed on to European consumers. This aspect of the guidelines was subject to significant input from interested parties.

In particular, the guidelines require that the standard setting process should be unrestricted, transparent for all interested parties, and should allow access for all parties on 'fair reasonable and non-discriminatory' (FRAND) terms. There should not be an obligation to comply with the standard; nor should pressure be brought to bear on third parties not to market non-compliant products.

Where the standard incorporates intellectual property rights (IPRs), this should be reflected in a clear and balanced IPR policy such that those involved commit to licensing their essential IP on FRAND terms.

In this way, the Commission hopes to promote an efficient, open and transparent standard-setting process, which is the key to ensuring effective competition. While it is too early to tell whether the new rules have been successful in achieving a balanced

outcome, it is helpful that the Commission has now provided detailed guidance on how it currently views standardisation agreements.

Conclusion

The new legal instruments do not radically amend European competition law. Indeed, much of what is new within them will be recognised by practitioners from Commission decisions and court judgments since the publication of the previous block exemptions and guidelines. Nonetheless, the guidelines help to codify existing Commission decisional practice and provide a helpful starting point for analysing the likely competition law compliance of potentially complex commercial arrangements. As such, the Commission's willingness to invest time and resources into bringing the block exemptions and guidelines up-to-date is welcomed.

France

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Update on antitrust cases

The recording of phone conversations without the consent of the person concerned

In a recent decision Cour de Cassation considered as inadmissible evidence consisting of phone conversation recordings made by one party against another. The reason for this was that they had been collected without consent and not been obtained by fair means on the basis of Article 9 of Code of Civil Procedure and of Article 6§1 of European Convention of Human Rights.

See Decision of the Cour de Cassation Arrêt n° 587 du 7 January 2011 (pourvois n° 09-14.316 et 09-14.667) – Cour de Cassation – Assemblée plénière, **www.courdecassation.fr/jurisprudence_2/assemblee_pleniere_22/587_7_18654.html**

Sector inquiry regarding online advertising sector by the competition authority

In an opinion 10-A-29 of 14 December 2010 concerning the online advertising sector, the Competition Authority considers that Google holds a dominant position in the advertising market linked to its search engines which is a specific market on the basis of different elements 'market share, price level, nature of customers relations, margin level, etc. The entry barriers also appear to be high when it comes to developing an activity as a competing search engine, because of the investments at stake for the development of the algorithms and indexing of content, as well as due to the size effect.'

The Competition Authority has identified possible exclusionary conducts inter alia through excessive exclusivity clauses in terms of their field, duration or scope and possible operational abuses through imposition of exorbitant conditions on partners or customers and discriminatory treatments

The opinion is provided on a consultative basis which means that the Competition Authority makes no ruling as to the legality of such practices.

See press release of the Opinion of the Competition Authority at **www.autoritedelaconcurrence.fr/user/standard.php?id_rub=368&id_article=1514**.

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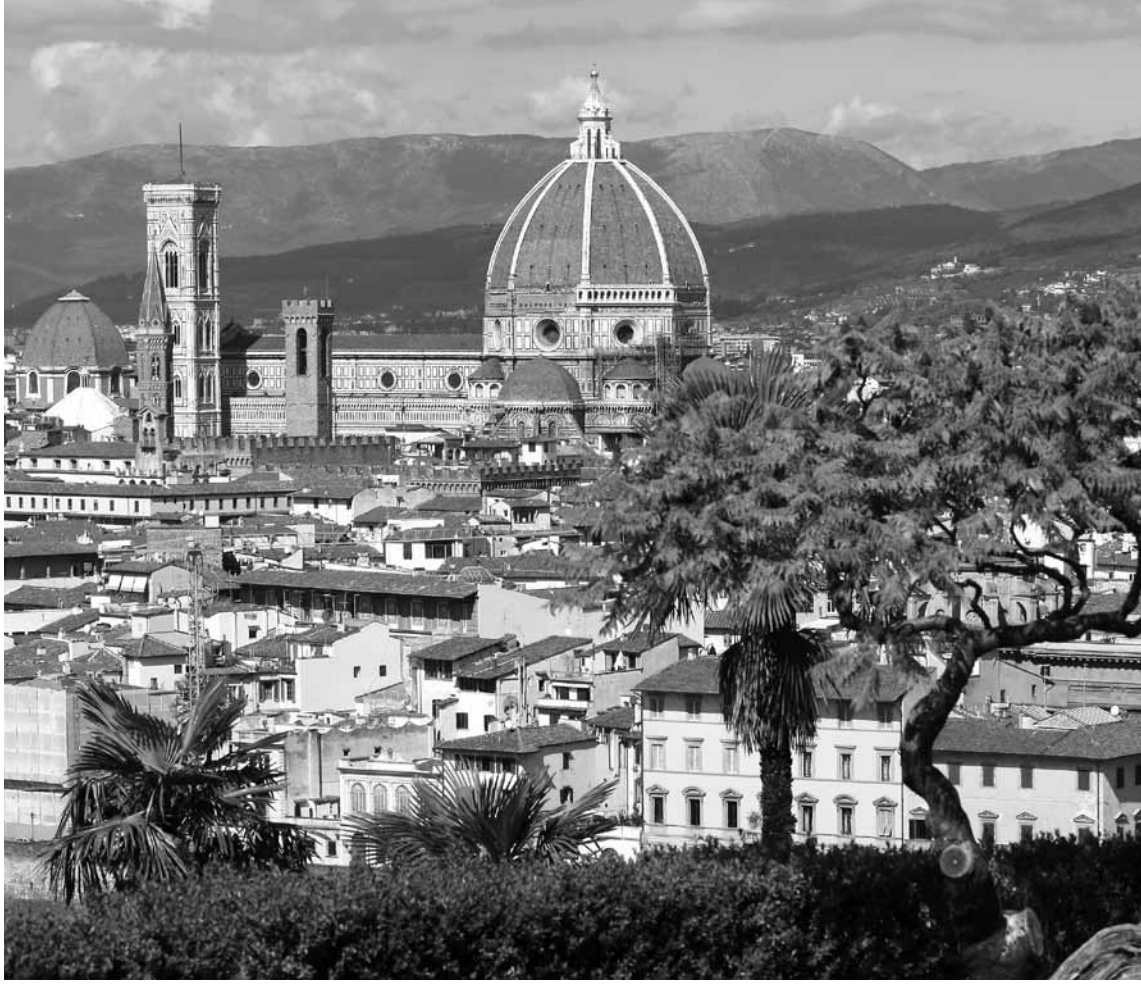

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Germany

Courts tend to reject passing-on-defence

When the German Act Against Restraints of Competition was amended in 2005 to facilitate damages claims in cartel cases, one of the rules introduced was that '[i]f a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service.' This rule, which was only added at a late stage in the legislative process, is supposed to impose limits on the passing-on-defence. It is unclear to what extent it does. Remarkably, a number of courts have rejected the passing-on-defence without even relying on this rule.

In a judgment of 11 June 2010 (6 U 118/05 (Kart)), the Karlsruhe Court of Appeal held that, in principle, only the direct customers are entitled to claim damages from cartel members. This would only be different in a case where the direct customer is an affiliate of the cartel member, which would allow the (indirect) customers at the next level to claim damages from the cartel member. According to the court, one reason for limiting claims to direct customers is that otherwise the cartel member might have to pay more than the actual damage caused. This risk exists, because the defendant is not allowed to rely on the passing-on-defence. Allowing the passing-on-defence would not be in line with the purpose of the law. Under the passing-on-defence, there would be no deterrence, and the efficiency of competition law would be in danger. The court added that it would not be possible on a practical level to streamline claims by direct customers and indirect customers so that the debtor would not have to pay more than the actual damage caused.

A few months earlier, on 1 October 2009, the Berlin Court of Appeal (2 U 10/03 Kart) had also rejected the passing-on-defence. However, this court took a different position on whether indirect customers have claims. It held that both direct and indirect customers have claims, but that the member of the cartel does not have to pay more than the damages caused. The direct and indirect customers are joint creditors, and, if one of them receives more than its share of the damages, it has to share with the others. In this view, the direct customer, who, because the passing-on-defence is not allowed, can claim full damages, is then responsible for passing on some of the money received to the indirect customers. The court pointed out that only the direct customer is in a position to pursue claims against the debtor. Unfortunately, the court did not explain how the indirect customers should then efficiently pursue their co-creditor claims against the direct customer.

Both courts rejected the passing-on-defence, but they came to opposing views as to whether indirect customers can claim damages. The latter is the question that should be decided first, because if indirect customers have claims, it makes no sense to exclude the passing-on-defence. Otherwise, the debtor might have to pay more than once, and there is a consensus that he should not be put in that position. Assuming that direct customers will happily share their litigation proceeds with indirect customers is naïve. Letting direct customers, who in some industries encourage cartels at the upstream level, because they benefit from higher (recommended) prices, pocket a windfall benefit is not what comes to mind when one thinks about the aims and effectiveness of competition law.

The Federal Court of Justice has not yet ruled on these issues. Until it does, uncertainty continues to reign.

Hungary

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Hungarian approach to RPM remains unchanged – the Hungarian Competition Authority's GEKKO decision

In the *GEKKO* case, the Hungarian Competition Authority (HCA) had to assess the following issues in GEKKO's franchise agreements: (i) resale price maintenance (RPM); (ii) territorial restriction; and (iii) non-compete obligation after the termination of the agreement.

Legal assesssment of the Hungarian Competition Authority

GEKKO operated a nationwide franchise network of playhouses providing an integrated, complex educational concept for children between the ages of one month to 14 years-of-age. According to the HCA's assessment, GEKKO's market share was around 30–40 per cent, this figure being established on the basis of the number of playhouses GEKKO owned. Gekko's competitors were usually operating only one playhouse.

