the global voice of
the legal profession®

Antitrust News

Newsletter of the International Bar Association Legal Practice Division

VOLUME 30 NO 1 MAY 2017

INTERNATIONAL CONVENTION CENTRE (ICC SYDNEY)

IBA 2017 Sydney

8–13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

The 2017 IBA Annual Conference will be held in Sydney, Australia's leading global city. Recognised internationally as a future-focused and innovative business centre, Sydney provides headquarters for almost 40 per cent of the top 500 Australian corporations.

The city combines natural beauty with buzzing urban villages and a city centre that's home to some of the world's most recognisable and iconic structures such as the Opera House and Sydney Harbour Bridge.

As one of the world's most multicultural and connected cities, Sydney will be an ideal location for the largest and most prestigious event for international lawyers, providing an abundance of business and networking opportunities, as well as the chance to explore one of the most beautiful cities on Earth.

What will Sydney 2017 offer you?

- Gain up-to-date knowledge of the key developments in your area of law which you can put into practice straight away
- Access to the world's best networking and business development event for lawyers – attracting over 6,000 individuals in 2016 representing over 2,700 law firms, corporations, governments and regulators from over 130 jurisdictions
- Build invaluable international connections with leading practitioners worldwide, enabling you to win more work and referrals
- Increase your profile in the international legal world
- Hear from leading international figures, including officials from the government and multilateral institutions, general counsel and experts from across all practice areas and continents
- Acquire a greater knowledge of the role of law in society
- Be part of the debate on the future of the law

To register:

Visit: **www.ibanet.org/Conferences/Sydney2017.aspx**

To receive details of all advertising, exhibiting and sponsorship opportunities for the IBA Annual Conference in Sydney email **andrew.webster-dunn@int-bar.org**

REGISTER BEFORE 21 JULY 2017 TO RECEIVE EARLY REGISTRATION DISCOUNTS

OFFICIAL CORPORATE SUPPORTER

IN THIS ISSUE

From the Co-Chairs 4

Committee officers 5

IBA Annual Conference – Sydney, 8–13 October 2017: Our committee's sessions 6

International reports

Argentina 8
Australia 9
Austria 10
Belgium 12
Canada 14
China 16
Colombia 17
Czech Republic 18
Denmark 20
Finland 22
France 23
Hong Kong 24
India 26
Indonesia 28
Ireland 29
Israel 32
Italy 33
Japan 36
Kenya 37
Malaysia 38
Netherlands 39
New Zealand 40
Norway 43
Poland 44
Portugal 47
Russia 49
Singapore 51
South Africa 53
Spain 54
Sweden 57
Taiwan 60
Turkey 61
Ukraine 62
United Kingdom 64

Newsletter Editor

Leonor Cordovil
Grinberg Cordovil Advogados, São Paulo
lac@gcalaw.com.br

Contributions to this newsletter or articles pubished directly on the IBA website are always welcome. If you wish to be a contributor for your country or region and can provide updates twice a year, please contact the Newsletter Editors using the details above.

International Bar Association
4th floor, 10 St Bride Street
London EC4A 4AD
Tel: +44 (0)20 7842 0090
Fax: +44 (0)20 7842 0091
www.ibanet.org

© International Bar Association 2017.

All rights reserved. No part of this publication may be reproduced or transmitted in any form or by any means, or stored in any retrieval system of any nature without the prior permission of the copyright holder. Application for permission should be made to the Director of Content at the IBA address.

Terms and Conditions for submission of articles

1. Articles for inclusion in the newsletter should be sent to the Newsletter Editor.
2. The article must be the original work of the author, must not have been previously published, and must not currently be under consideration by another journal. If it contains material which is someone else's copyright, the unrestricted permission of the copyright owner must be obtained and evidence of this submitted with the article and the material should be clearly identified and acknowledged within the text. The article shall not, to the best of the author's knowledge, contain anything which is libellous, illegal, or infringes anyone's copyright or other rights.
3. Copyright shall be assigned to the IBA and the IBA will have the exclusive right to first publication, both to reproduce and/or distribute an article (including the abstract) ourselves throughout the world in printed, electronic or any other medium, and to authorise others (including Reproduction Rights Organisations such as the Copyright Licensing Agency and the Copyright Clearance Center) to do the same. Following first publication, such publishing rights shall be non-exclusive, except that publication in another journal will require permission from and acknowledgment of the IBA. Such permission may be obtained from the Director of Content at **editor@int-bar.org**.
4. The rights of the author will be respected, the name of the author will always be clearly associated with the article and, except for necessary editorial changes, no substantial alteration to the article will be made without consulting the author.

Advertising
Should you wish to advertise in the next issue of the Antitrust newsletter, please contact the IBA Advertising Department:
advertising@int-bar.org

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

From the Co-Chairs

Janet McDavid
Hogan Lovells US,
Washington, DC
janet.mcdavid@
hoganlovells.com

Pieter Steyn
Werksmans,
Johannesburg
psteyn@werksmans.com

Looking ahead

We are pleased to present the May 2017 edition of the Antitrust Committee's newsletter, which covers news from 34 different jurisdictions from around the world including reports on:

- Recent notable merger and behavioral cases, for example from the Belgium (including non-notifiable mergers) and Canada
- Increase of MOFCOM interest in gun jumping measures in China
- The public consultation paper on the issues of competition and regulation in the sector of transportation in passenger vehicles in Portugal
- The recent decision in Russia against Google alleged abuse of dominance

Working groups

The various Antitrust Committee working groups have been working very hard in the last few months and we are grateful to all the members who contribute to their activities. Our working groups have enabled the IBA to participate in various consultations on legislative antitrust initiatives. In particular, we have submitted our comments on issues involving antitrust policy to Argentina, Australia, Brazil, China, COMESA, European Union, Germany, Hong Kong, India, Japan, New Zealand, Peru, Philippines, South Africa, Ukraine and the United States. Details of the working groups and copies of the submissions made may be accessed on the Committee page on the IBA website (details below).

Conferences

During the first quarter of 2017, the Antitrust Committee has successfully:

- participated in the Latin America M&A Conference in Buenos Aires;
- organised a joint conference with the World Bank Group and International Chamber of Commerce in Porto for 10–12 May;
- organised the Antitrust Committee's Mid-Year Conference scheduled for Seoul on 15–16 June, jointly with the Korean Bar Association and the IBA's Korea Advisory Board;
- co-organised the Competition and Communications Conference with the Communications Committee in Berlin; and
- increased its interaction with key regulators (such as the US DoJ and FTC, the EU's DG Competition, Canada, and other authorities).

We look forward to seeing you at our conference in Florence on 8–9 September. We are arranging several interesting sessions for this year's IBA Annual Conference in Sydney, 8–13 October. A conference on the effects of Brexit on antitrust regulation in Europe will be held in London on 13 November.

We encourage you to become involved in the Committee's activities and welcome any help you can provide in recruiting new members.

For more information on the IBA Antitrust Committee's activities please visit our web pages at: www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/Default.aspx.

Committee officers

Co-Chairs

Janet McDavid
Hogan Lovells, Washington, DC
janet.mcdavid@hoganlovells.com

Pieter Steyn
Werksmans, Johannesburg
psteyn@werksmans.com

Senior Vice-Chairs

Elizabeth Morony
Clifford Chance, London
elizabeth.morony@cliffordchance.com

Marc Reysen
RCAA Partnerschaft von Rechtsanwälten, Frankfurt
mreysen@rcaa.eu

Vice-Chairs

Thomas Janssens
Freshfields Bruckhaus Deringer, Brussels
thomas.janssens@freshfields.com

Daniel Swanson
Gibson Dunn & Crutcher, Los Angeles
dswanson@gibsondunn.com

Secretary

Samantha Mobley
Baker & McKenzie, London
samantha.mobley@bakermckenzie.com

Journal Editor

Samir Gandhi
AZB & Partners, Noida
samir.gandhi@azbpartners.com

Publications Officer

Janet Yung Yung Hui
Jun He Law Offices, Beijing
xurr@junhe.com

Newsletter Editor

Leonor Cordovil
Grinberg Cordovil Advogados, São Paulo
lac@gcalaw.com.br

Conference Coordinator

Thomas Janssens
Freshfields Bruckhaus Deringer, Brussels
thomas.janssens@freshfields.com

Working Group Coordinator

Kyriakos Fountoukakos
Herbert Smith Freehills, Brussels
kyriakos.fountoukakos@hsf.com

Working Group Liaison Officers

Randal Hughes
Bennett Jones, Toronto
hughesr@bennettjones.com

Youngjin Jung
Kim & Chang, Seoul
youngjin.jung@kimchang.com

Website Officers

Munesh Mahtani
Google, London
munesh@google.com

Julian Peña
Allende & Brea, Buenos Aires
jp@allendebrea.com.ar

North American Regional Representative

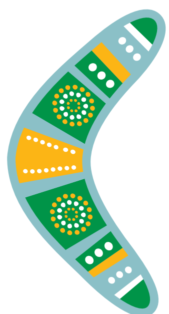
Ilene Knable Gotts
Wachtell Lipton, Rosen & Katz, New York
ikgotts@wlrk.com

Asia Pacific Region Liason Officer

Tsuyoshi Ikeda
Mori Hamada & Matsumoto, Tokyo
youngjin.yung@kimchang.com

LPD Administrator

Susan Burkert
International Bar Association, London
susan.burkert@int-bar.org



IBA 2017 Sydney 8–13 OCTOBER

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

Antitrust Committee sessions

Monday 0930 – 1045

Competition issues in trade agreements: how is it working and where can it go?

Presented by the Antitrust and Trade Law Section, the Antitrust Committee and the International Trade and Customs Law Committee

Even though some recent developments, such as the Trump presidency in the US, have challenged the way trade policies will develop around the world, regional and bilateral trade agreements have been on the rise globally in the past few years, and have included competition almost as a mandatory feature. This panel will explore the different approaches and levels of ambition of competition clauses adopted by recent trade agreements and discuss their effectiveness, trends and practical implications for competition and trade law practitioners.

Monday 1115 – 1230

Non-price considerations in merger review

Presented by the Antitrust Committee

For a long time, price effects have been the focus of merger review procedures in many jurisdictions – newly established and more mature systems alike. The yardstick by which to measure transactions has consistently been whether a transaction will result in customers paying more for the same products. Recent enforcement action seems to suggest a shift in focus: non-price effects are becoming more relevant for purposes of the assessment. Authorities realise that, in a world that is heavily driven by innovation – be it in computer software or raw material exploration services – the effect that consolidation may have on the development of new ideas for products and services may be just as relevant for consumer welfare as the development of prices of such services. This adds a significant dimension to the analysis, challenging merging parties, their advisors and third parties, as well as antitrust enforcers to come up with theories of harm (or justifications for their transactions) that appropriately describe the effects of such deals on competition in a modern world. Is this a trend that we are likely to see more of as the political landscape seems to shift in many places?

Wednesday 1430 – 1730

International online distribution issues part 1

Presented by the Antitrust Committee and the Communications Law Committee

This panel will explore issues arising in online distribution of goods and digital content around the world. The panel will discuss issues such as territorial restraints (export bans and exclusive distribution with a focus on cross-regional issues, eg, a US website not selling to Australian consumers), geoblocking (including the European Commission's e-commerce enquiry and initiatives in this area) and resale price maintenance (minimum advertised prices, platforms and pricing, sales on app stores and recent developments such as the Japan Fair Trade Commission investigation into app stores).

Wednesday 1615 – 1730

Watch out for regulatory bottlenecks in public transactions

Presented by the Securities Law Committee and the Antitrust Committee

Stricter and more unpredictable merger control and other administrative, regulatory and supervisory preconditions make it increasingly difficult to plan and execute the closing of M&A transactions. The session will look at how best to manage such transaction risks.

Thursday 0930 – 1045

International online distribution issues part 2: distribution models and contract drafting

Presented by the International Sales Committee, the Antitrust Committee and the Healthcare and Life Sciences Law Committee

As discussed in the session 'International online distribution issues, part 1', the digital environment presents important antitrust legal issues. Changes are faster than legislators and judges, and e-commerce is having a strong impact on distribution models, consumers' behavior and the overall economy. In this second part we will focus on new forms of distribution and which restrictions and controls are acceptable. We will discuss vertical restraints with our antitrust team and negotiate most-favoured clauses, as well as pricing policies, exclusivity, geoblocking and advising our clients on dos and don'ts.

Thursday 0930 – 1230

Antitrust after cartels: next generation enforcement

Presented by the Antitrust Committee and the Young Lawyers' Committee

Virtually all jurisdictions today are united in their hostility to cartels. Antitrust enforcers have arrived at a consensus that 'hardcore' price and output restraints must be rooted out and attacked with punitive measures. What next? This panel will address emerging approaches to the application of competition law to competitor coordination falling short of cartel activity. What are the rules and how can businesses comply? Topics to be discussed are the scope of prohibitions on 'concerted practices' under EU (and, soon, Australian) law, scope of 'agreement' under US law, contrasting approaches across jurisdictions to the legality of information exchanges and price signalling, and the nature of other 'non-traditional' theories of collusive or cooperative conduct

Thursday 1430 – 1730

Africa – a continent with abundant resources and capability for growth: where lies the road map for the promotion of growth, development and poverty elimination?

Presented by the African Regional Forum, the Anti-Corruption Committee and the Antitrust Committee

Africa has an abundance of resources. This is one of the major factors behind the growth experienced by African economies during the past 15 years. What are the major features of resources laws needed to enable African countries to leverage this endowment for growth, development and elimination of poverty?

Thursday 1430 – 1730

Risks for dominant firms, including exclusivity, rebates and bundling

Presented by the Antitrust Committee

What sort of conduct by firms that may possess market power might make them vulnerable to charges of abuse of dominance? Can they require that customers have exclusive relationships? Can they bundle products? Can they pay rebates? What other conduct might be risky? Our expert panel, including enforcers, will explore what the boundaries are and what might pose risks.

To find out more about the conference venue, sessions and social programme, and to register, visit **www.ibanet.org/Conferences/Sydney2017.aspx**.

Further information on accommodation and excursions during the conference week can also be found at the above address.

INTERNATIONAL REPORTS

Draft bill amending competition law starts its Congressional process

ARGENTINA

Julián Peña

Allende & Brea, Buenos Aires

jp@allendebrea.com.ar

A draft bill proposed by Argentina's ruling party that intends to amend the Argentine competition law has recently started its Congressional process. Previously, the draft bill underwent a public consultation process whereby the Argentine government received comments from various international organisations including, for the first time ever, both the International Bar Association and the American Bar Association.

The main characteristics of the draft bill are:

- **Per se hardcore cartels –** The draft bill establishes that hardcore cartels are to be considered per se unlawful, thus creating an exception to the general rule of reason framework of analysis.
- **Reform of the institutional framework –** The draft bill envisages the creation of the National Competition Authority (ANC), as a decentralised and independent competition agency within the sphere of the Executive branch. The ANC's five members will be a president and four commissioners, all of whom require a technical background and suitability for the role. They should have five-year terms and can only be removed if there is proper justification.
- **Greater sanctions for anti-competitive conducts –** Fines shall be established according to whichever is the higher of the following criteria: (1) up to 30 per cent of turnover related to the affected products multiplied by the number of years that the illegal conduct lasted; (2) up to 30 per cent of national turnover achieved by the economic groups involved in the unlawful conduct during the previous fiscal year; or (3) twice the illicit profit obtained. Recidivism will be subject to a duplication of the fine. The draft bill also eliminates the requirement introduced in 2014 by which the parties had to pay the fines in order to have the right to appeal.
- **Introduction of a leniency programme –** The creation of a leniency programme that would fully exempt from any sanction the first party that applies for leniency and meets certain requirements, plus the reduction of fines of between 20–80 per cent for subsequent applicants that provide useful information to prove a collusion. The draft bill also contemplates the introduction of a 'leniency plus' mechanism, by which a leniency applicant would be entailed to a fine reduction of up to one-third for the first cartel if it provides useful information about a different cartel.
- **Changes in merger control –** The draft bill introduces various changes to the existing merger control system, notably: (1) the implementation of a pre-merger control regime; (2) an update and modification of the notification thresholds, which were established in pesos in the 1999 reform (since then the peso was devaluated more than 15 times vis-à-vis the US dollar) and the methods used for their calculation; and (3) the introduction of a fast-track mechanism for transactions unlikely to affect competition.
- **Damages actions –** The draft bill allows any injured party to bring either standalone or follow-on damages actions as a consequence of infringements to the competition law.
- **Judicial review –** The draft bill provides for the creation of the National Antitrust Court of Appeals, which would act as the competent court in appeals to the ANC's decisions.

Since Congress resumed its activities on 1 March 2017, it is expected that the debate of the draft bill at the appropriate commissions of the Chamber of Deputies should start shortly.

AUSTRALIA

Russell Miller

Minter Ellison
Australasian
Competition Group,
Canberra

russell.miller@
minterellison.com

Price discussions between agents and principals – lessons for principals, agents and consumers

When Flight Centre, Australia's largest travel agent, tried to protect its revenue from the sale of airline tickets for Singapore Airlines, Malaysia Airlines and Emirates, it could not have imagined that it would end up in Australia's highest court defending price-fixing allegations. But that is precisely what happened. And last December the High Court handed down a judgment that will have ramifications well beyond Flight Centre itself.

At issue was whether or not Flight Centre, an agent for each airline, engaged in price-fixing when it attempted to induce the airlines to agree not to discount the price at which they sold tickets direct to the public via the internet. Under Australian competition law, price-fixing occurs when two or more competitors fix, control or maintain the price for goods or services. Flight Centre had tried to have each airline agree to stop directly selling international airline tickets at prices lower than those available to Flight Centre. The essential question was whether or not the agent was in competition with each airline.

How was the conduct to be characterised? Was it an agent discussing pricing practices with its principal – something that happens as a natural incident of the principal-agent relationship? Or was it that Flight Centre and the airlines were competitors such that their interaction amounted to price-fixing? The majority decided that it was the latter.

The majority accepted that where the contractual and fiduciary relationship between principal and agent obliged the agent to act only in the interests of the principal, the agent would lack the autonomy to compete. But, as Kiefel and Gagleler JJ said, the crucial point was that:

> 'To the extent that an agent might be free… to act in the agent's own interests, the mere existence of the agency relationship did not in law preclude the agent from competing with the principal'.

Flight Centre was clearly the agent of the airlines, under a global agency agreement established by the International Air Transport Association on their behalf. Nevertheless, the majority decided that it was in competition with the airlines in the market for international airline tickets. The majority were influenced by two indicia: (1) Flight Centre's authority under the agency agreement 'extended not only to deciding whether or not to sell an airline's tickets but also to setting its own price for those tickets'; and (2) Flight Centre was free to act in its own interests in selling the tickets, and did so.

The fact that Flight Centre had no proprietary rights in the tickets it sold, was required to hold sale proceeds in trust and remit them to the airlines less commission and was subject to a number of other requirements and restrictions, was not sufficient to displace the majority's conclusion.

This is one of the most important competition decisions of the year, with ramifications well beyond the international aviation sector. Why is that so? In this age of alternative distribution opportunities, firms use multiple distribution channels to distribute their products and services. The propensity for firms to sell directly over the internet, as well as through agents, is well-established. Airline bookings are by no means the only example. Hotel room bookings are yet another. Hotels take bookings directly over the internet and phone, while also utilising established internet booking and travel agency sites. Manufacturers sell products through agents, many of whom are franchisees, while also selling direct over the internet both directly and through established online sites. There are countless other examples.

The *Flight Centre* decision, by Australia's highest court, provides guidance on when principals and agents can safely discuss pricing and when they cannot. Where, as is often the case, agents represent a number of suppliers and have pricing discretion, principals who also sell direct will need to be particularly cautious about discussing pricing practices – the price at which each will sell the product or service – with those agents and vice versa. Depending on the circumstances, this may prove to be quite problematic where the agent is remunerated by commission on the sale price.

It will only be safe for principals who sell directly to discuss pricing practices with their agents where the agency relationship is one in which the agent is required to carry out the instructions of the principal and not permitted to independently determine its own pricing conduct. As *Flight Centre* shows, only in those circumstances will agents be safe in discussing pricing practices with their principals.

All firms that distribute their products though agents as well as through direct channels will need to review their trading relationships and conduct in relation to pricing within those relationships in the light of this decision. Their agents will need to do so as well.

Time will tell whether or not the benefit to consumers being protected from collusion under the guise of agency will outweigh the costs to consumers as a result of suppliers eschewing agency as a vertical method of distribution.

Austria's competition law gets an update

AUSTRIA

Gerhard Fussenegger

bpv Hügel Rechtsanwälte GmbH, Vienna / Brussels

gerhard.fussenegger@bpv-huegel.com

Astrid Ablasser-Neuhuber

bpv Hügel Rechtsanwälte GmbH, Vienna / Brussels

astrid.ablasser@bpv-huegel.com

Based on the EU's Directive 2014/104 on Antitrust Damages Actions (the 'Directive'), which entered into force on 26 December 2014, Austria was legally obliged to implement the Directive in its legal system by 27 December 2016. So far, the Austrian legislator has published a draft of the amendment to the Austrian Cartel Act ('draft cartel act') and to the Austrian Competition Act ('draft competition act') (together, 'draft amendment'). This draft was adopted by the government on 28 February 2017 and will now be forwarded to the parliament for vote. The draft amendment is expected to enter into force on 1 May 2017.

The draft amendment primarily intends to implement the Directive, that is, its major aim is to create legal certainty for the enforcement of claims for damages arising from infringements of competition law. However, the amendment is more far-reaching and includes provisions that are not related to the Directive. For example, the draft amendment now includes a new threshold in merger control based on the value of the transaction. Furthermore, the Cartel Supreme Court will also be entitled to decide on substance (at least to a limited extent).

Directive's implementation into Austrian Competition Law

Concerning implementation of the Directive's standards, the amendment comprises, among other things, the aspects discussed below.

In line with the jurisprudence of the EU courts in Luxembourg, undertakings concerned may seek full compensation. This includes compensation not only of the actual loss suffered but also loss of profit plus interest from the time at which the harm was sustained.

Furthermore, contrary to Austria's current general three-year limitation period, the limitation period for private antitrust damages claims has been extended to five years (calculated from the date when the claimant knows or can reasonably be expected to know of the conduct concerned). The limitation period is interrupted if a competition authority takes action for the purpose of the investigation in respect of an infringement of competition law to which the action for damages relates. The absolute limitation period for bringing in actions for damages is now ten years (calculated from the occurrence of damage).

The Directive's rebuttable presumption that cartel infringements cause harm to consumers, which has now been included in the draft amendment, is a substantial divergence from basic Austrian civil law rules, following which the burden of proof rests with the claimant.

The Directive's concept of joint and several liability has been incorporated in the draft amendment. However, there are certain exemptions with regard to micro, small and medium-sized enterprises (SMEs), undertakings with less than five per cent market share or if the joint and several liability irretrievably endangers the existence of the undertaking concerned. Ring-leaders cannot apply for these exemptions.

Update of national competition law besides Directive's legal requirements

In the process of implementing the Directive, the Austrian legislator also decided to update its rules on national competition law matters in regards to procedural law aspects. In particular these changes included the below.

Access on electronically retrievable documents

The Austrian Administrative High Court ('*Verwaltungsgerichtshof*') ruled in 2015 that the Austrian Federal Competition Agency ('*Bundeswettbewerbsbehörde*' - NCA) may also examine electronic documents in dawn raids, as long as they are accessible from the premises that are covered by the search warrant. Following this judgment, for the purposes of the examination, it is therefore irrelevant whether the data is saved on internal hard disks or on external servers. However, as external servers cannot be seized (different to internal hard disks), the draft amendment now enables the Cartel Court to impose a penalty payment on undertakings in order to enable the NCA to get access to electronically retrievable documents. This proposed amendment was heavily discussed in advance. Inter alia, it was criticised that undertakings might be only able to provide the respective passwords or codes, but not the access to an external server as such.

