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Antitrust

Newsletter of the International Bar Association Legal Practice Division

VOLUME 23 NO 2 – OCTOBER 2010

Merger Regulation in the EU after 20 Years

10–11 March 2011 Brussels, Belgium

A conference presented by the IBA Antitrust Committee in collaboration with the European Commission

Topics include:

- The development of EU merger control since the birth of the merger regulation
- Eminent economists will consider the dominance test
- International cooperation and convergence
- Cooperation and convergence within the EU
- Administrative enforcement, judicial review and the issue of minority shareholdings

Who should attend?

Senior practitioners, in-house counsel and officials from across the EU as well as from Australia, Brazil, Canada, Japan, Korea, Russia, and the United States are expected to attend.

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From the Co-Chairs

Interesting times for competition lawyers

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Competition lawyers are participating in, and helping to shape the globalisation of antitrust law enforcement at a pace never seen before. Merger reviews and cartel investigations are increasingly multi-jurisdictional, paradigm-changing unilateral conduct cases have emerged in the technology sector, agencies continue to develop and revise enforcement guidelines, and several jurisdictions including the BRIC countries have become much more active. The IBA's Antitrust Committee provides opportunities for its members to stay abreast of these developments and to influence them.

One of the key vehicles for doing so is our conference programmes. In May, our rotating mid-year conference returned to Brazil. The programme was co-ventured with IBRAC and included in-depth sessions on cartel leniency programmes, merger remedies, pharmaceutical patent settlements, loyalty programmes and a roundtable with leading enforcement officials. Conference materials are available on **www.int-bar.org/conferences/conf305/**.

Our 14th Annual Competition Conference is scheduled for 17-18 September 2010 in Florence. The programme includes panels on mergers, cartels, standard setting and competition in online advertising and media as well as keynote addresses by EU Commissioner Almunia, FTC Commissioner Kovacic and EC Court of First Instance Judge Milanesi, as well as an interview with former EU Court of First Instance President Vesterdorf.

Our programmes at the IBA's Annual Conference in Vancouver (3-8 October 2010) begin with a roundtable involving enforcement officials and general counsel. We will also have sessions on mergers and unilateral conduct, as well as joint programmes in the areas of dawn raids, airline alliances, competition issues in the mining sector and developments in the BRIC jurisdictions.

In 2011, the mid-year conference will be held in Seoul, Korea on 28-29 April in collaboration with the Korean Competition Law Association. If you have any questions or suggestions, Dave Poddar (**dpoddar4@bigpond.com**) and Koya Uemura (**koya.uemura@amt-law.com**) are taking the lead in organising this programme.

The Committee plays a leading role in the international competition policy community as a contributor of submissions to government agencies on proposed changes to competition laws or enforcement practices. We recently provided comments to the UK Office of Fair Trading on merger issues, and to the US antitrust agencies on proposed revisions to their horizontal merger guidelines. This fall we will be providing comments to the UK OFT's consultation on its investigative procedures. The foundation of our success in this area has been active participation by geographically diversified groups of volunteer members. If you have an interest in participating in one of these projects, or if there is a consultation opportunity relating to proposed changes in your jurisdiction, please advise our Working Group Coordinator, Marc Reysen (**reysenm@howrey.com**).

The Committee's website contains a variety of useful materials including our working group submissions (see **www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/Default.aspx**). Please let our Website Officer, Liz Morony (**elizabeth.morony@cliffordchance.com**) know if you have suggestions related to the website.

Our *Competition Law International* journal continues to thrive. A special edition focusing on remedies will be in print shortly. Planning is also well advanced for the Winter 2011 issue which will cover a range of topics. Please contact the Co-Chairs of the Editorial Board, Stephen Kinsella (**skinsella@sidley.com**) or Ilene Gotts (**ikgotts@wlrk.com**), or our Publications Officer, Jan McDavid (**jlmcdavid@hhlaw.com**) if you are interested in submitting an article to CLI.

The newsletter provides members with concise and topical updates on relevant developments from around the world. Our new newsletter editors, Philippe Rincazaux (**princazaux@orrick.com**) and Koya Uemura (**koya.uemura@amt-law.com**), are

in the process of expanding the coverage of our newsletter. If you have an interest in contributing from a jurisdiction that does not already have a rapporteur, please let them know.

This year, we have introduced formal liaisons to the major regional fora in the IBA. They are Thomas Janssens for the European Forum (**thomas.janssens@freshfields.com**), Kimitoshi Yabuki for the Asia Pacific Forum (**k.yabuki@yabukilaw.jp**), Julián Peña for the Latin American Forum (**jp@allendebrea.com.ar**), and Paul Coetser for the African Forum (**pcoetser@werksmans.com**). In addition, Petri Kuoppamäki (**petri.kuoppamaki@nokia.com**) is our Committee's liaison to the Corporate Counsel Forum. Please feel free to communicate with any of them or any of our officers about issues of regional interest.

We are also working with our liaisons and IBA staff to expand the Committee's membership in all regions, with a particular focus on emerging jurisdictions that are becoming more active in the competition law field. Please encourage colleagues and others you know in the competition bar to join. For those in firms that have become IBA group members, every lawyer at the firm may join one IBA Committee at no incremental cost. Any questions about membership can be directed to our Secretary and Membership Officer, Pieter Steyn (**psteyn@werksmans.com**).

We hope that the Committee's activities will contribute to your work in the competition field and that we will have a chance to meet you at one of our conferences this year.

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From the Editors

Welcome to the second issue of the 2010 volume of the Antitrust Committee newsletter. This issue will be the final one of the year and we are once again delighted to bring you a number of submissions covering all aspects of competition law from around the globe.

This issue is again substantial with over 30 articles covering a broad range of subjects. We have contributions from Asia, Europe, Latin America, North America and the Asia-Pacific region. Articles in this issue include:

- an update from China's antitrust enforcement agencies The Ministry of Commerce (MOFCOM), The National Development and Reform Commission (NDRC) and The State Administration for Industry and Commerce (SAIC);
- reconciling the Colombian Government's financial needs with competition regulation in the electricity sector;
- an article on the proposed new Finnish Competition Act which is expected to enter into force in late 2010/early 2011;
- the Spanish Competition Authorities in-depth investigations into acquisitions in the TV market; and
- the release of guidelines by the Uruguayan Antitrust Agency for determining relevant markets.

As you read through this issue, you will notice that many of the articles now have a box with links to relevant websites. These web links take you directly to the competition authorities of that country, the specific cases and decisions mentioned in the article, and other related websites which you may find of interest. We hope that you will find this new initiative useful.

Conference reports

As mentioned in the last edition of the newsletter, we would welcome conference reports from any of our readers who are attending the upcoming 14th IBA Annual Competition Conference, being held in Florence on 17-18 September 2010, or the IBA Annual Conference which takes place in Vancouver from 3-8 October. As we are sure you are aware, your Committee has many excellent sessions planned for these two conferences and we would welcome session reports from these events for possible inclusion in the first edition of the newsletter in 2011. Please contact us at the e-mail addresses above if you would like to write a conference or session report for the newsletter.

We would like to thank all the contributors to this issue, and we hope that you, the reader, enjoy this issue.

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

IBA Annual Conference, Vancouver 2010

INTERNATIONAL BAR ASSOCIATION CONFERENCE
VANCOUVER
3 – 8 OCTOBER 2010

Antitrust Committee sessions

General counsel and antitrust enforcer round table

Session Co-Chairs
Neil Campbell *McMillan LLP, Toronto, Ontario, Canada*
Gregory McCurdy *Microsoft Corporation, New York, USA*

European and North American antitrust enforcers and prominent general counsel will discuss lessons learnt from recent cases and current hot topics.

MONDAY 1000 – 1300
Room 111 & 112, Level 1

Unilateral conduct – The law of discounts and loyalty rebates

Session Co-Chairs
Cani Fernández *Cuatrecasas Gonçalves Pereira SLP, Madrid, Spain; Senior Vice-Chair, Antitrust Committee*
Philippe Rincazaux *Orrick, Paris, France; Newsletter Editor, Antitrust Committee*

Unilateral conduct – the law of discounts and loyalty rebates – has been front and centre in the Intel cases in the EU, US and elsewhere. The law varies from jurisdiction to jurisdiction. This panel will examine the debate on these issues in light of the current cases.

MONDAY 1500 – 1800
Room 111 & 112, Level 1

A LUNCH will be held for committee members and accompanying persons

TUESDAY 1315
Fairmont Pacific Rim Hotel

Current issues in international merger policy and practice

Session Co-Chairs
Janet L McDavid *Hogan Lovells US LLP, Washington DC, USA; Publications Officer, Antitrust Committee*
Marc Reysen *Howrey LLP, Brussels, Belgium; Working Group Coordinator, Antitrust Committee*

There have been a number of significant developments in merger law and policy around the world, including new laws in India and Canada, the first major decisions in China, and new Merger Guidelines in the US. This panel will consider recent developments in international merger law.

TUESDAY 1500 – 1800
Room 201, Level 2

Dawn raids and search powers in antitrust investigations
Joint session with the Business Crime Committee.

Co-Chairs
Michael O'Kane *Peters & Peters Solicitors LLP, London, England; Vice-Chair, Business Crime Committee*
Pieter Steyn *Werksmans Attorneys, Johannesburg, South Africa; Secretary and Membership Officer, Antitrust Committee*

Dawn raids, also known as 'unannounced inspections' are a common tool in civil law countries, including European jurisdictions, to gather documentary evidence from companies being investigated in antitrust or other types of business crime cases. This panel will examine some common issues that arise, such as compulsory production of documents, handling implicated individuals, evidence collection, and coordinating with other jurisdictions. The speakers, both government and defence lawyers will also attempt to suggest improvements to the current procedures in antitrust and other business cases.

WEDNESDAY 1000 – 1300
Room 217 & 218, Level 2

Specifics of antitrust regulation and enforcement in emerging markets of BRIC countries

Joint session with the European Regional Forum.

Session Co-Chairs
Marcelo Calliari *TozziniFreire Advogados, São Paulo, Brazil;*
Vice-Chair, Trade and Customs Law Committee
Thomas Janssens *Freshfields Bruckhaus Deringer LLP, Brussels, Belgium*
Marc Reysen *Howrey LLP, Brussels, Belgium; Working Group Coordinator, Antitrust Committee*
Vassily Rudomino *ALRUD Law Firm, Moscow, Russian Federation; Co-Chair, European Regional Forum*

As investors are still looking for profitability in growing markets, M&A activity in BRIC countries remains at a high level and foreign companies are expanding their activities in these countries. At the same time the governments of these countries continue to develop and enforce their legislation to protect competition. Antitrust enforcers from Brazil, Russia, India and China, as well as leading competition law practitioners, have been invited to this special 'BRIC session' to discuss the latest developments and trends in antitrust regulation and enforcement in these jurisdictions. The panel will explore features of merger control, problems of antitrust law enforcement and the consequences for violating the competition laws. The speakers will also address the prospects for cooperation among BRIC antitrust authorities.

WEDNESDAY 1500 – 1800
Room 221 & 222, Level 2

Antitrust issues in airline alliances

Joint session with the Aviation Law Committee.

Session Co-Chairs
Jose Augusto Regazzini *TozziniFreire Advogados, São Paulo, Brazil; Senior Vice-Chair, Antitrust Committee*
Mia Wouters *LVP Law, Brussels, Belgium; Secretary, Aviation Law Committee*

In a moment of evident consolidation of the airline industry, antitrust authorities are focusing their attention on potential damages to consumers and ways to enforce competition laws without further disrupting an already difficult segment heavily affected by the economic crisis. Currently several airlines are seeking approval for cooperative alliances in various jurisdictions from the antitrust and aviation authorities. This panel will examine these antitrust issues and the policy and business advantages and disadvantages of permitting such alliances.

THURSDAY 1000 – 1300
Room 217 & 218, Level 2

Antitrust regulation for natural resources

Joint session with the Mining Law Committee.

Session Co-Chairs
Pedro de Freitas *Veirano Advogados, Rio de Janeiro, Brazil; Secretary, Mining Law Committee*
Dave Poddar *Mallesons Stephen Jaques, Sydney, New South Wales, Australia; Vice-Chair, Antitrust Committee*

The mining industry changed a lot in the first decade of the 21st century. There has been a trend for cross-border consolidation in the mining industry. Sales price has been a hot topic and subject to many disputes among all parties involved. There have been nationalistic debates regarding ownership of mining reserves. The environmental standards have changed. There is an ever-growing demand for royalties and corporate social responsibilities. But what has changed in the industry from a competition standpoint? What new elements are now present in the scenario? Specialists in the area will discuss recent cases, concerns and what to expect.

THURSDAY 1000 – 1300
Room 215 & 216, Level 2

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Argentina

Greater judicial control over Argentine antitrust enforcers

In the past couple of years, the courts have become increasingly strict when reviewing decisions taken by the antitrust authorities in Argentina. Although historically the courts of appeals have sometimes overturned fines imposed by the antitrust authorities, in recent months different courts of appeals have questioned certain powers of either the Comisión Nacional de Defensa de la Competencia ('CNDC') or the Secretariat of Domestic Trade ('SDT') and have even annulled several decisions taken by such agencies. These court decisions have been taken both in anti-competitive behaviour investigations as well as in merger control cases and most of them relate to cases that are still in the pipeline.

Although the courts have always played an important role in antitrust cases and have revoked different CNDC and SDT decisions on grounds of insufficient evidence, the type of control exercised by the courts in recent times goes further since it even questions the CNDC's and the SDT's power to take decisions. This process started in 2003 with the 'judicialisation' of antitrust enforcement due to the institutional fragility derived from the lack of implementation of the Tribunal Nacional de Defensa de la Competencia ('TNDC'), an independent agency created by law in 1999 to replace the CNDC that even today has not yet been implemented.

The greater importance of competition cases (much higher fines and important merger cases) has forced the courts to a stricter scrutiny of the decisions taken by the Argentine antitrust enforcers.

Since 2008, the courts started to set stricter limits on the government regarding its antitrust enforcement. This new trend included: (i) restrictions on the CNDC's and the SDT's power to issue injunctions and to decide on appeals filed by the parties; and (ii) reviewing the use of discretionary powers in merger control cases.

Historically, the CNDC issued injunctions in its anti-competitive behaviour investigations and the courts upheld its decisions. Moreover, the courts have even exempted the CNDC from paying a 'contra-cautela,' a monetary guarantee which is one of the legal requirements for those parties that request injunctions. Furthermore, in 2006 a Court of Appeals ordered the CNDC to issue an injunction in a merger case.[1]

However, in July 2008, 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.[2] Since then, at least three different courts of appeals have revoked or nullified injunctions issued by the CNDC on the grounds that such measures could not be taken either by the CNDC or by the SDT but only by a court of justice at the SDT's request. Although this change in the case law is an institutional setback for the CNDC, at least until June 2010 it continued to issue new injunctions.[3]

Although the CNDC invokes the 'need to exercise the state's power' to protect the general economic interest, the argument on which the courts have changed their position has been that the CNDC cannot have greater powers nowadays than those granted by the 1980 law that created it since the 1999 law only allowed the CNDC and the SDT to continue in existence until the TNDC was implemented.

For this reason, the courts of appeals have systematically revoked or nullified the CNDC's injunctions issued in recent merger cases. For instance, in December 2009[4] and in February 2010,[5] a Court of Appeals issued an injunction temporarily suspending the effects of certain injunctions issued by the CNDC, while on various rulings – including three rulings issued on 17 June 2010 – another Court of Appeals declared the nullity of different injunctions issued by the CNDC in the *Telefónica-Telecom* merger case.[6]

On 13 May 2010, a Court of Appeals nullified a CNDC decision that rejected an appeal filed by the parties of an investigation on the grounds that the CNDC was not a decision-making agency.[7] Such decisions shall, pursuant to this ruling, be taken exclusively by the SDT in accordance with the Supreme Court Recreativos Franco ruling.

On 12 February 2010, a Court of Appeals

nullified a resolution issued by the SDT based on a recommendation prepared by the CNDC ordering a divestment in the Telefónica-Telecom merger.[8] The main reason for the ruling was that the decision to order a divestment was totally unsubstantiated and that the investigation did not respect the due process. Therefore, the Court of Appeals ordered the CNDC to restart the investigation.

The decisions taken by the courts in recent years show an unprecedented level of judicial control over antitrust enforcement in Argentina. Although this level of scrutiny is the result of multiple causes, it can be explained as due both to a weaker institutional framework and to an increase in the level of importance of the decisions taken by the antitrust enforcers in anti-competitive conduct investigations as well as in merger control cases.

Since most of the judicial decisions of the past two years are still pending the review of the Supreme Court, it is too early to predict the final outcome of such rulings and how they will impact antitrust enforcement in the future. However, what has been clearly reflected is the growing interest of the courts in setting tighter limits on the discretionary powers of the antitrust enforcers in Argentina.

Notes

1 Federal Civil and Federal Court of Appeals – Chamber 3 – Isenbeck – Buenos Aires, 24 August 2006.
2 Federal Administrative Court of Appeals – Chamber 5 – Multicanal – Buenos Aires, 18 July 2008.
3 On 9 June 2010, the CNDC issued an injunction against Cablevisión ordering it to include a TV signal in its listings.
4 Federal Civil and Commercial Court of Appeals – Chamber 2 – Grupo Clarín – Buenos Aires, 18 December 2009.
5 Federal Civil and Commercial Court of Appeals – Chamber 2 – Cablevisión – Buenos Aires, 18 February 2010 and DirecTV, 25 February 2010.
6 Criminal Economic Court of Appeals, Chamber A, Sintonia, Telecom Italia – queja – and Telecom Italia – rec dir – Buenos Aires, 17 June 2010.
7 Federal Civil and Commercial Court of Appeals – Chamber 3 – Buenos Aires, 13 May 2010.
8 Criminal Economic Court of Appeals, Chamber A, Pirelli and others, Buenos Aires, 12 February 2010.

Australia

Use of foreign testimony in Australian cartel proceedings

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One of the less considered, but important implications, of the criminalisation of cartel conduct in Australia is that testimony given overseas may be able to be adduced in criminal cartel proceedings, and related civil proceedings, in the Federal Court of Australia. This means that careful consideration should be given to providing testimony in jurisdictions overseas where the relevant conduct may be a breach of Australian criminal cartel offences.

Cartel conduct

Since mid last year, it is a criminal offence, and a civil prohibition, for a corporation and/or an individual to enter into or give effect to a contract, arrangement or understanding between competitors which contains a 'cartel provision'. A 'cartel provision' is a provision that has:

- the purpose or effect of price fixing; and/or
- the purpose of restricting: production or supply; allocating customers, suppliers or geographical areas; or rigging bids.

Corporations may, for each criminal cartel offence, attract a penalty of up to the greater of: AU$10 million; three times the value of the direct or indirect benefit attributable to the cartel as a whole; or if the cartel gain cannot be determined, ten per cent of the corporate group's annual turnover. The same penalties apply to corporations for a breach of the civil cartel prohibitions. Individuals face up to ten years imprisonment and/or a fine of up to AU$220,000 for each criminal cartel offence. For each breach of the civil cartel prohibitions, penalties of up to AU$500,000 apply.

Foreign testimony

With the criminalisation of cartel conduct in Australia, foreign testimony (and material annexed to that testimony) may be adduced in federal criminal cartel conduct proceedings, and related civil cartel conduct proceedings, under Part 3 of the Foreign Evidence Act 1994 (Cth) (FE Act).

The FE Act provides that, prior to the foreign testimony being adduced in the Federal Court, the foreign testimony must:

- have been obtained as a result of a request by, or on behalf of, the Federal Attorney-General to a foreign country;
- have been taken on oath, affirmation or similar caution or under a lesser obligation to tell the truth, whether express or implied, under a law of the foreign country; and
- purport to be signed or certified by a foreign judge, magistrate or officer.

Practically, these criteria are likely to present a low hurdle to adducing foreign testimony in criminal cartel conduct proceedings in the Federal Court of Australia. This is because most foreign testimony is taken under a legal obligation to tell the truth, foreign testimony need only 'purport' to be signed or certified by a relevant person, that is, it only need appear to be signed or certified by a relevant person,[1] and 'officer' in the relevant sense is likely to extend to include '… persons holding public offices as long as they are apparently appropriate officers to sign or certify the relevant document'.[2]

Importantly, foreign testimony may not be adduced, however, if:

- at the time of the proceedings, the person who gave the foreign testimony is in Australia and able to attend the hearing; or
- the foreign testimony would not have been admissible had it been adduced at the proceeding from the person, for example, for reasons of legal privilege or hearsay (subject to the exception for business records set out below).

Admissibility of business records

Recent amendments to the FE Act allow 'business records' forming part of the foreign testimony to be adduced if the sole reason they would not have been admissible in the proceedings is for reasons of hearsay. This is an exception to the general rule regarding non-admissibility of foreign testimony for reasons of hearsay set out above.

Meaning of 'testimony'

Although the FE Act only applies to foreign 'testimony' (and any annexed material), it is unlikely that the word 'testimony' will be given a narrow definition. 'Testimony' clearly encompasses the oral evidence of a witness in court,[3] but it is likely that the term will be given a much broader interpretation. The term 'testimony' is not defined in the FE Act. The FE Act does indicate, however, that the testimony may be reduced to writing or recorded on any device and it need not be in an affidavit or court transcript.[4] It is therefore likely that testimony taken in circumstances other than in a court, for example in depositions connected to court proceedings or interviews with regulatory authorities, may be 'testimony' for the purposes of the FE Act.

Related civil proceedings

It is possible not only to adduce foreign testimony in criminal proceedings, but also in 'related civil proceedings'. 'Related civil proceedings' are defined as '… any civil proceeding arising from the same subject matter from which the criminal proceeding arose…'.[5]

Proceedings brought by the Australian Competition and Consumer Commission (ACCC), Australia's antitrust regulator, in respect of associated breaches of civil cartel prohibitions would likely be caught by these provisions. However, it is not clear whether private litigants in civil proceedings, such as cartel class actions, where the proceedings arise from the same subject matter as criminal proceedings, would also be able to avail themselves of the operation of the FE Act.[6]

Even assuming, however, that third party litigants were to be able to avail themselves of the FE Act, they would still likely face significant hurdles to obtaining the information in the first place (by virtue of the fact foreign testimony that can be adduced under the FE Act must be obtained as a result of a request by, or on behalf of, the Federal Attorney-General, any subpoena requesting such information is likely to be the subject of challenge, at the very least, on public interest grounds,[7] and, if it is the ACCC holding the information, the existence of the protections provided in the Trade Practices Act 1974 (Cth) in respect of disclosure of 'protected cartel information').

Conclusion

Although the full extent of the application of the FE Act to cartel proceedings in Australia is not yet clear, corporations and individuals should be mindful that testimony given in foreign countries in connection with cartel conduct may be adduced in Australia in criminal cartel proceedings, civil cartel proceedings brought by Australian regulators and, possibly, in civil cartel proceedings brought by private litigants.

Notes

1 Director of Public Prosecutions (WA) v Nigel Cunningham Mansfield [No 11] [2009] WASC 294 (Unreported, Jenkins J, 3 July 2009) [27]-[28].
2 Ibid.
3 Reid v Attorney-General (Cth) and Another (1995) 133 ALR 428 at 433.
4 FE Act section 23.
5 FE Act section 3.
6 Cf Karen Coleman, 'The Foreign Evidence Act' (1995) 18(1) University of New South Wales Law Journal 172, 181-182.
7 Ibid, 176-179.

Austria

Actual developments in competition law in Austria

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The Austrian competition law practice is still characterised by a continuous application of the leniency programme. The Austrian Federal Competition authority (Bundeswettbewerbsbehörde, 'BWB') thereby initiates proceedings, which are involving more and more undertakings concerned. With regard to merger control law, the Cartel Court indicated that implementation before clearance – even in cases of only marginal effects on the Austrian market – will be fined in any way.

The developments can be summarised as follows:

Leniency programme

The court proceedings against wholesalers of chemicals needed in the print industry, which were initialised by the BWB after an application for leniency in April 2009, resulted in a fine of (total) €1.5 million (for details, see Antitrust/fines)

With regard to the freight forwarding cartel, which was initiated by a leniency application of Schenker in 2007, the undertakings concerned submitted their replies to the Cartel Court (for details see Antitrust/fines).

Antitrust/fines

First leniency applicant gets highest fine in cartel proceeding

The Cartel Court, on request of the BWB, imposed a fine of €1.5 million against four undertakings in the chemicals industry sector. For the first time in Austria, the first leniency applicant was not granted immunity. Moreover, the Cartel Court even imposed the highest fine in the proceedings on the first leniency applicant:

In April 2009, the BWB applied for fines against four undertakings. Following the BWB, the alleged cartel (with regard to special chemicals for the print industry at wholesale level) comprised increases in prices, price cuts in order to force competitors out of the market, customer allocations (with adjusted bid-riggings) and the exchange of information with regard to conditions and payment arrangements (discounts and bonuses).

The proceedings were initiated by two leniency applicants (Donau Chemie AG and DC Druck Süd GmbH & Co KG). Donau Chemie AG had been the first applicant. However, the Cartel Court came to the conclusion that Donau Chemie AG did not provide all available information with regard to the cartel. Therefore, in not fulfilling all of the preconditions necessary for a successful application as a leniency applicant, Donau Chemie AG, instead of getting no fine at all, had to pay the highest

fine of all the undertakings concerned (€675,000). On the other side, the second applicant, DC Druck Chemie Süd got a reduction of the fine.