- As far as the franchise agreements' RPM clause is concerned, it was stipulated that the franchisee may only deviate from the prices defined by GEKKO with GEKKO's prior explicit written consent. The HCA considered the fixing of resale prices as a restriction of competition by object, emphasising that the restriction of intrabrand competition is a serious infringement on markets with few market players. The HCA also emphasised that a franchisee's fixed turnover is less likely to create an incentive to increase the quality of the services, thus rejecting the argument that fixing the resale price is necessary for the maintenance of service quality.
- The franchise agreements were concluded with each franchisee for a concretely defined territory. This meant that the franchisee was given exclusivity within a certain area, but was not allowed to actively seek customers outside this sphere. However, it must be added that none of the provisions of the franchise agreements contained a prohibition on passive sales. The HCA held that a territorial exclusivity for an area of reasonable size is indispensable in attracting new franchisees and in maintaining such a franchise network.
- The third provision to be assessed by the HCA was a clause which prohibited the franchisee to compete with GEKKO's services for two years after the termination of the franchise agreement. In the view of the HCA, a non-compete clause exceeding one year should be considered as anti-competitive. This evaluation follows the approach of the EU and Hungarian block exemption regulations.

In its decision, the HCA took into consideration the low restrictive effects of GEKKO's practice onto competition and did not impose a fine. It must be added that, according to the coherent practice of the HCA, the proceedings were not extended to the franchisees as they had no influence over the wording of the franchise agreement.

Comments on the case

In recent times there has been much debate about whether the antitrust perception of vertical restrictions should include the 'magical' more economic approach. Many consider that the hardcore restriction status (ie, restriction by object) of resale price maintenance is being questioned. As it is well known, the wave came from the other side of the Atlantic, the starting point being the *Leegin* judgment of the US Supreme Court, which superseded the same court's leading case on RPM, the *Dr Miles Medical* judgment of 1912. According to the latter decision, resale price maintenance is a per se illegal restriction of competition. In the *Leegin* case, however, the Supreme Court stated that RPM might have pro-competitive effects, thereby it must be subject to the so-called rule of reason analysis. According to this doctrine, the pro-competitive and restrictive effects of a certain practice should be set against each other in order to be able to decide whether this practice should be prohibited. Among the reasons for this new approach was that in the

absence of RPM some services would not be offered and it could also facilitate new market entry.

However, it must be emphasised that the difference between per se illegality and rule of reason in the US and restriction by object and restriction by effect in the EU is not the same, thus dampening the possible consequences for European competition policy. In Europe, the discussion ended up in the adoption of the European Commissions' new Block Exemption Regulation and the Guidelines on Vertical Restraints, in which the Commission restated that RPM, as a hardcore restriction, excludes the exemption from the prohibition on agreements restricting competition.

It seems, on the basis of the Hungarian Competition Authority's *GEKKO* decision, that the Hungarian antitrust agency still considers resale price maintenance a hardcore restriction (restriction by object), although not imposing a fine may suggest a tendency towards a softer approach as regards such vertical restrictions.

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Ireland

The exclusion of the application of competition law to operations in the financial sector

Background

The impact of the recent financial crisis has been felt particularly acutely in Ireland. Many indigenous financial institutions have required government support or re-financing; a number have been actually or effectively nationalised. The extent of the state's involvement in the rescue of the Irish financial sector has in turn led to concerns about Ireland's financial stability.

For competition lawyers, a striking element in the legislation responding to the crisis is the repeated reliance on measures excluding or blocking the application of the Competition Act 2002, the statutory basis for Irish competition law, to operations in parts of the financial sector. This contrasts with the approach adopted at EU level where the Commission signalled early in the crisis that, while it would be flexible and pragmatic in the exercise of its prerogatives, it did not accept that the adverse economic and financial conditions provided a basis for the exclusion or curtailment of the application of EU competition law (notably in relation to merger control and state aid) to exceptional operations in the financial sector.

The exclusion of the merger control rules

The trend of exclusion of Irish competition law began with the first major legislative response to the financial crisis, the Credit Institutions (Financial Support) Act 2008, which permits the minister for finance to provide financial support to troubled banks. That Act (at Section 7) substantially modifies the scope of application of the Irish merger control system in respect of transactions involving a credit institution. It provides for a parallel review system administered by the minister for finance in which competition criteria are no longer paramount. Section 7 of the 2008 Act substantially lessens the role of the Competition Authority, relegating it to an advisory function and allows the Minister for Finance to approve proposed transactions judged necessary for banking, economic or financial stability even where those transactions will substantially lessen competition.

Any merger or acquisition involving a credit institution or subsidiary may be certified by the minister for finance where the minister believes that the transaction is necessary to maintain stability in the financial sector. If the certified transaction would otherwise be notifiable under the Competition Act,[1]

it must be notified to the minister, and not the Competition Authority. Certified transactions are dealt with exclusively under the procedure in Section 7 of the 2008 Act to the exclusion of the Competition Act.

Further exclusions

Adopted in January 2009, the Act authorising the nationalisation of the Anglo Irish Bank, the Anglo Irish Bank Corporation Act 2009, includes a provision excluding the application to that nationalisation of both the Competition Act and the special banking merger control regime introduced in 2008. A similar approach was adopted later in 2009 in legislation covering transactions by the National Pensions Reserve Fund (Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Act 2009). In November 2009, the legislation establishing the National Asset Management Agency (known as NAMA) which acquires distressed assets from banks and financial institutions, the National Asset Management Agency Act 2009, contains a provision excluding the application of the Competition Act and the special banking merger control regime to the acquisition of bank assets by NAMA. A similar exclusion was introduced in Schedule 3 of that Act in respect of the acquisition by the minister for finance of an interest in a building society.

Credit Institutions (Stabilisation) Act 2010

At the end of 2010, the continuing crisis in Ireland resulted in the adoption by the EU and the IMF of a programme of financial support for Ireland. Domestically, the Irish Government adopted a National Recovery Plan 2011–14, while the Irish Parliament enacted the Credit Institutions (Stabilisation) Act 2010 giving the minister for finance wide-ranging powers to adopt measures to promote the stabilisation and restructuring of credit institutions in Ireland. Like its predecessors, the Stabilisation Act also contains a broad exclusion of the Competition Act and the special banking merger control regime, neither of which will apply to operations under the Stabilisation Act involving the issue of shares in a financial institution to the Minister, the appointment of a special manager to a financial institution, the acquisition or disposal of assets or liabilities by a special manager, or in respect of a direction order or a transfer order made by the Minister concerning a financial institution's assets or liabilities.

Conclusions

One can speculate on the intention behind the exclusions set out in this series of legislative provisions. It is likely that they were regarded as necessary to avoid the possibility that national competition law might delay or frustrate the implementation of measures judged necessary for the stabilisation and restructuring of the financial sector in Ireland.

From a competition lawyer's perspective, some of the exclusions seem unnecessary insofar as they relate to measures that are unlikely to fall within the scope of the Competition Act in the first place. In addition, the prospect of the application of the EU Merger Control Regulation to a merger of two or more large Irish financial institutions remains; the Commission's jurisdiction cannot be ousted by national legislation (and the Irish legislative provisions do not purport to do this).

At a more general level, it would seem unfortunate if these provisions could be regarded as signalling a view that competition law and policy are part of the problem (and thus candidates for exclusion) rather than part of a solution to the difficult situation from which the Irish economy and financial sector are currently seeking to emerge.

Note

1 Under the Competition Act, an obligation to notify a transaction arises where, in the most recent financial year, the world-wide turnover of each of at least two of the undertakings involved is not less than €40 million, at least two of the undertakings involved carry on business in any part of the island of Ireland, and the turnover in the Republic of Ireland of any one of the undertakings involved is not less than €40 million.

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Italy

Recent developments

Twentieth anniversary of the Italian Competition Authority in 2010

The year 2010, which marked the 20th anniversary of the Italian Competition Authority (ICA) was characterised by a series of workshops and conferences on competition issues and consumer protection, organised by the ICA to celebrate this important milestone.

The conference, entitled 'Convergence in the Electronic Communication sector. The competitive background on networks, services and contents: competition issues in an international perspective', held on 21 January 2010, was only the first in a series of initiatives scheduled by the ICA under the High Patronage of the President of the Republic, aimed to showcase how antitrust policy has accompanied Italian economic and social life over the last two decades.

These initiatives culminated at the last conference, held on 11 October 2010, which dealt with the relationship between free competition and protectionism in the framework of the current financial and economic crisis.

In particular during this last conference, the Chairman of the Authority Antonio Catricalà spoke of 'an Italy which is still "recovering" in terms of the free market', and took the opportunity to highlight the ever 'impellent need to promulgate the new law on competition'.

The Chairman of the Authority subsequently underlined that the Authority's activities should not be based on the imposition of fines on undertakings as they are 'often easily absorbed as the cost of undertaking: it must first be obtained, with the tools provided for by law, changes in business practices. The penalty is really a last resort'.

At the same time, to celebrate its 20th anniversary, the Authority also published a book consisting of two volumes which include over 77 articles written by Italian antitrust law practitioners.

Investigations concluded by the ICA

The conclusion of an investigation in the Italian retail cosmetics market on the existence of alleged anti-competitive arrangements (in breach of Article 101 TFEU)

In June 2008, the ICA initiated an investigation in the Italian retail cosmetics market following a leniency application of Henkel Italia SpA, which would enable leniency applicants to receive 100 per cent immunity from fines under EC and Italian antitrust rules. The aforesaid leniency application was followed by two further leniency applications of Colgate-Palmolive SpA and Procter & Gamble Srl.

In the leniency applications, it was alleged that, during meetings held by Centromarca (the Italian Association of Branded Products Industries) between January 2005 and 2007, the main companies active in the manufacture and sale of cosmetic products distributed via retail outlets exchanged sensitive market information concerning their business strategies, such as planned price increases or discounts and bonuses offered to distributors.

In addition, the companies involved allegedly jointly put pressure on distributors to obtain a generalised increase in retail prices.

At the end of the investigation, the ICA concluded that the above-mentioned meetings usually started with an introduction of a sector analysis about general market trends and continued with brief 'roundtable' introductions, during which each company exchanged information about price increases and discounts of products offered or to be offered to the big purchasing consortia.