Publication requirements

Currently, decisions of the Cartel Court as court of first instance are only published if the court acknowledges an infringement of competition law, that is, if it decides against the undertakings concerned. In future, cease and desist orders, negative procedural decisions or negative decisions on the merits will have to be published. Furthermore, the NCA will have an extended duty to publish its requests to initiate proceedings. Additionally, the NCA must also publish the Cartel Court's decisions of the on its website. From a practitioner's view, these proposals are to be welcomed.

Supreme Cartel Court to decide on substance (to a limited extent)

According to existing law, the Austrian Cartel Supreme Court as court of second and last instance in competition law matters can only review appeals that are based on questions of law but not on substance. As a consequence, the Cartel Court as court of first instance currently is the only instance that decides on substance. In the past, critics in this regard referred to a structural deficit as far as legal protection was concerned. Following the draft amendment, the Cartel Supreme court is now entitled to also rule on substance if, based on the court's file, there are 'serious concerns' with regard to the decision of the first instance.

Value of transaction as additional merger control threshold

An additional merger control threshold based on the 'equivalent' of the transaction will be introduced. The respective threshold will be €200m (while the first draft referred to €350m). Further criteria must be met in order to trigger this new threshold, for example, the undertakings concerned must achieve a turnover in Austria of more than €15m and the target must be active in Austria to an 'essential amount'.

Furthermore, by increasing the filing fee from €1,500 to €3,500, the filing fee will be more than doubled. However, in comparison to other jurisdictions, for example Germany, the lump sum fee of €3,500 (independent of the size of the transaction and filing) can still be considered moderate.

Most-favoured-nation clauses in e-commerce

BELGIUM

Koen Platteau

Simmons & Simmons, Brussels

koen.platteau@simmons-simmons.com

In a decision of 7 November 2016, the Belgian Competition Authority (BCA) closed its investigation against real estate website operator Immoweb regarding the 'most-favoured nation' (MFN) clauses in its contracts with developers of e-commerce software used by real estate agencies.

In 2015, the BCA opened an investigation against Immoweb for a possible infringement of Articles 101 and/or 102 TFEU and/or the corresponding provisions of the Belgian Competition Act. Immoweb is the operator of the website **www.immoweb.be**, the leading real estate website in Belgium.

At the core of the investigation was a software interface that enables real estate agencies to post their real estate portfolio on real estate websites. In Belgium it is common practice for the operators of real estate websites to pay a fixed sum to software developers for each real estate advertisement placed on their website. This system differs from other jurisdictions, where the software developers are paid by the real estate agencies.

Most of Immoweb's contracts with these software developers contain a MFN clause. On this basis, the software developer undertakes to offer Immoweb the same financial conditions it offers to competitors of Immoweb, whenever these terms are more favourable. The preliminary findings of the BCA pointed to a dominant position of Immoweb on the online real estate market. As a result, the BCA considered Immoweb to be an unavoidable trade partner for the software developers and held that no real estate agency would be prepared to conclude a contract with a software developer that does not feature Immoweb's website in its listing.

The BCA considered that the MFN clauses restricted competition by artificially raising prices for the competitors of Immoweb. The software developers need to include Immoweb in their offering, but they do not have any incentive to grant better terms to competitors of Immoweb, since they would have to pass these conditions on to Immoweb and therefore lower their overall revenues.

When informed of the BCA's preliminary analysis, Immoweb offered to unilaterally put an end to the existing MFN clauses in its contracts, and to refrain from reintroducing said clauses in any future contracts with software developers for a period of five years. Following these commitments, the BCA has decided not to pursue its investigation.

The *Immoweb* investigation can be related to a broader interest by the BCA in the real estate sector. Back in 2010, the BCA established that the recommendations of the BIV – the Belgian institute for real estate agents – regarding certain minimum scales for the fees of real estate agents were in violation of competition law. Earlier this year, the BCA decided to launch an ad hoc investigation into the BIV's current policy regarding real estate agents' fees. In June 2016, the BCA concluded that the real estate sector was still largely characterised by limited differentiation in fees, and that a common rate of three per cent was still used as a reference by the majority of real estate agents. However, the evidence collected in the context of this investigation was not sufficient to establish an anti-competitive practice.

The observed price rigidity may explain the position of the BCA in the *Immoweb* case. The case illustrates a determination to make the real estate market more competitive, especially in the more innovative online segment.

Scope for intervention in a non-notifiable merger case

In a decision of 21 November 2016, the BCA sets out the circumstances in which it is prepared to review concentrations that remain below the EU and Belgian notification thresholds.

On 8 September 2016, AB InBev announced the acquisition of Bosteels, a brewer of specialty beers. As a result of the size of Bosteels (turnover of approximately €32m), the acquisition fell outside the scope of the EU and Belgian merger control regimes.

Alken-Maes, the second-largest Belgian brewer and part of the Heineken group, filed a complaint to the BCA against the planned acquisition. As an interim measure, Alken-Maes requested a suspension of

the acquisition pending the review of the complaint.

The Belgian Competition Act provides the ability to request interim measures in cases where there is a prima facie violation of the provisions of the Competition Act regarding restrictive practices. Alken-Maes invoked the *Continental Can* case law and claimed that the acquisition of Bosteels amounted to an abuse of dominance in violation of Belgian and EU competition law.

Interestingly, the BCA did not rule out its ability to intervene against non-reportable concentrations on the basis of the prohibition of abuse of dominance contained in the Belgian Competition Act. It did rule out, however, the possible application of Article 102 TFEU to such a scenario.

In its decision, the BCA defined its jurisdiction strictly. It stated that it is only prepared to intervene on an interim basis if there are strong indications that the concentration constitutes an abuse of dominance. In that context, the BCA set out a double test: first, there needs to be prima facie evidence of further specific negative consequences for competition than those that would result from the concentration; and second, if such negative consequences are present, they must constitute, prima facie, an abuse that is itself distinct from any effects from the concentration. Should these negative consequences for competition be too closely related to the concentration, the BCA will not intervene.

In this particular case, the BCA held that the double test was not met. It noted that AB InBev had a pre-existing dominant position in the Belgian market, but added that, on the basis of the usual market definitions, its market share would only marginally increase. As a result, the BCA could not establish a prima facie impact distinct from the concentration effect. The BCA applied the same reasoning on the basis of more narrow market definitions. Moreover, it held that other negative consequences alleged by Alken-Maes, such as raising barriers to entry for other competitors or increased buying power, were not demonstrated. On this basis, the BCA rejected the request for interim measures.

The most interesting part in the BCA decision is the recognition by the BCA that, in certain well-defined circumstances, concentrations that fall outside of the scope of the Belgian merger control regime may still be subject to review. This is in line with the 2006 *Rocco* judgment from the Brussels Court of Appeal. The circumstances in which this scenario can occur are, however, very strictly defined. The BCA emphasises in its decision that it is only in very exceptional circumstances that concentrations that do not meet the notification thresholds can be subject to intervention by the BCA.

The standard set by the BCA relates to interim relief, which is, in the context of merger control, a very powerful instrument, in that it may halt, at least for an interim period, a planned concentration. The parties now await a final decision from the BCA. It can, however, be expected that the BCA will apply the same test in that context.

Competition law update

CANADA

Brian A Facey
Blake, Cassels & Graydon, Toronto
brian.facey@blakes.com

Peter Flynn
Blake, Cassels & Graydon, Toronto
peter.flynn@blakes.com

Joe McGrade
Blake, Cassels & Graydon, Toronto
joe.mcgrade@blakes.com

This quarter has seen significant developments in Canadian competition law, including:

- consent agreements in the major acquisitions of Manitoba Telecom Services by BCE Inc and of Rexall Health by McKesson Corporation;
- settlements with various companies for antitrust matters, including Moose Knuckles, Volkswagen and Amazon; and
- the suspension of an abuse of dominance investigation into TMX Group.

Consent agreements

Bell acquisition of Manitoba Telecom Services (MTS) approved, subject to Bureau consent agreement

On 17 February 2017, the Bureau reached an agreement with BCE Inc (Bell) and Xplornet Communications Inc (Xplornet) relating to Bell's acquisition of Manitoba Telecom Services (MTS). Bell announced its intention to acquire MTS in May 2016, in a transaction valued at approximately CA$3.9bn. The agreement comes in the wake of a several-month Bureau investigation including consultation with numerous customers, mobile wireless service providers, community organisations and other market participants.

Bell initially proposed to sell certain MTS subscribers and assignment of stores to TELUS Corporation, and through the consent agreement also agreed to sell subscribers and provide certain support services to Xplornet, a new entrant into the Manitoba wireless market.

Specifically, Bell agreed to divest six retail stores, 24,700 subscribers and 40MHz of spectrum to Xplornet in Manitoba. In addition, Bell agreed to provide Xplornet with transitional and support services including expedited access to Bell's towers in Manitoba for a period of five years, transitional remedy access to a mobile wireless network in a specified territory in Manitoba for a period of three years, support for wireless handset procurement for a period of five years, mobile wireless roaming services pursuant to a mobile wireless roaming service agreement, and discounted access to advertising inventory on Bell Media's Manitoba advertising platforms.

Bell also agreed to allow Bell customers in Manitoba at the time of the consent agreement to switch to Xplornet without being required to repay any early cancellation fee during the term of their contract in force as of the date of the consent agreement.

Bureau reaches consent agreement in McKesson acquisition of Rexall Health

In December 2016, the Bureau reached an agreement with pharmaceutical wholesaler McKesson Corporation (McKesson) related to its acquisition of pharmaceutical retailer Rexall Health (Rexall). Upon conducting its review, the Bureau concluded that the acquisition would result in a substantial lessening or prevention of competition in the wholesale and retail sale of various pharmacy products and services, and expressed concerns that McKesson may be able to negatively influence independent downstream retail pharmacies. The Bureau also expressed concerns that McKesson obtains commercially sensitive information through its ClaimSecure business, which collects detailed data on prescription drug purchases of Rexall and rival pharmacies, and through McKesson's serving of its wholesale customers, many of whom compete with Rexall.

In order to address the Bureau's concerns, McKesson has agreed to sell Rexall pharmacies in 26 markets where there was insufficient wholesale competition to McKesson, to prevent McKesson from dealing with Rexall's rivals under less favourable terms, conditions or services quality, or where Rexall would have a lesser incentive to compete as lost customers would likely switch to rival retailers also supplied by McKesson.

McKesson also agreed to establish firewalls restricting the transmission of such information among McKesson's wholesale business, the ClaimSecure business and the Rexall business. The consent agreement requires that commercially sensitive information for each of the businesses be maintained confidentially and not be transmitted to other businesses, subject to narrow exceptions.

Antitrust settlements

Bureau and Moose Knuckles negotiate CA$750,000 settlement relating to advertising concerns

On 7 December 2016, the Bureau came to an agreement with Moose Knuckles, a Canadian outerwear brand, to settle legal proceedings launched by the Bureau earlier this year regarding concerns over its advertising and labelling of certain parkas that are promoted as 'Made in Canada'.

The Bureau alleged that only the finishing touches to the jackets such as trim, zippers and snaps are done in Canada, while they are mostly manufactured in Vietnam and elsewhere in Asia. The Bureau guidelines for 'Made in Canada' claims typically require products to have at least 51 per cent of the total direct cost of producing or manufacturing the good to occur in Canada, to have the last substantial transformation of the good occur in Canada, and for the 'Made in Canada' representation to be made with qualifying statements, such as 'Made in Canada with imported parts', where necessary.

As a part of the settlement, Moose Knuckles has agreed to donate CA$750,000 over five years to charities in Canada, including those that provide winter jackets to children in need, and will ensure that representations made about parkas in Canada and worldwide abide by the settlement. In addition, Moose Knuckles will add operations at its Canadian factories and implement an internal compliance programme to ensure that misleading advertising issues do not arise in the future.

Volkswagen and Audi agree to CA$2.1bn settlement and CA$15m penalty for emissions claims

On 19 December 2016, Volkswagen reached a settlement with consumers of certain 2.0l diesel vehicles providing for buyback and restitution payments of up to CA$2.1bn, relating to the misleading of consumers with respect to the emissions levels of its diesel cars. Investigations revealed that the vehicles only passed emissions tests due to software that altered the operation of the vehicle to reduce emissions during testing.

The Bureau's investigation found that Volkswagen Canada and Audi Canada misled consumers by promoting vehicles sold or leased in Canada as having clean diesel engines with reduced emissions that were cleaner than an equivalent gasoline engine sold in Canada.

The Competition Bureau participated in the settlement agreement, and reached a consent agreement with Volkswagen Canada and Audi Canada providing for an additional monetary penalty of CA$15m.

Amazon to pay CA$1.1m to settle price advertising case

On 11 January 2017, Amazon.com.ca Inc (Amazon), agreed to pay a CA$1m penalty and CA$100,000 of costs to the Bureau in order to address the Bureau's concern with Amazon's online pricing practices.

The Bureau's investigation relates to pricing practices on **www.amazon.ca**, in which Amazon compares its prices to a regular or 'list price' to indicate savings to consumers. The Bureau, through its investigation, determined that Amazon relied on its suppliers to provide list prices without verifying their accuracy. In addition, the Bureau concluded that the representations made by Amazon as to the list price of certain Blu-ray movies were inaccurate based on the volume and time tests used to establish ordinary market prices.

Amazon cooperated with the Bureau throughout the investigation, and took a number of voluntary steps to alter its price listing protocol, including suppressing the list prices of certain products available on **www.amazon.ca**, mobile applications, in electronic messages and in online advertisements, and adopting internal policies requiring that list prices be set in good faith for all products offered for sale.

Abuse of dominance investigations

Bureau closes investigation into TMX Group abuse of dominance allegations

On 21 November 2016, the Bureau announced that it was closing its investigation of alleged anti-competitive conduct by TMX Group Limited (TMX Group) related to securities market data.

The investigation began in 2015 when Aequitas Innovations Inc (Aequitas) advised the Bureau of alleged anti-competitive behaviour by the TMX Group. Aequitas claimed that it could not develop a

consolidated market data product, called the CMV Connect (CMV), due to certain contractual clauses imposed by TMX Group on investment dealers precluding them from sharing private market data with third parties, such as Aequitas, without consent from TMX Group, which the TMX Group refused to give. The Bureau's review considered whether the contractual clauses contravened the Competition Act, with a focus on abuse of dominance provisions.

During the course of its investigation, the Bureau collected evidence from investment dealers in Canada, and concluded that Aequitas would not have been likely to meaningfully compete with TMX group through CMV, even absent the contractual clauses. The level of interest among investment dealers in the CMV product varied considerably, dealers had a number of concerns with CMV, including concerns with respect to the confidentiality of private market data, and Aequitas had not obtained credible commitments from investment dealers to provide their private market data absent TMX Group's contractual clauses.

The Bureau concluded that the TMX Group's contractual restrictions have not substantially lessened or prevented competition in any relevant market in Canada, and discontinued its investigation.

First gun-jumping decision against foreign-to-foreign deal in China

CHINA

Adrian Emch

Hogan Lovells, Beijing

adrian.emch@hoganlovells.com

In a decision adopted on 16 December 2016 and made public on 4 January 2017, China's Ministry of Commerce (MOFCOM) fined Japanese company Canon for failure to file its acquisition of Toshiba Medical Systems (Toshiba Medical) for merger control clearance under the Anti-Monopoly Law (AML). This decision sends an important message to the business community, demonstrating MOFCOM's willingness to address and enforce against breaches of the AML's merger control rules even more actively and assertively than before.

Transaction structure

In March 2016, Canon agreed to buy 100 per cent of the shares in Toshiba Medical from Toshiba ('Transaction'). In anticipation of the Transaction, Toshiba created three types of equity-related rights in relation to Toshiba Medical: 20 shares with voting rights; one share without voting rights; and 100 warrants, allowing the owner to convert them into ordinary shares. In addition, a special purpose vehicle (SPV) was established by three unidentified natural persons, just days before the Transaction.

The Transaction itself was split into two steps. First, the SPV would acquire the voting shares, while Canon would acquire the non-voting share and the warrants. This first step of the Transaction was completed immediately upon signing of the two sale and purchase agreements between Toshiba with the SPV and with Canon, respectively.

Second, Canon would exercise the warrants (involving payment of a nominal fee of ¥100, amounting to less than US$1) and would convert them into ordinary shares, while Toshiba would buy back and cancel the 20 shares with voting rights from the SPV and the non-voting share from Canon. Only the second step of the Transaction was made subject to antitrust approvals: indeed, Canon filed the Transaction with MOFCOM after completing the first step.

MOFCOM decision

In its decision, MOFCOM held that the two steps were indivisible parts of a single transaction. It pointed out in its ruling that the transfer of all shares and warrants – and the 'entire' payment – had already been made before notification to MOFCOM.

Unfortunately, the MOFCOM decision does not provide additional details as to the regulator's thinking in terms of how it arrived at the decision. For example, it is not clear from the decision that the natural persons setting up the SPV were affiliated with Canon. Similarly, the decision does not provide guidance on whether the mere fact of acquisition of warrants or other share options – rather than their exercise – would be deemed a notifiable transaction under the AML. In that sense, this is a missed opportunity, as MOFCOM has so far only given indications in this regard through informal means.

In contrast, the MOFCOM decision did reveal that the regulator's assessment was that the Transaction did not raise competition issues.

Following its assessment, MOFCOM decided to impose a fine of CNY 300,000 (around US$43,000) on Canon.

Impact

The *Canon/Toshiba Medical Systems* decision is MOFCOM's ninth public failure-to-file decision since its announcement in March 2014 to make public all breaches of merger control rules as of 1 May 2014. What is particularly notable here, however, is that this is the regulator's first failure-to-file decision in relation to a purely foreign-to-foreign transaction (as all companies involved in this case are headquartered in Japan). This demonstrates the regulator's willingness to address perceived breaches of merger control rules assertively, even when the companies involved are headquartered outside China.

Equally importantly, the *Canon/Toshiba Medical Systems* decision sends a strong signal to market participants that resorting to artificial transaction structures in order to avoid or delay antitrust filing obligations may not achieve the intended purpose. The decision comes hard on the heels of two cases in 2015 – *Fujian Electronics and Information Group/Chino-E Communications*, and *Fosun Pharmaceutical Development/Suzhou Erye Pharmaceuticals* – where MOFCOM had sanctioned the splitting up of two share acquisitions into two tranches (each a 35 per cent share acquisition as the first step, followed by another package of shares as the second step).

In short, the *Canon/Toshiba Medical Systems* decision shows that MOFCOM may be taking a more assertive stance against certain perceived forms of 'gun jumping' going forward.

COLOMBIA

Gabriela Mancero
Peña Mancero Abogados, Bogota
gabrielam@pmabogados

The Colombian Competition Agency orders precautionary measures as a result of the *Odebrecht* case

The Superintendence of Industry and Commerce (SIC) has passed Resolution 5216 dated 16 February 2017, a landmark decision whereby the entity has issued an injunction ordering the termination of an infrastructure concession contract involving the Colombian Infrastructure Agency (*Agencia Nacional de Infrastructura* - ANI) and a consortium formed by Odebrecht and other companies (Concesionaria Ruta del Sol SAS).

The measure originated in Odebrecht's international scandal that led to the Colombian Attorney General's decision to prosecute ex-transport Minister Gabriel García Morales for receiving US$6.3m from the construction company in order to be awarded the 'Ruta del Sol' concession contract back in 2010. García Morales accepted charges and is currently imprisoned.

The injunction was based on the violation of Law 155 of 1959 and Article 47 of Decree 2153 of 1992, which prohibit any agreement having as its object:

> '(…) the collusion in bidding processes or those the effect of which is the distribution of contract awardings, distribution of contests or fixing proposals' terms (…).'

In its decision, the SIC first summarised the facts behind the Ruta del Sol bid awarding. For instance, during the bidding process, there were three proposals presented but only the Odebrecht consortium's one was qualified as admissible. The SIC established that, as the person responsible for the bidding process, García Morales had manipulated it in favour of the Odebrecht consortium and had met with Odebrecht's officers to advise them on how to present the only admissible offer. In this sense, their agreement to collude fell within the above-mentioned prohibition of Article 47 because it barred other proponents from competing during the bidding process and unlawfully enabled the Odebrecht consortium to be awarded the corresponding concession contract. Likewise, the SIC indicated that the above anti-competitive conduct became even more serious given the fact that this matter involved public funds thus affecting the community in general and public interest.

The competition agency also determined that a conduct intended to distort competition by means of the payment of bribes or incentives to public servants, with the object of guiding the contractual process to exclude others for benefit of the payer of such bribes, not only has an ostensible effect in competition in the market but also has consequences regarding the development of the activity under the contract.

With the above background, the SIC's injunction ordered the ANI: (1) to immediately terminate the concession contract regarding 'Ruta del Sol'; and (2) to start a new bidding process thus guaranteeing a legal and transparent procedure. To justify its decision to issue such injunction, the SIC explained that the underlying objective was to avoid that a final decision on the restrictive trade practices proceedings may not offer an actual and timely remedy to safeguard free competition. The eventual delay in the administrative procedure that complying with the proceedings envisaged in the competition regulation may entail, may put at risk the protected interest or right. The SIC held that it may not be limited to imposing fines and to give late orders but, as far as possible and adequate, it must make sure that markets function under competitive conditions for the benefit of other business entities acting in the market, of consumers, of economic efficiency and of the state.

Even though the ANI ended up reaching a settlement agreement with Concesionaria Ruta del Sol SAS for the mutual consent termination of the concession contract, the SIC's resolution does send a message to competitors, to public servants and to the community in general that the agency is determined to impose exemplary measures against anti-competitive practices and, in particular, against corruption.

The Act on Private Enforcement of Antitrust damages

CZECH REPUBLIC

Arthur Braun

bpv Braun Partners, Prague

arthur.braun@bpv-bp.com

As in the other EU countries, the term for transposition of the Directive 2014/104/EU on antitrust damages actions ended shortly after Christmas 2016. The Czech Republic almost made it on time, as the government presented the draft of the Act on Damages in the Area of Competition (and two more lines, which will be deleted for the sake of readability) (the 'Act') to the Lower Chamber of Parliament on 13 December 2016. By March 2017, not much progress had been made, despite the content itself not being subject to much political debate so far. We may still assume that it will come into effect some time in 2017.

In the following, the Czech aspects for dealing with private enforcement cases shall be presented, in particular where the Czech draft chose another solution compared to other countries or used the space provided by the Directive.

Effect of decisions by Antitrust Office/ European Commission

An infringement of competition law found by a final decision of the Czech Antitrust Office is deemed to be irrefutably established for the purposes of an action for damages brought before the national courts under Article 101 or Article 102 TFEU or under national competition law (Article 9(1) of the Directive). This quite new concept will now be brought into the Czech Civil Procedure Code, section 135, paragraph 1.

Passing-on defence and quantification of damages

Already – before the Act comes into effect – both direct as well as indirect customers can file for damages in theory. The passing-on defence would, however, have been accepted by Czech courts. Now, the draft Act states this expressly (section 29).

The concept of punitive damages is still foreign to Czech law. Maybe in order to avoid US-style litigation, the draft now expressly states that the awarding of damages must not lead to excessive compensation. If it is not possible or only with inadequate difficulties to quantify the amount of damages, the court may state them on base of equitable assessment of the circumstances. While joint and several liability of the cartel members is the rule, the court may, however, also split the obligation to pay damages between the defendants.

Only direct or indirect suppliers or customers can request damages. Other persons can claim damages only if no redress can be obtained from the direct or indirect suppliers/customers due to insolvency. In our opinion, this means an exclusion of the concept of umbrella damages, which has been applied in several jurisdictions already.

Collective redress actions

Such actions are also still foreign to Czech legal thinking. Class actions are not possible for breaches of competition law, only representative actions, for instance by consumer organisations, would be but they cannot obtain damages (section 2989 Civil Code, section 25 Consumer Protection Act).

