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Antitrust News

Newsletter of the International Bar Association Legal Practice Division

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INTERNATIONAL BAR ASSOCIATION CONFERENCES

17th Annual Competition Conference

13–14 September 2013 **St Regis Hotel, Florence, Italy**

A conference presented by the IBA Antitrust Committee, supported by the IBA European Regional Forum

Topics include:

- Antitrust and innovation
- Challenges of global merger control – International merger control enforcement: are we still seeking coordination of substance and procedure or do we accept multinational cacophony?
- Pricing issues: MFNs, discounts, discrimination
- Cartels evidentiary standards
- Views from those who are shaping competition law – an interview with Frédéric Jenny
- Case study: antitrust and the music industry – a long and winding road

Who should attend?

Antitrust and commercial lawyers in private practice, in-house counsel, enforcement officials and academics involved in antitrust and trade law.

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If you wish to be a contributor for your country or region and can provide updates twice a year, please contact the Newsletter Editors using the details above.

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This newsletter is intended to provide general information regarding recent developments in antitrust. The views expressed are not necessarily those of the International Bar Association.

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We are pleased to present this first edition of the IBA Antitrust Committee's newsletter in 2013, which provides updates on recent antitrust developments in 32 countries. This includes for the first time contributions from Ecuador, Poland and Taiwan.

As the trend towards globalisation of antitrust laws and enforcement continues, competition law practitioners need to be aware more than ever of developments not only in their own country but in jurisdictions around the world. The IBA Antitrust Committee is uniquely placed to provide a global forum in this respect for competition lawyers to stay informed and exchange ideas. As evidenced by the interventions from pre-eminent antitrust policy-makers at our Competition Mid-year Conference in Sydney on 21–22 March 2013, competition regulators too constantly exchange views and experience, whether on cross-border mergers, international cartel cases or general policy issues. It is therefore important for the competition bar to maintain similar contacts. Our upcoming conference in Warsaw on 23 April 2013 will take place on the eve of the next meeting of the International Competition Network, where competition authorities will again meet to address practical competition concerns and continue a dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community.

The Antitrust Committee has planned various other interesting activities, including a full programme of competition law conferences and working group activities. We hope to see many of you at these upcoming events, which provide excellent opportunities for in-depth learning, discussion and networking.

Our outstanding conference programmes are attended by high-ranking policy-makers and leading practitioners from around the world

At our 9th Competition Mid-year Conference in Sydney, we presented an outstanding programme and welcomed a number of high-ranking policy-makers, namely Joaquin Almunia, Vice-President of the European Commission and Competition Commissioner; the Honourable David Bradbury MP, Australia's Assistant Treasurer and Minister assisting for Deregulation; Rod Simms, Chair of the Australian Competition and Consumer Commission; Mark Berry, Chair of the New Zealand Commerce Commission; Hiroyuki Odagiri, Commissioner of the Japan Fair Trade Commission; and Alexey Sushkevich, Head of the Analytical Department of the Federal Antimonopoly Service of the Russian Federation. In addition, the conference panels covered highly topical issues in the areas of merger control, abuse of market power, information exchange and multijurisdictional cartel enforcement. We thank the host committee, chaired by Professor Bob Baxt, and the conference participants who joined us from about 15 countries.

In the first quarter of 2013, we also presented antitrust panel sessions at IBA conferences 'Investments in BRICS: Business Perspectives and Legal Frameworks' in London and the 'Mergers and Acquisitions in Latin America: Boosting Growth' conference in Lima.

For the remainder of this year, we also have an outstanding roster of events scheduled:

- **The ICN in Poland: New Challenges and Enforcement Tools in Competition Law**

  23 April 2013, Warsaw, Poland

  Continuing a recently established tradition, we intend to organise a one-day conference on the eve of the ICN meeting, which this year will take place in Warsaw.

- **Annual Communications and Competition Conference**

  29–30 April 2013, Rio de Janeiro, Brazil

  The 24th conference of this kind will be co-presented by our Antitrust Committee with the IBA Communications Committee and IBRAC.

- **AIJA/IBA Joint Conference**

  21–22 June 2013, Marseille, France

  We are pleased to team up with AIJA, the International Association of Young Layers, in organising this two-day antitrust conference.

- **Annual Competition Conference**

  13–14 September 2013, Florence, Italy

  The 17th of our annual conferences promises again to attract leaders in the antitrust field from around the world.

- **IBA Annual Conference**

  6–11 October 2013, Boston, USA

  At this year's IBA Annual Conference, we will present several interesting panels, including a number of sessions in cooperation with other Committees of the IBA.

The Annual conference sessions are described in further detail on the IBA website at **www.ibanet.org/Conferences/Boston2013.aspx**. For all other IBA conferences, see: **http://tinyurl.com/IBAConferences2013.**

Our working groups focus on important competition policy developments

Our working groups make contributions to worldwide legislative initiatives and policy developments. This remains a key activity for the Antitrust Committee in today's changing competition law environment. Copies of our most recent submissions (along with prior submissions) can be found on the Antitrust Committee's pages of the IBA website at **www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/Default.aspx**.

Through our working groups and similar initiatives, we engage with antitrust authorities on issues that are of direct relevance to us all. Participation in working groups offers the opportunity to help shape the competition policy framework in collaboration with colleagues from diverse jurisdictions. We would like to express again our appreciation to the many Committee members who have contributed to the production of valuable and influential submissions.

We constantly seek to expand our geographic coverage

The Committee is uniquely placed to foster connections among the international antitrust bar as the competition law field evolves. To that end we will continue emphasising geographic diversification in our working groups, conferences, publications and other activities.

Our liaisons help coordinate our activities in particular regions and our interactions with the counterpart regional fora in the IBA. For more information, please see the Antitrust Committee pages of the IBA website.

You can get involved in our activities

Finally, we encourage you to get involved in the activities of our Committee. We also welcome any help you can provide in recruiting new members. We repeat our invitation to those of you that are part of IBA 'Group Member' law firms: did you know that every lawyer can join one committee free of charge? In our experience many firms fail to take advantage of this opportunity.

If you would like to contribute to future editions of this newsletter, please contact our editors who would be delighted to receive more contributions, including from countries that currently are not covered.

We also invite your input on our various activities. Please speak to any of the officers or regional liaisons if you have suggestions.

We hope you enjoy reading this newsletter and hope to see you at one of our upcoming events.

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ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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Antitrust Committee sessions

Monday 0930 – 1230

Antitrust and trade law implications of national security and national interests

Presented by the Antitrust and Trade Law Section

How security concerns and other national interests affect antitrust and international trade enforcement.

Monday 1430 – 1730

Abuse and use of antitrust issues in arbitration

Presented by the Antitrust Committee and the Arbitration Committee

This panel will cover a number of important issues involving arbitrating antitrust disputes, including:

- Are arbitrators equipped to deal with competition law matters?
- Can and should arbitrators rely on the assistance of competition authorities?
- Are antitrust/competition law arbitrations different from other arbitrations?
- Arbitrability of competition law matters – hot topic in several jurisdictions.
- Judicial scrutiny of awards deciding competition law matters.

Tuesday 0930 – 1230

Asserting intellectual property rights without running afoul of antitrust laws

Presented by the Antitrust Committee and the Intellectual Property and Entertainment Law Committee

Issues to be discussed at the intersection of antitrust laws and IP rights include:

- implications of the ongoing mobile phone wars:
- the review of the EU technology transfer regime:
- recent developments on FRAND and standard essential patents: and
- acquisitions of patent portfolios.

Wednesday 0930 – 1230

Avoiding the abyss – how to achieve effective cartels deterrence

Presented by the Antitrust Committee

This panel will address effective cartel deterrence, including such topics as:

- Which legally-imposed cartel sanctions (fines, jail time, community service, director disqualification, etc) are most effective?
- How do private sanctions ('shaming', demotion, loss of employment, etc) come into play and how effective are they?
- Should sanctions be more severe to balance against less than 100 per cent odds of detection?
- Do leniency programmes really deter cartels?
- Do corporate compliance programmes really deter cartels?
- What is the empirical evidence?

Wednesday 1430 – 1730

Hot topics in merger enforcement

Presented by the Antitrust Committee

The panel will examine recent developments in global merger control, focusing on the review of recent complex M&A transactions by antitrust enforcers around the world.

Courts further curtail the powers of Argentina's antitrust regulators to issue injunctions

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Through a battery of rulings issued during the past year, different courts of appeals have finished overturning a long-standing court interpretation regarding the powers of the *Comisión Nacional de Defensa de la Competencia* ('CNDC') to take certain decisions in general and specifically to issue injunctions. Although these powers remained undisputed by the courts until 2008, since then different courts started to question the CNDC's powers, and this trend has been consolidated in at least 12 cases within the past year against no known case of a court ruling ratifying a CNDC injunction.

The 1999 Antitrust Law created an independent antitrust court to enforce the law. Notwithstanding the legal mandate, more than 13 years after the enactment of the antitrust law, such court has not been set up yet. The Antitrust Law provided that until such court was established, all antitrust cases were to be decided by the enforcement authority of the former law consisting of both the CNDC as an investigative body and the Secretary of Domestic Trade ('SDT') which would have decision-making powers.

During the first decade after the enactment of the Antitrust Law, the CNDC issued many injunctions in its anti-competitive behaviour investigations and the different courts upheld its decisions. This trend started to change in July 2008 when a Court of Appeals upheld an injunction issued by a first instance judge ordering both the SDT and the CNDC to refrain from issuing an injunction in a merger case.[1] Since then, at least three different courts of appeals have revoked or nullified injunctions issued by the CNDC but the case law was not unanimously held by all the courts since some rulings went further saying that not even the SDT could issue injunctions.

Following this new trend in the courts, in November 2012 the Court of Appeals in criminal and economic matters[2] held that an injunction issued by the CNDC was null and void since the latter agency lacks powers to issue such type of decisions. The Court of Appeals decided the case on the basis of the 2011 Supreme Court precedent *Moda SRL*, which ruled that the CNDC has no decision-making powers and that such powers solely rest on the SDT.

Recently, the Court of Appeals in civil and commercial matters has gone even further in curtailing the powers of the antitrust regulators. In *Shell*, *YPF* and *Esso*,[3] all of which were decided in August 2012, it held that the injunction issued by the SDT was null since neither the CNDC nor the SDT have the power to issue injunctions. Therefore, the Court of Appeals in civil and commercial matters concluded that should the CNDC or the SDT want to issue an injunction in an antitrust case, the Antitrust Law allows them to request such a measure to a judge.

These cases have been appealed by the government and now the Supreme Court will have to decide whether the SDT has powers to issue injunctions under the Antitrust Law. However, considering previous Supreme Court decisions, most likely this new trend will be completely settled.

Notes

1 *Multicanal*, Federal Administrative Court of Appeals, Chamber No 5, 18 July 2008.
2 *Falabella*, Court of Appeals in criminal and economic matters, Chamber B, 7 November 2012.
3 *Shell*; *YPF*; *Esso*; Court of Appeals in civil and commercial matters, Chamber No 3, 21 August 2012.

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ACCC Challenges Construction Industry Cover Pricing

The November 2001 Dutch television expose of widespread bid-rigging in the construction industry demonstrated, yet again, that some industry practices survive for an extended period notwithstanding active pursuit of cartel activity by competition agencies. In that case, over 1,400 companies were fined a total of €232m.

Although the latest construction industry case in Australia involved a practice nowhere near as egregious or widespread as the bid-rigging uncovered in the Netherlands, the conduct challenged by the Australian Competition and Consumer Commission (‘ACCC’) – ‘cover pricing’ – seems to have been of long standing in the construction industry, and not only in Australia.

What is ‘cover pricing’ and what are the circumstances in which it is used? Taking the circumstances as they arose in the Australian case on which this note is based, in regional centres builders rely on the state and local authorities for a regular flow of building work. Local authorities assign building contracts by tender to pre-qualified builders. Builders on the list are expected to respond to these tenders and run the risk of being removed from the list if they do not do so. However, every tender takes time and is expensive to prepare. Responding to every tender is a burden, especially for smaller builders. The dilemma they face is if they put in a price without doing the work they run the risk of winning a contract on which they make losses, but if they do not tender they run the risk of falling out with the local authority.

The practice that apparently developed in the construction industry to deal with this dilemma is for a builder who was not interested in the tender, but who felt the need to lodge a bid, to call other builders who were known to be interested in the work, ask for a ‘cover price’ and lode a bid taking that ‘cover price’ into account. As the judge in the Australian case, *ACCC v Woolham*, explained:

> ‘The effect was to eliminate, in respect of the person receiving the cover price, someone who appeared to external observation and, in particular, to the agency of State or local government letting the tender, to be a competitor.’

Describing the conduct as ‘price controlling behaviour’, a form of collusive tendering and an unlawful civil conspiracy, the builders in question were found to have contravened Australia’s price-fixing prohibition.

This case illustrates that price-fixing can take many and varied forms and that practices that may be well established in a particular industry may nevertheless fall foul of competition laws. With every competition agency in the world treating cartels as their number one target, and cooperation between agencies at an all time high due to the work of the International Competition Network, there will no doubt be more instances of agencies challenging established business practices like ‘cover pricing’.

Brussels Court of Appeal recognises confidentiality of in-house legal advice

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In a landmark decision, the Court of Appeal of Brussels ruled on 5 March 2013 that the confidentiality granted to legal opinions rendered by in-house legal counsel prevents the Belgian Competition Authority ('BCA') from seizing in-house legal advice and related correspondence during a dawn raid. The decision, which explicitly denies the applicability of the Court of Justice of the European Union's ('CJEU') ruling in Akzo, effectively confirms that legal professional privilege ('LPP') applies to in-house legal advice in Belgium. The decision is also important because it clearly sets out a number of guiding principles for the BCA to take into account when seizing electronic data during a dawn raid.

Background

In March 2010, the telecom operators Mobistar and KPN Belgium (active on the Belgian market via BASE) lodged a complaint with the BCA against the incumbent operator Belgacom. According to Mobistar and KPN, Belgacom was abusing its dominant position on the market for broadband access by obstructing competition from alternative DSL operators. The complaints resulted in inspections at Belgacom's premises, carried out by officials of the BCA on 12 and 13 October 2010. During the inspections, the mail boxes and hard disks of several of Belgacom's employees were copied in their entirety resulting in a vast amount of documents and electronic files (148 gigabytes) being seized. During the inspections, Belgacom had expressed its concerns about various aspects of the procedure, including that many of the documents seized fell outside the scope of the officials' inspection mandate or concerned advice from or correspondence with in-house legal counsel and were therefore privileged. The BCA disagreed with Belgacom's observations and Belgacom brought the matter before the Brussels Court of Appeal.

Confidentiality of in-house legal advice and related correspondence

Before the Court, Belgacom, supported by the Institute for Company Lawyers ('ICL'), argued that the seizure of legal advice by its in-house legal counsel was illegal, in light of a specific statutory provision which establishes the confidentiality of advice rendered by in-house legal counsel for the benefit of their employer (Article 5 of the Act of 1 March 2000 establishing the Institute for Company Laywers). Belgacom and the ICL argued that the CJEU's ruling in *Akzo* (September 2010), which denies LPP to in-house lawyers in EU antitrust proceedings, is irrelevant in the context of an investigation conducted by the BCA under the Belgian Competition Act. The BCA, on the other hand, contended that, according to the *Akzo* case law, in-house legal advice cannot be protected by LPP.

The Court of Appeal, recognising that in-house counsel perform a task of general interest, agreed with Belgacom and the ICL's view that, according to Article 5 of the Act of 1 March 2000, the confidentiality of in-house legal advice should be guaranteed. Although the Court held that in-house legal advice is not covered by Article 458 of the Belgian Criminal Code, which provides the legal basis for the protection of professional secrecy of, amongst others, external lawyers, it effectively extends the scope of legal professional privilege to advice by company lawyers who are members of the ICL. The Court thereby recognised that the confidentiality of in-house legal advice also covers the correspondence related to the (request for) advice, drafts of the advice and documents relating to the preparation of such advice.

In its reasoning, the Court referred to case law of the European Court of Human Rights in relation to the right to privacy under Article 8 of the European Convention on Human Rights ('ECHR'). It held that interference with a company's right to privacy by the competition authorities, which would result from a violation of the

confidentiality of in-house legal advice, would be disproportionate under Article 8 ECHR and therefore illegal. Because the Act of 1 March 2000, establishing the confidentiality of in-house legal advice, was adopted after the Belgian Competition Act – which the BCA had relied upon to seize the confidential documents – the Court ruled that the Belgian legislator did not intend for competition investigations to interfere with the confidentiality of legal advice rendered by in-house counsel.

The Court also explicitly held that the *Akzo* case law of the CJEU was inapplicable to the case at hand because it related to a separate, that is, the European, legal order. The Court added that in accordance with Article 22(2) of Regulation 1/2003 (which determines that national competition authorities conducting inspections at the request of the European Commission shall exercise their powers in accordance with their national law), this was the case even when the BCA carries out an investigation on behalf of the Commission.

Accordingly, the Court ruled that the BCA's interference with the confidentiality of legal advice rendered by corporate counsel was illegal.

Court sets out guidelines for seizing IT data during dawn raid

Belgacom also argued that the search method applied by the BCA officials during the dawn raids to find proof of the alleged abuse of dominance on the computers of Belgacom employees was illegal, as it resulted in the seizure of a vast amount of electronic data falling outside the scope of the officials' inspection mandate.

The Court, referring to the rules of the Belgian Code for Criminal Procedure and case law of the European Court of Human Rights, held that also in the context of an antitrust investigation, the search method applied during the collection of IT data should avoid documents without any relevance to the investigation from being copied and transmitted to the investigating officials. The use of search terms, established on the basis of the complaint, is therefore key and fishing expeditions are not allowed. Given that the dawn raid at Belgacom resulted in several hundred thousand documents being copied, the Court concluded that the search terms used were inappropriate and did not correspond with the required level of precision and proportionality.

The Court concluded that the BCA should follow a number of guidelines when seizing IT data. The key words used by the authority should be justified by the object of the investigation, thereby noting that general search terms are inadequate and that a selection based on a first keyword should be corroborated by the use of a second keyword. The relevance of the selected documents should be checked by controlling samples of the documents. The company under investigation should be allowed to be present when the documents are selected and reasonable deadlines should be awarded to the company to contest the selection. Finally, documents which are not included in the final selection should be deemed out of scope and discarded beyond recovery by the BCA.

Canada's Federal Court of Appeal sheds new light on merger efficiencies defence and prevention of competition standard

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On 11 February 2013, the Canadian Federal Court of Appeal ('FCA') handed down the first appellate decision in a contested merger proceeding in approximately a decade. While the FCA upheld the Competition Tribunal's ('Tribunal') finding that the transaction prevented competition substantially and the accompanying divestiture order issued by the Tribunal, the Court made three important clarifications:

- first, the FCA confirmed that the efficiencies analysis is the hallmark of merger review in Canada;
- secondly, when assessing whether the efficiency gains brought about by the merger exceed and will offset its anti-competitive effects, the analysis must be as objective as is reasonably possible (meaning that the parties must attempt to quantify these considerations whenever it is reasonably possible to do so); and
- thirdly, the appropriate timeframe for determining whether a merger results in a substantial prevention of competition must be discernible and typically will correspond to the time that it would take for entry to occur in the relevant industry.

Background

In January 2011, the Commissioner of Competition brought an application challenging the completed acquisition by Tervita of Complete Environmental Inc ('Complete') and its proposed Babkirk hazardous waste landfill site. The Commissioner claimed that Complete was poised to enter the market for the disposal of hazardous waste served by Tervita. In May 2012, the Tribunal granted the Commissioner's application, holding that the merger would lead to a substantial prevention of competition for the disposal of hazardous waste in the northeastern section of the province of British Columbia and ordering Tervita to divest the Babkirk landfill site. The Tribunal denied the Commissioner's proposed dissolution remedy. Tervita and its shareholders appealed the Tribunal's decision.

The challenge was notable because the transaction was challenged by the Commissioner even though the acquisition had already been completed, and the acquisition had not met the relevant thresholds for pre-merger notification.

Efficiencies defence

The Competition Act ('Act') provides an express 'efficiencies defence' to anti-competitive mergers, which applies in cases where the efficiencies from the merger are likely to be greater than and offset the merger's anti-competitive effects. The FCA confirmed that the Commissioner bears the burden of proving the extent of the quantifiable and qualitative anti-competitive effects of the merger, while the respondents bear the burden of showing that the cognisable efficiencies would be likely to offset those effects. The Commissioner is relieved of this burden only where the efficiency gains adduced by the respondents are marginal or negligible, as was the case in the *Tervita* matter.

The FCA held that the balancing exercise undertaken to weigh the quantitative and qualitative gains in efficiency against the anti-competitive effects of a merger 'must be as objective as is reasonably possible'. In this regard, both the Commissioner and the respondent(s) must provide precise quantification where possible. When it is not reasonably possible to provide a precise

quantification for an element of the offset analysis, 'a rough estimate is to be preferred to a subjective judgment call'.

Prevention of competition

The FCA also clarified the framework for cases in which the Commissioner's theory of harm is based on the merger's alleged prevention of future competition (as opposed to a lessening of existing competition). Specifically, the FCA confirmed that the burden of proving both that a merging firm is a 'poised entrant' in a specific market and that the merger is likely to prevent competition substantially in that market rests with the Commissioner.