At the end of the investigation, the ICA ascertained the anti-competitive conduct, the final aim of which had been an increase in prices, had been set over the annual inflation rate and was not justified by an increase in production costs.

Therefore, the ICA imposed fines of over €81 million on the companies involved (Unilever Italia Holdings Srl; Reckitt-Benckiser Holdings (Italia) Srl; Colgate-Palmolive SpA (fine reduced by 50 per cent due to the submission of a leniency application); Procter & Gamble

Srl (fine reduced to 40 per cent due to the submission of the leniency application); Sara Lee Household & Body Care Italy SpA; L'Oreal Italia SpA; Società Italo Britannica L Manetti-H Roberts & Co SpA; Beiersdorf SpA; Johnson & Johnson SpA; Mirato SpA; Paglieri Profumi SpA; Ludovico Martelli Srl; Weruska & Joel Srl; Glaxosmithkline Consumer Healthcare SpA; Sunstar Suisse SA; Associazione Italiana dell'Industria di Marca – Centromarca) and granted full immunity from fines to Henkel Italia SpA which was the first leniency applicant.

One of the main aspects considered by the ICA was the primary role of eight companies (Henkel, Reckitt Benckiser, Beiersdorf, L'Oreal, Unilever, Procter & Gamble, Colgate and Manetti & Roberts), as well as the cooperation between Reckitt, Mirato and Centromarca.

The ICA excluded the liability of Biochimica SpA (since it was created after the end of the ascertained unlawful behaviour) and Sodalco Srl. In particular, Sodalco was involved in the investigation since, in 2006, the said company acquired the cosmetics branch of business belonging to Quidnovi SpA, a company that, according to the ICA's assessment, had taken part in the meetings held by Centromarca and was therefore a participant in the alleged cartel. Notwithstanding the above, in its final decision the ICA excluded any kind of liability of Sodalco Srl for the ascertained anti-competitive conduct, in the light of the fact that 'Sodalco Srl, created on 26 June 2006, did not exchange sensitive information with competitors, and did not increase the retail prices communicated to the big purchasing consortia'.

The conclusion of an investigation on the allegedly anti-competitive agreements entered into by Solvay Pharma SpA and Sanofi Pasteur MSD SpA (in breach of Article 101 TFEU) in the flu vaccine market

On 16 December 2009, the ICA initiated an investigation against *Solvay Pharma SpA and Sanofi Pasteur MSD SpA* to ascertain the existence of alleged anti-competitive conduct, consisting of collusive practices aimed at altering the result of the competitive tender called by the local health authority in the field of flu vaccines (I726 – *ASL Regione Piemonte–gara fornitura vaccino antinfluenzale*, Decision No 21677 dated 13 October 2010).

In its decision to initiate an investigation, the ICA also assumed that the aforementioned conduct could be the result of a wider form of collusion by Solvay and Sanofi, with the objective being the restriction of competition in the flu vaccine market, not only in the region of Piemonte, but also in other regions of Italy, thus having an effect on trade between EU Member States.

Following the investigation, the ICA established that the evidence collected during the investigation was not sufficient to ascertain the existence of collusive behaviour between the parties, due to variability of prices offered by bidders in tenders called by the local health authority in the Italian territory, and due to the absence of proof of an agreement aimed at market sharing.

In other words, according to the ICA, each company seemed to have acted on the basis of its own business strategies, behaving autonomously within the market to award the contract.

Indeed, the most important aspect considered by the ICA was the variability of prices offered by bidders in all of the national territories, which, according to the ICA, was indicative of the absence of any collusion between the companies involved.

Furthermore, the ICA underlined the market differences between 2008–2009 and 2009–2010, during which the ICA noted a demand surplus in the flu vaccines sector, due to the increasing awareness of the Italian public on the necessity to get vaccinated against flu.

For this reason, the ICA ascertained the absence of any form of collusion.

Investigations commenced by the ICA

Investigation launched into the tendering process for the assignment of gas distribution services, in relation to an alleged abuse of dominant position by Italgas

On 13 October 2010, the ICA decided to launch an investigation to determine whether Italgas had abused its dominant position by obstructing the preparation of calls to tender for the assignment of gas distribution services by the municipalities of Rome and Todi (A432 – *Execution of tendering in the assignment of gas distribution services*, Decision No 21675, dated 13 October 2010).

The investigation was initiated on the basis of reports that these two local entities submitted to the ICA, and the company itself was notified during special inspections

conducted in collaboration with the Guardia di Finanza's (Italian Tax Police) Special Unit for Market Protection.

The main contention is that Italgas – the current gas distribution concessionaire, whose contract expired in December 2009 – delayed or refused to furnish information required by these authorities to prepare calls to tender for the awarding of the next service contract.

According to the ICA, the preparation of calls to tender represents a critical moment for ensuring the development of competition in the gas distribution market, which is characterised by natural monopolistic conditions, in the light of Italgas' position in this sector.

According to the ICA, in addition to its critical impact on the preparation of calls to tender, the information possessed by Italgas may also influence the 'overall quality level' of the bids presented by competitors in response to the call to tender.

Furthermore, Italgas' conduct could very well have significant exclusionary effects on competition in the gas distribution markets, for two additional reasons: 'first of all, this is the first time a call to tender has been used to assign this particular service contract and, secondly, Rome represents Italy's largest municipality, endowing it with exceptional strategic and economic importance from the perspective of competing operators'.

The investigation is envisaged to be concluded by 15 December 2011.

Investigation launched with regard to the tendering process for the assignment of gas distribution services by Estra Reti Gas and Estra's alleged abuse of dominant position

The ICA also decided to initiate formal antitrust investigations against Estra and its controlled company Estra Reti Gas (A435 – *Comune Di Prato–Estra Reti Gas*, Decision No 21859, dated 1 December 2010), active in the field of gas distribution services by the municipality of Prato.

The investigation was launched following a report submitted to the ICA by the municipality of Prato, and is aimed at establishing whether Estra Reti Gas and Estra abused their dominant position by refusing to furnish information required by the Authority to prepare calls to tender. The said investigation is envisaged to be concluded by 31 January 2012.

Investigations have also been launched against undertakings providing similar services in the municipalities of Messina (A433 – *Affidamento del servizio di gestione integrata dei rifiuti solidi urbani nel Comune di Messina*, Decision No 21858 dated 1 December 2010) and Catania (S778 – *Comune di Catania–bando di gara per la costruzione di parcheggi sotterranei*, Decision dated 9 December 2010), to verify the existence of alleged abuses of dominant position.

In particular, with regard to the former, the ICA is investigating the alleged anti-competitive conduct of Messinambiente,a company active in the field of environmental health in the municipality of Messina. Indeed, Messinambiente allegedly refused to furnish information required by the aforsaid municipality to prepare calls to tender. With regard to the second investigation, the ICA is seeking to ascertain any alleged anti-competitive effects of the changes to the original project for a call to tender for the construction of underground parking in the municipality of Catania.

Unfair commercial practices

The ICA has paid particular attention to unfair commercial practices over the last three months.

Conclusion of an investigation on the www.easy-download.info link and imposition of the highest fine (€960,000) on the German company Eurocontent Ltd

A 'record' fine was imposed by the ICA in accordance with the Italian law on unfair commercial practices (Consumer Code) following an investigation opened against Eurocontent Ltd (PS 6013 – *Easy-Download*, dated 3 November 2010). The decision of the ICA was based on hundreds of complaints received from individual citizens and consumer associations, among which were Altroconsumo, Adiconsum, Aduc, Codacons and Unione Nazionale Consumatori and Federconsumatori (it must be recalled that in 2009 and 2010 alone, the ICA imposed a total of €4.45 million in fines for unfair practices whereby the website registration mechanism was used to induce consumers to unknowingly subscribe to various service contracts).

The complaints testified how the www.easy-download.info 'link' would come up whenever the name of a software application

and the word 'gratis' or 'gratuito' (free) were entered into the Google search engine.

Clicking the 'link' then led consumers directly to this website's registration page instead of its homepage. By entering their information, in essence, consumers were unknowingly subscribing to two-year contracts with Eurocontent Ltd, a German company that provides software for an annual fee of €96, to be paid in advance once a year. In contrast to the homepage, which presented the terms and conditions of the contract quite clearly, the registration page exhibited these terms graphically in ways that were not easily and readily comprehensible. Essentially, consumers were led to believe that the service was free. With no other notification to consumers about the conclusion of the aforesaid contracts, the German company proceeded to solicit payments from consumers, once the period allowed for annulment of the relative contract had expired.

Hence, the ICA ordered payment of the highest fine it has ever imposed, ie, €960,000 from the German company Eurocontent Ltd, and inhibited it from engaging in the above described unfair commercial practice.

Vendor guarantees: investigations launched and publication of a brief guide, following the conclusion of an investigation vis-à-vis the main retail chains

The efforts of the ICA in its protection of consumer welfare are particularly evidenced by several investigations that the ICA has launched over the last few months against several companies in relation to vendor guarantees and consumer rights.

In particular, the ICA started seven investigations against nine companies (five of which used the 'expert' trademark: Eldo Italia SpA; Expert Italy SpA, Papino Elettrodomestici Group and Leso Elettrodomestici Srl (Expert Group), 'Di Salvo e Della Martira Srl') and various retail chains (Carrefour, Auchan, PAM-Panorama, FINIPER) in the field of vendor guarantees and consumer protection.

The aim of the investigations is to ascertain whether the aforesaid companies correctly informed consumers about the vendor guarantee and the related costs.

Indeed, according to reports submitted by many consumers, the mentioned companies allegedly did not provide the necessary information to consumers and refused to repair the defective products to the detriment of the said consumers.

Furthermore, the ICA has stressed the importance of consumer protection, underlining how consumers are often not informed of their right to request that a product be repaired by the services offered directly by the vendor.

In this respect, it has to be noted that the importance of consumer protection has recently been stressed by the Secretary General of the Authority Luigi Fiorentino (speech dated 26 November 2010, entitled 'Competition and the consumer 2005–2010'), who underlined that the Italian antitrust system must be considered as a unified system that has consumer protection as its most important aim.