Discovery

Information asymmetry between the damages party and the cartelist/abuser is one of the main reasons for the low number of private enforcement cases in the Czech Republic so far. The draft Act introduces a new independent court procedure while keeping – and sometimes exceeding – the requirements of Article 5.6 of the Directive (the Proceedings on access to proof).

Proceedings are opened before the complaint itself is filed, and most elements are known from the civil procedure for obtaining an injunction. A security of CZK 100,000 – about €3,600 – is provided by the plaintiff who also has to claim a probable right to damages with sufficient information on the facts. The plaintiff has to specify the documents expected, at least by their characteristics and a final test of proportionality by the judge must confirm the need to obtain the requested documents and the extent of the presentation as well as the cost related to the defendant.

The judge may then order the defendant to provide the plaintiff with the documents provided and, in case they do not dispose of them anymore, the place where they estimate them to be. In particular for confidential matters, the court may also restrict the persons to have access to these documents or may name an independent person to prepare a 'sanitised version' of the proof.

It is interesting to note the consequences for the breach of such discovery order, which certainly qualifies as a deterrent in the meaning of Article 8 of the Directive: first a penalty of up to one per cent of turnover can be levied repeatedly. Mainly, however, the non-compliance with such an order without substantial reason leads to the fact deemed to be considered as proven.

Correspondingly, a plaintiff who breaches business secrets may be fined CZK 1m and is liable for damages. Proof obtained by such a breach may not be used in Czech civil proceedings.

Procedural aspects and forum

Already some EU-countries are trying to establish themselves as the best forum for damage claims under competition law. So far, the Czech Republic has a minuscule track record for private enforcement of damages for anti-competitive behaviour (only two cases were reported for abuse cases, neither of them in legal force yet). There are many reasons why the Czech Republic will not become the prime forum for such actions. For instance, compared to other

locations, there is still a very long duration of court proceedings, and despite all the improvements of the past few years there is still a lack of trust of the business community into the quality of Czech courts and high court fees (five per cent of the value for each instance).

Local jurisdiction

The draft decided to move away from the originally proposed sole jurisdiction of one court in Brno (conveniently at the seat of the Antitrust Office). The draft Act now does not provide for such special jurisdiction, different for instance from neighbouring – and still in its legal practice closely aligned – Slovakia.

This decision is of course also in accordance with the Directive but will mean that probably only few Czech judges if any will invest any time to get acquainted with this new and difficult topic, leading to a further decrease in the attractiveness of the Czech Republic as a forum for damage claims.

Outlook

As in other countries, it will take years, probably more than a decade, until the rules – in particular relating to the difficult procedural issues of discovery and access to files – are set by Czech courts. For this reason, potential plaintiffs will probably look for jurisdictions abroad for the foreseeable future.

The CJEU has been requested by the Danish Maritime and Commercial Court to provide guidance on how to apply the prohibition against 'gun jumping'*

DENMARK

Erik Kjær-Hansen

Gorrissen Federspiel, Copenhagen

ekh@gorrissenfederspiel.com

In November 2013, two of the Big Four audit and advisory firms in Denmark, KPMG and EY, announced that they would merge their Danish activities. The Danish KPMG firm would terminate its membership agreement with KPMG International and integrate with the existing Danish EY firm. This transaction was subject to Danish merger control.

The Danish KPMG gave notice to terminate its membership with KPMG International at the time of the announcement of the merger so that that the Danish Competition Council's (DCC) review of the merger could take place alongside the notice period.

In May 2014, the DCC approved the merger in Phase II, though subject to remedies. Seven months later, however, the new EY faced a decision from the DCC holding that it had jumped the gun when terminating its membership with KPMG International before obtaining merger approval.

The DCC based its finding of 'gun jumping' on the following elements in particular:

- the Danish KPMG's notice to terminate its membership with KPMG International was a direct consequence of the decision to merge and thereby merger specific;
- the notice to terminate was irreversible; and
- the notice to terminate had potential effects on the market as the future of the Danish KPMG would be uncertain if the merger with EY was not completed.

The new EY brought the infringement decision before the Danish Maritime and Commercial Court, claiming an incorrect application of the prohibition on pre-merger implementation. The Court has now referred questions to the Court of the Justice of the European Union (CJEU), asking for guidance in order to determine whether the DCC applied the correct legal test.

The referral is interesting in more than one aspect.

First, it will be interesting to see whether the CJEU agrees with the criteria adopted by the DCC, since the area relating to gun jumping has very little case law and decisional practice to lean on.

Second, the Danish Court is asking the CJEU to interpret EU law even though the case before the Court is based on the prohibition against 'gun jumping' in section 12c(5) of the Danish Competition Act and not Article 7(1) of the EUMR. Accordingly, this is a reminder that requesting a preliminary ruling may be possible even in cases where EU law forms no direct part.

The Danish Maritime and Commercial Court awards damages in relation to bid-rigging in the Danish construction cartel

In a judgment of 4 November 2016, the Danish Maritime and Commercial Court rendered a decision in an action for damages brought as a result of the Danish construction cartel.

The Municipality of Gentofte claimed damages from the construction company N H Hansen & Søn A/S in relation to two contracts that had been subject to bid-rigging. The claims amounted to approximately €16,000 and €145,000, respectively. The first claim was dismissed due to lack of causation. The second claim was reduced to approximately €33,500 by the court.

In assessing the damages, the court relied on the amount paid by one of the tenderers to the winning tenderer as part of the bid-rigging. The Court reasoned that there was a presumption that this amount had led to a corresponding increase in the price offered by the winning tenderer N H Hansen & Søn A/S to the municipality. The Court did not, however, award any further damages.

Withdrawal of the merger between the Danish publishing house JP/Politiken and the business newspaper Dagbladet Børsen

On 24 January 2017, JP/Politikens Hus A/S called of its planned acquisition of Dagbladet Børsen, after the Danish Competition and Consumer Authority (DCCA) had expressed concerns that the merger would reduce competition for online and print newspapers and advertising.

Instead, JP/Politikens Hus A/S will now purchase a non-controlling 49.9 per cent stake in the Dagbladet Børsen.

The DCCA stated that the review of the proposed merger involved some of the most comprehensive investigations and calculations ever in a Danish merger case. The review especially focused on determining the relevant markets and on the role of companies like Facebook and Google. While newspapers compete with other online media in making revenue through advertising, it appears uncertain whether newspapers should be considered part of the same market as companies like Google and Facebook, which do not produce news articles themselves.

JP/Politiken is the largest privately owned media company in Denmark, publishing three national newspapers and multiple local newspapers. Børsen publishes the daily business newspaper *Dagbladet Børsen* and other publications. The DCCA was of the opinion that the planned merger would possibly have led to a strengthening of JP/Politiken's market position, enabling them to increase prices and reduce supply to the detriment of newspaper subscribers and advertisers.

The merging companies proposed remedies to accommodate to the DCCA's concerns. However, the companies withdrew the notification to merge when it became clear that a solution was unlikely to be agreed upon.

The new Danish Act on actions for damages for infringements of competition law has entered into force

On 27 December 2016, a new Act for damages for infringements of competition law entered into force, implementing EU Directive 2014/104/EU (the Damages Directive).

The object of the Act is to encourage effective competition by ensuring that the prohibitions against anti-competitive agreements and abuse of dominant position under both national and EU law work effectively in practice. The Act will improve the possibilities for consumers, undertakings and public authorities to claim damages before the courts for anti-competitive conduct.

The Act contains both substantive and procedural rules governing actions or damages for infringements of the competition law provisions.

The substantive rules concern the scope of application of the Act, the right to full compensation, joint and several liability, passing on overcharges on any level of the supply chain, presumptions that cartel

infringements cause losses, the effects of consensual settlements on subsequent actions for damages and limitation periods.

The procedural rules include definitions and rules governing disclosure of evidence, including disclosure of evidence in the file of a competition authority, the significance of the competition authorities' and the courts' final decisions in respect of making up the harm suffered, postponement of the action for damages for up to two years due to consensual dispute resolution in respect of the claim and the possibility of bringing class actions for damages.

In accordance with the underlying Damages Directive, the new Act implies several material changes, including:

- a presumption that cartel infringements cause harm;
- changes in the limitation period;
- improvement of the possibility for indirect purchasers to prove that an overcharge by the infringer has been passed on by the direct purchaser leading to a loss suffered by the indirect purchaser;
- changes in burden of proof;
- special rules in respect to reduced joint and several liability for small and medium-sized enterprises and immunity recipients; and
- special rules governing the effects of settlements in relation to later action for damages.

As a consequence of the new act entering into force, we may see an increase in the number of actions for damages brought as a result of infringements of competition law.

Note

* Gorrissen Federspiel represented parties in some of the cases mentioned above.

Record €70m fine for predatory pricing upheld

FINLAND

Mikael Wahlbeck
Hannes Snellman Attorneys at Law Ltd, Helsinki
mikael.wahlbeck@hannessnellman.com

Sebastian Wiik
Hannes Snellman Attorneys at Law Ltd, Helsinki
sebastian.wiik@hannessnellman.com

On 29 December 2016, the Finnish Supreme Administrative Court (SAC) upheld the Market Court's decision of 26 June 2014 imposing a €70m penalty payment on dairy company Valio. This is the highest individual fine ever imposed in a Finnish competition case.

According to the SAC, Valio had abused its dominant position in the wholesale market for basic drinking milk between 1 March 2010 and 20 December 2012. The SAC agreed with the Market Court that Valio was dominant and that it had priced basic drinking milk below average variable costs, which was found to constitute prohibited predatory pricing under Finnish and EU competition law.

The Finnish Competition and Consumer Authority (FCCA) opened proceedings following a complaint by Valio's competitor, Nordic dairy company Arla. According to evidence presented by the FCCA, Valio had decided to aggressively lower its prices to win back market shares after it had lost certain important retail customers to Arla. The FCCA alleged that Valio's intention had been to raise prices once Arla had been forced to exit the market. Valio, on the other hand, argued that the FCCA was misinterpreting normal business jargon.

A main argument by Valio throughout the proceedings was that both the FCCA and the Market Court had applied an incorrect legal test for abuse of dominance. Valio based its argument on the peculiarities of the dairy industry. Relevant to the case was the fact that raw milk can be processed into a wide range of products – one of which is basic drinking milk – with different levels of profitability.

Valio claimed that when a court applies the abuse test, it should look at the use of raw milk on a company-wide basis, rather than at a relevant market basis. According to Valio, if the revenue of basic drinking milk was higher than the revenue of the product with the lowest value, industrial butter, Valio's behaviour could not be abusive. The SAC, however, held that on the basis of EU case law, the correct point of reference was the relevant market for basic drinking milk.

Valio furthermore claimed that the FCCA

had infringed the company's rights of defence during the investigation. The claims were based on the outcome of a separate action related to access to file, which eventually led to a partial win for Valio in the SAC.

Valio invoked EU case law according to which the European Commission had infringed a defendant's rights of defence when the defendant was not granted access to file until the decision at hand had been appealed. The SAC held that this case law was not directly applicable, as the role of the FCCA is different from the role of the Commission, and as Finnish courts have broad powers of review. The SAC reasoned that an error made in access to file can be remedied in Market Court proceedings, which is the first instance that can impose fines. Furthermore, the Market Court is not restricted to reviewing errors in law, but is empowered to review evidence as well. The SAC also held that Valio's request for access to file, which was originally denied by the FCCA, was not central to Valio's defence.

Even though the SAC decision is final in regards to the fine payable by Valio, the case is likely to continue in the form of private enforcement proceedings. According to public sources, Arla and certain other dairy companies have lodged actions for damages at the Helsinki District Court.

FRANCE

Michel Ponsard
UGGC Avocats, Paris
m.ponsard@uggc.com

Nizar Lajnef
UGGC Avocats, Paris
n.lajnef@uggc.com

The Paris Court of Appeal annuls a €50m financial penalty imposed by the Competition Authority after rescinding the investigation report

In 2013 (decision 13-D-12), the French competition Authority issued a decision whereby it fined four distributors of commodity chemicals (used in solvents, alcohols, acids, ethers, bleach, soda, etc) a total amount of €79m for customers allocation and prices coordination. Together, the companies involved represented more than 80 per cent of the commodity chemicals distribution market in France. The cartel had been first reported to the Authority by the company Solvadis, followed by Brentag and Univar, under the leniency procedure.

On 2 February 2017 (decision 2013/13058), the court of appeal of Paris annulled the part of this decision that involved the companies of the group Brenntag, and revoked the penalty of nearly €50m (the highest in this case), on the basis of a violation of its rights of defence.

In the leniency file provided to the Competition Authority by the person acting on behalf of the company Brenntag, this person accused the company's attorney of being personally involved in the anti-competitive practices, and reported several breaches of ethics (without providing evidence) later confirmed to be false. These documents and minutes were included in the investigation report that was later disclosed to the other parties and to the 'collège' of the Authority (internal body in charge of deciding the cases).

The investigation report, the statement of objections and the decision of the competition Authority all mentioned the documents that included these statements.

In front of the Court of Appeal, the Competition Authority argued that: (1) the documents submitted by the leniency applicant are under their sole responsibility and neither the 'rapporteur' (case handler) nor the collège are empowered to exclude documents, which do not infringe any protected secrets; (2) case handlers are bound by an impartiality and objectivity obligation, which prohibits

censorship; and (3) rights of defence were not breached since Brenntag later decided to keep the same lawyer.

The Court of Appeal reminded that the guarantee of the rights of defense required that an attorney exercises independently and without pressure. The case handler should have either hidden the parts that personally involved Brenntag's attorney in the documents disclosed to the parties and the collège, or distanced him or herself from the charges by specifying that there was no evidence. The correspondence between the attorney and their client should also have been concealed.

The fact that the slanderous and/or insulting nature of the documents are not covered by trade secrets, which the General Rapporteur (general case handler) is empowered to protect by removing the documents from the file, does not prevent the case handler from concealing parts of the documents. Allowing a suspicion that these companies were defended by a guilty attorney necessarily discredited the defence of the Brenntag group, which invalidates the procedure.

The court decided to rescind the report, as well as the decision on which it was based and therefore the penalties imposed to the Brenntag group.

On the merits of this case, the court considered that the infringement of rights of defence was not irrecoverable, thereby reopening the debate at the stage of the notification of the statement of objections to the companies of the group Brenntag.

Standalone actions possible for anti-competitive behaviour in Hong Kong?

HONG KONG

Henry Wheare
Hogan Lovells, Hong Kong
henry.wheare@hoganlovells.com

Stephanie Tsui
Hogan Lovells, Hong Kong
stephanie.tsui@hoganlovells.com

PJ Kaur
Hogan Lovells, Hong Kong
pj.kaur@hoganlovells.com

Speaking at a conference in 2016, the President of the Hong Kong Competition Tribunal, Mr Justice Godfrey Lam, examined whether parties might seek remedies for anti-competitive acts in Hong Kong based on common law economic torts without relying on follow-on actions under the Competition Ordinance.

A follow-on action is a private action for damages resulting from a contravention of a conduct rule under the Competition Ordinance, which requires a prior determination by the Tribunal (or on appeal), or an admission in a commitment accepted by the Hong Kong Competition Commission (HKCC).

The question raised was whether it might be possible to seek redress for anti-competitive acts where the cause of action is not based on contravention of a conduct rule. We will look at a few such potential alternative avenues below.

Breach of the Companies Ordinance and the *Loyal Profit* case

In February 2016, a travel agency, Loyal Profit International Development, sought injunctions against directives issued by the Travel Industry Council (TIC), one of which required travel agencies to bring mainland Chinese tourists only to shops that registered under a Refund Protection Scheme. Loyal Profit's Counsel argued at the pre-trial hearing in June 2016 that having a list of registered shops to be frequented by tourists was 'outright anti-competitive'.

The TIC's articles of association state that it would:

- 'discourage unfair competition without however interfering in any way with initiative and enterprise based on fair trading'; and
- 'promote friendly relations with others in the travel industry and to provide means for

negotiations and liaison with other bodies concerned with the development of travel both in Hong Kong and abroad.'

Without first complaining to the HKCC, Loyal Profit brought the case directly in the High Court based on contravention of the Companies Ordinance, pursuant to which a company's exercise of powers is limited by its articles.

As the cause of action is not a contravention of a conduct rule under the Competition Ordinance, it does not appear to fall under its provisions. The hearing in the case took place in February 2017.

Economic torts

Historically in common law, anti-competitive behaviour has been challenged under the unlawful restraint of trade doctrine embodied in such 'economic torts' as inducing breach of contract and interference with business by unlawful means. However, there is a higher burden of proof in such cases requiring, in addition to the interference, an intention to cause economic injury.

In the ongoing global air cargo cartel litigation, the English Court of Appeal recently considered the application of such economic tort claims to a cartel, where some of the alleged cartel behaviour concerned commerce outside the EU and so was beyond the scope of EU competition law (see *Air Canada v Emerald* (2015)). In that case, the Court focused in particular on the requirement that the defendant must have an intention to injure the claimants. The Court referred to the judgment of the *House of Lords in OBG v Allen* (2007), which held that actual intention to harm the claimant must be a cause of the defendant's conduct as distinguished from a mere likelihood or knowledge that a course of conduct would probably harm the claimant. The English Court of Appeal in *Newson Holding v IMI Plc* (2013), a cartel damages case, also considered that the intention of the cartelists 'to make a profit at the expense of a class of persons to whom the wrongful acts were targeted', regardless of whether they were direct or indirect customers, was not sufficient intention to satisfy the requirement of intent. Applying these principles, the Court of Appeal in *Air Cargo* determined that in a cartel case, where a wrong-doer would not know who would ultimately suffer the harm, the necessary intention would not be made out.

These decisions, although limiting the ability of claimants to bring cartel damages claims based on economic tort, are under English law. Such economic tort claims remain to be tested in Hong Kong courts, where the enforcement regime is substantially different, and will no doubt continue to be tested.

Restraint of trade – contractual provisions

Clauses in employment and business contracts that restrict competition are only enforceable in common law and as a matter of public policy if they do no more than is reasonably necessary to protect the employer's legitimate interests.

There is a vast body of case law striking down contractual provisions in restraint of trade and such actions are commonplace.

Breach of other legislation

Apart from the Competition Ordinance, and as noted in the *Loyal Profit* case, anti-competitive behaviour can be addressed in other ways and under other legislation.

For example, under the Securities and Futures Ordinance, the Securities and Futures Commission has jurisdiction to bring proceedings in the Market Misconduct Tribunal and the Court for insider dealing, price rigging and price manipulation – all of which are similar in concept to the provisions in the Competition Ordinance. In 2012, a day after a bank agreed to settle with US, British and Swiss regulators for the alleged manipulation of Libor, the Hong Kong Monetary Authority launched an investigation into the bank for allegedly rigging the Hong Kong's benchmark interest rate. The Monetary Authority concluded that the bank's traders tried to rig Hong Kong's benchmark interest rate for a period of time and ordered the bank to take disciplinary action against responsible employees.

In July 2015, a former proprietor of a Hong Kong engineering company was charged by the Independent Commission Against Corruption for conspiracy to offer about HKD45m in bribes to secure consultancy and renovation contracts of two residential estates. This was found to be contrary to provisions of the Prevention of Bribery Ordinance and the Crimes Ordinance. The initiation of these proceedings occurred in parallel to

the HKCC's market study of anti-competitive conduct in the building maintenance industry.

The above two examples are classic cases of price fixing and bid-rigging that fall squarely within the areas of conduct prohibited by the Competition Ordinance. It remains to be seen whether the HKCC will interfere (or indeed has jurisdiction to interfere) in cases initiated by regulators or private litigants bearing competition elements, where the Competition Ordinance is not relied on.

Conclusions

The structure of the Competition Ordinance has been criticised as limiting the ability of affected parties to prevent activity clearly intended to be sanctioned. The limited jurisdiction and resources of the HKCC and the Competition Tribunal, as well as express limits on the right to bring private follow-on actions, is likely to encourage litigants (and judges) to explore alternative avenues.

Treatment of joint ventures under Indian competition law

INDIA

Avaantika Kakkar
Khaitan & Co, Mumbai
avaantika.kakkar@khaitanco.com

Kirthi Srinivas
Khaitan & Co, Mumbai
kirthi.srinivas@khaitanco.com

Jayati Handa
Khaitan & Co, Mumbai
jayati.handa@khaitanco.com

A joint venture (JV) is a business model whereby participating firms agree by contract or otherwise to combine, other than by amalgamation, significant productive assets, either tangible or intangible, sometimes for a stipulated period of time. A JV could be formed by incorporation or by contract. The Competition Act, 2002 (as amended) (the 'Act') does not define or explain the term.

The efficiency exception for JVs under the Act

A JV is an arrangement that would come under the scanner of the Competition Commission of India ('the Commission') where the agreement or arrangement is entered into by the firms who are competitors under section 3(3) of the Act (Prohibition of Anti-Competitive Agreements). There could be anti-competitive side effects of JVs that result from collaboration among competitors (real or potential) such as collusion regarding prices, manufacturing, distribution, supply or other restraints that the participating entities (ie, shareholders in the JV) may agree to. Equally, it is well accepted that there are usually intended efficiencies that flow from such arrangements such as economies of scale, dispersal of risks, decrease in costs of research and development (R&D) and formation of a common pool of resources that would increase overall efficiency of the business.

As such, horizontal arrangements between competitors under the Act, are subject to the presumption that they cause an appreciable adverse effect on competition in India. This presumption is read to be understood as the per se rule against horizontal arrangements under Indian competition law.

However, the Act envisages an exception to this presumption for JVs that increase economic efficiencies.

By extension of the principle, the exception available to JVs incorporates a 'rule of reason' approach. While agreements between competitors may be per se violations of the Act, an agreement by way of JV would not be considered to be a violation unless it causes or is likely to cause an appreciable adverse effect (AAEC) on competition in India. It is incumbent on the party making the allegation to show that the JV has caused or is likely to cause an AAEC.

As far as proving that the JV enhances efficiency, much would depend on the presentation of facts supplemented with economic evidence, by the parties showing that the JV leads to accrual of benefits to the customer and/or improvements in production or distribution of goods or provision of services and/or promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

In spite of the requirement that the JV must be one that results in efficiencies, the approach of the Commission thus far appears to be limited to the question of intended

efficiencies as opposed to a full appreciation of the actual efficiencies that the JV may have resulted in.

The approach of the Commission is best evidenced in the case of *Association of Third Party Administrators (Informant) v General Insurers (Public Sector) Association of India and Others (Opposite Parties)* (Case No 107 of 2013) where the Commission observed that Health Insurance TPA India Limited (a JV) formed by the opposite parties increased efficiency in the market for health insurance services by increasing and ensuring speedy cashless hospitalisation for the policy-holders, cost-efficient services to the insurance companies and timely reimbursements for the healthcare providers. In fact the Commission extensively analysed the public healthcare market in India and the role of insurers and Third Party Administrators (TPAs). The Commission noted that the role of TPAs in the market was to function as an intermediary between the insurance companies, that is, the insurer and the policy-holder (ie, the insured). TPAs facilitate the cashless hospitalisation and facilitate settlement of claims in consideration for a fixed percentage of the insurance premium as commission. TPAs thus provide hassle-free services to the insured and cost-efficient services to the insurer by managing the claims settlement process. The Commission also noted that appointing a TPA is only optional and not mandatory as per the relevant insurance laws in India. The TPA was not bound to serve one insurer. In other words, a TPA could serve multiple insurance companies. In the past (prior to deciding the matter), the services provided by TPA were found to be unsatisfactory and lacked capabilities in terms of robust technology and systems required to deliver the services which were expected from the TPA. This was one of the reasons attributed for the collection of public sector general insurance companies having a higher claim ratio of 120 per cent as opposed to 80 per cent being the claim ratio of private companies. It was also seen by the Commission that fraudulent claims had increased due to inefficient TPAs that was ultimately found to affect the insurance companies and the consumer at large. The decision to form a common TPA was found to be a commercial decision to improve the level of service and also to curb the leakages in the form of inefficient claim handling that resulted in higher claim ratio for these companies. Therefore, the Commission ruled that by virtue of this efficiency enhancing objective of the JV there was no contravention of Section 3 of the Act. The Commission also reasoned that the setting up of the JV did not result in any foreclosure of the market, nor did it cause an AAEC.

