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Antitrust News

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IBA 2017 Sydney

8–13 OCTOBER

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

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We are pleased to present the September 2016 edition of the IBA Antitrust Committee newsletter, which covers news from 34 different jurisdictions around the world, including reports on:

- the introduction of criminal liability for directors and managers who participate in a cartel in South Africa;
- recent notable merger and antitrust cases, inter alia from the Sweden (affirming the per se significance of price-fixing, quantity limiting and market allocating agreements), Taiwan (Uber Taiwan fined NT1m on charges of false advertising) and Turkey (presumption of concerted practice)
- upcoming liberation of Russian competition legislation with respect to small businesses;
- cooperation between agencies: exchange of information between JFTC and the Chinese Commerce Agency on mergers and acquisition, and the Framework Cooperation Agreement between COMESA Competition Commission and the Competition Authority of Kenya;
- Pro-privacy judgment of Irish Competition Court limiting regulator's dawn raid powers regarding electronic data;
- The practice of the Croatian competition agency in imposing fines;
- The Opinions on Establishing Fair Competition Review System in the Development of the Market Regime published by the China State Council

Working groups

The Committee's various working groups have been very active 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 in June, we have submitted our comments on the Chinese draft Guidelines on the General conditions and Application Procedures for Exemption for Monopoly Agreements by the State Council's Anti-monopoly Commission. The Submissions may be found on the Committee's webpage on the IBA website.

Conferences

Upcoming conferences are:

- IBA Annual Conference, 18–23 September, Washington, DC. The Antitrust Committee will actively participate in the conference. Sessions sponsored by the Antitrust Committee include Global antitrust enforcers roundtable, Effective remedies in multijurisdictional mergers, Cartels and corruption, Effective antitrust compliance programmes, Are recent trends in franchising competition law-proof, The antitrust/intellectual property interface: how are courts and competition authorities around the world dealing with standard essential patents and FRAND commitments?, A game of thrones: interaction between manufacturer and distribution channels, and The interplay between antitrust merger review and foreign investment review.
- 20th Annual Competition conference, on 14–15 October, in Florence. The conference is presented by the Antitrust Committee, supported by the IBA European Regional Forum. Topics include Development and future of multinational antitrust enforcement, Public interest considerations and the enforcement of competition law, Antitrust issues viewed from the in-house perspective, Mergers in concentrated markets, Private damages litigation, and Antirust in the online world.

In the second quarter of 2016, the Antitrust Committee successfully hosted or participated in the following conferences:

- 12th Annual IBA Competition Mid-Year Conference, on 16–17 May, Mexico City. The conference was presented by the Antitrust Committee, supported by the Latin American Regional Forum and included such topics as: cartel enforcement (Cartels, leniency, settlements and damages: what is new in the Americas?); criminal sanctions including dawn raids and due process (Criminal Enforcement in Latin America); information exchange, international enforcers roundtable, merger control (From fireside chats to pre-merger due diligence: the impact of competition rules on the exchange of information

among competitors, including merger clean teams); and unilateral conducts (Unilateral conduct in Latin America: on the radar), including telecom (International merger control: global and local issues).

- 27th Annual IBA Communications and Competition Conference, on 6–7 June, in Amsterdam. The conference was presented by the IBA Communications Law Committee, the IBA Antitrust Committee, supported by the IBA European Regional Forum. Topics included Antitrust and Regulatory Joint Roundtable; Regulating Digital Platforms, Consolidation and Incentives to Invest, Regulatory Models: what works and how effective are current models, Digital cities as drivers of economic growth and innovation: how can regulation play a role, and Privacy challenges for new services and new devices.

We encourage you to attend our conferences and become involved in the IBA Antitrust Committee's activities. We also welcome any help you can provide in recruiting new members, informing us of antitrust developments in your country or reporting on our conference panel sessions for this newsletter.

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

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IBA2016 18–23 SEPTEMBER WASHINGTON DC

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

Antitrust Committee sessions

Monday 1045 – 1230

Cartels and corruption

Presented by the Antitrust Committee, the Anti-Corruption Committee and the Healthcare and Life Sciences Law Committee

This programme will consider the interplay between cartels and other forms of corrupt conduct, such as bribery, market manipulation and fraud.

Tuesday 1045 – 1230

Effective antitrust compliance programmes

Presented by the Young Lawyers' Committee, the Antitrust Committee and the Corporate Counsel Forum

This session will offer practical advice on how to design and implement effective antitrust compliance programmes, including designing programmes to maximise the availability of leniency credit.

Tuesday 1430 – 1730

Global antitrust enforcers roundtable

Presented by the Antitrust Committee

Senior antitrust enforcers from the US and the European Commission will participate in a discussion of current antitrust enforcement issues.

Wednesday 1045 – 1230

Effective remedies in multijurisdictional mergers

Presented by the Antitrust Committee

This programme will discuss the challenges of negotiating remedies in multinational mergers where different competition authorities may insist on different remedies.

Wednesday 1615 – 1730

Are recent trends in franchising competition law-proof?

Presented by the International Franchising Committee and the Antitrust Committee

The session will discuss the current status of recent trends in competition law affecting franchising, including: (i) digital & e-commerce: ECJ Pierre Fabre judgment, EU Commission inquiry on e-commerce and the debate on whether restrictions of third party platforms are allowed; (ii) mandatory laws on the dependency of franchisees on the franchisor around the globe ('abuse of dominance' rules in both the civil and comp law context, and the impact on termination cases around the globe); and (iii) franchising in a multi-tier setting (combination with a selective or exclusive distribution system in the same – or other – regions).

Thursday 1045 – 1230

The antitrust/intellectual property interface: how are courts and competition authorities around the world dealing with standard essential patents and FRAND commitments?

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

This programme will consider recent developments in antitrust issues raised by SEP and FRAND and how these issues are addressing the interplay, including the European Court of Justice decision in *ZTE v Huawei*.

Thursday 1430 – 1730

The interplay between antitrust merger review and foreign investment review

Presented by the Antitrust and Trade Law Section

Many mergers and acquisitions are subject to both antitrust and foreign investment reviews. These foreign investment reviews are often based on national interest and national security concepts that may not be well defined or objective, and that follow a different logic from conventional antitrust and international trade rules. This panel will explore the growth of foreign investment reviews, how they relate to antitrust and international trade regimes, and how they must be taken into account by practitioners when assessing plans for cross-border investment and mergers and acquisitions.

A game of thrones: interaction between manufacturer and distribution channels

Presented by the International Sale Committee, the Antitrust Committee and the Asia Pacific Regional Forum

From the starting point of the new balance of power of distribution on the internet and of larger international retail organisations, this panel will deal with the most important practical and legal issues in the relationship between the manufacturer and members of the distribution channel. Among the topics to be discussed will be marketing duties and minimum purchase and sales obligations, restraints on competition, price control, internet sales, termination clauses and compensation.

New appointments in the Argentine Antitrust Commission

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The Minister of Production has recently appointed Eduardo Stordeur, María Fernanda Viecens and Marina Bidart as commissioners of the Argentine Antitrust Commission (CNDC) to replace former commissioners Humberto Guardia Mendoca, Santiago Fernandez and Fabián Pettigrew. The new commissioners will work alongside with the newly appointed CNDC President, Esteban Greco, and are expected to implement major changes in the dynamics of the agency.

Eduardo Stordeur is a lawyer with a Masters in Economics and Political Sciences from ESEADE and a Law Doctorate from the University of Buenos Aires. Stordeur has a strong background in Law & Economics and is currently a postgraduate Law & Economics professor at the Torcuato Di Tella University in Argentina.

María Fernanda Viecens is an economist with a Masters in Economics and a PhD in Economics from the Carlos III de Madrid University in Spain. Mrs Viecens is currently a research fellow at the CONICET (*Consejo Nacional de Investigaciones Científicas y Técnicas*) and a visiting researcher at the Technology and Society Centre of San Andrés University in Argentina. She has focused her recent research on industrial organisation; regulation and competition policy; network industries; two-sided markets and platforms; telecommunications; the economy of the internet; and the internet's impact on the economy.

Marina Bidart is a political sciences graduate from the University of Buenos Aires and holds a Masters in Public Economics from the San Andres University. Marina Bidart has previously worked as an economist at the CNDC from 2000 to 2003 and has been a consultant on competition issues at GPR (an Argentinean economic consulting firm) since 2004. She has also been active teaching competition law and economic analysis at the University of Buenos Aires.

These appointments are part of the CNDC's internal restructure revamp launched earlier this year with the new government of Argentina. The appointment of the CNDC's commissioner is expected soon.

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Cartels and Airlines – Identifying Relevant Markets

Although the air cargo fuel surcharge cartel cases have run their course in almost every country, resulting in over US$2.5bn in penalties being paid by airlines, they are not entirely over in Australia. Indonesian airline Garuda continues to defend action by the Australian Competition and Consumer Commission (ACCC). And the recent decision by a Federal Court of Australia appellate bench, *ACCC v PT Garuda Indonesia Ltd,*[1] is unlikely to be the end of the matter. That decision, if not appealed to the High Court of Australia, has significant implications well beyond the interests of the parties in the case.

Competition agencies around the world, including the ACCC, took action against international airlines after investigators simultaneously launched coordinated dawn raids in February 2006. They sought evidence of widespread, if not global, price-fixing in relation to air freight, following information provided to authorities by one of the airlines in an immunity application.

In Australia the ACCC took separate court actions against more than 18 airlines, including Garuda, claiming that they had been involved in making and giving effect to arrangements with each other to fix the level of air freight fuel surcharges and security fees. While most finally settled with the ACCC and paid hefty penalties, Garuda and Air New Zealand vigorously defended their cases.

The airlines unsuccessfully raised every imaginable defence – described by the appellate court as ‘a scorched earth policy’ – but ultimately only one issue was found in the airlines’ favour by the trial judge. The issue was whether or not the alleged conduct had taken place in a ‘market’ in Australia. The appellate court, reversing the trial judge’s decision by a two-to-one majority, decided that the conduct had occurred in a market in Australia. This article focuses on that issue and its potential implications.

The ACCC’s case was that the airlines had entered and given effect to arrangements and understandings to fix fuel surcharges for the supply of air freight services on direct and indirect services into Australia from Hong Kong, Singapore and Indonesia. At the relevant time the Australian competition law prohibited arrangements that had the purpose or likely effect of substantially lessening competition ‘in a market’ in which a party supplied, or was likely to supply, goods or services. Furthermore, the law deemed arrangements fixing, controlling or maintaining the price for goods or services or any discount, rebate or allowance in relation to goods or services to be anti-competitive, effectively making price-fixing a per se contravention of the Australian law. The legislation defined, and still defines, the term ‘market’ to mean a market in Australia. So the issue was whether or not the airlines had engaged in the relevant conduct, including fixing prices for relevant services, in a market in Australia.

It needs to be borne in mind that the effects doctrine that has resulted in significant extraterritorial reach of the Sherman Act in the United States, has no equivalent in Australian competition law. However, the Australian competition law extends, where the particular prohibition permits, to conduct outside Australia by Australian corporations and foreign corporations carrying on business in Australia.

The trial judge had concluded that there were individual markets for air cargo services on individual routes from overseas to ports in Australia, rejecting the proposition that there was a single market for all cargo flights originating overseas to Australia. As to the location of those individual markets, His Honour asked: ‘Where are the relevant substitutable services provided to consumers of those services?’ He concluded that this did not occur in Australia because demand-side substitution – the choice by freight forwarders and shippers – did not take place in Australia.

The majority on appeal rejected that approach. The relevant question for them was not whether the ‘geographic dimension of the market’ was in Australia, or whether switching decisions were made in Australia, but whether, as a matter of characterisation,

the *market* is in Australia. They took a very broad view in answering that question in the affirmative, noting that the Act was to be 'construed so as to facilitate achievement of its stated objective.' Their Honours' reasons demonstrate the potentially wide scope of the Australian competition law. They included that: (1) a market could be 'in Australia' even if the market were also in another country; (2) it is appropriate to take into account factors such as the presence of customers in Australia to whom the services are marketed; (3) that a significant and important part of the operation of the services was in Australia; and (4) that there were barriers to entry in Australia, including availability of landing slots and licences to operate in Australia.

Interestingly, the majority referred specifically to US authorities and noted that the US effects doctrine was not relevant. This is to be expected. Jurisdiction and market definition are separate issues. Even if a foreign firm operates in a market that includes Australian customers, Australian competition law will only apply to that firm if it incorporated or carries on a business in this country. Nevertheless, given the reasons expounded, a logical conclusion is that the Australian position is moving much closer to that of the United States, but without the limitations imposed by the US Foreign Trade Antitrust Improvement Act.

The decision in *Garuda* was under provisions that have since been replaced by explicit and rather complicated cartel provisions, but those provisions require, as an element, that at least some of the parties to the cartel must be likely to be in competition with each other, which raises the geographic question given that competition occurs, not in a vacuum, but in a market.

Note

1 [2016] FCAFC 42 (21 March 2016).

Google Android under the EU spotlight: competing for business or preventing effective competition?

BELGIUM

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Google continues to be in the European Union (EU) spotlight. Only a year after opening its investigation into Google's conduct in relation to the Android operating system and applications, the European Commission sent Google on 20 April 2016 a statement of objections outlining its preliminary competition concerns (Google Android). This is the second EU investigation currently pending against Google. The European Commission opened another investigation in 2010 into Google's conduct in relation to its general search engine and the comparative advantage it gives to its specialised search services in general search results, advertising, and copying of rival web content. In this earlier investigation, the European Commission issued a statement of objections in April 2015 which focuses on Google's practices in relation to comparison shopping (Google Shopping).

Google Android

The European Commission's statement of objections regarding Google Android is premised on the consideration that Google holds a dominant position in the markets for: (1) general internet search services; (2) licensable smart mobile operating systems; and (3) app stores for the Android mobile operating system. Google is alleged to be abusing its dominant position by imposing restrictions on Android device manufacturers and mobile network operators.

The European Commission's case is based on three principal concerns:

Google's licensing practice

Google is alleged to oblige device manufacturers to pre-install Google Search and set it as the default search provider as a condition to installing Google's Play Store. Also, Google's Chrome browser must also be pre-installed, allegedly as a condition to having Google Play Store or Google Search pre-installed. The European Commission is concerned that by forcing Google proprietary apps to be pre-installed, tablet and smartphone manufacturers are limited as to the apps they wish to pre-install on their mobile devices. In turn, this has a detrimental effect on consumers as they are arguably unlikely to download apps with similar functionalities to those that have already been pre-installed on their mobile device. The European Commission is concerned that the effect of these practices is to reinforce Google's dominant position in the general search market and to negatively affect competition in the market for mobile browsers.

Google's anti-fragmentation practice

Google is alleged to require manufacturers of devices running on Android and wishing to pre-install Google's proprietary apps (such as Google Play Store or Google Search) to enter into anti-fragmentation agreements. These agreements prevent device manufacturers from selling mobile devices using a modified Android operating system (so-called Android forks). The European Commission has concerns that Google is preventing the development of alternative or improved versions of the Android operating system which could in turn provide opportunities for competing apps – such as competing general search services – to be pre-installed on Google forks.