Freight forwarding cartel

In February 2010, based on a leniency application of Schenker in 2007, the BWB applied to the Cartel Court for a fine against more than 40 freight forwarding undertakings which had been organised in a conference ('Speditions-Sammelladungs-Konferenz'). Following BWB's allegations, the undertakings had fixed prices and allocated customers within the SSK with regard to national piece goods transports. Furthermore, following BWB's request, there had been cooperation between the SSK and Rail Cargo Austria ('RCA', a subsidiary of Österreichische Bundesbahnen (Austrian Federal Railway)). Within this cooperation, the undertakings and RCA are accused of exchanging sensible market information and adjusting their tariffs.

In BWB's view, the SSK itself and the cooperation between SSK and RCA infringe EU competition law (Article 101 TFEU).

However, the undertakings concerned fiercely contest BWB's allegations. Besides contesting the facts of an infringement, the case is of special interest as the conference – based on Austrian competition law – was exempted from the application of Austrian competition law by order of the Austrian Cartel Court. The Cartel Court was applying the Austrian de-minis exemption, which, contrary to EU competition law, also exempts hard core infringements.

Public prosecution can request access to Cartel Court's file

In a very recent, and so far not published judgment of the Supreme Court (June 2010), it was ruled that in case public prosecution – within its legal scope – requests access to file with regard to cartel proceedings in front of the Cartel Court, the Cartel Court must follow this request. This judgment is of special interest as section 39 (2) of the Austrian Cartel Act states that access to the Cartel Court's files for third parties is not possible without the parties' approval (which has not been granted in the given case).

So far, it cannot be assessed in which way this decision will affect Austrian competition law in practice (key words 'business secrets', 'leniency application', 'damage claims').

Merger control

Infringement of the prohibition of implementation of the concentration prior to its clearance results in fine

In April 2010, the Cartel Court, on request of the Austrian Competition Authority, BWB, imposed a fine of €5,000 against an undertaking active in the area of production and distribution of construction material for implementation of a non-filed merger.

In its reasoning (as illustrated in the BWB's press release, the order of the court itself is not public), the Cartel Court argues that due to deterrent effects on a particular offender and the general principle of prevention, the undertaking concerned had to be fined. This was mainly reasoned by the fact that between closing of the merger and its (too late) filing, 11 months had passed and that, in general, implementation before clearance cannot be accepted.

However, even the Cartel Court considered the negligence of the party concerned of being 'very marginal'. Following the Court, the obligation to file was not readily identifiable; the delayed filing had no negative effects and did not result in enrichment. Furthermore, the transaction had its focus in Germany and did not cause any merger control law concerns based on the delay of filing. Finally, it was argued it had been the undertaking concerned itself which started the procedure by filing and clarifying the facts.

Therefore, the amount of €5,000 was considered sufficient. The order of the court is legally binding.

Belgium

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Turning up the heat on cartels

On 20 May 2010, the Belgian Competition Council established that four steel plate radiator manufacturers had participated in cartel agreements. The four manufacturers, Masco, Quinn, Rettig and Caradon, are the most important players on the relevant Belgian market. The first two manufacturers filed leniency applications. A third manufacturer acknowledged the facts.

According to the Belgian Competition Council, the manufacturers exchanged commercially sensitive information and coordinated an increase in the gross wholesale prices of steel plate radiators. The relevant events took place between 2003 and mid-2006.

The Competition Council applied Belgian and EU competition law, and held that the infringements were serious. The Competition Council stated that the contacts between the parties made their behaviour more predictable.

The Competition Council imposed aggregate fines of approximately €3.5 million. Masco, the whistleblower, received immunity from fines. The other leniency applicant, Quinn, received a reduction of its fine under the leniency programme.

Access to file

The debate on the right of access by the complainant and other third parties to the file of the Belgian Competition Authority continues. In its 2008 *Tecteo* judgment, the Belgian Supreme Court clarified the position in the context of merger control procedures. In a judgment of 6 May 2010, the Brussels Court of Appeal looked at similar issues in the context of procedures relating to restrictive practices and set the rules applicable at appeal level.

The judgment was issued in the context of an appeal against the Competition Council's *BASE/BMB* decision (decision of 26 May 2009), in which the Competition Council established that the mobile telecommunications operator Belgacom Mobile had abused its dominant position and imposed an unprecedented fine of €66.3 million. The case was triggered by a complaint lodged by Base, another mobile telecommunications operator. The third mobile operator active on the Belgian market, Mobistar, had intervened in the procedure before the Competition Council.

The principle set by the Belgian Competition Act is that before the Belgian Competition Council, third parties do not have access to the file in a procedure relating to restrictive practices. However, at Competition Council level, derogations can be granted. In this particular case, Base and Mobistar received limited access to the file.

The three parties appealed the decision to the Brussels Court of Appeal on different grounds. One of the first issues that the Court had to get to grips with related to the access of third parties to the file. In an interlocutory judgment, the Court held that in the context of the appeal proceedings it is entitled to review the position on access to file adopted at the Competition Council level. However, the Court stated that it would be inappropriate to reverse the principle of absence of access for third parties at appeal level. Access should therefore remain the exception. In its search for an adequate test, the Court introduced a new concept, ie, effectiveness, thus applying a different test to the one developed by the Supreme Court for merger control cases in Tecteo. According to the Court, access can be granted to third parties if they can demonstrate that such access would contribute to the effectiveness of their intervention in the appeal procedure. It is, however, up to the parties concerned to demonstrate that they meet this test. The Court further distinguished between the complainant and other third parties, setting a stricter standard for the latter. In addition, the usual confidentiality safeguards apply.

In its judgment, the Court invited the third parties to identify the documents to which they wanted to obtain access, and to demonstrate that they meet the test of effectiveness as defined by the Court.

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Brazil

OECD-IDB Peer Review Report praises Brazilian antitrust policy

Launched on 14 May 2010 during the IBA's conference 'Global Antitrust Enforcement: the Perspective from Latin America' in São Paulo, the OECD-IDB Peer Review praises the latest developments in the Brazilian antitrust policy, although it also reiterates the need for reforms. The 2005 Peer Review Report had pointed out similar suggestions, part of which has not yet been implemented. Actually, the delay is due to the fact that Bill No 06/09 is currently under analysis by the National Congress – optimistic analysts believe that the bill may be enacted in 2011.

Bill No 06/09 amends the Brazilian Antitrust Law in order to, among other measures: (i) reduce the red tape – there are three agencies in Brazil; (ii) create the premerger review – mergers are cleared ex-post, which makes it more complicated for the Antitrust Authorities to enforce restrictions or order the divestiture; and (iii) recruit civil servants for a specific career focused on competition policy – not only do the councilmen have two-year mandates, but they are also the three agencies chronically understaffed.

Furthermore, the inadequate funding of the competition agencies and the long duration of the judicial cases involving CADE's decisions were also criticised as serious problems in the Peer Review Report. On the other hand, there are other aspects which deserved a positive evaluation. The growing number of cartel investigations started and beginning of a more effective criminal prosecution is an evidence of the improvements occurred since 2005 Peer Review. According to the Peer Review Report, 'in Latin America, Brazil is considered the leader in prosecuting cartels, and its neighbours regularly consult with it in this area. SDE's advocacy programme is innovative and successful. In this regard, the active competition advocacy performed by the Secretariat of Economic Surveillance (SEAE) among the governmental entities is positively seen'.

As regards merger controls, the Peer Review Report mentions the successful use of the fast-track process for quickly approving simple mergers: most of the fast-track cases are cleared in no longer than two months. Even so, as the Peer Review Report warns, 'while there have been substantial improvements in the merger review process, it continues to suffer from the lack of pre-merger notification. The result is longer review times for non-fast track mergers and greater obstacles to the imposition of structural remedies by CADE when mergers are found to be anti-competitive.'

For the full content of the 2010 Peer Review Report, which provides a comprehensive, critical view of the Brazilian Antitrust Policy, visit the OECD's website at: **www.oecd.org/dataoecd/4/42/45154362.pdf**.

Mr Badin to quit CADE's presidency

Arthur Badin, current President of the Administrative Council of Economic Defense (CADE), decided not to ask the government to reappoint him for another two-year mandate. As a result, Mr Badin will be quitting CADE on the 11 November 2010. In a letter addressed to the Minister of Justice, Mr Badin explained that his decision was taken due to personal reasons, since he has been living in Brasilia for almost eight years.

Before becoming CADE's President, while Mr Badin was CADE's General Attorney, he was criticised by some interest groups due to his aggressive antitrust enforcement. By that time, CADE's decisions used to face serious difficulties to be enforced and although judicial review continues to be the Achilles' heel of the antitrust authorities, CADE's performance in courts has clearly improved over the last few years due to Mr Badin's work. Besides that, his active work at CADE's Attorney Office was responsible for increasing the amount of antitrust fines received.

Partially due to his success, Mr Badin's appointment as CADE's President was subjected to opposition in the Senate's hearing, an unprecedented fact when it comes to the antitrust authorities. During

Mr Badin's mandate, his attempts to defend the independence of CADE's Attorney Office in relation to the Federal Attorney Office are said to have displeased some high officials close to the President. In spite of these frictions, Mr Badin continued to be highly considered by the Secretariat of Economic Law (SDE) and the Secretariat of Economic Surveillance (SEAE).

So far, no official decision regarding CADE's next president has been made public. Some argue the role will probably be filled by one of the current councilmen. Another potential name for the position would be Antônio Henrique Silveira, SEAE's Chairman.

It is more likely that any decision will be taken only under the auspices of the next Brazilian President after the general elections in October 2010. In spite of the possible delay in the decision, other CADE members have already been reappointed for an additional two-year mandate. This will avoid CADE's board running short of councilmen to make decisions, which happens when there are less than five members qualified to vote.

Canada

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***Canada (AG) v United States Steel Corporation and US Steel Canada Inc*, 2010 FC 642**

On 14 June 2010, the Federal Court (Trial Division) released a decision in *Canada (AG) v United States Steel Corporation and US Steel Canada Inc*, 2010 FC 642 (the '*US Steel Case*') upholding the constitutionality of the remedies, including monetary penalties, available under section 40 of the Investment Canada Act (the decision is still subject to possible appeal). The decision confirms the enforceability of the undertakings that investors typically enter into with the responsible Minister under the Investment Canada Act (the 'ICA') when the investment is subject to review.

Overview of relevant provisions of ICA

Under the ICA, and subject to certain limited exceptions, the direct acquisition of control of a Canadian business by a non-Canadian that meets a prescribed financial threshold cannot be implemented until the non-Canadian has filed its application for review and the responsible Minister under the ICA has, or is deemed to have, declared that he is satisfied that the investment is 'likely to be of net benefit to Canada'. In making this determination, the ICA provides that the Minister may take into account any undertakings offered by the investor.

The undertakings that an investor provides to the Minister represent binding commitments. Because circumstances can, and sometimes do, change, the Minister's Administrative Procedures Guidelines state that:

> '... plans and undertakings are based to some extent on projected circumstances and the monitoring of an investor's performance will recognize this factor. Where inability to fulfill a commitment is clearly the result of factors beyond the control of the investor, the investor will not be held accountable.'

Investors are expected to provide a progress report within 18 months after the implementation of the investment. The Investment Review Division of Industry Canada will assess whether any further monitoring is required thereafter.

If an investor has failed to live up to its undertakings, the Minister may send a demand to the investor requiring the investor to cease the contravention, remedy the default, show cause why there is no contravention of the ICA or justify any non-compliance. If the investor is unable to satisfy the demand, the Minister has at least two alternatives. First, following amendments to the ICA in March 2009, the Minister and investor can agree to a new undertaking, presumably one that takes into account any changed circumstances. Secondly, the Minister can bring an application to a superior court for a range of remedies, including divestiture, an order requiring compliance

with undertakings and a penalty not exceeding C$10,000 per day for each breach of an undertaking.

The *US Steel Case* and decision

In August 2007, United States Steel Corporation ('US Steel') announced that it had reached a definitive agreement with Stelco Inc ('Stelco'), a Canadian steel manufacturer, under which US Steel would acquire all of Stelco's shares. As the transaction was subject to review under the ICA, US Steel could not complete the acquisition until the Minister had determined that the transaction was likely to be of net benefit to Canada. In September 2007, US Steel proposed 31 undertakings to the Minister, including two related to employment and production. On 28 October 2007, the Minister approved the acquisition, in part on the basis of the undertakings provided.

On 5 May 2009, the Minister sent a show cause demand to US Steel, notifying US Steel that it was in contravention of two of its undertakings and requiring that they cease the contraventions, remedy the default or show cause why there were no contraventions or justify any non-compliance. Following US Steel's response to the Minister's request, the Attorney-General filed an application under section 40 of the ICA with the court, seeking an order directing US Steel to comply with the two undertakings in question, and a penalty of C$10,000 per day, per breach of the undertakings, calculated from 1 November 2008. US Steel subsequently filed a motion alleging that section 40 is unconstitutional.

In its motion, US Steel argued that section 40 of the ICA violates section 11(d) of the Canadian Charter of Rights and Freedoms (the 'Charter'), which provides that any person charged with an offence must be presumed innocent until proven guilty in accordance with that paragraph of the Charter, and section 2(e) of the Bill of Rights, which provides that every person shall be provided a right to a fair hearing in accordance with the principles of fundamental justice. Among other things, US Steel argued that:

- the Charter is engaged by section 40 because application of the section involves the imposition of true penal consequences and is, by its nature, a criminal proceeding;
- the Minister's application under section 40 causes US Steel to be 'a person charged with an offence', as required in order for section 11(d) of the Charter to apply, because: (i) the purpose of the legislation is public and not private; (ii) the magnitude of the monetary penalty is significant; (iii) the failure to pay the monetary penalty leads to contempt proceedings and exposure to a term of imprisonment; (iv) the penalty goes to the Consolidated Revenue Fund and not to an internal body to maintain or regulate an internal or private sphere of activity; and (v) the penalties are imposed by a court and not a regulator; and
- the procedure under section 40 does not accord investors the right to a fair hearing in accordance with principles of fundamental justice.

Madam Justice Hansen ruled that section 40 of the ICA neither breaches the Charter nor the Bill of Rights and therefore upheld the section. At the end of the day, Justice Hansen held that the purpose of the monetary penalty under the ICA is to '... encourage and promote timely compliance and to enforce compliance with any undertakings and provisions of the legislation' and is 'not concerned with a public sphere of activity', as such a proceeding '... arises in the context of a private transaction involving the acquisition of interests in Canadian businesses by private investors.' Justice Hansen did not accept that section 40 constitutes an offence for purposes of the application of section 11(d) of the Charter. She also was satisfied that section 40 does not offend the right to a fair hearing in accordance with the principles of fundamental justice, and therefore did not accept that the section violates the Bill of Rights.

Implications

A number of implications arise from this decision. First, the decision is likely to provide greater comfort to the Minister in respect of his constitutional authority to seek fines against, or seek other remedies from, non-Canadian investors under section 40 of the ICA. Prior to the *US Steel* decision, there had been no judicial determination of the constitutional validity of a court-ordered penalty under this provision. Investors will need to give careful consideration to agreeing to replacement undertakings under the new section 39.1 of the ICA, or otherwise face possible proceedings. This said, we do not expect that the decision will result in the Minister routinely bringing enforcement actions under the ICA. The *US Steel Case* is the first such action, notwithstanding that the Minister has accepted hundreds of undertakings since the ICA came into force in 1985. It is unlikely that this case will open the floodgates. On the other hand, it does show that the Minister will use the enforcement tools at his disposal where he believes it is appropriate to do so.

Secondly, the decision suggests that parties engaged in merger discussions with a foreign buyer will need to seriously consider and 'value' possible undertakings into their deal arrangements, including negotiated appropriate conditions of closing and relevant covenants, much in the way that antitrust covenants have come to be negotiated over the past decade in Canada.

Thirdly, the decision may be relevant to other statutes that provide for administrative monetary penalties ('AMPs'). One such statute is the Competition Act, which provides that the Competition Tribunal may order AMPs in respect of certain deceptive marketing practices and, as of March 2009, for abuse of dominance. While the decision in the *US Steel Case* and the penalties under the ICA can clearly be distinguished from the Competition Act, it nonetheless represents a case that will be considered closely by any court that may review the constitutionality of AMPs under the Competition Act in the future.

Relevant websites

Competition Bureau: **www.competitionbureau.gc.ca**

Competition Tribunal: **www.ct-tc.gc.ca**

Investment Review Division of Industry Canada: **www.ic.gc.ca/eic/site/ica-lic.nsf/eng/home?OpenDocument**.

China

Recent developments in Chinese competition law and enforcement

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On 1 August 2010, the Anti-Monopoly Law (AML) celebrated its second anniversary. The AML is China's first comprehensive competition law, and was intended to provide a new basic framework for antitrust regulation and enforcement in the country.

During the past few months, the number of actual enforcement cases appears to have decreased relative to 2009 and early 2010. In contrast, the antitrust authorities have been active on the legislative front.

In China, antitrust enforcement is shared between three agencies. The Ministry of Commerce (MOFCOM) is in charge of merger control. The National Development and Reform Commission (NDRC) has jurisdiction over anti-competitive agreements, abuses of dominant market position and abuses of administrative power that eliminate or restrict competition, provided that the anti-competitive conduct is related to pricing. The State Administration for Industry and Commerce (SAIC) is essentially responsible for investigating and sanctioning the same types of anti-competitive conduct as NDRC but which is not related to pricing.

SAIC consults on draft rules on anti-competitive agreements and abuse of dominance

On 25 May 2010, SAIC circulated for public comment three draft regulations intended to implement the AML in the areas within its jurisdiction.[1] The draft regulations target three types of conduct respectively, ie, anti-competitive agreements, abuses of dominant market position and abuses of administrative power with anti-competitive effects, but excluding conduct related to pricing. For market players, the draft regulations on agreements and abuse of dominance will likely be most significant, as the draft rules on abuse of administrative power principally apply to government activity.

The release of the new draft rules represents SAIC's second round of public consultation. The new drafts do not drastically differ from the versions issued about a year earlier, and it could be said that they do not constitute significant progress either. Many of the new draft rules are identical or very similar to the provisions in the AML and a procedural regulation which SAIC enacted in 2009.

From the substantive perspective, the provisions on leniency applications are among the most interesting parts of the draft on anti-competitive agreements. While SAIC in principle seems keen to encourage self-reporting by companies engaged in anti-competitive conduct, the draft provisions do not seem to be sufficiently detailed to make whistle-blowers comfortable with filing for leniency. Perhaps more significant in terms of companies' business practices is the fact that the broad prohibition on imposing exclusive territories and other resale restrictions on distributors contained in the first draft has been moved to the draft rules on abuse of dominance in the second round of drafts. This limits the scope from being of general application to only applying to companies with a dominant position.

The provision on refusal to deal is among the most significant novelties in the draft rules on abuse of dominance. If enacted in an unchanged form, the new rules would not only oblige companies to grant access on reasonable terms to 'essential facilities' but reduction of existing supply volumes, suspension of ongoing business relationships and refusal to enter into new transactions would also be illegal, unless justified by valid reasons. On the upside, the draft regulation on abuse of dominance attempts to clarify precisely the concept of 'valid reasons'. One broad interpretation of the specific provision might even lead to the conclusion that potentially anti-competitive behaviour could be justified as long as there is no consumer harm.

The three SAIC draft rules are generally expected to be enacted in final form during the course of 2010 or in early 2011.

MOFCOM enacts new regulation on remedies in merger control cases

On 8 July 2010, MOFCOM issued the Interim Regulation on the Implementation of Asset or Business Divestiture in Concentrations between Undertakings (Interim Regulation).[2] Despite its title, the Interim Regulation is a final rule that may remain in force for a number of months or years. It became effective from the date of issue.

The Interim Regulation lays down the basic procedural framework for transactions which are subject to MOFCOM merger control where the authority requires divestment of part of the merging parties' business, in order to allay competition concerns. As in other jurisdictions, MOFCOM is entitled to approve transactions subject to the fulfilment of certain conditions.

MOFCOM plans to rely on monitoring trustees and divestiture trustees in order to supervise the divestiture process. The merging parties are entitled to propose the trustees – both organisations and individuals are possible – subject to MOFCOM's approval. The trustees must have the ability to perform the task and be independent of the merging parties. Their remuneration will be borne by the parties.

The Interim Regulation splits the divestiture procedure into three main phases. First, the merging parties attempt to find a suitable buyer for the business to be divested. The exact conditions for that step will be set in MOFCOM's conditional clearance decisions, and can thus vary from case to case. In a few past cases, the relevant time period was six months. During this first phase, the monitoring trustee will supervise the parties' actions. If the parties fail to find an appropriate buyer, a divestiture trustee will be put in charge of that task. Again, the clearance decisions are meant to give details about the length of this second phase. In contrast, the Interim Regulation itself sets a deadline for the last phase: following signature of the sales and purchase agreement, the divested business must be transferred to the new owner within three months (although MOFCOM may grant extensions).

NDRC releases new draft rule on price gouging for public comment

On 13 July 2010, NDRC circulated for public comment a draft version of the Special Regulation on Penalties for Illegal Pricing Conduct during Periods of Abnormal Fluctuation of Market Prices ('draft Special Regulation').[3]

In essence, the draft Special Regulation aims to curb price gouging on important basic commodities, especially food products. It targets four types of conduct: (i) fabrication and dissemination of news on price hikes; (ii) hoarding of products; (iii) driving up prices and reaping excessive profits; and (iv) price collusion.

The draft Special Regulation is meant to apply only in times of crisis, namely when important goods and services experience abnormally high price rises. But while NDRC might have had recent natural disasters in

mind, there is little guidance as to when exactly a situation becomes 'abnormal' or what 'important goods' are.

Although the draft Special Regulation mentions that the provisions of the AML take priority, it prohibits 'price collusion' between companies and subjects it to abbreviated procedures and sanctions which are different from both the AML and the Price Law, another legal text that includes a prohibition of price-fixing between competitors. If enacted in the present form, the draft Special Regulation may increase the 'regulatory thicket' of Chinese antitrust rules and make compliance more difficult for market players.

Notes

1 *See* **www.saic.gov.cn/zwgk/zyfb/qt/fld/201005/t20100525_85718.html** (in Chinese).

2 *See* **http://fldj.mofcom.gov.cn/aarticle/zcfb/201007/20100707012000.html** (in Chinese).

3 *See* **www.ndrc.gov.cn/tztg/t20100713_360457.htm** (in Chinese).

Colombia

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Selling Colombia's major state-owned electricity asset: reconciling the government's financial needs with competition regulation

Introduction

ISAGEN, one of the few major state-owned companies still existing in Colombia, is the third electricity generator in the country and currently holds 16 per cent of the generation market. As a general rule, the Colombian electricity market is open to free competition and it currently has 24 players. In the past few years the Colombian Government has tried to sell ISAGEN in an effort to obtain fresh resources deriving from a very healthy and attractive company.

One of the main obstacles for the sale of ISAGEN refers to the limits established by competition laws regulating the electricity market. While in theory the generation market has free access and currently 24 players, the market shows that those 24 players are actually concentrated in four economic groups which has converted the activity in a highly concentrated one. Concentration has had an evident impact in commercialisation and, at the end of the day, in the price final users pay for electricity.

In the light of EPM's interest in acquiring ISAGEN – EPM is another generating company which currently holds 20 per cent of the market in Colombia – there has been wide discussion both at media level and among the legal community on whether the existing competition regulation is sufficient to avoid market concentration and whether it should be revised.

This essay presents an overview of current competition regulation in the Colombian electricity generation sector including an analysis of the recently proposed regulation by the Colombian Commission for Energy and Gas Regulation (CREG from its abbreviation in Spanish). A final section will present some conclusions about the trends of competition regulation in the Colombian electricity sector and their impact on the way the structure of the market will be modified.

Constitutional and legal framework

As reported by the recently published OECD peer review on competition law and policy:[1]

> 'Colombia's competition law is one of the oldest in Latin America. The law was approved by the national Congress in 1959, on the basis of the 1886 Constitution. It was a fully comprehensive law which included the basic legal standard applying to conduct cases (agreements and abuse of dominance) and a system of prior review of mergers and acquisitions.
> However the implementing regulations issued afterwards were insufficient to implement the law effectively and it was seldom enforced for the purpose of preserving competition, but as the legal basis for applying price controls. This situation has changed

dramatically since the early 1990s, due to the implementation of an economic liberalisation policy, the adoption of a new Constitution which established free competition as a constitutional right, and the promulgation of Decree 2153 (hereafter the 1992 decree), which elaborated on the types of conduct subject to the competition law and refined the legal standards that applied to that conduct.

The liberalisation policy also introduced significant reforms in public services such as the creation of sectoral regulatory bodies (telecommunications, water and sanitation, electricity and gas, public services) provided with a general mandate to strengthen competition and prevent monopolistic practices, in addition to the usual regulatory powers. Thus, these reforms create a decentralised institutional model for enforcing competition policy, in which various economic authorities may apply sanctions for restrictive practices or abuse of market dominance and exerted control over mergers and acquisitions.

By 2004 the shortcomings of this model were becoming apparent and motivated a second reform, focused on updating the competition protection system in order to improve the investment and business climate in the country. The result was the enactment of significant amendments to the competition law approved by Congress in June 2009 and signed on 24 July by the President (Law 1340/09). Two of its principal effects are to set up the SIC as the sole authority to enforce competition rules in all sectors and a substantial augmentation of applicable fines. The law amendment corrects some other shortcomings, but several more remain.'