JVs and merger regulation (the principal of attributability)

While JVs are not defined under the Act or the Commission's regulations, it is generally acknowledged that the Act itself and the Competition Commission of India (Procedure in regard to transaction of business relating to combination) Regulations, 2011 (as amended) ('the Combination Regulations') treat brownfield JVs as notifiable combinations, where the jurisdictional thresholds under section 5 of the Act are met. The principle of attributability applies in these cases.

'Brownfield JVs' are JVs where one or more of the shareholders of the JV is contributing assets into the JV company.

In the Order of the Commission with regard to a notice jointly filed for merger by Andhra Pradesh Gas Distribution Corporation Limited, GDF Suez Energy International Global Developments BV, Shell Gas BV and GAIL (India) Limited (collectively, the 'Parties') (C-2015/10/333), the Parties envisaged setting up of the project comprising of two JVs. The Commission in its order observed that, while the Parties had submitted in their notice that both the JVs were greenfield in nature, however, as Shell was transferring an asset as part of the transaction to one of the JVs, the asset/turnover of the Shell group was taken into consideration applying the principal of attributability under Regulation 5(9) of the Combination Regulations. Therefore, the principle of attributability required that the value of assets/turnover of each of the parents contributing business/assets to the joint venture be considered 'targets' for the purposes of applying the thresholds under the Act, as opposed to the value of asset and turnover of the actual asset/business (ie, true targets) being transferred to the joint venture entity. While this was the position until recently, the Ministry of Corporate Affairs, Government of India (MCA) notified significant amendments on 27 March 2017 (Notification) to the small target exemption (also known as the STE or *de minimis* exemption), expanding its scope

to include mergers and amalgamations and clarifying that only the 'true target' in case of asset acquisitions will now be considered for the purposes of determining the applicability of the asset and turnover thresholds under the Act.

In light of the Notification, the approach of attributing the value of assets/turnover of each of the parents to the proposed JV is no longer necessary. Stated differently, brownfield joint ventures need only be notified when the 'true target' meets the relevant thresholds under the Act.

Proposed amendment of Indonesia's competition law

INDONESIA

Dyah Paramita

Dewi Negara Fachri & Partners (in association with Hogan Lovells), Jakarta

dyah.paramita@dnfp.com

In Q4 2016, DPR[1] released the latest working draft of the proposed amendment to the Indonesia's competition law.[2] Since its promulgation in 1999, Indonesia's competition law has been formulated in a unique way compared to the competition laws in other jurisdictions. Infringements and various provisions are regulated separately and specifically to avoid wide interpretations and to ensure effective enforcement in accordance with Indonesian legal system, which is also reflected in the proposed amendment.

Currently the Legislative Board of DPR is in the midst of harmonising the draft amendment with reference to other applicable and relevant legal instruments. According to the released draft, some of the key points of the proposed amendment are discussed below.

Organisational structure of the competition authority

Currently, the KPPU[3] is an auxiliary organ reporting to the President, but it stays as an independent institution.

The proposed amendment will change KPPU structurally as a governmental institution reporting to the President, which might in some ways translate to the transformation of its independence. Nevertheless, this change will transform the status of its employees to be state apparatus as well as giving them a clearer career path and resolve the high employee turnover problem in KPPU.

The extended authorities of KPPU

KPPU does not have the authority to conduct dawn raids, search or foreclosure. It aspires to be equipped with these authorities to function optimally in deterring anti-competitive conducts and enforcing the law. However, the legal framework for these authorities under the Indonesian laws is limited to detectives (*penyidik*) as provided under the Criminal Procedural Code. Whether these authorities should be vested upon the KPPU is one of the reasons the draft amendment has been challenged and opposed.

Extraterritorial reach of the law

The current merger control regime of Indonesia applies this principle. The draft amendment will adopt the extraterritorial reach of the law as a general principle of law enforcement.

Merger control regime switch

The post-notification merger control currently in force will be replaced with a pre-notification (approval) merger control. Under the draft amendment, it is possible for KPPU to block potentially anti-competitive mergers or acquisitions in advance, since the businesses shall obtain KPPU approval prior to the transaction.

This will provide legal certainty that a transaction will not be wound up after its financial closing, something that could happen under the current regime. On the other hand, it will add another layer of bureaucracy. The current government's move in cutting off bureaucracy to enhance the ease of doing business in Indonesia may be at stake, but the KPPU has shown a fairly timely performance throughout the years, which might be taken into consideration.

No more standalone private enforcement

The proposed amendment took out the provision whereby a party can file a report with a request of compensation that is currently available under the KPPU Regulation No 1 of 2010.

Although the current regime allows private enforcement (standalone action, through filing reports with requests of compensation to KPPU, and follow on action, through generic civil claims) competition law enforcement in Indonesia is still heavy on public enforcement by the competition authority.

Adopted leniency procedure

Leniency procedure is included in the proposed amendment, but in a very general manner. There is no clarity as to at what point this would be available and how the 'pardoning' is to be made.

Prepayment requirement for appeal

Currently an appeal to a KPPU decision has to be made within 14 days to the District Court and no part of the fine has to be paid for filing the appeal.

The proposed amendment might change the timeframe[4] and the forum of appeal,[5] as well as adding a requirement for a prepayment of ten per cent of the fine for filing the appeal.

Calculation of fines

The administrative fine imposable by the KPPU under the current regime ranges from IDR 1bn (approximately US$75,000) to IDR 25bn (approximately US$1.875m). The proposed amendment will change the fine calculation method by using the company's turnover within the period of infringements, ranging from five per cent to 30 per cent.

This has also become a topic of debate. If only the competition authority's performance indicator is independent from the number of cases it closes and the amount of fines imposed and paid to the state's treasury, the proposed change of fine calculation method resulting in higher sanction could actually be an effective tool for deterrence.

Counting the days

In one instance Syarkawi Rauf, the Chairman of KPPU, stated to the media that the amendment should be passed by mid-2017 (in June or July). Whilst in another instance, a representative of the Legislative Board of the DPR – Rufinus Hutauruk – stated that too many revisions are still needed and the amendment might as well be dropped for efficiency purposes.

The draft amendment has been in circulation since 2013, and it has been discussed and criticised. It has now reached the top of the list in the National Legislation Programme of the DPR and is being scrutinised by the Legislative Board of the DPR. The recently circulated draft may not be the final amendment, but it is only a matter of time before the law is finally amended.

Notes

1 The Indonesia House of Representatives (Parliament), Dewan Perwakilan Rakyat.
2 Law No 5 of 1999 on Prohibition of Monopolistic and Unfair Business Practices.
3 Indonesia's competition authority, Business Competition Supervisory Commission, Komisi Pengawas Persaingan Usaha.
4 Although there is duality in the circulated draft whereby one article stated 14 days and another stated 30 days.
5 Whether it should be addressed to the District Court or Commercial Court.

IRELAND

Philip Andrews
McCann FitzGerald, Dublin
philip.andrews@mccannfitzgerald.com

Ronan Dunne
McCann FitzGerald, Dublin
ronan.dunne@mccannfitzgerald.com

Updates from Ireland

Irish Competition Authority censures landlord association for coordinating activities

On 20 January 2017 the Competition and Consumer Protection Commission (CCPC) announced that it had concluded its investigation into the Irish Property Owners Association (IPOA), Ireland's residential landlord representative body. The IPOA had announced that its members were considering introducing new charges to their tenants in response to proposed rent control measures. The CCPC considered that this may constitute 'collective withdrawal of services

and the adoption of charging structures' by competing undertakings (ie, residential landlords) in breach of competition law. The IPOA agreed to enter into an Agreement and Undertakings (A&U) with the CCPC to retract its statements.

The IPOA's press release

On 16 December 2016, the IPOA issued a press release in reaction to the introduction of legislation that sought to cap rent increases in so-called pressure zones at four per cent per year. The IPOA, which has approximately 5,000 members in Ireland, stated that 'hard-pressed landlords are the victims of the newest onslaught on the sector' and that the 'measures being introduced are so severe that rents will not cover costs and devaluation of property will be significant.'

The statement went on to say that, in order to offset the damaging effects of the legislation, IPOA members were 'seriously considering' several actions including: (1) withdrawing from state-sponsored rental schemes; (2) introducing new fees for keys, documents and car parking; (3) introducing additional service, letting and registration charges; and (4) seeking contributions for local property tax.

Calls for the CCPC to investigate such an action were immediate and the IPOA opened an investigation into 'potential anti-competitive conduct'.

The CCPC's investigation and conclusion

The CCPC was concerned that the IPOA's actions could constitute an anti-competitive decision of an association of undertakings, in breach of section 4 of the Competition Act 2002 (as amended) and Article 101 of the Treaty on the Functioning of the European Union. The CCPC also stated that private residential landlords are undertakings, likely the correct position. The CCPC noted that competition law 'expressly forbids a trade association from co-ordinating the business conduct of its members, including the terms and conditions under which they are prepared to supply a product or service'.

On 19 January 2017, the IPOA agreed to enter into an A&U with the CCPC, under which the IPOA gave binding commitments:

- to retract the press statement and to make no further reference to the contents of the press statement, whether publicly or to members of the IPOA;
- to inform, in writing, IPOA members that the IPOA has retracted the press release and to remind members in writing of the IPOA that the setting of rents and charges in the private rental sector are matters for individual landlords and their tenants;
- to introduce a competition law compliance training programme to members of the IPOA Committee by the end of June 2017 and report same to the CCPC; and
- not to issue recommendations or suggestions to, or otherwise seek to influence decisions of, members of the IPOA or other landlords in the private rental sector with respect to the setting of rents and charges and/or withdrawal from State-sponsored rental schemes and/or any recommendations that have similar effect.

Decision to accept agreement and undertakings

Under Irish competition law, an agreement between the CCPC and a trade association can be made an order of the High Court under section 14B of the Competition Act 2002, as amended. Failure by the parties to comply with such a court order would constitute contempt of court and could lead to sanctions such as fines, and even imprisonment.

It appears that the CCPC decided not to make this latest A&U an order of court. Some have argued that this is somewhat surprising in circumstances where the CCPC has previously had cause to censure the IPOA. In December 2011, the IPOA released a statement stating that private landlords would pass on the newly introduced household charge to their tenants. In that instance, the IPOA was prompted by the CCPC to withdraw its recommendation and clarify that pricing decisions are for private landlords to make themselves, after the CCPC had raised the possibility that there may have been a breach of competition law. The decision not to apply to make the A&U an order of court means that if the IPOA breaches the terms of the A&U in the future, it will be harder for the CCPC to convince a court to impose sanctions on the IPOA. Any fines, for example, would require a full criminal trial to be brought for breach of competition law.

Commenting on the A&U, CCPC chairperson Isolde Goggin expressed satisfaction with the outcome: 'the commitments provided by the IPOA allow for a swift conclusion of our investigation and

importantly, ensure the IPOA's commitment to fostering a culture of competition law compliance within its organisation and membership.' Attempts to coordinate business conduct in this manner, she added, are taken 'very seriously as invariably consumers will suffer'. She also stated that '[w]hile trade associations have the right to represent the interests of their members, it is important that they not only take an active role in ensuring their own compliance with competition legislation, but they must not allow or facilitate commercially sensitive discussions between their members.'

CCPC opens public consultation on future of Ireland's mortgage market

On 20 February 2017 the CCPC published a public consultation on mortgage lending in the Irish market. It has invited submissions from interested parties by 20 March 2017.

Ministerial request

The CCPC consultation was initiated by ministerial request, a first for Ireland's combined competition and consumer protection watchdog, pursuant to powers introduced in 2014.

In accordance with the government's 'Programme for a Partnership Government', the Irish Minister for Finance, Michael Noonan, wrote to the Minister at the Department for Jobs, Enterprise and Innovation, Mary Mitchell-O'Connor (the 'Minister'), requesting that the CCPC set out options in respect of mortgage lending in Ireland (in furtherance of the programme for government). This is the first consultation of its kind mandated under section 10(4) of the Competition and Consumer Protection Act 2014, which provides that the Minister may request the CCPC to carry out an analysis and to issue a report on any issue relating to consumer protection and welfare, or any practice affecting the supply and distribution of goods or the provision of services, or any other matter relating to competition.

Ongoing examination of the Irish mortgage market

The consultation takes place against the backdrop of the CCPC's ongoing examination of the market structure, legislation and regulation of the mortgage market in Ireland and will outline options on how Ireland can develop a better-functioning, more competitive mortgage market (rates in Ireland are twice the European average). Since formally commencing the study in December 2016, the CCPC is understood to have undertaken interviews and discussions with a wide range of stakeholders such as existing mortgage providers, lenders in external markets and potential new entrants into the Irish market. The CCPC has also conducted focus groups with consumers, consulted with researchers and academics and met with consumer representatives.

The objective of the consultation is to identify any barriers to entry and effective competition and to assist the CCPC in providing a recommendation of options for the government to implement, including legislative or regulatory changes, in order to enhance competition for the benefit of Irish mortgage customers.

Establishing a competitive market which serves the needs of consumers

Remarking on the consultation, Isolde Goggins said:

> 'We know that the Irish mortgage market has undergone a period of crisis and that currently it is highly concentrated. This impacts on consumers, both in terms of the options available to them when taking out a mortgage and those considering switching. It also has an impact on the likelihood of new firms entering the market and providing choice, product innovation and competition. We believe that now is a good time to look forward and propose a series of options for Government to put in place a mortgage market, which is competitive, open to entry and serves the needs of consumers.'

A final report by the CCPC is expected in May 2017.

RPM minimum shall be deemed a restrictive arrangement unless it is competitively justified

ISRAEL

D Ziv Abramovich
Lapidot, Melchior, Abramovich & Co, Jerusalem & Tel Aviv
ziv@lma-law.com

The Israeli Antitrust Authority publish a draft of a policy document regarding minimum resale price maintenance by suppliers

In January 2017, the Israeli Antitrust Authority published a draft of a policy document for public comment, regarding arrangements, under which a supplier dictates the entity that is sequential downstream in the supply chain (its customer), and the price at which the goods shall be sold (such arrangements are professionally called resale price maintenance - RPM).

According to the draft, an RPM arrangement between a supplier and a retailer shall be deemed as a restrictive arrangement unless: (1) the arrangement does not raise competitive concern in a certain market (for example, as a result of strong inter-brand competition and no fear that the arrangement shall lead to a coordinated price); and (2) the arrangement is in order to achieve a significant pro-competitive benefit (such as the encouragement of the retailers to invest in promoting the sale of the product by providing ancillary services, in cases that there is such a need according to the characteristics of the product and the inter-brand competition in the market).

The draft policy document focuses on arrangements under which the supplier sets a minimum or a fixed price level (RPM minimum and RPM fixed). The public statement aimed to illuminate the manner that the Israeli agency shall examine such arrangements and to clarify that such arrangements shall be more carefully examined than other vertical arrangements. The attitude to RPM arrangements is based on the fact that the immediate result of RPM minimum arrangements is the limitation of the intra-brand competition, that is, the competition between retailers regarding the sale of a product originated from the same supplier.

The need to publish the draft of the public opinion was crystalised after the Israeli Supreme Court's verdict in the *Shufersal* case in August 2015. In the *Shufersal* verdict, it was decided that vertical arrangements (ie, arrangements between a supplier and its client), including RPM arrangements, shall be analysed according to the potential harm to competition as a result of the arrangement.

Block exemption rules that were published by the Authority in July 2013 regarding non-horizontal arrangements that do not include certain price restrictions actually applied on most vertical restraints a 'self-assessment' mechanism by the parties. RPM arrangements were explicitly excluded from those rules in such a manner that their status remained as horizontal arrangements: forbidden unless a specific exemption was granted for them.

The *Shufersal* case changed the law that was valid regarding RPM minimum arrangements, as until that decision such arrangements were deemed per se illegal regardless of the level of harm to competition as a result thereof. This is the background for the need to clarify the agency's position regarding RPM arrangements and to mention the special circumstances in which such an arrangement shall not be deemed a forbidden restrictive arrangement.

The draft policy document also refers to RPM arrangements that are not regarding the retail segment (ie, arrangements between a supplier and a reseller that does not sell directly to the consumer, mostly a distributor), and mentions that those shall be examined according to the specific characteristics of the relationship between the supplier and the reseller, as detailed in the draft. The relationship between the parties to such an arrangement shall be examined according to the risk allocation between the supplier and the distributor (consignation on one end and complete sale on the other end) and the analysis

whether the distributor in fact acts as the supplier's 'long arm', in such manner that it is not expected to establish an intra-brand competition within the resellers segment.

In addition, the draft also refers to RPM maximum arrangements that are usually not deemed as price dictation and deemed as economically effective. Nevertheless, the price that is set in an RPM maximum arrangement might actually become a focal point for all resellers or suppliers, and might become de facto an RPM fixed arrangement. Therefore, the agency is of the opinion that such arrangements should be periodically analysed in order to estimate their economic essence and to check their competitive influence.

The document also deals with price recommendations that are also not deemed as price dictation, as long as such recommendation is a 'pure' recommendation, that is, it is not an outcome of an explicit or implicit agreement between the parties, and such that the resellers or retailers are free to digress from and that there is not an expectation they will avoid to do so.

ITALY

Enrico Adriano Raffaelli

Rucellai & Raffaelli, Milan

e.a.raffaelli@rucellaieraffaelli.it

Updates from Italy

The Italian Council of Ministers approves the Legislative Decree 3/2017 implementing the EU Antitrust Damages Directive

On 14 January 2017, the Italian Council of Ministers approved the Legislative Decree 3/2017, which implements the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of EU Member States.

The Decree was published on 19 January 2017 on the *Italian Official Journal* (No 15) and it entered into force on 3 February 2017. Following the Directive, the Decree introduces several innovations.

One of the main innovations is the strengthened mechanism of evidence disclosure in the context of antitrust damages actions. Italian judges now have the possibility to request evidence that lies in the control of the defendant or a third party as well as evidence included in the file of the Italian Antitrust Authority (IAA). It is relevant to recall the absolute prohibition for persons seeking to obtain damages for infringements of EU competition law, concerning the access to documents relating to (1) leniency statements and (2) settlement submissions (a procedure that is not regulated in Italy for the time being).

The set of conditions regarding evidence disclosure entails substantial implications for the applicants' position in the proceedings (namely an extremely heavy burden of proof, in addition to the structural information asymmetry between the parties), which characterises antitrust damages actions.

Another topic that it is necessary to mention concerns the rules governing the effect of national decisions: an infringement of competition law found by a final decision of the IAA or by a review court is deemed to be irrefutably established for the purposes of an action for damages. This provision entails nothing less than a 'procedural revolution'. Indeed, according to the case law of the Italian Supreme Court (*Corte di Cassazione*), the defendants in damages actions could call into question the findings contained in the decisions of the IAA, though subject to strict conditions (it should be remembered that, in Italy, the so-called 'technical aspects' of the decisions of the IAA did not fall within the borders of the power of judicial review of the administrative courts of appeal).

Such provision definitely deprives the defendants of this possibility, thus creating a problematic gap in the protection of defence rights.

It is worth mentioning that the Decree also applies new rules for the limitation periods in actions for damages. Specifically, the new provision ensures that a limitation period is suspended if the IAA takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at

the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

The new Decree establishes new rules on how Italian courts shall assess the joint and several liabilities of companies which are found to have infringed competition rules, and how they shall quantify the damages suffered because of the alleged infringements.

Finally, the Decree identifies the business sections (*Sezioni specializzate in materia di impresa*) of the courts of Milan, Rome and Naples as the only competent courts for antitrust actions for damages. This provision will permit the attribution of the antitrust matters to more specialised judges, with a strong economic preparation and awareness of the economic impact of a decision in this field.

Introducing several innovations in a number of respects, the Decree (and the Directive) is surely primarily aimed at striking a balance between the support for competition damages actions and the defence of the prerogatives of public enforcement of antitrust law. This is confirmed by different factors, inter alia, the little consideration given to standalone actions, which do not seem to be sufficiently encouraged by the new provisions laid down.

Certainly, it is relevant to consider that the new Decree provides a clearer legislative scenario aimed at removing the main obstacles to effective compensation for citizens and businesses interested in claiming damages for antitrust infringements.

It could be foreseen that the Decree will have a strong impact on antitrust actions for damages in Italy and it will be at the heart of the antitrust law debate for a long time to come.

The IAA and AIFA signed a memorandum of understanding concerning the pharmaceutical field

The IAA often engages in agreements with other sector agencies or authorities; in this respect, the IAA recently signed a memorandum of understanding with the Italian Medicines Agency (AIFA) in order to increase enforcement in the pharmaceutical sector by strengthening respective investigation powers and facilitating the exchange of data.

On 19 January 2017, a memorandum of understanding between the IAA and AIFA was signed with the aim of strengthening their cooperation and to coordinate and improve the effectiveness of the interventions of both parties in areas of common concern.

The memorandum oversees several areas of coordination between the IAA and AIFA. Among these is the mutual signalisation in which hypothesis of infringements emerge, in the context of procedures relating to their respective competence, whose implementation shall be pursued by the other party. In this respect, the memorandum also specifies that such occurrences shall in particular concern: (1) trading-related activities of the price of medicines that AIFA conduct with pharmaceutical companies; and (2) cases of counterfeiting and/or long-distance trading of pharmaceutical products that emerge within the activities of competence of the IAA.

Among other fields of cooperation, we can see the collaboration in the context of cognitive investigations and in the elaboration of reports at parliament and by the government, as well as the coordination of the institutional interventions on matters of common interest.

These goals of cooperation will be achieved through: (1) the mutual exchange of documents, information and data; (2) the establishment of general roundtable discussions and theme-based working; and (3) any other activity of collaboration, even if informal.

Recent trends in antitrust enforcement

The extent of the relationship between competition and innovation in the current economic scenario is certainly the most significant issue that antitrust enforcers have to face. Specifically, innovation and competition are closely linked: on the one hand, competition is a driver of innovation; on the other, as proved by the dynamics of the digital market, innovation can bring significant pro-competitive changes. In this light, the IAA is focusing its attention on economic sectors with higher growth potential such as the telecoms sector, the infrastructures sector, and the energy sector and services.

In this context, the IAA opened a proceeding against Vodafone Italia and Telecom Italia for alleged abusive conducts in the bulk short message service (SMS) market. According to the IAA, both companies would have abused their dominant position in the upstream market of SMS termination services through alleged abusive conducts aimed at excluding or limiting other competitors' ability to compete in the downstream bulk

SMS market applying prices that would leave an insufficient margin for any efficient competitor to cover their own specific costs for providing the bulk SMS service to customers.

Another interesting proceeding launched by the IAA in the telecoms sector regards a joint venture agreement between Telecom Italia and Fastweb, aimed at implementing fibre-optic networks in major Italian cities. The IAA believe that the joint venture could reduce the intensity of static and dynamic competition, considering that it involves the two main vertically integrated operators active in this sector and may comprise a relevant coordination between Fastweb and Telecom Italia regarding strategic choices relative to the fixed networks and broadband and ultra-wideband.

In the context of the strong debate regarding taxi services, the IAA launched two proceedings into taxi operators (three operators in Rome and three in Milan) for an alleged violation of European and national rules on cartels. The IAA deems that the operators use restrictive clauses in agreement with drivers that could block market entry to new rivals. Such clauses seem to offer suitable means to obstruct, if not impede, the simultaneous use by the individual taxi drivers of various intermediaries and sorting of the demand of taxi services and to obstruct or slow down the entrance into the market of new operators that offer innovative services of this type (such as the application for the smartphone and tablet operated by Mytaxi Italia Srl, that puts the user and the drivers in direct contact, and also offers a rating service).