In determining whether a merging party was poised to enter the market prior to the merger, the Tribunal may take into account events occurring after the date of the merger. While the appropriate timeframe over which to consider this will necessarily vary from case to case, and will depend on the nature of the industry, the timeframe must be discernible and generally will correspond to the time that it would take for entry to occur and the barriers to entry in the industry generally. On this point, the FCA expressly adopted the reasoning of the US Court of Appeals (2nd Circuit) in *BOC International Ltd v Federal Trade Commission*, 557 F 2d 24 (2d Cir 1977).

Importance for merger planning

The FCA's decision reinforces a number of considerations that parties contemplating a transaction should keep in mind, including the following:

- Regardless of whether a merger triggers a pre-merger notification requirement under the Act, mergers may be challenged by the Commissioner for up to one year after completion. Substantive due diligence is critical in mergers even in circumstances where formal advance notice need not be given to the Commissioner.
- Parties to a merger that generates efficiencies that can be supported with evidence may be in an improved position for getting their merger cleared in light of the evidentiary burdens placed on the Commissioner.

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Chinese antitrust authority cracks down on resale price maintenance

Introduction

The Chinese Anti-Monopoly Law ('AML') has been in force for over four years. Up until now, restraints in vertical agreements have essentially not played any role in the enforcement of the AML.

However, this situation is changing quickly. On 22 February 2013, the National Development and Reform Commission ('NDRC') – which is the competition authority with powers to enforce the law against anti-competitive 'pricing' conduct – announced through its local offices in two provinces that fines of RMB 247m (around US$40m) and RMB 202m (approximately US$32m) were imposed upon two leading Chinese traditional alcoholic beverage producers for their resale price maintenance ('RPM') practices.

The combined fines imposed on the two Chinese white liquor makers, Maotai and Wuliangye, set a new all-time record for antitrust violations in China.

Decisions against liquor makers

Unlike previous cases which were handled by NDRC at the national level, the investigation into the RPM offences of Maotai and Wuliangye were driven by the Guizhou Price Bureau and the Sichuan Development and Reform Commission ('Sichuan DRC') – two local offices of NDRC.

The Guizhou Price Bureau published a very short, one-paragraph announcement.[1] The announcement states that, from 2012 onwards, Maotai had agreements with its distributors setting minimum resale prices for Maotai liquor products and penalising distributors selling below those prices. The legal reasoning articulated in the announcement is limited; it simply notes that Maotai's RPM arrangement restricted competition in the marketplace and harmed the interests of consumers, but does not explain how such a finding was reached or the evidence on which the finding was based.

By contrast, the press release published by the Sichuan DRC contains more in the way of detail.[2] It provides some underlying facts relating to Wuliangye's unlawful acts and analyses the purported anti-competitive effects of the RPM agreements between Wuliangye and its distributors.

The press release mentions that Wuliangye entered into RPM agreements with over 3,200 distributors. In order to secure full implementation of the agreements, Wuliangye punished disobedient distributors by curtailing its business dealings with them and reducing the level of financial incentives such as rebates given to 'non-compliant' distributors. For instance, in 2011, Wuliangye stopped supplying to a large supermarket chain store in Sichuan, forcing the store to commit to not selling Wuliangye products at below the agreed minimum price. As another example, the Sichuan DRC found that in 2012 the company penalised 14 distributors nationwide for their 'low sale prices'.

The press release further discusses the alleged anti-competitive effects of Wuliangye's RPM policy. According to the press release, the effects were threefold:

- Wuliangye's RPM policy eliminates intra-brand price competition (competition between distributors of the same brand).
- The policy also restricts inter-brand competition (competition between different white liquor brands). In that regard, the Sichuan DRC held that Wuliangye's conduct had set a 'bad example' for the entire white liquor industry and – possibly referring to Maotai – other white liquor brands had indeed adopted similar policies.
- The press release found that consumer interests were harmed. It pointed out that consumer choice was severely affected particularly because of Wuliangye's strong market position in the white liquor market and the low degree of substitutability of Wuliangye products.

Implications

The decisions against Maotai and Wuliangye are significant because they set a new record for antitrust fines in China. Nonetheless, due to the lack of detailed reasoning, the press releases do not provide much helpful guidance for the business community when assessing what contributes RPM going forward.

The benchmark for where RPM practices cross over the line is left unclear in the two decisions. Although the press release in the *Wuliangye* case mentions the company's 'strong market position' and 'important position' in the market, it does not use the word 'dominance' or point to a specific market share level as reference. In fact, the press release does not even explicitly state that the supplier's market position is a key factor in assessing the legality of the RPM arrangements. This contrasts with the judgment by the Shanghai Intermediate People's Court in the *Johnson & Johnson* case in 2012 which did put forward a few benchmarks, namely:

- the supplier's market share;
- the extent of upstream and downstream competition; and
- the impact of the RPM practice on the quantity and price of the products in the market.

In that case, a distributor of Johnson & Johnson brought an action against the medical equipment maker before the Shanghai court, alleging that Johnson & Johnson had imposed an unlawful RPM clause into their distribution contract. At first instance, the court ruled in favour of Johnson & Johnson, in spite of its factual finding that the distribution contract indeed contained such a RPM clause and that Johnson & Johnson terminated the contract when it discovered that the distributor had sold below the minimum prices. The reason for the court to dismiss the action was that the distributor had failed to adduce sufficient evidence to show that the RPM clause actually had an anti-competitive effect in the market. The court held that, to the contrary, Johnson & Johnson had shown that there were sufficient competing suppliers in the market, suggesting that competition as such was not harmed.

The *Johnson & Johnson* case is on appeal now, and observers fear that there could be a divergence between the assessment of RPM practices by NDRC and that by the courts. Although in theory NDRC's decisions can be appealed and thus find their way

into the court system, few if any companies investigated by NDRC would agree to confront the authority head-on and litigate against it. Hence, any inconsistencies between the authority decisions and judgments resulting from private litigation would not necessarily be resolved through the judicial appeal process.

In short, the law on RPM is in flux in China. Market players eagerly await the appellate court's ruling in the *Johnson & Johnson* case. In the meantime, many companies will probably decide to 'play safe' and take a hard look at their distribution agreements and the context of their distribution structure.

Notes

1 See: **www.gz12358.gov.cn/article.aspx?menuid=2030&tab=tab_News&tabid=48718**.

2 See: **www.scdrc.gov.cn/dir25/159074.htm**.

COLOMBIA

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Fine of nearly US$2.7m to a Colombian energy company for abuse of dominant position

According to the Colombian Superintendence of Industry and Commerce ('SIC'), Ebsa, a non privately-held local utility company, abused its dominant position in the energy market in the Colombian province of Boyacá while it was a state-owned company, that is, until the year 2011. With a history of over 57 years in the region, Ebsa is one of the most important utility companies in Colombia. They cover 123 municipalities with around 380,000 clients in the electricity trading sector, 99.9 per cent of which are serviced by Ebsa and only 138 by other electricity traders. In December 2011, the government sold Ebsa through a public bid awarded to Bcif Holdings Colombia SAS for approximately US$450m.

The investigation carried out by the SIC started in February 2012 and its decision was published in Resolution 3694 dated 5 February 2013. The investigation showed that Ebsa, which holds a dominant position in 122 municipalities of Boyacá and four in Santander province, charged for the standardisation of meters that were calibrated in laboratories different from the ones owned by the company.

This meant that importers and distributors of energy meters wanting to sell them in Boyacá had to pay Ebsa an amount of COL$4,000 (around US$2.25) per meter. The company called this process 'meter approval' and argued it was justified because this was meant to bring the traceability of installed meters and to recover the costs the company had incurred. However, this procedure, according to the SIC, was a legal obligation of the company that was already being paid for by the end user. Ebsa was charging twice for the same procedure, as it charged importers and distributors as well as end users.

The competition agency established that when the calibration was performed in an Ebsa laboratory, such approval was not required, otherwise the dealer had to pay the aforementioned fee which was to be assumed by the distributor or transferred to the end consumer. This fee could lead to an alleged abuse of dominant position, since Ebsa was to increase or maintain its market share of meter calibration in which it is not currently dominant. It also stated that this move was aimed at making users who did not want their meters calibrated by Ebsa into 'forced customers' since the approval of meters required them to pay Ebsa the equivalent of 61 per cent of the approval fee.

The SIC estimated that the profits made by the company from 2010 to 2012 amounted to more than US$84m. Besides imposing a fine on the company, the SIC also sanctioned the company's Chief Executive Officer, Roosevelt Martinez Mesa, with a fine of US$26,000, for allowing the behaviours that were deemed as anti-competitive.

Ebsa has appealed the SIC's decision and is now waiting for a final resolution of the case.

Penalty for failure to comply with merger control filing (dating back to 2002)

CZECH REPUBLIC

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The Czech Republic, before the EU accession in 2004, used to have very low thresholds for merger control procedures. In particular, a combined worldwide turnover of about €80m in a merger had the effect in the Czech Republic of triggering the need to file in the Czech Republic. It is an open secret in the Czech antitrust community that many mergers that would have to be filed for approval by the Antitrust Office simply were not filed for cost reasons or in order to simplify the transaction. Thus, even the historic high of 239 Czech merger control cases in 2003 – as compared to 57 in 2000 and an average of 40–50 in the prior years – did not reflect the actual number of mergers that would have to be filed for approval. Buyers in many cases exercised control in the acquired undertakings without major fear of sanctions which would, in theory only, have been quite high.

In February 2013, however, the Czech Antitrust Office levied a small fine (€22,000) on a company for not having applied for merger clearance as far back as 2002 (KAREL HOLOUBEK – Trade Group AS – file No 495/2010). The background in this case was the exercise of control in the operation of the heating plant in Karlovy Vary (Carlsbad) whereas the penalised entity in 2002 had acquired control of the target on the basis of borrowed shares but filed for merger control approval for a contract on lease of enterprise as late as 2010. In the course of those proceedings, the Office established that the applicant had indeed already exercised control through having shares borrowed that enabled it to exercise sole control over the heating company and its management since 2002.

The Office emphasised that no major negative effect on competition or consumers was established by the merger, and that the merger itself was unconditionally cleared in simplyfied proceedings in 2010.

An interesting procedural aspect in levying the penalty for non-filing of the 2002 merger is that the Office took into account the long duration of the breach (more than eight years) but also granted a 20 per cent reduction of the fine under settlement proceedings as the company accepted its legal responsibility for the infringement.

It is with a certain irony that the most important previous case with the highest sanction for procedural violations in connection with merger control proceedings also took place in Carlsbad: a penalty of some €400,000 was levied in 2004 for effecting a merger despite the explicit prohibition of the merger by the Office (Karlovarské minerální vody, AS – Carlsbad mineral water – covering a large part of the Czech market for table and mineral water). It is also true that a few years later, this merger was approved in new proceedings arguing that the market is bigger than the Czech Republic alone. Nevertheless, putting into relation an intentional violation of a prohibition to merge and the penalty for a relatively minor infriction without danger to the final consumer, the sanction levied in 2013 does indeed appear to be high.

The most important aspect for due diligence of Czech companies and many existing companies in the Czech Republic, however, is the following: companies that decided not to file for Czech antitrust approval despite the low thresholds before 2004 having been exceeded, must be aware of the sanctions in case the Antitrust Office learns of this fact at a later time, for instance in other proceedings (as was the case here), sector investigations or other antitrust proceedings.

Such companies cannot rely on the fact that this omission should have been time-barred in the meantime. The Office argued in the discussed decision that the illegal status has been going on since the taking over of control and therefore the term for limitation has not started to run. So the skeletons from the past may rise again.

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Updates from Ecuador

Ecuador passed its first Competition Law in October 2011. It constitutes a major step towards the effective control of anti-competitive practices that have been common in some Ecuadorian industries and markets.

The Superintendence of Control of Market Power was created at the top of the institutional control structure. It is accompanied by different national directorates that specialise in the investigation of abuses of market power, restrictive agreements and other practices controlled by the Competition Law. There are also departments responsible for market research, merger control and promotion of competition.

Since its creation, the Superintendence has started various proceedings aimed at investigating both abuses of dominance and collusion in public procurement.

An interesting decision has been rendered regarding a public bidding process for the provision of hardware to the Ministry of Finance, in which evidence of collusion was found (*COMPSESA and MAINT*). The authority determined that sharing technical information regarding the bidding documents unequivocally shows the existence of a collusive agreement. It is worth noting that the Superintendence took into account some European guidelines and case law in its decision.

Further, investigations concerning excessive pricing in the soft drinks industry were also conducted. After considering a benchmark on international prices, the authority ruled that a price raise does not constitute a violation to the Competition Law (*ARCA ECUADOR – Coca Cola*).

The Superintendence of Control of Market Power has a very important role to play in preventing anti-competitive practices in Ecuador. Given its recent creation and the country's lack of familiarity with competition legislation, we expect that the authority will continue to take into account advanced guidelines and case law in order to give its decisions the credibility that a new authority requires.

EUROPEAN UNION

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Recent antitrust developments in the EU

Commission opens abuse of dominant position proceedings against Gazprom

On 4 September 2012, the European Commission announced that it has opened formal proceedings against Gazprom to investigate whether the Russian liquefied natural gas giant may be abusing its dominant position in the sense of Article 102 TFEU in upstream gas supply markets in Central and Eastern European Member States. Russia provides 25 per cent of Europe's gas imports and many countries rely almost entirely on these supplies for their imported gas.

The launching of formal proceedings against Gazprom follows on the unannounced inspections that the Commission conducted a year ago, at the premises of companies active in the supply, transmission and storage of natural gas in ten Member States, mainly in Central and Eastern Europe. The inspections were focused on the upstream supply level, where, unilaterally or through agreements, competition may be hampered or delayed. More specifically, in the proceedings against Gazprom, the Commission is investigating whether Gazprom:

- divided gas markets and restricts the free flow of gas across Member States;
- prevented the diversification of the supply of gas; and
- imposed unfair prices.

The Russian reaction to the institution of the proceedings shows the political sensitiveness of the case. Russian President Vladimir Putin has passed a law blocking

co-operation with EU antitrust officials. The new degree 'establishe[d] the obligation of a federal executive body to refuse permission to conduct the aforementioned activities if they are capable of damaging the economic interests of the Russian Federation'.

According to Gazprom spokesman Sergei Kupriyanov, the EU is trying to extort gas discounts. He stated:

'Right now a series of relatively weak EU economies are continuing to demand from Gazprom unilateral concessions on gas prices. You can't view this [the EU probe] as anything other than EC [European Community] support for Gazprom subsidies to Eastern Europe. This is an attempt to solve the economic problems of the EC at Russia's cost.'

Gazprom CEO Alexei Miller also told Russian newswire Interfax the decree means EU energy firms will have to call the Kremlin instead of his office if they want price cuts.

The Dutch bitumen cartel: 16 judgments of the General Court

On 27 September 2012, the General Court delivered 16 separate judgments in the appeals introduced by bitumen producers and construction companies against the decision of the Commission which found that they had infringed Article 101 (1) of the TFEU by participating in an illegal price-fixing cartel in the road bitumen sector in the Netherlands. The investigation was instigated by a leniency application by BP (British Petroleum).

In its decision, the European Commission found that regular meetings were held between bitumen suppliers and the six largest road construction companies in the Netherlands as well as separate preparatory meetings between the suppliers and construction companies between at least 1994 and 2002. The Commission concluded that at the joint meetings parties: (i) fixed the gross price of road bitumen to be invoiced to the asphalt production plants; (ii) fixed rebates for the construction companies owning the production plants, while a lower maximum rebate was fixed for non-cartel participants; and (iii) imposed systems for the regular monitoring of the pricing agreements and imposed fines, in the form of retroactive extra discounts, for non-compliance with the agreed rebates for non-cartel participants. Eight bitumen suppliers and six construction companies were fined, in total for €266.96m. Besides BP – who received full immunity – the largest fines were imposed Shell (€108m), Koninklijke Volker Wessels Stevin (€27.6m) and Total (€20.25m).

In the appeal proceedings, Shell argued that the Commission erroneously concluded that it was an instigator and leader of the cartel (Case T-343/06). The Court found that evidence showed that Shell had a particular role during the first two years of the cartel, but that it was not possible to conclude with certainty from the evidence adduced by the European Commission that Shell played the role of leader from the time that the cartel operated in a multilateral manner. As a consequence, the Court annulled the 50 per cent fine increase that the European Commission had imposed on Shell for playing the instigator and leader role. The amount of the fine was reduced to €81m.

Several of the fined parties argued in appeal they were wrongly held liable for the behaviour of their subsidiaries. The Court noted in this respect that the burden to rebut the presumption that the parent company exercises the necessary decisive influence where it owns all of the share capital of the subsidiary, lays upon the parent company by showing that the subsidiary did, in fact, act independently on the market (Case C-97/08, Akzo Nobel NV and others v Commission), even if the parent company only holds a quasi-totality of the shares in the parent company (Case T-203/01, Michelin v Commission). None of the appellants however succeeded in delivering the evidence to prove that the Commission had erred in its conclusions regarding the exercise of the decisive influence by the appealing parent companies over their respective subsidiaries.

Update

On 24 February 2013, it was published in the Official Journal that Kuwait Petroleum and Shell Petroleum had lodged appeals against the General Court's judgments. Kuwait Petroleum claims that the General Court erred in law in its application of the 2002 Leniency Notice. Shell Petroleum claims that the General Court committed several errors of law both when establishing the infringement and as regards the calculation of the fine imposed.

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Finnish Competition Authority proposes record fine for predatory pricing

In December 2012, the Finnish Competition Authority ('FCA') proposed to the Finnish Market Court that it should impose a penalty payment of €70m on Valio Oy ('Valio'), a Finnish milk processor owned by dairy farmers, for alleged abuse of its dominant position in the production and wholesale of fresh milk. In addition, it ordered Valio to terminate its anti-competitive conduct which, according to the FCA, had continued for nearly three years.

A public version of the FCA decision was published in mid-January 2013. According to the decision, a strategic decision was made by Valio's top management in February 2010 to combat competition on the Finnish fresh milk market by measures aimed at foreclosure. The FCA's findings allegedly show that Valio lowered the wholesale prices of fresh milk below the cost level as of 1 March 2010. Valio's intention, according to the FCA, was to achieve foreclosure by predatory pricing and acquire back the near monopolistic position it had on the fresh milk market before its biggest competitor, Arla Ingman, had entered the market. The FCA noted that once the foreclosure was achieved, Valio would have been able to increase the prices back to the level prevailing before Arla Ingman had entered the market.

According to the FCA, Valio's pricing policy was so aggressive that the actual and potential competitors did not have any real possibility of competing on the market. Valio also proved ready to defend its share of the market in case any new competitor tried to enter it as it would have sacrificed profit in pursuit of market share.

The FCA stressed that Valio's conduct amounted to a serious antitrust violation with a detrimental effect on consumers. The FCA's view was that Valio's conduct prevented Arla Ingman from competing effectively in the fresh milk market and significantly impaired the ability of small dairies to operate in the market.

In determining the size of the proposed penalty payment, the FCA paid particular attention to the gravity and duration of Valio's anti-competitive conduct, the size of the fresh milk market, Valio's considerable turnover and the fact that it has once before been fined for abuse of dominance.

The FCA's decision has received a great deal of attention in the media and Valio itself has publicly contested the FCA's allegations.

The proposed penalty payment of €70m is the highest single fine ever proposed in Finland for any competition law infringement. As there is little Finnish case law on predatory pricing, the Market Court's handling of the case will undoubtedly be followed with great interest.

Selective distribution in France

FRANCE

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The last quarter is mainly of interest due to selective distribution issues.

On 31 January 2013, the Paris Court of Appeal (the court of appeal specialised in anti-competitive issues) confirmed the decision of the Competition Authority concerning the distribution of cosmetic and personal care products via the internet. The main companies in this area, which implemented a selective distribution network, prohibited their selected distributors from online selling or imposed on them conditions which substantially restricted their ability for online selling. Although many companies have taken commitments to enable distributors to sell products online in order to avoid fines, one of them, Pierre Fabre, refused to propose any. By Decision 08-D-25, dated 29 October 2008, the Competition Authority obliged Pierre Fabre to provide the possibility of online sales in its selective distribution agreement and imposed a fine amounting to €17,000. Pierre Fabre brought an appeal and the court of appeal asked the ECJ if a provision by which a company obliges its distributor to sell its products only in a brick and mortar space with the intervention of a pharmacist was anti-competitive by object. The ECJ ruled on 13 October 2011 that:

> 'a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified. ….However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met.'

Pierre Fabre argued before the court of appeal that this prohibition of online sales was necessary in order to protect the quality of services granted to consumers when they purchased the products based on the nature of the products and that this provision was even pro-competitive taking into account the high degree of inter-brand and intra-brand competition (the products are sold in 23,000 points of sale) and its 20 per cent market share. The Paris Court of Appeal did not share the view that the intra-brand competition was very high since this type of selective distribution agreement prevents sales to non-selected distributors and to consumers whose locations are far from the physical space and since such type of sales does not facilitate the comparison of prices by consumers. The Court added that with a 20 per cent market share, Pierre Fabre was the leader of the market. The Court of Appeal noticed that the sale of those products does not require the intervention of a pharmacist according to law. Furthermore, the necessity to provide specific advice to each consumer does not justify the prohibition of online sales since such advice could be provided online. Such prohibition cannot be exempted on the basis of Article 101 section 3 of the treaty since the risk of free riding is not due to the authorisation of online sales nor is it specific to such type of sales.