Within this general legal framework on competition, the Colombian electricity sector is regulated by Laws 142 and 143 of 1994 and a full range of specific provisions including a huge number of specific rules issued by the sector regulator, the Energy and Gas Regulation Commission (CREG). While Law 142 applies to the electricity public utility as a service, Law 143 is the general regime bearing all principles for the activity in the country.

The general rule fostering free competition in the Colombian Constitution is Article 333 whereby economic activity and private initiative are free and do not require any prior requirement or permit unless expressly established by law. The state is empowered to enforce competition rules in order to avoid any restriction to free competition and to control any abuse of a dominant position in the market. In the public utilities' area, this rule was developed by Article 2 of Law 142 which allows for state intervention for the purposes of promoting free competition in the sector.

There are also a number of specific rules regarding competition under Laws 142 and 143. For instance, Article 73 of Law 142 grants CREG the power to promote competition among electricity service providers so that services rendered are quality services, economically efficient and do not create an abuse of dominance. For this purpose, the CREG has, among others, the power 'to establish indispensable mechanisms to avoid concentration of share ownership by companies with supplementary activities in the same sector or sectors related to the rendering of the public utility service'.[2] Article 74 gives CREG the power to ensure free competition in the mining and energy sectors and to adopt differentiated rules of behaviour, depending on the position of the companies in the market.[3]

Likewise, Article 3 of Law 143 of 1994, which is the Colombian electricity statute, establishes that the state must promote free competition in all sector activities and also prevent any unfair competition or dominance abuse practices in the market.

The electricity statute also declares that all economic agents, whether public, private or combined, may participate in all the sector's activities. They shall have full freedom to develop their activities within the context of free competition.[4]

Limits to free competition in the generation activity

Since the early stages of implementation of Laws 142 and 143, CREG was aware of the need to prevent concentration in the generation activity as concentration would have a negative impact on the other activities (in particular distribution and commercialisation). Since 1996, when CREG passed Resolution 128 which was the first set of rules limiting concentration in the electricity generation market, several sets of rules have been introduced[5] finally leading to draft Resolution 64 of 2010 that is currently under consultation and is very likely to be passed soon.

Back in 1996, the general rule passed by CREG and still in force is that companies' participation in the Colombian electricity generation market may not exceed 25 per cent. Even though this threshold has not been modified, what has changed throughout the years is (i) the basis and formula for market share calculation; and (ii) the introduction of a new threshold consisting of the calculation of a power band – franja de potencia – used to determine whether a particular agent may have pivotal power.

Market participation

CREG Resolution 128 of 1996 established that, as from 1 January 2002, agents participating in the generation market may not have more than 25 per cent of the national interconnected system's effective installed electricity-generation capacity. CREG Resolution 042 of 1999 then replaced the 'installed capacity' criterion with the 'nominal capacity' criterion, which refers to the calculation of electricity generation capacity of the power plants based on their full charge rate (ie, what power generators are fully capable of producing). Resolution 042 also introduced the expression 'directly or indirectly' which allowed CREG to include related parties' capacity for market share calculation purposes.

The above criterion was later replaced again by CREG Resolution 001 de 2006. The 25 per cent market participation threshold under Resolution 001 is calculated as follows:

Quotient multiplied by 100, between (a) the addition of the effective net generation capacity of generator's own power plants and of those represented by generator at the wholesale generation market; and (b) the addition of the effective net generation capacity of all the generators within the national interconnected system.

This change resulted in a broader definition of product market thus making it easier for agents to show a lower market share and, therefore less concentration.

With the issuance of Resolution CREG 060 of 2007, the regulatory agency introduced two important changes that have resulted in a less strict application of the 25 per cent market threshold. On the one hand, the calculation formula was replaced with the concept of firm energy capacity that a generator is able to produce in low hydrology conditions within a one-year period (called ENFICC from its Spanish wording Energía en Firme para el Cargo por Confiabilidad). It is worth noting that Colombia's generation capacity mainly comes from hydroelectric and thermoelectric plants. By introducing a concept based on the reliability charge, this new condition basically focused not on offer and demand as the previous regulation but on the whole system's reliability. So if the ENFICC is calculated during winter periods, it will be a very high figure whereas if calculated in summer periods, the figure will be very low. The effect of this is that the hydroelectric power plants would have a greater margin for firm energy than that of thermoelectric power plants. This means that, during winter, hydroelectric generators will have more market power than the other generators.

On the other hand, Resolution 060 of 2007 created a differentiated treatment whenever the generator's market share exceeds 25 per cent, namely:

- Between 25 per cent and 30 per cent market share, and a Herfindahl Hirschman (IHH) index equivalent to or exceeding 1,800. In this case, the matter must be remitted to the competition agency. The regulation does not specify what the agency's powers are regarding this situation. It just states that the competition agency will be competent in such case.
- If market share exceeds 30 per cent and the Herfindahl Hirschman (IHH) index is equivalent to or exceeds 1,800, the dominant generator must make available to other agents any excess of energy necessary for it to return to the 25 per cent threshold. Again the regulation is not very specific as to the mechanisms or ways to achieve this, thus giving agents great flexibility to enter into any type of agreements for the disposal of such surplus.

Resolution 060 of 2007 is still valid and in force and has not been subject to modification under the proposed Resolution 064 of 2010 currently under consultation.

Power band

The power band or power strip is the result of deducting the maximum annual average of energy demand from the annual average of energy availability. The power band is used to determine whether the agent has pivotal power to act at a determined time of energy generation demand.

This threshold was first introduced by CREG Resolution 042 of 1999 stating that agents may not increase their participation in the electricity generation market through business integration operations whenever the

total net-effective-capacity megawatts (Mw) resulting from the integration operation (acquiring party + target capacity), is above the power band calculated by CREG.

In this sense, an agent may not have the 25 per cent market share but it may still be deterred from implementing a merger or acquisition operation if the power band resulting from the M&A transaction is above the power band calculated by CREG.

Resolution 064 of 2010, currently under consultation, introduces a new calculation formula for the power band whereby the concept of 'control' is determinant when calculating whether an agent is pivotal. The new formula introduces a Beta factor element where 0 = not acquiring control and 1 = acquiring control. Only if the M&A operation results in the agent acquiring control would the MW (average annual available capacity) resulting from the operation (those of the participants in the operation plus those of their controlled entities) be added. If the result of such addition is above the power band, then the operation will not be possible. The complete formula is the following:

$$MW_v = \beta \times [MWev + \sum_{ec} MW\,ec]$$

MW_v: MW equivalent to the M&A operation.

ß: Beta factor where (1) is acquiring control and (0) is not acquiring control.

MWev: Annual average available capacity of power generation plants and/or generation units of the parties participating in the M&A operation.

MWec: Annual average available capacity of power generation plants and/or generation units of the controlled entities of the parties participating in the M&A operation.

ec: Entity with which there is a control relationship.

Conclusions

Notwithstanding the existence of 24 generators, the reality of the Colombian market shows that the generation market is actually a concentrated one with those players belonging to a few economic groups such as EPM, state-owned group and EMGESA.

Concentration in the generation market mainly affects prices for commercialisation agents. This in turn affects the price to final users. Market power acquired by those generators exceeding a 25 per cent market share is a clear signal of the risk of that agent being able to abuse its position.

By introducing the power band criterion, the regulation has accepted that sometimes market share is not enough to determine whether a M&A operation is acceptable. Nevertheless, we still need to see whether the competition authority will be willing to enforce the regulation knowing about the government's inclination towards the sale of ISAGEN. Shifting the authority from a specialised agency (the Superintendence of Public Utilities) to a sole national competition agency (the Superintendence of Industry and Commerce) presents a major challenge for the authority to be able to apply adequately specialised sector regulation.

Notes

1 OECD, Country Studies, Colombia – Peer Review on Competition Law and Policy, 2009.
2 Law 142 of 1994, Article 73.25.
3 Law 142 of 1994, Article 74.1.
4 Law 143 of 1994, Article 7.
5 CREG Resolutions: 128 of 1996; 042 of 1999; 001 of 2006; 060 of 2007; and 064 of 2010.

Croatia

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Focus on cartels

In line with the proclaimed shift in enforcement priorities on the EU level, the Croatian Competition Agency ('Agency') has recently started focusing its attention on combating cartels. However, unlike the European Commission, the Agency still does not dispose with appropriate tools to detect and prove cartels (for example, the current applicable Competition Act does not provide for leniency programmes, efficient down raid system or the Agency's power to levy fines for violations of competition law) and thus encounters significant problems in collecting evidence sufficient to demonstrate the existence and functioning of cartels. It remains to be seen whether any significant improvements in this regard will be brought about by the new Competition Act (scheduled to come into force on 1 October 2010) which introduces significant changes both with respect to availability of the leniency programmes and the Agency's inspection powers.

The Agency's focus on cartels as much as the deficiencies in the Agency's powers to fight and prove them is apparent from the recent Agency's decision on a price fixing agreement between publishers of daily newspapers. Encouraged by wide public and media attention afforded to the increase in prices of daily newspapers, the Agency initiated a probe into events preceding the simultaneous increase in price of the daily newspapers adopted by nine publishers (including all the major ones).

Before the opening of the formal cartel proceedings, the Agency undertook an extensive data collection process including numerous submissions by the targeted companies, competitors and industry associations. According to the Agency, the collected data revealed the existence of the level of coordination between the publishers preceding the price increase. By way of example, one of the important grounds for such a finding was the announcement of the intended price increase made by the representative of the Publishers Association attached to the Employers' Union.

During the course of the formal proceedings, targeted publishers strived to persuade the Agency that: (i) the price increase was not coordinated by the alleged agreement or concerted practice; (ii) the price increase was never discussed or agreed on at the meetings of the Publisher's Association; and that (iii) the price increase was mandated by objective economic reasons (eg, steady increase of costs). However, the Agency rejected the submitted arguments. The Agency concluded that nine publishers had simultaneously increased the price of daily newspapers for the same amount (the increase in price amounted to HRK 1 or approximately 17 per cent of the previous prices) despite obvious differences in their cost and profit structure. More specifically, since the Agency's analyses had shown significant differences in the business structures of the publishers (eg, different structure of costs, different sources of income, different levels of profitability), the Agency reasoned that there is no objective economic justification for parallel identical price increases. As to the proof of the agreement or concerted practice, it follows from the published Agency's decision that the Agency was satisfied that the publishers discussed and agreed upon the price increase during the sessions and meetings at the Publishers' Association.

Consequently, the Agency decided that the nine publishers increased prices as a result of the agreement or concerted practice thus concluding anti-competitive prohibited agreement. According to the current setup of Croatian law, following the decision, the Agency should institute appropriate proceedings before competent Misdemeanor Court that should end with fines for the members of the alleged cartel.

Besides detailed analysis of the economic rationale for the relevant price increase, the most striking feature of the Agency's decision is a questionable lack of evidence supporting the Agency's finding of the agreement. Although the decision does not treat this item in sufficient detail, it

appears that the existence of the agreement was mainly supported with the lack of evidence to the contrary, rather than the availability of some direct proof. By way of example, the Agency was not able to obtain minutes from the meeting of the Publishers' Association which preceded the decision on price increases. Based on this fact (non-availability of the minutes) the Agency concludes that this Publishers' Association meeting was actually crucial for the joint decision on price increases and therefore crucial for the agreement. Although the necessity to adhere to such apparent leaps in evidentiary logic stems from the obvious lack of appropriate means to fight and prove cartels, it remains to be seen whether the Administrate Court (if any motion for the judicial review of the decision is submitted, of course) will decide that such constructions are contrary to relevant procedural rules and quashes the Agency's decision as insufficiently proven.

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Czech Republic

The *Tupperware* decisions by the Antitrust Office, the Brno District Court and the Highest Administrative Court Act – *ne bis in idem*

On 21 April 2010, the President of the Czech Antitrust Office confirmed the decision by the Office to issue a 2.3 million CZK fine (about €110,000) against Tupperware Czech Republic, spol, s r o. This decision is the sixth in the same matter and sanctions a practice in effect from 1997 until October 2005 in which the independent salespersons of Tupperware were contractually bound to resale price maintenance and were materially prohibited re-exports as well.

In three decisions within a few months (*RWE, Gas insulated switchgear* ('PISU- kartel') and the present *Tupperware* case), various aspects of the parallel application of national and community antitrust law had to be decided by the Office and the competent courts up to the Highest Administrative Court.

The case

Even though the amount of the fine is not the highest in the practice of the Office, the decisions (first and second degree decision by the Office in 2006, in 2007 District Court decision repealing the fine, the 2008 Decision by the Highest Administrative Court) spreading over a time span of five years show that some important questions were involved. The most important issue involved concerned the right application of the *ne bis in idem* rule.

It must be kept in mind that during the timespan of the use of these problematic provisions by Tupperware, not only a new Antitrust Act came into effect (in 2001) but also the accession of the Czech Republic to the EU took place.

The Office in their 2005 decision held Tupperware to have not only violated the former Czech Antitrust Act (until 30 June 2001), but afterwards also (then) the actual Czech Antitrust Act 143/2001 Coll and after 2 June 2006 (the effectiveness of the Act 340/2004 incorporating the procedural elements of the European regulation) subsequently the relevant European regulation (Article 81 subsection 1a) because this could also affect the trade between Member States. This decision was overturned by the District Court in 2007 mainly because of violation of the *ne bis in idem* principle but also because of unclear reasoning of the decision.

Ne bis in idem

The Highest Administrative Court confirmed the *ne bis in idem* principle to be applicable also in competition law as the sanctions of the Antitrust Act justify an analogy with the constitutional principle applicable in criminal law as well as generally in the European Charter of Human Rights. The Highest Administrative Court cited in its decision among others the ECJ decisions *Walt Wilhelm*

and *Archer Daniels Midland*, as well as its own former decision from 31 October 2008, *RWE*, in which the parallel application of community and national antitrust law was not excluded (but also not required).

In its decision binding for any future court decision in the same matter, the Highest Administrative Court, citing in particular the *ECJ Manfredi* decision from 13 July 2006, reconfirmed the possibility of parallel application of European and Czech antitrust law. It pointed out that the Office decided only in one proceeding and that this is not comparable to a repeated sanctioning in criminal proceedings.

Principle of absorption/cumulation

In addition the Highest Administrative Court had to deal with the principle of absorption, meaning that for various culminating infringements such as the use of the same illegal clause in various contracts, the penalty is not levied for each infringement but must provide for a decrease of the fine compared to the sum of fines the Office would have levied had it considered each case separately.

Consequences

In the new proceedings after the court decision the Antitrust Office levied a fine in the same amount and confirmed this in its internal appeal procedure. It remains to be seen whether this enters into legal force.

First case of bid-rigging sanctioned

For many years, the prohibition of bid-rigging had been only a paper tiger in Czech antitrust law, despite having always been a criminal act (with no cases reported, however). This fact certainly is not to be explained by correctness of all tender procedures in the Czech Republic but rather by difficulties in proving bid-rigging. The Czech Antitrust Office therefore could only, in the 20th year of existence of Czech antitrust law, in July 2010 report the first sanctions in the amount of overall about €200,000 for five participants in a 2006 relatively small tender for operation of accommodation facilities for soldiers in Litomerice on the basis of information handed over by the police.

The organiser of the cartel had given detailed instructions by e-mail how to prepare the offers with the prices agreed on before, including the prescribing of using different paper for the offers. The Office decided to hand out substantial penalties, for the organiser in the range of three per cent of turnover, certainly higher than in a ordinary cartel case but still below the ten per cent it would have been entitled to.

The Czech Antitrust Office is also the supervisory body for public procurement issues and the public procurement department has in the last years started to levy substantial penalties for the state institutions issuing flawed tenders. Maybe in the future, a stronger cooperation will be sought with the economic competition department when there is something obviously wrong. The new government made transparency in public tenders one of its main focuses – but similar declarations were issued before by other governments.

Relevant website

Court decisions (in Czech): **www.compet.cz**.

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Denmark

Danish Competition Authority withdraws merger clearance for the first time

The Danish Competition Authority has for the first time withdrawn the clearance of a merger after the parties had failed to correct erroneous information in the clearance.

On 25 January 2010 at 09:38 the Danish Competition Authority approved the acquisition by Danish Agro a.m.b.a. ('DA') of S.A.B a.m.b.a. Landbrugets Andel ('SAB'). The parties are active on the markets for purchase of corn and sale of animal feed for pigs, cattle, poultry, fertilisers, crop protections, seeds and energy products. The parties would not obtain significant market shares on the affected markets and the concentration did therefore not give rise to unilateral concerns. As regards coordinated effects, the two largest undertakings did have very similar market shares but competitor Aarhusegnens Andel a.m.b.a. ('AAA') was characterised as a maverick able to disrupt any such coordinated conduct. The Authority had itself obtained information on AAA, but the parties had not objected to the description during the hearing. Against this background, the Danish Competition Authority approved the concentration without conditions.

On 25 January 2010 at 11:06, Dansk Landbrugs Grovvareselskab a.m.b.a. ('DGL') and DA informed the Danish Competition Authority of a contemplated acquisition of AAA. On 1 February 2010, AAA had entered into a suspension of payments and the acquisition was necessary in order to save the company from bankruptcy. DGL and AAA had entered into a framework agreement on 13 January 2010 regarding the acquisition of AAA and subsequently split-up AAA between them. Following this new information, the Danish Competition Authority on 1 February 2010 withdrew its clearance of DA's acquisition of SAB. Thus, the Danish Competition Authority can withdraw a merger clearance if it is, to a substantial extent, based upon inaccurate, misleading, or faulty information attributable to one or more of the undertakings concerned. Consequently, DA had to re-notify its acquisition of SAB.

On 1 February 2010, the Danish Competition Authority granted DLG and DA a derogation from the standstill obligation allowing them, inter alia, to take over rights and obligations under one of AAA's supply contracts for soy. The Danish Competition Authority emphasised that this was necessary in order to sustain the activities of AAA. This is the fourth time the Danish Competition Authority has derogated from the pre-implementation prohibition.

On 25 February 2010, the Danish Competition Council's presidency and Director General of the Danish Competition Authority approved DA and DLG's purchase of AAA following commitments to divest assets (two alternatives) to a viable competitor. In light of the commitments in this concentration, the Danish Competition Authority also approved the acquisition by DA of SAB without conditions.

Relevant website

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

Limited information about the above case is available in English.

Finland

Government Bill for new Finnish Competition Act

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In June 2007, the Finnish Ministry of Employment and the Economy appointed a working group to assess the need to reform the Finnish Competition Act and its final report was published on 29 January 2009. The report was followed by the Government Bill of 11 June 2010, stipulating the enactment of a new Finnish Competition Act which would bring the legislation even more in line with that of the European Union. The Government Bill includes the following main changes to the current regime.

Sanctions

There has been some debate whether the Finnish sanctions for competition law infringements are low by international standards. The provisions in the Government Bill arguably entail not only better predictability but also higher fines at least for hardcore cartels. New rules on successor liability and limitation periods are likewise intended to increase enforcement efficiency. The introduction of criminal sanctions and/or trading prohibitions was also assessed during the review process but it was nonetheless concluded that the current system with administrative fines is preferable.

Leniency

The Finnish leniency programme, adopted in May 2004, is largely modeled on that of the European Commission. However, there have been some notable discrepancies. By way of example, a company that has coerced other companies to participate in a cartel may currently benefit from full immunity from fines. This has been remedied in the new Government Bill, along with the introduction of the prerequisites for reductions of fines and specific fine reduction percentages. The leniency procedure will also be streamlined with that of the European Commission.

Damages

Only undertakings are entitled to claim damages on the basis of the Competition Act currently in force. The Government Bill stipulates for the removal of this restriction, which would enable also, for instance, consumers and public bodies to claim damages. Furthermore, the relevant limitation period will be adjusted to facilitate private enforcement actions.

Procedure

The Government Bill places emphasis on the Finnish Competition Authority's ('FCA') ability to handle matters with sufficient speed and efficiency. Under the new Competition Act, the FCA will therefore have the right to prioritise certain matters. Correspondingly, it will have wider decision-making discretion to cease the handling of cases, eg, if overall competition is deemed to function in spite of the competition restriction under investigation.

Inspection powers

Currently, the FCA is entitled to assist in the inspection of private premises only if requested to do so by the European Commission in relation to suspected infringements of Articles 101 or 102 TFEU. The Government Bill provides for corresponding powers also when the FCA investigates infringements of the Finnish Competition Act. Inspections of private premises would always be subject to the Market Court's approval.

Rights of defence

Although companies' rights of defence have generally been recognised, there have been no explicit stipulations in the Finnish Competition Act. In line with

the emphasis on due process issues in international competition law enforcement, the Government Bill codifies the central principles such as access to file, privilege against self-incrimination, legal privilege, and the right to be heard.

Merger control

The current filing thresholds will remain but a new substantive test replaces the dominance test. The proposed SIEC test (significant impediment to competition) corresponds to that applied by the European Commission. Also, the Finnish merger control procedure will be further aligned with its EU equivalent. Such amendments include the abolishment of the filing deadline and the introduction of a possibility to file on the basis of a good faith intention. A 'stop the clock' possibility will also be available in the new Act.

The proposed new Finnish Competition Act is welcome in the sense that the systematic structure of the current legislation has suffered from several partial reforms. Many of the reforms in the new Act are also logical next steps to the most recent amendments in May 2004 when the material provisions on anti-competitive agreements and abuse of dominance were harmonised with Articles 101 and 102 TFEU.

However, the Government Bill also contains provisions which encompass ambiguous elements. It remains to be seen how they will be interpreted in practice. Certain proposed provisions could thus preferably have been clarified in order to ensure an even better balance between enforcement efficiency and due process.

The new Finnish Competition Act is expected to enter into force in late 2010/ early 2011.

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France

New legislation and antitrust updates from France

Changes in legislation and regulation

Online gambling

Law no 2010-476 dated 12 May 2010, concerning competition and regulation of online gambling, came into force on the 13 of May 2010 and created a competitive market. This law pursues three targets:

- Protection of players and vulnerable people;
- Security of games operations; and
- Fight against corruption and money laundering.

An authority to regulate online gambling (ARJEL) has been created. This is an independent administrative authority and is in charge of setting up means of regulation, information and control to protect the players, warn of the addiction of gambling and fight against fraud. This authority delivers authorisations to games operators depending on a payment by them of a fixed tax per demand.

The law gives a definition of online gambling as a paying game where chance prevails on ability and combinations of intelligence in order to obtain a gain.

The law distinguishes the network services market and the internet network market. This second market is open to games operators who have received an authorisation delivered by ARJEL.

Three kinds of gambling online are opened in the competition:

- Horse betting;
- Sports betting; and
- 'Circle' games, especially poker.

Those gambling online are subject to conditions provided by law no 2010-476, dated 12 May 2010, and Decrees.[1]

Priority preliminary ruling on the issue of constitutionality

An application for a priority preliminary ruling on the issue of constitutionality, stemming from law no 2009-1523 dated 10 December 2009, is the right for any person who is involved in legal proceedings before a court to argue that a statutory provision infringes rights and freedoms guaranteed by the French Constitution. This new rule is applicable since 1 March 2010.

In such cases, any claimant can request to a court to transmit his question to the Cour de Cassation. The court is free to decide whether to transmit the question or not. If the Cour de Cassation receives a question, it has three months to decide whether or not to transmit the question to the Conseil Constitutionnel which will finally decide if a provision of a law is contrary to the Constitutional principles.

On 18 June 2010, the Supreme Court refused to transmit two priority preliminary rulings on the issue of constitutionality of provisions of law applicable to competition litigation.[2]

Update on antitrust cases

Online advertising market

Navx markets online databases for GPS navigation devices. These databases include the localisation of fixed and mobile speed cameras as well as the fuel prices implemented by service stations.

The French Competition Authority received a complaint from Navx against practices implemented by Google Ireland and Google Inc. Navx also requested for interim measures.

According to Navx, Google has abused its dominant position in regards the online advertising market and it has also abused its economic dependency. Navx denounced mainly the sudden breach of the relationship with Google – via AdWords (service of sale of advertising space of the Google search engine) – and discrimination.

On 30 June 2010, the French Competition Authority ordered Google to implement in an objective, transparent and non discriminatory manner the content policy of its AdWords service. Google is free to define its policy as regards the contents admitted on AdWords but it is important that the implementation of its policy is made in objective and transparent conditions and that it does not lead to discriminatory practices to the detriment of certain actors of the market

The French Competition Authority considered that Google has implemented the content policy of its AdWords service without objectivity and transparency, resulting in a discriminatory treatment of speed camera database suppliers.

The French Competition Authority has therefore decided to grant interim measures. For instance, it ordered Google Ireland and Google Inc to restore, within a five-day period following the notification of its decision, the AdWords account of Navx. Google also had four months to clarify its conditions of the use of AdWords and more particularly the condition of termination.[3]

On 21 July 2010, the French Competition Authority published on its website the commitments suggested by Google Ireland Ltd and Google Inc in order to put an end to the concerns of competition likely to constitute antitrust practices.

Electronic discount coupons

Ma Liste de Course uses a promotional technique of distribution targeted to the consumers of e-coupons for partner announcers. Another player in this market Group HighCo (HighCo Data and HighCo 3.0), issue and process electronic discount coupons. Sogec is the historical operator in France for the implementation of the coupons.