The IAA closed two important cartel cases recently:

- On 19 January 2017, the IAA fined 14 companies active in the respiratory-assistance services for having breached Article 101 TFEU in the context of public tenders (with a fine of €47m). The IAA ascertained that the companies implemented agreements, aimed at fixing high prices and allocating clients on the market, in the context of public tender procedures. Specifically, said tender procedures showed irregularities consisting in either the absence of participants or the participants offering exactly the same bid.
- On 11 November 2016, the IAA fined eight modelling agencies and their trade association (Assem) for alleged price collusion with a €4.5m fine. The IAA ascertained that the modelling agencies agreed on prices (fees for models, wages for the modelling agencies and other additional costs) with the aim of restricting/eliminating competition. It is relevant to recall the role played by Assem, since in its premises the modelling agencies had held frequent meetings to develop the alleged concerted practice. One of the agencies involved in the cartel adhered to the IAA's leniency programme, consequently benefiting of full immunity from fines given that it revealed the existence of the alleged conduct.

Updates from Japan

JAPAN

Masatsugu Suzuki

Baker & McKenzie, Tokyo

masatsugu.suzuki@bakermckenzie.com

Agricultural cooperative investigated

The *Asashi Shinbun* (a Japanese newspaper) reported on 28 October 2016 that the Japan Fair Trade Commission (JFTC) had investigated the Oita prefecture agricultural cooperative (JA Oita) regarding an alleged unfair trade practice in violation of the anti-monopoly law (AML). The JFTC was concerned that JA Oita was not permitting the use of a registered trademark for Oita-Aji-Ichi-Negi (a type of onion) by three farmers who were members of JA Oita. The three farmers were not selling the onion to JA Oita despite JA Oita's request that they sell all onions produced by JA Oita member farms to JA Oita.

Acquisition of Showa Shell Oil approved

As reported in the September 2016 issue of the *IBA Antitrust News*, Idemitsu Kosan (IK) concluded a stock purchase contract with a subsidiary of Royal Dutch Shell (RDS) for shares of Showa Shell Oil Co, Ltd (SSO). This stock purchase contract was approved by the JFTC on 19 December 2016. However, major IK shareholders are still opposing the merger between IK and SSO, making it uncertain whether the unification of the management of IK and SSO can be accomplished by 1 April 2017 as planned.

Unification of local bank management

Fukuoka Financial Group and Jyuhachi Bank (18B) announced on 21 January 2017 that they will postpone the planned April unification of their management until October 2017, because the JFTC has taken a relatively long time to investigate the effect of the unification on competition among the local banks. The unification of the local banks may result in a larger market share for the unified local bank, and its clients are concerned that this could allow it to increase interest rates for borrowing.

Standard patents and the AML

One Blue LLC is a patent pooling entity to which many indispensable standard patents related to Blu-ray discs have been assigned for management purposes.

Patent holders have granted One Blue the authority to grant third parties a standard patent licence on fair, reasonable and non-discriminatory terms (FRAND). A potential licensee requested that One Blue explain how the licence fee was set, and One Blue refused this request and also refused to negotiate the licence fee. In addition, One Blue notified major retailers that the patent owners who had assigned their patents to One Blue would be sending the retailers a notice of injunctive relief regarding infringement of Blu-ray discs patent rights.

As a result, one of the retailers was forced to stop selling Blu-rays for one year and nine months. The Blu-ray disc manufacturer and distributor who distributed the discs to the major retailers mentioned above took legal action against One Blue. The Tokyo District Court issued a judgment against One Blue, and held that its business practices constituted unfair competition under the Unfair Trade Practice Prevention Law.

In the wake of this judgment, the major retailers resumed their Blu-ray dics retail business activities. Under the above circumstances, the JFTC observed that competition had been restored and concluded its investigation.

JFTC expands leniency system

The *Nihon Keizai Shinbun* (*The Nikkei*; a Japanese newspaper) reported on 10 February 2017 that the JFTC will expand its surcharge leniency system. Under the revisions, the five company limit on the number of companies eligible for leniency for reporting a violation of the AML and the 20-day period after the commencement of a JFTC investigation, during which leniency may be requested, will both be relaxed. A JFTC study group is currently discussing the specifics of the changes to the surcharge leniency system and will report the details in April 2017. The JFTC is planning to file an AML reform plan with the Diet during its 2018 session in accordance with the study group's report.

Recent bid-rigging cases

On 15 February 2017, the JFTC issued a cease-and-desist order and a surcharge payment order to two manufacturers of specific apparatuses for hybrid optical communication equipment and one manufacturer of specific electrical transmission facilities. The total amount of the surcharge was ¥319.21m (about US$2.8m). These manufacturers had agreed to take turns bidding for Chubu Electric Co Ltd projects in connection with specific hybrid optical telegraph facilities and specific electrical transmission facilities.

In another bid-rigging case, on 16 February 2017, the JFTC issued a cease-and-desist order to six construction firms and a surcharge payment order to five construction firms. These construction firms had been involved in bid rigging related to the construction of garden facilities in Miyagi and/or Fukushima prefecture commissioned by local public institutions, etc. The construction firms agreed to take turns accepting work in a pre-determined order and to cooperate in enforcing the overall agreement.

KENYA

Amar Grewal-Thethy

Kaplan & Stratton, Nairobi

amargt@kapstrat.com

Search and seizure

MEA case

The Competition Authority of Kenya ('the Authority') has been increasingly proactive and particularly vigilant in the investigation and enforcement of restrictive trade practices. The broad powers given to the Authority now have the definitive backing of the courts.

In 2016, in the course of conducting investigations into alleged price fixing in the fertiliser industry, the Authority conducted a dawn raid on MEA Limited (MEA), a supplier of plant nutrition products in Kenya. MEA sought to challenge the raid in the courts and filed a constitutional petition seeking relief for violation of its constitutional right to fair administrative action and conservatory orders to stay the investigations and further proceedings and to grant a temporary injunction restraining the disclosure or use of the information obtained by the Authority. The court dismissed the application by MEA asserting:

- MEA had not shown that its right to fair administrative action was violated by lack of notice prior to the investigations;
- the right to fair administrative action was not absolute and is limited by the entry and search provisions of the Competition Act;
- the Authority ought to perform its statutory mandate with minimal interference. Given the role played by the Authority in promoting and protecting efficient competition in the market and preventing unfair market conduct, it would not be proportionate to grant the conservatory orders; and
- public interest considerations.

According to the Authority, the substantive suit was settled out of court. Apparently the Authority did not actually find any evidence of the alleged price-fixing and no penalties were imposed on MEA. The court decision is, however, a clear indication that the Authority's powers of enforcement do in fact have 'teeth'.

Investigation, search and entry under the Competition Act

Under the Competition Act, the Authority may, either on its own initiative or upon receiving a complaint from any person or government agency, carry out an investigation into any conduct that is alleged to constitute an infringement of the prohibitions relating to restrictive trade practices or abuse of dominance. Where the Authority receives a complaint and fails to investigate, it must inform the person filing the complaint of the reasons for its decision. The Authority has powers to require a person to furnish the Authority with information/documents relating to the investigation or appear before the Authority to give evidence.

Where the Authority deems it necessary, it may, with the assistance of police officers and other law enforcement agencies, enter any premises in the occupation of any person believed to be in possession of relevant information for the purposes of the investigation. The Authority has powers to use any computer system on the premises to search for data, reproduce any record from that data, seize any output from a computer and remove from the premises anything that has a bearing on the investigation.

Whilst not specifically provided for in the Act, the Authority will normally obtain a search warrant from a magistrate prior to exercising its powers of search and entry. This however does not preclude the Authority from carrying out a search and the Authority is under no obligation to inform a third party prior to the search being carried out.

PIAM and 22 of its members

MALAYSIA

Anand Raj
Shearn Delamore & Co, Kuala Lumpur
anand@shearndelamore.com

Boo Sha-Lyn
Shearn Delamore & Co, Kuala Lumpur
sha-lyn@shearndelamore.com

The Malaysia Competition Commission ('MyCC') has recently issued a proposed decision[1] ('the Proposed Decision') against the General Insurance Association of Malaysia (PIAM) and its 22 members, who are all general insurers, for an alleged infringement of the prohibition against anti-competitive horizontal agreements contrary to section 4(2)(a) of the Competition Act 2010 (CA).

Sometime in 2010 or 2011, the Federation of Automobile Workshop Owners' Association of Malaysia (FAWOAM) sought to lobby the authorities and PIAM with a view to securing lower trade discounts and higher labour rates for its members (motor vehicle workshops and repairers) to boost their profitability. These rates related to certain models of popular motor vehicles.

The Central Bank, Bank Negara Malaysia (BNM), is the sectoral regulator for the general insurance industry. BNM had directed PIAM to engage FAWOAM to discuss and resolve these issues in 2010 and 2011. Pursuant to this directive, PIAM and FAWOAM reached an understanding on the trade discounts and labour rates to be offered by FAWOAM's members.

The Competition Act came into force on 1 January 2012.

In April of 2015, FAWOAM complained to the MyCC that its understanding with PIAM was anti-competitive. The MyCC thereafter commenced investigations and, in issuing its Proposed Decision, the MyCC has taken the view that the said understanding constituted an anti-competitive horizontal agreement.

The Proposed Decision includes proposed financial penalties on all 22 general insurers totalling MYR213,454,814 (approximately US$48m). This is the largest ever fine in Malaysia and very likely the largest ever in the whole of South-east Asia.

The Proposed Decision is not final and the insurers have the right to submit written and oral representations to the MyCC to object.

The insurers and PIAM generally appear to take the view that they have not infringed section 4(2)(a) of the Competition Act by virtue of the BNM directive. BNM has issued a press statement to affirm that it had directed PIAM to engage FAWOAM in 2011.[2]

If the MyCC confirms its Proposed Decision, any aggrieved party may appeal to the Malaysian Competition Appeals Tribunal and, from there, make an application for judicial review to the High Court with the prospect of further appeals to the Court of Appeal and (with leave) the Federal Court.

Notes

1 The MyCC issued a proposed decision against PIAM and its 22 members, MyCC Press Statement, 28 February 2017: www.mycc.gov.my/sites/default/files/media-releases/Press%20statement%20on%20the%20Proposed%20Decision%20against%20PIAM%20and%20its%2022%20Members.pdf.

2 The MyCC's Proposed Decision Against PIAM and its 22 Members, BNM News Releases, 1 March 2017: www.bnm.gov.my/index.php?ch=en_press&pg=en_press&ac=4384.

NETHERLANDS

Martijn Snoep

De Brauw Blackstone Westbroek NV, Amsterdam

martijn.snoep@debrauw.com

Updates from the Netherlands

The number of antitrust damages actions in the Netherlands is likely to increase further due to the entry into force of the Dutch law implementing the EU Damages Directive and a number of other legislative initiatives. In addition, the Dutch Competition Authority (ACM) recently launched a public consultation on the risks and opportunities of bundling in the telecoms market, whereas the Dutch minister of Economic Affairs published a draft bill to block or reverse mergers in the Dutch telecoms sector considered detrimental to national security or public policy.

Dutch law implementing the EU Damages Directive entered into force

The Netherlands is the first of the three jurisdictions currently attractive for antitrust damages proceedings that has implemented the EU Damages Directive[1] into national law. The UK and Germany, together with 16 other EU Member States, still need to incorporate the Directive's new rules into their national legislation. The Dutch law[2] implementing the Damages Directive, which entered into force on 10 February 2017, does not fundamentally affect the already well-established antitrust damages regime. It largely follows the provisions of the Damages Directive and only applies to cases where there is a breach of EU competition law. The Dutch government's promise to publish a bill[3] to have the provisions also apply to civil damages actions in case of purely national competition infringements may even further increase the Netherlands' charm. As will the recent draft bill[4] to facilitate collective redress.

ACM consultation on bundling in the telecom market

The ACM recently published a consultation document[5] with a preliminary analysis of the impact of the bundling of telecoms services and video content on competition due to the rise in quad play. According to the ACM, more and more telecoms providers offer competitive deals to consumers through quad play, four-in-one packages combining television services, broadband access, fixed telephone and mobile telephone. In addition, providers increasingly add free movies and series or sports broadcasts to these packages through exclusive channels. Although the bundling of these services may offer cost savings to consumers, it may also make it more difficult for them to switch providers and will likely weaken the position of smaller providers.

Draft bill to block or reverse takeovers in the Dutch telecoms sector

The Dutch government recently published a draft bill[6] that will enable the minister of Economic Affairs to block or reverse mergers in the Dutch telecoms sector that are considered a threat to national security or public policy. According to the minister,[7] the Netherlands does not 'benefit from takeovers by foreign companies that have links to criminal activities, are reputed to be financially unstable or have non-transparent ownership structures'. Takeovers of telecoms providers, hosting services, internet exchange points or data centres will be scrutinised to safeguard continuity and reliability of supply. The minister intends to submit the final bill to the Dutch Parliament before the summer.

Notes

1 http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.
2 www.eerstekamer.nl/wetsvoorstel/34490_implementatiewet_richtlijn?zoekrol=vgh5mt4dsdk1.
3 www.eerstekamer.nl/behandeling/20160607/memorie_van_toelichting/document3/f=/vk4scqr01ixv.pdf.
4 www.rijksoverheid.nl/ministeries/ministerie-van-veiligheid-en-justitie/nieuws/2016/11/16/wetsvoorstel-collectieve-schadevergoedingsactie-naar-tweede-kamer.
5 www.acm.nl/en/publications/publication/17018/ACM-identifies-opportunities-and-risks-of-bundling-in-the-telecom-market.
6 www.internetconsultatie.nl/telecommunicatie.
7 www.government.nl/latest/news/2017/02/16/national-government-seeks-legal-conditions-for-takeovers-in-the-telecom-sector.

New Zealand Commerce Commission kicks Sky/ Vodafone NZ merger for touch

NEW ZEALAND

Andrew Matthews
Matthews Law, Auckland
andrew.matthews@matthewslaw.co.nz

Gus Stewart
Matthews Law, Auckland
gus.stewart@matthewslaw.co.nz

In what appears to be only the second New Zealand merger blocked on non-horizontal grounds – the first being in 2005 – the Commerce Commission (NZCC) has declined to grant clearance for the proposed merger of Sky Network Television (Sky) and Vodafone New Zealand (Vodafone NZ).

The proposed merger was set out in two related clearance applications, both registered on 29 June 2016. One of those applications was from Vodafone Europe BV to acquire up to 51 per cent of the shares in Sky, and another was from Sky to acquire up to 100 per cent of the assets and/or shares of Vodafone NZ. In essence, Vodafone Europe BV would own 51 per cent of the merged entity with the balance being listed on the New Zealand Stock Exchange.

The NZCC clearly saw issues with the proposal from an early stage. On 31 October 2016, NZCC sent a 'Letter of Unresolved Issues' (LUI) to the parties (with a copy on its website), noting it had concerns around vertical and/or conglomerate effects. (A LUI essentially provides the applicant(s) with a further opportunity to provide additional information or submissions to allay the NZCC's concerns, such as divestment undertakings; this is the first time we are aware of the NZCC publishing a LUI.) These concerns arose from the following factors:

- the merged entity would have substantial market power by virtue of its portfolio of content, including premium content such as live rugby;
- the merged entity would have an increased incentive and ability to make buying Sky on a standalone basis relatively less attractive than buying it in a bundle (with mobile and/or broadband) offered by the merged entity, resulting in customers switching to the merged entity;
- the merged entity would have less incentive to enter into reselling arrangements than Sky would in the counterfactual, meaning rivals would be unable to offer bundles with Sky and mobile/broadband services or offer bundles as attractive as those offered by the merged entity; and
- as a result of the above, one or more rivals may lose customers to such an extent that they no longer provide an effective constraint in a telecoms market, allowing the merged entity to profitably raise prices of a telecoms service above levels that would prevail in the counterfactual.

Apparently the parties were not able to sufficiently allay those concerns, with the NZCC ultimately announcing its decision to decline to grant clearance on 22 February 2017. To grant clearance, the NZCC must be positively satisfied that the proposed merger will not substantially lessen competition. It appears that the NZCC could not satisfy itself as such on this occasion, with the NZCC Chairman, Dr Mark Berry, observing that the NZCC had not been able to exclude the real chance that the merger would substantially lessen competition:

> 'The proposed merger would have created a strong vertically integrated pay-TV and full service telecommunications provider in New Zealand owning all premium sports content […] Around half of all households in New Zealand have Sky TV and a large number of those are Sky Sports customers. […] Given the merged entity's ability to leverage its premium live sports content, we cannot rule out the real chance that demand for its offers would attract a large number of non-Vodafone customers […] If significant switching occurred, the merged entity could, in time, have the ability to price less advantageously than without the merger or to reduce the quality of its service. Given we are not satisfied that we can say that competition is unlikely to be substantially lessened by the proposed merger, we must decline clearance.'

The NZCC's written decision was not available as at 6 March 2017. However, all indications have been that 'live sport', and how that

premium content could be leveraged to the detriment of smaller telecoms players, was the ultimate sticking point. This was summed up by Dr Berry at a media briefing in Wellington, where he was reported as saying 'had the merger not included all premium sports content we would likely have cleared this merger'. Dr Berry expanded on this theory of harm at the media briefing:

> 'The problem we have is that there's this major customer segment, for whom Sky Sports is a must have, and the merged entity would have the ability to leverage that market power to potentially have an adverse impact on Vodafone-Sky's rivals.'

Dr Berry also explained more in the media release:

> 'The evidence before us suggests that the potential popularity of the merged entity's offers could result in competitors losing or failing to achieve scale to the point that they would reduce investment or innovation in broadband and mobile markets in the future. In particular, we have concerns that this could impact the competiveness of key third players in these markets such as 2degrees and Vocus.'

So where do we go from here? While Sky and Vodafone NZ may have been optimistic about a favourable result from the NZCC, presumably they have prepared for the worst and, after licking their battle wounds – Sky shares reportedly fell 14 per cent to their lowest value in eight years immediately after the NZCC's announcement – have several options they could pursue, including:

- **Appeal the NZCC's decision**: Sky and Vodafone NZ have a statutory right under the Commerce Act 1986 to appeal the NZCC's decision to the High Court, and will no doubt be weighing up the costs and benefits of taking such an approach. (The parties did not have to wait long before receiving news that no doubt added fuel to the fire. On 26 February 2017, Spark – formerly Telecom New Zealand, and one of the most vocal opponents of the Sky/ Vodafone NZ merger – announced that it had signed an 'exclusive partnership' with Netflix, offering free Netflix for a year on new 24-month 'Unlimited Data' broadband plans.) But with the clearance process taking almost eight months, the parties may be unwilling to commit further resources to protracted legal proceedings when the result is by no means certain.
- **Proceed without clearance**: On its face, simply proceeding with the merger as proposed would be risky and likely to be met by challenge from the NZCC and/ or third parties in the courts, including by seeking urgent injunctive relief. (The clearance regime is voluntary in New Zealand, and the parties are not barred from proceeding with a 'declined' merger.) However, this would require an opponent to demonstrate, on the balance of probabilities, that the merger is anti-competitive. (The clearance regime where the NZCC must decline to grant clearance if it is not satisfied that the proposed merger will not substantially lessen competition.) Key players such as Spark and 2degrees have already indicated they would be willing to fight a merger between Sky and Vodafone NZ, including when they successfully sought from the High Court a stay on the proposed merger to consider their legal options if the NZCC had decided to grant clearance. Ultimately, they did not need to exercise that stay.
- **Submit a new application for clearance**: The parties could submit a new application for clearance for an 'amended' merger, under which the parties give an undertaking to divest certain problematic aspects of the original proposal and/or require the Commission to consider new information. (Unlike many of its international counterparts, the NZCC is unable to formally accept behavioural undertakings.) This type of approach has been successfully adopted by parties to a declined clearance application in the past, including for a recent hospitals merger.
- **Strengthen the status quo**: The parties could also seek to strengthen what they referred to in their clearance applications as a 'successful and complementary strategic relationship, under which Vodafone resells Sky's pay television services, and Sky promotes Vodafone NZ's broadband products and refers customers to Vodafone NZ'.

Other recent New Zealand merger news

Print deadline for media merger decision

The NZCC was due to reach a decision in relation to New Zealand Media and Entertainment (NZME) and Fairfax's application for clearance or authorisation by 15 March 2017, having previously indicated in its draft determination on 8 November 2016 that it would be likely to decline to grant authorisation for the merger. The proposed merger would essentially be a 'two to one' in newspaper supply (national dailies) and merge the two largest news websites. There would also be overlap in community publications, magazine supply and radio stations. The proposed merger and relevant parties are discussed in more detail in earlier editions of this newsletter. While the NZCC acknowledged considerable public benefits (through economic efficiencies) in its draft determination, it decided that those benefits were 'trumped' by its quality and plurality concerns. This has raised issues around whether the NZCC exceeded its jurisdiction or misapplied the 'public benefits' test. While some media outlets may be quick to jump to conclusions, the NZCC's decision in Sky/Vodafone NZ should have no bearing on the outcome of this (fundamentally different) merger.

Fire sprinklers blocked

On 3 March 2017, the NZCC declined to grant clearance for Aon New Zealand to acquire the fire sprinkler and alarm inspection business of Fire Protection Inspection Services. In the NZCC's media release, Dr Mark Berry observed that:

> 'the proposed merger involved the two largest national sprinkler inspection firms and would have resulted in most sprinkler inspectors in New Zealand being employed by the same company […] if the proposed merger was to have proceeded, most markets would have been left with only two competing providers. The merged entity would have been in a dominant position as it would have employed the bulk of all inspectors. We were concerned that this proposed merger would have therefore eroded choice, which could have led to higher prices or lower quality services.'

Further consolidation in insurance sector

On 3 March 2017, the NZCC registered an application for clearance from Vero Insurance New Zealand (the New Zealand subsidiary of Suncorp Group – an Australian finance, insurance and banking) to acquire up to 100 per cent of the shares that it does not already own in TOWER. This application comes in the wake of a period of consolidation in the New Zealand insurance sector, including 'approved' acquisitions by IAG (Suncorp's largest competitor in New Zealand) of AMI (cleared in 2012) and Lumley (cleared in 2014). Both parties provide a range of personal and commercial insurance products in New Zealand. The proposed merger also appears to be subject to consent from the Overseas Investment Office.

NORWAY

Håkon Cosma Størdal
Advokatfirmaet Wiersholm AS, Oslo
hcst@wiersholm.no

Marie Wangsmo Haugland
Advokatfirmaet Wiersholm AS, Oslo
maha@wiersholm.no

The importance of closeness of competition and econometrics when assessing competitive effects in differentiated product markets

On 20 January 2017, the Norwegian Ministry of Trade, Industry and Fisheries ('the Ministry') upheld a decision by the Norwegian Competition Authority (NCA) to intervene against the Umoe Restaurants AS merger with Dolly Dimple's Norge AS (of 15 September 2016), both active in the markets for pizza restaurant and home delivery. Arguably, looking at the reasoning of the NCA and the Ministry, it is clear that closeness of competition is more prominent in the assessment of competitive effects in differentiated product markets than before. In that regard it also appears that econometrics and quantitative factors are emphasised to a larger extent than qualitative factors, thus requiring more thorough preparations from competitors wishing to merge.

The case concerned the merger between Umoe Restaurants AS, owner of Peppes Pizza AS, and Dolly Dimple's AS. Peppes and Dolly Dimple's are two of the largest pizza chains in Norway, operating both in the pizza restaurant market and in the takeaway market. In its decision, the NCA found that the players in these markets are differentiated on the basis of product range, level of service, price and geographic location. A central issue of the case was whether Peppes and Dolly Dimple's were close competitors.

According to long-standing practice, closeness of competition is an important factor when assessing competitive effects in markets with differentiated products; this was also repeated in the case at hand. However, the NCA may have gone even further when explicitly stating that in markets with product differentiation the NCA will take greater account of the closeness of competition between the parties than on the concentration in the market. It was also emphasised that the parties do not need to be each other's closest competitors in order for the transaction to have negative competitive effects. This was reiterated by the Ministry in the appeal-round, which also stated that it is of less importance whether other competitors exercise a price pressure on the merging parties. On this basis, the parties' objection that the market in question is not concentrated and that there are other players in the relevant markets disciplining the parties were not given much consideration.