Therefore according to the Authority, competition can only subsist in a context characterised by freedom and consumers' awareness of their own choices: these values, in particular, can only be guaranteed by rules on consumer protection.

For this reason, the ICA has recently decided to make available a brief guide on vendor guarantees and consumer rights on its website, wherein it has furnished consumers with the essential information on vendor guarantees. In particular, the ICA has clarified the contents and terms of the guarantee plus the vendor's duties, specifying also all the necessary information required to submit a report to the ICA in case of alleged unlawful behaviour.

The launch of the aforesaid investigations follows the conclusion of five earlier investigations opened against nine companies – Mediamarket SpA (Mediaworld trademark), Unieuro SpA, SGM Distribuzione Srl (MarcoPoloExpert trademark), Euronics Italia SpA and Nova SpA (Euronics trademark), DPS Group Srl and DML SpA (Trony trademark), GRE SpA and Estendo SpA – in January 2010, some of which were reported to the ICA's call centre, outlining discrepancies in the overall application of the new regulations on vendor guarantees to the detriment of consumers.

The action taken by the ICA led to the adoption of commitments by the large retail chains and clarified the new regulations, which previously had been rarely applied.

More than 700 sales outlets were targeted by the investigation and these outlets now offer clear and detailed information which

has been made available via various means (for example via brochures and leaflets) concerning the conformity requirements – as is the case for legal guarantees – of products that prove to be defective after purchase, the maximum time limits for repairs or replacement, and the liability of the vendor for defective products.

The companies have also committed themselves to simplify and speed up online purchase cancellations (for example, via e-mail or fax) and to provide appropriate instructions on their websites.

In their advertising and promotional communications, the companies will provide better information as to the use and terms of 'additional' after-sales services, specifying that such services, which are supplied at a charge, in no way limit the scope of the 24-month legal guarantee but supplement and run concurrently with, and possibly beyond, the duration of the legal guarantee.

In any case, the ICA declared that it will continue to monitor all companies to ensure they provide consumers with a legal guarantee of conformity and correctly observe and apply the relative rules set forth by the Consumer Code.

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Japan

BHP and Rio Tinto abandon their unification plan

On 18 October 2010, *Asahi Newspaper* reported that the planned unification of the production of iron ore by BHP Billiton (BHP) and Rio Tinto had been abandoned.

BHP announced that as the competition authorities in the EU, Australia, Germany, Japan and South Korea would not approve the planned unification, BHP and Rio Tinto hesitatingly agreed to cancel the unification plan. The Japan Fair Trade Commission (JFTC) has therefore abandoned its review of the unification plan. As reported in the March 2009 edition of the *IBA Antitrust Committee newsletter*, in 2008, BHP tried to acquire Rio Tinto but had to give up its acquisition as a result of the global financial crisis. The JFTC closed its investigation into the planned merger between BHP and Rio Tinto.

Contrary to the 2008 BHP acquisition of Rio Tinto case, BHP and Rio Tinto filed an application for prior consultation with the JFTC in accordance with the regular procedures provided in the Anti-monopoly Law (AML). (See 'Prior review procedures for mergers and acquisitions' in the *IBA Antitrust Committee newsletter*, October 2010 and the JFTC's guidelines governing mergers and acquisitions.)

Prior review for the planned unification between two foreign companies was conducted by the JFTC in Phases 1 (June 2010) and 2 (September 2010). In prior consultations, the JFTC sometimes pointed out that the planned unification might be substantially restricting competition. The JFTC used information exchanged with the relevant foreign competition authorities and had a negative attitude regarding the merger case between foreign companies.

Cease and desist order to J&J

The JFTC informed Johnson & Johnson (J&J), a leading manufacturer accounting for about 50 per cent share of the market of the disposal of contact lenses in Japan, that the JFTC would issue the company a cease and desist order for committing unfair business practices (*fukōseina torihiki hōhō*). J&J has allegedly forced retailers not to indicate prices in advertisements; otherwise, it would increase the wholesale prices it has set with respect to retailers.

J&J's conduct constitutes dealing with the retailers on such terms as were unjustly restricting the latter's business activities. (*Nihon Keizai Newspaper*, 10 November 2010)

JFTC acknowledges the cooperation between Google and Yahoo Japan

The JFTC announced in a research report published on 2 December 2010, that cooperation in furnishing reference and advertising service of internet between

Google USA (Google Asia Pacific Private Ltd) and Yahoo Japan would not contravene current Anti-monopoly Law.

The above announcement was given due to Google USA and Yahoo Japan having been a joint venture company of Soft Bank (Japan) and Yahoo USA.

Under the circumstances, Yahoo Japan was unable to receive the reference service of internet from Yahoo USA since Yahoo USA had decided to adopt the reference technology of Microsoft USA, a competitor of Google USA and to cease its own development and licensing of the basic technology (platform) on the reference and advertising services in 2009. The market share of Google USA is about 90 per cent of the Japanese reference service market. However, the JFTC found that Yahoo Japan had valid reasons to select Google's technology and that cooperation between Yahoo Japan and Google USA was not likely to impede fair competition (*Nihon Keizai* Newspaper, 3 December 2010).

New Zealand

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Increased settlements

The second half of 2010 saw a noticeable increase in the number of settlements reached between the New Zealand Commerce Commission (NZCC) and parties under investigation for coordinated behaviour, including cartel conduct. Settlements included with two defendants in the NZCC's freight forwarding cartel proceedings, a domestic waste oil cartel and a number of warnings to relatively unsophisticated parties whose conduct, according the NZCC, risked breaching the relevant price fixing prohibition.

This development has not gone unnoticed by practitioners. It suggests a subtle change in the NZCC's priorities, with an increased focus on more efficient outcomes from its investigations, reminiscent of the NZCC's approach in the 1990s. This apparent change in approach may be influenced by two recent unsuccessful NZCC proceedings relating to (alleged) extra-territorial cartels with potential New Zealand effects: *Commerce Commission v Siemens AG,* HC AK CIV 2007-404-2165 [28 October 2010]; and *Poynter v Commerce Commission* [2010] NZSC 38 (see *IBA Antitrust Committee Newsletter*, October 2010, p45).

Interestingly, the NZCC received four leniency applications for the year ended 30 June 2010 and all involved either alleged domestic or trans-Tasman based cartels. This was in stark contrast to the previous year in which the NZCC received five leniency applications, four of which allegedly involved international cartels. This is arguably a sign of a 'maturing' leniency policy as domestic businesses gain an appreciation of the benefits of being the first party to 'blow the whistle'.

Increased merger activity

As expected, the global financial crisis (GFC) has had a significant impact on merger activity but there are signs of a recovery. For the year ended 30 June 2010 the NZCC received a record low number of merger clearance applications. Only two applications were received in the first three quarters of the year, however a further five applications were lodged in the final quarter (usually the NZCC receives around 18–23 applications per year). This increase in activity has been maintained since 1 July 2010 with a further seven applications lodged. Many commentators expect this level of activity to be maintained during 2011.

Draft enforcement guidelines for unilateral conduct abandoned

In October 2011 the NZCC abandoned its plans to develop guidelines regarding the Commerce Act's (the 'Act') prohibition on misuse of substantial market power following the Supreme Court's (SC) dismissal of the NZCC's appeal in a significant test case in telecommunications. The NZCC had sought clarification from the SC on whether New Zealand's test for unilateral conduct should reflect Australia's (which many commentators consider to be a more flexible and nuanced approach), or whether the sole test for

such conduct is the counterfactual test as determined in 1994 by the London based Privy Council in *Telecom v Clear* (then New Zealand's highest Court).

On the basis that the SC reaffirmed the so-called counterfactual test (which many commentators consider to be a relatively high test) as the sole test for unilateral conduct (albeit referring to it as a 'comparative' approach); the NZCC determined that there was 'limited' value in developing such guidelines.

The NZCC may be disappointed that it was unable to make progress in its work regarding unilateral conduct, but readers will no doubt be aware that New Zealand is not alone when it comes to difficulties in defining the boundaries for permitted unilateral conduct.

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South Korea

Recent Supreme Court landmark decisions

KFTC's referral is prerequisite to criminally prosecute defendants

On 30 September 2010, the Korean Supreme Court held that the referral of the Korea Fair Trade Commission (KFTC) regarding antitrust violators to the Prosecutor's Office was a prerequisite for criminally prosecuting such violators.

History of the case

With respect to the KFTC case concerning unfair collaborative acts by ten high density polyethylene (HDPE) manufacturers/sellers, following its investigation the KFTC referred five HDPE companies to the Prosecutor's Office for criminal prosecution. As a policy and practice, the KFTC did not refer Honam Petrochemical, the first-ranked leniency applicant in the above case, and Samsung Total Petrochemical (a joint venture between Samsung of Korea and Total of France), the second-ranked leniency applicant in the above case, as well as the respective officers of those two companies (collectively, the 'Defendants') to the Prosecutor's Office. However, the Prosecutor's Office unilaterally indicted the Defendants for violating Korean antitrust laws.

The Court of First Instance held that, since the prerequisite to criminally prosecute the Defendants required the KFTC to refer the Defendants to the Prosecutor's Office and this was not satisfied, the indictment of the Defendants violated the relevant laws and was invalid. Accordingly, the court voided the indictment of the Defendants. Subsequently, the Prosecutor's Office appealed to the Court of Second Instance, the Seoul High Court, but such an appeal was dismissed.

The Korean Supreme Court decision

The Prosecutor's Office appealed the present case to the Korean Supreme Court and argued that the 'principle of indivisibility' applied to the KFTC's referral to the Prosecutor's Office and that the effect of referring the five companies to the Prosecutor's Office carried over to the Defendants as well based on an analogy with Article 233 (Indivisibility of Complaint) of the Criminal Procedure Act, which notes that '[c]omplaints filed against one or more of the co-offenders in an offense subject to prosecution … shall also take effect in respect to the other accomplices.'

The Supreme Court initially noted that Article 71(1) of the Monopoly Regulation and Fair Trade Act (MRFTA) stipulated that an offence concerning unfair collaborative acts should be criminally prosecuted by a public action only after a complaint is filed by the KFTC.