Google's exclusivity practice

Google is also alleged to be granting financial incentives to device manufacturers and mobile network operators in return for *exclusively* pre-installing Google Search on their devices.

Commentary

The Google investigations are already being compared to the *Microsoft* case[2] dating back to a decade ago, in terms of significance for EU antitrust enforcement and impact on the current market structure and on innovation. In particular, Google Android gives rise to two key issues at this stage: market definition and the theory of harm.

Of fundamental importance will be the question of market definition and whether Google effectively holds a dominant position in any relevant market. Very little information is available at this stage as the only publicly available document is the press release (and accompanying factsheet). In its press release,[1] the European Commission has indicated that it views Google as dominant in three markets, namely general search, licensable operating systems and app stores for Android. Much discussion is likely to revolve around the contours of these market definitions and which products are to be included in these markets as a basis for assessing whether Google is dominant. As in all fast-moving and dynamic markets, market definition is a key challenge. In part this is due to the rapid change in the market landscape brought about by innovation and the resulting introduction of new technology and products.

Another challenge arises from the difficulty of applying traditional market definition tools to tech markets. In regards, for example, the market for general internet search, these services are provided for free and therefore no price-based tests can apply to assess the competitive constraints and therefore delimit the relevant products making up this market. Likewise, in order to find Google dominant in these markets, the European Commission must show that Google exerts market power. As set out in its Guidance, the European Commission assesses market power principally by measuring an undertaking's capability of 'profitably increasing prices above the competitive level for a significant period of time'.[3] In markets such as general search or operating systems where Android is free, measuring market power will require this test to be adapted as Google does not charge for user access to these products.

As regards theories of harm and based on the European Commission's factsheet,[4] several routes are likely to be pursued by the European Commission, including exclusive dealing (through financial incentives), tying (through licensing practice described above) and refusal to supply (through the anti-fragmentation agreements). It is unclear yet whether and how much the European Commission could rely on Google's products such as Android or general search as being essential facilities. While this is not necessary to

make its case under Article 102, showing that access to Android is objectively necessary for rivals to compete effectively in the market for apps or app stores, could make it easier for the European Commission to make its case.

Another issue of interest is the extent to which the European Commission will focus in its theory of harm on the effect of Google's conduct on consumer harm, beyond the alleged anti-competitive foreclosure of competitors. The parties most directly affected by Google's practices in relation to Android are the device manufacturers and mobile network operators. Nevertheless, the European Commission has also hinted in its press release that consumers are being harmed by Google's practices, which allegedly has prevented, for instance, the emergence of improved versions of the Android operating system and access to a wider choice of apps.[5] This is important as the abuse must be shown to foreclose competitors in an anti-competitive way to the detriment of consumers.[6] The extent to which consumer harm must be proven is debatable. As the European Commission's decisional practice has shown, in some cases consumer harm may be inferred or based on a summary assessment.

If the European Commission's preliminary competition concerns are confirmed, the Google Android investigation could be resolved by means of commitments or an infringement decision requiring Google to bring an end to the infringement, to which may be added a fine of up to ten per cent of Google's worldwide turnover. In the event commitments are offered, the key challenge will be to construe workable and efficient remedies which address the competition concerns without stifling innovation and the development of the market. Google knows from its experience in the Google Shopping investigation how difficult this can be.

In the meantime, the European Commission continues to investigate other practices of Google. The investigation into Google Shopping has been ongoing since 2010, with Google offering several sets of commitments which were ultimately rejected by the European Commission in 2014. The Google Shopping case is now expected to be concluded this year, after a statement of objections was issued in April 2015. This timing is important as the Commission's decision in the Google Shopping case will address a number of mutually relevant issues to the Google Android investigation, namely market definition – particularly general search which is relied upon in both cases as a market where Google is allegedly dominant – and the factors taken into account in assessing Google's market power.

Notes

1 Commission sends Statement of Objections to Google on Android operating system and applications – Factsheet, 20 April 2016: http://europa.eu/rapid/press-release_MEMO-16-1484_en.htm.

2 Case T/201-04 Microsoft Corp v Commission [2007] ECR11-03061.

3 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ 2009 C45/7

4 See n1 above.

5 Commission sends Statement of Objections to Google on Android operating system and applications – Press release, 20 April 2016: http://europa.eu/rapid/press-release_IP-16-1492_en.htm.

6 See n2 above, para 19.

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Belgian Competition Authority conditionally approves two mergers in highly concentrated local markets

The two remedies decisions date from March 2016 and relate to cinema theatres and supermarkets.

The acquisition by Kinepolis of Utopia's Belgian cinema complexes

The first merger concerned the acquisition by Kinepolis of Utopia's four 'Utopolis' cinema complexes in Belgium. Kinepolis is the largest operator of cinema complexes in Belgium. In addition, it is a distributor of films.

The transaction did not exceed the Belgian merger control thresholds, but had to be notified to the Belgian Competition Authority (BCA) on the basis of prior conditions imposed on Kinepolis at the time of its creation in 1997. One of the conditions imposed at that time was the prior BCA approval of any future acquisition by Kinepolis. The condition still applies today as a previous request from Kinepolis to obtain release from the condition was unsuccessful.

Although the transaction was notified under the 1997 remedy package and not under the normal merger control regime, the Competition College took the view that the merger control procedure as well as the legal test for concentrations applied. Hence, during the in-depth Phase II investigation it was assessed whether the acquisition would significantly impede competition on the national and local markets for the screening of films in cinemas, as well as on the vertically related national market for the distribution of films for screening in cinemas.

The investigation concluded that the merger would significantly impede competition. It would eliminate an important competitor and allow Kinepolis to considerably increase its market share on the national and local markets. According to the investigation team, this was likely to have important negative unilateral effects for consumers (by way of price increases and a less diverse film offering); competitors (because Kinepolis' improved economies of scale, stronger negotiating position vis-à-vis movie distributors and other suppliers and the increased barriers to entry and expansion); and film distributors (in light of Kinepolis' strengthened negotiating position).

In order to meet the identified competition concerns, the Competition College imposed both structural and behavioural remedies. Structural remedies include the divestiture of two of Utopolis' cinema complexes in Mechelen and Aarschot, the local markets where Kinepolis and Utopolis primarily compete. The behavioural remedies are designed to lessen the concerns of a price increase in Turnhout and Lommel.

The remedies have been imposed for a three year period and include commitments to maintain the existing Utopolis' voucher system and keep the complexes open. In addition, Kinepolis must monitor and report to the BCA on the price/quality customers' satisfaction ratio in Turnhout and Lommel.

The merger of Ahold and Delhaize

On 15 March 2016, and in the context of a Phase I procedure, the Competition College conditionally approved the merger between Ahold and Delhaize. The case was examined by the BCA following a referral by the European Commission upon request of the parties.

Delhaize and Ahold both operate chains of supermarkets and specialist stores. Although both parties are present throughout Europe and the United States, their activities only significantly overlap in Belgium.

The investigation considered the impact of the merger on the national market for the

procurement of daily consumer goods and the local markets for the resale of such goods.

With regard to the national procurement market, the investigation team concluded that the merger would not significantly impede competition. Although the merger would strengthen the market position of the parties at the national level, the increase would be limited. In addition, the investigation team noted an efficiency in the sense that the proposed merger would enable the parties to improve their negotiating position with suppliers at a supranational level. With regard to the local selling markets, the investigation showed that the parties were close competitors in already highly concentrated and saturated local markets, resulting in a combined market share of more than 50 per cent in some markets. In addition, as a recent entrant Ahold was found to exert a considerable competitive pressure on Delhaize and the other retailers and their ability to raise prices.

Due to the cumulative effect of the aforementioned competition concerns, the Competition College concluded that the merger would significantly impede competition on some local markets. To meet these concerns, the parties agreed to divest 19 supermarkets. These include supermarkets which are already in operation and a number of supermarkets which are yet to open.

Comment

Although both decisions concern totally different markets, the Competition College took similar factors into consideration when assessing the appropriateness of the remedies. In both cases, the Competition College emphasised that the divestiture of the outlets should prevent their closure. Therefore, it attached great importance to the fact that any potential buyer should have the financial means, expertise and incentive to manage the divested outlets and to become a viable competitor to the merging parties and other competitors on the market. Hence, the remedies are aimed at maintaining a sufficient level of competition in the relevant (local) markets.

Both cases also illustrate the impact of different tactics followed in the remedies discussions. In the *Kinepolis/Utopolis* case, the parties were only willing to initiate discussion of remedies after the opening of the Phase II procedure. In addition, the remedies were the subject of extensive discussions between the parties and the investigation team and required several market tests. This resulted in a protracted review procedure. In the *Ahold/Delhaize* case, the parties broached the subject of remedies early on in the procedure by offering a detailed package of structural remedies shortly after the notification. This allowed the Competition College to clear the transaction in the context of a Phase I procedure.

The *Ahold/Delhaize* case is yet another example of the BCA's practice of approving mergers in highly concentrated markets in the context of a swift Phase I procedure (the *Kinepolis* case is an exception in this line of decisions). Parties involved in such cases are therefore welladvised to engage in early remedies discussions.

Belgian Competition Authority settles with cruise operators in river cruise cartel

On 27 May 2016, the BCA adopted a settlement decision concerning a cartel in river cruise services on the Upper Meuse and the navigable part of the Lesse in Belgium.

The BCA established that several river cruise operators participated in the cartel, which consisted of two subsequent, uninterrupted agreements that restricted competition by object. The first agreement, which had been effective for 30 years from 1983 until the end of 2013, organised systematic consultations between the undertakings involved with the objective of jointly deciding prices, hiring and remuneration of staff, maintenance and other works, publicity, as well as, commercial and accounting policies. Furthermore, the agreement provided for an allocation key to distribute the costs of production and the income from ticket sales between the cartel participants. The second agreement, which immediately followed the first agreement at the end of 2013, provided for a market allocation of the waterways by means of exclusive exploitation clauses.

Furthermore, over the course of many years, the parties to the river cruise cartel had bought out the majority of their competitors on the relevant market, creating a beneficial competitive environment for their cartel.

The BCA had no difficulty in establishing that these agreements constituted agreements that restrict competition and had a single objective, that is, to eliminate effective competition in the provision of organised river cruise services on the

Upper Meuse and the navigable part of the Lesse. The BCA considered the agreements as a single and continuous infringement, because of their identical objective and their joint intent of establishing a 'master plan' to remove all competition from the market. Taking into account the severe gravity of the established infringements, the BCA saw no possible justification for the competition law infringement.

The BCA method of setting fines follows the approach of the European Commission. As a result, the total value of the sales of tickets for all the river cruises constituted the starting point for the calculation of the fines. The basic amount of the fine was then set on the basis of gravity and duration of the infringement. The calculated fines were eventually adjusted in light of the applications for leniency, the settlement procedure, and the ten per cent cap on fines. The two parties that applied for leniency first received full immunity from fines and the three remaining parties received a leniency reduction of 45 per cent and an additional reduction of ten per cent for settling, resulting in joint and several liability for a fine of €64,100.

The modest level of the fine reflects the small size of the companies involved and the fact that, even if the cartel lasted for more than 30 years, only a limited number of years were taken into account when the fine was set (until October 2006, small enterprises could not be investigated and fined under the Belgian Competition Act).

Four individuals involved in the cartel practices applied for, and obtained, immunity from prosecution.

BRAZIL

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Brazil antitrust: CADE issues guidelines on gun-jumping, competition compliance programmes, settlement agreements and leniency agreements

In the past year, the Brazilian competition authority ('CADE') has issued important guidelines covering key practical issues of interest to practitioners: gun jumping (May 2015), competition compliance programmes (January 2016), leniency agreements (May 2016), and settlement agreements in cartel cases (May 2016). CADE is also working on horizontal merger guidelines, but the final version has not yet been released.

This is a very welcome development. Even though the guidelines are expressly not binding, they are expected to increase predictability with respect to CADE's interpretation of the law and the authority's best practices. It remains to be seen, however, how CADE's procedures in the future will adhere to its guidelines.

Below are some highlights of CADE's guidelines:

Gun-jumping guidelines

The gun-jumping guidelines were the first to be issued since the Brazilian Competition Act (BCA) entered into force and established a pre-merger notification regime.

CADE identified some activities as having the highest risk of gun jumping: (1) exchange of sensitive information; (2) clauses in transaction agreements that might result in the premature integration between the parties, such as payment of part of the purchase price or clauses; (3) conduct such as the transfer of assets in general, the exercise of the right to vote or relevant influence, the

joint development of commercial/marketing strategies, and exclusive licensing of IP; and (4) anticipated non-compete clauses (ie, in force prior to the closing of the transaction).

The guidelines also recommend procedures to reduce the risk of gun jumping, mostly focused on the creation of a 'Clean Team' and an 'Executive Committee'. The 'Clean Team' may be composed of employees of the parties and independent members who will sign a non-disclosure agreement and be in charge of receiving, analysing and processing the data and information regarding the merger control proceeding. The 'Executive Committee', on the other hand, is composed of the executives of the parties, responsible for the transaction assessment and future integration of the parties after the approval by the authorities.

Some of CADE's suggestions about the 'Clean Team' and 'Executive Committee', however, do not reflect the reality of M&A practices (such as the proposition that 'Clean Team' members cannot request or receive information from the other transaction party, but only from its own employer, or the indication that the purpose of the Executive Committee is to assess the viability of the transaction, which in practice does not happen jointly with the other party). It remains to be seen whether CADE will consider amending its guidelines based on the experience of other countries and on M&A practices, as they might be difficult to implement in reality.

Compliance guidelines

The guidelines on competition compliance programmes explain what sorts of steps companies can take to avoid breaching the BCA and also set out CADE's view of the key ingredients of an effective competition compliance programme. Significantly, the guidance explains that a company which has sought to implement a 'robust' compliance programme is eligible for a penalty reduction in the event of a competition law violation – adding Brazil to a growing list of jurisdictions willing to accept genuine attempts at compliance as a mitigating factor.

CADE provided guidance on the elements required for a compliance programme to be considered robust and made it clear that only programmes devised to bring material changes to the corporate culture – that is, no sham compliance programmes – could receive a compliance credit: (1) existence of a commitment from the top; (2) appropriate resources dedicated to the operation of the programme; (3) autonomy and independence of the compliance leader; (4) individualised analysis of the risks associated with the company's activities; (5) mechanisms for mitigating risk that are in place; and (6) periodic review of the programme.

The guidelines also provide a general view of the benefits of having a robust compliance programme in place. First, a robust compliance programme meeting the requirements explained above may be considered evidence of good faith of the company and used as a mitigating factor in the calculation of the fine. Second, in the context of settlement negotiations, a robust compliance programme may justify CADE granting the maximum discount available to the company. In any case, CADE's guidelines clarify that the company itself has the burden to prove that its compliance programme qualifies as robust in order to benefit from any potential fine reduction.

Regrettably, the guidelines stop short of explaining in clear terms how any reduction in penalty would be calculated. It therefore remains to be seen how the guidelines will be followed in practice.