On 15 January 2013 (Auto 24 c/ Jaguar Land Rover), the *Cour de cassation* confirmed, according to the ECJ (C-158/11 on 14 June 2012), that in a quantitative selective distribution network it is not necessary for such a system to be based on criteria that are objectively justified and applied in a uniform and non-differentiated manner in respect of all applicants for authorisation. Therefore, the manufacturer does not have to justify the reasons which led them to apply these selective criteria (72 agreements for 109 sites).

GERMANY

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Limited state liability for wrong merger decisions

In 2006, GN Store Nord decided to sell its hearing aid division GN ReSound to Phonak (today called Sonova). Since the case did not meet the European turnover thresholds, it was subject to certain national filings, including in Germany. The German Federal Cartel Office prohibited the (worldwide) merger in 2007 because it thought the merger would create a collective dominant position among the three leading manufacturers in the German hearing aid market. The parties appealed to the Düsseldorf Court of Appeal, which confirmed the prohibition decision and even concluded that this collective dominant position already existed and that the merger would reinforce it. Upon GN Store Nord's appeal, the Federal Court of Justice held in 2010 that in doing so the Court of Appeal had made two mistakes. First, it had put too much emphasis on the symmetry between the leading companies. The fact that several companies have similar market shares does not imply that there is no competition between them. Moreover, the market shares had not been stable. Secondly, the Court of Appeal had erroneously taken price transparency to imply that there is insufficient competition. While the manufacturers' list prices were stable within a narrow band, actual prices were determined by discounts and rebates, and these were significant but not similar.

While the deal should never have been prohibited, it was dead by the time it could have been consummated. Because of the financial crisis, the value of GN ReSound's shares had dropped considerably in the meantime. Its parent company GN Store Nord had lost a considerable amount of money. GN Store Nord decided to sue the Federal Republic of Germany for damages exceeding €1bn.

The Cologne Regional Court rejected the complaint on 26 February 2013 (Docket No 5 O 86/12). In its judgment, the Regional Court confirmed that the representatives of the Federal Cartel Office had breached their duty to apply the law correctly. The decision to prohibit the merger was not in line with the law. The plaintiff could also rely on these circumstances since it had been party to the proceedings. However, the Court found that the representatives of the competition authority had not acted wilfully or negligently in breaching their duty. The law had not been clear enough because at the time the German Federal Court of Justice had not yet endorsed the European Courts' *Airtours* case law. Moreover, legal terms such as 'significant competition' or 'paramount market position' are not very precise. In particular, the assessment of collective dominance requires weighing all circumstances of the case. The Court also relied on a line of case law in state liability cases, pursuant to which public servants do not act negligently if their decision is confirmed by a panel of professional judges. This is precisely what happened when a panel of three judges at the Düsseldorf Court of Appeal (erroneously) confirmed the prohibition decision.

Restriction of competition by object – the *'Hungarian' Allianz* case

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The Court of Justice of the European Union ('ECJU') ruled that agreements concluded between insurance companies and repair shops concerning the price of repairs of insured vehicles have an anti-competitive objective and are therefore prohibited where they are, by their very nature, injurious to the proper functioning of normal competition.

National proceedings

In 2006, the Hungarian Competition Authority ('HCA') imposed substantive fines on two insurance companies, the national association of authorised car dealerships ('NAACD') and three authorised car dealerships.[1] The HCA found that:

- the NAACD and the insurers agreed to increase in excess of inflation the hourly repair charges paid by insurers to authorised car dealerships for the repair of insured damaged vehicles; and
- the insurers and authorised car dealerships agreed on target bonuses if authorised car dealership sell a certain number of the insurance policies of the insurers.

The authorised car dealerships also functioned as repair shops paid by the insurers and insurance intermediaries selling insurance policies for the sale or repair of vehicles, therefore, the case related to two separate markets: (i) car repair services and (ii) car insurance services (including motor vehicle insurance policies and mandatory motor vehicle liability insurance policies).

According to the HCA:

- the decisions of the NAACD – on the basis of the negotiations with the insurers – contained hourly repair charges recommended for authorised car dealerships;
- the framework agreement between the NAACD and one of the insurers, as well as individual agreements between the authorised car dealerships and the insurer, contained a target bonus based on the number of insurance policies offered by that insurer sold by the authorised car dealership; and
- the practice of the other insurer to apply a target bonus was based on the number of insurance policies offered by that insurer and sold by the authorised car dealership.

Together and individually, these qualify as a restriction of competition by object. The HCA considered that the bundle of agreements made the (increased) amount of hourly repair charges dependent on the number of insurance policies of the given insurer sold by the authorised car dealership as an insurance intermediary.

The HCA applied Hungarian competition law in the absence of an impact on intra-community trade.

The parties challenged the decision of the HCA before the Metropolitan Court (Budapest). In 2009, the Metropolitan Court adopted its judgment[2] partially annulling the decision of the HCA and ordering the HCA to repeat the investigation in respect of the annulled part of the decision.

The Metropolitan Court based its judgment on a clear distinction between: (i) agreements on hourly repair charges between the NAACD and insurers (not a vertical agreement since the parties are not in a sales relationship); and (ii) agreements on target bonuses between authorised car dealerships as insurance intermediaries and insurers (a vertical agreement since parties are in a sales relationship). Furthermore, the Metropolitan Court established that the HCA committed a procedural error by extending the decision to the agreements on target bonuses without adequate investigation and reasoning.

Later in 2009, the Metropolitan Court of Appeal adopted its judgment[3] on appeal and decided to revoke the partial annulment by the first instance judgment, dismissing the challenge of the HCA's decision by the parties completely.

According to the Metropolitan Court of Appeal, the procedural error of the HCA did not influence the decision of the HCA to justify an annulment. Furthermore, the Metropolitan Court of Appeal stated that the insurers agreed to a higher payable hourly repair charge because they were compensated by the sale of new insurance policies due to the target bonuses. Although it was not indicated explicitly, the hourly repair charges (and their increase) were made dependent on the contribution to financing these charges by selling more insurance policies offered by the given insurers. Since this favoured the given insurers, the agreements had the restriction of competition as their objective.

In 2010, the Curia (Supreme Court) on legal review decided to suspend the proceedings and requested the preliminary ruling of the CJEU on the issue set out below.

The advocate general's opinion

First, the advocate general emphasised in his opinion[4] that the agreements in question are vertical agreements, which may only qualify as a restriction by object in certain cases (imposition of minimum resale price; prohibition of parallel trade; restriction of passive sales). This classification is independent of the circumstance that the parties (insurers and authorised car dealerships) do not provide services to each other, in accordance with the broad definition of Regulation No 330/2010.

Secondly, the advocate general distinguished the assessment of the agreements in question on the basis of the two relevant markets:

- the agreements in question would only qualify as restriction by object with respect to the car insurance market if there is a concerted practice between the insurers aimed at excluding competitors from the market (which would need further investigations); and
- the agreements in question would only qualify as restriction by object with respect to the vehicle repair market if there is a horizontal agreement on charges between the dealers (which seems to have been the case due to the decisions of the NAACD).

Judgment of the CJEU

The CJEU took a slightly different approach from the one of the advocate general. According to the CJEU,[5] the agreements in question may qualify as restriction of competition by object if:

- the HCA specifically and individually examined the wording and aim of these agreements and the economic and legal context of which they form a part; and
- on the basis of this examination, it is apparent that these agreements are by their very nature injurious to the proper functioning of normal competition on one of the two relevant markets.

In advance, the CJEU clarified that notwithstanding the circumstance that Article 101 TFEU was not applied, the CJEU has jurisdiction since there is an interest of the European Union to interpret uniformly those domestic provisions, which adopt the same approach for internal situations as European Union law.

It is worth noting that the advocate general held that the CJEU had not had jurisdiction due to a lack of direct and unconditional reference to EU law in the domestic legal provisions.

The Hungarian government argued that the request is inadmissible since the Curia in its order for reference did not indicate all relevant information, with particular respect to the circumstance that the question only addressed the bilateral agreements between the NAACD/ authorised car dealerships and insurers. However, the CJEU considered that the request of the Curia is admissible since the information indicated is sufficient and it is for the Curia to apply the ruling of the CJEU to the case (taking all of the information into consideration).

The CJEU emphasised that a link between independent activities (that of car repair shops and car insurance intermediaries) is not automatically a restriction of competition by object, it can nevertheless qualify as such if independence of those activities are necessary for the proper functioning of normal competition.

The CJEU set forth that if there was a horizontal agreement between the insurers to partition the market, that would qualify as a restriction by object and would render the related vertical agreements unlawful as well. Nevertheless, in the absence of a horizontal agreement, it is not excluded that the vertical agreements in themselves qualify as a restriction by object. In order to establish this, the content, objectives and the economic and legal context of the agreements must be taken into account, inter alia, the alleged domestic law requirement of independence

of insurance intermediaries (acting on behalf of the consumers, not the insurers) and the existence of alternative distribution channels of car insurance policies.

Notes

1 See Decision No Vj-51/2005 of the Competition Council of the HCA.

2 See the judgment of the Metropolitan Court (Budapest) in Case No 7.K.31.116/2007/44.

3 See the judgment of the Metropolitan Court of Appeal in Case No 2.Kf.27.129/2009/14.

4 See the Opinion of Advocate General Cruz Villalón in Case No C-32/11.

5 See the judgment of the Court of Justice in Case No C-32/11.

Amendments to the Competition Act, 2002

INDIA

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On 10 December 2012, the central government introduced the Competition (Amendment) Bill, 2012 (the 'Bill') in the parliament based on the recommendations of the Expert Committee constituted in June 2011 to examine and suggest modifications in the Competition Act, 2002 (the 'Act'). The Act had previously been amended in 2007 and 2009. The Union Cabinet approved the Bill in October 2012 and the Bill will come into force once the Houses of Parliament pass it. Some of the key changes proposed by the Bill are discussed below.

Joint or collective dominance

Section 4 of the Act prohibits an 'enterprise or group' from abusing its dominant position. 'Group' here refers to different enterprises belonging to the same group in terms of control of management or equity, and does not refer to different and completely independent corporate entities or enterprises.[1] The Competition Commission of India ('CCI') in its various orders[2] has recognised that there is no concept of 'collective dominance' under the Act in its present form.

Following the proposed amendment, abuse of dominance by an enterprise or group, individually or jointly, would be prohibited. This means that abuse of dominance by one or more unrelated enterprise or one or more unrelated group may now come under the purview of the Act, despite the fact that by acting individually, the said enterprises and groups may not contravene section 4 of the Act. The Bill introduces to Indian competition law the concept of joint or collective dominance, which is well-established under EU law and other jurisdictions.

Different exemption thresholds

Under section 54 of the Act, the central government has been empowered to exempt, inter alia, any class of enterprise from the application of the Act for a specified period, if such exemption is necessary in the interest of security of the state or public interest. Presently, the central government has, citing public interest, exempted target enterprises whose assets and turnovers fall below a particular numeric threshold; groups exercising less than 50 per cent of voting rights in other enterprises and certain banking companies were thereby exempt from application of section 5 (which deals with combinations).

The Bill introduces section 5A to the Act which allows the central government to notify, in consultation with the CCI, different value of assets and turnover for any class or classes of enterprise for the purpose provisions. Notably, unlike section

54, the Bill does not specify 'public interest' and 'security of state' as restrictions on the central government's power to exempt. It is unclear how the exercise of power under the proposed section will differ from that under the existing section, other than the obvious requirement of prior consultation with CCI under the former.

Section 5A may possibly entail sectoral threshold values instead of or in addition to the present threshold values which are irrespective of sectors. The concern underlying the introduction of section 5A appears to be that certain combinations either escape filing or invariably require filing because characteristics of the particular sector allow thresholds to be met easily or rarely, as the case may be. It appears that policy makers favoured the idea of sectoral thresholds over lowering or raising thresholds across the board. While this may introduce a certain degree of flexibility, determining the sectors under which proposed combinations fall may prove to be contentious.

General protection of IP rights

Under the Act, prohibitions on anti-competitive agreements do not extend to restrain any infringement or imposition of reasonable conditions as may be necessary, in respect of rights conferred under certain specified statutes relating to intellectual property rights (for instance, the Copyright Act, 1957; the Patents Act, 1970 etc). The proposed amendment has extended the scope of the above exemption to rights conferred by 'any other law for the time being in force relating to the protection of other intellectual property rights'. With this amendment, a generic exemption would come into force broadening the base of IP rights which fall outside the purview of restrictions on anti-competitive agreements. It also remains to be seen whether the amendment would extend to the protection of intellectual property rights under the laws of any other jurisdiction.

Scope of appealable orders

The Act provides for a detailed procedure for inquiry into allegations of contravention of its provisions. Under section 26, if the CCI is of the opinion that a prima facie case exits, it can direct the Director General to conduct an inquiry into the matter. Presently, the Act provides for an appeal to the Competition Appellate Tribunal ('COMPAT') in the cases where the CCI closes the matter and passes orders as it deems fit, either because it is of the opinion that there exists no prima facie case or because the Director General reports that there is no contravention. With the proposed amendment, the scope of appealable orders to COMPAT would expand to include cases where CCI orders for further investigation in the matter, both where the Director General reports that there is no contravention as well as where the Director General reports that there is contravention.

Definition of turnover

Section 2(y) of the Act defines 'turnover' to 'include the value of sale of goods or services'. The Bill proposes to amend the aforesaid definition to expressly exclude 'the taxes, if any, levied on sale of such goods or provision of services'.

The definition of 'turnover' is significant, as this not only determines whether or not the parties to a proposed 'combination' are required to give notice under merger control provisions, but also the quantum of penalty which the CCI may impose under section 27(b) of the Act.

The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (the 'Combination Regulations') already provide that the turnover shall be computed in accordance with section 2(y), excluding indirect taxes, if any. The aforesaid amendment, however, would remove ambiguity as to whether or not indirect taxes are included in the definition of 'turnover' for the purpose of computation of penalty.

Vertical agreements in respect of services

Section 3(4) of the Act, read with section 3(2), prohibits any 'vertical agreement' (ie, agreement amongst enterprises at different stages or levels of the production chain in different markets), which causes or is likely to cause an appreciable adverse effect on competition within India.

Whilst section 3(4) of the Act refers to 'vertical agreements' in respect of both trade in goods and the provision of services, the explanation to section 3(4), which clarifies what is included within the scope of the specifically enumerated 'vertical agreements' (ie, tie-in arrangements, exclusive supply agreement, exclusive distribution agreement,

refusal to deal and resale price maintenance), contains no express reference to the provision of services. The Bill seeks to address this anomaly by amending the explanation to section 3(4) to include express references to the provision of services, and thereby removes ambiguity in this regard.

Definition of 'group'

Explanation (b)(i) to section 5 of the Act defines 'group' as two or more enterprises which, directly or indirectly, are in a position to exercise 26 per cent or more of the voting rights in another enterprise. The Bill proposes to amend the aforesaid definition so that only upon being in a position to exercise 50 per cent or more of the voting rights are enterprises considered to constitute a 'group'. This amendment is in line with a notification (dated 4 March 2011) issued by the Ministry of Corporate Affairs. This will bring greater clarity to the definition of 'group' in the Act.

Key procedural amendments in the Bill are discussed below.

Timeframe for approval of a 'combination'

In respect of combinations in which notice has been given to the CCI for approval, the Act mandates that the CCI must pass an order or issue a direction within 210 days, failing upon which it is deemed that the CCI has approved such proposed 'combination'. At the same time, the Combination Regulations provide that CCI shall 'endeavour' to pass such order or issue such direction within 180 days from the date on which the parties filed the notice of combination.

With the proposed amendment to the Act, it would be deemed that the CCI has granted its approval to a proposed 'combination' upon the expiry of 180 days from the date of such notice. Thus, the Bill attempts to bring provisions of the Act in tandem with those in the Combination Regulations. In reducing the above-referenced timeframe by 30 days, this amendment is likely to bring down the transaction costs. In practice, however, this amendment is likely to affect only those proposed 'combinations' which raise serious concerns of being anti-competitive and therefore call for more detailed scrutiny on the CCI's part.

Notably, the Bill does not amend section 6(2A) of the Act which states that, in the absence of an order by the CCI, no combination shall come into effect until 210 days have passed from the date of notice being given to the CCI. It is important that this anomaly be corrected or else the reduction in deeming the period to 180 days may become redundant.

Right of hearing prior to imposition of a penalty

The proviso to section 27(b) of the Act states that the CCI shall penalise each of the participants in a cartel, with the higher of upto three times the participant's profits, or ten per cent of its turnover, for each year for which the cartel continued to remain in existence. The Bill seeks to amend the proviso so as to make it mandatory for the CCI to give an opportunity of hearing to each participant, prior to the imposition of a penalty.

The Bill seeks to introduce the aforesaid requirement only while imposing a penalty on cartels (and not other kinds of 'anti-competitive agreements'). Perhaps the reason behind this is that only in respect of cartels is the CCI obligated to impose the higher of the two penalties which the Act provides for.

Right of hearing prior to inquiry

As stated earlier, the CCI can refer a matter to the Director General for investigation. Presently, the CCI is bound to invite objections or suggestions from the concerned parties only if the Director General's report recommends that there is no contravention. The proposed amendment confers upon the concerned parties the right to be heard by the CCI prior to the CCI reaching any finding, irrespective of whether the Director General's report recommends that there is a contravention of the provisions of the Act or not.

Powers of the Director General

The Bill significantly enlarges the scope of investigative powers of the Director General. At present, such powers are limited to the production and seizure of documents in the course of an investigation. Further, search and seizure can be carried out only after obtaining prior permission of the magistrate, a judicial authority.

With the proposed amendment, the powers of the Director General will extend to collecting evidence other than documents. Further, the Bill proposes to modify the above procedure so as to empower the Director

General to seize evidence solely on the basis of the prior authorisation of the chairperson of the CCI.

Conclusion

The Bill makes significant, substantive amendments to the Act and introduces concepts which aim to bring competition law in India in line with the international regime. The introduction of 'collective dominance' is a key step in this direction. Many other amendments are merely clarificatory in nature and seek to remove inconsistencies between the Act and the Combination Regulations as well as notifications issued by the central government/Ministry of Corporate Affairs. The procedural amendments seek to fill certain gaps in the investigative process. The Bill is likely to be taken up in the current session of parliament.

Notes

1 *Consumer Online Foundation v Tata Sky Limited & Others* [order of 24 March 2013 in Case No 2/2009].

2 *N Sanjeev Rao and Mrs Fatima Tahir v Andhra Pradesh Hire Purchase Association & 162 others* [order of 7 February 2013 in Case No 49/20012], *M/s Royal Energy Ltd v Indian Oil Corporation Ltd & Others* [order of 9 May 2012 in MRTP Case No 1/28].

IRELAND

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Irish update

Investigation and prosecution of criminal cartels continues to present significant challenges for Irish competition law enforcement authorities, according to the Irish Competition Authority's ('ICA') Annual Report published 28 February 2013. That report, which provides important and otherwise unavailable information on agency casework, details how – notwithstanding some significant successes in the mid-2000s – Ireland appears now to be experiencing a relative drought in the number of prosecutions of serious competition law offences.

In 2006 and 2007, the ICA secured 17 successful convictions for price-fixing of heating oil in the west of Ireland. In 2008 and 2009, 14 successful convictions were secured for price-fixing by Citroën car dealers. But, since then, two cases brought by the DPP – the agency charged with the prosecution of serious indictable offences following investigation by the ICA – have resulted in jury verdicts of not guilty and, to the surprise of many, award of defendant trial costs against the state.

The latest Annual Report from the ICA reveals that the last cartel investigation completed and sent to the DPP for prosecution, recommending prosecution on indictment, was in 2010. According to the Annual Report, '[t]his case remains under consideration by the DPP'. No further explanation or indication of likely prosecution timeframe is given. Under Irish prosecution rules, the DPP has the final say over whether to bring a prosecution on indictment following investigation and referral of the file by the ICA. The DPP does not give reasons for its decision whether or not to prosecute. For the time being, therefore, it remains unclear whether recent experience (including the award of trial costs against the DPP in recent cases) may have increased DPP reluctance to prosecute cartel cases.

In all events, the ICA remains firmly committed to investigating criminal cartels. According to its Annual Report, new resources expected to be in place in 2013, following EU/IMF Troika demands that Irish competition law enforcement be bolstered, should allow the agency to investigate and refer for prosecution two full cartel cases per year (up from one which the agency says it can typically process with current staffing levels).

Meanwhile, after more than a decade of operation, the Annual Report reveals that a revised Irish Cartel Immunity Programme is to be put in place this year. Under the existing programme, it is understood that around 20 immunity applications have been made since adoption in 2001. With a view to encouraging applications and enhancing cartel detection rates, the Annual Report states that a revised cartel immunity programme is expected to be published in 2013 (bringing the programme more into line with the European Competition Network Model Leniency Programme).