In dismissing the appeal by the Prosecutor's Office in its entirety, the Supreme Court held that not only is there no express provision under the law which would support the position of the Prosecutor's Office but '[i]f we were to reason by analogy that the principle of indivisibility for a complaint under Article 233 of the Criminal Procedure Act were to also apply to the KFTC's referral, this would mean that the scope of criminal measures which [may be taken by the Prosecutor's Office] would be expanded to allow such

criminal measures without the referral of the KFTC against an accused [regarding antitrust violations] and this cannot be permitted since it would go against the principle of legality by disadvantageously applying reasoning based on an analogy of the criminal law to the Defendants.'

New standard of review for resale price maintenance

On appeal from the 14 May 2009 decision of the Seoul High Court, which held that Hanmi Pharmaceutical Co Ltd ('Hanmi') violated the MRFTA by engaging in resale price maintenance, on 25 November 2010, the Korean Supreme Court issued a decision which ruled that the standard of review for minimum resale price maintenance should be the rule of reason while affirming the decision of the Seoul High Court.[1]

This decision is significant since prior to it being made, minimum resale price maintenance constituted a per se illegal violation (although maximum resale price maintenance may be permitted if justifiable reasons existed). Specifically, Article 29(1) of the MRFTA states that '[n]o enterpriser shall engage in resale price maintenance, provided that this shall not apply in the case where there exists justifiable reasons in terms of the maximum price maintenance preventing the transactions of commodities or services in excess of the specified prices.'

Specifically, the Supreme Court reviewed Article 29(1) of the MRFTA along with the legislative intent of the MRFTA, which 'was to promote competition and promote the welfare of consumers', and ruled that in those markets where minimum resale price maintenance served to promote competition, the review of minimum resale price maintenance should be based upon the rule of reason. However, the court emphasised that the defendant would have the burden of proving that justifiable reasons existed for the relevant conduct and rejected Hanmi's appeal regarding such issue based on the reasoning that Hanmi failed to prove that justifiable reasons existed for its conduct. We note that although the Supreme Court rejected Hanmi's appeal, such a decision has gained considerable attention from the antitrust community due to its new standard of reviewing minimum resale price maintenance.

Qualcomm to open ADSP interface

On 13 December 2010, the KFTC announced that Qualcomm Incorporated ('Qualcomm') had informed the KFTC that it will open its application digital signal processor (ADSP) interface to third party South Korean companies to allow such companies to develop mobile multimedia software for its modem chip. An ADSP interface helps to compress and convert computer files into moving images, which allows mobile phones to receive video and other types of content. The KFTC stated that the opening of the ADSP interface will begin within two to ten months from the date of the announcement.

Background of the case leading to the opening of the ADSP interface

Since early 2006, the KFTC has conducted an in-depth investigation into Qualcomm's alleged anti-competitive practices and, in July 2009, the KFTC imposed corrective orders and an administrative fine of KRW 273.2 billion (about US$250 million) on Qualcomm for certain anti-competitive behaviour. However, according to the KFTC, it continued to investigate Qualcomm due to the technical complexity of the case. During the period of investigation, Qualcomm informed the KFTC that it would voluntarily open the ADSP interface to allow other South Korean software companies to develop software for its modem chip.

Future plans by the KFTC

The KFTC announced that it will end its 'deliberation process' of the case due to its technical complexity of the case, the need for the effective and rapid sharing of information and Qualcomm's voluntary corrective measures. However, Qualcomm will need to produce quarterly reports for the KFTC which provides details on the progress of its opening of the ADSP interface. The KFTC stated that 'if Qualcomm fails to faithfully implement its planned opening, the KFTC will revisit the case.'

Expected benefits from opening the ADSP interface

The ADSP interface opening by Qualcomm is expected to provide South Korean small and medium sized software companies access to developing mobile software that is similar to Qualcomm's mobile software so

that such companies can enter the mobile multimedia software market. Also, up until now, since Qualcomm supplied its modem chips to handset makers without opening the ADSP interface, such handset makers had to purchase mobile multimedia software from Qualcomm which resulted in limiting competition in the mobile multimedia software market. With access to the ADSP interface, it is anticipated that the market will be reinvigorated and more competitive.

Note

1 Please see Korean Supreme Court Decision No 2009*Du*9543, which was announced on 25 November 2010.

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Spain

The debate on legal privilege for in-house lawyers

After the ECJ decided the *Azko Nobel* case in September 2010, some question marks were raised in relation to legal professional privilege (LPP) as it is regulated by each EU Member State in national investigations.

In the *Akzo Nobel* case, the ECJ decided not to extend LPP to communications with in-house lawyers in the context of an investigation carried out by the European Commission, but the Court recognised that rules on legal privilege may vary when enquiries are carried out at a national level by domestic competition authorities.[1] Therefore, the Court concluded that identical criteria might not be applied as regards LPP in those two types of procedure,[2] that is to say European and national procedures. For instance, it can occur that certain documents privileged in a given national context would not be privileged in an investigation conducted by the European Commission.

With respect to inquiries governed by national law, there is a high level of disparity between the 27 EU Member States. Many Member States follow the ECJ criterion and they do not extend LPP to communications with in-house lawyers in the context of national investigations. Moreover, some Member States do not allow in-house lawyers to be admitted to the Bar or Law Society and consequently do not recognise them in the same way as private practitioners. In direct opposition, there are other jurisdictions where the regulatory regime ensures that in-house lawyers adhere to the same standards as private practitioners, and affords LPP to in-house lawyers to the same extent as to external counsel. Therefore, as the co-existence of these different systems is very complex, doubts and uncertainties may arise in particular when the legal advice in question is cross-border.

In Spain, LPP in general is not expressly provided for in any provision of the Spanish legal system. However, national courts recognise LPP as part of Article 24.2 of the Spanish Constitution, which regulates the right of defence. In this regard, the former Spanish Competition Tribunal (Tribunal de Defensa de la Competencia), in the file *Pepsi-Cola/Coca-Cola*,[3] expressly recognised LPP as a requirement of the rule of law. Accordingly, it is beyond any doubt that LPP was acknowledged by the Spanish competition authorities as a limitation of its investigation powers, but neither the Constitution nor any other legal text clarifies what the precise scope of LPP is.

In this sense, Spanish case law seems to recognise LPP to external counsel with a scope at least similar to the principles defined in the ECJ's case law (with the peculiarity that LPP is extended to external lawyers who are not lawyers of the company subject to the cartel investigation, ie, the external lawyer of another company, as long as the documents for which the privilege is claimed were prepared for the purpose and in the interests of the company's right of defence).

Regarding LPP for communications between in-house lawyers and internal business clients, there are no rules for national proceedings and no case law which can be deemed conclusive. However, the Spanish Competition Tribunal's resolution in the file *Pepsi-Cola/Coca-Cola* seems to bond the LLP to the lawyer's professional secrecy principle rather than to the right of defence. By 'professional secrecy' we refer

to the principle whereby no confidential information that the lawyer may receive while giving advice to a client may be divulged to any person or authority whatsoever. If the LPP is linked to the professional secrecy, then this is an argument in favour of extending LPP to in-house lawyers, since we have to bear in mind that in-house counsel are subject to professional secrecy. In this sense, Article 437.2 of the Judiciary Law[4] states that all lawyers must keep confidential all information that they have knowledge of as a result of carrying out their professional activity and thus cannot be compelled to testify in a court of law with regard to such information. Article 32.1 of the General Regulation of the Legal Profession[5] also establishes this same rule.

Additionally, in Spain in-house lawyers are allowed to register at the Bar, and it is often the case that they decide to do so. Consequently the great majority of Spanish in-house lawyers are subject to the deontological rules applied by the Bar. In this regard, many local Bar Associations include the professional secrecy as a right of the client and as a duty of the lawyer in their deontological codes (for instance, this is stated in Article 32.2 of the Attorney's Regulation of Catalonia). Hence, the Spanish Bar Association and several authors ascertain that the LPP also applies to in-house lawyers, provided that the lawyer is registered as a member of the local bar and the documents are clearly marked as being privileged.

Nevertheless, the same resolution in *Pepsi-Cola/Coca-Cola* seems to exclude in-house counsel from LPP when a distinction is made between the internal ambit of the company (where in-house lawyers would be included) on one side, and the lawyers in charge of the defence on the other side. Also, it is important to highlight that the Akzo Nobel case law puts emphasis not on the professional secrecy as legal basis for the LPP, but in the independence of the lawyer which is to say that only lawyers who are not bound to the client by a relationship of employment can benefit from the LPP.

Until now, no cases involving LPP for communications between in-house lawyers were decided in Spain. In this respect, with the aim to clarify the precise scope of such privilege, it would be very interesting to see the above mentioned arguments tested in court.

New cartel decision after leniency application

A new case following leniency applications was decided by the Spanish Competition Authority (CNC) in July 2010. The Council of the CNC has fined eight freight forward operators a total of €14,127,000 for coordinating their competitive strategies on pricing.

In setting the level of the fines, the Council of the CNC took into account the turnover of the companies involved in the market concerned (road freight of up to 3,000kg), the very serious nature of the infringement, the Spanish wide scope of the cartel and its duration (the cartel was started in 2000).

Several known freight forward operators are among the eight companies fined. The company that filed the leniency application received full immunity from fines under the CNC's leniency programme, as it was the first to provide information about the cartel. In the absence of such a programme, the fine would have exceeded €4.5 million. Also, a 40 per cent reduction of the amount of the fine was obtained by another company which supplied the CNC with valued-added information.

Notes

1 Case C-550/07. PP: Judgment of the Court (Grand Chamber) of 14 September 2010 – *Akzo Nobel Chemicals Ltd, Akcros Chemicals Ltd v European Commission*, paragraph 102: 'The Commission's powers under Regulation No 17 and Regulation No 1/2003 may be distinguished from those in enquiries which may be carried out at national level. Both types of procedure are based on a division of powers between the various competition authorities. The rules on legal professional privilege may, therefore, vary according to that division of powers and the rules relevant to it'.
2 *Ibid*, paragraph 105.
3 Resolution of the TDC in File r508/02, dated 22 July 2002.
4 Organic Law 6/1985 on the Judiciary, as amended by Organic Law 19/2003.
5 Royal Decree 658/2001 of 22 June 2001.