Accordingly, the question of whether the parties to a transaction are close competitors is decisive when differentiated product markets are concerned. However, it is left relatively open how close competitors the parties actually need to be in order for a transaction to raise concerns by the NCA.

The NCA's assessment of whether the parties are indeed close competitors is largely based on econometrics. In its decision, the NCA used the calculation of diversion ratio based on customer questionnaires to assess the degree of substitution between the parties' products. In the complaint, the parties stated that the analysis was not reliable, since it was not based on a representative customer selection and it only covered a small selection of restaurants. The response rate was also very low, and it was held that such investigations were not apt in the relevant markets since the customers do not have a clear opinion as to their second choice of restaurant. When using such customer questionnaires there is thus a risk that the questionnaire exaggerates the diversion between the products due to trademark recognition instead of degree of substitution. These are common counter-arguments to such analysis. What is measured is what the customers would have done rather than what they actually do, which brings an element of arbitrariness to the analysis. These objections were, however, refuted by the Ministry.

The diversion ratio was also used to calculate possible Gross Upward Pricing Pressure Index (GUPPI) for each restaurant.[1] As a guiding principle, the NCA stated that a GUPPI of more than ten per cent in a local market is a clear indication that the transaction distorts competition. However, at the same time, the NCA did not rule out the possibility that competition may be limited if the GUPPI is below ten per cent.

In the calculation of GUPPI, the variable price-cost margin is central. Price cost margin is defined as (sales revenues – variable costs)/ sales revenues. Accordingly, it will be crucial for the analysis what can be categorised as variable costs. The assessment thus often boils down to questions of accounting.

Based on quantitative assessments, supported by qualitative comparisons of the parties, the NCA found that the parties were close competitors and that local restaurants in the pizza segment would not prevent the parties from exercising market power. Since the transaction would eliminate the competitive pressure between Peppes Pizza and Dolly Dimple's pre-transaction, the NCA concluded that the transaction would significantly impede competition.

This is the last of three transactions that were stopped by the NCA in 2016. In comparison, only one transaction was stopped in 2014 and 2015 combined (seven transactions were approved with remedies). A natural question to ask is whether we are now witnessing a policy change by the NCA, or whether the nature of the 2016 cases simply implied that remedies were not possible or adequate. It will be interesting to see if this trend continues in 2017. What is evident is that the NCA to a larger extent is focusing on closeness of competition and econometrics in the assessment of competitive effects in differentiated product markets. This makes acquisitions between competitors more difficult, even in situations where there exist other market-specific factors suggesting that the transaction will not harm competition. For example, a transaction that reduces competitors from four to three will most likely be subject to thorough scrutiny with a risk of intervention since the diversion ratio is high in such scenarios. The increasing focus on quantitative methods also requires that the parties to a larger extent engage economists to produce economic reports, making the process vis-à-vis the NCA more complicated.

Note

1 GUPPI is an estimate for the parties' incentives to exercise market power post-transaction.

POLAND

Robert Gago

Hogan Lovells, Warsaw

robert.gago@hoganlovells.com

Radosław Pawluk

Hogan Lovells, Warsaw

radoslaw.pawluk@hoganlovells.com

Better late than never: Poland is on the brink of implementing EU Private Damages Directive 2014/104/EU*

Poland's recent increased legislative works on the bill on actions for damages caused by competition law infringement ('the Project') is currently attracting significant attention, not only from competition law scholars and practitioners but also enterprises and citizens. Although it is currently possible to seek compensation for such damages in Poland, in practice these types of claims are extremely rare. Therefore, the main objective that lies behind the Project is to provide efficient redress in a civil court by strengthening the position of the parties injured by the infringement of competition law. Due to the fact that Poland is already behind in transposing the provisions of the Private Damages Directive into Polish law – which was due by 27 December 2016 – it can be expected that the parliament, which in March 2017 started its works on the Project, will take a quick course towards enacting the bill. Once revised by the lower house (*Sejm*) and upper house (*Senat*) of the Polish parliament, it is a short time until it is signed

by the President – the last stop on the way to the law being enacted in Poland.

Below we present the most important solutions foreseen by the Project.

Towards providing efficient redress

An undertaking that infringed competition law (the 'Infringer') will be held liable under the damages resulting from unlawful acts and regimes (liability in tort) set out in the Civil Code. It should be noted that, in comparison to already existing regulations, the Project provides for a number of solutions to a plaintiff's position. To date, in order to obtain compensation the claimant had to demonstrate in court:

- the infringement of competition law by the anti-competitive agreement or the abuse of a dominant position;
- fault of the Infringer;
- damage suffered by an injured party; or
- causal link between the infringement and damage.

This will no longer be the case. The Project introduces presumption of fault of the Infringer. This means that it is the Infringer who has to prove that they did not incur fault when infringing competition law. From a practical perspective, in cases where the anti-competitive behaviour has been declared in the decision of the competition authority or found by a court in the civil proceeding, proving the absence of fault seems to be a rather theoretical possibility.

Also, the rebuttable presumption that an infringement of competition law caused harm will be introduced. The claimant will still have to prove each time that the harm they suffered resulted from the Infringer's actions. The Infringer will be able to release themself from liability if they prove that the claimant did not suffer damage. In this respect, the Infringer's defence could be based on a presumption of damage transfer ('passing on defence'). If the infringement resulted in damage to the Infringer's contractor, who afterwards sold the goods, it is presumed that the overcharge was transferred to the subsequent purchaser. Such rebuttable presumption has been adopted to facilitate the claims of indirect customers. Imposing on the claimants the burden of proof that the damage was not transferred to the subsequent buyers may be a significant impediment to the compensation actions.

The Project confirms the approach already presented in Poland[1] that the final decision of the competition authority declaring the infringement (or the judgment being the result of an appeal against such decision) is not a condition to bring an action. If such a final decision (or a judgment) was issued, it constitutes the precedent and the court examining a damage claim is bound by it as far as establishing the existence of the infringement.

Access to evidence

In practice, it is difficult to prove the undertaking was engaged in anti-competitive practice, especially if there was no decision issued by the competition authority. In order to cope with this issue, the Project introduces the procedure for disclosure of relevant evidence from the alleged Infringer or other third parties. At the request of the claimant, the court may order the defendant or a third party to disclose relevant evidence that lies in their control. Such order may also concern evidence located in the case files of the Office of Competition and Consumer Protection.

In order to protect undertakings obliged to disclose evidence, the court will have to stick to the proportionality rule as indicated in the Private Damages Directive. Moreover, the protection of those who have decided to participate in the leniency programme will be preserved.

To ensure the appropriate level of expertise, the cases involving compensation for damage caused by the infringement of competition law will be considered by regional courts, irrespective of the amount of the compensation sought.

Limitation period for damage actions – changes in the civil law

The previous three-year limitation period calculated from the moment the injured party found out about the damage and a person was obliged to compensate for said damage, is subject to major changes. First of all, the period will be extended to five years in case of claims resulting from the infringement of competition law. Secondly, this period may start to run earlier (for all claims including non-competition law-related claims), that is, from the moment the injured party exercising due diligence could have found out about the damage and the person liable for it. This

change may be considered in favour of an Infringer, as it can serve as the argumentation that the injured party should have known about such circumstances earlier than they actually did.

Entry into force of new regulations

The new regulations are to be applied by courts so that it applies to the competition law infringements taking place after the entry into force of the new legislation. The law will also apply to ongoing violations at the time of the entry into force of new legislation. The new law will not apply to cases that have already been brought to court.

Comment

Although in Poland compensation for damages as a result of competition law infringement has not been popular, one can already see the first cases emerging. In this respect we point to the settlement between Orange Polska and Netia (at the end of 2014) concerning Netia's actions worth PLN 145m as a result of the abuse of a dominant position by Orange, as stated in the European Commission's decision.

From the perspective of enterprises, the Project has two main aspects:

- on one hand it may significantly increase the risk resulting from the infringement of competition law because except for the existing high administrative fines and the responsibility of the board, there appears a risk of very high compensation claims; but
- on the other hand, the injured parties will be able to effectively seek the recovery of loss resulting from anti-competitive practices, which could mean multimillion dollar compensations.

It needs to be underlined that the Project is not devoid of controversial provisions, such as the presumption of injury extended to all competition law infringements. The EU legislator in the Private Damages Directive limited such presumption to horizontal cartels only. These types of agreements infringe competition by their very object and thus do not require a study of their effects. However, the Polish legislator went even further and extended the presumption of harm also on vertical agreements and the abuse of a dominant position. The qualification of those actions as an infringement usually depends on in-depth assessment of their anti-competitive effects. Therefore, it is often impossible to predict accurately whether such effects occur. In this context, it is difficult to assess the concerned solution positively, as it significantly increases the risk of civil claims in relation to the activities that at the time of making business decisions are in line with the competition law, but over time and as a result of market changes may cause anti-competitive effects.

Notes

* Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

1 The judgment of the Supreme Court I CSK 83/05 of 2 March 2005.

PORTUGAL

Patrícia Fragoso Martins
Campos Ferreira, Sá Carneiro & Associados, Lisbon
pfm@csassociados.pt

Margarida Robalo Cordeiro
Campos Ferreira, Sá Carneiro & Associados, Lisbon
mrc@csassociados.pt

Competition in public transport services in passenger vehicles: a view from Portugal

In July 2016, the Portuguese Competition Authority (PCA) launched a public consultation paper on the issues of competition and regulation in the sector of people transportation in passenger vehicles in Portugal. The consultation period ended in September, and on 28 December 2016 the PCA issued its final report on the matter, where it identified the main competition restraints in the sector and presented a set of recommendations to improve competition in the market. Coincidentally or not, a few days earlier, the government had approved the draft bill – to be presented to Parliament – establishing the new legal regime on Transport in Ordinary Vehicles through Electronic Platforms.[1]

The recent rise of electronic platforms that provide for the hiring of transportation services, notably online, has represented a significant challenge to the traditional rules governing public transportation. This challenge – which is intensified by the acceptance by consumers of the new services – has resulted in a strategic reaction by traditional taxi service providers, notably through the adoption of similar technologies.

The transportation in passenger cars comprises different types of services, notably: (1) taxis; (2) the leasing of vehicles with a driver; and (3) other services usually associated with tourism. In Portugal, these activities are currently subject to significant regulatory constraints, mostly in what regards a 'taxi service'. In this context, the PCA focused on identifying the impact on competition of the regulatory regimes in force with a view to identifying and assessing possible restraints to competition in the market.

The activity of people transportation in passenger cars with a driver is presently regulated by the Framework Law on Land Transport.[2] According to this legal regime, public transportation is subject to strict licensing requirements. In particular, the PCA has identified the following restrictions to competition flowing from the current rules:

Market entrance

The entry in the market is subject to the acquisition of a specific licence (called '*alvará*') issued by the Transport and Mobility Institute (*Instituto da Mobilidade e dos Transportes* - IMT), which is valid for a period of five years, possibly renewable if certain requirements are fulfilled. Additionally, licensing at the municipal level involves a quantitative restriction by authorising municipalities to limit the number of vehicles in circulation. Furthermore, there are legal requirements specifically applicable to taxi drivers and their vehicles. The PCA considered this regulatory intervention to be too intrusive and restrictive, and susceptible to the deteriorating competition conditions insofar as it limits the entry and expansion in the market and therefore the intensity of competition.

Prices

Prices of taxi services are currently established by an agreement entered into between the Directorate-General for the Economic Activities ('*Direcção Geral das Actividades Económicas*') and the industry associations representing the interests of taxi drivers. The regime is based on the need to ensure control and transparency mechanisms for consumers. The PCA considered this to be a highly restrictive regulatory choice in so far as it eliminates the possibility of competition based on prices. In particular, this solution does not allow taxi companies to react to new entrants into the market, by diversifying strategies on the basis of the relationship quality/price.

Quality, safety and other regulatory issues

These matters relate mostly to the requirements applicable to the vehicles – certification, features, inspections and qualification of drivers – and take into account that consumers do not know the

quality of the service beforehand. This type of regulation is justified mostly on the grounds of protecting consumers, passengers and individuals' safety, protecting the environment and providing services for people with disabilities. Again, the PCA considered that the regulatory requirements should be confined to the ones strictly necessary to pursue these objectives, therefore not creating needless barriers to entry and not impeding innovation. The PCA noted that online platforms have created mechanisms which address these concerns and which may be more effective than regulatory requirements.

In light of the above, the PCA highlighted that electronic platforms represent opportunities to the market, notably at the level of efficiencies and competition, mitigating possible market failures and other public policy concerns that have, until now, justified intense public regulation. Thus, the PCA highlighted the need to undertake a regulatory review, which should not in any case result in replicating the existing regulatory framework to new entrants, but, on the contrary, in loosening current rules so as to contribute to more vigorous competition and promote a broader supply and higher quality of service. In particular, the PCA has put forward the following, most significant, recommendations:

- to evaluate the need for quantitative restrictions and to consider alternative and less stringent solutions;
- to assess the need and proportionality of territorial restrictions, as well of the rules governing parking spaces for taxis;
- to favour price liberalisation (although ensuring price publicity and criteria for structuring prices);
- to limit regulatory requisites on the quality of the services to the minimum, only to compensate market failures;
- to eliminate restrictions regarding the forms of providing and paying for taxi services;
- to reassess legal requisites applicable to vehicles, and make rules on publicity on cars more flexible;
- to verify the effectiveness of legal inspections of vehicles in such a way as to ensure equality among all operators; and
- to verify whether the requisites applicable to the qualification of drivers ensures equality of opportunities to all operators.

The government's bill is awaiting discussion in Parliament. The new proposed regime – which is the result of long, hard negotiations with stakeholders – was drafted with the aim of regulating services already available to consumers but that are legally distinguished from taxi services. Contrary to ordinary vehicles, taxis are considered to address specific market failures and are therefore subject to public service obligations.

The projected rules are, furthermore, based on a fundamental distinction between the types of services provided by the new operators. Hence, on the one hand, the bill defines the obligations and requisites to be fulfilled by the companies providing for electronic platforms that organise and intermediate transportation services. On the other hand, it establishes the specific obligations of the operators providing directly for transportation services. In this respect, the new bill foresees that: (1) drivers of ordinary vehicles are subject to qualification requirements and must obtain a driver's certificate issued by the IMT; (2) vehicles must circulate without distinctive exterior signs except from a label/sticker visible from the outside; (3) ordinary vehicles may not circulate in lanes reserved for public transport, and may not pick up passengers in the streets or at taxi ranks; and (4) prices are freely established, although consumers should be made aware of fixed prices or methods for their calculation.

It is debatable whether the projected new legal regime reflects some of the concerns enshrined in the PCA's 2016 Report, such as price liberalisation or the loosening of licensing requirements. However, it does not solve the issue of effective competition in the market for passenger transportation in individual vehicles. In particular, the establishment of two different regulatory frameworks – one applicable to taxis and another to ordinary vehicles – can be said to blur the actual functioning and dynamics of the markets.

Moreover, the distinction between electronic operators and drivers echoes the request for a preliminary ruling from the 'Juzgado Mercantil No 3 de Barcelona' (Spain), lodged on 7 August 2015,[3] where the Spanish court asked the Court of Justice of the European Union whether the activity carried out by Über Systems Spain should be considered either as a transport service or an electronic intermediary service/an information society service protected by the freedom of services provided for in the EU Treaties and Directives 2006/123/EC and 2000/31/ EC.

The case is still pending before the Luxembourg Court, but it may well be a sign that despite the efforts of the Portuguese government in settling the disputes surrounding passenger transportation and the recommendations of the PCA so far, national regulatory regimes on transportation services may continue to be questioned, not only in light of competition law, but also under the rules governing the European internal market.

Notes

1 *Proposta de Lei No 50/XIII*, '*Transporte em Veículo Descaracterizado a partir de plataforma electrónica*'.
2 '*Lei de Bases do Sistema de Transportes Terrestres*', approved by Law No 10/90, 17 March 1990.
3 *Asociación Profesional Élite Taxi v Uber Systems Spain, SL*, Proc C-434/15.

RUSSIA

Vassily Rudomino
ALRUD Law Firm, Moscow
vrudomino@alrud.com

Ksenia Tarkhova
ALRUD Law Firm, Moscow
ktarkhova@alrud.com

Vedernikov Roman
ALRUD Law Firm, Moscow
rvedernikov@alrud.com

Google case and its influence on the market and enforcement practices in Russia

In September 2015, the Federal Antimonopoly Service ('FAS Russia') found Google Inc and Google Ireland Limited ('Google') guilty of abuse of dominance in the Russian market of pre-installed application stores for Android OS, where it had established Google's market share of exceeding 50 per cent (approximately 58.6 per cent).

The above-mentioned decision is rather remarkable in light of the recent and ongoing discussions held around the world to approaches of anti-monopoly regulation in the developing and ever-changing area of information technology (IT).

As far as we are aware, similar cases concerning Google have been considered or are ongoing in a number of jurisdictions such as the European Union, the US, China and India.

Main stages of the case considered in Russia

The conflict between Google and FAS Russia began with the complaint of Yandex, one of the main players in the Russian market of pre-installed application stores for Android OS, whose rights had been violated by Google's anti-competitive activities.

Yandex claimed that some producers of smartphones based on Android OS had refused to pre-install Yandex services on the devices because it would have led to an infringement of contract terms with smartphone device producers and Google as the Android OS's owner.

FAS Russia regarded such market behaviour as unfair competition and initiated the case against Google in February 2015. However, after analysis of the market and a detailed case study, the Competition Authority requalified the case as an abuse of dominance one and issued the order for Google to cease its anti-competitive behaviour in the market of pre-installed application stores for Android OS. Google did not fulfil the obligation prescribed by FAS Russia, which resulted in the imposition of the turnover fine in the amount of RUB 438m (approximately US$7.4m) on Google for abusing its dominance.

Afterwards, Google appealed the decision of FAS Russia in the courts of appeal and cassation instances, but Russian courts upheld the position of the Competition Authority.[1]

During judicial proceedings, it was revealed that Google's failure to perform obligations prescribed by FAS Russia in its order resulted in negative consequences for the competition environment in the relevant market. FAS Russia issued the second order for Google to cease the infringement of competition in the market, however, the company failed to perform the order again.

As a result of the second act of non-compliance and because they ignored the orders issued by the Competition Authority, FAS Russia imposed a fine of RUB 1m (approximately US$17,000) on Google and, moreover, in January 2017, FAS Russia applied to compulsory execution of orders and prescriptions issued.[2]

Main arguments/concerns of the anti-monopoly authority

The main concerns of FAS Russia related to the aggregation of mobile services, mobile applications and system services provided by Google as a package: Google Mobile Services ('GMS'). Google insisted that the packaging did not infringe competition law as it was fully compliant with fair business practices.

FAS Russia also noted that packaging could not be deemed as a breach of competition legislation. However, rather than tying a dominant product (Google Play) to non-dominant products, Google ties several services and products together in order to create a market system for its own benefit that cannot be avoided even when competing with Google in several relevant markets. Moreover, due to the number of links that Google has built between its mobile services and applications, some of the ties are indirect and difficult to see.

FAS Russia established that contractual partners of Google (mostly producers of smartphones and communications service providers) were bound by the following restrictive conditions to purchase the rights of Google Play as a pre-installation on its devices:

Promotion of Google Play ('tying')

According to the terms of contract, producers are not allowed to purchase Google Play separately from other applications included in GMS. Moreover, users have no opportunity to delete pre-installed GMS applications: it can only be deactivated.

It should be noted that subsequent to the results of consumer inquiries in Russia, pre-installation of Google Play is an actual prerequisite of a smartphone's competitiveness in the Russian market.

Requirement of pre-installation of Google search as automatic search

Pre-installation of Google Search as an automatic search on a device has no technical background. It was proved by technical experts and representatives of Google.

GMS priority position on the screen of smartphone

Granting a highly visible position on the screen to GMS applications increases the level of probability that customers would use these particular applications. This argument of the Competition Authority was not denied by representatives of Google.

Prohibiting the pre-installation of Google's competitor applications

Some contracts include restrictions of producers to pre-install the applications, products or services of competitors on Google devices. These obligations were secured by Google via profit-sharing incentives from advertising.

'Anti-fragmentation'

Such terms as 'fragmentation' of Android OS is undetermined and is not fixed in any contracts. Technical experts consider that fragmentation includes any departure from 'anti-fragmentational' terms of contract such as pre-installation of non-GMS mobile applications on devices and service and the launch of devices without GMS.

Thus, Google turned to its advantage its control over Google Android to promote its applications and services, and ties its non-dominant products to its dominant products. This allows Google to collect user data that the company uses further for advertising. Herewith, the opportunity of pre-installation was entirely reserved by Google. Google also relies on the dominance of its apps to protect Android OS from competition, thus preserving its grip over the mobile advertising platform.

Conclusions and impact of the case on the market

Accusations of abuse of a dominant position against Google were given a hostile reception. The main concerns of the scientific and business communities are based on the possibility of recession in innovative development.

The antitrust investigations carried out are known to have been supported by FairSearch Alliance, a consumer protection organisation united to defend competition in online and mobile search. Acting as a community of major companies in the IT area (such as Microsoft, Nokia, Twenga), FairSearch thinks that Google implemented a 'bait and switch' strategy. In the Alliance's opinion, while Google claims that its success relies on merits and posits itself as an innovation champion, the truth is that Google does not know

whether competitors are more innovative or not, simply because Google has built barriers to entry that are virtually impossible to overcome.

Misstep in competition regulation could be harmful for national, and even international, economic efficiency. However, the decision made by the Russian Competition Authority is based on the idea of support and further acceleration of development in the information technology area.

We believe that consideration of the *Google* case is highly important for development of competition regulation in the IT area because strong competition in the relevant market forces companies to innovate and develop their best solutions. Companies should act within the non-discriminatory boundaries and should not be allowed to use their dominance to block competitors. A fair competition environment is the main leverage of blistering innovative development.

Moreover, the case shows the new trend of investigations by the Russian Competition Authority against global companies, in complex areas and with reference to the experiences of regulators in other countries.

Notes

1 Case No 1-14-21/00-11-15 development: 18 September 2015 – Decision on the violation of the Competition Law: http://solutions.fas.gov.ru/ca/upravlenie-regulirovaniya-svyazi-i-informatsionnyh-tehnologiy/ad-54066-15; 11 August 2016 – Decision on the imposition of the administrative fine: http://solutions.fas.gov.ru/ca/pravovoe-upravlenie/ad-55539-16; 15 March 2016 – Decision of the Arbitrazh Court of Moscow: http://kad.arbitr.ru/PdfDocument/0fd84f8d-5fb0-439f-b268-b6dadb01f847/A40-240628-2015_20160315_Reshenija%20i%20postanovlenija.pdf; 19 July 2016 – Decision of 9 Arbitrazh Appeal Court: http://kad.arbitr.ru/PdfDocument/3636987d-2fb0-4544-a38f-399b09fbe191/A40-240628-2015_20160819_Postanovlenie%20apelljacionnoj%20instancii.pdf.

2 FAS Russia, 'November 2016 – Imposition of the administrative fine' (2 November 2016): http://fas.gov.ru/press-center/news/detail.html?id=47652.

SINGAPORE

Daren Shiau
Allen & Gledhill, Singapore
daren.shiau@allenandgledhill.com

Elsa Chen
Allen & Gledhill, Singapore
elsa.chen@allenandgledhill.com

Update on Singapore competition law

Since our last article for the IBA Antitrust News (dated December 2016), there have been developments in Singapore competition law, of which this article seeks to provide a summary.

CCS accepts capacity commitments by Singapore Airlines and Lufthansa in clearing their proposed joint venture

On 12 December 2016, the Competition Commission of Singapore (CCS) issued a press release announcing that it had accepted voluntary commitments from Singapore Airlines Limited and Deutsche Lufthansa AG (collectively, the 'Parties') in clearing their proposed joint venture (the 'Proposed JV').