Settlement agreement guidelines

By entering into a settlement agreement with CADE, corporate and individual defendants in a cartel investigation are entitled to a discount on the 'expected fine'[1] of up to 50 per cent,[2] in exchange for the defendant's commitment to cease the illegal behaviour, confession and full cooperation with the investigation (the latter if the case is still at the investigatory stage).

The guidelines provide guidance on relevant issues regarding the calculation of the settlement fine and the extension of benefits to individuals.

Flexibility on the basis for calculating fines

Clarifications regarding the revenue basis to be adopted to estimate the expected fine in settlement negotiations and indication of flexibility:[3]

- to adopt a base year different from the statutory provision (the year preceding the opening of the investigation) if there is evident disproportionality between the revenues of the statutory base year and the revenues of the period of the infringement; or

- to adopt different cuts in the base revenue to account for proportionality when the product or service affected by the cartel, or the geographic scope of the conduct, is narrower than the base revenues provided by the law (a far-reaching concept of 'industry sector' that may include products/services unconnected to investigated practices)

Later adhesion clause

The guidelines reflect CADE's practice of negotiating a clause allowing for the later adhesion of individuals that have already been listed as defendants in the investigation, but that do not participate in the corporate settlement negotiations. The conditions for later adherence of current and former employees can be negotiated directly by the settling company, which has the possibility of pre-paying for the adhesion of these individuals. The employee could decide not to adhere to the settlement negotiated by the company, and still negotiate a settlement individually with CADE.

Exceptionally, CADE can also negotiate a later adhesion clause to cover other entities of the same economic group.

Umbrella clause

The umbrella clause automatically covers individuals that have not been identified by the time of the execution of the settlement agreement. As a general rule, the umbrella clause is available upon payment of an additional amount corresponding to ten per cent of the settlement fine and, as a result, no investigation will be opened against new individuals that have not been identified. Exceptionally, CADE is willing to accept an umbrella clause to cover different entities of the same economic group that are not listed as defendants.

Leniency guidelines

The recently released leniency guidelines outline both the substantive aspects and the procedural elements of CADE's leniency programme.

The first section of the guidelines deals with general aspects of the leniency programme. In a nutshell, the leniency programme in Brazil is available in connection with any violation of the BCA, and for both companies (only for the first to apply) and individuals (no requirement to be the first in).[4] In general terms, the execution of a leniency agreement implies a commitment from the applicant: (1) to cease the illegal conduct; (2) to fully cooperate with the authority so as to lead to the identification of the other participants and collection of evidentiary information and documents; and (3) to confess their own participation and report others' involvement in the illegal behaviour. In exchange, the leniency applicant receives full or partial immunity from administrative penalties (depending on whether CADE had previous knowledge of the reported infringement) and individuals receive criminal immunity in connection with cartel, bid-rigging and conspiracy crimes.

However, the guidelines make it clear that CADE's leniency programme does not offer protection against civil damage claims from third parties to account for injuries resulting from the illegal behaviour.

The second section of the guidelines addresses the procedural stages to negotiate a leniency agreement in Brazil. The highlights are:

Marker stage

CADE's investigatory tier will accept to negotiate an agreement with the first to apply, who will receive a marker attesting its position as 'first in' (for full immunity if CADE had no previous knowledge of the conduct reported; otherwise, for partial leniency and a reduction of the fine). Any other party that reaches out to CADE after the first-in marker has been secured will be placed in a 'queue' in the event the negotiation is thwarted.[5] The marker stage is confidential; in the event of an unsuccessful negotiation any documents submitted by the applicant shall be returned and information provided cannot be used by CADE for any purposes. The BCA sets forth – and the guidelines restate – that the withdrawal or rejection shall not be construed as an admission as to the illegal nature of the conduct or confession in relation to the facts discussed during the negotiation.

Submission of information/documents stage

At this stage, the first-in will report to the investigatory tier of CADE the documents and information uncovered in connection with the illegal conduct. All the information will eventually be summarised in a document that contains a detailed description of

the reported infringement, including the identification of the other parties involved in the conduct. This stage is also confidential, and CADE has internal safeguards in place to ensure that the confidentiality of the documents and information submitted is maintained.

Formalisation of the leniency agreement

This is the stage where the leniency agreement is signed and the documents supporting the conduct are formally submitted to CADE. As a general rule, at this point the Public Prosecutors' Office will be involved, as it must sign the leniency agreement as a consenting party.

The third and final section of the guidelines explains the procedural steps following the execution of the leniency agreement, from when CADE decides to open the administrative investigation until when compliance with the leniency agreement obligations is assessed by CADE in its final decision. Relevant in this section of the guidelines is the confirmation that, as a general rule, the contents of the leniency agreement and all the related documents are confidential and will not be disclosed to the general public,[6] except when: (1) a court decision demands disclosure; or (2) the leniency applicants expressly waive their right to the confidential treatment. The identity of the leniency applicant will also be kept confidential, but is disclosed when the CADE tribunal issues a final decision on the administrative investigation.

This is an important statement from the authority, aligned with creating and fostering the incentives for undertakings and individuals to come forward and report a violation without the threat of increased exposure to public enforcement in other jurisdictions or to private damage claims.

It is still uncertain how Brazilian courts will balance these public enforcement priorities in opposition to private parties' rights to be fully indemnified. The second highest Brazilian court recently issued a decision indicating that a plaintiff can request CADE to provide access to documents filed by a leniency applicant to support a cartel damages claim. The decision has a dictum explaining that the confidentiality of the leniency documents should only subsist up to the point that the CADE investigatory body issues its recommendation of conviction to be decided by the CADE tribunal; from that moment on, the agency would have a duty to share documents as requested by a Brazilian court. It remains to be seen how CADE will react to this decision, but the recently issued guidelines indicate that the authority's stance is aligned with protecting the confidentiality of leniency documents.

Notes

1 The expected fine is a percentage of revenues accrued in the 'industry sector' (far-reaching concept included in the BCA) in the year preceding the opening of the investigation. Corporate defendants are subject to a fine ranging from 0.1 per cent to 20 per cent, but for cartel investigations CADE considers that 15 per cent should be the baseline.

2 The percentage discount depends on the place of the applicant in the queue, on the quality of the cooperation to be provided to CADE and on the stage of the proceedings by the time of the application for settlement (ie, before or after the investigatory tier of CADE issues its recommendation for conviction for the analysis of the CADE tribunal).

3 This topic, however, has been recently the object of a heated debate within the CADE tribunal – with some Commissioners opposing the limitation of the base revenue in cartel cases as a means to ensure proportionality.

4 The benefits granted to a corporate leniency applicant can be extended to other entities of the economic group and employees as long as they execute the agreement with the applicant. If the leniency agreement is executed by the individual, however, the benefits cannot be extended to its corporate employer.

5 Both by CADE's rejection of the leniency proposal or by the applicant's withdrawal of its request for leniency. In this scenario, the subsequent applicant will be invited to negotiate. On the other hand, should the negotiation be successful, the parties placed in the queue will be invited to negotiate settlement agreements with CADE.

6 Including foreign authorities. Defendants will naturally have access to such documents and information, to the extent necessary for them to exercise their rights of defence.

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Landmark decision by the Bulgarian Competition Authority on abuse of stronger bargaining position

Legislative background

On 24 July 2015 an amendment to the Bulgarian Protection of Competition Act (PCA) was promulgated, introducing a novel type of infringement: the abuse of a stronger bargaining position. The social context of the new legislative provision is closely connected to some practices of food retailers. The wording adopted by the Parliament however has far-reaching effects as all business actors potentially fall within the scope of the novel provision.

The relevant Article 37a of the PCA reads as follows:

- Any act or omission of an undertaking with a stronger bargaining position, which contravenes good faith commercial practice and impairs or may impair the interests of the weaker contracting party or the interests of the consumers, shall be prohibited. Bad faith shall be those acts or omissions which have no objective economic grounds, such as unjustified refusal to deliver or purchase goods and services, imposing unjustifiably burdensome or discriminatory terms or unjustified termination of commercial relations.
- The existence of a stronger bargaining position shall be ascertained in view of the characteristics of the structure of the respective market and the specific legal relationship between the affected undertakings, while taking into account the degree of dependence between them, the nature of their activity and the difference in their scale, the probability of finding an alternative trade partner, including the existence of alternative sources of supply, distribution channels and/or clients.

The first-ever proceedings initiated

The first proceedings on the legal grounds of this provision were initiated by an engineering company against the Bulgarian subsidiary of Siemens, namely, Siemens EOOD ('Siemens BG'). The proceedings started in March 2016 and have resulted in the first decision of the Bulgarian Commission on Protection of Competition (CPC or 'the Commission') regarding the novel violation. The decision was announced on 1 June 2016 and is currently under appeal by Siemens BG, pending before a three-member court panel of the Bulgarian Supreme Administrative Court.

Facts of the case

The engineering company won a public procurement to inspect and repair a turbo generator of a heating company. The engineering company sent a request for a quote to Siemens BG regarding two pieces of equipment necessary to carry out the repair, manufactured by the Czech subsidiary of Siemens. Siemens BG then replied in a letter that it could not offer the requested equipment without stating the reasons therefor. The engineering company then lodged a request in the CPC alleging that Siemens BG abused its stronger bargaining position.

Findings of the CPC

Existence of a stronger bargaining position

The CPC dismissed the arguments of Siemens BG that the engineering company had an alternative supplier, namely the Czech subsidiary of Siemens which actually manufactured the relevant equipment. The CPC relied on the fact that Siemens BG is a representative of the Siemens Group in Bulgaria and further that the engineering company and Siemens BG had lasting commercial relations for many years. The CPC

found that Siemens BG did have a stronger bargaining position with no viable alternative sources of supply for the engineering company.

Act/omission in contravention with good faith commercial practice

Having established that Siemens BG did possess a stronger bargaining position, the CPC went on to assess whether Siemens BG had acted in violation of good faith commercial practice. In that context the CPC relied on some inconsistency in the conduct of Siemens BG – namely, that Siemens BG offered directly to the heating company the very same equipment it later refused to sell to the engineering company. Based on the letter by Siemens BG containing no explanation for the refusal to supply, the CPC accepted that the actions of Siemens BG had no objective economic justification. It further reasoned that considering the long-standing commerce between Siemens BG and the engineering company, the former owed the latter elaboration regarding the reasons for the refusal to supply. The CPC thus concluded that Siemens BG acted in a bad faith and unjustified manner, thus violating good faith commercial practice.

Detriment to the interests of the trade partner and the consumers

The CPC found that the refusal by Siemens BG led to the engineering company being unable to perform its obligations towards the heating company under the public contract. Importantly, the CPC confirmed that the requirement for detriment to the consumers' interest is indeed cumulative. Based on the definition of 'end client' as per the Bulgarian Energy Act (which is not limited to natural persons but also covers legal entities), the Commission adopted a wider notion of 'consumer' including the heating company therein. The CPC thus concluded that the detriment caused to the heating company sufficed to establish that the interests of consumers had been impaired by the conduct of Siemens BG. Nevertheless, the CPC added that the conduct does also prejudice the natural persons of the heating company.

Amount of the sanction imposed

Pursuant to Article 100, paragraph 2 of the PCA, the sanction for abuse of stronger bargaining position could amount to up to ten per cent of the turnover obtained throughout the preceding year from the product being subject of the infringement, but no less than BGN 10,000 (approximately €5,000). When there is no relevant turnover obtained during the preceding year, the sanction could amount to between BGN 10,000 and BGN 50,000 (approximately €25,000). Considering that there were no mitigating circumstances, the CPC imposed on Siemens BG a sanction in the amount of BGN 35,000 (approximately €18,000).

Conclusions

The above brief review shows that the Commission is ready to apply Article 37a PCA in a very broad-fashioned manner which raises the bar really high for renowned companies to ensure compliance therewith. Currently there are four other pending proceedings before the CPC on alleged abuse of stronger bargaining position, three of which concern conduct by major international food retailers.

We have yet to see whether the broad notions adopted by the CPC in the *Siemens* decision will stand the closer scrutiny of judicial review.

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Competition law update

There have been a number of significant competition law developments in Canada over the last quarter, including:

- continued work by the Canadian Competition Bureau (the 'Bureau') to promote competitive conduct and policy through the release of new intellectual property enforcement guidelines and the start of an investigation into the innovative Canadian FinTech industry;
- new tribunal jurisprudence expanding the scope of the abuse of dominance provisions in the Canadian Competition Act;
- a decision of the Canadian Competition Tribunal (the 'Tribunal') rescinding an earlier consent agreement entered into by the Commissioner of Competition (the 'Commissioner') and a number of private sector parties; and
- for the first time, a consent agreement between merging parties and the Commissioner arrived at through a mediation orchestrated by the Tribunal.

We report on these recent developments in more detail below.

Policy guidelines and development

Competition Bureau releases new Intellectual Property Enforcement Guidelines

On 31 March 2016, the Bureau published the first update to its Intellectual Property Enforcement Guidelines since the year 2000. The update seeks to make it easier for the legal community and pharmaceutical industry to operate within the law, and explains how the Bureau intends to apply the Competition Act to standard setting bodies and the settlement of patent infringement litigation.

Additionally, the update was aimed at clarifying the Bureau's approach to conducting investigations of alleged anti-competitive behaviour related to intellectual property. To do so, the update clarifies a number of principles concerning when the Bureau will get involved in disputes dealing with intellectual property rights. The Bureau will leave most intellectual property disputes regarding abuse of patents or trademarks to be dealt with by the appropriate intellectual property authorities. However, the Bureau may seek to intervene in cases where it believes a competition perspective would be important, or where the scope of intellectual property rights could be otherwise inappropriately defined, strengthened, or extended. If the conduct at issue is the mere exercise of an intellectual property right, the Bureau will only intervene in very rare circumstances where certain conditions are met relating to section 32 of the Competition Act.

Competition Bureau launches FinTech market study

On 19 May 2016, the Bureau announced that it will be undertaking a study of the innovative technology-based financial services (FinTech) sector. The study will focus on how innovation in FinTech is affecting the ways that consumers and businesses use financial products and services.

The Bureau has stated that it believes FinTech companies benefit consumers by unbundling existing financial products and introducing new ones. As such, the Bureau has indicated that the study will focus on the barriers to entry faced by FinTech companies, and whether regulatory reform is necessary to promote competition in the industry.

Practitioners have noted that the study reflects a belief in the Bureau's role as a competition advocate, as well as the belief that competition has a central role in innovation. In the context of the Bureau's recent investigation into Google, this study also demonstrates that the Bureau is increasingly focused on the digital realm, and the notion that control of data has a role in establishing or maintaining market control.

Toronto Real Estate Board held to be in violation of abuse of dominance provisions

In one of the Tribunal's two recent major decisions, the Tribunal found that the Toronto Real Estate Board (TREB), a not-for-profit corporation that serves real estate brokers in the Greater Toronto Area, was abusing its dominant position by restricting its members from offering innovative products

and services to consumers over the internet.