To prevent fraud, distributors wanted the process for issuing e-coupons to be secured. The Perifem Association (which collects the biggest brands of the French distribution) turned to two discount coupon processing centres, HighCo and Sogec, which then jointly developed a standardised and secure e-coupon that is referred to as the Webcoupon.

The French Competition Authority received a complaint from l'ILEC (which is an institute containing manufacturers of eating and non eating products) and Ma Liste de Courses against practices implemented by Group HighCo and Sogec in the market for the issuing and processing of electronic discount coupons.

According to the plaintiffs, Group HighCo and Sogec have abused their market power for supplanting all the competitors of the market for the issuing and processing of electronic discount coupons by creating a webcoupon which was presented as the reference standard in France and as the only one that guaranteed reimbursement by processing centres. Competitors such as Ma Liste de Course were refused the possibility of offering the Webcoupon under conditions that they considered to be acceptable and pricing differences were applied by the HighCo processing centre between Webcoupon and competing e-coupons.

On 25 June 2010, the French Competition Authority accepted the commitments suggested by Group HighCo, Sogec and

Perifem in order to put an end to the concerns of the competition. For instance, Group HighCo, Sogec and Perifem have to indicate that Webcoupon is only a brand coupon that complies with standard secure specifications, which means that non Webcoupon e-coupons that comply with these specifications can be used and accepted by stores, like e-coupons that use other securitisation solutions.[4]

Marketing of Plavix® generic medications

Teva Santé France produces and markets generic drugs. Sanofi-Aventis is the leader in France of the pharmaceutical industry. The French Competition Authority received a complaint from Teva Santé against practices implemented by Sanofi-Aventis France in the pharmaceutical sector. Teva Santé also requested for interim measures.

According to Teva Santé France, Sanofi-Aventis has abused its dominant position in supplanting from the market the generic medications that compete with one of its most important drugs, Plavix® (ie, by promoting to physicians and pharmacists the differences between its products and competing generic products without indicating that their total bioequivalence has been recognised by health authorities and that such differences have no therapeutic value).

On 17 May 2010, the French Competition Authority rejected the request for interim measures but it will be continuing its investigation on the merits of the case. The French Competition Authority shall determine if the practices of Sanofi-Aventis can be considered as abusive.[5]

Mobile telephone market

Orange France, Bouygues Télécom and SFR, the telephone operators, have been sentenced by the Conseil de la Concurrence (now the Competition Authority) and the Court of Appeal of Paris for anti-competitive agreement.

The three operators exchanged detailed and confidential information relating to the mobile telephone market. They also entered into an agreement aimed at stabilising the development of their respective shares of the market.

On 7 April 2010, the Supreme Court judged that the Court of Appeal of Paris has legally justified its decision concerning the evidence of the effect of the practice but considers that the Court of Appeal has violated Article L 464-2 of the French commercial code (the financial penalties are in particular proportionate to the scale of the damage caused to the economy) when the Court of Appeal judges that the damage caused to the economy is presumed when there is an anti-competitive agreement. The Supreme Court also indicated that the Court of Appeal of Paris should have taken into account the estimation of the damage to the economy and the sensibility of the demand for the price.

The violation by the Court of Appeal only concerns the sanctions imposed on the company Orange France; SFR and Bouygues Télécom, according to the original decision upheld by the Supreme Court, violated Article L 464-2 of the French commercial code.[6]

Notes

1 For more details, see law no 2010-476 dated 12 May 2010 at: **www.legifrance.gouv.fr**.

2 *See* decision of the Supreme Court dated 18 June 2010, no 09-72-655.

3 *See* the press release and decision of the French Competition Authority no 10-MC-01 at: **www.autoritedelaconcurrence.fr/user/index.php**.

4 *See* the press release and decision of the French Competition Authority no 10-D-20 at: **www.autoritedelaconcurrence.fr/user/index.php**.

5 *See* the press release and decision of the French Competition Authority no 10-D-16 at: **www.autoritedelaconcurrence.fr/user/index.php**.

6 *See* Supreme Court decision dated 7 April 2010, no 09-12.984, 09-13.163 and 09-65.940.

Germany

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Legislative developments

Last year, Germany introduced a second domestic turnover threshold in its merger control regime. Merger filings now only have to be made if: (i) the participating enterprises together have a worldwide turnover of more than €500 million; (ii) at least one participating enterprise has a domestic turnover of more than €25 million; and (iii) another participating enterprise has a domestic turnover in excess of €5 million. The introduction of the €5 million threshold has considerably reduced the number of notifications.

In October 2009, the parties forming Germany's current government had agreed to amend the Law Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, 'ARC') by introducing a new instrument that would allow the Federal Cartel Office (Bundeskartellamt, 'FCO') to force the break-up or divestiture of dominant companies even in the absence of an abuse of the dominant position. In January of this year, the Federal Ministry of Economics circulated within the government a draft law designed to implement the measure. The proposed measure has been criticised widely. Even the new head of the FCO wondered publicly whether the FCO really needed such a tool. While the project was initially on a fast track and planned to become law by this autumn, it now seems to have been put on the back burner.

The Federal Ministry of Economics has also begun to work on a more general revision of the ACR, the eighth major amendment of the Act. This is a mid-term project, which will take two years or so and the exact scope of which is not yet defined.

Changes within the authorities and courts

At the end of last year, Bernhard Heitzer became a secretary of state in the Federal Ministry of Economics. He was succeeded as president of the FCO by Andreas Mundt, until then head of the FCO's policy directorate. It was the first time that the president of the FCO was chosen from its staff. Mr Mundt's appointment has been welcomed widely.

At the Federal Court of Justice (Bundesgerichtshof), Joachim Bornkamm ceased being a member of the Cartel Division in order to reduce his workload. He continues to be the president of the First Civil Division, which deals with unfair competition and IP matters.

Antitrust cases

This year, the FCO has already imposed fines totaling €160 million in hardcore cartel cases involving distributors of construction materials, manufacturers of ophthalmic lenses, coffee roasters, and producers of cable fill.

Follow-on cartel damages litigation is picking up in Germany, partly as a result of changes in the law implemented in 2005 to facilitate such litigation. Noteworthy is a judgment of the Berlin Court of Appeal of 1 October 2009 (2 U 10/03 Kart) concerning a local ready-mix concrete cartel, which awarded substantial damages to the plaintiffs. The Court estimated the amount of damages by comparing the prices paid to the defendant and its local competitors during the cartel period with (i) the prices paid before and after this period; and (ii) the prices paid in other areas.

Merger cases

The FCO continues to be an activist agency. On 21 May 2010, it prohibited the proposed merger of Magna Car Top Systems and Karmann, two manufacturers of car top systems. The merger would have reduced the number of suppliers in the European market from three to two, which the FCO found unacceptable given the high degree of price transparency in the market. In 2009, the FCO blocked three mergers and passed five only subject to conditions.

In a landmark ruling of 20 April 2010 (KVR 1/09), the Federal Court of Justice overturned a decision of the Düsseldorf Court of Appeal that had confirmed the prohibition of a merger between two hearing aid manufacturers, Phonak and GN ReSound. Unlike the FCO, which had

only found that the merger would create a collective dominant position between the three leading manufacturers in Germany, the Court of Appeal had even come to the conclusion that this collective dominant position already existed and that the merger would reinforce it. Upon GN ReSound's parent company's appeal, the Federal Court of Justice held 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. The Federal Court of Justice also noted that the FCO has no discretion when deciding whether to accept remedies offered by the parties. If with such remedies the merger does not create or increase a dominant position, the FCO must accept them and cannot prohibit the merger.

Relevant websites

FCO: **www.bundeskartellamt.de/wEnglisch/index.php** (in English)

Federal Court of Justice: **www.bundesgerichtshof.de/cln_134/EN/Home/home_node.html** (in English, but decisions are only available in German)

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Hungary

Hungarian approach to RPM remains unchanges – the Hungarian Competition Authority's *Gekko* decision

In the *Gekko* case, the Hungarian Competition Authority (HCA) had to assess, besides a resale price maintenance (RPM), two other types of vertical restraints, a territorial restriction as well as a non-compete clause in the franchise agreements of Gekko Garden Kft.

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

As far as the franchise agreements' RPM clause is concerned, it was stipulated that the franchisee may only deviate with Gekko's prior explicit written consent from the prices defined by Gekko. The HCA considered the fixing of resale prices as a restriction of competition by object, emphasising that the restriction of intrabrand competition is a serious infringement on markets with few market players. The HCA also emphasised that a franchisee's fixed turnover is less likely to create an incentive to increase the quality of the services, thus rejecting the argument that fixing the resale price is necessary for the maintenance of service quality.

The franchise agreements were concluded with each franchisee for a concretely defined territory. This meant that the franchisee was given exclusivity within a certain area, but was not allowed to actively seek customers outside this sphere. However, it must be added that none of the provisions of the franchise agreements contained a prohibition on passive sales. The HCA held that a territorial exclusivity for an area of reasonable size is indispensable in attracting new franchisees and in maintaining such a franchise network.

The third provision to be assessed by the HCA was a clause which prohibited the franchisee to compete with Gekko's services for two years after the termination of the franchise agreement. In the view of the HCA, a non-compete clause exceeding one year should be considered as anti-competitive. This evaluation follows the approach of the EU

and Hungarian block exemption regulations.

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

Conclusions, comments

In recent times there has been much debate about whether the antitrust perception of vertical restrictions should include the 'magical' more economic approach. Many consider that the hardcore restriction status (ie, restriction by object) of resale price maintenance is being questioned. As it is well known, the wave came from the other side of the Atlantic, the starting point being the *Leegin* judgment of the US Supreme Court, which superseded the same court's leading case on RPM, the Dr Miles Medical judgment from 1912. According to the latter decision, resale price maintenance is a per se illegal restriction of competition. In the *Leegin* case, however, the Supreme Court stated that RPM might have pro-competitive effects, thereby it must be subject to the so-called rule of reason analysis. According to this doctrine, the pro-competitive and restrictive effects of a certain practice should be set against each other in order to be able to decide whether this practice should be prohibited. Among the reasons for this new approach was that in the absence of RPM some services would not be offered and it could also facilitate new market entry.

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

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

Italy

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The end to the antitrust case involving the major Italian airport managing company: some reflections upon the relationship between antitrust and regulated markets

By its ruling of 26 June 2010, the Italian Supreme Administrative Court (hereinafter *Consiglio di Stato*) put an end to the antitrust case, which began in 2006, involving Società Esercizi Aeroportuali – SEA S p A (hereinafter 'SEA'), which manages the two Milan airports (Linate and Malpensa) and is the major airport managing company in Italy. The ruling of the Consiglio di Stato has provided some interesting insights on the application of antitrust law in the airport sector.

Factual and regulatory background

In December 2006, upon request of some airlines, the Italian Competition Authority (hereinafter 'ICA') commenced an investigation against SEA in relation to an alleged abuse of dominant position consisting in the imposition of excessive pricing for granting access to airport installations, which are indispensable for the provision of ground handling services. The ICA focused its attention on fees charged in relation to the centralised infrastructures and other assets (including assets which are used in common as well as those which are exclusively granted to particular users) indispensable for suppliers of ground handling services, namely refuelling, catering and cargo activities.

The fees charged to suppliers of ground handling services for the use of the aforesaid airport infrastructures are subject to a particular regulatory regime, introduced at European level by Council Directive 96/67/EC of 15 October 1996 on access to the ground handling market at community airports and implemented in Italy by means of Legislative Decree 18/1999. In particular, in accordance with Article 16(3) of the said Directive, which states that 'where access to airport installations gives rise to the collection of a fee, the latter shall be determined according to relevant, objective, transparent and non-discriminatory criteria', Article 10(d) of Legislative Decree 18/1999 provides that the fees for the use of the centralised infrastructures and the other assets indispensable for the provision of ground handling services must be related to the management and development costs of the particular airport where the said activities are carried out. This legislative provision should have been monitored by ENAC (the competent regulator in relation to the airport sector in Italy) and followed by a series of regulatory measures, which were unduly delayed by the competent authorities.

At the end of the investigation, the ICA issued its decision on 15 December 2008, stating that SEA had infringed Article 82 (a) EC (now Article 102 TFEU), by charging excessive and unfair prices for the assets indispensable in order to carry out the following ground handling services: (i) refuelling; (ii) catering; and (iii) cargo activities. A fine of €1,549,000 was imposed on SEA. The ICA based its conclusions on the fact that the fees imposed by SEA were much higher than the fees related to the management and development costs, quantified by ENAC.

On the other hand, the ICA excluded the existence of an antitrust infringement in relation to the centralised infrastructures, which was the main alleged violation originally imputed to SEA. In particular, the ICA affirmed that the necessary burden of proof in relation to an infringement of Article 82 (a) EC had not been fulfilled, since the centralised infrastructures themselves constituted a separate relevant market and, consequently, the loss incurred in relation to the whole of the said infrastructures (whose costs greatly exceeded the relevant profits) could not lead to the conclusion that SEA had imposed excessive fees.

The ICA decision was subsequently challenged before the Italian Administrative Court of first instance of Latium (hereinafter 'TAR Lazio'). The said Court partly upheld the decision of the ICA in the sense that it confirmed the ascertainment of the abuse of dominant position committed by SEA, but reducing the fine imposed by 30 per cent, in view of the uncertainty of the sector-based regulation during the timeframe considered by the ICA decision.

Moreover, the TAR Lazio partly quashed the ICA decision concerning the centralised infrastructures market, stating that, in spite of the fact that the latter constituted a separate market, the ICA should have broken down the costs and profits related to each and every infrastructure as opposed to simply considering the global figure.

The second instance proceedings before the Consiglio di Stato

SEA further challenged the ruling of the TAR Lazio before the *Consiglio di Stato*, which partly reformed the ruling issued at first instance.

As regards the abusive practices imputed to SEA, the *Consiglio di Stato* maintained that the imposition by SEA of fees which were not related to the management and development costs (in violation of the requirements prescribed by Article 10 (d) of Legislative Decree 18/1999) constituted a grave abuse and therefore justified the imposition of a fine (the 30 per cent reduction of which was nevertheless confirmed). In particular, according to the *Consiglio di Stato*, where a regulatory provision has a pro-competitive content, such as the provisions of Article 10 (d) of Legislative Decree 18/1999, even a slight deviation from this rule would suffice to constitute an infringement in terms of antitrust law.

In relation to the centralised infrastructures, the *Consiglio di Stato* revoked the TAR Lazio ruling, affirming that the ICA had correctly excluded the existence of the burden of proof necessary to ascertain the imposition of excessive pricing. In particular, the *Consiglio di Stato*, considering the market of centralised infrastructures as a separate market, stated that the global loss incurred in relation to the whole of the said infrastructures was tantamount to the exclusion of excessive pricing, and that moreover the relevant regulatory framework (namely Article 10 (d) of Legislative Decree 18/1999) does not require an analytical

evaluation of the costs and profits for each infrastructure, but rather requires a global assessment.

Consequently, the TAR Lazio ruling has been amended accordingly and the ICA decision in relation to the centralised infrastructures has retained its validity.

The *Consiglio di Stato* has thus offered some novel reflections upon the application of antitrust law in regulated markets, such as the airport one. Indeed, the *Consiglio di Stato* has based most of its conclusions on sector-based regulation and seems to have moved beyond by affirming that, in certain cases, as in the present one, even the mere violation of a regulatory provision can entail a breach of antitrust law, without need for further proof. In following this line of thought, the *Consiglio di Stato* seems to have legitimated a kind of overlap between antitrust law and regulation, which should, as far as possible, remain in different spheres of applicability.

Cases concluded by commitments: ICA and administrative courts' recent views

In its efforts to promote a healthy competitive market, the ICA has favoured commitments by undertakings over the so-called 'conventional' procedures, the latter being conducive to the ascertainment of an infringement by undertakings and application of fines, and the former being far more expedient. Commitments by undertakings to the ICA are in fact on the increase, with proceedings settled by means of commitments in 2009 totalling to 19, as opposed to six cases settled in the so-called conventional manner.

Grandi Navi Veloci

Some cases before the ICA which exemplify the latter's efforts to conclude proceedings by means of commitments include a recent case in which the ICA accepted commitments, relates to the field of maritime transport. The ICA commenced an investigation against *Grandi Navi Veloci*, (GNV) for possible abuse of its dominant position on the maritime route Genova – Palermo.

Hence the proceedings against GNV aimed to verify the alleged abuse of dominant position by GNV with respect to T-link, a new entrant in the market, were concluded without the ascertainment of an infringement and the imposition of a sanction. Thanks to the ICA decision, GNV will be obliged to adopt a pricing list which is based on a standard grid indicating discounts and quantities, calculated on the basis of a basic price as per price list. The granting of particularly high discounts, (which will nevertheless have to be communicated to the ICA), must be based on objective considerations, such as the possibility of offering the same grant to competitors, or of promoting innovation which will ultimately benefit the entire customer base. Moreover, discounts should be available to all clients.

Thanks to these measures and to the continuous monitoring of the ICA, GNV's pricing policies will not be aimed to exclude new entrants from the market. Similarly, possible future additional vessels or additional journeys, will be communicated to the ICA, and must be based on objective factors. Moreover, GNV has also committed itself not to apply penalties with respect to clients which avail themselves of the services of T-Link.

According to the ICA, the measures proposed by GNV suffice to remove competitive concerns vis-à-vis GNV's potentially exclusionary conduct towards T-Link as a new entrant to the market. The said measures will link GNV's commercial policy to objective parameters, restricting any derogations to a set of defined criteria. The commitments shall be valid for two years, which the ICA may extend in the light of the level of competition on the market.

SKY Italia

Another recent case involved *SKY Italia*, whereby the said dominant undertaking committed itself to grant access to its platform to third parties.

The proceedings for ascertaining SKY's abuse of its dominant position in the pay -TV market were commenced upon a complaint of Conto TV, a TV broadcasting operator, according to which the economic conditions imposed by SKY for the access to its platform would not be defined in a transparent manner and would be more onerous than those granted by SKY to its own divisions. Consequently, the conditions that SKY applied to Conto TV would have reduced its capacity to make competitive offers for the acquisition of important and strategic programmes within the pay TV market (for instance TV soccer rights).

According to the ICA, the commitments proposed by SKY (application to third parties of the same economic conditions applied to SKY's divisions and granting of

short negotiating times; definition of clear and transparent conditions for the access to the SKY platform) are able to avoid any discrimination in the access to the platform. Therefore the ICA accepted these commitments making them binding and closed the procedure without ascertaining the infringement and applying fines.

Lega Calcio

Another case which is worth-noting in the ambit of television rights is the first case whereby the TAR Lazio annulled the decision of the ICA which had accepted commitments by Lega Calcio on television rights.

Proceedings had been initiated by ICA against Lega Calcio in order to verify a possible abuse of dominant position in the market for football television rights for the assignment of packages related to Serie A and Serie B (according to the ICA the Lega Calcio had bundled exclusive television transmission rights to Serie A and Serie B tournaments both in relation to its satellite platform and its digital terrestrial platform in violation of antitrust law). The said proceedings were concluded following the adoption of a market test, by the acceptance by the ICA of commitments entered into by Lega Calcio, which included the provision of a new football television rights package for Serie A and the division of the previous Serie B package into three.

Conto TV (jointly with a consumers' association) challenged the decision before the TAR Lazio, maintaining that none of the measures proposed by Lega calcio and approved by the ICA were capable of eliminating the contested anti-competitive conduct, and that it would, on the contrary, have reinforced Sky's dominant position.

The TAR Lazio annulled the decision of the ICA, identifying two errors. The first error was a procedural one related to the consultation in relation to commitments. Secondly, following improvement of the commitments, a further verification of commitments by all interested parties was necessary. The second point hence relates to the evaluation of the commitments accepted and made binding upon the ICA, which according to the TAR Lazio were insufficient to eliminate the allegedly abusive conduct which had been contested at the start of the investigation.

The ICA communicated that it will be challenging the TAR Lazio decision before the *Consiglio di Stato*.

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Japan

Abolishment of hearing procedure system

On 12 March 2010, the government submitted the Bill for Amending the Anti-monopoly Law of Japan ('AML'), which included the abolishment of the hearing procedure system of the Japan Fair Trade Commission ('JFTC').

If the AML is amended in accordance with the Bill, the JFTC would be able to order a respondent to take corrective measures and/or to pay a surcharge (Kachokin) without a hearing procedure.

The respondent would be able to file a suit to quash the JFTC's order with the Tokyo District Court (not the High Court; the District Court would have exclusive jurisdiction). In order to protect the right of the respondent to a defence, the above suit would be undertaken by a panel of three or five Tokyo District Court judges, the respondent would be permitted to submit new evidence, and the JFTC would be required to explain the content of the proposed corrective measures to the respondent and allow the respondent to review and copy the evidence prior to issuing an order. However, as of 27 July 2010, the Bill is still pending in the Diet.

Prior review procedures for mergers and acquisitions

The Ministry of Economy, Trade and Industry requested that the JFTC's prior review procedures for mergers and acquisitions (M&As) be made more transparent in order to bolster the international competitiveness of Japanese companies. Under the current system, a company may choose either to file a

prior notification of the M&A with the JFTC without consultation or to start informal consultation with the JFTC if the intended notification of the M&A would raise anti-monopoly law issues.

In the case of reforming the stainless steel industry in Japan, as Nippon Steel Corporation (Shin Nittetsu) did not receive any answer from the JFTC regarding its intended increased capital investment in Nisshin Seiko K K for more than two years, the Ministry of Economy, Trade and Industry criticised the prior review procedures as time consuming and lacking in transparency, and therefore in need of amendment. However, company management and the Ministry of Economy, Trade and Industry are said to not necessary desire the abolishment of the informal prior review system for M&As (*Asahi Newspaper*, 2 June 2010).

JFTC rejection of petition for leniency

On 9 June 2010, the JFTC ordered the shutter manufacturing companies Sanwa Shutter Corporation, Bunka Shutter Co, Ltd, and Toyo Shutter Co, Ltd to cease and desist from price fixing, and ordered these three companies to pay a Surcharge (Kachokin) totaling around 5,520,000,000 Japanese Yen (equivalent to around US$63,448,000).

This is the first case in which the JFTC rejected a petition for leniency (reduction or indemnification of the Surcharge) submitted by Bunka Shutter Co, Ltd due to a discrepancy between the facts found by the JFTC and the facts reported and amended later by Bunka Shutter Co, Ltd (*Nikkan Kogyo Newspaper*, 10 June 2010)

Incidentally, Toyo Shutter Co, Ltd filed a request for a hearing and suspension of execution of the cease and desist order and surcharge payment order with the JFTC on 20 July 2010 (**www.toyo-shutter.co.jp**).

The second investigation into BHP and Rio Tinto

The JFTC was reported to have commenced its second investigation into BHP Billiton ('BHP') and Rio Tinto regarding the unification of their businesses on 12 July 2010.

In July 2008, the JFTC commenced an investigation into the BHP and Rio Tinto merger plan but ceased it in November 2008 after the JFTC received a response by mail from BHP stating that BHP had given up on its acquisition of Rio Tinto due to the financial situation (for details, please refer to my report in the March 2009 edition of the *IBA Antitrust Newsletter*).

Currently the JFTC is conducting its (first) investigation (up to 16 July 2010) into the planned unification of BHP and Rio Tinto's businesses by setting up a joint venture company. According to the second investigation, the JFTC will request detailed materials from both companies on the joint venture plan and their controlling power in the iron ore market, and will decide in 90 days whether it will approve the joint venture project (*Nihon Keizai Newspaper*, 13 July 2010).

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Lithuania

Antitrust legislation, cartel litigation and abuse of dominance in Lithuania

Legislation

Amendments to the Law on Competition

Pursuant to the provisions of the Law on Competition of the Republic of Lithuania (the 'Law on Competition') revised as of 1 January 2010, the undertaking engaged in economic activity in the retail trade sector with a market share of not less than 30 per cent will be presumed to have a dominant position in the relevant market, unless proved otherwise. Furthermore, each of a group of three or fewer undertakings engaged in economic activity in the retail trade sector with the largest shares in the relevant market, jointly holding 55 per cent or more of the relevant market, will be presumed to enjoy a dominant position, unless proved otherwise.

It is noteworthy that in accordance with the general principle in order to assess the market power, an undertaking with a market share of not less than 40 per cent will be presumed to have a dominant position in the relevant market. Unless proved otherwise, each of a group of three or fewer undertakings with the largest shares in the relevant market, jointly holding 70 per cent or more of the relevant market, will be presumed to enjoy a dominant position.

Changes in the market share threshold for establishing dominance is the continuation of amendments to the Law on Competition that had become effective as of 25 April 2009. Previous amendments extended the investigation powers of the officials of the Competition Council of the Republic of Lithuania (the 'Competition Council'). Nowadays the Competition Council is, with the warrant of a judge, authorised to enter and check any other premises, land and means of transport, besides the ones directly used for business of an undertaking, including residential and other premises of a manager and other employees of the undertaking. The inspection of private premises can be conducted only when it is suspected that documents or other evidence that are necessary and significant in order to prove cartel arrangements or severe abuse of a dominant position are being kept there.

In addition, following the practices of the European Commission, the Competition Council is now entitled, with the warrant of a judge, to seal premises of the undertaking where documents are stored for the term and scope that is necessary for the inspection to be conducted but in any case for not longer than three days. Further, the Competition Council is now authorised to decide on confidentiality of resolutions that relate to investigations on alleged infringements of the Law on Competition. Moreover, as of 25 April 2009, the application of the leniency programme in respect of cases related to abuse of a dominant position was abolished. Finally, the amendments approved the exhaustive list of circumstances lessening the liability for infringements of competition rules.