Separately, the Annual Report states that the ICA will publish much anticipated revisions to its merger guidelines for public consultation in the first half of 2013. The ICA has been working on updating its existing merger guidelines, which date from December 2002 and which provide guidance on how the ICA applies the 'substantially lessening of competition' standard, for a number of years now.

The Annual Report also provides upbeat agency reflection on rule changes adopted last year in the Competition (Amendment) Act 2012 (whereby, again on instigation of the EU/IMF Troika, penalties for criminal cartels were increased to ten years imprisonment, and a procedure to make ICA settlement decrees legally binding on the parties involved, was introduced). According to the Annual Report, this legislation has already yielded positive change. On 18 December 2012, the ICA welcomed the first ever order on the legal enforceability of an ICA settlement decree. The settlement concerned commitments given by a footwear manufacturer to refrain from resale price maintenance practices.

Finally, the Annual Report notes that legislation is expected to be published in 2013 that will see the amalgamation of the ICA and the National Consumer Agency. The amalgamated agencies will operate on the basis of a dual mandate to protect consumers and enforce competition law in Ireland.

ISRAEL

Antitrust Commissioner intends to declare babies' food compounds market as a concentration group

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Hearing letters were sent recently to all four competitors supplying babies' food compounds before the Commissioner's final decision

By the end of February 2013, the Israeli Antitrust Commissioner announced that he had sent all four local competitors supplying babies' food compounds ('BFC') – Materna Holdings Ltd, Promedico Ltd, Medici Medical Ltd and Teva Pharmaceutical Industries Ltd – letters inviting them to be heard before he decides whether to declare all of them as a concentration group in the BFC market. Subject to the hearing procedure, it will be the first time the Commissioner will use his new authority to declare a concentration group as a result of an amendment to the Israeli Antitrust Law in force from July 2011.

The hearing shall also include the measures that the Commissioner intends to instruct the parties that they should take in order to avoid significant harm to competition and the public of customers; these are as follows:

- prohibition of exclusivity in providing BFC to hospitals;
- duty to ensure that every parent in the hospital will have the possibility to choose from at least two kinds of BFC from different producers or resellers;
- prohibition on a BFC supplier to be party to an agreement for the supply of BFC to a hospital for a term longer than two years; and
- a company will be allowed to supply BFC to hospitals subject that the aggregate birth rates in them shall not exceed 70 per cent from the total births registered in Israel.

According to the Commissioner's announcement, the BFC resale and supply market in Israel is characterised by low competition, inter alia, because it is hard for new companies to enter and expand in the market and because of the high loyalty to the products by the customers.

A major difficulty that new companies meet as they try to enter and to expand in the Israeli BFC market, which was raised by the

hearing letters sent to the companies, is the limitations on the access of new BFC suppliers to the labour departments in the hospitals. The Israeli Antitrust Authority's research found that parents of babies fed with BFC prefer, usually, to purchase the BFC brand that they used in the hospital after the birth, even if there are other cheaper substitutes. Therefore, the supply of BFC to hospitals by all BFC suppliers, and the ability of parents to choose between several BFC suppliers at the hospital, is very important in order to avoid significant harm to competition in this market and to avoid harm to the public and customers purchasing BFC, said the Commissioner in his announcement.

It should be noted that according to Article 31B(a) of the Law, as amended in this regard, the Commissioner is authorised to declare that 'a limited group of persons handling business, holding together more than a half of the total supply of assets or of the provision of services, or their purchase, is a concentration group, and that every one of those persons is a member of the concentration group', in certain circumstances. The history of the Law amendment shows that it was legislated in order to add as a complimentary tool given in order to handle a different economic situation from the classic monopoly (one person or entity holding market share higher than 50 per cent).

It is interesting to know that according to the public market estimations, two of the competitors in the BFC market (Medici and Teva) have a negligible market share and the others have 56 per cent (Materna) and 42 per cent (ProMedico) market shares, approximately. Even though normally the Commissioner could, and maybe should, declare Materna as a monopoly in the BFC market or declare only Materna and ProMedico (holding together around 98 per cent of the market) as a concentration group, he has preferred to use his new authority to include also the two minor competitors in his intended declaration and the further measures as published.

ITALY

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Recent developments

Main developments in the plant protection products and pharmaceutical sectors

The Consiglio di Stato quashes the Tar Lazio's ruling and confirms the Italian Antitrust Authority's (IAA) decision on abuse of dominance by Bayer Cropscience AG and Bayer Cropscience Srl

On the 29 January 2013, the *Consiglio di Stato* (the Italian Supreme Administrative Court) overruled the *Tar Lazio*'s (the Administrative Court of Latium) judgment, rendered in May 2012 in the context of the *Bayer case*, confirming the IAA's decision of June 2011, which had imposed a fine of more than €5m on Bayer Cropscience AG and Bayer Cropscience Srl ('Bayer') for an abuse of dominance carried out by the same in the *fosetyl*-based plant protection products market.

In particular, according to the IAA, Bayer had abused the dominant position it held in the relevant market at stake by refusing its competitors access to its own studies on vertebrates concerning the active substance *fosetyl*, which were necessary to re-register final products containing that active substance in Italy, with the aim of excluding its competitors from the market (as actually happened, since the Italian Ministry of Health withdrew Bayer competitors' product authorisations). According to the IAA, Bayer's studies on vertebrates had to be considered as an 'essential facility' since access to the same was necessary to operate in the *fosetyl*-based products market. Moreover, in the IAA's view, these studies could not be duplicated due to the de facto prohibition provided by Directive 91/414/CEE (regulating the placing on the market of plant protection products when Bayer put in place its exclusionary strategy).

Subsequently, the *Tar Lazio* quashed the IAA's decision, denying the non-duplicability of Bayer's studies on vertebrates (and, consequently, their qualification as essential facility), in consideration of the lack of an explicit prohibition to duplicate these studies in the regulatory framework then in force (ie, in Directive 91/414/CEE).

By its recent ruling, the *Consiglio di Stato* not only confirmed the exclusionary and abusive

nature of the strategy carried out by Bayer against its competitors, but it also reaffirmed the essential facility nature of Bayer's studies on vertebrates, fully upholding the IAA's position on this point.

In this respect, the *Consiglio di Stato* firstly reaffirmed that Directive 91/414/CEE provided for a de facto prohibition to duplicate studies on vertebrates, although 'only' encouraging undertakings to collaborate in order to reduce or minimise duplication of these studies.

In consideration of this de facto prohibition and the resulting lack of alternative options for undertakings seeking access to studies on vertebrates in order to obtain authorisations of their products (and to remain on the market), the Italian Supreme Administrative Court held that the data owner has to grant access to its own studies on vertebrates to competitors requesting it. According to the *Consiglio di Stato,* this obligation complies not only with fundamental principles of civility, but also with the safeguard of competition, ensuring that all operators acting in the relevant market can benefit from the same essential input. Moreover, in this case, the respect of such obligation by data owners prevails on possible conflicting interests, such as IP rights.

Consequently, the Supreme Administrative Court held that EU law obliges data owners to engage in negotiations with undertakings, requesting access to their own non-duplicable studies and that, should this obligation fail to be fulfilled due to obstructive behaviour of data owners, the IAA can intervene to assess the anti-competitive impact of this conduct and sanction the responsible undertaking.

The *Tar Lazio* quashes the IAA's decision on abuse of dominance by Pfizer

In September 2012, the *TAR Lazio* annulled a €10.6m fine imposed by the IAA on the pharmaceutical company Pfizer for allegedly excluding generic drug makers from the market.

The IAA had fined Pfizer in January 2012, stating that the company had abused its dominant position by artificially extending the patent protection of its anti-glaucoma drug, Xalatan, and keeping generic rivals out of the market in breach of Article 102 TFUE (see *IBA Antitrust News*, April 2012).

During the antitrust procedure, Pfizer had offered commitments aimed, in Pfizer's view, at eliminating the anti-competitive effects of the alleged abusive conduct under the IAA's scrutiny, in order to try to close the investigation but the IAA had rejected Pfizer's proposal.

The *TAR Lazio* overturned the IAA's decision, accepting Pfizer's claims concerning the following two main points.

- On the one hand, the *Tar Lazio* criticised the IAA's decision to reject the commitments proposed by Pfizer, stating that it was 'logically and procedurally' incorrect. Indeed, contrary to what was maintained by the IAA, the *Tar Lazio* stated that the proposed commitments were able to remedy the IAA's concerns about the anti-competitive effects allegedly deriving from Pfizer's conduct and were likely to diminish 'the legal uncertainty' on the generic drug manufacturers' rights created by Pfizer's strategy.
- On the other hand, the *Tar Lazio* stated that the IAA had not succeeded in proving that Pfizer's patent filings were aimed at excluding generic competitors from the market. In particular, the administrative judges affirmed that in order to qualify as abusive the exercise by a dominant undertaking of rights and actions provided by law, the IAA cannot limit itself to consider the undertaking's conduct in itself, but it must demonstrate the existence of a *quid pluris*, that is, of a clear exclusionary intent of the dominant undertaking.

Extension of the IAA's competence: legality rating

On 14 November 2012, the IAA approved the implementing regulation of Article 5 *ter* of the Decree Law No 1 of 24 January 2012 ('Regulation') which sets forth criteria and methods for the attribution of points, representative of the so-called 'legality rating' for undertakings.

Essentially, the rating constitutes a sort of 'mark' which the IAA, following an assessment, will render to 'compliant' undertakings, that is, undertakings which abide by the principles set forth under the Regulation and which confers addresses to which this legality rating is attributed, with an 'official' title to facilitated access to credit**.**

Through the introduction of the legality rating, the legislator intended to put in place an instrument that may constitute both a deterrent for undertakings to engage in unlawful conduct, as well as a strong incentive to adopt ethical and correct behaviour not

only vis-à-vis other undertakings, but also in relation to consumers and the state.

The inspiring principle of this instrument may be said to derive from the intent to encourage undertakings to act in conformity with the law and in accordance with professional fairness on the market, rewarding those which refrain from unlawful conduct and which actively participate in the compliance of the rules, reporting violations of the latter to the judicial authorities or the police.

The legality rating may be requested by undertakings which: (i) operate in Italy; (ii) have attained a minimum turnover of €2bn in the preceding business year; and (iii) have been in the registry of companies for at least two years.

In order to obtain the legality rating, an undertaking needs to fill a specific form signed by its legal representative and present it to the IAA. This request includes a series of declarations made by the requesting company to evidence that the latter satisfies the requirements set forth in the Regulation. Said declarations will be verified by the IAA to attest the lawfulness of the conduct adopted by the requesting undertaking. In this respect, the IAA will consider, for instance, the fact that an undertaking has not been found guilty of tax crimes or crimes against the public administration or mafia crimes, or has been found guilty of a serious violation of antitrust law by the IAA or the European Commission.

If the prescribed requirements are fulfilled, the IAA will grant the legality rating to the requesting undertaking, attributing to the same from a minimum of one 'star' (if the minimum requisites of the Regulation are satisfied) to a maximum of three 'stars' (if the undertaking fulfills the additional requisites provided by the Regulation). Undertakings with legality rating will be inserted in a list, which will be published in a specific section of the IAA website.

The legality rating has a duration of two years from its release and is renewable on request. The IAA might decide to suspend or revoke a legality rating upon loss of one of the requisites or if the rating has been granted on the basis of declarations which were subsequently found to be false.

Consumer protection

In December 2012, the IAA fined Apple €200,000 in addition to the initial €900,000 fine (see *IBA Antitrust News*, April 2012) for failing to comply, from 28 March 2012 to 10 November 2012, with Italian provisions concerning the application of the 'legal guarantee of conformity and commercial guarantees for consumer goods' on the basis of Articles 128–135 of the Consumer Code.

By this non-compliance decision, the IAA assured that Apple is no longer confusing Italian consumers on their rights.

Moreover, the IAA in collaboration with the *Guardia di Finanza* (ie, the Italian Tax Police) has taken several measures to regulate e-commerce.

The IAA, adopting a precautionary measure, blocked websites in relation to which it had received several complaints by consumers. In one case, the IAA blocked the access to a website that allowed Italian consumers to buy drugs without prescription online and imposed a fine of €200,000 on the website owner.

Other interesting decisions relate to fashion websites: the websites Private outlet Srl and Private Outlet SaS, after the adoption of a precautionary measure, were fined €240,000 for unfair competition practices as they gave consumers wrong information about the purchase and the delivery of the products sold on their websites.

Finally, it is worthy of note the order given by the IAA to close, in the period of two days since the communication was given, two websites based in China (**www.guccioutlet-italy.org** and **www.pradaborselinea.com**) offering counterfeited goods branded Gucci and Prada at low prices.

In addition to these cases above where the IAA always decided to sanction the concerned undertaking by imposing fines, the IAA also resorted to the commitments procedure which, as in the antitrust field, grants undertakings suspected of breaching the Consumer Code the possibility to propose remedial measures that, if accepted by the IAA and made binding, allow the IAA to close the investigation without ascertaining the infringement and imposing fines.

In this respect, last December the IAA accepted and made binding the commitments proposed by Groupalia and Liu Travel, operating in the field of travel and tourism, at the end of a procedure initiated to verify the existence of unfair commercial practices. Moreover, thanks to the implementation of these commitments, consumers will now find clear and comprehensive information about business offers and discounts will be advertised only when real.

The importance given by the Italian legal system to consumer protection is also proven by the fact the Italian legislator has recently increased the maximum fine the IAA can impose for breaches of the Consumer Code. Indeed, according to Decree Law No 95 of 6 July 2012 (the so-called 'Spending Review'), the IAA may now impose a fine up to €5m on undertakings which are held liable for unfair commercial practices (before, the maximum fine was €500,000).

Updates from Japan

JAPAN

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Twelve Japanese employees arrested by the US DOJ

On 25 March 2013, Asahi Newspaper reported that 12 employees of the Japanese automobile parts manufacturers Yazaki Sogyo, Koga Denko, Denso and one undisclosed company were arrested by the Department of Justice ('DOJ') of the United States for their participation in a price-fixing cartel. They pleaded guilty and face one to two years in prison. In Japan, no individual has served a prison sentence in connection with a price-fixing cartel to date. This arrest by the DOJ of the employees comes hot on the heels of a price-fixing case brought against several Japanese auto-parts manufacturers, including the above companies, in 2012 (see my report in the April 2012 edition of the *IBA Antitrust News*).

Consumption tax and AML

The Japanese government will raise the consumption tax rate from five per cent to eight per cent in April 2014 and to ten per cent in 2015. In this connection, the government decided to permit a price cartel among small- and medium-sized companies to add the increased amount of the consumption tax to their retail prices for three years. Thus, such a price cartel would not constitute a violation of the Anti-monopoly Law ('AML'). In addition, the Japan Fair Trade Commission ('JFTC') on 27 March 2013 decided to start an investigation into the alleged abuse of the dominant position of large scale retailers, such as home electrical appliance retailers and suppliers, in order to detect their illegal conduct at an early stage.

Price-fixing by axle bearing manufacturers

The JFTC investigated several companies, including Nippon Seiko KK, NTN Corporation, Nachi-Fujikoshi Corp and JTEKT Corporation for an alleged violation of the AML for price-fixing. On 29 March 2013, the JFTC ordered them to pay a surcharge of approximately ¥13,370m in total and issued a cease and desist order against them.

Merger control: a regional dimension

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The COMESA Competition Commission ('Commission') has announced that it is commencing operations. Parts 3, 4 and 5 of the COMESA Competition Regulations, 2004 ('Regulations') take effect from 14 January 2013 and will likely result in fundamental changes to the regulation of anti-competitive business practice, consumer protection and M&A in the region. This note focuses on the impact of the Regulations on regional M&A in particular.

Test

Under the Regulations, 'mergers', defined essentially as the direct or indirect acquisition of control of the whole or part of a business of a competitor, supplier, customer or other person, must be approved by the Commission if:

- both the acquiring firm and target firm or either the acquiring firm or target firm operate in two or more Member States;[1] and
- the threshold of combined annual turnover or assets in the region is exceeded. At present, a threshold of zero dollars is prescribed.[2]

The fact is that so long as merger transactions have a regional dimension in the context of the above (and it is unclear as to what 'operate in two or more Member States' means in this regard), such transactions will be subject to specific regulation in the common market irrespective of their overall size, turnover and impact on competition. Unfortunately, there is presently no indication of any change to this position.

It should also be noted that the Commission has broad powers to require 'non-notifiable mergers' to be notified – if these are considered likely to substantially prevent or lessen competition or likely to be contrary to the public interest. Various factors/market dynamics are taken into account by the Commission in determining this. On the face of it, the basis for assessment of non-notifiable mergers does not appear to be arbitrary.

Process and consequences

The Commission must be notified of the proposed merger by affected parties[3] no later than 30 days following the 'decision to merge'. Whilst there is no specific guidance on the interpretation of this phrase, we would expect a legally binding agreement for sale to be sufficient for this purpose (although this view is unsubstantiated).

Notifications to the Commission must be made in prescribed form and are subject to prescribed fees (which is a material departure from current policy). The applicable provisions state notification of a notifiable merger shall be accompanied by a fee calculated at 0.5 pre cent or US$500,000, or the combined annual turnover or combined value of assets in the common market, whichever is higher.

The provisions are ambiguous. We have, however, very recently sought for clarification on exactly how the fees are computed and have been informed by the Commission that merging parties shall be required to pay 0.5 per cent of their combined turnover or assets in the common market, whichever is higher. The maximum fee payable is US$500,000.

The Commission is required to make a decision on the notification within 120 days, although this period may be extended at discretion. Aggrieved parties may appeal to the Board of Commissioners.

Sanctions for non compliance are just as draconian as existing national antitrust laws. In addition to severe financial and imprisonment penalties, mergers carried out in the absence of the requisite approval under the Regulations are declared not to have any legal effect and obligations imposed under any underlying legal agreement are unenforceable. The Commission may also impose a fine not exceeding ten per cent of either or both of the merging parties' annual turnovers in the common market.[4]

Potential concerns and comments

The interaction between national and other regional competition policy and laws and the Regulations is not clear. From a Kenyan standpoint, there are potentially conflicting provisions between the Regulations and the Kenyan Competition Act ('Competition Act') over jurisdiction. Whilst both sets of legislation apply to Kenya,[5] each purports to exercise some level of primary jurisdiction over M&A in the region. Article 3(2) of the Regulations for instance suggests that the Regulations have primary jurisdiction over an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) with respect to anti-competitive trade practices and mergers and acquisitions. In a similar vein, the Competition Act states that it prevails in circumstances of conflict between the Act and the provisions of any other written law with regard to matters concerning competition.[6]

In the context of regional M&A, we note that the Commission has expressed the view that a merger notification to the Commission does not require an additional notification at the domestic level. This raises a number of questions from a Kenyan perspective, in particular:

- Do the Regulations override the provisions of the Competition Act as a matter of Kenyan law?

- On the basis that there is insufficient clarity on the first point, is there a need to make a concurrent merger filing in Kenya (assuming transactions are affected by the Competition Act)?

The first question is not easily answered. Whilst treaties, upon ratification by Kenya, are given the force of law by the Kenyan Constitution,[7] we are aware of at least one High Court decision which confirms that international conventions and treaties are not superior to national legislation.[8] It remains open to debate as to whether the Regulations are capable of overriding the Competition Act in circumstances of conflict or overlap. There is some suggestion that the more recently enacted law should prevail in these circumstances.[9]

The current position taken by the Kenyan Competition Authority, based on guidance from the Attorney-General, is that the Regulations will not be recognised by Kenya until:

- the Regulations (and the commencement of these) are properly published in the *Official Gazette of the Common Market*; and
- the Kenyan Competition Authority is engaged to develop and operationalise these (the Commission has been made aware of this position).

Assuming that the Regulations and commencement date are properly published, there is still some doubt over the conflict question. The stance of the Kenyan Competition Authority raises significant doubts and it is, accordingly, difficult to give a definitive view on the second question at this time. It is possible that merger transactions which fall within the ambit of the Regulations and the Competition Act must comply with both regimes and that it is therefore necessary for concurrent merger filings to be made. Even if this is the correct position, there are still a number of uncertainties. It is not clear for instance what happens if, in the event a double filing is made, one filing fails and the other is successful? It is also not apparent exactly when transactions can be implemented under this scenario.

The uncertainty as to whether a notification with the COMESA Competition Commission is required where applications for merger approvals have already been submitted to one or more domestic competition authority appears to have been clarified. We are informed by the Commission that if a decision to merge was made before the commencement of its operations (14 January 2013) and affected parties have already notified domestic regulators, it will not be appropriate for a further notification to be made to the Commission. Similarly, in instances where merger approvals have already been granted by one or more domestic competition authority but completion of the transaction has not yet taken place, we are advised that the intervention of the Commission will also not be necessary.

The absence of material thresholds and the very broad scope of merger control under the Regulations will likely cause major problems for all regional M&A. It is hoped that a carefully considered range of excluded transactions will be prescribed.