The case began in 2011, when the Bureau filed an application seeking to prohibit TREB's rules that restrict how its member agents provide information to consumers, such as previous listings and previous sale prices. In 2013, the Tribunal dismissed the Commissioner's application, agreeing with TREB that it did not 'compete' with its members, and that therefore abuse of dominance could not be made out. However, the Commissioner successfully appealed to the Federal Court of Appeal in 2014, where the Court held that conduct need not be directed at a competitor to constitute abuse of dominance. As such, the case was remanded back to the Tribunal for a further hearing.

The case advanced abuse of dominance jurisprudence in Canada in a number of respects. First, it clarified the degree of market control necessary for abuse of dominance provisions to be applicable: a 'substantial degree' of market power. Second, it confirmed that abuse of dominance is still actionable under the Competition Act where the effects are not price related. Third, it demonstrated that if non-price effects are the focus of the inquiry, the Commissioner may advance qualitative, rather than quantitative evidence in order to support the Bureau's claim.

Rakuten Kobo successfully applies to have consent agreement rescinded

On 10 June 2016, the Competition Tribunal issued a decision in *Rakuten Kobo Inc v The Commissioner of Competition* ('*Kobo*'),[1] rescinding a consent agreement entered into between the Commissioner and four e-book publishers in 2014. An application to rescind the agreement was brought by Rakuten Kobo, a third-party retailer of e-books, founded on the allegation that the consent agreement was based on terms that could not be the subject of a Tribunal order. Under section 106(2) of the Competition Act, persons directly affected by a consent agreement to which they are not party may apply to the Competition Tribunal within 60 days of the agreement taking effect to have the agreement rescinded or varied. This was the second application ever made under this section.

In rescinding the consent agreement, the Tribunal confirmed that consent agreements must disclose the legal basis of the conduct being remedied and the remedy's legal rationale. Rather than merely alleging unlawful conduct, the Commissioner must refer in the agreement to conduct that specifically contravenes the Competition Act. In this case, the consent agreement did not provide sufficient detail for the Tribunal to understand the legal basis for the consent agreement and was 'fatally flawed'.

The *Kobo* decision has a number of implications for Canadian competition law. First, it indicates that the Competition Tribunal is more willing to play a supervisory role as it relates to the substance of consent agreements. Second, the Commissioner will likely seek more specific language in future consent agreements in order to ensure that such agreements meet the standards set out in this case. Third, by forcing the Commissioner and parties to include additional detail, this case may make the consent agreement process more transparent.

Merger developments

On 29 March 2016, Parkland Fuel and the Commissioner of Competition arrived at a consent agreement through a mediation process organised by the Tribunal regarding Parkland Fuel's acquisition of Pioneer Energy. The Bureau had allowed the deal to close with six gas stations held separate pending the results of the litigation.

The mediation, conducted by the Chief Justice Crampton (a Federal Court judge and judicial member of the Tribunal), was the first to be conducted by the Tribunal in the context of a merger case before the Tribunal. The Tribunal also has issued a Practice Direction regarding mediation, which we expect will become a standard aspect of the litigation process before the Tribunal for merger cases moving forward.

On 31 March 2016, the Bureau reached a consent agreement with Iron Mountain Inc. The Bureau had concluded that Iron Mountain's acquisition of competitor Recall would likely have resulted in a loss of competition in the records management services sector, particularly in Canadian markets where both firms operated. Under the consent agreement, Iron Mountain agreed to divest itself of Recall's business in every Canadian city where both firms were in operation.

This case is significant because the transaction was not notifiable in Canada, and was a transaction between two non-Canadian companies. Nonetheless, it is a reminder that the Bureau retains jurisdiction to review any merger, regardless of size, for up to one year after closing.

Cartel developments

In late March 2016, Japanese automobile parts manufacturer Showa Corporation pled guilty to one count of bid-rigging. Showa was fined CA$13m by the Ontario Superior Court of Justice, the second largest fine ever imposed in Canada for a bid-rigging offence. Additionally, the company agreed to implement a compliance programme in order to reduce the likelihood of future offences.

Also in March, Quebec company Les Enterprises de Ventilation Climasol Inc ('Climasol') and its President pled guilty to bid-rigging charges in connection with a ventilation contract for a residential development in Montreal. The President of the company admitted that he coordinated his bid with competitors in order to pre-determine the winner of the contract.

The *Climasol* case began in 2010 when criminal charges were laid against eight companies and five individuals accused of rigging bids for ventilation contracts in the Montreal area. One other company and one other individual have since pled guilty to three charges of bid-rigging, for which they were fined a total of CA$565,000.

Note

1 (Case CT-2014-002) Rakuten Kobo Inc v Commissioner of Competition et al [2016] Comp Trib 11.

CHINA

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'Fair competition review system' – competition advocacy and state aid rules through the back door?

On 14 June 2016, China's State Council made public the Opinions on Establishing a Fair Competition Review System in the Development of the Market Regime ('Opinions'). The Opinions were approved on 1 June 2016.

The 'fair competition review system' forms part of China's broader efforts to tackle so-called 'administrative monopolies', a term used for various forms of government action or inaction leading to anti-competitive results. Abuse of administrative power with anti-competitive effects – the more technical term for 'administrative monopolies' – is prohibited under the Anti-Monopoly Law (AML). This law also prohibits a number of specific manifestations of abusive government conduct.

However, the Opinions go beyond the AML framework, both in terms of process and substance.

Review process

The 'fair competition review system' works somewhat like an 'advocacy' type of mechanism, only in a decentralised way. In many foreign jurisdictions, 'advocacy' is used to indicate a process whereby antitrust authorities attempt to influence the rule- and decision-making processes by other government bodies to prevent anti-competitive outcomes.

With the new system in China, each government body (and entity with a public policy mandate) is required to conduct a self-review when formulating new business-related rules or policies, in order to check whether they may give rise to anti-competitive effects. In other words, each body is being told to police itself.

The only exception is the State Council, where the actual drafting body, typically a ministry or commission under its supervision, is responsible for conducting the 'fair competition review'.

The scope of the review mechanism is broad, including:

- all types of business-related rules and policies (including administrative regulations issued by the State Council);
- all levels of government (the obligations apply to central and provincial-level bodies from July 2016, and to city and county-level bodies from 2017);
- not only will new rules and policies come under scrutiny, but existing ones are also required to be re-examined.

Indeed, each government body is required to carry out a periodic review of its rules and policies: the Opinions encourage government bodies to outsource the assessment to third parties. The report produced is required to be made public.

Importantly, during its review of new rules and policies, the government body must consult with interested parties or launch a public consultation before they are enacted.

The Opinions do not provide for any specific sanctions if a government body does not follow the Opinions. That said, the Opinions vaguely speak of personal consequences under party and government disciplinary rules for individuals who contravene the Opinions.

Another interesting facet is that the Opinions empower the three antitrust authorities, the National Development and Reform Commission (NDRC), the Ministry of Commerce, and the State Administration for Industry and Commerce (SAIC), together with the State Council's Legislative Affairs Office to formulate implementing rules for the self-review and other aspects of the new system (the Anti-Monopoly Commission, the high-ranking antitrust policy body, is also mentioned at one point in the Opinions but its role in this new system seems unclear).

Substance of review

The Opinions feature four categories of benchmarks for the substance of the 'fair competition review' (each with a set of specific benchmarks/prohibitions):

- market access (for example, no unreasonable or discriminatory market barriers);
- free flow of goods (for example, no discrimination against non-local companies in tenders);
- impact on costs (for example, no individual subsidies or tax breaks);
- impact on operations (for example, no undue intervention in market pricing).

Some of the substantive rules mirror, or are inspired by, similar prohibitions in the AML. On various occasions, the Opinions even directly refer to the AML. Other provisions, however, cover new ground. For example, there appear to be a set of rules aiming to curb favourable tax treatment by local governments not approved by the State Administration of Taxation for the benefit of specific companies. In a roundabout way, it could be argued that through the Opinions, China is introducing at least the basis of a 'state aid' system similar to that in the European Union (where advantages selectively granted by government to companies, thereby distorting competition, can be unlawful under antitrust rules).

Interestingly, as with the AML provisions applicable to companies, the Opinions provide for 'exemptions' to the prohibitions, in particular:

- to safeguard national economic and cultural security, or defence-related construction;
- for social security purposes, such as poverty alleviation or disaster relief;
- for social public interests, such as energy conservation or environmental protection; and
- other circumstances prescribed by laws and regulations.

Takeaways

The adoption of the Opinions and the launch of the 'fair competition review system' are significant. They create a new policy (working like 'soft' law) outside, or alongside, the AML framework.

The main driver behind this development may have been NDRC's antitrust bureau, which has been dealing with numerous 'administrative monopoly' cases in the recent past (as has SAIC's antitrust bureau). The AML provides relatively weak sanctions (only recommendations) for anti-competitive government actions, hence the need for a system with 'more teeth'.

For domestic and foreign companies alike, a major advantage of the new system (if properly and even-handedly enforced – which cannot be taken for granted at the outset) would be the additional transparency it could bring. Businesses would have greater opportunities to be consulted, and to feed into the normative processes. They would face fewer barriers to trading across administrative divisions, as the system challenges 'administrative monopolies' through local protectionism.

COLOMBIA

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Toilet paper and tissue cartel fined in Colombia

After several years of investigation, the Colombian competition agency – Superintendence of Industry and Commerce (SIC) – has decided[1] to fine the members of a cartel formed by a number of paper manufacturing companies including Kimberly-Clarke (US$22.3m), Productos Familia SA (US$20m), Papeles Nacionales SA (US$22.3m) and Cartones Papeles de Risaralda SA (US$1.3m) and a number of high profile individuals for entering into an agreement to fix the prices of tissue paper over a 13-year period. Practices also involved sharing information about future pricing and agreeing on mutual marketing policies.

Some of these companies came forward under the leniency programme, confessing to their taking part in the anti-competitive behaviour.

Even though the full text of the SIC's decision had not been published at the time of writing this article, the entity has published a summary of its decision.[2] The SIC found that the four above-mentioned tissue paper manufacturers collaborated in a scheme between 2000 and 2013 to artificially fix the prices of bathroom tissue, napkins, paper towels and handkerchiefs for the hands and face. In addition to sanctioning the companies, the competition agency also imposed fines on 21 senior managers and former officials of the four manufacturers for their role in the scheme, with penalties ranging from US$892 to more than US$113,000.

The anti-competitive practices were detected through different mechanisms, including emails found in some of the companies' presidents' inboxes where they acknowledged that prices had been agreed with their competitors and jointly controlled. In fact, the companies used nicknames to identify themselves without raising suspicions. Kimberly-Clarke was called Kiosko; Familia was called Feos; Papeles was named Pitufos and Cartones was called Rosas.

An important feature of this case is that the competition agency decided not to apply any benefit to Familia notwithstanding its participation in the leniency programme. The Colombian leniency policy offers companies involved in a cartel – which self-report and handover evidence – either total immunity from fines or a reduction of fines which the SIC would have otherwise imposed on them.

In this case, the Superintendent determined that Familia, who was the second company to apply for the leniency programme, defaulted its obligations under the programme mainly by hiding information, lying about relevant aspects of the investigation and not presenting evidence that was in its posession. Therefore, the agency excluded that company from all applicable benefits, including a 50 per cent fine reduction.

Nonetheless, when establishing applicable fines, the SIC considered the confession to the anti-competitive behaviour and the public apologies offered to the country by Familia, thus granting a reduction in the fine finally imposed.

The SIC's decision is still subject to remedies for it to be enforceable. Pursuant to the Colombian Contentious-Administrative Procedural Statute, the fined companies have ten business days counted as from the resolution notification date to file a reconsideration remedy before the SIC. If the agency confirms its decision, the administrative procedure will be exhausted and the parties will be able to start a contentious-administrative litigation for the Council of State to decide in a last instance decision.

Notes

1 SIC Resolution No 31739, dated 26 May 2016.

2 The decision can be found at: www.sic.gov.co.

A look at the practice of the Croatian competition watchdog in imposing fines

CROATIA

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Introduction

The sanctioning of competition law infringements in Croatia witnessed a turning point with the adoption of the 2009 Competition Act[1] which entered into force on 1 October 2010 and for the first time gave the Croatian competition watchdog – the Croatian Competition Agency (CCA) – the exclusive power to impose fines for competition law infringements.

Its predecessors, including the 2003 Competition Act,[2] have qualified competition law infringements as misdemeanour offences which resulted in a cumbersome two-tier procedure where the CCA first needed to determine the infringement and then forward the case to the competent misdemeanour court which decided on the fine. Practice has shown that this system has failed to effectively sanction competition law infringements, despite the fact that the substantive legal provisions on the amounts and manner of setting of fines were aligned with European Union (EU) *acquis communautaire*.

Namely, the split competence between the CCA and misdemeanour courts effectively meant that a competition law infringement was scrutinised by the CCA and administrative courts (as the CCA's second instance bodies), and then additionally by misdemeanour courts and the high misdemeanour court (as their second instance body). Furthermore, practice has shown that misdemeanour courts were not qualified to deal with the complex legal and economic issues inherent to competition cases, which resulted in insufficiently rigorous criteria in deciding on the amounts of fines. Finally, this complex and long procedure was combined with a short statute of limitations prescribed for misdemeanour offences which allowed a large number of cases to fall outside the statute of limitations before any fines have been imposed. As a result, in over 100 competition infringement cases handled by misdemeanour courts between 2004 and 2009, the total amount of imposed fines amounted to less than €200,000.[3]

The new 2009 Competition Act finally abandoned this inappropriate system. Competition law infringements are now infringements *sui generis* and the CCA is competent not only to determine the infringement, but also to impose the fine.

This article takes a closer look at the practice of the CCA in imposing fines in the period from 1 October 2010–1 June 2016.

Fines pursuant to 2009 Competition Act

The 2009 Competition Act divides competition law infringements into serious and minor infringements.

Serious infringements include participation in prohibited agreements (vertical or horizontal), abuse of dominance, participation in prohibited concentrations and breach of the remedies or measures imposed by the CCA. Serious infringements are subject to a fine of up to ten per cent of the total revenue of the undertaking in the preceding business year.

Minor infringements are failure to duly notify concentration to the CCA, providing false information in the concentration clearance procedure, failure to act pursuant to the request of the CCA, interference with the execution of orders of the High Administrative Court, and the implementation of concentration prior to CCA's clearance. Minor infringements are subject to a fine of up to one per cent of the total revenue of the undertaking in the preceding business year.

In addition, the undertaking which is not a party to the proceedings and which fails to deliver the requested information in the CCA's market research procedure is subject to a fine in the amount between €1,333–€13,333.[4] These fines are outside the scope of this article.

The 2009 Competition Act and its by laws[5] mirror the methodology of determining

the amount of fines from the European Commission's Fining Guidelines[6] and provide leniency for whistleblowers in the manner equivalent to that from the European Commission's Leniency Notice.[7,8]

The CCA may impose symbolic fines in case the undertaking is in a difficult financial situation and the payment of a fine would irreparably threaten its economic viability, as well as in cases where the CCA determines that the infringement was not serious, that is, that it had no negative market effects. The CCA must specifically elaborate the reasons for imposing a symbolic fine.