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Turkey

Fuel prices most expensive in Europe

The adverse effects of the global economic crisis started being felt in the fuel sector in Turkey and they became much more pronounced throughout 2010 with an increase in consumption aligned with financing and crediting problems.

Turkey is in pole position in terms of fuel and diesel taxes; Turkey is now ranked as the most expensive European country for both taxes and overall prices for fuel. Fuel oil prices increased by 47 per cent compared to the average price of fuel the previous year. It has been verified by official data, with studies conducted by the Finance Ministry and the Turkish Petroleum Industry Association, which shows that almost all of the crude petroleum is imported and the high taxes constitute approximately 90 per cent of the pump prices. As of November 2010, SCT and VAT constitute 66.8 per cent of the sales price, the highest rate among 28 European countries.

Regarding the tax burden on fuel, Turkey is followed by Greece which sells fuel for €1.5 per litre, of which €1 is tax. In Greece, taxes make up 63.9 per cent of the sales price.

The Turkish Competition Authority (TCA) is required to resolve market failures, as in the petroleum market where detailed regulations are required. However, the importance of petroleum products, and cases such as TÜPRAŞ which holds 86 per cent of the country's refinery capacity thus making TÜPRAŞ a dominant undertaking, means that certain regulations are necessary for the petroleum sector.

European Commission seems satisfied with Turkey's competition policy

The EU Commission published the 'Turkey 2010 Progress Report' in November 2010. Chapter 8 of the Report is dedicated to competition policy, and the Commission expressed its overall satisfaction with Turkey's competition policy, except specific issues in the area of state aid.

The report first mentions the implementation of two regulations on the oral hearings before the Competition Board and on the rights of access to files. The Commission also states the cooperation agreement between the Competition Authority and Public Procurement Authority, which facilitates the handling of competition infringements in public procurements. However, the Report underlines the need of transposition of acquis on horizontal cooperation agreements and the de minimis rules, since Turkey does not have any specific national legislation in these areas.

Moreover, the Commission concluded that the Turkish Competition Authority has a satisfactory level of administrative and operational independence and solid experience in the implementation of competition rules. However, the Report underlines the fact that Turkey has yet to adopt EU rules on public undertakings and undertakings holding exclusive rights.

As for the rules concerning state aid, Turkey has for the first time satisfied Commission expectations in this area, since the Act on the Monitoring and Control of State Aid entered into force in October 2010. While honouring Turkey's progress in this area, the Commission requires the full functionality of the Authority for the Monitoring and Control of State Aid as soon as possible. The Commission also criticised the limited progress in the control of state aid in the steel, energy and transport industries.

Competition policy

The TCA enacted the new M&A Regulation on 7 October 2010

The TCA had declared in 2007 that a new Regulation on mergers and acquisitions was on its agenda. In early 2010, the Draft Regulation was published on its official website and the Authority invited relevant parties to participate in the public consultation. With the proposed amendments to the previous Regulation and the notification form, the Authority aimed to eliminate deficiencies of the current merger control regime and meet the needs of a more dynamic competition environment. Finally, the new M&A Regulation No 2010/4 was published on 7 October 2010. The fundamental changes are discussed below.

Jurisdictional thresholds

The market share threshold of the previous Regulation is removed. Through the new M&A Regulation, notification will be compulsory for the parties in the case that the:

- total turnover of the parties in Turkey exceeds TL 100 million and turnover of each of at least two of them exceeds TL 30 million; or
- world-wide turnover of at least one of the parties exceeds TL 500 million and turnover of at least one of the other parties to the transaction exceeds TL 5 million.

When looking at the high turnovers stated by the first threshold, it could be thought that the Authority opts to pay attention only to transactions which significantly affect Turkish markets. However, considering the second threshold of TL 500 million (approximately €250 million as of December 2010) and TL 5 million are quite low thresholds for world-wide and Turkish turnovers, respectively, global transactions will be the main workload of the Authority.

Ancillary restraints

While the Act on the Protection of Competition No 4054 ('Act No 4054') and the current M&A Regulation do not contain any rules on ancillary restraints, the parties needed further authorisation for the ancillary restraints. In the settled case law of the Turkish Competition Authority, restrictions are accepted as ancillary restraints in cases where:

- its scope should not go beyond the necessary limits of what the realisation of the main operation requires;
- their restrictive effects are limited to the parties (two-year non-compete obligations are authorised if the transaction contains only commercial reputation acquisition and three-year non-compete obligations are authorised if know-how is also acquired); and
- they are directly related to and necessary for the realisation of the operation.

Through the new M&A Regulation, the authorisation of the Authority regarding the transaction itself also comprises the ancillary restrictions directly related to and necessary for the realisation of the operation.

Commitments

In the Turkish merger control regime, even if it is a regular part of the practice, commitments have no legal basis in the Turkish merger control regime. The new M&A Regulation provides the undertakings to give commitments either in Phase I or Phase II in order to eliminate competition concerns, and the Authority may envisage conditions for their proper fulfilment.

Notification form

The notification form has been revised to a great extent and requires more detailed economic information and it has short and long versions depending on the effect the transaction would have on the market. For instance, in cases where a party acquires sole control of an undertaking for which it already has joint control or the aggregate market shares of the parties in a horizontal relationship is less than 20 per cent, or at least one of the parties' market share is less than 25 per cent in vertical relationships on an affected market, undertakings are not required to fill in the long form.

Entry into force

The M&A Regulation No 1997/1 (annulled) was replaced when the new M&A Regulation No 2010/4 came into force on 1 January 2011.

Law on monitoring state aid recently entered into force

The long awaited development regarding 'state aid', which has been noted each year as the topic where there has been 'no progress' in the EU Progress Reports of Turkey, is finally welcomed. The basic aim of the Law on Monitoring and Controlling the State Aid (the 'Law'), which provides the establishment of the State Aid Monitoring and Controlling Board (the 'Board') in the first place, is monitoring and controlling state aid by regulating them compliant with the Customs Union between Turkey and the EU and determining the principles regarding notifications to the authority concerned.

The Law provides that the Board is to consist of one member assigned by each of the Ministry of Finance, Ministry of Industry and Commerce, Undersecretariat of the State Planning Organisation, Undersecretariat of the Treasury, Undersecretariat of Foreign Trade, and the Competition Authority which results in six members plus a State Aid Director General as the head of the Board.

The Board is the sole competent authority for: examining draft legislation and decisions notified by the granting institutions; for authorising the giving of compatible state aid; or deciding not to give the unlawful aids that are incompatible with the conditions stated in the Law or to recall it if it is granted already.

For all the state aid given (excluding the agriculture, fisheries and service industries), the granting institution is obliged to submit the draft legislation considering the aid to the Board. After a preliminary examination, the Board can decide that the aid be deemed as state aid in accordance with the Law and if so, it is a compatible or unlawful state aid. However, if it is considered as an incompatible state aid, the Board can commence an investigation. The court of first instance for the decisions of the Board is the Council of State.

Compatible state aid consists of two types: social aids granted to individual consumers without any distinction regarding the origin of the product or service; and aids granted following a natural disaster or an extraordinary situation and no bigger than the material harm suffered.

As per the Law, taking into consideration the importance of the details provided by them, the secondary legislation is expected to enter into force nine months after the establishment of the Board. For the secondary legislation to be enacted, it is intended to grant block exemptions to certain types of state aid and to define some particular aids which are granted at a certain time, for a definite amount and which do not eliminate competition in a significant part of the relevant market as 'compatible state aid' and thus notification of the said aids are not necessary.

Last but not least, the legislation regarding the existing aids at the time of the secondary legislation enacted shall be submitted by the granting institution to the Board within three months as of when the secondary legislation enters into force. Subsequent to the submission, the Board is expected to finalise its pre-assessment within 60 business days. In cases where there is evidence regarding an unlawful state aid, the Board can ask the granting institution to suspend its execution of the aid until the final decision.

Major cases

Cartel investigation into the meat and meat products market

On 5 August 2010, the TCA commenced an investigation into four undertakings (seven companies in all) which operate in the meat and meat products market after a claim of price fixing, customer allocation and information exchange. The claim relates to a narrow market which consists of collective consumption customers such as hotels and tourist facilities in the Aegean and Mediterranean regions.

Upon the extreme price increases in meat and meat products in Turkey, the TCA examined the market and concluded in its decision, dated 8 April 2010, that excessive increases were due to supply constraint caused by the nature of the industry and the increases did not arise from any competition infringements. In this respect, the subject of the investigation opened in August 2010 is not the increase in meat prices in Turkey but the conduct of the undertakings concerned relating to customers in collective consumption channels in the Aegean and Mediterranean regions.

Fines imposed on medical gas undertakings (except one)

Pursuant to the decisions taken by the TCA on 22 April 2009 and 23 December 2009, the investigation against 55 undertakings operating in the market for medical and industrial gas has been concluded. Within the framework of the decision taken, an administrative fine of approximately TL 2.5 million was imposed on 26 undertakings that were established to have infringed Article 4 of Act No 4054.

Most of the undertakings were small and medium size enterprises and administrative fines totalling TL 2.5 million have been imposed by the TCA. The TCA concluded that the undertakings had agreed to secure certain tenders during the meetings held before and after the tender process. The decision's highest fine of TL 2.1 million was imposed on Habaş Industrial and Medical Gases Production Industries Inc.

This decision was the first following the implementation of the leniency programme. The undertaking which appealed for leniency was not fined.

Citroen and Peugeot dealers fined for collusive behaviour

After conducting two separate investigations for 18 months, the TCA has concluded its work on Peugeot and Citroen automobile dealers in Turkey. The TCA has decided that the mentioned undertakings were in conduct and thus violated Act No 4054.