The impact of The East African Community Competition Act, 2006 (and accompanying regulations, 2010) remains to be explored. These laws are not yet operational and their impact on the COMESA and other national antitrust regimes is not known. Efforts to harmonise the various antitrust frameworks to avoid unnecessary expense and over-regulation will no doubt be welcome.

Notes

1 Current Member States are: Burundi, the Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, the Sudan, Swaziland, Uganda, Zambia and Zimbabwe. It should be noted that South Africa and Tanzania are not members.

2 Rule 4 of the Rules on the Determination of Merger Notification Thresholds.

3 In the case of hostile takeover/bid, the notification is made by the acquirer only.

4 Article 24(4) of the Regulations.

5 The Regulations apply by virtue of the COMESA Treaty which has been ratified by Kenya (on 8 December 1994). The Competition Act was passed into law in August 2011.

6 Section 5(2), the Competition Act.

7 Section 2, the Constitution of Kenya.

8 *Beatrice Wanjiku & Another v the Attorney-General & Another* [2012] EKLR.

9 Statutory Interpretation (Bennion); *Kenya Bankers Association & Others v Minister for Finance & Another* [2002] 1 KLR.

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Recent competition law developments in Malaysia

Introduction

Since the coming into force of the Malaysian Competition Act 2010 ('MCA') on 1 January 2012, there have been a number of important developments.

Nestle Malaysia withdraws exemption application

Nestle Sdn Bhd ('Nestle') was an early applicant for an individual exemption under the MCA in January of 2012. Nestle's application, along with several block exemption applications, was well publicised in early to mid 2012.

On 21 May 2012, it was reported that the Federation of Malaysian Consumer Associations ('FOMCA') had filed a complaint to the Malaysian Competition Commission ('MyCC') against Nestle for allegedly fixing the prices of its products. FOMCA claimed that retailers were restricted from selling Nestle's products at a lower price and that retailers who failed to adhere to the pricing would have to face repercussions.[1]

It was recently reported that, after a series of discussions with the MyCC, Nestle has withdrawn its application for an individual exemption. Nestle had sought an individual exemption to exclude its pricing policy which was described as the Brand Equity Protection Policy ('BEPP') from the MCA.[2]

In a press release on 25 February 2013, the MyCC stated that 'while the MyCC recognises the rights of Nestle to promote and enhance its brand equity under the BEPP, the pricing policy as contained in the BEPP was likely to infringe section 4(1) of the CA 2010 as it essentially constitutes a resale price maintenance. … In this regard, we have requested Nestle to dismantle its pricing policy contained in the BEPP.'[3] This reflects the MyCC's view that RPM arrangements may not be justified by brand equity arguments alone. This is a useful barometer for Malaysian enterprises, which may have previously considered the brand equity argument as offering some relief from the section 4 MCA prohibitions against anti-competitive agreements, in light of Nestle's much publicised application for an individual exemption.

However, in a statement issued by Nestle, it was suggested that Nestle may not have given up on its argument on the BEPP, as it was reported that 'perhaps MyCC may not be the appropriate forum to address the issues relating to loss leading selling and that these should be addressed by other organisations or government and more appropriately by the Domestic Trade, Co-operatives and Consumerism Ministry.'[4]Nestle appears to be confining its argument to 'loss leading selling' as the underlying reason why it is pursuing the matter before the 'appropriate forum'.

Nestle could be seeking a ministerial exclusion under section 13 of, and the second schedule to, the MCA. These provisions allow the minister to gazette exclusions from the MCA prohibitions, though this power has yet to be used in favour of an individual applicant. If the minister agrees to gazette a general exclusion for brand equity cases or to exclude RPM generally, such a move would likely be viewed as a setback to the MyCC's enforcement efforts, particularly as MyCC has clearly stated that it would take a 'strong stance against minimum RPM' (see the MyCC's *Guidelines on Anti-Competitive Agreements*). However, no additional information is available at this time on any specific steps having been taken by Nestle Malaysia.

Key points from Final Guidelines on Chapter 2 Prohibitions (Abuse of Dominant Position)

The *Guidelines on Chapter 2 Prohibitions* were finalised and issued on 26 July 2012. There were not many changes made to the draft guidelines which had been issued some time before that. The final guidelines confirm the MyCC's view that a market share of above 60 per cent will be indicative of a dominant position.[5]

In assessing the likelihood of an abuse of dominance, the MyCC would determine from an economic perspective whether the enterprise is engaged in 'exploitative conduct' or 'exclusionary conduct'. Amongst

the considerations to be taken into account by the MyCC in assessing dominance are market shares, degree of product differentiation, likely response to buyers, etc.

MyCC has also provided a non-exhaustive list of examples of the defence of 'reasonable commercial justification' in the final guidelines.

Review of domestic broiler market – interim report

The market review of the domestic broiler market undertaken by the MyCC in late 2012 was the first of its kind under the MCA. This review focused on the current structure of the market; the interactions of broiler enterprises and suppliers at the ex farm, wholesale and retail levels; and other matters of relevance.[6] For the purposes of this review, 'broiler' refers to chickens that are reared for commercial meat production.[7] The MyCC observed that due to severe market competition, the number of farm companies in Malaysia is gradually decreasing while the capacity is getting bigger.[8]

The MyCC considers Malaysia to be a large consumer of broilers for cultural and religious reasons. The price of poultry is regulated by the Ministry of Domestic Trade, Cooperatives and Consumerism ('MDTCC'). Although the 'ceiling price' of poultry was removed in June 2008, broilers are still gazetted as 'controlled items' under the Control of Supplies Act 1961 and made subject to 'permitted maximum' prices during specific festive seasons every year.[9] In the MyCC's Interim Report issued on 21 December 2012, the MyCC stated that this may 'weaken retailers' competition with one another, as well as create market distortions and a lack of transparency in the commercial relationships between wholesalers and retailers.'[10] There have been public complaints with what appears to be an inclining trend in the retail prices of poultry charged by sellers in 'wet markets'. One of the purposes of this review was for the MyCC to investigate and obtain feedback from poultry farm owners on whether the increase in poultry prices along the broiler supply chain is proportionate with the increase in production costs.

The MyCC also took note of mergers and acquisitions within the poultry industry, which could potentially lead to an increase in market power. Although merger control is not regulated in Malaysia, the MyCC may still examine the effect of any merger to see if it could lead to anti-competitive conduct.

Amongst the vertical issues which the MyCC considered were agreements which touch upon resale price maintenance, purchasing agreements, exclusive supply agreements, single branding and private label products.

Recently, it was reported that the MyCC had concluded that there was no anti-competitive behaviour within the broiler market but that this could be due to a lack of data and information needed to adequately complete the review.[11] The MyCC further expressed its concern that it may require a common database of all registered farming establishments to reach a proper conclusion on this matter.

Culling of layer hens

On 1 November 2012, the MyCC issued a press statement that it would look into the chicken layer industry which had reportedly culled five million hens to reduce production costs.[12] The MyCC decided to look into this matter following an announcement by the layer unit chairman of the Federation of Livestock Farmers Association of Malaysia ('FLFAM') who said that farmers typically cull approximately ten per cent of the older layer hens to accommodate younger and more productive hens and claimed that this decision was driven by the intention to reduce production costs.

A flowery mess

On 23 July 2012, the MyCC announced that it was investigating the Cameron Highlands Floriculturist Association ('CHFA') for allegedly fixing the price of flowers sold to distributors and wholesalers in Malaysia.[13] The MyCC took notice of an announcement that the members of the association had agreed to increase the prices of flowers by ten per cent. The CHFA consists of more than 100 members 'who produce approximately 90 per cent or more of the total temperature cut flowers produced locally'.[14] On 6 December 2012, the MyCC issued its decision against the CHFA under section 36 MCA to take the following remedial actions:

- CHFA shall cease and desist from the infringing act of fixing the prices of flowers;
- CHFA shall provide an undertaking that its members shall refrain from any anti-competitive practices; and
- CHFA shall issue a public statement on the remedial actions to be taken in regard to the above in the mainstream newspapers.

This demonstrates that the MyCC is prepared to act on its own initiative, as the investigation was triggered by media reports alone. There was no indication of any complaints being lodged against the CHFA. It is thought that the MyCC was moved not to impose any fines upon the CHFA and its members as the members are mostly farmers and small business owners. Moreover, this was the first decision made by the MyCC under the MCA in such a case.

Too much information sharing?

It was reported via a press release from the MyCC dated 11 July 2012 that the MyCC had advised the Malaysian Automotive Association ('MAA') on the competition law risks of information sharing. The MAA had been disseminating information and data on vehicle sales and the production of different car manufacturers in Malaysia to its members and the public.

The MyCC took the view that such information 'could facilitate members to plan their marketing strategy by allocating territories or adjusting their production. This indirectly has the consequence of discouraging members from competing fairly and more effectively against each other'.[15] The MAA was directed by the MyCC to take reasonable measures to reduce the risk of infringing the MCA by collecting only historical information and disseminating only aggregated information.

It was reported that Mercedes-Benz Malaysia, BMW Malaysia and UMW Toyota Malaysia have ceased providing information to the MAA.[16]

Steel probe by the MyCC

On 6 November 2012, it was reported that the MyCC had commenced an investigation into the domestic steel industry.[17] An officer from the MyCC revealed that the investigation was prompted by complaints from industry players against alleged anti-competitive practices in the domestic steel industry. The complaints alleged, amongst other things, the fixing of unfair prices.[18]

The complaint was reported to have been made by Melewar Industrial Group Bhd ('MIG') and Mycron Steel Bhd against Megasteel Sdn Bhd.[19] The MyCC has indicated that it was still in the information-gathering process and that it will obtain feedback from industry players and policy-makers before taking any further steps.

Exemption applications

The MyCC has a number of exemption applications pending. Amongst the applicants for block exemptions are the Life Insurance Association of Malaysia, Association of Malaysian Hauliers and a joint application by the Malaysia Shipowners Association, Shipping Association of Malaysia and Federation of Malaysia Port Operators Council. The only applicant for an individual exemption is Nestle Sdn Bhd[20] but this has been withdrawn (see above).

On 26 April 2012, it was reported that the fee imposed on each exemption application would be RM 50,000[21] and a fee would be charged for each year that the applicant is exempted from the MCA. Individual exemptions would be charged RM 10,000 per year whereas block exemptions would be charged RM 20,000 per year.[22]

The MyCC has proposed to exempt liner-shipping agreements made within Malaysia or which have an effect on the liner shipping services in Malaysia under section 8[23] of the MCA[24] for a proposed duration of three years. In a statement issued on 14 February 2013, the MyCC said that 'any attempt to raise prices pursuant to a liner shipping agreement will be viewed unfavourably by MyCC and may be taken as evidence of an infringement of section 10 of the Act.'[25]

The proposed block exemption order excludes inland carriage of goods and warehousing of goods.[26] The MyCC is about to conclude public consultations, which are required under the MCA, before any proposed exemption can be issued.

Notes

1 'FOMCA Files Complaint to MyCC Against Nestle', *NTV7 News*, 21 May 2012: **www.ntv7.com.my/7edition/local-en/FOMCA_FILES_COMPLAINT_TO_MYCC_AGAINST_NESTLE.html**.

2 'Nestle Withdraws MyCC Exemption Application', *The Malay Mail*, 25 February 2013: **www.mmail.com.my/story/nestle-withdraws-mycc-exemption-application-48789**.

3 Press Release by MyCC on 25 February 2013 – Nestle Withdraws Exemption Application: **www.mycc.gov.my/more-details.asp?page=25feb2013**.

4 'Nestle to Take Up Pricing Policy Issue with Ministry', *FMT News*, 26 February 2013: **www.freemalaysiatoday.com/category/business/2013/02/26/nestle-to-take-up-pricing-policy-issue-with-ministry/**.

5 Section 2 MCA: 'dominant position means a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors'.

6 Executive Summary of Review of Domestic Broiler Market.

7 Review of Domestic Broiler Market – Issues Paper.

8 Federation of Lifestock Farmers' Association of Malaysia, The Poultry Industry: **www.flfam.org.my/main.php?section=industry&page=industry_poultry_broiler**.
9 Background of Review of Domestic Broiler Market.
10 See note 7 above.
11 Press Release by the MyCC on 8 February 2013, 'Further Research Needed on Domestic Broiler Market': **http://mycc.gov.my/more-details.asp?page=08feb2013**.
12 Press Release by the MyCC on 1 November 2012, 'Culling of Chicken Could be Anti-Competitive': **www.mycc.gov.my/more-details.asp?page=01Nov2012**.
13 Press Release by the MyCC on 23 July 2012, 'MyCC Investigates Association for Price Fixing': **www.mycc.gov.my/more-details.asp?page=23Jul2012**.
14 *Ibid.*
15 Press Release by the MyCC on 11 July 2012, 'Information Sharing under Competition Law': **http://mycc.gov.my/more-details.asp?page=11Jul2012**.
16 See: **www.cbt.com.my/2012/07/20/june-2012-sales/**.
17 'Steel Probe Will Take Months', *The Star Online*, 6 November 2012: **http://biz.thestar.com.my/news/story.asp?file=/2012/11/6/business/12275581&sec=business**.
18 'MyCC Probes Steel Industry', *The Edge*, 18 October 2012: **www.theedgemalaysia.com/business-news/223255-mycc-probes-steel-industry.html**.
19 *Ibid.*
20 Press Release by the MyCC on 22 May 2012, 'Exemption Applications Are Under Assessment': **www.mycc.gov.my/more-details.asp?page=22May2012**.
21 'Four Parties Apply for Exemption from Competition Act', *The Star Online*, 26 April 2012: **http://biz.thestar.com.my/news/story.asp?file=/2012/4/26/business/11176730&sec=business**.
22 *Ibid.*
23 Section 8(1) MCA: 'If agreements which fall within a particular category of agreements are, in the opinion of the Commission, likely to be agreements to which section 5 applies, the Commission may, by order published in the Gazette, grant an exemption to the particular category of agreements.'
24 Press Release from the MyCC dated 14 February 2013, 'MyCC Proposes Granting Block Exemption for Liner Shipping Agreements': **http://mycc.gov.my/more-details.asp?page=14feb2013**.
25 *Ibid.*
26 *Ibid.*

Complaints and undertakings

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Antitrust infringers are still free from fines and private action damages but the Mauritius Competition Commission ('CCM') has imposed undertakings. These can be offered as an alternative sanction by any potential target before, during and after CCM investigation. However, the CCM has yet to show its teeth as it strives to encourage a regime comparable to the European and US requirements. A step toward benefitting consumers is allowing complaints to be submitted by e-mail or post in a form with markedly less detail than the EU Commission's equivalent document. Anonymity is an option for such moans and we can only wait to see if this helps to attain the declared vision of being the leading regional NCA. Time will tell if the absence of any need to demonstrate a legitimate interest or detail when raising a potential issue will prompt solely low level reports.

Undertakings

The ability of a potential infringer or merger party to offer undertakings, at any time, a reduction or removal of potential fines or other sanctions has been formally adopted in Mauritius. Although common elsewhere, it is often not detailed in the applicable legislation. Information on undertakings offered and accepted to resolve a finding of an abuse of a dominant position and merger concerns are discussed below.

Broadband bundling

The two year investigation into Mauritius Telecom ('MT') found a monopoly in two product markets: residential broadband and pay-TV. Tying broadband and pay-TV was an abuse of MTs dominance in these markets, but strangely three year undertakings were accepted in lieu of alternative penalties. This contrasts sharply with recent EU Commission fines of:

- €127m against Poland's broadband monopolist Telekomunikacja Polska SA for restricting access to competing operators; and
- €79m for tacit non-competition in Portugal and Spain by Telefonica and Portugal Telecom.

MT must ensure there is a sufficient price differential between broadband only and when in a combined package. Additional obligations for the next three years include maintaining the quality of service and

ensuring all combination offers are replicated for pure broadband.

Insurance

Concerns that the merger of Swan and Rogers would substantially lessen competition in the Mauritius pensions and general insurance markets were answered with the following undertakings:

- continuation of the same type and class of products;
- work in a fair manner with all insurance brokers and consultants; and
- no change in approach to risk assessment and acceptance practices or lessening of accessibility to products and services.

Refraining from anti-competitive practices was added by Swan to their written promises, presumably to reinforce that they are aware of and comply with existing laws. Rogers agreed to an inflation limit on any fee or admin charge increases for all existing or future clients.

Health

No sanction has been imposed following an enquiry into the potential competition restriction in the private medical health insurance market. The CCM has simply put its existing ability to launch a further investigation in a press release.

Current investigations

The first detailed investigation of 2013 involves the merger of car dealers, Toyota and CFAO. It remains to be seen if bringing import and sale of major car brands including Chevrolet, Hyundai and Toyota under the sole control of one entity is deemed to lessen competition. The absence of a motor vehicle block exemption and guidelines may prompt detailed written undertakings or refusal to clear the pairing.

Conclusion

Including a process for concerns to be answered at any point in time with signed commitments is sensible. Hopefully recovering funds for failing to satisfy such will be quick and simple, allowing the CCM to emphasise that cooperation only works if it is mutual.

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Cartel criminalisation expected to pass into law in 2013

As noted in our previous updates, the Commerce (Cartels and Other Matters) Amendment Bill ('Bill') proposes a number of amendments to the Commerce Act 1986 ('Act'), including criminalising cartel conduct. Individuals guilty of cartel conduct could face up to seven years imprisonment. Along with introducing criminal sanctions for 'hardcore' cartel conduct, the Bill would:

- radically re-define the forms of illegal conduct to follow the OECD definition of 'hardcore' conduct – price fixing, restricting output, market allocating and bid rigging;
- introduce new exemptions, most notably a 'collaborative activities' exemption designed to take joint venture-type activity outside the scope of the prohibitions;
- introduce the option of seeking clearance for restrictive trade practices;
- expand the jurisdictional rules of the Act to align the cartel offence with the conspiracy rules under the Crimes Act 1961; and
- expand the 'attributing conduct' provisions of the Act which deem the conduct of one person to be the conduct of another up the chain of command.

Of greatest significance for businesses are the new exemptions and the 'collaborative activities' exemption in particular. The collaborative activities exemption is intended to be wider than the current 'joint venture' exemptions, which have been largely

untested. The New Zealand Commerce Commission ('NZCC') is expected to issue guidance on the 'collaborative activities' exemption and introduce an 'advocacy programme' under which it can be expected to raise awareness about the new cartel provisions and exemptions.

The Commerce Committee has yet to report back to parliament on the Bill, but as presently drafted it will not be possible to seek clearance for existing arrangements (as opposed to seeking clearance before entering into new arrangements). Nor are there (currently) any grandfathering provisions for existing arrangements. This raises the uncomfortable prospect of potential liability under the new prohibitions for giving effect to existing joint venture-type activities if the criteria for the new exemptions are not made out.

Under the amended Act, there would be parallel civil and criminal offences but the NZCC would need to choose which path it followed. However, the criminal sanctions will not come into force until two years after the Bill becomes law.

Planes, ships and exemptions

Last year, the Minister of Commerce recommended that the Commerce Committee, which is currently reviewing the Bill, consider removing the competition law exemptions that apply to international shipping and civil aviation.

The Commerce Committee is due to report on the Bill by 14 May 2013.

NZCC and Australian counterpart agree on cooperation

As noted in our December 2012 update, the Commerce (International Co-operation, and Fees) Amendment Act passed into law in October 2012. The Amendment Act provides for the NZCC to assist and exchange information with overseas regulators where the Minister of Commerce has entered into an applicable government-to-government or approved a regulator-to-regulator reciprocal cooperation agreement.

The NZCC and Australian Competition and Consumer Commission ('ACCC') signed a cooperation agreement on 27 February 2013. The agreement enables the NZCC to provide the ACCC with information it receives through its compulsory information gathering powers.

Other changes on the horizon

This year could also see other important changes. The NZCC is currently considering updating its Mergers and Acquisitions guidelines, which were published in 2003. The NZCC has indicated that draft guidelines will be released for public consultation in early 2013.

Finally, the NZCC has been interested in seeing section 36 of the Act (the misuse of market power provision) brought in line with Australia.

Proposed amendments to Polish Competition Law and its impact on business activity in Poland

POLAND

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Currently, business society and lawyers in Poland are concerned about the proposed legislation which would constitute the most significant change of Polish competition law since Poland's accession to the European Union.

In May 2012, the President of the Office of Competition and Consumer Protection (the 'OCCP') published the proposed amendments to the Act on Competition and Consumer Protection (the 'Competition Act') and at the end of November 2012 a draft of the bill was

prepared. The changes will be far-reaching and are likely to have a direct impact on business activity in Poland. The aim of the changes is to facilitate business activity (introducing a two-phase merger control procedure) and strengthen the enforcement powers of the competition authority, in particular through the implementation of the anti-monopoly liability of individuals, the modification of leniency, the introduction of leniency plus, as well as granting the OCCP the possibility of issuing public warnings concerning the behaviour of entrepreneurs' undertakings which threaten the interest of consumers.

Regulations facilitating business activity

The bill introduces a two-phase merger control in Poland. The first phase is intended for non-complicated mergers and should be completed within a month. The second phase, which is significantly longer as it can last up to four months, would be required for more difficult concentrations, that is, in the case of mergers which may significantly restrict competition on the market, or which require a detailed market analysis. It is within the sole competence of the OCCP to decide whether a second phase would be necessary and undertakings will not be entitled to challenge the OCCP's decision, once made.