Overview of CCA's decisions

Tables 1 and 2 provide an overview of CCA's decisions where fines have been imposed, separately for serious and minor infringements.

Table 1 – Serious infringements

1	Bakeries cartel	Chamber of Trade of Osijek-Baranja County, Association of craftsmen Osijek	€6,666.67	less than 0.5 %	Symbolic fine, CCA decision of 26 July 2012, final
		8 bakeries from Osijek-Baranja County	€200.00 each	/	
		9 bakeries from Osijek-Baranja County	€66.67 each	/	
2	Bus cartel	Presečki grupa	€134,533.33	1.78 %	CCA decision of 27 December 2012, final
		Rudi Express	€13,066.67	2.18 %	
		Boris Jambrošić, owner of Jambrošić Tours	€10,666.67	5.83 %	
		Željko Jakopić, owner of Autobusni prijevoznik Turist	€8,933.67	2.1 %	
3	Vertical agreement (selective distribution system)	Kmag	€6,666.67	/	Symbolic fine, CCA decision of 13 May 2013 annulled on appeal
4	Abuse of dominance	Croatian Composers' Society - Protection of music copyrights	€13,600.00	/	CCA decision of 6 December 2013 annulled on appeal
5	Orthodontists' cartel	Croatian Society of Orthodontics	€20,000.00	/	Symbolic fine, CCA decision of 12 July 2014 annulled on appeal
6	Vertical agreement (resale price maintenance)	Dukat	€106,666.67	0.04 %	Symbolic fine, CCA decision of 30 July 2014, final
		Konzum	€80,000.00	0.0045 %	
7	Vertical agreement (resale price maintenance)	Kutjevo	€17,333.33	0.038 %	Symbolic fine, CCA decision of 30 July 2014, final
		KTC	€13,333.33	0.0091 %	
8	Vertical agreement (resale price maintenance)	Carlsberg Croatia	€66,666.67	0.17 %	Symbolic fine, CCA decision of 23October 2014, final
		KTC	€13,333.33	0.0091 %	
9	Vertical agreement (resale price maintenance)	Kraš	€208,080.00	/	CCA decision of 3 December 2014, final
		NTL	€136,266.67	/	
10	Security agencies' cartel	Sokol Marić	€177,733.33	0.45 %	CCA decision of 17 March 2015, final
		Klemm Sigurnost	€87,600.00	0.72 %	
		Securitas Hrvatska	€136,933.00	1.07 %	
		AKD-Zaštita	€120,666.67	0.95 %	
		Bilić-Erić	€125,600.00	1.16 %	
		Arsenal-Ivezić	€22,800.00	1.13 %	
		V Grupa	€38,533.33	0.63 %	CCA decision of 17 March 2015 annulled on appeal

11	Marinas' cartel	ACI	€156,933.33	0.57 %	CCA decision of 17 March 2015 annulled on appeal
		Marina Hramina	€12,666.67	0.21 %	
		Marina Šibenik	€17,733.33	0.51 %	
		Tehnomont	€17,066.67	0.32 %	
		Brodogradilište i marina	€4,933.33	0.18 %	
		Ilirija	€26,266.67	0.17 %	
		Marina Borik	€5,333.33	0.58 %	
		Marina Dalmacija	€43,466.67	0.47 %	
		Marina Punat	€25,333.33	0.39 %	
		Croatian Chamber of Economy	€13,333.33	0.044 %	Symbolic fine, CCA decision of 17 March 2015 annulled on appeal
12	Betting houses cartel	Bolus	€13,200.00	0.36 %	CCA decision of 22 December 2015
		Favorit sportska kladionica	€49,466.67	1.20 %	
		Germania Sport	€71,066.67	0.72 %	
		Prva Sportska Kladionica	€299,600.00	0.46 %	
		Super Sport	€865,866.67	1.3 %	

Fines for serious infringements were imposed in six cartel cases, five vertical agreement cases and only one abuse of dominance case.

In only four cases, the CCA found aggravating circumstances (Chamber of Trade of Osijek-Baranja County and Presečki grupa were cartel initiators; Dukat and Konzum as major Croatian undertakings should have been aware of the unlawfulness of the agreement; and V Grupa has failed to deliver requested documentation to the CCA).

In other cases, the CCA found mitigating circumstances, primarily by establishing that the undertakings did not apply the prohibited agreements in practice, or that they committed no prior infringements.

Most striking is the CCA's application of the symbolic fine. The data shows that symbolic fine was applied extensively (seven out of 12 cases). Besides this, symbolic fines were imposed for some of the most straightforward competition law infringements, such as resale price maintenance and even cartels. Finally, the amounts of the imposed symbolic fines varied significantly (from only €66.67 to €106,666.67).

Table 2 – Minor infringements

1	Failure to notify concentration	Tommy	€12,400.00	less than 0.25 %	CCA decision of 9 May 2013
2	Failure to notify concentration	Slobodna Dalmacija	€2,800.00	/	CCA decision of 13 May 2013 annulled on appeal
3	Failure to notify concentration	Andre	€1,733.33	less than 0.25 %	CCA decision of 27 June 2013
4	Failure to notify concentration, implementation of the concentration prior to CCA clearance	Cratis Retis	€1,333.33	less than 1 %	CCA decision of 11 July 2013

5	Failure to notify concentration, implementation of the concentration prior to CCA clearance	Shareholders of Televizija Dalmacija:	In total €1,333.33 divided between the shareholders as follows:	less than 0.25 %	CCA decision of 3 October 2013
		Saša Engler	€266.67		
		Zvonimir Kabelka	€266.67		
		Zoran Kovačić	€266.67		
		Zakup	€533.33		
6	Failure to notify concentration, implementation of the concentration prior to CCA clearance	Totalni radio	€1,333.33	0.09 %	Symbolic fine, CCA decision of 11 June 2015
7	Failure to notify concentration, implementation of the concentration prior to CCA clearance	Express radio	€1,333.33	0.7 %	Symbolic fine, CCA decision of 11 June 2015
8	Failure to notify concentration, implementation of the concentration prior to CCA clearance	Nautički centar Prgin	€1,333.33	0.03 %	Symbolic fine, CCA decision of 11 June 2015
9	Failure to notify concentration, implementation of the concentration prior to CCA clearance	Radio Trsat	€1,333.33	0.95 %	Symbolic fine, CCA decision of 17 July 2015
10	Failure to notify concentration, implementation of the concentration prior to the CCA decision	Capital FM	€3,333.33	0.22 %	CCA decision of 4 November 2015
11	Failure to notify concentration, implementation of the concentration prior to CCA clearance	Mile Kaselj	€600.00	0.9 %	Symbolic fine, CCA decision of 11 December 2015

All 11 cases of minor infringements were related to the failure to notify concentration and/or the implementation of the concentration prior to CCA's clearance. However, with the exception of Tommy, these were all mergers in the media sector where concentration notification in Croatia is mandatory regardless of the parties' turnovers. The fact that the parties of these media mergers were primarily small and medium undertakings explains the rather low amounts of fines imposed and the extensive use of symbolic fines.

Aggravating circumstances were found only in one case (Radio Trsat – previous infringement of its shareholder). All other cases involved mitigating circumstances (no previous infringements, cooperation of the parties, negligence, admitting the offence, difficult financial situation).

Conclusion

The fining practice of the CCA developed over the last almost six years shows a tremendous improvement in comparison to prior practice of misdemeanour courts. The significantly higher fines imposed by the CCA and, more importantly, the fact that the imposed fines are indeed effectively enforced from competition offenders, were the first steps in quashing the idea that competition infringements may pay off.

There is of course room to debate some of the CCA's fining practices. This primarily involves the rather extensive and somewhat unclear use of the symbolic fine. Symbolic fine is conceived as an exception to be used in extremely mitigating circumstances and should consequently indeed be 'symbolic' in its amount. However, the practice of the CCA has shown that symbolic fine was

used more as a rule then an exception, that it may be applied even for hard core competition infringements (Resale Price Maintenance or even cartels), and that it may be imposed in a rather significant amount. The CCA's development of clearer criteria and guidance on the use of the symbolic fine should result not only in the increase of legal security but also of the overall competition compliance.

Notes

1 Act on the Protection of Competition (Official Gazette No 79/09, 80/13).
2 Act on the Protection of Competition (Official Gazette No 122/03, 79/09).
3 Annual report of the CCA for 2009 available at: www.aztn.hr.
4 1 EUR = 7.5 Croatian kunas.
5 Ordinance on the Criteria for the Imposition of Administrative Punitive Measures (Official Gazette No 129/10, 23/15) and Ordinance on the Criteria for the Exemption and Reduction of Administrative Punitive Measures (Official Gazette No 129/10).
6 Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (Text with EEA relevance), [2006] OJ C 210, 2–5.
7 Commission Notice on Immunity from fines and reduction of fines in cartel cases (Text with EEA relevance) [2006] OJ C 298, 17–22.
8 Ordinance on the Criteria for the Exemption and Reduction of Administrative Punitive Measures (Official Gazette No 129/10).
9 €1 = 7.5 Croatian kunas.
10 €1 = 7.5 Croatian kunas.

Agreement between film distributors and cinema operators restricting discounts on cinema tickets held to be anti-competitive[1]

DENMARK

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In 2011, the Danish Competition and Consumer Authority (DCCA) carried out an inspection at the Association of Film Distributors in Denmark (FAIF) based on the assumption that film distributors and cinema operators had entered into anti-competitive agreements.

The case concerned a general trade agreement between FAIF and the Association of Danish Cinema Operators regulating the general terms for film distribution agreements between cinemas and film distributors. Clause 16 of the agreement stipulated that cinemas could only grant discounts on cinema tickets if this was agreed with the film distributor beforehand. The agreement covered most of the film distributors and cinema operators in Denmark.

Furthermore, the DCCA's investigation revealed that in 2010 FAIF had sent out a notice to all cinemas in Denmark emphasising that if a cinema operator wanted to grant a discount of more than 20 per cent of the standard price, this had to be approved by the FAIF.

On 25 May 2016, the DCCA found that these agreements limited competition on the market for the distribution of cinema movies and on the market for the showing of cinema movies. The DCCA ordered the two associations to bring the infringements to an end and to refrain from entering into similar agreements in the future. The decision entails that cinema operators will now be free to offer their customers discounts.

A franchisor and its franchisees accept fines for having coordinated prices and having shared markets with regard to milking robots

In April 2016, the Danish company Lely Nordic A/S (former Lely Scandinavia) and three of its Danish franchisees accepted fines of DKK 1m for having fixed retail prices and

having shared markets of supply with regard to milking robots.

The case was originally taken up by the DCCA on the basis of several complaints regarding Lely Nordic A/S and its activities on the markets for sale and subsequent service and repair of milking robots. In collaboration with the competition authorities in the Netherlands and Germany, the DCCA carried out inspections at Lely Nordic A/S and its Danish franchisees.

The investigations resulted in a decision by the DCCA in 2014, establishing that Lely Nordic A/S, as franchisor, and its Danish franchisees had held meetings and exchanged emails where selling prices were discussed and fixed, and where market sharing was discussed and agreed to. The DCCA thus found that Lely Nordic A/S and its franchisees had infringed section 6 of the Danish Competition Act and Article 101 Treaty on the Functioning of the European Union (TFEU) by having agreed to coordinate prices and share markets for a period of four-and-a-half years.

As Lely Nordic A/S had actively participated in the anti-competitive activities, the agreement was found to primarily constitute a horizontal agreement, and was thus not covered by the block exemption for vertical agreements.

The DCCA was of the opinion that the infringement could entail higher prices on milking robots to the detriment of farmers buying such equipment. These farmers could subsequently be expected to pass on their increased costs to the consumers buying milk products.

On 30 September 2015, the Danish Competition Appeals Tribunal upheld the DCCA's decision. The case was subsequently handed over to the Public Prosecutor for Special Economic Crimes which imposed a fine of DKK 750,000 on Lely Nordic and imposed fines of DKK 100,000 on each of the franchisees.

The Danish Competition Appeals Tribunal upholds decision stating that a consortia agreement between two road contractors was anti-competitive

On 24 June 2015, the Danish Competition Council held that the largest and second largest contractors within the market for road marking in Denmark, LKF Vejmarkering (LKF) and Eurostar Danmark (Eurostar), had entered into an anti-competitive consortia agreement by jointly submitting a bid for a tender made by the Danish Road Directorate. LKF and Eurostar brought the decision before the Danish Competition Appeals Tribunal (DCAT).

On 11 April 2016, the DCAT upheld the Competition Council's decision stating that it had been proven that Eurostar and LKF would each have been able to bid for individual parts of the tender, and thus the consortium had not been objectively necessary. The DCAT considered the companies as competitors which, by making a joint bid, had eliminated competition between them in the bidding phase. On this background, the consortia agreement was found to restrict competition by object.

The DCAT has reported the case to the Public Prosecutor for Special Economic Crimes.

LKF and Eurostar have brought the decision before the Danish Maritime and Commercial High Court.

Note

1 Gorrissen Federspiel represented parties in the cases mentioned above. This note is based on publicly available information only.

Finland proceeds in implementing EU Damages Directive

FINLAND

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On 19 May 2016, the Finnish government proposed a new Act on Antitrust Damages Actions to implement the EU Directive on Antitrust Damages Actions into Finnish legislation. The Government Bill was preceded by a proposal of a working group set up by the Ministry of Employment and the Economy, which had been published on 16 June 2015. Although the Government Bill largely follows the proposal of the working group, it also contains some important modifications based on comments received from various interested parties.

The Finnish Parliament is currently handling the Government Bill. The final Finnish Act on Antitrust Damages Actions is expected to come into effect on 26 December 2016.

Below we assess briefly the main features of the Government Bill, focusing on aspects where the Directive gives latitude for national variations.

Material and temporal scope

In line with the proposal of the working group set up by the Ministry of Employment and the Economy, the Act would be applicable to damage resulting from an infringement of both European Union (EU) and Finnish competition law, and to claims proceedings both in general courts and in arbitration.

According to the Government Bill, the Act would apply to actions for damages which are brought after the Act's effective date (26 December 2016). This means that actions brought prior to the said date will be dealt with applying the rules in force prior to the Act.

The Directive also requires Member States to ensure that the national measures adopted in order to comply with the substantive provisions of the Directive do not apply retroactively. According to the Government Bill, such substantive provisions are the provisions concerning the liability for damages (including the presumption of harm as well as the rules on joint and several liability), the persons entitled to compensation, the extent of the compensation, limitation periods and consensual dispute resolution. The said provisions of the new Act will only apply to infringements that have continued after the Act's effective date, and even then only to the parts of the infringement that concern the period after the effective date.

Compensable damage and presumption of harm

All persons who have suffered harm caused by an infringement of competition law have a right to full compensation. This compensation shall cover actual loss and loss of profit, as well as payment of interest from the time the harm occurred until compensation is paid.