Further details available at: **www.konkuren.lt/index.php?show=nutlrv_view&nut_id=881** (in Lithuanian).

New Law on Prohibition of Unfair Actions of Undertakings in Retail Trade

As of 1 April 2010, a new Law on Prohibition of Unfair Actions of Undertakings in Retail Trade became effective. The Competition Council is the authority responsible for control of compliance with the requirements on fair business practices.

The purpose of this new law is to restrict the enjoyment of the market power of undertakings with significant market power in retail trade of daily consumer goods and to ensure the balance between suppliers and undertakings with significant market power in retail trade.

The Law on Prohibition of Unfair Actions of Undertakings in Retail Trade describes the undertakings with significant market power in retail trade as undertakings engaged in retail trade in non-specialised stores where food, beverages and tobacco products dominate, and when undertaking alone or together with associated undertakings engaged in similar trade activities comply with the following requirements:

- at least 20 stores of all stores controlled in the Republic of Lithuania occupy the plot of at least 400 square meters; and
- the aggregate turnover in the last financial year exceeds LTL 400 million (approximately €115,848,007).

The law prohibits such unfair business practices where the risk of retail traders' activities is passed over to the supplier or additional obligations are imposed or if they restrict suppliers' possibility to independently act in the market. These unfair actions may be expressed as various requirements to the suppliers, ie, demand for compensation for the agreement to sell goods of a particular supplier ('entrance' fees), compensation for loss of profit, etc.

For failure to comply with the provisions of the Law on Prohibition of Unfair Actions of Undertakings in Retail Trade, monetary sanctions may be applied. The Competition Council may impose a fine in the amount not exceeding LTL 400,000 (approximately €115,848) for engagement in unfair business practices.

Further details available at: **www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=362061&p_query=&p_tr2** (in Lithuanian).

Cartel litigation: leniency application case

The Competition Council had formally granted full immunity from a fine for the first time in its practices in February 2010. The Competition Council applied a leniency regime to the undertaking that enabled the Competition Council to determine the existence of the hardcore infringement of the Law on Competition and was the first to notify the Competition Council about the participation in prohibited agreements. The undertaking applied for a leniency programme that establishes the possibility to avoid sanctions for participants in prohibited cartel arrangements.

In this case the Competition Council declared that three undertakings engaged in trading activities of small mechanisation and other tools and equipment and had concerted their actions while participating in public procurement tenders. The investigation revealed that the executives of the competing undertakings had been concerting their actions prior to participation in tenders announced by, for instance, SE Ignalina Nuclear Power Plant, oil refinery AB ORLEN Lietuva, electricity supplier AB Lietuvos elektrine, etc. The competitors had coordinated tender prices and other terms and conditions as opposed to independent actions, and as a result, enabled one of the undertakings to win the tenders. The Competition Council decided that the undertakings committed a hardcore infringement of Article 5 of the Law on Competition as such arrangements restrict competition by their object, and therefore, are prohibited.

The Competition Council applied full immunity to the applicant UAB Lintera and imposed fines to the amount of LTL 97,200 (approximately €28,151) to UAB Prof-T and LTL 4,000 (approximately €1,158) to UAB Frezlitus. Provided the undertaking UAB Lintera would not have applied under the leniency regime, the company could have been subjected to a fine of more than LTL 2 million (approximately €579,240). It is noteworthy that UAB Lintera having been exempted from sanctions will be able to further participate in public procurement tenders. Pursuant to the provisions of the Law on Public Procurement of the Republic of Lithuania, tender organisers are entitled to reject an offer of the supplier who had been subjected to a fine for the participation in prohibited agreements and less than three years have passed since the termination of the infringement.

The officials of the Competition Council had in particular considered the initiative of the cartel participant and the contribution to disclosing prohibited arrangements to be of significant importance. The Competition Council expects that the first case of granting full immunity will serve as an encouragement to other market players to timely terminate prohibited arrangements without being subjected to any monetary sanctions.

The full immunity principle was introduced in the Law on Competition in 1999. Thereafter, in 2004 the rules for reduction of fines for participants in prohibited agreements were adopted. Subsequently, the Rules on immunity from fines and reduction of fines upon participants in prohibited agreements were launched in 2008. Nevertheless, despite legally established principles on immunity and reduction of fines, detailed procedures as well as official marketing and invitations to the market players to take the advantage of the existing regime, the full immunity from a fine had never been applied until the year of 2010.

Further details available at: **www.konkuren.lt/index.php?show=nut_view&nut_id=1112** (in Lithuanian).

Abuse of a dominant position: unfair pricing

In the most recent abuse of dominance case on 6 May 2010, the Competition Council imposed a fine to the amount of LTL 178,000 (approximately €51,552) to UAB Vilniaus energija, a provider of central heating services in the city of Vilnius and the surrounding areas.

In addition, UAB Vilniaus energija is an exclusive operator of communication tunnels considered by the Competition Council to be essential facilities. Communication tunnels should be understood as buildings (ie, tunnels) where central heating, hot and cold water, electrical networks and other connections are being installed. UAB Vilniaus energija, as an operator of those tunnels, provides lease services to suppliers of cold water facilities, cable TV, internet services, etc, as well as uses piping zones for its own services.

The Competition Council found that UAB Vilniaus energija was engaged in prohibited unfair pricing; therefore, as concluded by the Competition Council, UAB Vilniaus energija abused a dominant position in an upstream market for lease of communication tunnels and did infringe Article 9 of the Law on Competition. According to the officials of the Competition Council, UAB Vilniaus energija had been making unreasonable profits and established unfair prices comparing costs to income. In addition, UAB Vilniaus energija exploited buyers of lease services by setting unfavourable prices that were not substantiated by their economic value.

When proving the unfair nature of the pricing policy, the Competition Council declared that UAB Vilniaus energija disproportionally distributed lease fees and subjected individual groups of lessees to unfair prices. UAB Vilniaus energija charged some lessees a tenfold price compared to others and lessees, by paying for the lease of occupied communication tunnels, were also covering the costs of communication facilities operated by UAB Vilniaus energija. The Competition Council held these prices for the lease of communication tunnels to be of an exploitative nature.

The Competition Council reached these conclusions as a result of the supplementary investigation of unfair pricing policies following the ruling of the Supreme Administrative Court of Lithuania. The initial decision on abuse of dominance by UAB Vilniaus energija was published back in September 2007. Upon appeal, the Supreme Administrative Court of Lithuania acknowledged the complicity of the pricing assessment and ruled that in its decision the Competition Council did not sufficiently substantiate why disputed prices should be held to be unfair and returned the case for supplementary investigation.

Further details available at: **www.konkuren.lt/index.php?show=nut_view&nut_id=1133** (in Lithuanian).

Merger control: failure to notify

On 15 July 2010, the Competition Council adopted a decision where the undertaking engaged in building maintenance services, AB City Service, was sanctioned with a fine in the region of LTL 10,000 (approximately €2,896) for failure to comply with national merger control rules.

The Competition Council started the investigation upon receipt of a complaint from the shareholder of the undertaking UAB Busto administravimo agentura. The complainant declared that on 17 November 2010, AB City service acquired 37.2 per cent of UAB Busto administravimo agentura shares on the basis of a swap agreement without permission from the Competition Council.

The Competition Council decided that AB City Service infringed provisions of the Law on Competition, even though the undertaking submitted the notification of the concentration on 10 June 2009 and the Competition Council granted the permission to implement the concentration due to the fact that the concentration would not have created or strengthened a dominant position or substantially restricted competition in the relevant market and AB City Service did not exercise factual control. The Competition Council noted that AB City Service had implemented the concentration prior to the clearance by the Competition Council, despite the fact that the thresholds established by the Law on Competition for mandatory notification to the Competition Council were exceeded.

Decisions on failure to comply with concentration control regime are quite rare in practices of the Competition Council. As of the year 2000, this was the fifth decision adopted by the Competition Council.

Further details available at: **www.konkuren.lt/index.php?show=nut_view&nut_id=1162** (in Lithuanian).

The Netherlands

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Since March 2010, competition law in the Netherlands has been marked by the following developments.

Legislative developments

A bill was adopted to extend the scope of the national de minimis clause to increase the protection of small and medium-sized companies against buyer power. In addition, the Dutch Competition Authority ('NMa') warned the Dutch Government of the regulatory consequences of intended budget cuts.

Antitrust cases

The Rotterdam District Court overturned a number of decisions by the NMa on leniency and the calculation of fines.

Merger cases

The NMa advised on the timing of a notification and imposed a fine on the Dutch State for failure to notify a concentration. In addition, it fined five executives for non-compliance with merger commitments.

Changes in legislation and regulation

Forced friendship among regulators?

At the announcement of its 2009 annual report, the NMa's Chairman Pieter Kalbfleisch stated that the Dutch Government's intended budget cuts may result in more cooperation between fellow regulators. At the same time, it could, however, lead to less effective regulation.

Regardless of intended budget cuts, cooperation between regulators has intensified over the years. The NMa has increasingly tapped new sources of information on possible competition law infringements through cooperation with, for instance, other competition authorities, the Fiscal Intelligence and Investigation Service and the Public Prosecutor.

According to the NMa, the budget cuts aimed at intensified cooperation between fellow regulators could lead to more synergy, but may also jeopardise effective regulation.

Relevant website

Dutch Competition Authority: **www.nmanet.nl/engels/home/index.asp** (in English).

Legislation on increased buyer power protection comes into force

The Dutch parliament recently adopted a bill to increase the market share threshold of the national de minimis clause to provide small and medium-sized companies with more leeway to join forces against buyer power.

Currently, the de minimis clause laid down in the Dutch Competition Act provides for an exemption for restrictive agreements, including hardcore cartels, where no more than eight participants with an aggregate turnover of less than €5.5 million (for companies whose primary business is in the supply of goods) or €1.1 million (for other companies) are involved. Also exempt are restrictive agreements where the parties' combined turnover does not exceed €40 million and their aggregate market share remains below five per cent. The latter thresholds have been based on the European Commission's guidelines on the effect on trade concept, according to which inter-state trade will not be appreciably restricted when these thresholds are met.

The increased buyer power of big retailers was one of the main reasons why the European Commission introduced an additional buyer's market share threshold in its new Block Exemption on vertical restraints. The initiative to raise the national de minimis clause was also inspired by increased buyer power: it intends to provide small companies more leverage against big retailers by being able to conclude, eg, joint selling arrangements without competition concerns.

The recently adopted bill proposes to amend the latter exemption by abandoning the turnover threshold and raising the market share threshold to ten per cent. As a result, the national de minimis clause will no longer be in line with the thresholds of the European Commission's guidelines. One of the main hang-ups of the bill was whether this would constitute an infringement of European law, since it would mean that certain hardcore cartels caught by Article 101 TFEU due to an appreciable effect on inter-state trade, would be exempted under national law. The parliament adopted the bill on 15 June 2010. The Minister of Economic Affairs recently requested the European Commission's advice on whether the bill is compatible with European law.

Another recent initiative against buyer power is the Minister of Economic Affairs' current examination of the possibility of a voluntary code of conduct between suppliers and customers against unilateral termination of agreements by suppliers without prior consultation of the specific customer. The European Commission is also looking into resolving unfair contractual practices in the retail chain.

Relevant websites

Dutch Competition Authority: **www.nmanet.nl/engels/home/index.asp** (in English)

Ministry of Economic Affairs: **www.rijksoverheid.nl/ministeries/ez** (in Dutch)

DG Competition: **http://ec.europa.eu/competition/index_en.html** (in English)

Update on antitrust cases

Court supersizes leniency carrot

The Rotterdam District Court has ruled that the NMa wrongly reduced construction company Vialis's full immunity by 20 per cent for having organised information meetings on the NMa's leniency programme for its cartel members.

Vialis initially received full immunity for being the first to submit a leniency application in regard of a possible cartel in the traffic regulation installation sector. The NMa reduced the immunity by 20 per cent because Vialis organised information meetings which could have impeded the investigation into the possible cartel by increasing the risk of the other cartel participants destroying evidence after the information meetings. Vialis argued that it merely organised the meetings to inform the other cartel members of the procedural aspects of the NMa's leniency programme for lack of a trade association in their sector. Similar information meetings had been organised by trade associations in other sectors of the construction industry to which the NMa had not objected.

The Court held that the NMa had insufficiently substantiated the reasons for applying a leniency reduction in this particular case and not in the other cases where similar information meetings had been held resulting in just as high a risk of destruction of evidence. The Court annulled the NMa's decision.

Single continuous infringement time-barred

According to the District Court of Rotterdam, the five-year limitations period applies to a single continuous infringement as far as the calculation of the fine level is concerned. The period preceding the lapse of the limitations period may, however, be taken into account in the assessment of the evidence.

In a decision of 13 November 2007, the NMa fined a number of tree growers in excess of €1 million for their participation in a cartel during the period 1 January 1998 to 25 February 2004. In the appeal against the NMa decision by two tree growers, the Rotterdam District Court remarkably ruled that, having regard to the five-year limitations period and the fact that the NMa's decision dated from 13 November 2007, the turnover achieved before 13 November 2002 related to the time-barred part of this single and continuous infringement. Consequently, the limitations period prevented the NMa from taking account of the turnover achieved before 13 November 2002 for the calculation of the fine. The court subsequently reduced the fine with €442,000 in regard of the first plaintiff and with €222,000 in regard of the second plaintiff.

Relevant website

Rulings by the Dutch courts: **www.rechtspraak.nl** (in Dutch)

Update on merger cases

Fine for late notification

The NMa has imposed a fine of approximately €1.4 million on British insurer Amlin and €782,000 on the Dutch State for failure to notify Amlin's acquisition of Fortis Corporate Insurance from the Dutch State.

In contrast to the procedure for the notification of concentrations at EU level, both the purchaser and seller have a responsibility to file concentrations meeting the Dutch merger thresholds. A fine was therefore imposed on Fortis Corporate Insurance as well as the Dutch State.

The NMa rejected the Dutch State's argument that it could not be caught by the merger control provisions of the Dutch Competition Act since it did not qualify as an 'undertaking'. Similar to the EU Merger Regulation, Dutch merger control is not limited to acquisitions by 'undertakings'; it also includes acquisitions by 'persons already controlling at least one undertaking'. The NMa considers that the term 'person' in this context extends to private entities as well as public bodies, including the state itself.

Informal advice on the timing of a notification

In an informal piece of advice, the NMa concluded that the intended amendment of articles of association to provide sole control to a company over another company as of 1 April 2013 constituted a concentration which has to be notified at the time of the amendment of the articles of association and not at the time the control is actually exercised.

Similar to the EU Merger Regulation, Dutch merger control prohibits the implementation of concentration either before its notification or until its approval. Based on the methodology of the Dutch Competition Act, the NMa considers a concentration to be implemented through the acquisition of control. According to the NMa, the amendment of the articles of association qualifies as the acquisition of control, irrespective of the fact that it would take another three years before the control would be exercised.

The NMa drew a parallel with a transaction involving a share acquisition. The transfer of shares is usually preceded by a share purchase agreement which does not constitute an acquisition of control. It is the actual transfer of the shares which constitutes control. The NMa compared the agreement on the intended amendment of the articles of association to a share purchase agreement and the actual amendment of the articles of association to the transfer of shares constituting control.

NMa fines Dutch media company Wegener and five executives

The NMa has imposed a fine of €19 million on Dutch media company Wegener as well as fines totalling €1.3 million on five of its executives for failure to comply with a merger commitment made in regard of its acquisition of publishing company VNU Dagbladen in 2000. It is the first time that the NMa imposed fines on individuals for non-compliance with merger commitments.

The NMa also imposed an order subject to periodic penalty payments, ordering Wegener to comply with the earlier imposed merger commitment within a year. If it fails to comply with said order, Wegener risks penalty payments of €1 million per quarter with a maximum of €20 million.

Relevant website

Dutch Competition Authority:
www.nmanet.nl/engels/home/index.asp
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New Zealand

Supreme Court limits extraterritorial jurisdiction

On 16 April 2010, the Supreme Court (New Zealand's highest court) provided clear guidance on the extraterritorial jurisdiction of the Commerce Act (Act). In Poynter, the court confirmed that the Act does not extend to overseas resident persons involved in cartel conduct directed at a New Zealand market if they were not physically present or carrying on business in New Zealand and did not otherwise engage in conduct in New Zealand (eg, by sending communications into New Zealand). (The Act's merger provisions still apply to offshore acquisitions if they affect New Zealand markets.)

The Poynter decision relates to an Australasian wood preservative chemicals cartel, where a record NZ$7.5 million in penalties had already been imposed on several companies and individuals involved. Mr Poynter was an Australian resident executive of one of the companies involved. He was not resident or carrying on business in New Zealand. All of the relevant meetings that he attended took place outside of New Zealand, and there was no evidence that he had sent communications (eg, a fax) into New Zealand in furtherance of the cartel. However, the lower courts had held that overseas residents could be subject to the New Zealand courts' jurisdiction if they directed a person outside New Zealand, including an innocent person, who carries the contravening conduct into effect in New Zealand.

The Supreme Court judgment, which overturned the decision of the lower courts, will limit the New Zealand Commerce Commission's (NZCC) ability to bring proceedings against some overseas residents. This is significant given that many of the cartels that affect New Zealand markets are global, and the Supreme Court's ruling may be perceived as creating a loophole. Indeed the Chief Justice commented in the judgment that it would be up to parliament to close any such perceived loophole. Some might argue that the result is appropriate, as it reduces the scope for double jeopardy, where cartelists are prosecuted in multiple jurisdictions for what is arguably the same conduct.

NZCC to gain greater information sharing powers

While its ability to pursue overseas residents has been limited, the NZCC looks likely to gain greater power to share compulsorily obtained information with its overseas counterparts under the Commerce Commission (International Cooperation, and Fees) Bill, which passed its first reading in parliament on 25 May 2010.

As might be expected, the NZCC can currently exchange information with certain overseas regulators where that information was voluntarily provided and the party providing it consents to that exchange. If the Bill is enacted, the NZCC would be able to provide investigative assistance and compulsorily acquired information to overseas regulators, where a reciprocal government-to-government co-operation arrangement has first been entered into. The Bill follows the enactment of similar legislation in Australia in 2007, and like many other legislative moves in the area, is partly driven by the move towards a Single Economic Market with Australia.

NZCC releases guidelines for divestments

In June this year, the NZCC released its Mergers and Acquisition: Divestment Remedies Guidelines (Guidelines). The Guidelines offer practical guidance on the NZCC's approach for considering divestment undertakings during the merger clearance process. Unlike many of its counterparts, the NZCC may only accept and consider structural, rather than behavioural undertakings. The Guidelines are, in effect, a succinct summary of the guidance set out in previous NZCC written clearance decisions (which are generally quite detailed).

The Guidelines emphasise the benefits of submitting a divestment undertaking early on in the process. Consistent with the approach of the UK Competition Commission, the Guidelines also outline the importance of submitting evidence to address the three key risk areas associated with divestments – composition risk (risks that the divesture package may be too constrained to attract a suitable purchaser), asset risk (risks that the competitive capability of a divestment package will deteriorate prior to completion of the divestment), and purchaser risk (risks that a suitable purchaser is not available or that the divesting party will sell to a weak or otherwise inappropriate party).

Portugal

Latest developments in Portuguese competition law enforcement

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General update

2010 has witnessed the announcement of some of the most significant developments in competition law enforcement in recent years, in particular the creation of a specialised court to handle competition, regulation and supervision matters and the long-awaited revision of the Competition Act (enacted by Law No 18/2003, of 11 June 2003, subsequently amended by Decree-Law No 219/2006, of 2 November 2006, Decree-Law No 18/2008, of 29 January 2008, and Law No 52/2008, of 22 August 2008).

Also noteworthy is the impact of the economic and financial crisis, which has continued to be felt in merger control activity in 2010.

Cartels and abuses of dominant position

Fining of the Portuguese Association of Chartered Accountants for anti-competitive practices

On 18 May 2010, the Competition Authority fined the Portuguese Association of Chartered Accountants (the 'OTOC') €229,300 for the adoption of anti-competitive practices in the market for mandatory training for the performance of the Chartered Accountant profession. On the one hand, the Competition Authority considered the adoption by the OTOC of a decision of an association of undertakings having as its object or effect a significant prevention, restriction or distortion of competition, to the extent that, by means of its professional Regulation on Training, the OTOC not only artificially divided the vocational training market but also reserved one third of the mandatory professional training for itself and defined specific criteria for admission of other vocational training entities and approval of their training courses. On the other hand, the Competition Authority also considered and proved an abuse of a dominant position by the OTOC, since, despite being the regulatory entity for the Chartered Accountant profession, this association was also competing in the very market that it had divided, in which it decides on the entry of competitors according to its own criteria and charges fees both for entry into the market and for performance of activity. Since these infringements were still going on at the time of the decision, the Competition Authority also ordered the OTOC to take the necessary measures to bring such practices and their effects to an end, within 90 days as of the date on which the decision may no longer be appealed, under a penalty payment of €500 per day of failure to comply with the decision from the end of the said deadline.

Judicial review

On 28 June 2010, the Lisbon Court of Commerce fully upheld the Authority's decision that on 16 December 2008 had fined the Lisbon Breadmakers' Association (hereinafter the 'LBA') in the amount of €1,177,429.30 on the grounds of adoption of a decision of association of undertakings with the objective of distorting competition in the market for sale of bread to final consumers. The Competition Authority based its decision on the conclusion that between 2002 and 2005 the LBA had operated a system for exchange of information among its associates regarding the selling prices of bread to the public, with the objective of directly or indirectly fixing the purchase or selling prices or interfering with their establishment by free market forces, thus having incurred in a serious breach of the rules aimed at protecting competition in the fundamental sector of essential foodstuffs. The ruling by the Lisbon Court of Commerce that fully upheld the Competition Authority's decision was notably substantiated on the consideration that the LBA had acted with intent to obtain that specific result.

Merger control

The economic and financial crisis continues to affect merger control activity. Although we may notice a slight increase in the number of concentration operations decided to date as compared to the same period in 2009 – 32

and 26 operations respectively in 2010 and 2009 – the fact is that we are still behind the figures of 2007 and 2008, 53 and 40 decided operations respectively, up to the end of July in each of these years.

Out of the abovementioned 32 merger control procedures concluded thus far in 2010, there have been 28 clearance decisions without conditions or obligations attached, one prohibition decision, two procedures in which the operation was found not to be subject to prior notification and one case (*Procter & Gamble Company/Sara Lee Corporation*) in which the procedure was referred to the European Commission.

Legislative developments

Since our last report for the *IBA Antitrust Committee Newsletter* (12 April 2010), some legislative developments have occurred or been announced.

Competent courts in competition matters

Law No 3-B/2010, of 28 April 2010, has amended Law No 52/2008, of 22 August 2008, which carries out a comprehensive reform of the organisation and functioning of judicial courts and amends the provisions of the Competition Act establishing the competent courts to handle appeals from decisions adopted by the Competition Authority both in sanctioning and in administrative proceedings. Under this new regime, such competence, previously entrusted exclusively with the Lisbon Court of Commerce, shall be granted to the section of commerce ('*juízo de comércio*') of the territorially competent court, in whose absence the section of commerce of the Court of Lisbon is ultimately the competent one.

The new regime is already in force in the three territorial areas indicated in Law No 52/2008 and was originally set to apply to the entire nation as of 1 September 2010. By virtue of Law No 3-B/2010, the period for nationwide implementation of the reform of the organisation and functioning of the judicial courts was extended until 1 September 2014.

The Portuguese Government has in the meantime announced the creation of a specialised court to deal with competition, regulation and supervision matters, which shall become the exclusive appellate instance for decisions adopted by the Competition Authority. The new court is expected to be settled in the near future in the town of Santarém, its location outside the Lisbon region having been the object of some criticism by competition law professionals.

Global revision of the Competition Act

Although no official proposal has been disclosed, a global revision of the Competition Act is said to be in motion, a procedure which is thought to be still at a very early stage.

The Competition Authority is known to have transmitted to the government the conclusions of its internal reflection on a possible revision of the Portuguese competition regime. The Competition Authority's proposals point towards further effectiveness, swiftness and transparency in the application of competition rules and a higher degree of harmonisation with EU competition law.

Conferences, seminars and sectoral studies

Conferences

The first Portuguese-Spanish Conference on Competition Law, organised by the Association of Portuguese Competition Lawyers (*Círculo dos Advogados Portugueses de Direito da Concorrência*) and the Spanish Association for Competition Protection (*Asociación Española para la Defensa de la Competencia*), was held in Lisbon on 1 and 2 July 2010, and was attended by a large number of competition experts, practitioners and academics.

Topics such as 'the Iberian Market' (and in particular the so-called *MIBEL*, the Iberian Electricity Market), leniency programmes and private enforcement were addressed by high-profile national and international experts, such as Nadia Calviño, Deputy-Director General, Mergers and Antitrust (Directorate-General for Competition, European Commission), Carles Esteva-Mosso, Director for Policy and Strategy (Directorate-General for Competition, European Commission), Andreas Keidel, Case Handler, Antitrust/Cartels (Unit 6 – Cartels Settlements, Directorate-General for Competition, European Commission), Maria dos Prazeres Beleza, Judge of the Supreme Court of Portugal, Manuel Sebastião, President of the Board of the Portuguese Competition Authority, Luis Berenguer Fuster, President of the Spanish National Competition Commission, Mário

Marques Mendes, President of the Board of the Association of Portuguese Competition Lawyers and partner at Marques Mendes & Associados (Lisbon), and Luis Ortiz Blanco, President of the Spanish Association for Competition Protection and partner at Garrigues (Madrid).