Currently, the same procedural rules apply to all mergers. Under the Competition Act, merger review proceedings should last no longer than two months. However, the 'stop the clock' rule, under which the periods of the OCCP's requesting and waiting for additional documents or information are not included within the two month deadline, can cause significant delays. The OCCP's present practice in difficult merger cases shows that the parties often have to wait for a decision for up to six, or as long as nine, months on occasion.

The bill also specifies new exemptions from mandatory merger notification. For instance, the creation of a joint venture by entrepreneurs with a small turnover in Poland (not more than €10m in any of the two preceding years) will not be subject to merger control.

New institutions strengthening the powers of the authority

One of the most controversial changes is the introduction of the liability of individuals who perform managerial functions or are members of the management bodies in companies. These individuals may be subject to liability if they, even unintentionally through their actions or omissions (including omissions in supervision), allowed for an infringement of a prohibition of an anti-competitive agreement. If the OCCP fines a company for an anti-competitive agreement it will also have the right to impose a fine up to €500,000 on individuals. Technically, the fines for individuals and for the company will be imposed during the same proceedings within a single decision.

First of all, it seems that the scope of 'employees performing managerial functions' is very broad. Under this broad scope, it appears that not only are top management from the management board included, but also other company employees such as sales directors or regional sales directors. It is not possible to establish a defined list of positions within a company that may be subject to liability since, to a large extent, this will depend on the range of duties of any particular manager.

Under the current version of the bill, it is possible to fine not only those directors who were directly engaged in a cartel, but also other directors who did not properly supervise their employees. To find an infringement it is enough for the OCCP to prove that a wrongdoing is, at the least, unintentional. It is worth noting that former employees can also be subject to anti-monopoly liability.

Managers and individuals performing managerial functions can be fined not only for horizontal cartels, but also for illegal vertical agreements. The bill provides a very broad list of the typical agreements which may trigger an anti-monopoly liability of individuals since it covers: price fixing (including resale price maintenance), limiting or controlling production, market, technical development, market sharing, applying dissimilar conditions to equivalent transactions, tying transactions, and hindering access to the market (for example, exclusivity clauses). The list is not limited to severe hardcore restrictions but can also encompass agreements which can be qualified as illegal only if their anti-competitive effects occur on the market. Thus, the concerned individuals can be fined even though it was not possible to assess at the time of signing the contract whether certain clauses were capable of bringing about anti-competitive effects on the market. Luckily, the OCCP abandoned their initial idea to introduce fines for individuals as well as for abuses carried out by companies

in dominant positions. In our opinion, it would be advisable to narrow the catalogue of agreements which may trigger the liability of individuals only to horizontal agreements which are qualified as anti-competitive by their object and not by their effect. We assume that the implementation of the current bill could disturb the decision-making process in many companies as, for example, the implementation of a business model based on exclusivity contracts.

In this respect, it is worth emphasising that the bill provides the same maximum value of fines for individuals for participating in vertical as well as for horizontal agreements. Taking into account that, in general, horizontal agreements (cartels) are regarded as the most detrimental for consumer welfare we assume that the establishment of the same ceiling is not proportionate. We believe that, using the analogy of criminal law, actions of differing harm should be subject to sanctions of differing severity.

Importantly, the procedure for fining individuals is very similar to that for fining companies. Individuals are not granted additional safeguards such as their rights against self-incrimination. On a side note, it is worth emphasising that, according to Polish doctrine, proceedings where under the Competition Act severe fines are imposed, should be qualified in a similar way to criminal proceedings and consequently the respective safeguards applicable in cases of criminal proceedings under Article 6 of the European Convention of Human Rights and Fundamental Freedoms should be introduced. The imposition of a fine on individuals and companies within the same decision may have an adverse impact on the rights of the parties to the proceedings. Currently the bill does not guarantee an adequate standard as far as the rights of defence is concerned. The bill specifies that it covers anti-competitive practices which exist at the time of the bill's entry into force. This means that the new law will have retroactive effects as individuals can be fined for wrongdoing which took place before and had not ceased when the new law entered into force. Such a regulation would be contrary to the Polish Constitution.

Leniency and leniency plus

The leniency programme has been operating in Poland since 2004. The statistics show that between 2004 and 2011, entrepreneurs filed 30 leniency applications while in 2012 alone, there were 15 leniency applications. The OCCP wishes to introduce changes which aim to increase the efficiency of the leniency policy. Thus, the OCCP decided to make a number of provisions more precise and to modify the conditions necessary in order to grant immunity from being fined. Under the bill, an entrepreneur filing for leniency will not be obliged to show that they were not the initiator of the agreement, but instead will have to show that they did not urge other entrepreneurs to participate in the agreement. The change has been welcomed as, in practice, it was difficult to establish who the initiator of an agreement actually was. The OCCP has also abandoned the condition that an entrepreneur should stop participating in the agreement no later than at the moment of filing the leniency application. In accordance with the bill, the entrepreneur should cease participating in the agreement immediately after filing the application.

The changes will also concern leniency applications on the basis of which the OCCP can only reduce a fine. The OCCP proposes to change the current provisions which specify what the maximum fine is, as a maximum percentage of turnover which can be imposed on an entrepreneur. Instead the OCCP wishes to include a provision that will reduce a fine by the specified percentage which would have been imposed had the entrepreneur not filed a leniency application.

As a *novum*, the OCCP has proposed 'leniency plus'. This is a concept originating from the United States. If an entrepreneur who is party to proceedings and has filed a leniency application on the basis of which it might receive a reduction of the fine, if they file a leniency application in relation to another agreement which is unknown to the OCCP, it can receive a further reduction of the penalty in pending proceedings and immunity from penalty in future proceedings.

Lack of specific regulations for legal professional privilege ('LPP')

The Competition Act does not expressly regulate LPP, however, in practice it has happened that entrepreneurs, or their lawyers, claim confidentiality in relation to legal opinions on the basis of the provisions of the Criminal Procedure Code which should be applied respectively. The Polish doctrine suggested introducing an express provision concerning legal professional privilege in the Competition Act in order to eliminate legal uncertainty. The current version of the bill

still refers to the specific provisions of the Criminal Procedure Code. Additionally, the bill proposes a new provision on the basis of which an entrepreneur subject to a search, any person authorised by the entrepreneur, or any another person obliged to maintain legally protected secrets, may file objections within 21 days from the end of the search in which he/she indicates that the copied documents contain legally protected information. The aim of this provision is to enable the entrepreneur to verify the copied documents and information after the search and to file their objection. It seems that the proposed procedure is inconsistent since the bill does not contain a provision prohibiting the OCCP from examining the files earlier than 21 days before the end of a search, thus the OCCP may examine some documents before the entrepreneur has raised an objection. Secondly, the bill does not specify LPP in relation to an anti-monopoly inspection, thus an entrepreneur will still have to face the legal uncertainty which exists at this moment. The lack of LPP in the inspection and the lack of the guarantee that the OCCP will not verify documents before the lapse of the period to file objections are important weak points in relation to the procedure of inspection and search.

Early information about threats to consumers

The bill includes a provision on which basis the OCCP will be entitled to inform the public about the behaviour of an entrepreneur and its probable effects where there is the high probability that an entrepreneur's behaviour has violated the law and may result in significant losses or adverse effects to a wide circle of consumers. The information can be passed to the public before an administrative decision has been issued. This provision will be added in the chapter of the Competition Act which deals with proceedings before the OCCP, thus we assume that the OCCP will most likely use it in cases of anti-competitive practices and in cases of violations of the collective interests of consumers.

In our opinion, the primary aim of the bill to reinforce the powers of the OCCP will be achieved. We expect the development of compliance programmes amongst companies in order to reduce the risk of violations of anti-monopoly law. The current version of the bill requires amendments to ensure an adequate level of rights of defence for individuals.

SINGAPORE

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Update on Singapore competition law

Since our last article for the IBA's *Antitrust News* (dated December 2012), there have been various developments in Singapore competition law. This article provides a summary of such developments which Allen and Gledhill ('A&G') has been involved in.

Merger control

Proposed acquisition of Oiltanking GmbH and Chemoil Storage Limited (CCS 400/007/12)

On 14 December 2012, the Competition Commission of Singapore ('CCS') issued its grounds of decision in relation to a notification filed by Oiltanking GmbH ('Oiltanking') and Chemoil Storage Limited ('Chemoil') pursuant to section 57 of the Competition Act, Chapter 50B of Singapore (the 'Competition Act') as to whether the proposed acquisition by Oiltanking of 100 per cent of the issued share capital of Chemoil would infringe section 54 of the Competition Act. The CCS concluded that the proposed acquisition would not infringe section 54 of the Competition Act in the market for the provision of fuel oil storage.

What is notable in the CCS' published grounds of decision is its consideration, inter alia, of the two-sided impact of negotiated contracts both on buyer power and as a competitive constraint on merger parties. In relation to the effect of negotiated contracts on buyer power, the CCS found that buyer

power was limited by the length of the customer's contract given that customers are likely to avoid paying compensation sums associated with the early termination of such contracts. Similarly, suppliers, including the merger parties, are constrained by the remaining contractual durations of its direct customers and are thus prevented from raising prices or reducing capacity in the short term. Accordingly, the constraints of negotiated contracts placed on the sellers are able to counter that placed on buyer countervailing power, thereby limiting the extent of any anti-competitive effects caused by such negotiated contracts.

The CCS also emphasised the extensive use of negotiated contracts between fuel oil storage providers and customers in evaluating whether coordinated effects are likely to arise as a result of the proposed acquisition. The CCS recognised that negotiated contracts vary in duration, fees and terms, and found that such contracts would likely reduce the transparency of fuel oil storage prices charged by the various suppliers. Furthermore, opportunities to engage in coordinated pricing are limited due to differing expiry periods and the fact that prices are non-negotiable during the duration of the contract.

Proposed acquisition of Elpida Memory, Inc by Micron Technology Inc (CCS 400/009/12)

On 30 January 2013, the CCS issued its clearance decision regarding the proposed acquisition of Micron Technology Inc ('Micron') of Elpida Memory, Inc ('Elpida') which would result in the sole control of Micron of Elpida, following Elpida's filing for bankruptcy (the 'Proposed Transaction'). The joint notification by Micron and Elpida had been submitted on 30 November 2012 to the CCS for a decision as to whether the Proposed Transaction would infringe section 54 of the Competition Act. The Proposed Transaction was also notified to competition regulators in the People's Republic of China, the Czech Republic, Japan, South Korea, Chinese Taipei and the United States. At the point of notification with the CCS, clearance had been obtained in the Czech Republic, South Korea and the United States.

Elsa Chen, the Principal Economist at A&G, notes that this decision illustrates the importance of convincing the CCS to adopt an appropriate counterfactual scenario in relation to a proposed transaction in order to obtain clearance from the CCS. When the CCS is applying the SLC test to a proposed transaction, the counterfactual scenario used may materially affect its assessment of the proposed transaction. In this instance, the CCS accepted the parties' submission that absent the proposed acquisition, the appropriate counterfactual scenario would entail Elpida and its assets exiting the market, in view of Elpida's bankruptcy proceedings.

In evaluating the Proposed Transaction, the CCS noted that the market for the manufacture and supply of Dynamic Random Access Memory ('DRAM') integrated circuits was in a downturn and was experiencing an oversupply. Hence, relative to the counterfactual, the CCS found that the Proposed Transaction would enable the current oversupply situation to persist, thereby constraining sellers from raising prices and restricting supply, whilst allowing for existing levels of strong countervailing buyer power to prevail. Furthermore, preserving Elpida's place in the relevant market would more likely prevent non-coordinated and coordinated effects from arising, than otherwise.

Abuse of dominant position

Coca-Cola Singapore Beverages Pte Ltd changes business practices in local soft drinks market following enquiry by CCS

On 10 January 2013, the CCS issued a press release stating that it had ceased its investigations into Coca-Cola Singapore Beverages Pte Ltd's ('CCSB') supply agreements with its on-premise retailers. The CCS had commenced its investigations of CCSB's commercial practices in March 2012, after receiving a complaint that CCSB's supply agreements with its on-premise retailers contained anti-competitive provisions such as exclusivity conditions and conditional rebates.

In response to the CCS' investigations, CCSB has voluntarily amended its supply agreements to remove potentially restrictive provisions and has given an undertaking to the CCS as follows:

- not to impose any exclusivity restrictions on its on-premise retailers for CCSB brands of non-alcoholic beverages, except in limited circumstances;
- not to require its on-premise retailers who wish to sell other brands of beverages to first negotiate with CCSB;
- not to grant loyalty-inducing rebates that have an effect of inducing on-premise

retailers to purchase exclusively or almost exclusively from CCSB; and

- to allow its on-premise retailers to use up to 20 per cent of the space in coolers provided by CCSB to store other brands of beverages, where these retailers have no access to alternative cooling equipment on their premises.

The CCS did not reveal any further details about its investigation but emphasised that it will continue to closely monitor practices in the local soft drinks market. Notwithstanding, had the CCS pursued the investigation, it would likely have raised the issue of whether CCSB's practices amounted to an abuse of a dominant position, prohibited under section 47 of the Competition Act,[1] given CCSB's substantial market power in the market for supply of carbonated beverages in Singapore, and its alleged abusive behaviour in creating vertical restraints through a series of restrictive contracts with retailers.

This case is notable as it signals the CCS' growing focus on commercial agreements between parties in vertical relationships and how terms of such arrangements may give rise to competition concerns in Singapore. Parties with exclusivity provisions, rebates and rights of first refusal clauses in their commercial agreements may therefore wish to consider if there is a need for their agreements to be assessed for compliance with Singapore competition law in light of the CCS' recent investigations.

Case statistics

As of 30 September, the CCS has completed 163 cases since 1 January 2006, as seen in the following table:[2]

Classification of cases	Cases completed
Preliminary enquiries and investigations	75
Notification for guidance[3]	8
Notification for decision	6
Mergers (from July 2007)[4]	30
Appeals	5
Competition advisories[5]	22
Market Studies	10
Total	163

A&G's Competition and Antitrust practice has, to-date, acted in approximately two-thirds of all merger control notifications lodged with the CCS, including four out of six merger filings lodged in 2012, and every public takeover notified and the majority of reviews under Phase 2, which is reserved for complex mergers. Since our last article for the December 2012 edition of *Antitrust News*, the CCS has cleared three merger control filings, two of which A&G was involved in, as mentioned above. The CCS is actively following through a number of investigations, with more in the pipeline, reflecting its commitment to rigorous enforcement and advocacy.

Notes

1 There is a two-step test to determine whether the section 47 prohibition applies.

2 Taken from the CCS' website: **www.ccs.gov.sg/content/dam/ccs/NewsLetters/Issue%204/Go-Figure.html** <accessed on 19 February 2013>.

3 Businesses may notify their agreements or conduct to the CCS for guidance or a decision under a non-mandatory scheme as to whether they are infringing the Competition Act.

4 Merger parties may notify the CCS for a decision under a non-mandatory scheme as to whether their anticipated merger will, if carried into effect, infringe, or whether their merger has infringed, the Competition Act.

5 The CCS may provide confidential advice and input to government agencies on competition matters early in the policy-formulation process.

South African competition law headlines

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COMESA – uncertainty abounds

There is nothing like a new law or compliance requirement to create a buzz amongst lawyers, and it is no different now that the Market for Eastern and Southern Africa's ('COMESA') Competition Commission is up and running. While practitioners, in South African and internationally, grapple with the interpretation of the relevant merger regulations there appears to be, from the writer's experience, a jurisdictional battle between the competition commission of member states and that of COMESA. Some have taken the approach that since they have not adopted the regulations and supporting legislation into their law, notifications are to be made only to the member state and not to COMESA. What is clear is that the COMESA Competition Commission is here to stay and will affect mergers and acquisitions within the area covered by the treaty.

South African Airways – a flight too far?

Turning to South African specific matters of interest it was reported in February 2013 that South African Airways ('SAA', South Africa's national airline) would receive an emergency bailout from the government to cover short term fuel costs to prevent the potential grounding of its local and international flights. The loan of R570m was provided by Absa and Investec and tops-up an emergency loan of R550m granted to SAA at the end of December 2012. The loan comes against the background of a R5bn guarantee that the South African government issued in favour of SAA at the end of last year.

As a result of the above there have been various suggestions from SAA competitors that the open door funding policy gives SAA an unfair advantage and that this conduct could fall foul of the Competition Act. In an industry where ten of the last 11 entrants into the market have not survived, these questions certainly seem pertinent especially considering that SAA has, in the past, already applied for, and been granted, albeit conditionally, six exemptions from the application of the Competition Act in respect of, inter alia, allocation of sector specific routes and the like.

Whether or not the bailout will be challenged remains to be seen.

Information exchange – I will show you mine if you show me yours

Insofar as the exchange of information is concerned, and the possible anti-competitive outcomes thereof, there has been little focus on the issue until recently. On 23 January 2013, the Competition Tribunal issued its reasons in the larger merger involving Absa Bank Limited ('Absa') and the Private Label Store Card Portfolio of Edcon (Proprietary) Limited ('Edcon') (Case No 70/LM/Jun12). The merger entailed the acquisition of the right, title and interest to the accounts and receivables relating to the Edcon portfolio. It so happened, however, that ABSA was in a joint venture, pre merger, with another retailer, Woolworths, and in particular Woolworth's Financial Services (Pty) Limited that provided unsecured credit products. The Competition Commission and the Competition Tribunal felt that post-merger, ABSA's interest in both retailers could create a platform for collusion thereby facilitating the exchange of competitively sensitive information (such as pricing, marketing policies and the like) between Edcon and Woolworths through Absa, and could substantially prevent or lessen competition. The result was the imposition of a set of behavioural conditions, pertaining to the implementation of ring fencing measures designed to prevent anti-competitive information exchange and monitoring conditions between the parties.

What 2013 will bring

Finally, and having regard to what 2013 will bring, practitioners will no doubt eagerly anticipate the outcome of the Competition Commission's investigations into price fixing and market division for diesel, the potential commencement of a health sector investigation and the Competition Commission's probe into an alleged R30bn cartel in the construction industry in South Africa.

SPAIN

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Brussels opposes format of new Commission

In relation to the draft law which creates the National Market and Competition Commission ('CNMC') by merging the main regulatory bodies, namely the National Competition Commission ('CNC') and the Telecommunications Market Commission ('CMT'), into one super regulatory authority, the Vice-President of the European Commission, Neelie Kroes, warned the Spanish government on 11 February 2013 that if the draft law is not amended in a way that guarantees the independence of the new body, the Commission will have to open infringement proceedings in accordance with Article 258 TFEU.

In particular, the European Commission is concerned about the provisions of the draft law regarding:

- the financing of the new authority, which is dependent on the general state budget;
- its powers, which in some cases has been transferred to ministries, for example, the Ministry of Industry; or
- the election of its members, which is elected by the government.

All these factors may negatively interfere with its independence. In addition, the Commission requests ensuring functional separation between competition law-related powers and other areas of enforcement. According to Kroes, the above mentioned provisions would leave the CNMC as one of the national regulatory authorities with less powers and functions in the EU.

In response to such warning and in order to comply with the requirements of the Commission, the Spanish government has announced several amendments to the draft law that are yet to be published. These amendments are deemed to include, among others, the following:

- financing the regulatory body both through the establishment of fees to be paid by companies and the general state budget;
- granting the parliament a veto right on the members elected by the government; and
- splitting the CNMC into two different chambers, the first one being the competition authority and the second one being the sector-specific regulator.

Heavy fines imposed on foam producers cartel

The CNC has imposed fines for a total amount of over €26m on ten producers of flexible polyurethane foam and the sector association. Polyurethane foam is used in different industries, including comfort (matrasses, pillows, furniture and other home appliances) and automotive (seats, etc). The cartel affected solely foams for comfort uses.

Three companies submitted leniency applications: Recticel, the Portuguese producer Flex 2000 and Flexipol. Recticel was granted full exemption and Flex 2000 a 40 per cent reduction, while Flexipol did not benefit from any reduction of the fine and not even a mitigation on the basis of its cooperation.

According to the CNC, the cartel consisted of a 20-year price cooperation and market allocation from 1992 until 2011, in different forms. Spanish and Portuguese producers were involved and the professional association Asepur gave coverage to the conduct and participated in it.

Interestingly, the CNC makes express reference to the role played by the consultancy companies Coopers & Lybrand (and then PriceWaterhouseCoopers) and Análisis & Investigación. The CNC stressed the role played by these consulting companies in the design, implementation and monitoring of the cartel. The CNC underlines that the production control was a consequence of the initiative of Coopers & Lybrand, who suggested the industry should cooperate in order to limit losses. They also coordinated the implementation of the agreement and its monitoring. The participation of these consultancy companies in the conduct is subject to criticism by the CNC: the latter affirms that the only reason why they have not been formally included in the investigation is because their intervention in the investigated conducts is only proven until 2000, and therefore the statute of limitation applies in their favour. In any case, this resolution is a clear statement regarding the CNC's intention to punish those companies that facilitate cartels by helping to design, implement or monitor cartel mechanisms.