The Government Bill notes that there were several alternatives as regards the calculation of interest. The final proposal is that interest shall be paid on damages as stipulated in section 3(2) of the Finnish Interest Act from the day when the damage was caused until the day when the conditions for overdue interest as set out in section 7 of the Interest Act have been fulfilled. The interest rate prescribed in section 3(2) refers to the reference rate of the European Central Bank (ECB), whereas the rate prescribed in section 7 is seven percentage points higher. Currently, the said rates are thus 0.5 per cent and 7.5 per cent, respectively.

According to the proposal, there is a rebuttable presumption that cartel infringements cause harm. However, there is no such presumption concerning other infringements.

Economic succession

The Damages Directive does not include specific provisions concerning so-called economic succession. However, the working group set up by the Ministry of Employment and the Economy had proposed that if the business activity in which competition law has been infringed has been transferred, also the acquiring party would be liable for damages if it knew or it should have known about

the infringement at the time of acquiring the business activity. This proposal received considerable criticism and the Government Bill does not contain any provisions concerning economic succession. Thus, the question of whether and under which circumstances liability for damages can be based on economic succession remains to be decided in future case law.

The effect of infringement decisions

A Finnish court shall base its judgment on the fact that competition law has been infringed if there is a final infringement decision of the Finnish Competition and Consumer Authority (FCCA), the Finnish Market Court or the Finnish Supreme Administrative Court. The effect of the determination of the infringement would cover only the nature of the infringement and its material, personal, temporal and territorial scope.

If the infringement of competition law is found in a final decision rendered in another Member State, a Finnish court shall consider such infringement decision as part of evidence that an infringement of competition law has occurred.

Joint and several liability

Undertakings that have infringed competition law through joint behaviour are in general jointly and severally liable for the harm caused by the infringement. The exceptions concerning leniency recipients and certain small or medium-sized enterprises correspond to those in the EU Damages Directive.

Passing on

According to the Directive and the Government Bill, compensation can be claimed by anyone who suffered damage, irrespective of whether they are direct or indirect purchasers (or sellers, as the case may be). In order to avoid overcompensation, appropriate rules shall be enacted to ensure that compensation for actual loss at any level of the supply chain does not exceed the harm suffered at that level. The Government Bill also contains rules concerning distribution of the burden of proof relating to passing on of the overcharge.

Presentation of evidence

As set out in the Government Bill, presentation of evidence will be assessed under the general rules in Chapter 17 of the Finnish Code of Judicial Procedure, in particular sections 38 and 40. A court cannot in damages proceedings take into account as evidence information on the contents of corporate statements from leniency procedures (unless invoked by the leniency applicant itself). Furthermore, before the FCCA has closed its proceedings, a court cannot take into account certain other information as evidence. Courts shall limit the disclosure of evidence to what is proportionate taking into consideration the legitimate interests of all parties concerned.

Limitation

The limitation rules proposed by the working group have been modified to ensure compliance with the Directive. According to the Government Bill, the right to compensation shall expire if the action for damages has not been initiated within five years from the point in time when the claimant knew, or should have known of the infringement of competition law, of the harm and of the party responsible for the harm. If there are pending public enforcement proceedings concerning the infringement, the limitation period is interrupted until one year after the end of such proceedings. In any case, an action is not time barred if it has been initiated within ten years from the point in time when the infringement of competition law ended, or within one year from the end of the public enforcement proceedings.

The French Competition Authority finds that Umicore abused its dominant position on the French zinc construction products market and imposes a €69m financial penalty

FRANCE

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On 23 June 2016, the Autorité de la concurrence (French Competition Authority) imposed a €69m financial penalty to the company Umicore for abuse of its dominant position on the French zinc construction products market (Decision No 16-D-14).

Umicore is a multinational materials technology company headquartered in Brussels, Belgium. It is among the world leaders in the manufacture and marketing of zinc products. Zinc is used in France in particular in roofs for houses and buildings. Umicore's zinc products represent 70 per cent of the total sales of zinc construction products in France, making it the leader of the market. Zinc producers sell their products to general or specialised distributors, who then sell them to construction workers, roofers in particular.

Since 1999, Umicore distribution agreements included a clause under which distributors were compelled to promote Umicore's products exclusively. Promotion of competing products was not allowed. After 2004, the clause was redrafted to become more implicit. However, the emails seized during the investigations on the computers of Umicore's staff, as well as statements given by distributors to the investigators and even by Umicore representatives, showed that this clause was interpreted as being an exclusivity clause under which distributors were prevented from supplying from alternative producers.

The contracts also compelled the distributors to have the entire variety of Umicore's products in stock continuously, with a possibility for Umicore to control the stock and its conditions of storage. However, the investigations' unscheduled stock controls conducted by Umicore representatives showed that instead of verifying the application of this clause, Umicore representatives were making sure that distributors did not store competing products. During the investigations led by the Autorité de la concurrence, a representative of a distributor even stated that some distributors were forced to hide the competing products stored in the warehouse.

In addition, under the distribution agreement, distributors had the obligation to provide Umicore with an estimation of their annual requirements in products, in order to allow Umicore to organise the manufacture of the corresponding quantities. However, the investigations carried out by the Autorité de la concurrence showed that these submissions were used to detect a drop in orders after which Umicore would request explanations from the distributor when said drop was not consistent with the market trend. This practice dissuaded distributors from purchasing competing products.

Finally, the investigations showed that Umicore's commercial policy included threats and retaliation against distributors who purchased or promoted the sale of competing products: distributors deviating from the line of conduct imposed by Umicore were facing a reduction or suppression of discounts, exclusion of the status of 'VM Zinc' distributor, which entailed the loss of special rates, privileged payment and delivery conditions. Moreover, 'VM Zinc' distributors were guaranteed to have a certain amount of orders from clients, due to the relations

maintained by Umicore with said clients. For instance, in 2007, Umicore withdrew the 'VM zinc' label from a distributor who decided to supply products from a Slovenian producer that offered lower prices.

Even if retaliation measures were not imposed on an important number of distributors, they allowed Umicore to send a message to all distributors, deterring them from violating the unwritten obligation not to supply from other zinc manufacturers. Umicore made it clear that supplying from other zinc manufacturers would entail sanctions.

Considering the 70 per cent market share held by Umicore, and the duration of the practices – from 1999 to 2007 – in practice, being a Umicore 'VM Zinc' distributor was necessary in order to distribute these products efficiently.

The Autorité de la concurrence found that these practices prevented Umicore's competitors from developing in the market and also lessened competition as distributors were prevented from obtaining lower prices from said competitors. As a result, Umicore's prices were five to 15 per cent more expensive than its competitors' and this surplus has been passed on to the end client for nine years.

The Autorité de la concurrence imposed a particularly significant fine of €69.2m taking into account, in particular, the length of the practices – nine years – and the fact that Umicore was the member of a worldwide group with a high turnover (€9.7bn in 2016).

GERMANY

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German competition law to be amended

Like any other European Union (EU) Member State, Germany has to implement the Antitrust Damages Directive by the end of this year. However, it will use the occasion to introduce additional reforms to its competition law. The Federal Ministry for Economic Affairs has just published a draft of the Ninth Amendment to the Act Against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*).

An important part of the reform is to adapt the law to the digital economy. The rules on unilateral conduct (abuse of a dominant position) will apply irrespective of whether a service is performed against payment of a remuneration or for free. Competition authorities and courts dealing with multi-faceted markets and with networks will have to take into account network effects, parallel usage of several services and the cost of switching services, economies of scope with respect to network effects, access to data, and competition in innovation. Merger control will no longer only apply if all turnover thresholds are reached (total worldwide revenues of more than €500m, one participant with German revenues of €25m, and another participant with revenues of €5m in Germany). In future, it will be enough if one participant reaches the worldwide revenues and the €25m in Germany provided that the purchase price exceeds €350m. This amendment is supposed to catch cases like *Facebook/Whatsapp* (Whatsapp had no sales in Germany).[1] Of course, without the second domestic turnover threshold it is difficult to establish a sufficient nexus to Germany. To this end, the draft requires that the second participant (who does not reach the €5m domestic turnover threshold) is active in Germany or will likely become active there.

The draft also aims to facilitate cooperation between newspaper or magazine publishers. Cooperation between them will be exempt from the law if they cooperate as publishers other than with respect to content, as long as the cooperation will improve the participants' commercial basis for competing between media. The effect of this exemption should be limited as Article 101 Treaty on the Functioning of the European Union (TFEU) continues to apply.

Loopholes that allowed enterprises to escape the payment of fines by transforming companies or by transferring assets will be closed. More generally, the German

system of fining companies will be brought closer to the EU model. Notably, it will become possible to impose fines on parent companies that exerted decisive influence on legal entities whose management participated in an infringement.

With respect to the civil law consequences of an infringement, the draft does not heed calls to establish liability based on the large notion of what constitutes an undertaking or enterprise. Otherwise, it implements the Antitrust Damages Directive closely. The statute of limitations is extended from three years to the minimum five years provided by the directive (albeit to the end of the calendar year). Rather than interfering with the German procedural system, in order to implement the directive's rules on document production, the draft creates substantive claims for the production of documents in antitrust damages cases. To the extent that such claims are raised between the parties to the proceedings, the court can issue interim judgments on these claims, which are subject to full appeal. Going beyond what the directive requires, the draft also contains a rule on how joint and several liability between several infringers is shared among them, namely on the basis of the facts of the case and notably the degree to which they have caused the damage.

The amendment is scheduled to enter into force by the end of 2016.

Note

1 (Case comp/m. 7217) Commission decision of 03.10.2014 [2014] OJ C(2014) 7239 final.

Hong Kong's first antitrust judgment since the new competition regime's entry into force

HONG KONG

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On 29 January 2016, Hong Kong's Court of First Instance quashed a 2013 decision ('Decision') by the Communications Authority (CA) – upheld by the Chief Executive In Council (CEIC) – against Television Broadcasters (TVB), primarily on the grounds that the CA and CEIC are inherently political entities lacking objective impartiality as decision-makers due to their concurrent policy, advisory and executive roles.

While the Decision was ultimately set aside on constitutional grounds, as the CA and CEIC were not found to be independent and impartial tribunals, the Honourable Justice Godfrey Lam of the Court of First Instance upheld most of the competition analysis by the CA and confirmed that TVB's practices were anti-competitive. As the first President of the Competition Tribunal under Hong Kong's new competition regime, Justice Lam's judgment provides considerable insight as to how future competition cases might be interpreted in Hong Kong.

September 2013 Decision

In September 2013, the CA found that TVB had violated the antitrust provisions of the Broadcasting Ordinance as the station had imposed certain restrictions with their artistes and singers with the purpose and effect of restricting or distorting competition in the Hong Kong television programme service market ('downstream market'). The restrictions included the:

- 'no promotion policy', which prohibited TVB's contractual artistes from appearing in promotional activities of other local television stations, even if they starred in the production promoted;
- 'no original voice policy', which prohibited TVB's contractual artistes' original voice from being used in productions featuring their images broadcasted by other local or overseas television stations;
- 'no Cantonese policy', whereby artistes on contracts with TVB were prohibited from speaking Cantonese in programmes of other television stations in Hong Kong; and

- 'no-obligation-to-use-clause', whereby TVB was not under an obligation to use a contracted artiste.

As a result of the above, the CA found that TVB had imposed exclusivity on singers and artistes. Due to the 'no-obligation-to-use-clause', TVB was not bound to make any actual use of an artiste's services and did not in fact fully engage significant numbers of artistes and singers it contracted with. This enabled TVB to 'warehouse' them at low cost. The CA found that the above provisions and policies had the effect of foreclosing rivals' access to an essential input for television programme production. Such foreclosure was found to produce significant harm on television viewers as end-consumers by causing a deterioration of quality of rivals' programme offerings. The CA imposed a HK$900,000 penalty on TVB.

Despite the ability for the artistes or singers to seek consent prior to appearing on or providing services to other television stations in Hong Kong, in reality, the artistes and singers considered requesting TVB's consent to be futile or feared that seeking consent would be detrimental to their careers.

Court of First Instance's 2016 judgment

The framework for competition analysis to be applied was set out in the Guidelines to the Application of the Competition Provisions of the Broadcasting Ordinance, which were applicable to the telecommunications industry prior to the Competition Ordinance coming into force in December 2015. It applies a sequential methodology comprising three broad stages:

- defining the relevant market;
- assessing market power; and
- identifying an anti-competitive purpose or effect in the relevant market.

Justice Lam considered the appropriate standard of proof is the balance of probabilities.

Market definition

While TVB agreed with the CA's definition of the downstream market as the 'all TV viewing market', it contended that the CA erred in failing to define the relevant upstream market since the allegation was that conduct in such market impaired competition in the downstream market. TVB wanted to include in the definition of upstream market new or aspiring artistes and singers, and artistes not currently contracted with Hong Kong television broadcasters.

However, the judge held that the central focus remains on evaluating whether the contested conduct has an anti-competitive effect in a particular relevant market – in this case, the downstream market. It is not essential to formally define the upstream market in every case where input foreclosure is the underlying theory of harm, nor is there a general mandatory requirement in competition law to carry out a formal market definition exercise. Further, by applying a substitutability analysis to determine the size of the available pool of talent for producers of TV programmes in Hong Kong, it was unlikely that a local broadcaster could rely significantly on new artistes or high value artistes not under contract with any TV broadcasters to participate in entertainment programmes to drive rating and advertising revenue, as it was found in the evidence that it takes time to nurture new talents.

Market power

Justice Lam rejected that the proper assessment of market power needed to be based on revenue. He remarked that assessing market power depends on the nature of the competition being studied. For broadcasters, this was best reflected in their share of viewership, since both free to air (FTA) and pay TV broadcasters were found to compete with each other to maximise viewership – the former to attract higher advertising revenue, and the latter to attract subscription fees.

The Broadcasting Ordinance defines dominance in terms of the ability 'to act without significant competitive restraint from its competitors and customers.' Thus, Justice Lam agreed that the relevant test is whether TVB was able to behave independently of its rivals and ultimately consumers, either by profitably raising prices or, in a FTA context, profitably reducing production cost. This is in line with international practices and is also the test favoured by the Hong Kong Competition Commission in its guidelines. If a broadcaster can reduce the quality of its programming without suffering a significant drop in viewership, this would be an indication of the extent of its market power. Reviewing the evidence, 40 per cent of all households in 2009 did not have a pay TV subscription. They would not necessarily respond to a small drop in quality of TVB's programmes by switching to pay TV given cost and other considerations.

The CA also based its finding of market power on other factors including:

- the fact that TVB's market share was significantly higher than that of its rivals;
- high barriers to entry and exit from the market; and
- the absence of any real countervailing buyer or supplier power.

Proportionality of remedies

Justice Lam held that the CA had imposed disproportionate remedies that went beyond what was necessary to redress the anti-competitive harm found. The judge held that there was no reason for requiring TVB to abandon all restrictive clauses and policies in relation to all artistes on all types of contracts – that is, serial-based, minimum one-show or singer contracts – when releasing artistes on the minimum one-show commitment contracts could already bring the infringing system to an end.