On 8 August 2010, the investigation of 56 Peugeot dealers, which had been in progress since 8 January 2009, was concluded. The final decision was that 44 dealers were seen to have been involved in collusive actions such as fixing prices and sales conditions and forming a cartel. While 12 of the undertakings were excluded, the rest were viewed as having infringed Article 4 of Act No 4054 and were fined at a rate of one per cent of their respective annual gross revenues. The total fines for 44 dealers equated to around €4.25 million (TL 8.5 million).

In a very similar investigation which had been initiated on 25 February 2009, 13 Citroen automobile dealers (out of 42) were fined by the TCA for having been a part of collusion, as of their decision on 23 September 2010. Fixing new car prices as well as prices for maintenance service and spare part deals for customers were some of the violations to competition that Citroen dealers had engaged in. With fines of one per cent of the annual revenues of each undertaking, the fines imposed by the TCA totalled €850,000 (TL 1.7 million).

Ortadogu Antalya Liman Isletmeleri did not abuse a dominant position

The TCA concluded the investigation concerning the Ortadoğu Antalya Liman Işletmeleri (Middle Eastern Antalya Ports) with its decision dated 30 November 2010. The investigation, which was launched the year before on 4 November 2009, was regarding whether Ortadoğu had violated Act No 4054 by rejecting the opportunity to make agreements with TSM Sea Products concerning the grounding and pier utilities for fishing vessels and charging higher prices for other port services.

The TCA's final decision was that Ortadoğu's conduct was not to be considered as an abuse of a dominant position in the relevant market and hence it did not violate Article 6 of Act No 4054. By drawing this conclusion, the TCA decided not to impose any fines on the undertaking.

Last year was quite an eventful year for the mentioned undertaking. Back in July 2010, the TCA gave permission to a change in the ownership structure of the company. Previously owning only 40 per cent of the shares, Global Ports, which is a subsidiary of Global Investment Holding, acquired the remaining 60 per cent from Ortadoğu and is now in full possession of the Antalya Port.

TCA imposed fines on undertakings in the dialysis devices and consumables industry

The TCA completed its investigation into dialysis devices and the consumables industry in the last few days of 2010. The investigation was launched following the allegation that 19 undertakings operating in the industry were party to an anti-competitive agreement and this agreement covered both sales to public hospitals and private dialysis institutions. Fresenius's distribution system in the after sales market was also examined during the investigation.

Besides international companies such as Fresenius and Gambro, dealers of these firms and other national suppliers have also been investigated. However, at the end of the procedure, only Fresenius, Gamroturk, Ece Tıbbi (dealer for Fresenius), Sasan (local supplier) and Renka (dealer for Braun) have been fined (€3 million in total). These five undertakings were fined 1.2 per cent (for Sasan), 1.8 per cent (for Renka) and three per cent (Fresenius, Gambro and Ece Tıbbi) of their annual turnovers.

As for the allegations regarding Fresenius's distribution system in the after sales market, the TCA did not impose any fine and concluded that this system benefits from individual exemption.

Authorisation regarding privatisation of electricity distribution companies was finalised before the TCA

Turkey's electricity distribution network has been divided into 21 distribution regions as announced in the *Reform of the Electricity Energy Sector and Privatisation Strategy Paper* (the 'Strategy Paper'). TEDAS (Turkey Electricity Distribution Inc), which owned 20 of the 21 regions, has been included in the privatisation programme and a separate distribution company has been established for each of these 20 regions.

The TCA's decisions regarding privatisation of electricity distribution companies are remarkable in terms of the assessment of dominant position. In most

of the decisions regarding privatisation of electricity distribution companies, the Board discussed the transaction under three concepts: horizontal evaluation (regarding concentration), evaluation on vertical integration and converging markets. While vertical integration was evaluated in brief, evaluation regarding converging markets was analysed in detail within the scope of the creation or strengthening of the dominant position.

While assessing the horizontal concentrations, the Board evaluated relevant markets under three categories: 'electricity distribution market', 'electricity retail market' and 'bilateral agreements market'. Moreover, the Board examined the possible results which may create and strengthen the dominant position in the event that a bidder acquires the electricity distribution region. The Board decided that there was no concentration risk.

Moreover, the Board decided that integration of production and retailing activities was not prohibited, although the Strategy Paper states that production, transmission, distribution and retailing should be unbundled due to the restructuring of the electricity industry as a result of privatisation. In addition, it was stated that vertical integration would lead to both positive and negative results in respect to the functioning of a truly competitive market. Accordingly, each bidder was evaluated by the Board within this scope. As a result, the Board resolved that there was no concentration risk. The Board decided that the natural gas retail market and electricity retail market are converging markets. However, since these converging regions are small scale, the Board cleared most of the transactions in the light of these explanations.

However, in the most recent decision of the Board, dated 16 December 2010, regarding the privatisation processes of Boğaziçi Electricity Distribution Inc (which covers the European part of Istanbul), Gediz Electricity Distribution Inc (which covers Izmir), Trakya Electricity Distribution Inc and Dicle Electricity Distribution Inc, the Board did not authorise the transaction with respect to some bidders since the transaction would result in creating a dominant position and would significantly decrease competition in the relevant markets.

In accordance with Article 6 of the Privatisation Regulation, an application for authorisation shall be filed in the form of independent files for each bidder. It is such that in case the number of bidders in the draft resolution is more than three, an authorisation application for the other bidders cannot be made before giving notice to the President of the Privatisation Administration on the Competition Board regarding any decisions on the acquisition transaction in respect of the first three bidders. In light of Article 6, the Board examined the transaction with respect to the first three bidders.

First of all, the Board decided that shareholders of MMEKA Machine Import Marketing and Trade Inc, which is the bidder for Boğaziçi, Gediz and Dicle Electricity within Kazancı Holding and therefore under the same economic entity as Aksa Electricity Retail Sales Inc which is another bidder company for Boğaziçi and Trakya, shall be regarded as one undertaking under the scope of Act No 4054.

The acquisition of Boğaziçi, Gediz and Trakya Electricity by İş-Kaya–MMEKA Joint Venture Group and/or Aksa was not authorised since the transaction would result in creating a dominant position and decreasing competition significantly in the relevant markets with respect to Kazancı Holding. However, if only two of Boğaziçi, Gediz or Trakya Electricity were to be acquired by the parties, the transaction would be cleared.

Acquisition by Eti Gümüş–Söğütsen Joint Venture Group, which is another bidder company for all four electricity distribution regions, was not authorised since the transaction would have resulted in the creation of a dominant position and decreasing competition in the relevant markets. However, if only three of these electricity distribution companies were acquired by this Joint Venture Group, the transaction would be cleared.

With respect to other bidders, the TCA has not brought any objections for the transactions.

Turk Telecom steps into the European market by acquiring Invitel

Turk Telekom has acquired Invitel International which is one of the leading independent data and wholesale capacity service providers in Central and South Eastern Europe. Invitel International has a high-quality 27,000 km fiber-optic network and it has a presence in 16 countries. This acquisition

will allow Turk Telecom to capitalise on its unique geographic 'hub' location by connecting the increasing data/broadband traffic within the Central Eastern European region from Turkey, the Middle East and Asian markets to Western Europe and the United States.

As a result of the examination conducted, which was based on the request for the authorisation of the acquisition by Turk Telecom of Invitel International and its affiliates, it was expected that Turk Telecom would strengthen its dominant position within the infrastructure services market provided by fiber-optic cables and this would thus significantly lessen competition. However, Turk Telecom submitted a commitment and received the authorisation, transferring the irrevocable usufruct rights on some domestic optical fibers to Vodafone Turkey after the transaction with Invitel International.

With this commitment, Vodafone would acquire three pairs of fiber-optic cables in the 'Ankara–Istanbul–Izmir' route and one pair of fiber-optic cables in the 'Istanbul–Edirne' route for 18 years by the method of establishing the indispensable right of use. Thus, Vodafone would be able to enter into the relevant market as a new infrastructure operator in a quicker and more cost effective way.

The effective and actual applicability of the commitment has also been evaluated by the Board. The fact that the commitment shall be implemented in four months is a clear reference for its applicability.

Website of the Turkish Competition Authority: **www.rekabet.gov.tr/index.php?Lang=EN**
Website of the Appeal Court for Competition Cases: **www.danistay.gov.tr/eng/index.html**
Website of ACTECON: **www.actecon.com**

Venezuela

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Charges and discounted fees of banks and financial institutions not anti-competitive practices

On 2 October 2008, the Superintendency for the Promotion and Protection of Free Competition ('Procompetencia') opened an administrative procedure by means of Resolution No SPPLC/0017-2008, similar to others seen in jurisdictions such as in Europe, the US, Peru and Colombia, to investigate the alleged commission of exclusionary practices, cartels, contracts conflicting with the antitrust law and abuse of a dominant position. This investigation involved virtually all of the banks[1] providing credit card services in Venezuela plus major international providers including Visa Inc International, Master Card Inc International, American Express and Diners Club. Procompetencia also decided to investigate the Venezuelan Chamber of Credit Cards, the Venezuelan Bank Association and the National Bank Chamber for allegedly entering into agreements or conventions which restrict or impede competition between the members of each association, and based on the presumption that such Chambers and Association could have issued recommendations, resolutions or decisions on how their members should determine the discounted rates paid by businesses to banks.

Now, over two years later, Procompetencia has issued Resolution No SPPLC/0019-2010,[2] finally deciding that in this case there was no evidence that any of the investigated parties were involved in anti-competitive practices.

An in-depth study of the case shows that as regards the banks, Visa Inc International, Master Card Inc International, American Express and Diners Club, the investigation conducted by Procompetencia focused on the discount rates that businesses offer banks for the use of credit cards by consumers and had to determine:

- whether banks independently or collusively established a discounted rate that could be considered excessively high and tried to impose unequal conditions on any commercial or service transactions;

- whether banks and the abovementioned companies collusively divided markets or geographical areas to impose a high discount rate; or
- whether banks used contracts to impose upon their clients a high discount rate.

It should be noted that the Superintendency also presumed that the banks abused what was alleged to be a dominant position.