With the objective of strengthening competition culture and promoting cultural exchange between Portugal and Spain, the Portuguese-Spanish Conference on Competition Law is expected to become a yearly event, the next conference being already scheduled to take place in Madrid next year.

Sectoral studies

In view of the ongoing liberalisation of the postal sector, expected to be completed by 31 December 2010, the Competition Authority has carried out an assessment of the competitive situation in the sector. In its final report, disclosed on 16 July 2010, the Competition Authority identifies the main difficulties that alternative postal sector operators may face and makes several recommendations aimed at promoting effective competition and consumer welfare.

As per our last report, within its policy of regular monitoring of the liquid fuel market and as a complement to the quarterly reports issued on such a market since 2004, the Competition Authority has been publishing every month a Monthly Bulletin of Liquid Fuel Statistics providing information on liquid fuel prices and quantities (demand and imports).

Relevant website

The Portuguese Competition Authority's website may be found at: **www.concorrencia.pt**. Most of its contents are available not only in Portuguese but also in English.

Singapore

Developments in treatment of resale price maintenance in Singapore

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Resale price maintenance is a business practice which has received ambivalent treatment under competition laws across jurisdictions. The practice where manufacturers impose upon downstream retailers or distributors ('Resellers') the prices at which such retailers or distributors would charge to customers for such manufacturer's products ('RPM') is one where the positions taken by competition regulators around the world has been evolving. While some jurisdictions have adopted a per se prohibition approach towards RPM, others, such as the US, have gravitated towards a rule of reason approach in assessing the legality of such practices based on the antitrust harm and the likely pro-competitive effects that RPM may bring about in specific cases.

This article examines the economic effects of RPM and highlights the issues that companies who may practice RPM across multiple jurisdictions should be aware of.

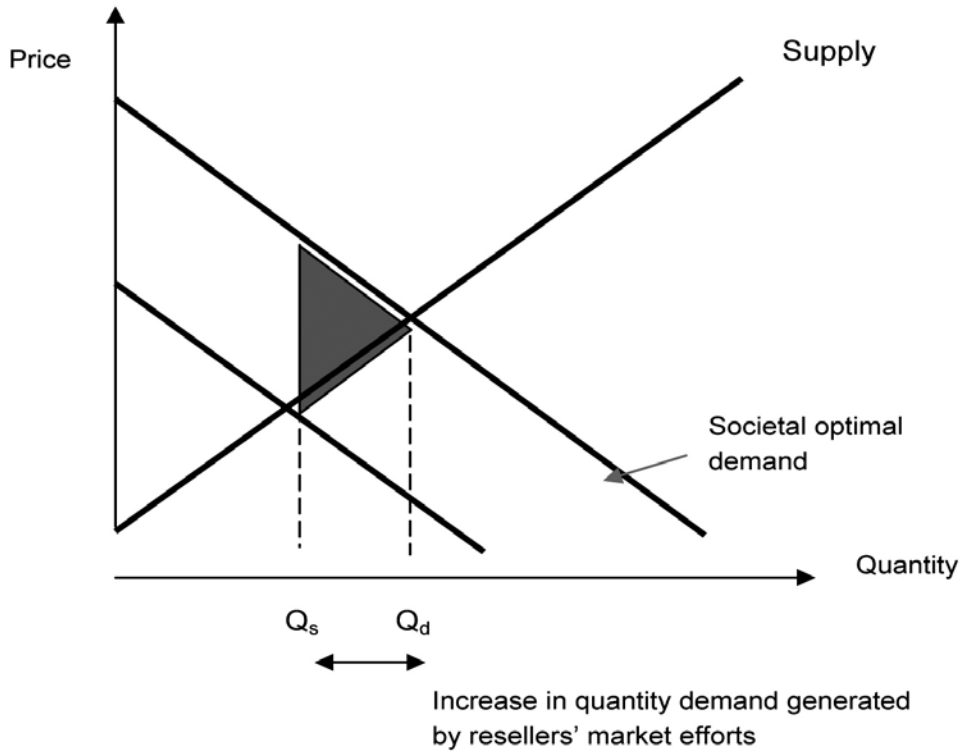
Pro-competitive effects of RPM

Proponents of RPM have established that RPM may bring about pro-competitive economic benefits. First, RPM serves to align the incentives between manufacturers and downstream retailers which promotes inter-brand competition. Manufacturers will have the incentives to invest in new products, advertising and brand-building activities, and consumers gain directly from the direct competition between competitors to develop new products and attract new customers.

Specific pro-competitive benefits that are likely to arise from RPM include the following:

- the elimination of the problem of 'free-riding';
- the creation of choice between premium products and low-end products;
- the prevention of predatory pricing; and
- ensuring consistency among franchisees.

Figure 1



Elimination of the problem of free-riding

Consider two resellers, X and Y, selling the same product from a manufacturer. X invests in his business to provide customers with high quality services such as personalised advice, luxurious showrooms and strong advertising campaigns to market the product and pique customers' interest, whereas Y opts to offer customers a no-frills service at a lower price. Effectively, Y is able to free-ride on X's marketing efforts in generating customers' awareness and interest in the product. As customers have no obligations to purchase from X, a portion of the customer pool generated by X will gravitate towards purchasing the same product from Y at a lower price. This is especially the case where after-care services, such as warranties and maintenance, are provided by the manufacturer and customers do not have a need to go back to X for quality after-care services. Accordingly, X would realise less than the full effect on aggregate profits which he would have expected from the additional level of services that he provides. This realisation may disincentivise X from providing high quality value-added services to promote the product, which may result in an overall smaller pool of customers for the product. This is not ideal from the manufacturer's perspective.

As illustrated above, the free rider problem results in a difference between the amount actually consumed (Q_s) and the amount which is beneficial to the society (Q_d).

The shaded triangle represents the deadweight loss to society, which is the economic surplus to suppliers and consumers arising from the 'units of services' that should be provided to satisfy the demands of the society, but are not.

This 'free-riding' effect, where resellers are disincentivised from competing on better services in view of free-riding by other resellers, may be resolved through the implementation of RPM. RPM restricts the prices at which resellers may resell the manufacturer's products, and as a result, compels resellers to compete on other bases, such as offering of value-added services and investments in promotional and advertising campaigns. This in turn promotes inter-brand competition between the manufacturer's products with that of other brands.

Creation of choice between premium products and low-end products

Manufacturers may impose RPM on resellers to ensure that they maintain a high standard of service provided to customers in the creation of a premium product.

In such cases, the RPM is expected to generate sufficient profit margins for resellers to offer value-added services to customers consistent with the premium image in which manufacturers have packaged their products. This is particularly important for the resale of premium goods, such as luxury watches and high-end clothing.

Accordingly, RPM creates a competitive choice for consumers between premium products with high quality value-added services and low-end products priced in a lower price category, and again serves to promote inter-brand competition.

Prevent predatory pricing by resellers

One potential competition problem which RPM may serve to address is the issue of predatory pricing by dominant resellers to drive out other resellers. Predatory pricing occurs when a reseller sells its products to customers at a price below the reseller's cost. Incumbent resellers may also threaten to use predatory pricing in order to create a reputation barrier to deter new resellers from entering the market.

With RPM in place, resellers would not be able to engage in such predatory practices as prices are determined and enforced by the manufacturers. Manufacturers would be able to benefit from a larger network of resellers for the promotion and distribution of their products. Consumers, on the other hand, would benefit with the intensified competition between the resellers on value-added services to the products.

Promote consistency amongst franchisees

Advertising for franchises generally occurs at the parent company level. As consumers view the franchisor and its respective franchisee as one entity, RPM ensures that promotional activities and prices are standardised and consistent across all franchisees. This encourages the expansion of the franchisee network and increases the scope and reach of the products.

Anti-competitive effects of RPM

The gain in inter-brand competition arising from RPM needs to be balanced against any potential loss to intra-brand competition which RPM may bring about, hence the 'rule of reason' approach which some jurisdictions have adopted in relation to an antitrust review of RPM. If there is competition upstream between the manufacturers, it is likely that the gain in inter-brand competition upstream will outweigh the reduction in intra-brand competition. However, if there is a monopoly upstream and there is no meaningful inter-brand competition, intra-brand competition may become important.

Further, there are instances where RPM may be used to facilitate anti-competitive behaviour, for example:

- the enforcement by manufacturers of prices or margins which are agreed horizontally between resellers for the resale of the manufacturer's products; and
- the monitoring of prices agreed by manufacturers in a cartel.

In Scenario 1, resellers in the market, A, B and C, have agreed horizontally on the prices and margins at which they would resell the manufacturer's products. This agreed price, $x, is in turn communicated upstream to the manufacturer who 'imposes' the agreed pricing as a RPM. The RPM is not determined based on the manufacturer's views of the level of pricing which would generate the desired amount of high quality, value-added services to competitively promote its products or enhance the image of the products. Instead, the RPM reflects the price and profits which the resellers have colluded to set for themselves. Even where RPM is not per se illegal under the competition laws of a jurisdiction, the horizontal collusion between the resellers may be an infringement of competition laws prohibiting anti-competitive agreements, and the manufacturer may be implicated for facilitating the anti-competitive collusion through RPM.

Figure 2 – Scenario 1

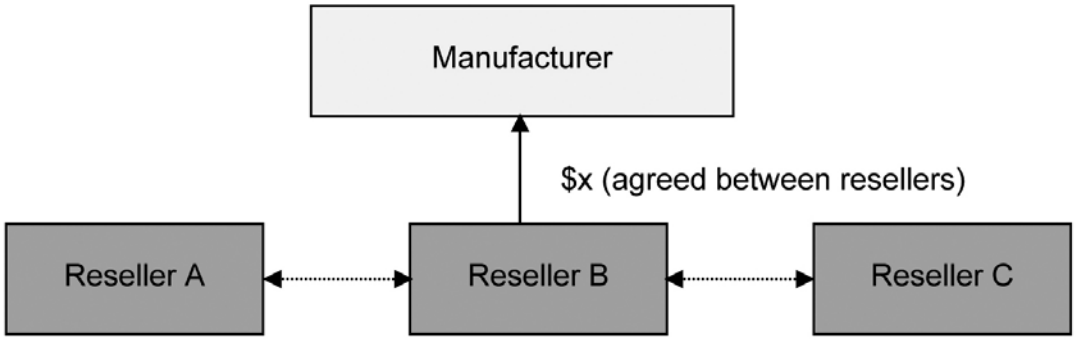
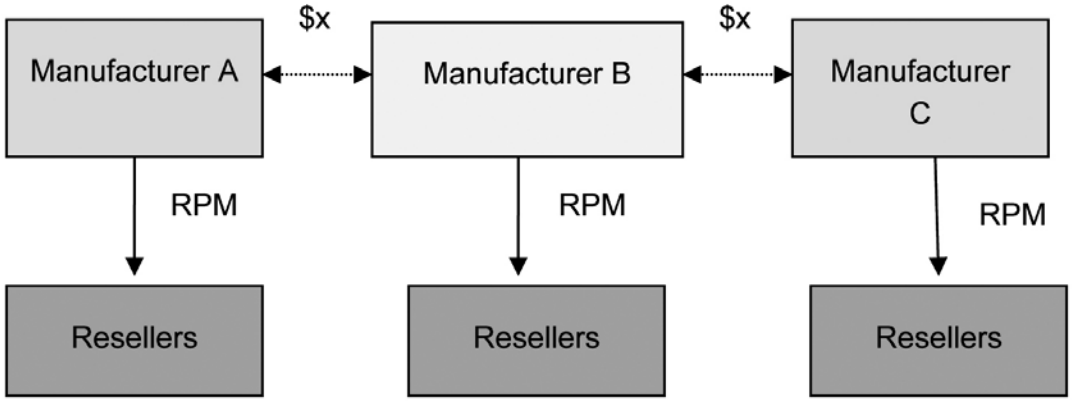


Figure 3 – Scenario 2



In Scenario 2, the manufacturers in a cartel have agreed to fix their prices at $x. This pricing is enforced by the manufacturers through RPM imposed on their downstream resellers. The imposition of RPM ensures the effectiveness of the agreed pricing and also further facilitates the monitoring by members of the cartel on the agreed pricing, in particular, where the RPM is published publicly. Such horizontal collusion by the manufacturers in a cartel is likely to constitute an infringement of competition laws prohibiting anti-competitive agreements.

Generally, RPM is more likely to facilitate collusion in less competitive markets and when all (or most) of the firms in a concentrated market adopt the practice.

Case study: Leegin-PSKS

In the landmark decision by the US Supreme Court on *Leegin Creative Leather Products Inc* ('Leegin') and *PSKS Inc* ('PSKS') in March 2007, the Court concluded that Leegin's did not infringe section 1 of the Sherman Act in view of the following economic benefits that may be brought about by RPM:

- stimulation of inter-brand competition;
- encouraging resellers to invest in services or promotional efforts;
- allowing consumers to choose among low-price, low service brands and high-price, high service brands; and
- eliminating free-riding.

The Court recognised the potential benefits of RPM and overturned the per se illegality rule in favour of a rule-by-reason, which requires the fact finder to weigh all circumstances before concluding if the RPM would be anti-competitive.

This enhances the ability of participants in a cartel to monitor the agreed prices. However, as with any cartel analysis, other characteristics of the markets should also be examined to determine if market participants indeed have the economic incentives to collude (eg, homogeneity of products and cost symmetries) and the ability to retaliate against, or 'punish' firms for deviating from the agreed pricing.

Reducing the potential for free-riding is less likely to be a valid rationale for RPM when the product is easier for ultimate consumers to evaluate without extensive service at the point of purchase.

Prohibition of RPM across jurisdictions

The treatment of RPM by competition authorities across jurisdictions has not converged to the same extent as the competition law principles that are applied in respect of other prohibited activities. While the RPM practice of a company may be allowed in a jurisdiction, that same practice may be prohibited in another.

In Australia and China, RPM is prohibited per se as competition regulators are not convinced that efficiency-enhancing RPM occurs with sufficient frequency to justify relaxing the per se prohibition. Per se prohibitions may also be favoured by competition regulators for the lower level of enforcement required to ensure compliance.

Some jurisdictions where the per se prohibition is applied may further have in place application procedures for the authorisation of RPM practices. For instance, in Australia, immunity from the RPM per se prohibition may be granted if the conduct results in a benefit to the public such that it should be allowed to occur.

Exemptions from per se prohibitions generally also exist where RPM takes the form of a genuine recommended price and resellers and manufacturers do not enforce such prices, for example, by refusing to supply the products to resellers who sell below the manufacturer's specified price.

In Europe, the European Commission treats RPM as a hardcore restriction, though there is a possibility that RPM may in some instances be permissible under Article 101(3) of the EC Treaty if the efficiencies arising from RPM can be proven to counter any negative effects.

In the US, RPM is judged based on the rule of reason rather than the per se illegality adopted in other jurisdictions. Canada has similarly adopted a rule of reason approach, wherein RPM is prohibited only where 'the conduct has had, is having or is likely to have an adverse effect on competition in a market'.

Case study: Price-fixing of replica football kit

In the UK Office of Fair Trading ('OFT') decision published on 1 August 2003, the OFT found that a number of sportswear retailers, Manchester United plc, the Football Association Ltd and Umbro Holdings Ltd ('Umbro'), had entered into price-fixing agreements in relation to the sale of replica football kit infringing the Chapter 1 prohibition contained in section 2 of the UK Competition Act (against anti-competitive agreements).

In particular, the OFT found that Umbro, an upstream manufacturer and supplier of replica football kit, had encouraged or facilitated price-fixing between certain downstream retailers for the sale of replica football kit. The OFT also found that Umbro had 'punished' those retailers which did not cooperate with the price-fixing agreements or with it by refusing or delaying supplies.

The OFT determined that although Umbro was acting under commercial pressure from a large customer, it should have resisted the temptation to engage in vertical price fixing in response to complaints by retailers about the discounting by other retailers.

In Singapore, section 34 of the Competition Act, Chapter 50B of Singapore (the 'Act'), prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which have as their object or effect the prevention, restriction or distortion of competition within Singapore (the 'section 34 prohibition'). Agreements, decisions or concerted practices may have the object or effect of preventing, restricting or distorting competition within Singapore if they directly or indirectly fix purchase or sale prices or any other trading conditions.[1]

The section 34 prohibition does not, however, apply to vertical agreements. Paragraph 8 of the Third Schedule of the Act excludes vertical agreements entered between two or more undertakings, each of which operates, for the purpose of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services and includes provisions contained in such agreements which relate to the assignment to the buyer or use by the buyer of intellectual property rights, provided that those provisions do not constitute the primary object of the agreement and are directly related to the use, sale or resale of goods or services by the buyer or its customers from section 34 of the Act (the 'Vertical Agreements Exclusion').[2]

In this regard, RPM imposed by upstream manufacturers on downstream resellers as conditions for the resale of the manufacturers' products may fall within the Vertical Agreements Exclusion. However, one should be cautious against treating the Vertical Agreements Exclusion as a 'get-out-of-jail-free-card' for all forms of RPM. Where the anti-competitive effect of RPM is considered to outweigh its pro-competitive effect, the Minister for Trade and Industry may issue an order to claw back the Vertical Agreements Exclusion and subject such practices to the section 34 prohibition.

The following table summarises the treatment of RPM in key jurisdictions:

Jurisdiction	Position on RPM
Singapore	RPM may fall within the Vertical Agreements Exclusion under the Act. However, where the anti-competitive effect of RPM is considered to outweigh its pro-competitive effect, the Minister for Trade and Industry may issue an order to claw back the Vertical Agreements Exclusion and subject such practices to the section 34 prohibition.
Australia	Section 48 of the Trade Practices Act prohibits a corporation from engaging in the practice of RPM. Note: there may be a possibility that RPM may in some instances be permissible under section 88(8A) of the Trade Practices Act which allows for the authorisation of RPM and the exemption of RPM from Section 48 of the Trade Practices Act.
USA	Prior to 28 June 2007, the US Federal Trade Commission ('FTC') consistently applied a per se illegality to vertical price fixing agreements (ie, RPM) After the ruling for *Leegin/PSKS*, the per se illegality rule was overruled and vertical price restraints were since then judged based on the rule of reason.
European Commission	Article 4(a) of the European Commission Regulation (EU) No 330/2010 of 20 April 2010 treats 'the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties', ie, RPM,[3] as a hardcore restriction. Note: in some instances, there is a possibility that RPM may be permissible under Article 101(3) of the EC Treaty if the efficiencies arising from RPM can be proven to counter any negative effects.
United Kingdom	The guidelines on vertical agreements published by the OFT states that '[w]here fixed or minimum resale prices are specified these are hardcore restrictions which will almost invariably infringe Article 81 [of the EC Treaty] and/or the Chapter I prohibition. Maximum prices and recommended resale prices will not usually infringe competition law, unless their effect is to fix prices and dampen price competition.'
China	Article 14 of the Anti-Monopoly Law adopted on 1 August 2008 by China's National People's Congress prohibits both resale price fixing and minimum resale price restriction.

Conclusion

In view of the divergence in the treatment of RPM by competition authorities across jurisdictions, firms should exercise caution in the way their RPM is implemented across different jurisdictions in order to minimise or avoid the risk of infringing the respective competition laws prohibiting anti-competitive agreements.

Notes

1 Section 34(2)(a) of the Act.
2 Paragraph 8 of the Third Schedule of the Act.
3 Paragraph 223 of the European Commission Guidelines on Vertical Restraints (2010/C 130/01) provides further information on the European Commission's treatment of RPM as a hardcore restriction.

South Africa

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Sasol Chemical Industries and collusion in the airlines industry

Behavioural conditions imposed on Sasol Chemical Industries ('Sasol')

On 20 July 2010, the Competition Tribunal confirmed a settlement agreement between the Competition Commission and Sasol relating to two complaints that Sasol abused its dominance by means of excessive pricing, exclusionary acts (including a refusal to supply competitors) and price discrimination in the market for ammonia based fertilisers. A key element of the settlement agreement is that Sasol will divest five of its six fertiliser blending facilities in South Africa before 20 July 2011. The divestitures must be approved by the Commission. This is the first time that divestiture has been used as a remedy in a prohibited practice case (divestiture has previously only been used as a remedy in certain merger cases). The Commission believes that the divestitures will increase competition in the fertiliser market but much will depend on who buys the facilities (assuming buyers can be found). The settlement also provides that:

- Sasol's ammonia plants and business operations will be restructured into a business unit separate to its fertiliser division;
- Sasol will sell its ammonium nitrate based fertilisers using a transparent pricing mechanism that will not discriminate against any customers other than on standard commercial terms such as volume and off take commitments; and
- Sasol will also cease to import ammonia by 20 August 2012 (other than for its internal use and imports on behalf of third parties).

Sasol had previously settled with the two complainants and the settlement with the Commission does not include the payment of a penalty by Sasol. The settlement agreement will remain binding upon Sasol for a period of ten years after its disposal of the five facilities. In 2009, a R250 million (about US$33 million) penalty was imposed on Sasol pursuant to its involvement in a price fixing cartel in the fertiliser market. Interestingly, the other parties to the alleged fertiliser price fixing cartel (Omnia and Kynoch/Yara) have denied liability and are defending the allegations before the Tribunal.

Commission continues to actively investigate and prosecute cartels

The Competition Commission has wide ranging search and seize powers in terms of the Competition Act. In April, the Commission conducted raids on the offices of South African Airways, Mango Airlines and the Airlines Association of Southern Africa as part of its investigation into collusion in the airlines industry around the football World Cup. In May, the Commission raided four electric cable manufacturers as part of an investigation into suspected price fixing, market allocation and collusive tendering.

The Commission has referred twelve bicycle retailers and sixteen bicycle wholesalers to the Tribunal after finding that they had been party to a price fixing cartel. The Commission has also referred British Airways, South African Airways, Air France/KLM, Alitalia and Singapore Airlines to the Tribunal for fixing the price of air cargo fuel surcharges and air cargo rates on cargo flown in and out of South Africa. The Commission is recommending that the Tribunal impose the maximum penalty of ten per cent of South African turnover and exports against all the respondents in the bicycle and air cage cases. Lufthansa was granted leniency by the Commission in the air cargo case. The respondents are fortunate that the amendments to the Competition Act (which introduce criminalisation for cartel offences) is not yet in force.

Relevant websites

Competition Commission website: **www.compcom.co.za**.
Competition Tribunal website: **www.comptrib.co.za**.

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South Korea

Updates from the Korean Fair Trade Commission

The Korea Fair Trade Commission (KFTC) has continued to be active in enforcing the Korean Monopoly Regulation and Fair Trade Act (MRFTA) while making tremendous efforts in educating Korean companies about antitrust law compliance at home and abroad especially due to many Korean companies being involved in international cartels. The KFTC has recently taken proactive measures in protecting consumers and small and medium sized companies doing business with larger companies. In this connection, the following are some of the major activities engaged by the KFTC:

KFTC conducts survey of major pharmaceutical companies

Similar to the European Commission's pharmaceutical sector survey of recent years, from 16 June 2010 the KFTC started conducting surveys regarding trade practices of domestic and foreign pharmaceutical companies in Korea regarding intellectual property rights. Thirty foreign pharmaceutical companies and 18 domestic pharmaceutical companies were subject to the above survey. Specifically, the KFTC targeted those pharmaceutical companies which are the top sellers of prescription drugs in Korea and/or those pharmaceutical companies that are subsidiaries of large conglomerates. The survey is in line with the KFTC's 31 March 2010 announcement of its new antitrust guideline for the exercise of intellectual property rights.

The survey is focusing on obtaining information concerning prescription drugs which are sold in the Korean market and/or prescription drugs which had been approved by, or an application for approval had been filed with, the Korea Food and Drug Administration. Specifically, the survey pertains to applications for patents, execution of agreements (eg, information on the number of intellectual property-related agreements which were executed per year, scope of patent protection and special provisions which apply following the expiration of the patent) and disputes concerning intellectual property (eg, receipt of warnings for patent infringement, results of patent trials and status of any ongoing litigation).

The above survey is scheduled to be conducted from 16 June 2010 to 16 July 2010. The KFTC noted that it had the goal of promoting voluntary corrective measures of unfair agreements regarding intellectual property rights through the pursuit of such a survey and that it plans to conduct on-site inspections of those pharmaceutical companies that do not comply with such a survey.

KFTC promotes antitrust law compliance in China

Education and training session for Korean companies in Shanghai, China

On 6 July 2010, in Shanghai, China, the KFTC held an education and training session for about 80 executives and employees coming from around 30 Korean companies operating in the Chinese market. The focus of the session was on preventing Korean companies from engaging in international cartels in order to enhance international antitrust compliance.

The KFTC found it to be urgent to educate and train the Korean companies operating overseas because they have become targets of antitrust investigations for international cartels by various foreign antitrust authorities. In particular, the number of foreign subsidiaries of Korean companies that are involved in international cartels is increasing due to their relative lack of antitrust compliance awareness. In the case of China, which is now Korea's biggest trading counterpart, the Korean companies operating in China need to pay special attention to this issue given that the Chinese Government has been stepping up its legal enforcement activities since it adopted antitrust laws in August 2008.