Takeaways

This case is of considerable significance to competition enforcement in Hong Kong, as it is the first case decided by the President of Hong Kong's new Competition Tribunal.

While the Decision was struck out on constitutional grounds, Justice Lam upheld the entirety of the competition analysis by the CA – except the proportionality of the remedies – and confirmed that TVB's practices were anti-competitive.

The judge found that the 'no original voice policy' rendered rivals' programmes less appealing to TV viewers, and imposed a direct cost on rivals by requiring them to dub acquired programmes. Similarly, the 'no promotion policy' exacted a direct cost on rivals in the form of extra advertising and promotional expenses incurred to promote a drama series. The 'no Cantonese policy' also reduced the quality of the interviews with singers on rival TV stations, thus impairing rivals' ability to compete with TVB. On the balance of probabilities, restricting artistes' services had a high potential of causing harm to consumers by resulting in a deterioration of quality of rivals' self-produced TV programmes for which artistes services are a key input.

Updates from India

INDIA

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Introduction

Enforcement provisions of the Competition Act 2002 (as amended) (Competition Act) came into effect in May 2009 while merger control in India became effective only on 1 July 2011. Competition law in India continues to develop in a manner that one has come to expect from emerging jurisdictions. There has been much activity at the courts, which continue to hear legal challenges to the Competition Commission of India's (CCI's) jurisdiction; and at the Competition Appellate Tribunal (COMPAT), which most significantly remanded both the *Cement Cartel* case (of 2010)[1], as well as the *Airlines* case (of 2013)[2] to the CCI, without hearing the merits of the cases, so that the very obvious due process concerns of the appellant companies were appropriately addressed by the CCI. The COMPAT's insistence on the CCI following the basic rules of natural justice has been a recurring theme ever since it heard the first appeals against some of the CCI's earliest orders.

The CCI heard the cement manufacturers again, earlier this year, and while one awaits its final order, developments in investigative methods at the Director General's office suggest a greater and more concerted effort to seek direct evidence (such as, emails and telephone records) as opposed to the purely circumstantial and economic evidence that it has so far relied upon in finding cartel infringements.

There have been no known instances of 'dawn raids' this year (perhaps while the authorities await the Delhi High Court's order on the challenge to the manner in which the Director General's office exercised its powers of search and seizure of JC Bamford India Limited's (JCB) premises in the National

Capital Region of Delhi (2014)). And, while it is well known that the CCI has been in receipt of the first few 'leniency' applications since 2013,[3] these cases have not yet seen closure.

The number of merger control filings at the CCI have seen a tremendous increase[4] and there is a significant number of global transactions[5] being notified in India. Notable developments include higher penalties for delayed filings[6] made by the parties as well as the conclusion of the third 'phase II' (or detailed investigation) by the CCI into the proposed merger of PVR Limited and DLF Utilities Limited, with significant overlaps across several relevant geographic markets in the National Capital Region of Delhi. The companies are in the business of film exhibition (multiplex cinema screens).

A summary of the key recent developments is set out below.

Key changes to legislation

The Combination Regulations were amended twice during the year 2015 – 16. The amendments include:

The trigger to making a filing with the CCI:

Previously, communications to a statutory authority or the central or state government would trigger the 30 calendar day period to filing a notice with the CCI, where such communication conveyed an intention to acquire shares, voting rights or control. This requirement stands amended and it is now only a public announcement in terms of the Securities and Exchange Board of India (SEBI) Takeover Code that would trigger a filing with the CCI. India is one of the few jurisdictions that mandate a filing be made within a few days of the trigger event (which also includes the binding agreement and, in case of hostile takeovers, any document conveying a decision to acquire control) in spite of the fact that the merger control regime is mandatory and suspensory.

Jurisdictional thresholds increased and the de minimis exemption

Original jurisdictional thresholds under the Competition Act were increased by a 100 per cent and the de minimis (small target) exemption was extended until 2021. The de minimis exemption would be met where the target enterprise has assets in India valued at up to INR 3.5bn (approximately US$52.15m) or, a turnover in India of not more than INR 10bn (approximately US$149.09m).

Minority acquisitions

Minority acquisitions of less than ten per cent, where the acquirer does not have any special voting rights and is not a member of the board of directors of the target (without also being entitled to nominate a director on the board of directors), would be exempt from notification to the CCI. This amendment, to some extent, puts to rest concerns surrounding the question of whether minority acquisitions (particularly those involving competitors) were notifiable even when the acquisition involved a nominal shareholding. Acquirers would, however, be advised to proceed with caution given the CCI's recent observations in the *Piramal/Shriram Group* case (discussed later). There is no change to the existing exemption to acquisitions of up to 25 per cent as long as the acquirer does not acquire control over the target and as long as the transaction is in the ordinary course of business. CCI's decisional practice[7] views certain minority protection rights (that is, appointment of key managerial personnel, approval of annual budget and/or business plan, approval for commencement of new line of business, etc) as amounting to control for the purposes of the Competition Act.

Key developments at the courts, the COMPAT and the CCI

Delhi High Court allows CCI jurisdiction on abuse of dominance in respect of patent rights

In a petition filed by Telefonaktiebolaget LM Ericsson ('Ericsson') challenging two orders of the CCI, the Delhi High Court held that the jurisdiction of the CCI under the Competition Act to probe allegations of anti-competitive practices and abuse of dominance arising out of the monopoly granted by patent rights cannot be taken away even if the Patents Act 1970 ('Patents Act') provides for efficacious remedies such as the nature of granting compulsory licences. The Delhi High Court did not find irreconcilable conflict between the Patents Act and the Competition Act.

Appeal to the COMPAT against the CCI's conditional approval in Holcim/Lafarge[8]

The CCI's conditional approval of the

merger between Holcim Ltd and Lafarge SA involved the divestment of two cement plants of Lafarge India Private Limited ('Lafarge India'). The parties were unable to sell these assets and proposed an alternate remedy to the CCI. The CCI passed a supplementary order altering the divestment process which, instead of the divestment of the assets, envisaged the sale of 100 per cent of Lafarge India's shares. Dalmia Bharat Limited ('Dalmia') (another cement manufacturer) challenged the supplementary order of the CCI at the COMPAT alleging procedural irregularities and also challenging the substance of the original order (particularly the conditions that the purchaser of the divestment assets would have to satisfy in order for the divestment to go through). The COMPAT did stay the operation of the supplementary order for a few days after which Dalmia withdrew the appeal.

PVR/DLF Utilities[9] (the third 'Phase II' merger at the CCI)

The combination involved the acquisition of 39 cinema screens (29 existing and ten that are forthcoming) of DLF Utilities Limited ('DUL') by PVR Limited ('PVR'). The target assets were located in New Delhi, Noida, Gurgaon and Chandigarh. This case represents only the third instance where the CCI has conducted a Phase II investigation (a detailed review) into a proposed merger, the first being *Sun Pharma/Ranbaxy* and the second, *Holcim/Lafarge*.

Piramal/Sriram Group[10] (minority acquisition)

Piramal Enterprises Limited ('PEL') made a series of minority acquisitions involving three separate entities within the Shriram Group of Companies over the period spanning May 2013 to June 2014. While none of the agreements seemed interlinked, the CCI decided that the three acquisitions were interconnected and did not qualify for the exemption available to minority acquisitions and that they also ought to have been notified when the first acquisition (May 2013) was contemplated. The CCI's conclusions were premised largely on statements made by PEL in their Annual Report, which suggested that the investments in the Shriram Group of Companies were of a 'strategic' nature and announced PEL's foray into financial services. It is not clear from the CCI's order how PEL would have been expected to notify within 30 days of executing the documentation for the first acquisition (that is, in May–June 2013) the other two acquisitions, which were signed only a year later, in 2014. The most significant aspect of this case concerns the applicability of the Item 1 exemption (for minority acquisitions) and that parties must exercise caution with respect to their announcements and public statements. The CCI is prone to attributing emphasis to such statements without allowing for the possibility that they may be rhetorical.

GE/Alstom[11] (delayed filing)

The CCI found that General Electric (GE) ought to have sought the CCI's approval within 30 days of its communication (being the public announcement) to the SEBI in accordance with the Combination Regulations (as they read then). The argument that a unilateral offer for indirect acquisition that the acquirer had made to SEBI was not a 'communication' triggering the filing requirement under the Combination Regulations, was rejected by the CCI as it amounted to an intention to acquire, which sufficiently triggered merger control in India.

The 30 calendar-day filing deadline is a creature of the statute, not of the CCI's own regulations, however, it appears that the CCI finds itself constrained to strictly enforce the letter of the law in spite of the fact that this requirement was intended for the voluntary notification regime that the original version of the Competition Act had contemplated as opposed to the mandatory and suspensory regime of the statute, as it reads now.

Grasim/Aditya Birla Chemicals[12] (single economic entity)

On 31 August 2015, the CCI approved the proposed merger of Grasim Industries Limited ('Grasim') with Aditya Birla Chemicals (India) Limited (ABCIL). In this case, the common shareholding in each of the combining entities was less than 50 per cent. The CCI, nevertheless, agreed that Grasim and ABCIL formed a 'single economic entity' for the purposes of the Competition Act. The CCI's conclusion was premised on the consideration of various factual circumstances, collectively, such as: (1) the promoters constituted the single largest shareholder group in both ABCIL and Grasim and the rest of the shareholding

was dispersed; (2) the promoters had voted together as a single voting bloc for, at least, three years; and (3) the promoters exercised decisive influence on the two companies since they determined the appointment of directors, and had common management level employees, procurement and marketing teams, and logistics management. This is a significant development for the reason that the CCI has held the 'single economic entity' to be irrelevant when judging cartel-like arrangements, where the entities hold themselves out to be competitors. In the *Insurance Companies* case,[13] the CCI had penalised four public sector insurance companies for cartelisation, in spite of the insurance companies being wholly owned by the government of India and controlled and managed through the Department of Financial Services in the Ministry of Finance. The CCI had concluded that the decision-making at these companies (who had also held themselves out as competitors) was not centralised.

Notes

1 *Builders Association of India v Cement Manufacturers Association and Ors* (Case No 29/2010) dated 20 June 2012 (CCI).
2 *Express Industry Council of India v Jet Airways (India) Limited and Ors* (Case No 30/2013) dated 17 November 2015 (CCI).
3 The Competition Commission of India (Lesser Penalty) Regulations 2009 was notified on 13 August 2009.
4 The number of combinations notified to the CCI during the Annual Year (1 April–31 March) in 2011–12 was 47, in 2012–13 was 64, in 2013–14 was 45, in 2014–15 was 94, and in 2015–16 was 101. From 1 April 2016 to date, a total of 27 combinations have been notified to the CCI.
5 In the period from January 2016, a total of 49 combination have been notified to the CCI of which 22 notices pertain to global transactions.
6 As per the provisions of the Competition Act, a notice to the CCI has to be given within 30 calendar days from the trigger event. In cases of merger or amalgamation, the trigger event is the approval of the proposal of merger or amalgamation by the board of directors of the merging or amalgamating entities; and in cases of acquisitions, the trigger event is the execution of an agreement or other document.
7 See *SPE Mauritius/MSM* (Combination Registration C-2012/06/63), *Century Tokyo Leasing Corporation* (Combination Registration C-2012/09/78), *Etihad Airways PJSC/Jet Airways* (2013/05/122) and *Alpha TC Holdings & Tata Capital Growth Fund* I (Combination Registration C-2014/7/192).
8 *Holcim Limited/Lafarge SA* (Combination Registration C-2014/07/190). Supplementary Order dated 2 February 2016.
9 *PVR Limited/DLF Utilities Limited* (Combination Registration C-2015/07/288) dated 4 May 2016.
10 *Piramal Enterprises Limited* (C-2015/02/249) dated 2 May 2016.
11 *GE Energy Europe BV/General Electric Company/GE Industrial France SAS/ Alstom India Limited/Alstom T&D India Limited* (C-2015/01/241) dated 16 February 2016.
12 *Grasim and ABCIL 9* (C-2015/03/256) dated 31 August 2015.
13 *Suo Moto*, Case No 02 of 2014 (CCI).

IRELAND

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Pro-privacy judgment of Irish Competition Court limits regulator's dawn raid powers regarding electronic data

Bulk seizure and search of emails by Irish competition law enforcement agents constitutes an unlawful privacy violation in breach of the European Convention on Human Rights (ECHR) and the Irish constitution, according to a recent ruling of the Irish Competition Court.

Dawn raid search

On 14 May 2015, authorised officers of the Competition and Consumer Protection Commission (CCPC), along with members of An Garda Síochána (the Irish police force), conducted a dawn raid of the business premises of Irish Cement Limited. The dawn raid was conducted pursuant to a search warrant which specifically named Irish Cement Limited, a group company of CRH plc ('CRH Group').

During the search, the CCPC seized the entire email box of a senior executive within the CRH Group. That executive had formerly been employed by Irish Cement Limited and had subsequently taken up a senior role in another entity within the CRH Group.

The copied mailbox included emails and attachments relating to companies within the

CRH Group other than Irish Cement Limited as well as personal emails.

Trial

At trial, the plaintiff contended that the CCPC had acted outside the scope of the search warrant by seizing material unrelated to the business activities undertaken at the premises of Irish Cement Limited (referred to herein as, the contested material,). The plaintiff argued that the CCPC had unlawfully removed the contested material. A number of declaratory reliefs were sought, along with injunctive relief to restrain the CCPC from accessing, reviewing, or making any use of the contested material. Further, the plaintiffs sought a declaration that the CCPC acted *ultra vires* and contrary to domestic legislation, as well as outside the scope of its search warrant, in seizing books, documents and records unrelated to activity in connection with the business of supplying or distributing goods or providing a service at the premises of Irish Cement Limited.

The CCPC, as defendant, argued that such a position would seriously impede its ability to conduct effective search and seizure operations and that, as a regulatory agency, it must have the ability to determine what is relevant to its investigation.

Judgment

The Competition Court granted a declaration that, on the balance of probabilities, it appeared that certain materials seized by the CCPC during the dawn raid were not covered by the terms of the applicable search warrant and were done without authorisation under domestic competition law legislation.

The Competition Court refused to a grant a further declaration to the effect that the CCPC acted in contravention of Article 8 of the ECHR. The court stated, however, that were the CCPC to proceed as it intended, that is, to go through all the material it had taken away and decide upon its relevance, then that would involve such a contravention.

Finally, the plaintiff sought an injunction restraining the CCPC from accessing, reviewing or making any use whatsoever of any books, documents or records howsoever described which were seized by the CCPC, and which did not relate to an activity in connection with the business of supplying or distributing goods or providing a service at the premises of Irish Cement. The Competition Court granted this injunction, pending agreement between the parties as to a methodology to filter the irrelevant materials taken in the raid from those that were relevant to the CCPC's investigation.

Outcomes for Irish dawn raids

One challenge with the judgment is how to reconcile some key conclusions. One such conclusion is that 'certain materials seized by the [CCPC] … were not covered by the terms of the applicable search warrant and were done without authorisation.' On that basis, the court declared that the CCPC acted *ultra vires* in copying that material.