On 5 February 2016, CCS received a notification for a decision with regard to the Proposed JV, which relates to the provision of international scheduled air passenger services between certain Asia/Asia Pacific countries (specifically Singapore, Indonesia, Malaysia and Australia) and certain European countries (specifically Germany, Austria, Switzerland and Belgium).

Under the Proposed JV, the Parties will cooperate in respect of pricing, inventory management, sales and marketing. The Proposed JV will also involve schedule coordination, capacity coordination and revenue sharing on the following routes involving non-stop or direct services: Singapore–Frankfurt; Singapore–Munich; Singapore–Dusseldorf; and Singapore–Zurich.

The CCS reviewed information provided by the Parties as well as feedback received from third parties in a public consultation. In the case of two specific routes, namely the Singapore–Frankfurt and Singapore–Zurich routes, the Parties are the only two airlines operating direct flights from Singapore and their combined market shares exceed 80 per cent. The feedback from the public consultation, with which the CCS agreed, was that the price and capacity coordination

between the Parties would raise competition concerns on these two routes, in particular possible reductions in capacity and an increase of fares after the JV came into effect.

The Parties provided the following voluntary commitments, to address the competition concerns identified by the CCS:

- maintain seat capacity levels on the Singapore–Frankfurt and Singapore–Zurich routes, at levels that existed prior to the Proposed JV;
- increase seat capacity on the Singapore–Zurich route by an additional specified number of seats, by a certain date;
- increase seat capacity on the Singapore–Frankfurt route by an additional specified number of seats, by a certain date;
- carry a minimum number of Singapore passengers on the Singapore–Frankfurt route, in each calendar year;
- carry a minimum number of Singapore passengers on the Singapore–Zurich route, in each calendar year; and
- appoint an independent auditor to monitor compliance with the above, and report periodically to the CCS.

Having considered feedback from third parties after the market testing of the commitments, the CCS found that the commitments provided by the Parties would be sufficient to mitigate the identified competition concerns and would provide assurance that the benefits of the Proposed JV to Singapore would materialise. In particular, the commitments would ensure an increase in capacity and frequency on flights between the Singapore–Frankfurt and Singapore–Zurich routes, and would lead to increased passenger numbers and tourists to Singapore, and accordingly benefit Singapore's economy. The CCS concluded that, as long as the commitments are complied with, the Proposed JV will result in net economic benefits to Singapore.

CCS continues to closely scrutinise vertical restraints

On 20 December 2016, the CCS was cited in an article in *The Business Times* as having investigated an exclusive agreement in the sporting gear industry in Singapore. The investigation was in relation to exclusive supply agreements in the retail replica football merchandising industry in Singapore pursuant to a complaint in 2014.

Following its investigation, the CCS found that the barriers to entry and/or expansion were not prohibitive for retailers in the business of retailing replica football merchandise. This is on the basis that suppliers would consider on a yearly basis the retailers to be appointed for new product lists and designs to be released in the market. The CCS accordingly found that it was unlikely any retailer had significant market power to be able to prevent other retailers from competing in the market.

Vertical restraints and, in particular, exclusive agreements, continue to be a focus for the CCS in its enforcement priorities. While vertical restraints are excluded from the prohibition against anti-competitive agreements, they are nonetheless subject to, and closely examined under, the abuse of dominance prohibition. This is the fourth publicised investigation by the CCS into exclusive agreements in the past 18 months, and the sixth such publicised investigation by the CCS into vertical restraints since 2013.

In August 2016, the CCS announced that it had, acting on complaints, investigated an alleged anti-competitive practice by an online food delivery provider in Singapore. The investigation revealed that the online food delivery provider had entered into exclusive agreements with certain restaurants, which prevented the restaurants from using other providers' services. While the CCS ceased its investigation as competition has not been harmed at this time, the CCS stated that it will continue to closely monitor the market as such exclusive agreements can be problematic in future.

CCS clears acquisition of shares in an automotive vehicles supplier

On 6 February 2017, the CCS issued a press release announcing that it had cleared the acquisition (the 'Transaction') by Nissan Motor Co Ltd (Nissan), an affiliate of Renault SA (Renault) pursuant to an alliance entered into between Renault and Nissan in 1999, of a 34 per cent shareholding in Mitsubishi Motors Corporation (Mitsubishi). In Singapore, Nissan, Renault and Mitsubishi are involved in the supply of automotive vehicles to third-party distributors, including passenger vehicles and commercial vehicles and of automotive spare parts for their own respective brands of vehicles. In its merger assessment, the CCS considered the possibility of narrower and/or broader product market definitions for light commercial vehicles and passenger vehicles, and concluded that the parties overlap in the

supply of: (1) mini cars; (2) small cars; (3) medium cars; (4) sports utility cars; and (5) pick-up trucks in Singapore (collectively, the 'Relevant Markets').

Overall, the CCS was persuaded that the Transaction did not infringe section 54 of the Competition Act (Chapter 50B), which prohibits mergers that have resulted, or may be expected to result, in a substantial lessening of competition in Singapore, on the basis that:

- **Extent of entry barriers**: The barriers to entry in the Relevant Markets were sufficiently low as it was proven that there were new manufacturers and/or brands of passenger vehicles that entered Singapore in recent years with respect to passenger vehicles and there would be little cost for an existing manufacture that already supplies passenger vehicles in Singapore to supply light commercial vehicles; and
- **Countervailing buyer power**: It was established that distributors and large corporate end-customers have the buyer power to engage in price negotiations, and that the Transaction is therefore unlikely to affect the large corporate end-customers and distributors' abilities to negotiate for a better price.

The parties notified the CCS of the Transaction on 29 November 2016, and the CCS issued the clearance decision on 23 January 2017 within the CCS Phase I review. This marks the first CCS merger clearance of 2017.

SOUTH AFRICA

Alexis Apostolidis
Adams & Adams, Pretoria
alexis.apostolidis@adamsadams.com

Jac Marais
Adams & Adams, Pretoria
jac.marais@adamsadams.com

Misha Van Niekerk
Adams & Adams, Pretoria
misha.vanniekerk@adamsadams.com

2016: A year in review

Criminalisation of cartel conduct

With effect from 1 May 2016, section 73A of the Competition Act, 89 of 1998, provides that contravening section 4(1)(b) of the Act may result in criminal liability for directors or managers of firms.

Section 73A provides that it is a criminal offence for directors or managers of firms to cause the firm to engage in or knowingly acquiesce to the firm engaging in a prohibited practice in terms of section 4(1)(b) of the Competition Act – the abovementioned section prohibits colluding with competitors to fix prices, divide markets or collude in tenders.

However, this section does not apply retrospectively; in other words, it only applies in respect of conduct that occurs after 1 May 2016.

Section 74(2) provides that a person convicted of an offence in terms of section 73A is liable to a fine not exceeding ZAR500,000 or to imprisonment for a period not exceeding ten years, or to both a fine and imprisonment.

Although the Act does provide for the Commission to certify that a person is deserving of leniency in the circumstances (and allows the Commission to make submissions to the National Prosecuting Authority in support of leniency), it is feared that criminalising cartel conduct will have a negative impact on firms coming forward and utilising the corporate leniency policy.

Nationwide Airlines' civil damages claim arising from contravention of the Competition Act succeeds

In a landmark judgment on 8 August 2016, the Gauteng Local Division of the High Court ruled in favour of Nationwide Airlines in its case against South African Airways for damages arising from anti-competitive conduct.

Nicholls J stated that Nationwide's claim for damages, based on a section 65 certificate issued by the Competition Tribunal evidencing anti-competitive conduct committed by South African Airways, 'is a delictual claim, the first of its kind, arising out of the anti-competitive practices of our national carrier South African Airways'.

Government reaches a settlement with a number of construction companies involved in the construction cartel

On 11 October 2016, the government, through the Minister for Economic Development, entered into a settlement agreement with seven construction

companies, including Aveng, WBHO Construction, Murray & Roberts, Group Five and Stefanutti Stocks.

In terms of the agreement, the companies will, inter alia, collectively contribute ZAR1.5bn to a development fund over the next few years. The agreement sets the framework for the settlement of claims by the industry regulator, Construction Industry Development Board (CIDB), and civil claims by public entities arising from the Competition Commission's findings in respect of collusion in the industry.

Publication of guidelines regarding analysis of public interest in mergers

On 2 June 2016 the Commission published its final guidelines setting out the steps it will take (and the types of information the Commission may require be taken into account) when considering the impact of a particular merger on the listed public interest grounds.

This includes determining the likely effect of a merger on the public interest grounds listed and considering whether such effect is merger-specific, that is, resulting from the merger. If such effect can be said to be merger-specific, the Commission will then consider whether the effect can be said to be substantial.

The acting Deputy Commissioner at the time, Hardin Ratshisusu, stated that the guidelines 'mark an important milestone in merger regulation in South Africa since the establishment of the Competition Commission 16 years ago [...] We encourage business and practitioners to follow these guidelines when filing mergers in South Africa.'

The Spanish competition authority closes the investigation opened to Pfizer for alleged prevention of parallel imports

SPAIN

Iñigo Igartua

Gómez-Acebo & Pombo, Barcelona

iigartua@gomezacebopombo.com

In 2009, the former Spanish Competition Authority (*Comisión Nacional de la Competencia* - CNC') decided not to further investigate the complaint filed by Spain Pharma (a Spanish wholesale distributor of medicines) concerning an agreement between Pfizer and COFARES (a cooperative for the distribution of medicines and medical devices), which would have allegedly prohibited the export of Pfizer's medicines from Spain to other EU countries and the implementation by Pfizer of a dual price system for medicines being dispensed in the national market or intended to be sold in other EU countries.

This decision by the CNC was appealed by Spain Pharma before the Court of Appeal and the judgment issued thereby was subsequently appealed by the State Attorney and Pfizer before the Supreme Court, who decided that the CNC should have further investigated Pfizer's conduct and should not have closed the file.

In view of the Supreme Court's judgment, the Competition Authority (*Comisión Nacional de Mercados y Competencia* - CNMC) opened formal proceedings against Pfizer in order to investigate its supply agreements, which may have hindered parallel trade between European countries. In particular, the CNMC has analysed whether the price policies implemented by Pfizer as from 2001 may have prevented parallel trade of Pfizer's medicines.

Since 2001, Pfizer has implemented and maintained price policies characterised by the fact that they distinguished two prices: (1) the prices for those medicines funded by the Spanish national healthcare system and dispensed in Spain (which correspond to the regulated prices established by the competent public authorities); and (2) the prices applied for the sale of the rest of medicines (which are the prices freely established by Pfizer). According to Pfizer's price policy implemented in 2005, Pfizer sells the medicines at the price it freely determines; afterwards, only when the medicines are

funded by the national healthcare system and the distributors prove that the medicine has been dispensed in Spain, then Pfizer makes the corresponding adjustments in order for that sale price to be adapted (reduced) to the regulated price.

In this decision, the CNMC analyses the described pricing policies in order to determine whether it may be considered as anti-competitive conduct for restricting parallel imports of medicines between EU Member States and carries out an assessment based on two main points: (1) whether Pfizer's conduct is its independent behaviour or results from Spanish regulation of medicines' prices; and (2) whether the famous *Glaxo* case[1] is applicable to Pfizer's conduct.

The CNMC takes into special account that at the time that Pfizer established its dual pricing system, the Spanish regulation in force as regards medicine prices provided that the administration would fix a maximum price for those medicines that were funded by the Spanish social security (or by state resources destined for health services) and were dispensed in the national territory. This second requisite was introduced in 2000; until 1998, all medicines sold in Spain had a regulated price, while from 1998 until 2000, the sole condition for establishing a regulated price was that the product was funded with public resources.

In view of this regulation, the CNMC has considered that the application by Pfizer of two different prices has been a consequence of an obligation imposed by the law, which Pfizer is obliged to comply with. In this regard, Pfizer would not have voluntarily fixed two different prices depending on the destination of the medicines aiming at avoiding parallel trade but would have unilaterally determined its prices, using its freedom to fix the price of its products. It would have replaced those prices with the regulated prices once it verified that the legal requirements have been fulfilled (ie, the products are funded by the national healthcare system and have been dispensed in Spain) in order to comply with the duties imposed thereon by the law. On the basis of that interpretation, the CNMC concluded that Pfizer's price scheme was implemented only in order to comply with the national system for the funding of medicines; moreover, the CNMC considers that it would not be reasonable to impose on the laboratories the obligation to fix their prices (for those medicines that are not subject to price regulation) at a similar level as the regulated price or the price at the destination country in order to avoid competition concerns related to parallel imports.

The CNMC has also assessed whether the *Glaxo* case law is applicable to Pfizer's conduct, concluding that it is not possible to apply such case law to the case at stake in view of the different facts of both cases. In particular, the CNMC considered that in 1998 Glaxo established a double pricing scheme on the basis of an extensive interpretation of the law in force at that moment beyond its literal wording. In this regard, Glaxo applied the regulated price only to those medicines that were funded by the national healthcare system and were subsequently commercialised in Spain (in particular, when the medicine was sold to a chemists or hospital located in Spain). However, the law in force at that moment did not require the medicines to be commercialised in Spain in order to have a regulated price: any medicine belonging to a medicine group included in the funding system of the national healthcare system and commercialised in Spain should be sold at the regulated price. Therefore, the double pricing scheme adopted by Glaxo was a voluntary decision taken by the company beyond the actual express wording of the law in force at that moment and was not a consequence of an obligation imposed by the law, as it would be in Pfizer's case.

In view of all the above, the CNMC has closed the investigation on the Spanish subsidiary of Pfizer for alleged double pricing on medicines sold within Spain supposedly aimed at preventing parallel trade of its medicines in its decision issued in 2017.

This case puts an end to a saga of cases relating to the double pricing of medicines funded by the Spanish healthcare system.

The CNMC fines a Spanish company active in the car wash sector for alleged anti-competitive conduct aimed at excluding independent technical services from the market for the provision of repair and maintenance services of its machines

The CNMC has recently fined Istobal, a Spanish company active in the manufacturing and sale of car wash machinery, in the after-sales service and the manufacturing and supply of spare parts for its machinery, for its participation in an agreement concerning a refusal to supply, a market allocation agreement and an abuse

of dominant position aimed at excluding independent (non-authorised) technical services from the market.

The conduct analysed by the CNMC concerned the spare parts for Istobal's car wash machines, which are specific to those machines. According to the CNMC, these spare parts would be customised and essential for the functioning of the machines. These spare parts are manufactured either by Istobal or by third parties in an exclusive regime (ie, the final suppliers of those spare parts manufactured by third parties are Istobal or its authorised technical services). In view of this, the CNMC has considered that Istobal is a monopolist in the market for the manufacturing and distribution of spare parts.

Within this context, the CNMC has understood that Istobal reached two tacit agreements aimed at refusing the supply of spare parts to independent technical services. One of those tacit agreements would have been reached with its authorised technical services by establishing certain requirements for the supply of spare parts that would not be, according to the CNMC, justified from a competition perspective and would be aimed at preventing independent technical services from providing repair and maintenance services. The second tacit agreement would have concerned third parties manufacturing spare parts, according to which those manufacturers would not supply spare parts to the independent technical services but instead would refer those supplies to Istobal. Additionally, from 2008, Istobal would have only supplied the technical information necessary for repairing its car wash machinery through a platform only available for its authorised technical services. Therefore, even if the independent technicians could access the spare parts, they would not have the necessary technical information and, therefore, they could not provide the service. In view of this, the CNMC has concluded the existence of a restrictive agreement aimed at excluding independent technical services from the market for the repair and maintenance of Istobal's car wash machinery.

Moreover, the CNMC has also considered that Istobal abused its dominant position in the market for the supply and commercialisation of spare parts for machinery of its own brand by denying the supply to independent technical services, which would have allowed it to exclude independent technical services from the downstream market for the provision of repair and maintenance services for Istobal's machinery, thereby restricting competition.

Finally, the CNMC has also considered that Istobal reached a tacit agreement with its authorised technical services for the allocation of the market of repair and maintenance services that would have reinforced the refusal to supply, as explained above. In particular, the authorised technical services would only sell spare parts to clients within their assigned territories, while Istobal would have supplied spare parts to those clients located in those areas not covered by any authorised technical services. The CNMC has considered that the assignment of an exclusive territory to the authorised technical service within a selective system operated by Istobal, who controlled the supply of spare parts, reinforces the exclusion of independent technical services and restricts competition among authorised technical services.

In view of the above, the CNMC considered that Istobal had infringed Articles 1 and 2 of the Spanish Competition Act and imposed a fine of €638,770.

This case confirms that the CNMC is prepared to apply the doctrine of abuse of dominance.

Note

1 Joined Cases C-501/06P, C-515/06P and C-519/06P, *GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc v Commission and Commission*, EAEPC and *Aseprofar v GlaxoSmithKline Services Unlimited, formerly Glaxo Wellcome plc*, ECJ judgment, 6 October 2009.

SWEDEN

Lars Johansson
Roschier, Stockholm
lars.johansson@roschier.com

Kristian Hugmark
Roschier, Stockholm
kristian.hugmark@roschier.com

Kristin Heilborn
Roschier, Stockholm
kristin.heilborn@roschier.com

With great power comes great responsibility: proposal for increased powers for Swedish Competition Authority is seen in new light following recent failure to block merger in court

The Swedish Competition Authority (SCA) is one of only a small number of competition authorities in the EU that lack the authority to impose fines or obligations and prohibit mergers. Such measures in Sweden lie within the sole authority of the relevant courts. The Swedish government is currently in the process of assessing whether the SCA should enjoy such powers. A proposal has been put forward that the statutory amendments should be effective as of 1 January 2018.

On 24 November 2016, shortly after the proposal was circulated for a formal consultation, the Swedish Patent and Market Court of Appeal rejected an appeal by the SCA to block the acquisition of Powerpipe AB (Powerpipe) by Logstor Sverige Holding AB, a subsidiary of Logstor A/S (jointly 'Logstor'), owned by private equity.

The case centred on the SCA's standard of proof and the definition of the geographical market. The appeal court's judgment is one of the few court precedents in the field of merger control in Sweden, and it is also interesting in the context of the current consideration of whether or not to increase the SCA's powers.

Background to the *Logstor* case

In September 2015, Logstor notified its acquisition of Powerpipe to the SCA. The SCA decided to launch an in-depth investigation.

The SCA concluded that the there was a risk that the merged entity would gain a dominant position, thereby weakening competition to the detriment of Swedish customers. Thus, the SCA initiated proceedings before the Stockholm District Court to prohibit the merger. The parties to the proposed merger were two out of a total of four manufacturers of pre-insulated pipes used for district heating in Sweden, and the SCA claimed that the parties were the main competitors on the market. The SCA further argued that the merger would substantially weaken competition because it would result in one dominant producer with an approximately 80 per cent share of the Swedish market.

Following a trend in reviews of mergers by competition authorities globally, the SCA relied heavily on internal documents to support its arguments. For example, the SCA stated that although internal documents indicated that Logstor expected synergies to result from the merger, internal documents also indicated that Logstor's purpose in carrying out the acquisition was defensive in nature. According to the SCA, an internal document from Logstor from August 2014 (entitled *Logstor Competitor Analysis*) showed that Logstor's intention behind the acquisition was not only to eliminate a competitor that aggressively competed on price in respect of Swedish customers, but also to remove the risk of another company acquiring Powerpipe. Also, to support its arguments in relation to competition conditions and market shares, the SCA referred to a Vendor Due Diligence (VDD) report produced by a major auditing firm in connection with the acquisition of Logstor by its current private equity owner in 2012.

Logstor and Powerpipe disputed the SCA's claim and argued that there was no specific support for limiting the geographical market to Sweden. On the contrary, Logstor and Powerpipe argued, the current market conditions confirmed that the market was Europe-wide.

On 4 August 2016, the court rejected the SCA's request to prohibit the merger.

In its judgment, the Stockholm District Court considered, contrary to the view of the SCA, that the geographic market for the manufacturing and distribution of pre-insulated pipes used for district heating was broader than national in scope. According to the court, the relevant geographic market was northern Europe, in which Powerpipe would have only a 35 per cent market share as a result of the proposed merger. Accordingly, taking into consideration the other characteristics of the market, the court found that a market share of 35 per cent was not indicative of a dominant position.

Ruling of the Patent and Market Court of Appeal

The SCA appealed the judgment to the Patent and Market Court of Appeal, the highest court in Sweden to which a case concerning the prohibition of a merger can be appealed. In its appeal, the SCA claimed that the court erred in its methodology of defining the relevant geographic market, which in turn resulted in an erroneous judgment to allow the acquisition.

As evidence, the SCA again referred to the parties' internal documents, which in the SCA's view illustrated how competitors and conditions on the market differ between EU countries. In the SCA's opinion, these differences indicated that the relevant geographic market was national in scope. The SCA also referred to internal strategy documents in which Logstor described Powerpipe as 'a key competitor threat' and 'a major headache on the Swedish market'.

On 24 November 2016, the appeal court upheld the court's judgment, thereby approving the merger.

After having concluded that the first step is to determine the relevant market, which will serve as the basis for the assessment of the merger's effects on competition, the appeal court evaluated which party has the burden of proof and what standard of proof is required. The appeal court came to the conclusion that the burden lies on the SCA to establish convincingly the actual relevant product market and the actual relevant geographical market.

The appeal court then critically reviewed the lower court's assessment of the relevant market, where only the geographic market definition was disputed.

Both parties maintained their arguments as regards the scope of the geographical market, the SCA arguing that the market was Sweden and Logstor and Powerpipe arguing that the market was the EEA and Switzerland.

In an overall assessment of the evidence in relation to the relevant geographical market, the appeal court came to the conclusion that the SCA had not convincingly established that the relevant market was limited to Sweden.

As regards the VDD report cited by the SCA, the appeal court noted that, when assessing the VDD report's value as evidence, the court must take into account that the VDD report had been produced about four years ago and that it was created in connection with a divestment of Logstor. (That is, even though the VDD report was an important document, it was produced by an auditor instructed by the seller and, therefore, is likely to include subjective opinions rather than facts.) Thus, the appeal court concluded that the information in the VDD report could not be used as a basis for establishing the market shares of the market players either in Sweden or in other countries.

Further, the appeal court noted that the SCA had not presented an alternative definition of the market and there was no other investigation in the case that indicated an alternative definition. Based on this factor, the appeal court concluded that the views of Logstor and Powerpipe must form the basis for the further assessment, that is, that the relevant geographical market should include the EEA and Switzerland. On that basis, the appeal court concluded that there was no support in the investigation for the notion that the merger between Logstor and Powerpipe would create or strengthen a dominant position, or that it would otherwise have a negative effect on competition. Accordingly, the appeal court permitted the merger.

Comments

Even though the SCA must go to court in order to prohibit a merger, final judgments in such cases have been rare in Sweden. In the vast majority of cases where the SCA has declared its intention to go to court, the merging parties have decided not to proceed with the concentration. In the past ten years, there have only been seven merger cases where prohibition has been the SCA's main claim. Out of these seven cases, the action was withdrawn in four (because the parties

abandoned or modified the merger), the court agreed with the SCA to prohibit the merger in one, and the court decided to go against the SCA in two (one of them being the recent *Logstor* case, the other being dismissed on procedural grounds).

Going even further back in history, the SCA has lost a merger case in court on geographic market definition before. In 1998, the SCA requested that the courts prohibit Swedish manufacturer Optiroc's acquisition of Stråbruken. The SCA claimed that the merger would create a dominant position on several Swedish building material markets. Both the lower court and the appeal court rejected the SCA's claim, the latter concluding that there were several factors indicating that the geographic market was wider than national in scope.