The KFTC invited experts on Chinese antitrust laws and explained about the regulations, enforcement activities and cartel case analysis of Chinese antitrust laws and the recommended operating principles of the companies. In addition, the KFTC held a meeting with executives of Korean companies in China to listen to their difficulties and to support their legal compliance.

The KFTC plans to hold more sessions abroad, including in the United States in October 2010, in order to promote the antitrust compliance efforts of Korean companies operating overseas.

The first Korea-China bilateral meeting on cartels held in Beijing, China

On 9 July 2010, in Beijing, China, the KFTC held the first Korea-China bilateral meeting on cartels with China's National Development and Reform Commission (NDRC) to exchange opinions on the two countries' legal enforcement activities against cartels. The NDRC is the agency that has been in charge of pricing-related cartels since China's adoption of antitrust laws.

The purpose of the meeting was to strengthen the KFTC's cooperation with the NDRC in order to reduce exposure from local antitrust violations and support the Korean companies operating in China, which has been increasing its legal enforcement activities ever since its adoption of antitrust laws. The KFTC and NDRC discussed various issues including methods of cooperation between the two agencies and the trend of their enforcement activities.

KFTC investigates subcontracting violations

Investigation of subcontracting violations

On 13 July 2010, despite financial difficulties in the construction industry, the KFTC announced that it rendered its decision against 20 construction companies, which found that such companies violated the Fair Transactions in Subcontracting Act (the 'Subcontracting Act'), the applicable law that protects the interests of small and medium sized companies doing business as subcontractors for larger companies in Korea.

Specifically, the KFTC conducted on-site inspections of 20 construction companies for potential violations of the Subcontracting Act and found that all 20 companies violated the Subcontracting Act. The KFTC found that the construction companies were engaged in unfairly determining the subcontracting price, failed to make interest payments to subcontractors and/or failed to pay the fees/commissions for promissory notes (among other violations). In particular, with respect to subcontracting tenders, the KFTC noted that the above construction companies engaged in the act of requesting a new tender or follow-up negotiation to the lowest bidder even though the lowest bid price was below the estimated price by the relevant construction company. Further, there were also occurrences where, even though the construction companies received payment from the customers in cash, the subcontractors were paid in long-term promissory notes.

Based on the above noted violations, the KFTC imposed total administrative fines of KRW 400 million (about US$335,000) against the 20 construction companies and ordered such companies to pay KRW 5.1 billion (about US$4.25 Million) owed to 936 subcontractors that were injured due to the violations of the Subcontracting Act.

Approval of amendments to the enforcement decree of the Subcontracting Act

The Korean Government approved the proposed amendments to the Enforcement Decree of the Subcontracting Act, which is expected to go into effect on 26 July 2010. Some of the key changes are as follows:

- Notices and responses: Under the amendments, notices and responses concerning the subcontracting project must be sent to the address noted in the commercial registry or the actual business premises by content-certified mail or through a method which can be objectively confirmed. The amendments also permit the KFTC to provide the form document to be used for the notice and response.
- Technical information: The prime contractor is prohibited from compelling the subcontractor to provide its own technical information. 'Technical information' is defined as information related to intellectual property and/or independent information which have a monetary value that is used for business purposes.
- Documents on subcontracting fee: The amendments include a provision which requires that documents related to the determination of the subcontracting fee be preserved.
- Administrative fine and penalty points: A provision which allows the imposition of administrative fines and/or penalty points for violations of the above has also been added.
- List of repeat offenders: The amendments permit the KFTC to release a list of repeat offenders on its website homepage. 'Repeat offenders' are defined as those companies which received a warning or corrective order more than three times during a period of three years. The information that may be released on the KFTC's website homepage consists of the name of the company, the address of the company and the name of the company's representative.

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Spain

The Spanish Competition Authority (CNC) opens an in-depth investigation into Telecinco's acquisition of Cuatro and into the acquisition by Prisa, Telefónica and Telecinco of joint control over Digital+

On 30 June 2010, the CNC has decided to open an in-depth investigation under the Spanish Competition Act 15/2007 into the acquisition of Cuatro by Telecinco and into the acquisition by Prisa, Telefónica and Telecinco of joint control over Digital+. Cuatro and Telecinco are national free TV broadcasters operating TDT channels. Cuatro is so far controlled by Prisa and Telecinco is controlled by the Italian company Mediaset. Digital+ is the only satellite-based pay TV platform in Spain, and is so far controlled by Prisa. The CNC considered that the initial market investigation indicated potential obstacles to the maintenance of effective competition in several audiovisual and electronic communication markets in Spain.

Although the transactions under review met the thresholds set out in the Council Regulation (CE) 139/2004, the Commission decided to transfer the case to the Spanish competition authority because, according to Article 4 of the said Regulation, it considered that the concentration may significantly affect competition in the national market. The CNC was notified on 28 April of the projected acquisition of Cuatro by Telecinco and on 29 April of the acquisition by Prisa, Telefónica and Telecinco of joint control over Digital+.

The CNC's report on this first stage analysed the horizontal and vertical effects of both transactions jointly. In relation to the main horizontal effects which may result from the projected transactions, the CNC concluded that in the pay TV market, the notified operations can produce unilateral effects on competition, especially in the case of the acquisition by Prisa, Telefónica and Telecinco of joint control over Digital+. In this sense, the CNC stated that after the transaction, Telefónica (which operates an ADSL-based pay TV service) could lose every incentive to continue competing with Diagital+ in the market for pay TV, and as a result, they may act as an economic unit in this market with very significant competitive advantages over other competitors. According to the CNC, these entities would combine their competitive strategies in the market for pay TV, particularly regarding the most relevant inputs, such as the audiovisual content in their different modalities and the availability of a pay TV platform with wide geographical coverage and a large customer database. The CNC explained that this conduct could also be extended to other aspects like commercial strategies, price fixing or bundling of Digital+ with Telefónica's electronic communications services.

Regarding the TV advertising market, as a consequence of the transaction Prisa will disappear as a provider of TV advertising spaces of Cuatro and Digital+, and Telecinco will be the only authorised entity to handle said spaces. Having taken into account that TVE has not offered advertising spaces since 1 January 2010, and that the regional television stations have a limited presence in the national advertising market, this new scenario would significantly increase Telecinco's market share and it might enable Telecinco and Antena 3 to act as an economic unit in the Spanish advertising sector, with a joint market share of around 75 per cent.

In relation to the main vertical effects which may result from the projected transactions, the CNC stated that Telefónica, Telecinco and Digital+ can be placed in a privileged position because they would be able to jointly negotiate the purchase of attractive audiovisual content, and this could allow them access to exclusive content and generate important costs savings, which may be not replicated by the competitors in the downstream markets, which, together with horizontal effects, could lead to a significant reduction of the competition in such markets.

Concerning the upstream markets of edition, channel marketing and production of audiovisual content, the significant

presence of Digital+ and Telefónica in the pay TV market, and of Telecinco and Cuatro in the free TV market, linked with the vertical integration of Telecinco, Digital+ and Cuatro, could lead to a competition restriction in these upstream markets because other channel producers or editors could have no access to an important stake of the demand represented by Digital+, Telefónica, Telecinco and Cuatro which after the transaction, may cover these needs with agreements among themselves without using third party providers.

The decision to open an in-depth inquiry does not prejudge the final result of the investigation as the CNC has two months to take a final decision on whether the concentration would significantly impede effective competition within the national market or a substantial part of it.

Sweden

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Follow up on Swedish merger rules, cases and new guidelines

In November 2008 the thresholds for merger filing in Sweden was changed once again. Nearly two years have passed since then so this article will investigate what was the result and what is next.

The changes in 2008 meant that the thresholds were increased in order to concentrate resources on more substantial mergers threatening to be harmful to competition, but they were also changed to reflect their significance on the Swedish market. It was assumed that this would mean less merger filings, enabling the Swedish Competition Authority ('SCA') a possibility to concentrate on more important mergers as well as other issues. It is to be remembered in this context that larger mergers which affect several countries in Europe are usually handled by the European Commission under the EC merger regime.

The current thresholds under the Swedish Competition Act since the 2008 changes are:

- the combined aggregate *turnover in Sweden* of the undertakings concerned (the buyer and the target) in the preceding financial year shall exceed SEK 1 billion (approximately €100 million); and
- at least *two of the undertakings* concerned shall have a *turnover in Sweden* in the preceding financial year exceeding SEK 200 million (approximately €20 million) for each of the undertakings.

This means that at least one of the parties needs to have a rather significant presence in Sweden and that the other part has at least some presence. With the earlier threshold only some presence was required. The thresholds have been changed several times. Initially in 1993 with the first Competition Act, a merger filing obligation was triggered if there was a world-wide turnover of some size and some connection to Sweden. This lead to a lot of unnecessary merger filings without any significance for competition.

Under the current system, there is a mandatory filing obligation if both thresholds are fulfilled. If only the first one is matched (but not the second) the SCA might request a filing (it is also possible for the parties to voluntary file). Compared with 2008, last years merger filings in Sweden (2009) were more than halved so in that respect the assumption that there should be less merger filings proved correct. This trend continues for 2010. Whether this is only attributable to the changed thresholds is doubtful; the financial climate has meant lower merger activity. Whatever the reason, it is more interesting if the changed thresholds have lead to the SCA being able to concentrate on more substantial mergers with significance for the Swedish market.

In those, about 70 merger filings made since November 2008 until now and only three have been taken to second phase. Of those, one was withdrawn and the two other cleared after special investigation (Phase II). None of them could be said to be really substantial, perhaps creating a dominant position, but if the mergers could significantly pose a risk to impede the existence or development of effective

competition is doubtful. Since none of the cases did go to the stage of an actual prohibition it is difficult to draw any more definite conclusions. A prohibit can only be decided by a court and only then would it be possible to see the reasons necessary for such a decision.

The cases show other things that are useful to be aware about. A general observation is that the SCA concentrates resources on cases that they see as important; they use their economist and request a lot of information during the handling of such cases. In complicated matters, it is advisable to prepare carefully and have pre-notification meetings with the SCA in order to avoid unexpected delays or surprises. The SCA expect extensive information already in the filing when there are possible competition issues.

The first of the three cases concerned GlaxoSmithKline's acquisition of a pain killer producer in Sweden from AstraZeneca. The products were non-prescription drugs for fever and pain based on the active ingredient paracetamol. The merger was cleared (April 2009) but involved extensive investigation in relation to the parallel opening of the Swedish pharmacy market.

The second case concerned the department store chain Åhléns' planned acquisition of NK Kosmetik. The SCA found that Åhléns would be close to a monopoly of the market for luxury products in cosmetics, perfumes and skincare in the major cities Stockholm and Gothenburg. The SCA submitted after its investigation an application for a summons to the Stockholm District Court in order to get a prohibition; the buyer decided to break off the acquisition and the SCA in turn rescinded the application for a summons (November 2009).

The third case was recently cleared (July 2010) and concerned the news agency Tidningarnas Telegrambyrå ('TT') and their acquisition of Retriever, a media monitoring company. The acquisition was not subject to a duty to notify since the targets' turnovers were too low. The SCA nevertheless requested a notification as they argued that there was a risk that the acquisition could have negative effects in the media monitoring sector. It might be observed that it was questioned if even the first thresholds were fulfilled. The SCA found that was the case through negative joint control following two larger media houses respective minority ownership and a shareholders' agreement. Apart from being an interesting case, two observations can be made from it.

First the target Retriever was earlier subject for a merger procedure at the European Commission. The same companies that the SCA found to have negative joint control over TT filed a proposed acquisition of joint control over Retriever (previously solely controlled by one of the parties). After that the Commission opened an in-depth investigation and the transaction was aborted (February 2009).

Secondly a filing was requested by the SCA, even though the turnover of the target was well below the second threshold. An important explanation therefore is probably active involvement by one of Retrievers' competitors. This follows a new trend in Sweden in which competitors and customers intervene in merger filings, but also intervene in order to influence the SCA to request filings. Another such case was recently cleared in the first phase by the SCA after an extensive investigation. Also here the SCA requested a filing although the second threshold was not meet and the targets turnover was well below the threshold (cleared in June 2010). Interestingly this was also in the media sector and affected one of the media houses. The request to file was heavily influenced by competitors.

This underlines the importance of a careful handling of the merger filing issues in transactions. Competition authorities are willing to intervene at the same time as competitors and customers are ready to act. The SCA will continue to monitor cases below the second threshold and surely there are third parties that see the opportunity to interfere. Still we have not seen any prohibition in a more substantial case, the cases that have been handled more thoroughly lately have been rather small and without any major significance for the competitive situation. The work on those cases shows that the SCA are sharpening their tools.

The SCA will, with effect from November 2010, issue new rules and guidelines in relation to the requirement for information in a merger notification as well as for the handling of notifications. This will further support them in concentrating on the more important mergers. Still there have not been any major merger cases decided; it is probably a question of time. There are neither any major decisions in cartel or abuse of dominance cases, although there have been some smaller cases investigated as well as a lot of investigations into major cases. This gives the indication that the SCA are working on their methods, sharpening their tools and preparing for the major cases to come.

Switzerland

Legal and organisational developments

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Public consultation on a draft for a revised Act on Cartels

On 30 June 2010, the Swiss Federal Government published a draft bill for an amendment of the Act on Cartels (Draft) along with an Explanatory Report. The government has submitted this Draft for public consultation until 19 November 2010.

The Draft proposes a number of fundamental changes:

- *New Federal Competition Court:* The Draft provides for a clear separation between investigating and prosecuting functions, on the one hand, and decision-making functions, on the other hand. While it confers the latter to a newly established independent Federal Competition Court, it leaves the former to a competition authority which is basically made up of the current Secretariat of the Competition Commission (ComCo). The Competition Court shall be composed of full-time and part-time judges. A majority of the part-time judges shall have enterpreneurial experience or economic knowledge. All the judges must be independent. In particular, they must not be employees of any trade association, in contrast to the representatives of interest groups within the current ComCo. As a rule, the Competition Court shall make its decisions as a first instance court in two-party proceedings. By contrast, the Competition Authority shall only have limited decision-making powers, which shall be conferred to it for purely practical reasons. Thus, the Competition Authority shall continue to make decisions on concentrations of undertakings and issue the necessary procedural orders in the course of its investigations (requests for information, extensions of deadlines, etc).
- *Vertical agreements:* The Act on Cartels currently provides that (i) vertical agreements regarding fixed or minimum prices and (ii) vertical agreements regarding the prohibition of passive sales in distribution contracts are presumed to eliminate effective competition and, hence, to be unlawful. The federal government believes that this provision is too rigid and no longer in line with present-day economic theory and empiricism. It therefore suggests that the presumption described above shall be abolished and/or that a fine for a vertical agreement (but not a prohibition) shall be ruled out in case the undertaking concerned (i) proves that an identical agreement is practiced in the EU without any objection; and (ii) credibly shows that the agreement would commonly be admissible in the European Economic Area.
- *Control of concentrations:* The current Swiss merger control regime features a peculiar standard of assessment (the 'dominance-plus test'). According to this test, the ComCo may prohibit a concentration of undertakings (or impose conditions) only if (i) the concentration creates or reinforces a market dominant position and (ii) effective competition can be eliminated by means of this position and (iii) the concentration does not lead to any improvement of the competitive situation in another market which would outweigh the harmful effects of the dominant position. The federal government regards this test as ineffective and, therefore, proposes to replace it either with a simple dominance test (whereby the criterion of a possible elimination of competition would be dropped) or with an SIEC test ('Significant Impediment to Effective Competition') analogous to EU law. The government favours the dominance test, as this might be the less resource-consuming alternative. Furthermore, the government suggests a new exception to the notification duty in order to avoid duplicate proceedings in international cases. This exception would apply in cases where (i) every relevant market geographically extends over Switzerland plus at least the European Economic Area; and (ii) the concentration of undertakings is being appraised by the European Commission. Finally, the government's Draft creates a possibility to extend the (relatively short) time limits for first and second phase proceedings with the consent of the notifying undertakings. This would facilitate a coordination of Swiss merger control proceedings with parallel proceedings in the EU.

- *International cooperation:* The Draft includes two new provisions which authorise the Competition Authority to cooperate and exchange information with foreign competition authorities subject to certain prerequisites. These prerequisites are similar to the principles of judicial assistance law (in particular, the principles of double criminality, reciprocity, and speciality).
- *Strengthening of private enforcement:* The Draft does not introduce any kind of class actions, but limits itself to minor amendments. In particular, the right to sue shall be extended to persons 'threatened or hurt in their economic interests by an unlawful restraint of competition', including consumers (who could assign their claims to consumer organisations then) and public entities. Furthermore, the Draft provides that periods of limitation shall neither start nor run between the opening of a formal investigation and the final decision.

There are ongoing political discussions on whether undertakings which have implemented compliance programmes should benefit from lower fines and whether fines (and prison sentences) should be introduced for individual persons in case of cartel infringements.

It is open to what extent and by when the government's proposals for a revised Act on Cartels will be implemented. Should the legislative process run smoothly, the earliest possible implementation would likely be in January 2013.

Revised Verticals Notice

On 30 June 2010, the Swiss Competition Commission (ComCo) published a revised version of its Notice on Vertical Agreements after it had submitted a draft of such Notice to public comments in April 2010.

The ComCo's objectives were to adapt the former Verticals Notice to the revised EU Verticals Block Exemption Regulation, to prevent foreclosure of the Swiss markets, and to include its practice in three recent leading cases (ie, the *pruning shears* case, the '*hors-liste*' *pharmaceuticals* case and the *toothpaste* case). Two of these cases are still on appeal before the Federal Administrative Court.

The ComCo's revised Verticals Notice (RVN) features a number of important changes and clarifications:

- The RVN clarifies in its preamble that, as far as possible, the same rules shall apply to vertical agreements in Switzerland as in the EU, so as to prevent an isolation of the Swiss markets and to provide legal certainty. Insofar, the rules of the EU shall apply by analogy in Switzerland.
- The RVN clarifies that 'general measures of advertising or sales promotion' shall be deemed to constitute passive sales even if they reach customers in a territory, respectively, a group of customers which the supplier has reserved to itself or which it has exclusively assigned to another dealer, provided, however, that such measures are a reasonable alternative to addressing customers outside these territories or customer groups (eg, in the dealer's own territory). Accordingly, internet sales shall constitute passive sales unless sales efforts are actually targeted at customers outside the assigned territory.
- The RVN clarifies that it is also applicable to vertical agreements in the case of dual distribution (ie, to non-reciprocal vertical agreements between competitors, where (i) the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level or (ii) the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services). The fact that the RVN is applicable shall, however, not rule out that a parallel assessment under the rules for horizontal agreements is required. It remains to be seen what this statement will mean in practice.
- According to the Swiss Act on Cartels (ACart), vertical agreements regarding absolute territorial protection or regarding fixed or minimum prices presently are presumed to eliminate effective competition and, thus, to be unlawful. The former Verticals Notice provided that this presumption could only be rebutted by proof of intrabrand competition. This provision was subject to fierce criticism from private practitioners, economists, and academic writers. The RVN now provides for an overall assessment of the relevant market, whereby the existence of either sufficient intrabrand competition or sufficient interbrand competition (or sufficient competition due to a combination of both) must be demonstrated.

- The ACart provides that every agreement which significantly affects competition must be justified on grounds of economic efficiency. Whereas the former Verticals Notices listed certain categories of agreements which were deemed to significantly affect competition per se, the approach of the RVN is more open in this respect. It provides for an overall assessment which is to include both qualitative and quantitative criteria. The RVN, however, retains the former list of per se significant types of agreements in the form of a list of 'qualitatively restrictive' agreements. It remains to be seen whether this new approach of the RVN will have an impact on the assessment of vertical agreements in practice.
- The RVN provides that the restriction of sales by members of a selective distribution systems to unauthorised distributors *within the territory reserved by the supplier to operate that system* shall not be regarded as 'qualitatively restrictive' per se. As in the revised EU Block Exemption Regulation, the passage in italics is new compared to the former Verticals Notice.
- The RVN now explicitly recognises the admissibility of the so-called 'location clause' in selective distribution systems (ie, the clause prohibiting a member of the system from operating out of an unauthorised place of establishment). Remarkably, the Motor Vehicles Notice (which takes precedence over the RVN) still considers location clauses as unlawful if they are contained in a motor vehicle dealer agreement.
- The former Verticals Notice provided that price recommendations had to be assessed in the individual case, and listed several circumstances which were to 'carry weight' in this assessment. The RVN holds on to this individual assessment, but now clarifies that a price recommendation is deemed to be 'qualitatively severe' if it amounts to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties (which corresponds to the relevant criterion in the EU Block Exemption Regulation). The specific circumstances listed in the former Verticals Notice are still mentioned in the RVN, but only as circumstances which could cause the ComCo to have a closer look at price recommendations.
- According to the former Verticals Notice, an agreement that significantly affected competition was deemed to be justified without individual assessment if the supplier's market share in the relevant market did not exceed 30 per cent. The RVN now provides a double-sided 30 per cent threshold relating to both the supplier's and the buyer's market shares, analogous to the rules of the revised EU Block Exemption Regulation.

New chairman of ComCo

In May 2010, the federal government appointed Professor Vincent Martenet as Professor Walter Stoffel's successor as chairman of the ComCo effective 1 July 2010. Professor Martenet has been a member of the ComCo since 2005 and has been its Vice-President since 2008. At the same time, he is a full professor of constitutional law and competition law at the University of Lausanne.

Recent cases – horizontal agreements

Credit cards (DMIF)

In July 2009, the ComCo opened a formal investigation regarding the Domestic Multilateral Interchange Fees (DMIF) of Visa and MasterCard. Interchange fees are fees paid by acquirers (which negotiate credit card acceptance agreements with retailers) to issuers (which issue credit cards). They influence the commissions which retailers have to pay to their acquirers. The investigation deals with the question whether it is permissible to fix interchange fees collectively and, as the case may be, what kind of control mechanisms should apply. The ComCo currently has not (yet) decided to replace its traditional cost-based approach by a different approach such as the merchant indifference test.

A first investigation of this matter had been closed in December 2005 with an amicable settlement which was concluded for a period of four years. The parties then undertook to reduce their fees. The purpose of the present investigation is to reassess this solution in the light of recent developments at the European level.

In January 2010, the ComCo issued provisional measures with the objective of renewing the solution of 2005 in a modified form, particularly, with a stronger focus on the most cost-efficient market participants. These measures will lead to a reduction of the DMIF and to an alignment with the European

average. They were based on an amicable settlement with the most important market players and are to stay in force until the ComCo will issue its final decision. However, the ComCo's provisional measures are still in dispute, as they have been appealed before the Federal Administrative Court.

Perfumes and cosmetics

In May 2010, the Secretariat of the ComCo closed its formal investigation of the market for luxury perfumes and cosmetics and submitted a proposal for a decision to the ComCo and to the parties involved. According to the Secretariat's proposal, the ComCo is asked to declare that the Act on Cartels has been violated and impose fines upon both the relevant producers', importers' and suppliers' association and its individual members. The fines proposed by the Secretariat range from approx. CHF 17,000 to CHF 25.5 million, and their total is estimated to be substantially around CHF 120 million. In its investigation, the Secretariat had found signs that an exchange of market information organised by the industry association ASCOPA enabled the undertakings involved to coordinate their prices and freeze their market shares. The Secretariat qualified this as unlawful price-fixing and quota agreements. In addition, the Secretariat alleged that the members of ASCOPA agreed on uniform general terms and conditions of trade. The parties involved were invited to submit their comments on the Secretariat's proposal.

Other cases

In July 2009, the ComCo issued its decision regarding bid rigging by members of a Bernese electrical installation cartel (cf report for 2008/2009). Based on an amicable settlement, the ComCo imposed fines on seven of the eight participating undertakings and waived the fine of the eighth undertaking which had been the first to file a leniency application. In the meantime, the ComCo has published its decision including the considerations. It appears from the text of the decision that, besides the undertaking which obtained a full waiver of its fine for its leniency application, every undertaking was granted a 20 per cent reduction of its fine for participating in the amicable settlement and a further 40 per cent reduction for having cooperated in the investigation.

Recent cases – vertical agreements

In February 2010, the ComCo opened a formal investigation against Aktiengesellschaft Hallenstadion Zürich (AGH), the operator of a major event hall, and Ticketcorner AG (Ticketcorner), a ticketing system operator. AGH and Ticketcorner had entered into a five-year cooperation agreement providing that every organiser of an event in AGH's event hall must distribute at least 50 per cent of its tickets through Ticketcorner. Two competitors of Ticketcorner had subsequently filed a complaint with the ComCo. In a preliminary investigation, the Secretariat of the ComCo found signs that the agreement between AGH and Ticketcorner could constitute an unlawful anti-competitive agreement and that AGH could possibly have abused a dominant position. The formal investigation is now supposed to show whether these allegations are true or not.

In March 2010, the ComCo opened a formal investigation against Nikon AG and conducted a dawn raid on Nikon AG's premises. Based on a complaint, the ComCo suspects Nikon AG of hindering or preventing parallel imports of Nikon photo products into Switzerland.

Recent Cases – dominance

Swisscom ADSL

In November 2009, the ComCo ruled in a decision that the leading Swiss telecom operator Swisscom had abused a market dominant position through its pricing policy for ADSL services and fined Swisscom with an amount of CHF 220 million.