It also notable that the CNC applies a narrow interpretation of the requirement that a company must not have taken measures to compel other companies to participate in the infringement, in order to obtain immunity from fines. Five companies indicated that Recticel exerted considerable pressure, as market leader, on other companies to participate in the cartel. However, the CNC considers that the requirement is only met when the situations described in the leniency guidelines arise, such as physical violence or an economic pressure so strong that there is an actual risk of market exclusion (organised boycott against a given company or refusal to supply necessary inputs).

Swiss parliament starts general overhaul of competition law

SWITZERLAND

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On 21 March 2013, the state chamber of the Swiss parliament (the 'Council of States') debated the government's draft bill for a general revision of the Swiss Federal Act on Cartels and Other Restraints of Competition ('Cartel Act'). Based on the proposals of its Committee for Economic Affairs and Taxation (the 'Committee'), the Council of States substantially reshaped the government's draft bill.

The key decisions of the Council of States are discussed below.

Dominance: new provision regarding unlawful impediment of purchasing abroad

The Council of States adopted an amendment regarding 'unlawful impediment of purchasing abroad', which was proposed by a minority of its Committee based on an earlier proposal in parliament but opposed by the government and the majority of the Committee. Subject to a possible justification on grounds of economic efficiency, this provision outlaws the refusal to supply customers from Switzerland with goods or services in an OECD country at the prices and terms and conditions which are applied there. Such refusals are deemed illegal (and subject to fines) if (i) these goods or services (in comparable form) are offered also in Switzerland and if (ii) the providers publicly quote a sales price there or the customers are dependent on these goods or services due to the expectations of their customers or a prior purchasing decision and the customers cannot purchase these goods or services at comparable prices and terms and conditions in Switzerland. Subject to a possible justification on grounds of economic efficiency, the provision further outlaws measures taken with regard to goods or services which are offered also in Switzerland if such measures are aimed at preventing third parties from complying with unsolicited orders from Switzerland. As far as can be seen, such a provision is hitherto unprecedented in the world.

Agreements on restraint of competition: partial prohibition of hardcore agreements

The government proposes to introduce a partial prohibition of certain horizontal and vertical restraints with a possibility of justification. The partial prohibition shall include horizontal price-fixing, market allocation and quota arrangements as well as vertical resale price maintenance and geographical market allocations (prohibitions of passive sales into exclusive territories). Possible grounds for justification shall be listed in an ordinance. The burden of proof for grounds of justification due to efficiency gains shall lie with the undertakings.
The Council of States basically adopted the government's proposal with certain clarifications. The Council clarified that

the undertakings shall assert the grounds of justification and that they shall bear the consequences of a lack of evidence. The Council further inserted a *de minimis* clause stating that the competition authorities shall not take up restraints to competition with a negligible effect on competition.

Merger control: SIEC test

Presently under Swiss merger control rules, the substantive test requires that the authorities establish (i) the creation or strengthening of a dominant position and (ii) the possibility that such dominant position eliminates effective competition. While the Committee proposed to introduce a simple dominance test, the Council of States adopted the government's proposal to replace the current test by the significant impediment to efficient competition test ('SIEC test').

Institutions: only minimal reform

The Swiss competition authorities are presently structured as one government body consisting of the Competition Commission (which has to decide cases but also plays an active role in investigations) and its Secretariat which carries out investigations. The Competition Commission is composed of experts (lawyers and economists) and representatives of trade organisations. The government proposes to introduce a new independent government agency in lieu of the Secretariat with responsibility for investigations and for decisions in merger control cases. This agency would be independent from the government. Decisions in cartel and abuse of dominance cases, according to the government's proposal, would in the future be taken by a newly established chamber of the Federal Administrative Court. The chamber would partly consist of judges with an economic background and experience in industries. The Council of States, however, rejected this proposal outright and decided to maintain the current institutional structure, only reducing the number of commissioners from its current 12 to five and eliminating the representatives of trade organisations. The Council also rejected an alternative proposal to give undertakings the right to opt for the Federal Administrative Court in place of the Competition Commission as the first instance.

Fines: compliance programmes as mitigating factor

The Council of States further adopted a provision proposed by the government obliging the competition authorities to take into consideration the existence of a bona fide compliance programme, if evidenced by the respective undertaking, as a mitigating factor when determining the amount of a fine. By contrast, it rejected the introduction of criminal sanctions against individuals involved in restraints of competition, which was proposed in parliament but is also opposed by the government.

Additional amendments

The Council of States also adopted some additional proposals from the government's draft bill, including certain improvements in procedural matters and regarding private enforcement.

The bill, which requires the approval of both chambers of parliament, now goes to the second chamber (the National Council). For the time being, it is completely open and uncertain to what extent and how (if at all) the Cartel Act will be revised.

Updates from Taiwan

TAIWAN

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The antitrust bar in Taiwan has been very busy in the past few months. The media in Taiwan has seen substantial concentration; the leniency programme is shown to have some teeth. This issue covers these two headlines and other updates in the competition law.

I want all of your eyeballs – the largest Asian media merger in five years

Merger and concentration of media power has been a highly publicised and debated issue in Taiwan since July 2012, as the Want Want China Times Group attempted a NT$76.25bn (US$2.58bn) takeover of the China Network Systems Co ('CNS') which consists of 11 cable television system operators across Taiwan.

While the Taiwan Fair Trade Commission ('TFTC') is the competition authority in Taiwan, due to the special nature of the broadcast and television industry, mergers related to the broadcast and television industry are overseen by both the TFTC and the National Communications Commission ('NCC'). The NCC is the authority in charge of television and broadcast licensing, but according to an understanding executed in November 2010 between the TFTC and NCC, the TFTC must wait for the NCC's comments before reviewing any business combination application involving broadcast and television related mergers. In effect, the NCC does the initial merger control review for mergers related to the broadcast and television industry.

In July 2012, the NCC decided that Want Want China Times Group may proceed with the acquisition of the CNS, with the following stringent conditions:

- Want Want China Times and its related persons must separate itself from CTI Television Inc;
- China Television Co should cease being a news channel; and
- CTV should set up an independent reviewing and editing systems for its televised content.

A public hearing was held on 24 October 2012 over the matter, and on 20 February 2013, the NCC announced that the conditions had not been met and that Want Want China Times Group's acquisition of CNS is therefore not approved.

While the CNS acquisition is ongoing, the Want Want China Times Group made another sensitive acquisition attempt.

Want Want China Times Group's president, along with Formosa Plastics Group's chairman, Chinatrust Charity Foundation's chairman and Long Yen Life Service Corp's chairman signed a NT$17.5bn (US$603.55m) deal to acquire Next Media Group (which owns popular news tabloid Apple Daily). Under the deal, Formosa Plastic shall have 34 per cent of the shares, followed by Want Want's 32 per cent.

Since Apple Daily and Sharp Daily (also owned by Next Media Group) account for more than 25 per cent of the local newspaper industry market share, the TFTC required and the parties made a merger filing on 1 February 2013. The review is currently ongoing and being heavily scrutinised by the commissioners, the academia and the public domestically and overseas. Members of the press and academia have expressed concern over the acquisitions, arguing that they could lead to media monopolisation, thereby endangering press freedom. The outcome of the TFTC's decision remains to be seen.

The first application of the leniency programme

A leniency programme for potential unlawful actions constituting 'concerted action' under the ROC Fair Trade Act of 2011 (the 'FTA') was instituted in January 2012, due in part to discussions between the Taiwan Fair Trade Commission ('TFTC') and the Organisation for Economic Co-operation and Development ('OECD').

Anyone involved in a potential concerted action can apply except for 'those that have coerced others to be involved in or eliminated from a concerted action' (see Article 35-1 of the FTA). This Article and its related regulations provided leniency for enterprises partaking in concerted actions and which have not coerced other enterprises to participate in or remain as participants. The new law allows enterprises to come forward as whistleblowers and provide evidence useful for the TFTC's investigation, and in exchange

the TFTC may waive or reduce penalties in connection with any misconduct that the whistleblowers may have engaged in.

To qualify for leniency, applicants for the leniency programme may not, prior to investigation by the TFTC, destroy, falsify, alter, or hide relevant evidence. Also, they may not directly or indirectly disclose to third parties the fact that they are preparing to apply for leniency.

The Article had its first application in mid 2012 in the optical disk drive ('ODD') industry. The TFTC investigation stemmed from a US Department of Justice bid-rigging investigation which resulted in a plea bargain in November 2011. Parties were reported to have been fined by the TFTC as high as NT$25m (US$844,595).

Endorsement advertising: in search of truth

Celebrity endorsements have long been scrutinised by the TFTC for truth and veracity. However, non-celebrities have also been found to endorse products and services using false or misleading methods. The FTA has been revised in November 2011 to allow for enforcements against non-celebrity endorsements as well.

Paragraph 4 of Article 21 of the FTA states: 'Where anyone provides testimonials that he or she knows or should have known are misleading, he or she shall be jointly and severally liable with the advertiser for damages arising therefrom.' The amendment added a provision as follows: 'Testimonial providers who are not celebrities, professionals, or organisations who provide any testimonials that they know or should have known is misleading shall be jointly and severally liable with the advertiser for damages arising therefrom….' These non-celebrity endorsers found in violation of this provision may be subject to fines of up to ten times the amount that they were paid for their endorsement.

The TFTC's Explanation of Endorsement Advertisement (the 'Explanation'), effectively the enforcement rules of Paragraph 4, Article 21 of the FTA, has been revised in March 2012 to reflect the amendment of the Act.

The Explanation further provides guidelines in applying Paragraph 4, Article 21:

> 'In order to scrutinise for truthfulness in each advertisement, different standards apply to professional and non-professional endorsers. For professional and institutional endorsers, their endorsement must not deviate from opinions of those in the same profession. For consumer endorsers, they must have actually used or experienced the product or service in question prior to making such endorsements.'

It appears that the occurrence of violations is substantially reduced since the new amendment and its Explanation took effect. However, this observation is subject to a continuous and careful review.

Potential change in merger control filing threshold

The current merger control filing threshold in Taiwan is based on both market share and sales amount:

- as a result of the merger, the enterprise(s) will have more than one-third of the market share in Taiwan;
- one of the enterprises involved in the merger has more than one-quarter of the market share in Taiwan; or
- the sales amount for the last fiscal year of one enterprise exceeds NT$10bn, and the sales amount of the other enterprise for the last fiscal year exceeds NT$1bn (if the parties are financial institutions, the amounts are NT$20bn and NT$1bn).

However, in December 2012, the Executive Yuan of Taiwan proposed legislation under which thresholds based on market share is removed. Under the proposed legislation, the sales amount would be the only threshold. The change may take place as early as the close of the current legislative session in May.

Updates from Turkey

TURKEY

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General

ICC's Turkish National Committee has established its Competition Law Commission

With a meeting organised on 14 February 2013, ICC Turkey brought together the interested parties among its members. More than 15 people who volunteered to take part in the potential activities of the Competition Commission have discussed the possible targets of the new Commission, set forth the priorities based on the aims of the National Committee and ICC in general and the scope of the activities. After the meeting, ICC Turkey will share the outcomes of the first meeting to receive feedback and set a date for the next meeting which will probably deal with the calendar of events and activities to be assumed in 2013.

Competition policy

New turnover thresholds in Turkish merger control regime

The turnover thresholds applied according to M&A Communiqué No 2010/4, which is the primary legislation of the Turkish merger control regime, has been recently amended. The amendment will be effective as of 1 February 2013. The amendments were made in Article 7: they did not change Article 7.1 (a), but they increased Turkey's turnover threshold in Article 7.1(b) from TRY 5m to TRY 30m (approximately €13m or US$17m) and abolished Article 7.2 including the qualitative threshold, 'the affected market condition'.

According to the threshold in Article 7.1(b), while parties to an acquisition will need to satisfy the Turkish threshold for the target asset/business only, the regime has not changed for mergers apart from the increase in the amount of the Turkish turnover threshold.

Major cases

More reasoned enforcement on fines is expected

Before the Regulation on Fines was enacted in 2009, the unlimited discretionary of the TCA on fining enforcement was the most criticised issue in Turkish competition law. However, critics did not disappear after putting the regulation into force, since in some cases the TCA did not clearly state how it establishes the fine rate.

The TCA's decision in *Turkish Pharmacists' Association* was one of these cases. In the decision concerned, the TCA established the fine rate as three per cent of the Association's turnover without determining the grounds.

According to the Regulation on Fines, the TCA first has to establish the base fine considering the nature of the violation, for example, whether it is a cartel or not, its duration and the effect on the market. The TCA, when considering these factors, first determines the base fine between two and four per cent for cartels and between 0.5 and three per cent for other violations.

Even though the TCA has not ruled that the violation was a cartel, it has imposed a fine of three per cent, the maximum amount for other violations. The problem was that the TCA reached that conclusion without any analysis regarding the nature of the violation and its duration/effect on the market and mitigating/aggravating factors.

The Council of State ('CoS') recently ruled the stay of execution of the decision concerned. It emphasised that the decision did not enable an assessment on the legality of the fine concerned since the grounds of how the TCA established the rate of fines are totally unknown.

Council of State stayed the execution of cinema decision

On 9 April 2012, the TCA made public its reasoned clearance decision on the merger of the two major cinema chains in Turkey, Mars Sinema and AFM, following a phase II investigation. Upon the opposing view of rapporteurs, the TCA's concern was that the acquisition may cause high market shares in some specific geographical markets, causing an increase in ticket prices.

Thereupon the parties had committed remedies to divest ten specific cinemas and to notify average ticket prices and the changes in thereof by the end of January of every year for five years. The Board had found these remedies sufficient and gave clearance.

However, a moviegoer appealed the decision to the CoS' 13th Chamber. Following the analysis, the CoS had stopped the execution and stated that, referring to EU guidelines, the HHI level and delta generated by the acquisition are beyond thresholds. In addition, the CoS concluded that:

- the market has high barriers to entry;
- the commitments would not be able to frustrate the dominant position created by the acquisition, as there is no other third competitor;
- the acquisition would create an unbalanced buying power; and
- in the absence of robust rivals within the market, there is no competitive market structure.

It is compelling whether the TCA will wait for the final decision of the CoS or give the undertakings a certain time limit for complying with the ruling. Nevertheless, we believe that the TCA should initiate an investigation in order to return to the pre-acquisition state.

The TCA initiated an investigation to examine the anti-competitive agreement between Digiturk and the TFF

Digiturk has been holding exclusive rights of broadcasting Turkish Super Football League matches for a period of 14 consecutive years and has won the latest auction, thereby holding on to the rights until 2014. However, mainly because of the match-fixing scandal that took place in 2011, Digiturk found itself in the midst of a financial crisis. In an attempt to strengthen its position, Digiturk requested to the TFF that it grant it exclusive broadcasting rights for two more years without an auction so that it would be able to pay its debts. The TFF agreed but Digiturk's competitors brought the issue before the TCA. The TCA stated in its decision that such an agreement does not possess necessary conditions for individual exemption.

Despite the TCA's decision, the TFF and Digiturk signed an agreement that extends the period of exclusive broadcasting rights held by Digiturk. Digiturk and the TFF claim that this is not a violation of the Competition Act because the extension period is shorter than two years. Yet, the TCA decided to start an investigation on 6 December 2012. The TCA will investigate whether this agreement is to be considered as an anti-competitive agreement.

Banking investigation

The TCA has announced the date of the oral hearing phase regarding the banking investigation. The hearing, concerning 12 banks, was held on Monday 25 February 2013. We are still awaiting the decision.

In November 2012, the TCA decided to open an investigation of the banking undertakings. As a matter of fact, just months ago before the commencement of this investigation, the TCA had closed its previous investigation with an imposition of TL 72m (approximately €30m) to eight banks. The investigation (as the first investigation in the TCA's history in to the banking industry) had been launched in August 2009 to determine whether the undertakings colluded as part of a gentlemen's agreement to not offer promotions to private firms and to not extend offers to institutions/firms for which the protocols were continuing.

The oral hearing of this case was live on television. Some columnists in newspapers had argued that the TCA had no authority on the banking sector since there is a regulator for the sector and it is also unethical to raid the banks. However, the second investigation is showing us that the role of competition law and the TCA is now clear in the banking industry. The decision is being eagerly awaited.

The TCA concluded steel straps decision

Another concluded investigation concerning the steel straps market had been initiated in response to the information claiming that MPS Metal Plastik and BEKAP Metal were in collusion concerning sales prices to be implemented for steel straps. As a

result of the examination, the TCA imposed administrative fines on undertakings for acting in collusion in steel strap purchase tenders, jointly setting prices or sales terms and exchanging information.

However, MPS Metal Plastik had already admitted the existence of the violation and entered into active cooperation with the TCA in the framework of 'Regulation on Active Cooperation for Detecting Cartels', and the administrative fine imposed on this undertaking was discounted by half.

Recently opened investigations

Here is a list showing recently opened investigations:

- Concrete Producers: The TCA has opened an investigation in to ready-mixed concrete producers operating in the Erzincan province.
- Driving courses: The TCA has decided to open an investigation regarding driving courses operating in Bartin for setting their prices in collusion.
- Bus terminal: Another investigation has been opened in to the Bus Terminal in Edirne.
- The TCA initiated a new investigation about Mey Icki, an affiliate of Diageo operating in the Raki market, a popular local distilled alcoholic beverage in Turkey.

Website of the Turkish Competition Authority: **www.rekabet.gov.tr/index.php?Lang=EN**
Website of Appeal Court for decisions of Courts of First Instance (the appeal body for the TCA's decisions): **www.danistay.gov.tr/eng/index.html**
Website of ACTECON: **www.actecon.com/**

Competition law in the United Arab Emirates: the new regime

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On 23 February 2013, the UAE enacted a new federal competition law (Federal Law No (4) of 2012). A newly created Committee of Competition Regulation (chaired by the UAE Minister of Economy) will enforce the competition law regime.

The law is one of many reforms in the UAE to ensure that the country remains attractive to foreign investors. Other measures include new laws on arbitration and protecting intellectual property rights.

The competition law introduces, for the first time, a comprehensive regime for both merger control and prohibitions of anti-competitive agreements and abuse of a dominant market position. It reflects many elements of EU law and international norms but its impact will be limited, given the important market sectors that are exempted from the new rules.

Scope of application

The law applies to all entities established in the UAE for their commercial activities and intellectual property rights, as well as entities established outside the UAE but whose activities affect competition in the UAE. However, there are a broad range of entities that are exempted from the law's requirements.

The exemptions cover UAE federal and local governments, government-owned or controlled entities and small- and medium-sized enterprises (to be defined in a separate implementing regulation). In addition, entities operating in a wide range of market sectors are also excluded. The list of exempt sectors can be amended by the Minister of Economy, but at the time of the law's enactment it includes:

- telecoms;
- financial services;
- pharmaceutical production and distribution;

- cultural activities;
- oil and gas;
- postal services including express delivery;
- electricity and water production and distribution;
- sewage and waste disposal; and
- transportation and railways.

Merger control

The law stipulates that the Ministry of Economy will need to give merger control clearance before a transaction completes if it meets three criteria:

- first, that the transaction will result in the acquisition of direct or indirect control through total or partial transfer of ownership or benefits in assets, equity, shares or obligations from one entity to another;
- secondly, that the transaction will give the combined entity a market share on the 'relevant market' that exceeds specific thresholds; and
- thirdly, that the transaction will affect competition, in particular by creating or enhancing a dominant position in any market.

The thresholds under the second criterion are still to be decided and will likely follow in implementing regulations. Whilst there is currently no reliable insight as to the likely level of such thresholds, neighbouring Saudi Arabia – and other countries in the region – have opted for a 40 per cent threshold, meaning that transactions that result in the relevant party/parties controlling 40 per cent plus of a given market would require notification.

The last of the three criteria appears to require substantive competition assessment already at the stage of deciding whether a notification is required. This is unusual, as jurisdictional tests are usually based on numerical thresholds (turnover, market share, or a combination of both).

Where a transaction meets all three of the criteria, filing is mandatory and suspensory, and must be made at least 30 days before the intended date of implementation of the underlying transaction. The Minister of Economy then has a period of 90 days within which to to issue a decision, with a possible extension of a further 45 days. The interaction between the review timetable and the 30-day notification period is unclear at present.

The Minister's decision may take one of three forms:

- an approval, on the grounds that there are no adverse effects on competition, or that any adverse effects are outweighed by positive effects;
- an approval subject to conditions; or
- an outright prohibition.

If a decision is not issued within the prescribed period, the application will be deemed to have been approved. The implementing regulations are expected to set out more details of the clearance procedure.

Anti-competitive conduct

In addition to merger control, the law contains provisions that prohibit businesses from entering restrictive agreements. As would be expected, the 'agreements' to which these provisions apply are defined widely to include both implicit and explicit agreements, as well as concerted practices, whether written or oral. The law also contains provisions that prohibit dominant entities from abusing a dominant market position.

Prohibited restrictive agreements include agreements that have the object or effect of directly or indirectly fixing purchase or selling prices so as to adversely affect competition. It will be interesting to see whether in practice 'adverse affect on competition' would need to be established in cases where the object of the agreement is itself anti-competitive (eg, a price-fixing agreement between competitors). Other prohibited agreements include:

- agreements between competitors that set terms and conditions for the sale and purchase of goods or services;
- collusion in bids and tenders;
- agreements limiting trade, production, development or investment;
- agreements blacklisting certain entities for sale or purchase of goods and services; and
- agreements that either limit the supply of products and services, or flood markets with products and services.