Relevant market study

Upon studying and determining the relevant market, Procompetencia arrived at the following conclusions:

- *Demand-side substitution*: The Superintendency concluded that there was no possibility of substituting the demand of the service of affiliation to the credit card payment system provided to commercial establishments by acquiring banks.
- *Supply-side substitution*: Because of the conclusions reached in terms of demand-side substitution, the Superintendency ruled out nine banks from the analysis,[3] as they did not offer the affiliation service.

On an interesting note, Procompetencia ruled out another nine banks[4] because they were intervened by the government at the time of the investigation.

The Superintendency then proceeded to calculate the market concentration of the remaining 17 banks still under analysis, calculating the HHI in the affiliation services market according to the number of installed POS terminals, and arrived at the number 1,716 (a market with moderate concentration). Then Procompetencia calculated the market concentration in the affiliation services market according to the number of affiliated establishments, resulting in an HHI of 1,632 (again, moderately concentrated).

As a conclusion, the Superintendency determined that there was no supply substitution for the affiliation service to the credit card payment system provided to commercial establishments by acquiring banks.

Geographical market: national territory

Procompetencia determined the relevant market in this case as being '[t]he service of affiliation to the credit card payment system provided by acquiring banks to commercial establishments located within the national territory'.

Now, after completing the study of the relevant market, the Superintendency has issued the resolution in question, analysing the alleged anti-competitive practices as set out hereunder.

Exclusionary practices

As is commonly the case, the Superintendency commented that the first element it must study to determine whether the 17 banks still subject to analysis had engaged in an exclusionary practice is the capacity of each bank to affect or potentially affect the relevant market. Considering its comment, Procompetencia pointed out that when studying the relevant participants within the market, the differences between one bank and another are usually not material in terms of installed POS and affiliated establishments and no one competitor should have an advantage over another.

Furthermore, the Superintendency commented that the market under analysis is constantly supervised by the Superintendency of Banks and Other Financial Institutions (SUDEBAN) and the Venezuelan Central Bank (BCV), precluding that any one bank or financial institution take advantage of another or act outside the law regulating the financial market.

To conclude this part of the analysis, Procompetencia established that none of the 17 banks still involved in the investigation had the capacity or potential capacity to affect the market and that no further analysis of this practice was warranted.

Abuse of a dominant position

Similar to what was said in the section on exclusionary practices, the Superintendency commented that during the investigation and analysis of the relevant market and its participants, it was proven that no bank held a dominant position such that it could affect a competitor or even exclude them from the market.

Procompetencia also pointed out, as mentioned earlier, that upon analysis of the concentration of the affiliation services market based on the number of affiliated establishments, the resulting HHI is 1,632, which proves that this is a moderately concentrated market. This implies that establishments have the opportunity to go to another financial institution and require the service of affiliation to the system of payment by credit card if they have suffered at the hands of any particular financial institution.

The Superintendency also noted that before the BCV proceeded to regulate the exchange fee and discount fees, the financial institutions already charged different fees to different establishments based on:

- the activity of the establishment;
- the monthly volume of sales;
- direct or indirect relation with the establishment or it shareholders;
- the checking account activity; and
- the establishment growth potential and expansion, among other considerations.

Cartel

Having determined that the 17 banks participating in the relevant market are competitors, Procompetencia analysed whether their behaviour could be considered that of a cartel or as colusionary practice.

Along these lines, the Superintendency commented that although it could be considered that the banks charging almost identical fees is the result of an agreement between the financial institutions participating in the relevant market, the agreement could not and, more importantly, was not proven to exist. Furthermore, the investigation proved that competition between the banks participating in the relevant market is strong and the almost-identical fee is the result of an effort to compete, inasmuch as if a bank were to offer a higher fee than its competitors, in all likelihood the commercial establishment will prefer the fee offered by another bank.

The antitrust agency added that the administrative procedure confirmed that the fees charged by the financial institutions continue to be almost the same after the new regulation issued by the BCV, which also takes into consideration the different aspects mentioned at the end of the section dedicated to the analysis of what was alleged to be an abuse of a dominant position.

Considering the above, Procompetencia determined that in this case the banks and financial institutions subject to the investigation did not participate in a cartel or any other collusive practice.

Contracts in conflict with the antitrust law

In this regard, Procompetencia commented that to contradict the antitrust law, a contract must set prices or contractual terms for the sale of goods or provision of services to third parties.

Each bank participating in the administrative procedure presented a model of the contract that it uses with commercial establishments, allowing the Superintendency to analyse in depth whether any of the banks had established contracts that were in conflict with the antitrust law. The Superintendency arrived at the conclusion that the banks had by no means established prices or contractual terms of any sort for third parties and that they had merely regulated the commercial ties between banks and establishments.

It concludes by noting that if the banks did in fact transfer the cost of the discount fee to the cardholders, it was not evidenced by the analysis of the contracts in question.

Decision

Following the comprehensive analysis conducted by Procompetencia, it was determined that none of the financial institutions subject to investigation had participated in any of the antitrust practices. Therefore, no bank was sanctioned or fined.

Last note from the authors

Upon closely reading the resolution, it may be seen that the Superintendency did not undertake any special analysis or comment on the alleged practices by Visa Inc International, Master Card Inc International, American Express, Diners Club, the Venezuelan Chamber of Credit Cards, the Venezuelan Bank Association and the National Bank Chamber, so it could be inferred that such persons are excluded in the analysis because of the determination of the relevant market. In our opinion, however, Procompetencia should have indicated this in an express judgment.

Notes

1 Banesco, Bancoro, Guayana, Venezolano De Credito, Mercantil, Provincial, Bancaribe, Exterior, Occidental De Descuento, Corp Banca, Caroni, Federal, Plaza, Canarias, Confederado, Inverunion, Bangente, Banorte, Total Bank, Bolivar, Fondo Comun, BFC, 100% Banco, Del Sur, Central, Stanford Bank, Provivienda, Banpro, Banvalor, Citibank, Nacional De Credito, BNC, ABN AMRO, Activo, Casa Propia, Mi Casa and Banplus.

2 At the time of writing, the resolution was not available electronically. However if you require a copy, you can write to the authors of the article or wait for the resolution to be made available at the following address: **http://procompetencia.gob.ve/index.php?option=com_content&view=article&id=153:procompetencia&catid=44:%C3%81rea%20de%20Competencia**.

3 Bangente, Total Bank, Bolivar, Stanford Bank, Banvalor, Citibank, ABN AMRO, Mi Casa and Banplus.

4 Confederado, Banpro, Canarias, Central, Banorte, Mi Casa, Inverunion, Federal and Bancoro.

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Vietnam

Competition Law update

When Vietnam's Law on Competition ('Competition Law') entered into force on 1 July 2005, Vietnam became the tenth country in Asia to adopt a comprehensive cross-sector competition law. The Competition Law, which is based on Article 81(1) and Article 82 of the EC Treaty, prohibits or restricts two broad categories of business activities: (i) practices in restraint of competition, namely, agreements which restrain of competition (such as agreements to fix prices in certain cases, tying arrangements, agreements to divide consumer markets, etc.), abuse of dominant/monopoly market position and certain economic concentrations; and (ii) unfair competition practices, including use of misleading instructions in respect of goods and services, infringing business secrets, coercion in business, unfair advertising and several other types of unfair business practices.

For the first four years, there was significant discussion, but little investigation or enforcement of the Competition Law by the Vietnam Competition Administration Department (VCAD) and the Vietnam Competition Council (VCC), the bodies charged with enforcing the Competition Law. This is due in part to the lack of detailed implementing legislation for the Competition Law, but it is also believed that the competition authorities were observing a defacto 'phase in period' while Vietnamese enterprises (and perhaps the competition authorities themselves) became better acquainted with the Competition Law.

The more recent period has, however, seen an increase in investigation and enforcement activity by the VCAD and VCC.

In April 2009, the VCC ruled that Vietnam Air Petrol Company (Vinapco) had abused its dominant position in the Vietnam petrol market when it unilaterally breached a fuel supply contract with Jet Star Pacific Airlines, a local competitor of Vietnam Airlines. Vinapco was fined VND 3.37 billion (approx. US$192,000), which was upheld on appeal. A recommendation that Vinapco be spun off from Vietnam airlines (Vinapco's parent) was rejected.

Also in 2009, the VCAD initiated an investigation of infant powdered milk importers based on suspicions that the importers have been collusively inflating and fixing prices. Meanwhile, prompted by the perceived high price of imported medicines, the VCAD began monitoring Vietnam's pharmaceutical distribution system for evidence of anticompetitive activity.

On 29 July 2010, following a VCAD investigation that began in late 2008, the VCC concluded that 19 Vietnamese insurance companies with a combined market share of more than 30 per cent had entered into an agreement to fix prices for car insurance in violation of the Competition Law. Each of the 19 insurance companies was fined 0.025 per cent of their revenues during 2007 (approximaley US$90,000).

In another case which is currently pending, the VCAD is investigating the claims of six Vietnamese cinema operators against Megastar Media Joint Venture Co Ltd ('Megastar'). Megastar, which reportedly has more than half of the foreign film import/distribution market and owns its own cinema chain in Vietnam, is alleged to have abused its dominant market position by, among other things, requiring the six cinemas to pay Megastar VND25,000 (approximately US$1.25) for each ticket sold for films distributed by Megastar. The six cinema operators claim that this unfairly forced them to increase their ticket prices thereby causing damage to consumers

Megastar maintains that it has acted lawfully. The VCAD is expected to issue the results of its investigation in early 2011.

In light of the above, foreign companies investing in or doing business with Vietnam should be mindful of Vietnam's Competition Law in case their activities run afoul of its provisions. This includes companies engaged in mergers and acquisitions as well as other activities that can have competition law implications in Vietnam.

For further information about Vietnam's Law on Competition visit **www.qlct.gov.vn.**

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- Merger control in the Asia Pacific Region
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Antitrust and commercial lawyers in private practice, in-house counsel, enforcement officials and academics involved in antitrust and trade law.

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