Swisscom is active as an ADSL provider, competing with several other providers. However, Swisscom also provides the pre-product which is indispensable for the provision of broad-band internet services via ADSL. The ComCo reproached Swisscom with a so-called 'margin squeeze'. According to the ComCo, Swisscom had rendered the margin between the costs of the pre-product and the retail prices too narrow by charging high prices for the pre-product until 2007. The ComCo found that Swisscom's competitors had not been in a position to run their ADSL businesses profitably, therefore. It is true that even Swisscom incurred losses from its ADSL business; these were, however, compensated by profits resulting from the sale of the pre-product.

Swisscom has appealed the ComCo's decision before the Federal Administrative Court. This appeals procedure is currently pending.

Publigroupe

In April 2010, the Federal Administrative Court rejected an appeal by the media advertising company Publigroupe against a ComCo decision of March 2007. The ComCo had found that Publigroupe abused a dominant position in the market for the placement and sale of advertising space in print media in Switzerland. The allegation was that Publigroupe prevented independent advertising placement agents from entering and competing in the market and that it discriminated against such agents in comparison to other placement agents by the fact that it refused to pay commissions to them based on certain unjustified criteria contained in commissioning guidelines.

Publigroupe has announced to appeal the matter before the Federal Supreme Court.

ETA

In September 2009, the ComCo opened a formal investigation against ETA Manufacture Horlogère Suisse SA (ETA), a subsidiary of the Swatch group. In a preliminary investigation, the Secretariat of the ComCo had found signs that ETA could possibly have abused a dominant position in the market for mechanical movements. This preliminary investigation had been triggered by complaints after ETA had notified its customers of price increases and changes in its conditions of payment. The formal investigation is now supposed to show whether ETA has in fact abused a dominant position or not. The ComCo intends to place a particular focus on the question whether intra-group companies have possibly been favoured over external customers.

Recent cases – merger control

Pfizer/Wyeth

In July 2009, Pfizer obtained conditional clearance from the ComCo for its proposed acquisition of Wyeth in a first-phase procedure. The condition imposed related to a voluntary commitment made by Pfizer and Wyeth during the procedure. As regards the markets where both Pfizer and Wyeth were active, the combined market shares of the two undertakings proved to be small in most cases. The only exceptions concerned tranquillisers and endectocides respectively. In the case of tranquillisers, the combined market share of Pfizer and Wyeth was high (ie, between 40 per cent and 50 per cent). This high market share was not perceived as critical, though, due to the existence of substitutable products in the category of hypnotics and sedatives. Furthermore, the ComCo observed that any price increase for the tranquillisers in question is subject to prior approval by the Federal Office of Public Health. As to the segment of endectocides for production animals, the ComCo noted that the parties had allayed its concerns by making the same commitments as the ones which the European Commission had imposed on them with regard to Belgium, Germany, and the United Kingdom. Finally, as regards the markets where only Pfizer or Wyeth were active, the ComCo found that there was either sufficient actual competition or sufficient potential competition.

Edipresse/Tamedia

In September 2009, the ComCo approved the acquisition of the Swiss activities of Edipresse group by Tamedia, two publishing houses, in a second-phase procedure. The ComCo observed that in most of the markets concerned, Tamedia gained no market shares through the acquisition. This was due to the fact that, in these markets, Tamedia was active only in the German speaking-part of Switzerland, whereas Edipresse was active only in the French-speaking part. The market for commuter newspapers in the French-speaking part of Switzerland was an exception, though. The acquisition led to the combination of the only two existing commuter newspapers there. The ComCo found, however, that there was no room for two commuter newspapers in that region, anyway, and that one of these newspapers (ie, the one published by Edipresse) would have dropped out of the market shortly even without the acquisition. This finding was confirmed by an independent expert. A survey conducted by the ComCo also showed that obviously no other media company was willing to enter the market by acquiring Edipresse's commuter newspaper. The ComCo, therefore, considered the prerequisites of the so-called 'failing division defence' to be fulfilled and approved the acquisition.

Sunrise/Orange

In April 2010, the ComCo prohibited the planned acquisition of Sunrise Communications AG (Sunrise) by France Télécom SA and the subsequent merger of Sunrise with France Télécom AG's Swiss subsidiary Orange Communications SA (Orange). Sunrise and Orange are two of the three network operators in the Swiss mobile telecommunications market. In case of a merger, they would have had a combined market share of approximately 40 per cent. The third operator is Swisscom with a single market share of approximately 60 per cent.

According to the ComCo, the merger would have produced a situation where only two mobile phone companies with a network of their own would have been left in Switzerland. In the ComCo's view, this would have led to a collectively dominant position suitable to eliminate effective competition. Moreover, the ComCo considered it as unlikely that the two remaining market players would have been disciplined by market entries. The ComCo believed that in such a situation, neither Swisscom nor the merged new company would have had sufficient incentives to compete effectively for market shares, but that it would have been more advantageous for them to keep prices up. According to the ComCo, possible synergies for end customers would not have been significant enough so as to outweigh the expected harm to competition. Also, the ComCo could not identify any effective remedies or conditions which could have allayed its concerns. By contrast, the ComCo believes that in the current situation with three competitors, there is still a certain degree of competitive dynamics and a market which is open towards innovation.

Relevant website

Homepage of the Swiss Competition Commission: **www.weko.admin.ch.**

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Turkey

9th International Competition Network (ICN) Annual Conference held in Istanbul with 81 participant countries

The 9th Annual Conference of the International Competition Network (ICN), hosted by the Turkish Competition Authority, took place in Istanbul between 27-29 April 2010.

On behalf of 81 countries, 483 participants attended the conference. Attendees consisted of the representatives of developed and developing countries applying competition law. Among the participants, there were also academics and consultants of competition law and policy.

At the opening of the conference, the Commissioner responsible for Competition Policy Joaquin Almunia, Chief Executive of ICN and CEO of the Office of Fair Trading in the UK, John Fingleton and President of the Competition Authority Professor Dr Nurettin Kaldirimci, spoke about various topics.

The topics discussed at the ICN Conference were as follows:

- Collecting evidence and utilising information technology to handle Cartel files in a more efficient manner;
- Market definition in mergers and acquisition cases and an analysis of the Failing Firm Defence;
- Refusal to deal with competing undertakings within the abuse of a dominant position;
- Strategical planning for competition authorities and effective management of investigating procedures; and
- Principles of market research and storage of acquired data.

Competition policy

Two new regulations on procedures

Two new regulations regarding procedures before the Turkish Competition Authority (TCA) entered into force in April 2010. Regulation No 2010/3 on 'the Regulation of the Right of Access to the File and Protection of Trade Secrets' is aimed at setting procedures and principles concerning

the exercise of the right of access to files by parties. Article 44 of the Act on the Protection of Competition (Act No 4054) lays down the general principles on parties' rights of access to exhibits and documents during an investigation. The new Regulation broadens these general principles to Phase II merger clearance procedures and contains provisions for determining whether the pieces of information obtained during the implementation of Act No 4054 shall be qualified as trade secrets, which is the limit for the parties' right of access to the file.

Regulation No 2010/3 on hearings held vis-á-vis the Competition Board, lays down procedures and principles related to hearings in order to provide that the parties can use their rights fully and efficiently in the hearings held before the Board. Like parties' right of access to the file, the Competition Act contains general provisions on the Competition Board's hearings. However, with an aim of respecting principles of efficiency, transparency and legal certainty, the Regulation underlines general principles on these hearings, especially regarding confidential sessions and means of proof. It is obvious that the Board has codified traditional rules applied during hearings since the establishment of the TCA.

TCA's strategic plan

The Turkish Competition Authority (TCA) announced on its website that the procedure for preparing the Authority's strategic plan for the period between 2011 and 2015 was to be launched. The main aim of the procedure is dedicated to the development and implementation of an idea of success for the future of the Authority. After the installation of a working team, the main steps of the procedure will be as follows:

- Trainings orientated to those who are contributing to the strategic plan;
- Roundtable sessions for the preparation of the strategic plan;
- Internal and external studies of stakeholders;
- Drafting of the strategic plan and revising it after comments of the TCA's different chambers;
- Communication of the plan with the State Planning Organisation and incorporating its revisions if necessary; and
- Preparation and presentation of the final draft.

It is clear that the Authority is seeking for a plan that will be prepared to take into account targets and one that is in conformity with the country's economic and general policies.

11th annual report from the TCA

The TCA recently published its 11th annual report. In the 2009 annual report, besides the statistical information regarding the former operational year, a section provided us with some insights regarding the Authority's policies. Accordingly, the TCA has determined its priorities for the following year, 2010, as follows:

- Amending the Act and the secondary legislation in order to adapt to EU legislation as much as possible;
- Organising training activities for business and academic environments to improve the culture of competition;
- Focusing more on hardcore infringements rather than relatively less important ones; and
- Developing proper measures aimed at increasing the awareness of competition in all segments of society and consciousness of competition in public institutions by the help of the framework rendered by Regulatory Impact Analysis.

Statistical information covers all decisions in each area of competition law and provides detailed statistical information comparing the industries, numbers of cases year-by-year and the most noteworthy practices of the year of 2009. You may find below several exemplary outcomes cited in the report:

- *Distribution of the number of antitrust cases in 2009 according to industries:* Food products and beverages, 33; transportation, 19; petroleum products, 16; telecommunications, 16; and motorway, airline, maritime and railway, 12 (in total, 178 cases).
- *The most remarkable antitrust cases: Naked ADSL* decision, *lat iron and steel* decision, *cartel in the poultry market* decision and *Turkcell's mobile marketing decision.*
- *Distribution of the number of merger/acquisition, privatisation and joint venture cases in 2009 according to the industries:* Food products and beverages, 27; chemical products and pharmaceuticals, 11; energy, 10; motorway, airline, maritime and railway, 10; and machinery and defence industry, 9 (in total, 146).
- *The most remarkable merger/acquisition cases: Mudurnu* decision; *Opet and THY Joint Venture* decision; *Oyak-Lafarge* decision;

TGS-Joint Venture decision; *Gwalior-Lanxess* decision; *Burgaz Raki* decision; and *Cadbury-Kraft* decision

- Another interesting piece of information given is the claimed case and concluded case rates. In 2009, while 395 antitrust complaints were placed, only 178 of them were concluded. Furthermore, in mergers/acquisitions, 146 of 169 cases were concluded. In comparison with the numbers in the previous years between 2005-2009, whilst the number of merger/acquisition cases reduced appreciably as a result of the financial crisis, the highest number of antitrust cases was concluded in 2009 since the establishment of the TCA.
- The Authority also levied fines to undertakings to the total of €46,414,700 in 2009. €26,182,100 of this sum was levied for antitrust agreements and €18,704,400 for abuse of dominant position. In merger/acquisition cases, only €1,024,360 was imposed due to realising the transaction without the TCA's consent or notifying after the given period. Additionally, while the executives were not fined in 2008, in 2009 the TCA levied fines of €17,943 to the executives of the infringing undertakings.
- The fines given to the undertakings in comparison with the previous years increased dramatically, considering the average fine amount of those years was around €10,000,000. This indicates the TCA's intent on becoming serious about dealing with competition infringements.

Major cases

Individual exemption for Turk Tuborg's exclusive agreements

In 2005, the TCA withdrew the exemption granted to exclusive distribution agreements of Efes Pilsen, the dominant brewer in the Turkish market, and Turk Tuborg, the second firm in the market, due to the fact that parallel distribution networks of these two undertakings limited competition in the market. The Turkish beer market has the characteristics of a strong duopoly of these two entities with a market share reaching 99 per cent.

In 2008, Turk Tuborg applied to the TCA in order to benefit from individual exemption and claimed that Turk Tuborg's market share has decreased after withdrawal of the exemption in 2005. Considering that there is no direct relation between the decrease in Turk Tuborg's market share and withdrawal of the exemption, the TCA partially accepted Turk Tuborg's requests and granted individual exemption only for distribution agreements with open sales points, ie, bars, restaurants, etc and under strict conditions.

However, at the end of 2009, Turk Tuborg renewed its application for an individual exemption and this time, the TCA concluded that all the market share loss of Turk Tuborg between 2005 and 2009 was transferred to Efes Pilsen. The TCA also analysed the market structure and noted the increase in the HHI index of the market and the barriers to entry. According to the TCA, the acquisition of 'Tekel Birası', the first beer brand in the Turkish market, by Efes Pilsen, all market indications supported the fact that Efes Pilsen had strengthened its dominant position (90 per cent market share) after the withdrawal of the exemption in 2005. The Competition Board concluded that Turk Tuborg has been weakened both in terms of market share and sales, even though the total market has expanded. Finally, depending on these facts, the TCA granted individual exemption to Turk Tuborg's exclusive distribution agreements.

Individual exemption to the ATM protocol

The TCA assessed The Interbank Card Center (BKM)'s request of permanent exemption to 'Protocol of ATM Card Sharing Platform' signed by 26 banks in order to allow customers to use their bank cards in all ATMs.

After the examination, the TCA held that it is in the scope of the Competition Act since the parties are setting commission rates which are going to be taken from the customers and consequently the permanent exemption is not granted to the parties. However, the TCA obliges the parties to inform customers about the exchange commission rates when using this service and ruled that the exchange commission shall be published on the BKM's website.

According to the reasoned decision, banks may charge the cardholders for using this service and this application does not restrain the benefit of customers because they have the freedom not to use it. The TCA stated that the platform is open for customers of all other banks that signed the Protocol and the commission rate is reasonable considering the convenience brought to customers. Since the aforementioned Protocol meets the exemption conditions stated in Article

5 of the Competition Act, the TCA granted an individual exemption for the duration of three years.

On the other hand, the TCA is still carrying out an investigation conducted into the claim that eight banks have agreed on promotions offered to private firms and public institutions.

Sector inquiry on driving courses

The TCA concluded its sector inquiry about motor vehicle driving courses to determine whether the conditions of the sector may cause anti-competitive behaviours. In the report, the TCA analysed the relevant legislation and institutions. The Board decided that the market conditions are unreliable and a responsible institution is supposed to offer the TCA for consideration before implementing any relevant legislation. The TCA also hinted that a device may be attached to count the hours of lessons in order to prevent irregular price cuts by means of lessening the driving exercises. Moreover, the TCA asserted the deterrent nature of the Competition Act and suggested that more selective examination for driving licences are necessary to pave the way for competition in the quality of the services and not just to ensure competitive prices.

Moreover, in line with the sector inquiry, the TCA initiated an investigation on the claims of market sharing and price setting agreements made under the Association of Driving Courses in Sivas where the TCA prosecuted an investigation and imposed fines to the undertakings. In this recent investigation, the TCA decided that the undertakings have engaged in price fixing and market conditions, and imposed fines totalling approximately €20,000 on the undertakings.

Vodafone Turkey acquired Borusan Telekom, a major alternative telecom operator in Turkey

In line with the global trend of large scale telecommunications firms prompting to mergers in order to position themselves strategically and to benefit from the convergence of technologies, Vodafone Turkey acquired Borusan Telekom which operates fixed line, broadband internet services, infrastructure and satellite communications systems.

In its decision, the TCA ruled that the acquisition concerned enables Vodafone Turkey to provide more competitive services utilising from the infrastructures and retail services of Borusan in the fixed lines, broadband internet and mobile phone services markets. In Turkey, while Turk Telekom Group dominates the markets in fixed lines, leased lines and both wholesale and retail broadband internet services, Turkcell holds dominant position in mobile phone services and is the second biggest player in the leased line market.

An investigation against Samsung and its Turkish Partner

On 18 March 2010, the TCA launched an investigation against Samsung Electronics Turkey and Anadolu Elektronik, Samsung's distributor in Turkey since 2005. The investigation concerned was initiated to determine whether these two undertakings restricted competition among the dealers and technology markets by maintaining the minimum prices of consumer electronics.

This investigation demonstrates that vertical restraints have acquired the attention of the TCA again and the effects of the *Leegin* Decision of the US Supreme Court stated in some of the TCA's recent decisions could become an exception, especially when the new developments in the US are taken into account.

Turkish Pharmacists' Association was subjected to a fine of three per cent

Recently, the TCA announced that the investigation initiated regarding the Turkish Pharmacists' Association is concluded. The investigation, opened on 16 September 2009, focused upon the allegations claiming that the Association established the purchasing conditions in the market by encouraging its members to boycott certain producers or importers with the reason that they reduced the commercial discount or due dates applied to pharmacies. More concretely, the Association demanded a four per cent discount if a generic drug exists, a seven per cent discount if a generic drug does not exist and additionally requested due dates of 90 days and announced that the Association would take necessary measures to those that do not apply these conditions.

After rejecting the interim measure application on 25 February 2010, the TCA announced on 23 July 2010 that it decided the

Association infringed Article 4 of the Turkish Competition Act – equivalent to Article 101/1 of the EU Treaty. As a result, the TCA decided by a majority of votes for the Association to be levied an administrative fine of €183,973.19, which is three per cent of its gross revenues (which amounted to €6,132,439.542).

TCA shakes the airline industry

For the first time since its establishment, the TCA initiated two new investigations in the airline business, with allegations of abuse of dominant position and anti-competitive agreements between competitors.

The first investigation is against Turkish Airlines (THY), with allegations that THY, the flag carrier airline, excludes its competitors from the market composed of domestic and international routes from Istanbul.

Günes Eksres Havacılık A S, the affiliate of THY and Lufthansa which operates under the 'Sun Express' brand, and Condor Flugdienst GmbH, the affiliate of Thomas Cook and Lufthansa, are the parties involved in the second investigation. It is alleged that these two firms infringed the Competition Act by a cartel agreement regarding routes between Germany and Turkey.

Relevant websites

Website of the Turkish Competition Authority:
www.rekabet.gov.tr/index.php?Lang=EN

Website of the Appeal Court for Competition Cases:
www.danistay.gov.tr/eng/index.html

Website of ACTECON: **www.actecon.com**

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United Kingdom

The Office of Fair Trading (OFT) has recently reached two infringement decisions.

On 30 March 2010, the OFT fined the bank, RBS, £28.5 million for an infringement of the Competition Act between October 2007 and February/March 2008. The fine had been reduced from £33.6 million to reflect admissions made by RBS and its cooperation. The infringing conduct involved the unilateral disclosure of confidential pricing information by the RBS Professional Practices Coverage team to their counterparts at Barclays Bank which had been taken into account by Barclays in determining its own pricing. This information related to RBS's future pricing intentions in relation to loan products for professional services firms such as lawyers and accountants. The infringement came to light as a result of an application for immunity by Barclays which was not fined as a result.[1]

Shortly after, on 16 April, the OFT imposed a £225 million fine on two tobacco manufacturers, Gallaher and Imperial Tobacco, and ten retailers for infringements in relation to the retail prices of tobacco products. These infringements took place between 2001 and 2003 and related to cigarettes, tobacco, cigars etc. The infringements were a form of resale price maintenance. Each manufacturer had a series of agreements with each retailer which linked the retail price of particular brands to the retail price of competing brands thereby restricting the ability of the retailers to set their retail prices independently. One retailer, Sainsburys, received immunity from fines as it alerted the OFT to the infringements; a number of other retailers received discounts on their fines for cooperation and admissions during the course of the investigation. The decision is being appealed by six of the parties.[2]

The Court of Appeal on 23 July 2010 in *Cooper Tire & Rubber Company Europe v Dow Deutschland* [2010] EWCA Civ 864[3] has commented on the jurisdiction of the English Courts to hear private damages claims arising from European Commission cartel infringement decisions. Although it was not necessary for the Court to reach a decision, it nevertheless questioned the expansive

approach to jurisdiction taken in the earlier (2003) *Provimi* case.

The facts are complex; in short a number of tyre manufacturers brought claims in the English High Court for damages arising from a synthetic rubber cartel which had been the subject of the European Commission infringement decision. At issue was whether there were arguable claims against the UK domiciled defendants which would give the Court jurisdiction over the non-UK defendants pursuant to Article 6(1) of the Brussels Regulation. Article 6(1) allows a person that is one of a number of defendants to a claim to be sued in the courts of the state where any one of the defendants is domiciled so long as the claims are closely connected that it is expedient to hear them together to avoid the risk of inconsistent judgments. In other words, arguable claims against UK defendants operate as an anchor to allow claims to be brought against non-UK defendants in the English court.

The UK domiciled defendants were not addressees of the Commission infringement decision. Following the approach in *Provimi* it would be sufficient to establish an arguable claim against a company if it was part of the same undertaking as the addressee of the Commission decision; a company can be held to be liable for the infringing conduct of its parent company or a sister subsidiary company regardless of its knowledge of or involvement in the infringement. This reflects the wording of Article 101 which prohibits *undertakings* (in effect corporate groups) from entering into arrangements with an anti-competitive object or effect. At first instance it was found that there was an arguable claim against the UK defendants on this basis. It was argued on appeal that *Provimi* went too far.

The Court did not need to address this issue as it found that the allegations against the UK defendants were to the effect that they were involved in the infringing conduct or at least aware of it. It was not necessary to rely on *Provimi* to establish an arguable claim. However, the Court did go on to comment on *Provimi* doubting the approach.

First, whilst the Court accepted that it could be presumed that a parent company, by reason of the control that it exercises over a subsidiary, would be liable for the conduct of the subsidiary, it was difficult to see how a subsidiary could be liable for the conduct of its parent.

Secondly, *Provimi* was not consistent with the Commission's approach to fining where it imposes fines against particular companies within a group which it considers are responsible for the infringement not against all companies in the group.

Thirdly, the logical extension of the approach would be to make a subsidiary liable even where that subsidiary was not involved in the sale of the cartelised products.

The Court found that had it been necessary to decide these issues it would have made a reference to the European Court of Justice for resolution.

Notes

1 OFT Press Release, 30 March 2010: **www.oft.gov.uk/news-and-updates/press/2010/34-10**.

2 OFT Press Release, 16 April 2010: **www.oft.gov.uk/news-and-updates/press/2010/39-10**.

3 *See* **www.bailii.org/ew/cases/EWCA/Civ/2010/864.html**.

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Uruguay

The Uruguayan Antitrust Agency releases guidelines for determining relevant markets

In May 2009, the Commission for the Promotion and Protection of Competition (*Comisión de Promoción y Defensa de la Competencia*, the 'Commission') issued Resolution 2/009 including guidelines for defining the relevant market in the context of any investigation of competition issues.

Introduction

The Uruguayan Antitrust Law No 18.159 (the 'Law') prohibits two practices in particular: (i) abuse of dominant position; and (ii) any practice or behaviour the effect or object of which is to distort or hinder present or future competition in the relevant market. Further, the Law states that when analysing whether a certain conduct affects competition, the relevant market in which such conduct or behaviour takes place must be determined. As a consequence, the determination of the relevant market becomes a key element and the starting point of any antitrust case.

In this scenario, the Commission drew up general guidelines for the determination of the relevant market (the 'Guidelines'), that will guide the array of methods and techniques to be used in each antitrust case. However, in each specific case the Commission may adopt different methods to determine the relevant market. As provided in the Guidelines, when determining the relevant market two approaches may be taken: (i) the product market; or (ii) the geographical market.

Determination of the relevant market under the product approach

The analysis under this approach is aimed at setting the markets or market segments whereby goods or services which appear as potential substitutes for the goods or services offered by the agents are offered. This must be analysed from the perspective of both suppliers and consumers.

Substitutability analysis from the perspective of consumers

According to the Guidelines, two products/services may be regarded as substitutes for each other when an increase in the price of one of the goods and/or services produces the alteration in the consumption habits of consumers of the substitute good or service.

The following analysis techniques and sources of information may be used:

- technical and functional studies of different varieties and brands of the goods or services;
- statistical analysis of trends in trade of goods or services and market prices of the products under analysis;
- analysis of qualitative and historical information regarding consumers' reactions to price changes in the past;
- review of opinion polls regarding preferences of consumers and other agents;
- review of documents, communications and other sources of information produced by the investigated agents and other agents in relation to the substitutability of products;
- consultation with experts about the preferences of consumers and other agents and about the regular functioning of the market; and
- calculation of the estimated costs to be incurred by the consumers when changing supplier (switching costs).

Based on the abovementioned techniques, the Guidelines also suggest completing the well known following tests: (i) 'Small but Significant Non Transitory Increases in Prices' ('SSNIP'); and/or (ii) critical losses.

Substitutability analysis from the perspective of suppliers

Two products/services might be regarded as substitutes for each other when an increase in the price of one of the goods or services has as an effect on the reallocation of their resources by other companies in order to be able to offer the same product or services in the short term (generally, less than one year according to the Guidelines) and without

significant investments. According to the Guidelines the following analysis techniques and sources of information may be used: (i) history of supply substitutability; (ii) information on the willingness of consumers to switch supplier in case of a price increase; (iii) information about the costs in which suppliers shall incur to offer the new product and the estimated time needed to be able to provide it; (iv) information on the idle capacity of potential suppliers; and (v) information about the production process.

Determination of the relevant market under the geographical approach

The geographical market is usually (but not necessarily) determined once the product market has been determined. The following information may be relied on:

- the cost for consumers to switch to products/services offered in other geographical areas;
- the cost for suppliers to provide their products in other geographical areas;
- characteristics of the products;
- information about the different strategies to be used regarding prices, sales and marketing;
- information regarding the flow of goods and services between geographic areas and the existence of barriers to entry; and
- information on tariffs and other restrictions on foreign trade.

Final note

The Guidelines described above are based on well known international precedents. However, the fact that the Commission compiled all such criteria in a document and uses it as a guide when analysing an antitrust case shows the recent, yet continuous, development of the Uruguayan Antitrust Law and the will of the government to broaden the legal and regulatory framework in the field.

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