The prohibition on abuse of market dominance covers both single and collective dominance, which is defined as an ability to control or influence the market. A market share threshold for dominance is expected to be set in the implementing regulations and if the Saudi model is anything to go by, would be set at the same level as the market share threshold that would trigger a merger filing requirement.

Abusive practices prohibited by the new law include:

- unjustified discrimination between customers in respect of prices or contractual

conditions relating to equivalent transactions;
- preventing a customer from dealing with a competitor;
- making the conclusion of contracts subject to acceptance of supplementary obligations concerning other products or services, which by their nature have no connection with the subject of these contracts;
- knowingly publishing false information on products and their prices; and
- directly or indirectly imposing prices or conditions for resale of goods or services.

Interestingly, the last of these prohibited practices – which effectively amounts to resale price maintenance or 'RPM' – is regarded in most jurisdictions as an anti-competitive agreement rather than a conduct that could amount to an abuse of a dominant position.

Individual exemption

The Ministry of Economy can grant exemptions from the prohibitions on anti-competitive agreements and, unusually, abuse of a dominant position if a business can show that its activities will enhance economic development, enhance competition or create efficiencies or customer benefits.

The decision on an application for exemption must be made within 90 days, with a possible extension of 45 days, and can be conditional or unconditional. If no decision is issued within this period the application will be deemed approved.

Fines and other penalties

The law contains a number of provisions for imposing fines and other penalties, which are to be imposed by the competent court. Additionally, it provides for the possibility for victims harmed by an infringement to claim damages.

A company entering into restrictive agreements or abusing market dominance may incur a fine of between AED500,000 and AED5m (approximately US$140,000–US$1.4m), whilst failing to notify a notifiable transaction can attract fines of between two to five per cent of the infringing company's annual revenue deriving from the sale of the relevant goods and services in the UAE (or, where this cannot be assessed, fines in the range mentioned above).

Further, implementation of a notifiable transaction before clearance is grounds for fines of between AED50,000 and AED500,000 (approximately US$14,000–US$140,000).

Repeat offenders will be liable to having their fines doubled. The law also gives the competent court the authority to close down the infringing company's facilities – presumably only within the UAE – for three to six months and to have the infringement decision published in daily newspapers. This will undoubtedly cause severe financial and reputational damage to the business. These additional sanctions do not typically feature in competition laws.

Implications for business

This new law marks another important step in the steady spread of competition legislation and enforcement in the six states of the Gulf Co-operation Council ('GCC') and across the MENA region. Egypt, Jordan, Kuwait, Qatar, Saudi Arabia and Syria already have some form of competition law in force. Whilst fines under the UAE law are comparable to those in other MENA jurisdictions, they are low compared with many jurisdictions in other regions. This may be changing though; for example, Saudi Arabia is considering replacing relatively low fixed-level fines with the more common turnover-based fines.

Fines may not yet be at levels which provide a serious deterrent, but infringements bring a risk of reputational damage, particularly for international companies. Moreover, given cross-border cooperation among competition enforcement agencies, infringements picked up in the UAE may well lead to investigations by agencies elsewhere and in jurisdictions where penalties may be more severe.

Companies doing business in the region will need to take these developments fully into account in planning deals and in developing international compliance strategies. They will need to review business agreements and arrangements, such as supply and distribution arrangements, participation in trade associations, joint ventures and alliances. Companies at risk of being considered dominant will also have to consider their pricing strategies and other unilateral practices. In addition, companies that commit to meet all applicable competition law standards globally as part of their international compliance policy will also need to take action, to ensure compatibility with the new law.

The implementing measures, which will include further specific provisions and which will help to clarify the impact of the law, need to be adopted within six months

from 23 February 2013. Active enforcement is expected to start after this, though it will inevitably take time for the authorities to streamline working practices and gain the experience they need to enforce the law effectively and consistently.

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Private-public relations in antitrust disputes: is it possible to find balance?

The problem with the state authorities' approach to the regulation of legal relationships, which are the subject of public and private interests, namely the elaboration of the unified approach in securing a balance between them, has become topical recently. Upon the conditions of the market, the state authorities are playing a sufficient role in the regulation of commercial activity in most jurisdictions. And this is the main reason why the problem of their relationship balance has always been and will always be worthy of attention and subject to analysis. Below we will analyse the abovementioned problems within Ukrainian jurisdiction.

Within the respective court practice of Ukraine in general, we can single out the practice of competition law provisions implementation in the resolution of disputes by the Antimonopoly Committee of Ukraine (the 'AMCU') and its territorial subdivisions. Considering the extensive powers of the AMCU and its specific rights relating to sanctions imposed for breach of competition law (including fines), commercial courts frequently face situations where the private interests of the undertakings may conflict with the state ones. The lack of clear regulation of such situations by the law provides the courts with grounds for divergence from its practice which currently does not demonstrate a unified approach to the resolution of such disputes.

On analysing the topic, we cannot overlook one of the representative examples of the imbalance of private and public interests, which can be observed in the process of consideration by commercial courts of the AMCU's claims of recovery of penalty from the undertakings within invalidation and cancellation of the AMCU decision proceedings.

In accordance with paragraph 4 of Article 60 of the Law on Protection of Economic Competition (the 'Law'), the enforcement of the AMCU decision on the breach of competition law shall be halted in case the commercial court initiates the proceedings on invalidation of such a decision and the higher courts reconsider it.

Regardless of the abovementioned provisions of the Law, there is a strong tendency for the AMCU's applications to the courts with counterclaims to be considered together with the initial claim of invalidation of the decision imposing the fine. The AMCU is referencing such claims to comply with the requirements of procedural legislation (the procedure for counterclaiming with the purposes more complete, fast and objective consideration of the case is indeed provided by the Commercial and Procedural Code of Ukraine) as well as absence of objections from higher courts. Despite the fact that the legitimacy of the decision taken and the respective penalty imposition has not been established by the commercial court, such actions of the AMCU can be regarded as a preventive measure enabling the state body to gain time and secure the fastest decision enforcement, including in cases of possible bankruptcy or liquidation of the indebted undertaking. Thus, the state is implementing its fiscal policy with regards to penalty recovery and collection of costs for the budget.

However, the fact that the violation of law by the antitrust authorities in relation to the undertaking is obvious as the undertaking becomes indebted under the obligation legitimacy of which has not been confirmed by the court. Previously the courts were

willingly satisfying such claims of the AMCU although the practice of the Higher Commercial Court (the 'HCC') is diverse at the moment. It became more frequent that the court references 'premature appeal of the AMCU to the court due to the fact that the right for claim has not arisen yet' in the decisions of the higher courts relating to rejecting the counterclaims of the AMCU on penalty recovery (the HCC Regulation, dated 19 February 2013 in Case No 5009/2447/12, the HCC Regulation dated 27 November 2012 in Case No 5011-10/5844-2012). In fact, there are neither official clarifications of the HCC on the issue nor a unified approach to the resolution of such disputes.

Among the cases on display of the contradictions between the private and public interests in the field of competition law, one can also name the burning issue of calculation of the amount of penalty for breaches of competition law.

Considering the fact that there is no precise methodology for penalty calculation for a certain infringement in the field of economic competition, the range of the AMCU's powers is limited to the boundary penalty amount set in clause 2 of Article 52 of the Law, namely ten per cent of the undertaking's annual turnover for the latest financial year. The issues of the fault as well as the damages caused to the state by the undertaking which has violated the law come into consideration for the calculation of the penalty amount, which is up to the AMCU.

Given the fact that the penalty calculation is determined as the AMCU's exclusive competence, commercial courts of Ukraine, while considering the claims on cancellation of the AMCU's decisions, are not capable of diminishing or enlarging a penalty amount. Thus, the practice of such cases consideration is limited to cancellation of such a decision in full scope or to its confirmation, including in part the penalty amount calculated by the AMCU.

In that context, the decisions made by the Commercial Court of Appeal in February 2013 on invalidation of the AMCU decisions of part of the fine imposed on the undertakings for violation of the competition law, expressed in anti-competitive concerted actions on the market in the process of participation in specialised auctions for the sale of the raw woods, shall be considered as precedent ones.

On cancelling the first instance courts' decisions, the Court of Appeal came to the conclusion that 'the AMCU had applied disproportional and incommensurate measures by imposing the maximum penalty amount'. The court references the principle of proportionality known as the 'fair balance principle', the term used by the European Court of Human Rights, which case law is one of the sources of law for Ukraine.

For example, in the case *Broniowski v Poland* (No 31443/96), the European Court of Human Rights determined that the 'same as in case of intervention in the right of quiet property possession one has to ensure the fair balance between the public interest requirements and the necessity to protect the main rights of the respective person by abstaining from taking measures'.

Moreover, from the standpoint of the Court of Appeal, Article 52 of the Law providing the AMCU with optional powers on determining the penalty amount simultaneously charges the state authority with a certain obligation, namely to ascertain the circumstances sufficient for determination of the measure of legal liability of the undertaking which had violated the competition law. Such circumstances have to ensure the fairness of the sanction to be imposed and its proportionality to the factual character of violation.

The court also motivates its decision by the fact that on determining the penalty amount, the AMCU did not assess the circumstances connected with the complicated financial position of the company's violators which was declared by such companies by means of the respective petitions.

Thus, the Commercial Court of Appeal had determined the provision on the 'incompleteness of determination of the circumstances sufficient for the case' as the main ground for invalidation of the AMCU decisions in part of the fine calculation.

Since the court's case law is still missing decisions prejudicing correctness of penalty amount calculation by the AMCU bodies, the position of the SCC will become a precedent in case of appeal of the Court of Appeal's decision in cassation.

The necessity for elaboration and adoption of the unified act containing the common approaches and rules of the penalty calculation and imposition in this context is obvious. For example, in the Russian Federation on 17 December 2012, the Eurasia Economic Commission Council adopted methodology for calculation and the order of imposition of fines. This methodology contains the general formula

for the fine amount calculation, the rules on the order of sanctions imposition and the list of circumstances extenuating as well as aggravating the liability. Such fines applied by the Federal Antimonopoly Service of the Russian Federation are based on the undertakings' turnover and are imposed for exactly determined infringements of competition law. The other penalty amounts are fixed by the Code for Administrative Offences of the Russian Federation for the infringements of competition laws set therein. Thus, the approach to penalty amount calculation is more precisely regulated by the laws of the Russian Federation.

The list of examples of contradictions in the context of satisfaction of private and public interests in Ukraine we have mentioned above is not exhaustive. The reasons for such contradictions are not limited to the imperfection of Ukrainian laws; the social and economic situation in the country providing for the unbalanced relationship between 'business' and the state also plays an important role.

On the one hand, the AMCU is trying to carry out one of the state's main functions: the punishment of law violators and enforcement of the respected decision via all available methods. And there's nothing strange about the fact that the violators are not always willing to pay the imposed fines. In accordance with the official data of the AMCU, the amount of fines paid to the budget in 2012 constituted UAH 40.5m (approximately €4m) while the figures for the same category of fines in 2011 constituted UAH 22m (approximately €2m). We assume that the abovementioned methods of 'dealing with' the law violators could be one of the reasons for the increase in the above stated amounts. On the other hand, upon application of such methods by the AMCU, the interests of business representatives are frequently infringed since the state directly violates the principles of proportionality, equality and justice.

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UK government announces far-reaching reform of the competition private enforcement regime

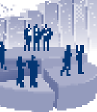
Overview

On 29 January 2013, the UK government published its plans for reforming the UK private enforcement regime,[1] following a detailed consultation exercise carried out in 2012. The reforms are wide-ranging and include, controversially, the creation of an opt-out collective action for competition law claims.

The reforms stem from government concerns that the level of private actions (both stand-alone claims and those following an infringement decision) being brought in the UK is low and that cost and complexity remain an 'insuperable' barrier to consumers and SMEs in challenging competition law breaches or obtaining redress through private actions.

It remains to be seen whether the government's desired balance of increasing redress for competition law breaches, without leading to disproportionate risks of unmeritorious claims or the perceived 'excesses' of US-style class actions, can be successfully achieved. This will depend in large part on the detailed implementation of the reforms and how they are applied in practice. It is clear, however, that the reforms will lead to an increase in private competition law litigation in the UK.

The majority of the proposals will require changes to primary legislation and therefore subject to parliamentary schedules and



approval, but the reforms could come into force by late 2014.

Extension of the CAT'S jurisdiction

The government plans to expand the role of the UK's specialist Competition Appeal Tribunal ('CAT') with the aim of making it the major venue for competition actions in the UK by:

- allowing stand-alone competition law actions to be brought in the CAT;[2]
- enabling the CAT to grant injunctions as well as award damages; and
- making it the sole venue for an opt-out collective action (see below).

'Fast track' claims procedure

The government plans to introduce a fast track procedure in the CAT for 'simpler' cases, focussing on injunctive relief and designed to deliver 'swift, cheap results'. This is intended to benefit SMEs in particular (although the procedure will be open to any type of claimant). There will be a presumption that any case brought by an SME will be considered for the fast track. Other factors to be taken into account include the likely length of trial and the level of damages claimed.

Significantly, all cases on the fast track must be cost-capped in order to provide certainty to claimants when deciding whether to proceed with a claim.

What cases will be regarded as sufficiently 'simple' to benefit from the fast track is not clear.

Opt-out collective actions regime

The question of collective redress has been the most hotly debated aspect of the proposals.

The government's view is that collective actions are necessary to overcome the complexities and costs of bringing competition claims. It therefore plans to introduce a competition specific opt-out collective action only in the CAT for both stand-alone and follow-on claims. The government proposes that the opt-out aspect will only apply to UK domiciled claimants; non-UK claimants needing to opt in to a claim if they wish participate.

Standing

Proposals to limit the ability to bring such claims to designated bodies were rejected. The right will instead extend to any directly affected claimants (whether individuals or businesses), as well as genuinely representative bodies. Law firms, third party funders and special purpose claims vehicles will be prohibited from bringing collective actions.

Safeguards and design details

The government recognises the possibility of unmeritorious litigation arising from the introduction of an opt-out regime, but considers that this can be prevented by appropriate safeguards. It has been keen to draw distinctions between its proposals and the class action regime which exists in the US. The proposed safeguards include:

- a strict certification process including the application of a preliminary merits test;
- the requirement for CAT approval of settlements, including as to the reasonableness of legal fees;
- maintenance of the 'loser pays' costs principle;
- the prohibition of contingency legal fees (conditional fee arrangements will remain permissible); and
- the prohibition of exemplary damages.

Unclaimed funds

The government rejected cy-près distribution and reversion to the defendant as mechanisms to deal with unclaimed funds, which will instead be paid to a single organisation: the Access to Justice Foundation.

The rejection of defendant reversion raises questions about whether the policy driver for the collective action is truly compensatory, as is claimed, or in fact is designed with punishment and deterrence in mind.

The government states that defendants will be free to settle on any other basis, subject to approval from the CAT. How willing the CAT will be to depart from the default position is not yet clear.

Alternative dispute resolution ('ADR')

The government proposes to promote ADR, seeking to ensure that the courts are the option of last resort.

Opt-out collective settlements

The main reform in this area is to introduce a new opt-out collective settlement regime

for competition cases in the CAT. This will allow undertakings to settle cases on a collective basis without the need for a claim to be brought, and is similar to the mass settlements regime which exists in the Netherlands. However, unlike the Dutch scheme, the procedure will apply to non-UK claimants on an opt-in basis and therefore will not operate to allow defendants to achieve 'global peace' in the case of, for example, a cartel which operated EU-wide or globally.

Cases would need to be certified by the CAT as suitable for such a settlement and the settlements themselves as fair, just and reasonable. The CAT would be able to issue directions as to the timing and mechanics of the settlement, including as to publicity.

OFT/CMA power to certify redress scheme

The government proposes to grant the UK competition authority, the OFT (and in due course its successor the CMA), the discretionary power to certify a voluntary redress scheme put forward by an undertaking which is subject to an infringement finding of the OFT or Commission. The OFT will not have the power to mandate a redress scheme, but will have the power to take enforcement action should the terms of a certified scheme not be complied with. The OFT's role will be limited to certifying that a scheme had been created in accordance with a reasonable process, not that the level of compensation proposed itself is reasonable. The existence of such a scheme will not prevent private actions being brought.

In return for such a redress scheme, the OFT will consider whether to grant a (five to ten per cent) reduction in fines where a business has made such redress.

Relationship with the public enforcement regime

The government had originally consulted on potential measures to ensure that a strengthened private enforcement regime does not undermine the public enforcement system, and in particular the OFT and Commission leniency regimes. Such measures included the regulation of access by claimants to documents created for the purposes of a leniency application (following the ECJ's preliminary ruling in the *Pfleiderer* case) and adjustments to the rules on joint and several liability in the leniency context.

However, given that the Commission is expected to put forward EU-wide proposals in this area later this year, the Government has not proposed taking any action at this stage. It has stated it will consider doing so if there is significant delay to the Commission's proposals.

Proposals not taken forward by the government

The government had originally consulted on introducing a rebuttable presumption of loss in cartel cases (floating the figure of 20 per cent) but has now dropped this proposal following widespread opposition.

The government also does not propose to legislate in respect of the passing-on 'defence' (which has not to date been explicitly recognised in English law but is assumed to apply) or the ability of indirect purchasers to bring claims.

Notes

1 See: **www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform**.

2 Such claims can currently only be brought in the English High Court (or the Court of Session in Scotland) and the limitation of the CAT's jurisdiction to follow-on claims has led to extensive procedural litigation as to the appropriate boundaries of a follow-on claim.

Recent developments of antitrust in Uruguay

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On 31 December 2012, the Executive Power passed a resolution in which it established quotas for the number of users which cable companies can provide their services to.

The Decree No 436/012 (hereinafter, the 'Decree') states that one of its main purposes, established in the foreword, is to avoid undesired levels of concentration under the scope of antitrust policies.

The Decree sets forth that cable companies licensed to operate in all of Uruguay's territory cannot have more than 25 per cent of the total homes registered in the 2011 Census (approximately 350,000 homes) as clients. In addition, section 2 limits the number of homes to which cable companies can provide their services within particular territories. The reason for this is that licences in Uruguay are based on a territoriality principle. Therefore, upon this section, it is established that the number of clients that the cable companies are authorised to have within a certain territory (ie, state, town, etc) is 35 per cent of the total of homes registered in the 2011 Census for that particular territory.

This was the first time that – based on antitrust grounds – that the Government issued these kinds of limitations.

Regarding the competent authority, we point out the following: Law 18.159, dated 20 July 2007 (hereinafter, the 'Antitrust Act') sets forth in its section 27 that when certain sectors of the economy (ie, financial markets, energy, communications) are expressly regulated by a particular entity, such entity has the duty to enforce the Antitrust Act. Alternatively, should there be no specific body of norms or a sector sufficiently determined, the Commission for the Promotion and Protection of Competition comes in to play. In the case of communications, which comprehends broadcasting, there is the Regulatory Unit of Communication Services (hereinafter, 'URSEC', as per its acronym in Spanish). Therefore, it would fall under the scope of URSEC to control and enforce the applicability of this Decree, even though there are no special provisions regarding the measures that can be taken.

However, what needs to be considered carefully is whether these quotas (market shares limits) are necessary or even desirable under the antitrust policies. We tend to believe that such limitations would probably not foster competition. Please note that the necessary legal tools to avoid or restrict undesired levels of concentration in this market already existed in the legal framework. The Antitrust Act provided for the possibility of filing claims in case of anti-competitive practices (like abuses of a dominant position), such as the ones which are trying to be avoided through the Decree.

Despite the fact that the cable company that has the biggest market share within the Uruguayan territory has – according to public available information – 11 per cent (far from the 25 per cent limit), the enactment of the Decree results in a detriment in the environment of cable operators that may translate to a detriment of potential investments and, in turn, of customers.

In all, what can be pointed out about the Decree is that it separates from the original criteria adopted by the government to regulate anti-competitive practices and antitrust policies through the application of the rule of reason (section 2 of the Antitrust Act), while in this case, the criteria adopted was that of a fixed criteria, under which no further analysis of the conduct has to be undertaken.

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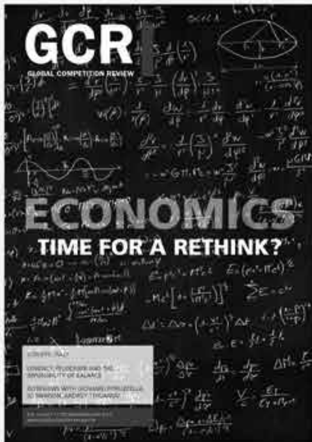

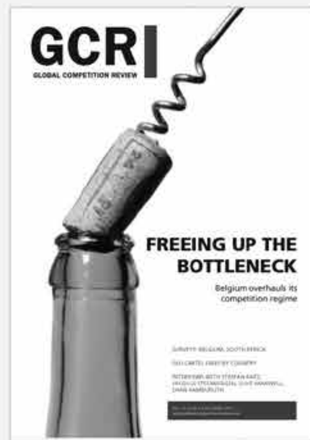

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