Therefore, the *Logstor* case is the second case in which the SCA has failed to prove its view of the geographic market. Overall, in Swedish merger control history the SCA has only 'won' one out of five contentious cases where a judgment has been rendered. The SCA has similarly struggled in antitrust cases. For instance, the fines the SCA has asked the court to impose have been reduced by approximately 75 per cent on average in final judgments.

If the SCA had enjoyed the power to prohibit mergers at the time of the *Logstor* case, the merger would likely have been prohibited. The process would then have been reversed, with the possibility for the merging parties to appeal the SCA's decision.

In a press release concerning the *Logstor* case, the SCA stated that, following the judgment, the standard of proof required in respect of the authority's evidence is so high that more extensive investigations could be required, thereby making the process more onerous for merging companies.

Given the recent *Logstor* judgment and the proposals to increase the SCA's powers, in terms of providing legal certainty and adhering to due process, it seems reasonable to require a high standard of proof for the SCA to prohibit mergers.

It is not surprising that the SCA is seeking increased decision-making powers, both in the areas of merger control and antitrust.

Leaving aside the wider discussion of whether such a legislative change is merited, it is conspicuous that the current proposal does not include any amendments to the current organisational structure of the SCA. In the current structure, there is no division between the investigating function and decision-making function (where one Director General is the sole decision-maker), and there are currently no legal safeguards in place for the SCA, as there are for the European Commission's decision-making procedure (for example, there is no binding 'Statement of Objections' but rather a right for the merging parties to comment on a non-binding 'draft').

Thus, if the decision-making power is to be transferred to the SCA, the SCA's organisational structure and due process should reasonably be reformed and some 'checks and balances' should be introduced.

Much of the stakeholder criticism of the proposed changes centred on those very issues; for example, Stockholm University made a broad comparison with the organisational structures of other national competition authorities in the EU to illustrate that there is a need to further investigate necessary amendments to the SCA's organisational structure before transferring decision-making powers to the authority. Also, the Svea Court of Appeal found that certain elements of legal certainty ran counter to the current proposal.

The proposal is still a work in progress and is yet to result in a government bill to be adopted by the Swedish government.

In summary, the *Logstor* case confirms the standard of proof required of the SCA by the courts. In terms of legal certainty, it is crucial that the standard of proof is not in effect lowered if the decision-making powers are transferred to the SCA. On the contrary, a competition authority with such increased powers should set its own bar higher, since the effects of its decisions will be more profound. The SCA's colleagues in European Competition Network (ECN) can surely testify that it is quite a tall order to get the checks and balances right, while at the same time avoiding a system that is unduly cumbersome.

It may be disputed whether it originates from the French revolution or from a Marvel comic, but the saying 'with great power comes great responsibility' is something that both the legislator and the SCA should keep in mind when proceeding with the legislative proposal.

New administrative orders relating to merger control

TAIWAN

Margaret Huang
LCS & Partners, Taipei
margarethuang@lcs.com.tw

Rose Lin
LCS & Partners, Taipei
roselin@lcs.com.tw

Ariel Huang
LCS & Partners, Taipei
arielhuang@lcs.com.tw

On 18 July 2016 and 2 December 2016, Taiwan's Fair Trade Commission (TFTC) issued two new administrative orders relating to 'merger control' under the Fair Trade Act (FTA). In the abovementioned administrative orders, the TFTC announced additional exceptions to merger filings to the existing ones set forth under Article 12 of the FTA and amended the sales threshold of merger filings under paragraph 1 of Article 11 of the FTA.

Exceptions to merger filing

On 18 July 2016, the TFTC announced a new administrative order to supplement the exceptions to merger filing. Based on the announcement, transactions exempt from merger filings include not only those stipulated in the FTA, but also four additional types of transactions:

- the merger of an enterprise with another enterprise that has controlling and subordinate relation with such enterprise;
- the merger of an enterprise with another subordinate enterprise controlled by the same companies as such enterprise;
- the transfer of all or part of an enterprise's outstanding voting shares or equity capital of a third party to another enterprise that has a controlling and subordinate relationship with such enterprise; or
- the transfer of all or part of an enterprise's outstanding voting shares or equity capital of a third party to another subordinate enterprise controlled by the same companies as such enterprise.

Since these transactions are merely internal structural adjustments by controlling enterprises, these transactions are exempt from merger filing in Taiwan under the new order.

Amendment to the sales revenue threshold of merger filings

Pursuant to Article 11 of the FTA, the TFTC has discretion to determine different sales thresholds of merger filings by issuing an administrative order. On 2 December 2016, the TFTC issued a new administrative order, which is an amendment to the previous administrative order dated 9 March 2015 relating to such sales threshold. Before the amendment, the TFTC needs to identify whether a subject enterprise is a financial enterprise as different thresholds would be applied to financial enterprises and non-financial enterprises. For non-financial enterprises, transactions require a pre-merger application when one enterprise in the contemplated transaction has sales in excess of TWD15bn in the preceding fiscal year and the other enterprise has sales in excess of TWD2bn in the preceding fiscal year in Taiwan, respectively. For financial enterprises, transactions require a pre-merger application when one enterprise to the contemplated transaction has sales in excess of TWD30bn in the preceding fiscal year while the other enterprise has sales in excess of TWD2bn in Taiwan in the preceding fiscal year, respectively.

After the amendment, in addition to the current thresholds set forth above for financial and non-financial enterprises, a new threshold was added. Based on the new administrative order, a transaction is subject to pre-merger application in the event where the combined global sales of all the enterprises to the contemplated transaction in the preceding fiscal year exceed TWD40bn and at least two of such enterprises each have sales in excess of TWD2bn in Taiwan in the preceding fiscal year.

With the addition of the new 'global' sales threshold, chances of merger participants requiring a pre-merger application may subsequently increase. Participants in a merger transaction should be aware of the new threshold to avoid inadvertent violations of the FTA and/or subsequent fines from the TFTC.

TURKEY

Bora Ikiler

Moroglu Arseven Avukatlik Ortakligi, Istanbul

bikiler@morogluarseven.com

Employee statements in Turkish competition law: binding or not?

The Turkish Competition Board ('the Board') recently published a decision that could signal a changing stance on the admissibility of statements from employees of investigated undertakings. The Board continues to have wide powers to request and consider information during investigations. However, the recent decision suggests the Board may no longer attach as much weight to statements that are made by employees who do not have official capacity to bind the undertaking.

The Board holds wide legislative power to request information

The Board is the decision-making body of the Competition Authority ('the Authority') and holds wide investigative powers (Articles 14 and 15 of Law No 4054 on Protection of Competition – the 'Competition Law').

Accordingly, the Board can:

- request any information it deems necessary from any public institution, organisation, undertaking and association of undertakings; officials must provide the requested information within the determined period;
- examine the books, paperwork and documents of undertakings and associations of undertakings, plus take copies if needed;
- request written or oral statements about particular issues; and
- perform dawn raids.

Under this framework, statements received from representatives and/or employees of undertakings under investigation are powerful tools in the Board's arsenal. In the past, the Board had used employee statements as both primary and supporting evidence when concluding Competition Law violations.

A recent Board decision states that a person cannot represent and bind an undertaking in an investigation unless the person is in the authorised signatory list. The new approach contradicts prior decisions on the topic, where the Board based its decisions on interviews with employees of undertakings regardless of their authority to represent and bind the undertaking in question.

Turkcell decision[1]

Mobile phone operator, Turkcell İletişim Hizmetleri AŞ (Turkcell), was alleged to have abused its dominant market position via actions towards distributers and dealers. MTK is an individual who submitted information against Turkcell to the Board at the preliminary investigation stage. He attended a complainants' meeting with the case-handlers and made statements against Turkcell. The Board ultimately ruled against Turkcell in June 2011, fining the company TRY 91,942,343.[2]

Turkcell appealed the Board's decision to the Council of State. During these procedures, MTK submitted a petition and a notarised statement confessing to earlier providing misleading information and false statements. He claimed all of his statements and information were untrue and he had been tempted by the complainants' offers to act against Turkcell.[3]

The Authority's legal department asked the Board to provide an opinion on whether MTK's statements would change the merits of the case, as well as an assessment of MTK's wrongful acts within the competition law's scope.

The Board reviewed the investigation report and concluded that it was satisfied that MTK's misleading statements had not impacted the decision's outcome. It noted that:

- MTK was not one of the complainants in the case;
- MTK was a Turkcell dealer, whose statements had only been recorded in one set of meeting minutes. These statements had no prominent effect on the Board's assessment and determinations in the investigation report;
- neither MTK's name, nor the company for which he acted as an unauthorised signatory (Bilgi Teknoloji Telefon Sistemleri Tesksil San Ltd Şti – 'Biltek'), were included in the investigation report; and

- the decision was based on extensive assessment and analysis of information and documents from:
  - onsite inspections;
  - interviews with other market actors;
  - statements by Turkcell's dealers; and
  - precedents from the EU Commission and US Supreme Court.

The Board noted that rules regarding the submission of misleading information only apply to undertakings. It ruled that since MTK is a natural person, who does not operate as an economic entity by himself, MTK could not be deemed to be an undertaking and had therefore not breached the relevant provisions of the Competition Law.

The Board also considered the relationship between MTK and Biltek, on the basis that MTK acted as an unauthorised signatory for Biltek and submitted misleading information to the Board. The Board held that MTK has no liability under the Competition Law because he could not legitimately represent or bind Biltek. However, it noted that MTK's actions could violate the Turkish Criminal Code in terms of giving false statement when preparing official documents, as well as slander. Thus, the Board decided to file a criminal complaint against MTK via the public prosecutor's office.

Conclusion

The Board's decision suggests the binding nature of statements from employees of investigated undertakings depends on whether they have the official capacity to bind the company. This indicates a shift in the Board's established position on admissibility of employee statements. If the Board sticks with this approach, it could mean employee statements will lose their importance as evidence, which the Board uses to consider and rule on infringements.

In this regard, it could be argued that the Board is shooting itself in the foot by unnecessarily limiting the scope of its own powers. The decision's dissenting minority opinions argue that:

- the Board is not required to limit information to employees who have the power to officially bind the undertaking; and
- MTK was de facto representing Biltek and an organic link existed. The Board should have considered these two factors.

Notes

1 Decision No 16-17/285-128, dated 18 May 2016; published on the Competition Authority's website on 16 January 2017.
2 Decision No 11-34/742-230.
3 Council of State, file number 2011/4540.

An update from Ukraine

UKRAINE

Vladimir Sayenko
Sayenko Kharenko, Kiev
vsayenko@sk.ua

Maksym Nazarenko
Sayenko Kharenko, Keiv
mnazarenko@sk.ua

At the end of 2016, the Anti-Monopoly Committee of Ukraine (AMC) approved guidelines regarding the assessment of horizontal concentrations ('the Guidelines'),[1] which were drafted on the basis of EU Horizontal Merger Guidelines. The respective document was developed by the AMC in coordination with Ukrainian law firms with leading positions in competition law, as well as with representatives of the relevant competition authorities of Germany, Lithuania and the US Federal Trade Commission.

The key object of the Guidelines is to ensure increased transparency and improve assessment of horizontal concentrations by the AMC.

In its controlling activities of horizontal concentrations, the AMC defines relevant product and geographical markets and assesses the influence of proposed concentrations on competition within the relevant markets in Ukraine. According to the Guidelines, while assessing horizontal concentrations the AMC has to focus on the following criteria:

- market share of the parties to the concentration on the relevant product markets, as well as Herfindahl-Hirschman Index (HHI) level;
- change of competition structure on the markets as a result of the concentration;
- possibility of anti-competitive consequences on relevant product markets;
- buyers power on the relevant markets;
- possibility for new undertakings and market entrance; and
- bankruptcy risks.

The Guidelines determine that the starting point for the AMC's analysis is the assessment of the volume of the relevant market and determination of the market shares of the parties and their competitors, as well as the competition structure of the market.

At the same time, the Guidelines stress that analysis in each case should be based on the overall assessment of the expected impact of concentration, taking into account all factors and conditions. Assessment of the above-mentioned factors would not always be applicable for horizontal merger analysis, and certain criteria may not be subject to the process.

In accordance with the Guidelines, horizontal mergers may have either unilateral or coordinating consequences.

Unilateral consequences are effects that occur without the coordination of competitive behaviour, that is, take place as a result of the elimination of existing or potential competitive restrictions with respect to one or more undertaking. The Guidelines illustrate the limitation of production facilities, influence on the markets of differentiated products, and influence on the potential of competitors to compete as the main examples of unilateral effects.

Coordinated consequences are effects reducing competition that could occur only via tacit or explicit coordination. The implementation of the horizontal merger may lead to the possibility of coordination between the parties. In order to determine coordinated effects, the AMC will analyse the possibilities of reaching a coordination, conditions for the sustainability of coordinated interactions, capabilities to monitor deviations from the terms of coordination, restraining mechanisms, and reactions of third parties.

As a result of the assessment, the AMC may conclude that the merger could lead to negative impacts on competition, which are simultaneously counteracted by the positive competitive effects provided that such effects: (1) could not be achieved without the implementation of the concentration; and (2) are profitable and timely for consumers.

In particular – as potential balancing factors – the AMC takes into consideration the countervailing buyer's power, the possibility for market entry, and the risks of bankruptcy. In cases where such balancing factors are in place and could neutralise the anti-competitive effects of concentrations, such concentrations may be permitted.

Buyer power is the strength of the position in the market, that is, the buyer's ability to influence the supplier in business negotiations by means of its size, commercial value and ability to switch to alternative suppliers. In certain cases, the buyer could be able to prevent an increase of prices by suppliers or other quality deterioration or supply conditions, in particular, if the buyers: (1) could switch to other sources of supply in a reasonable time; (2) become vertically integrated in the relevant market; or (3) to foster an increase of market players, that is, entry of new participants. This could mean the opportunity to place large orders from potential competitors. This would represent having significant power.

At the same time, the monopolisation of the market or a substantial restriction of competition as a result of concentration is unlikely to be the case when new competitors could easily enter the market. The AMC indicates that when market entry is expected, it may prevent any potential negative effects of concentration. Analysis of these points should also take into account entry to the relevant markets in the past.

The AMC may also approve a horizontal merger that could lead to distortion of competition in cases where one of the parties is an insolvent entity facing bankruptcy. The basic condition of the respective risk of bankruptcy is a fact that could lead to deteriorating competition in any case in the future, even if the proposed concentration did not occur. In particular, there are three criteria for applying risk of bankruptcy as a balancing factor: (1) a potentially insolvent undertaking would be displaced from the market due to financial difficulties, even if the merger is not consummated; (2) there is no less anti-competitive alternative other that the proposed concentration; and (3) if the concentration is not performed, the assets of an insolvent undertaking would be certainly derived from the product market.

To sum it up, the Guidelines have been developed and approved by the AMC in order to establish certain predictability in the initial analysis of horizontal mergers by the Ukrainian competition authority and fulfil both Ukrainian state commitments under the EU-Ukraine Association Agreement and expectations of the business community.

Note

1 Guidelines regarding procedure of applying part one of Art 25 of the Law of Ukraine 'On Protection of Economic Competition' on assessment of horizontal concentrations as of 29 December 2016.

An update from the UK

UNITED KINGDOM

Stephen Wisking
Herbert Smith Freehills, London
stephen.wisking@hsf.com

Molly Herron
Herbert Smith Freehills, London
molly.herron@hsf.com

The question of personal liability for competition law breaches has been a focus of debate in the UK in recent years. To date, that debate has to date centred on criminal liability for cartel conduct, in particular the changes to the Section 188 Enterprise Act 2002 (EA02) criminal cartel offence introduced by the Enterprise and Regulatory Reform Act 2013, notably the removal of the 'dishonesty' element of the offence. However, a December 2016 decision of the Competition and Markets Authority (CMA) has placed the spotlight on the CMA's hitherto unused power to secure director disqualification for infringements of competition law, and its potential deterrent effect.

Director disqualification

The EA02 introduced new provisions into the Company Directors Disqualification Act 1986 (CDDA) allowing the court to make a competition disqualification order (CDO) disqualifying a company director from acting as a director for up to 15 years where:

- the company of which they are a director has infringed the Article 101 or 102 TFEU and/or Chapter I or II prohibitions on abuse of dominance or anti-competitive agreements; and
- their conduct as a director makes them unfit to be concerned in the management of a company.

The CMA and the sectoral concurrent regulators (responsible for regulating sectors such as telecoms, energy, rail, aviation and water) have the power to seek such a CDO from the court, and to accept disqualification undertakings in lieu of a CDO (allowing the individual to avoid the cost of a court application).

This is in addition to the power of the court to disqualify any director convicted of an indictable criminal offence, including the criminal cartel offence (this power was used in 2008 to disqualify three directors for periods of between five and seven years as a result of their criminal convictions in relation to the *Marine Hoses* cartel).[1]

Despite guidance issued by the CMA's predecessor, the Office of Fair Trading (OFT), in June 2010 indicating a greater willingness to make use of CDOs in light of their deterrent effect,[2] this power had remained unused. It is unclear why, despite its rhetoric, no attempt to secure a CDO had been made until now.

On 1 December 2016 the CMA announced that Daniel Aston, managing director of the online poster supplier Trod Ltd, had given a disqualification undertaking to the CMA not to act as a director of any UK company for five years.[3] The CMA had in August 2016 found that Trod Ltd had infringed the Chapter I prohibition by agreeing with (the leniency recipient)[4] GB eye Ltd not to undercut each other's prices for posters and frames sold on Amazon Marketplace (this price agreement interestingly being implemented by the use of automated repricing software), imposing fines of £163,371 following a settlement.[5] The CMA stated that as Mr Aston was the managing director of Trod Ltd at the relevant time, and because he personally contributed to the breach of competition law, it considered that his conduct makes him unfit to be a company director. It is worth noting that its guidance makes clear that the CMA may also apply for a CDO where a director was not personally involved in an infringement, or indeed does not have actual knowledge of the infringement, provided that they *ought* to have been aware of the infringing conduct in light of their position and responsibilities.

In its press release announcing the disqualification, the CMA noted that it would look at the conduct of directors involved in competition law infringements and that it is 'absolutely prepared to use this power again'. The CMA will no doubt hope that this precedent will increase the deterrent effect of CDOs and, together with its criminal enforcement powers (see below), which were not used in this case, drive leniency applications and raise awareness of the need for competition law compliance (in particular for small and medium-sized enterprises).[6] As part of this awareness-raising campaign, the CMA has updated its competition law risk guide for business and produced a '60-second summary' for company directors and their advisers on how to avoid disqualification.[7]

It remains to be seen, however, how prepared the CMA will be to seek a CDO from court in a contested case (for example, where no settlement was reached in the competition investigation).

Criminal cartel offence

The CMA's compliance campaign also highlights the risk of prosecution for the section 188 EA02 criminal cartel offence.

As noted above, the cartel offence was revised by the Enterprise and Regulatory Reform Act 2013, in particular to remove the requirement to prove dishonesty on the part of the defendant(s) (which the OFT had identified as the key barrier to successful prosecutions).[8] To establish dishonesty, it was necessary for the jury to find that what was done was 'dishonest' according to the ordinary standards of honest and reasonable people, and that the defendant realised that what they were doing was dishonest according to those standards. This *mens rea* element was replaced by a series of exclusions (for example, where specified information about the agreement is given to customers or published prior to the relevant agreement being entered into) and defences (including the absence of an intent to conceal the arrangements from customers or the CMA and, controversially, the disclosure of the arrangements to professional legal advisers for the purpose of obtaining advice), intended to delineate legitimate from criminal agreements.

However, the new law applies only to agreements made on or after 1 April 2014. No cases have been brought under the new offence to date.

The CMA has continued to pursue criminal cartel investigations under the old offence. Most recently, on 21 March 2016, Barry Kenneth Cooper pleaded guilty to the cartel offence (as part of the CMA's investigation into suspected cartel conduct in respect of precast concrete drainage products).[9] Sentencing is awaited. In terms of likely sentence, in September 2015 an individual who had pleaded guilty to the cartel offence (in connection with cartel conduct in respect of galvanised steel water tanks)[10] was sentenced to six months' imprisonment, suspended for 12 months, and ordered to do 120 hours of community service. The judge noted that 'the economic damage done by cartels is such that those involved must expect prison sentences', and indicated that his starting point was two years, discounted by 75 per cent in light of the defendant's early guilty plea, his personal mitigation and the extent of his voluntary cooperation as a witness in the trial of his two co-defendants who pleaded not guilty.[11]

In that trial the two co-defendants were acquitted by the jury, on the grounds of a lack of dishonesty (the only contested issue).[12] Those defendants had argued that the cartel was not dishonest because it had the aim of saving their businesses as well as the jobs of their employees. The outcome of this case has inevitably raised questions as to whether any further cases will be pursued under the old offence.[13]

The first prosecution under the new offence is therefore awaited, with speculation that criminal cases may increase following the UK's exit from the European Union, when the European Commission will no longer conduct civil investigations in relation to the UK market.

Notes

1 See: http://webarchive.nationalarchives.gov.uk/20140402142426; www.oft.gov.uk/news-and-updates/press/2008/72-08.
2 Competition disqualification orders: OFT510; see: www.gov.uk/government/publications/competition-disqualification-orders.
3 See: www.gov.uk/government/news/cma-secures-director-disqualification-for-competition-law-breach.
4 The CMA will not apply for a CDO against any current director of a company receiving leniency.
5 See: www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products. The US Department of Justice also investigated this conduct.
6 See: www.gov.uk/government/collections/competing-fairly-in-business-advice-for-small-businesses.
7 See: www.gov.uk/government/news/cma-updates-competition-law-risk-short-guide.
8 The only convictions having been secured prior to that point were those in *Marine Hoses* (see: www.gov.uk/cma-cases/marine-hose-criminal-cartel-investigation), in relation to which the defendants agreed to plead guilty as part of a plea bargain with the US Department of Justice. A subsequent prosecution against a number of British Airways executives in relation to the *Passenger Fuel Surcharges* (see: http://webarchive.nationalarchives.gov.uk/20140402142426; www.oft.gov.uk/OFTwork/competition-act-and-cartels/criminal-cartels-completed/fuel-surcharges-proceedings) investigation collapsed at trial.
9 See: www.gov.uk/cma-cases/criminal-investigation-into-the-supply-of-products-to-the-construction-industry.
10 In relation to which the companies involved were recently found to have infringed the Chapter I/Article 101 TFEU prohibitions, including as a result of the exchange of commercially sensitive information at a single meeting (see: www.gov.uk/government/news/cma-fines-water-tank-firms-over-27-million).
11 See: www.gov.uk/government/news/director-sentenced-to-6-months-for-criminal-cartel.
12 See: www.gov.uk/government/news/cma-statement-following-completion-of-criminal-cartel-prosecution.
13 The CMA has not ruled this out, in appropriate cases, although it subsequently closed two investigations on the ground that the threshold for prosecution was not met (see: https://competitionandmarkets.blog.gov.uk/2015/09/29/criminal-cartel-enforcement-after-galvanised-steel-tanks).

IBA conferences

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

the global voice of
the legal profession®

21st Annual Competition Conference

Follow us

@IBAevents
#IBAComp

8–9 September 2017, The St Regis Florence, Florence, Italy

Now in its 21st year, the IBA Antitrust Committee will once again bring together some of the world's leading practitioners to discuss the latest developments and hot topics in competition law today. This conference is now one of the most established events in the antitrust calendar.

Keynote speakers:

Andreas Mundt *Chairman, International Competition Network; President, Bundeskartellamt, Bonn*

Maureen Ohlhausen *Acting Chairman of the US Federal Trade Commission, Washington DC*

Topics include:

- Big data: the big issue
- Extending the scope of merger control
- Dealing with the world's competition regulators: an in-house perspective
- Dominance and rebates in the high-tech sector and beyond
- Selective distribution: views from both sides
- Interview with former heads of US agencies
- Protecting documents: confidentiality, publication, disclosure and legal privilege

Headline conference sponsor

FOR MORE INFORMATION AND TO REGISTER YOUR INTEREST VISIT
WWW.IBANET.ORG/CONFERENCES/CONF783.ASPX