It should follow that bulk seizure of emails is unlawful and, in practice, could be resisted by defence lawyers at a dawn raid.

Throughout the judgment, however, the court seems to consider that the dawn raid (and coping of the executives email inbox) was conducted lawfully. Thus, the court sees no difficulty 'in the conduct of the 'dawn raid' per se, nor even in the inadvertent taking away of information that is not covered by the warrant.' Copying of material outside the scope of the search is 'almost, if not entirely inevitable in the course of such a "raid".' 'But such is life,' the court states. But, apart from considering it an almost inevitable transgression, the court does not explain when and why an Irish State agency may seize and/or copy private and personal correspondence unlawfully.

In applying ECHR principles, the court made reference to a number of cases concerning raids conducted by national competition authorities. Barrett J considered and applied the test set out in *Olsson v Sweden* and held that the raid carried out by the defendants was carried out in accordance with the law and necessary in a democratic society. Barrett J went on to differentiate the case at hand with the decision in *Niemetz v Germany* where it was held that the terms of a warrant for a raid were too broad. The court asserted that the decision was not relevant here as the warrant involved was 'suitably constrained in its ambit and effect.' However the court concluded that while the carrying out of the raid was lawful the retaining of documents that were surplus to the investigation was unlawful.

In applying the cases of *Delta Pekárny v Czech Republic* and *Vinci Construction v France*, the Irish Competition Court held that there was a lack of judicial oversight post raid. Barrett J

noted that the cost of bringing a Competition Court application acted as a barrier which meant that effective judicial oversight was not readily available to the average plaintiff.

Also of interest is the Competition Court's justification for finding the Charter of Fundamental Rights inapplicable. According to the court, the relevant provisions of Irish competition law (specifically, section 37 of the Competition Act 2002, in which CCPC search and seizure powers are set out) do not implement European Union (EU) law and '… are simply not a part of that corpus of legislation.' Further, the court found that section 37 of the Competition Act 2002 '… does not fall properly to be viewed as a statutory provision that is implementing European Union law, in the sense of realising some provision of European Union law in Ireland.' This is notable given that the CCPC's investigation, on foot of which the dawn raid was based, involved investigation of suspected breaches of EU and Irish competition law. Section 37 is routinely cited by CCPC officials as the agency's most potent and important power to investigate suspected EU (and Irish) competition law breaches.

In considering the plaintiffs claim that the CCPC's actions constituted a breach of privacy the court referred to the Canadian decision of *R v Vu*. Barrett J concurred with the court's assertions in this judgement that there is need for a more nuanced approach when seizing electronic information. Barrett J quoted the assertions of Cromwell J that 'computers are a multifaceted instrumentality without precedent in our society.' Barrett J notably went on to state that an unwarranted intrusion of privacy at the office 'is every bit as bad as an unwarranted search of a personal or home computer'.

Finally of possible interest is the Competition Court's *obiter* view, when considering whether the CCPC's copying of disputed material was consistent with data protection rules, that '… it was of course open to the persons present at [the business] premises … to refuse to release to the Commission some or all of the personal data that was being sought by the authorised officers of the [CCPC].'

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Irish Competition Law Agency will not proceed with Supreme Court appeal on merger review standard

Ireland's manifest error review standard in appeals of CCPC merger review decisions has effectively been settled. Recent agency decision not to pursue its appeal of a 2009 Competition Court judgment that overturned an earlier CCPC decision to block a deal effectively puts the matter to bed. Until the next appeal, at least!

Introduction

On 21 April 2016 the Competition and Consumer Protection Commission (CCPC) announced it would not proceed with an appeal against a decision of the High Court concerning the acquisition by Kerry Group plc of a rival food manufacturer, Breeo.[1]

The appeal related to a March 2009 judgment of the Irish Competition Court which overturned an earlier deal prohibition determination by the Competition Authority (now the CCPC). The CCPC's decision not to pursue the case means a review standard akin to the 'manifest error' test applied by the European courts, and effectively adopted in the 2009 judgment, remains in place.

Competition Authority prohibition

In August 2008, the Competition Authority prohibited the implementation of a €165m merger which involved the acquisition by Irish food conglomerate, Kerry Group, of various meat and cheese brands from a rival.

Following a protracted Phase II investigation, the Competition Authority blocked the deal on the basis that it would substantially lessen competition in the 'rashers' (or uncooked bacon), non-poultry cooked meats and processed cheese markets.

Competition Court reversal

Kerry Group subsequently appealed the Competition Authority's determination to the Competition division of the Irish High Court. This remains the first, and only, appeal of a Competition Authority/CCPC merger decision since adoption of Ireland's merger control regime in 2002.

In March 2009, the Competition Court annulled the Competition Authority's prohibition. Cooke J found that the Competition Authority's determination was vitiated by material error in two respects:

- the Competition Authority made a material and significant error in its appraisal of the countervailing buyer power of the four main supermarket retail chains in Ireland; and
- the Competition Authority had erred in its definition of the product markets for the cheese sector with the result that its conclusion as to a resulting substantial lessening of competition in a product market comprising processed cheese was fundamentally flawed.

Of particular significance were the Competition Court's pronouncements on the standard of review to be applied by the Competition Authority (and now the CCPC) when reviewing a deal. The Court effectively endorsed a 'manifest error' standard of review, akin to that applied by the General Court in reviewing European Commission decisions, by citing with approval the former Court of First Instance's judgments in *Commission v Tetra Laval* and *Microsoft v Commission*. Accordingly, this meant that '… the Court will be entitled and obliged to intervene to set aside a material economic conclusion if it is shown to be incorrect because it is unsupported by or inconsistent with the clear effect of the evidence, information or data upon which it is based.'[2]

As a result, the Court considered whether certain evidence relied upon by the Competition Authority was sufficiently robust and probative to support the initial prohibition determination's conclusions. This was found not to be the case. The judgment arguably establishes a more rigorous standard of judicial scrutiny of merger decisions than may be typical in judicial reviews of regulatory decisions under Irish law.

Conclusion

As a result of the Competition Court's annulment decision, Kerry Group and its rival subsequently implemented their deal notwithstanding a Competition Authority appeal lodged to the Supreme Court in April 2009. Now, seven years later and just before the case was due to be heard by the Supreme Court at the end of this month, the CCPC has decided to end the matter. In concluding its challenge, the CCPC's press release states:

> 'Following the latest review of the case, taking all the circumstances of this case into account, particularly the passage of time since the High Court judgment, the CCPC has decided not to proceed with the appeal to the Supreme Court.'

Notes

1 Press release available at: www.ccpc.ie/news/2016-04-21-m08009-kerry-breeo-update

2 Rye Investmetns Ltd v Competition Authority [2009] IEHL 140. Judgment available at: www.bailii.org/ie/cases/IEHC/2009/H140.html.

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Fast track for the approval of mergers that clearly do not harm competition

The Israeli Antitrust Authority initiates a fast track for the analysis of mergers, intended to focus the agency's efforts in transactions that have potential harm to competition

In May 2016, the Israeli Antitrust Authority (IAA) published its initiative to reduce over-regulation and to establish a new procedure, in which mergers that clearly do not harm competition shall be directed to a fast track approval called 'glitter green merger procedure'. Under this procedure, a merger that clearly does not raise any competitive concern shall be classified internally by the agency as a 'glitter green merger'. The analysis of the merger shall be made in a reduced manner and the decision regarding the proposed merger shall be achieved during a period significantly shorter than 30 calendar days (the period determined in the Israeli Restrictive Trade Practices Law for the Commissioner's decision in merger cases).

The Israeli law determines that merging companies must, under certain thresholds, notify the merger between themselves and wait for the agency's approval before executing the proposed merger. De facto, the threshold set under the law leads to a situation that a significant part of the mergers notified to the IAA for its approval are not competitive or problematic, and one can know in advance that they will be approved without the need of an in-depth analysis.

In order to enhance the chances that the agency will classify the merger as one that fits to the fast track, and in order to allow the IAA to get to conclusions faster, the parties will be required to provide as much detailed information as possible in their merger notification forms. Accordingly, in order to benefit from the fast track, the parties are required to submit full merger notification forms (and not short forms, as currently exists for certain transactions).

Provision of objective information from external sources supporting the conclusion that the merger is not harmful to competition (such as market surveys, analyst reports, market shares measures made by objective entities) might also enhance the probability that the merger will be handled under the new procedure.

The IAA announced that the new track shall be examined during a trial period of three months from 8 May 2016 until 8 August 2016, and they will also publish a full detailed public announcement, determining the three main conditions for the fast track:

- the merger should be notified only under the full (long) merger notification forms, and not under the short forms that the parties may use, in certain circumstances;
- as more relevant information shall be provided by the parties in the framework of the notification form and its appendices, including information that shall ease estimating the competitive influence of the transaction, it shall also assist the IAA to reach the conclusion (in the appropriate cases) that the merger does not raise reasonable fear for significant harm to competition and that it should be examined under the glitter green fast track; and
- the merger notification form should be signed by the CEO of each of the merging parties, and in cases that the merging party has an internal legal counsel, also signed by the internal legal counsel, and not by any other junior officers of the notifying party. The signing persons shall also confirm in a specific representation included in the merger notification form that all the information included in the merger notification form, is full and accurate.

Recent developments in Italy

ITALY

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Reference for a preliminary ruling before the ECJ in the case of *Roche/Novartis*

By its Order No 966 of 11 March 2016, the Consiglio di Stato (the Italian Supreme Administrative Court) submitted a request to the European Court of Justice (ECJ) for a preliminary ruling concerning the interpretation of Article 101 of the Treaty on the Functioning of the European Union (TFEU).

The questions brought before the ECJ arose in a case involving the companies F Hoffmann-La Roche Ltd, Roche SpA, Novartis AG and Novartis Farma SpA (hereinafter, the 'Companies'), and the Italian Antitrust Authority (IAA). The case originates from the appeal lodged against a decision of the TAR Lazio (the Regional Administrative Court of Latium), which confirmed the fines issued on the Companies by the IAA.[1] In particular, the IAA – having established the existence of an anti-competitive agreement in violation of Article 101 TFEU, implemented by Roche and Novartis in the marketing of the medical products Avastin and Lucentis – imposed fines totaling over €180m.[2]

The reference for a preliminary ruling submitted to the ECJ by the Consiglio di Stato concerns the following points:

- On a proper construction of Article 101 TFEU, can the parties to a licensing agreement be regarded as competitors if the licensee company operates on the relevant market concerned solely by virtue of that agreement? Do possible restrictions of competition between the licenser and the licensee in such a situation, although not explicitly provided for in the licensing agreement, fall outside the scope of Article 101(1) TFEU or fall within the scope of the exception set out in Article 101(3) TFEU and, if so, within what limits?
- Does Article 101 TFEU allow the National Competition Authority to define the relevant market autonomously vis-à-vis the content of marketing authorisations (MAs) for medicinal products granted by the competent pharmaceutical regulatory authorities (the Agenzia Italiana del Farmaco and the European Medicines Agency), or must the relevant market for the purposes of Article 101 TFEU instead be held to be primarily shaped and established in respect of the authorised medicinal products by the appropriate regulatory authority in a way binding on the National Competition Authority also?
- In the light of the provisions of Directive 2001/83/EC, in particular Article 5 thereof, which relates to marketing authorisations for medicinal products, does Article 101 TFEU allow a medicinal product used off-label and a medicinal product that has received an MA in respect of the same therapeutic indications to be regarded as interchangeable and, thus, to be included in the same relevant market?
- Pursuant to Article 101 TFEU, for the purposes of defining the relevant market, is it important to establish, in addition to the essential fungibility of pharmaceutical products on the demand side, whether or not those products have been supplied on the market in accordance with the regulatory framework concerning the marketing of medicinal products?
- In any event, can a concerted practice intended to emphasise that a medicinal product is less safe or less effective be regarded as intended to restrict competition, when the idea that that product is less effective or less safe, although not supported by reliable scientific evidence, cannot, in the light of the level of scientific knowledge available at the time of the events in question, be indisputably excluded either?

Merger control: Italian turnover thresholds updated

The IAA, by its Decision No 25892 of 9 March 2016, set forth the new turnover thresholds for prior notification of concentrations.

Article 16, paragraph 1, Law No 287/90 provides for annual review of the thresholds the exceeding of which gives rise to the obligation of giving prior notice of concentrations to the IAA.

Therefore, the IAA decided that, starting from 14 March 2016, the above-mentioned thresholds shall amount to:

- €495m as regards the turnover accounted at the national level by the collection of undertakings concerned by the operation; and
- €50m as regards the undertaking to be acquired.

Chairman Pitruzzella presents the Annual Competition Report

On 15 June 2016, the Chairman of the IAA, Professor Giovanni Pitruzzella, presented the Annual Competition Report to the Italian Parliament. During his speech, the Head of the IAA emphasised the importance of competition policy as a key instrument to overcome the economic crisis and to face this period of 'great transformation'.

Professor Pitruzzella recalled the main activities carried out by the IAA over the last year, pertaining to several different sectors. Particular attention has been paid to the new technologies sector, as well as to the antitrust concerns that could arise from e-commerce, the sharing economy and online platforms.

The chairman highlighted that in the course of 2015 and in the first few months of 2016, the IAA imposed fines amounting to €433m. Such amount represents a huge increase – 63 per cent – compared with the period between January 2014 and June 2015.

The new Italian public procurement law reinforces the cooperation between ANAC and the IAA

The long awaited reform of the Public Procurement Code was completed with Legislative Decree No 50 adopted on 18 April 2016. The reform aims to create a more efficient and transparent market and completing public works projects within expected deadlines and costs, as well as eliminating corruption in the public sector.

In this light, the above Legislative Decree awarded a central role to the National Anti-Corruption Authority (ANAC), which will act not only through ex post sanctions, but also ex ante through the emission of guidelines, procedures, notices and contracts.

The reform emphasises the collaboration between ANAC and the IAA, launched in 2014 through signature of the memorandum of agreement on anti-corruption in public contracts. The Legislative Decree also affords considerable importance to the *Legality Rating*, approved by the Italian Parliament at the end of 2012. The Legality Rating is a sort of 'mark', which the IAA, following an assessment, assigns to 'compliant' undertakings (ie, undertakings which abide by the principles set forth under Law No 62/2012) aiming to reward compliant companies with an 'official' title to facilitated public finance and access to credit. Legislative Decree No 50/2016 institutes the so-called *Company's Rating* that could be requested as a 'qualification' to participate in public tenders, wherein the Legality Rating is considered as a proof of the good reputation of a company. The new law will certainly further increase Legality Rating requests, which already registered a boom over the last year.[3]

Guidelines on antitrust compliance programmes for undertakings

With the ever-increasing degree of undertakings' responsibility, antitrust compliance programmes (ACP) constitute organisational and procedural key tools, being conducive to the prevention of anti-competitive behaviours and obtaining a reduction of the penalties applied.

Thus, the ACPs may be relevant to the IAA's sanctioning policy, according to the Guidelines on the quantification of fines, pursuant to which the adoption and the effective implementation of ACPs, adhering to best European and national practices, may be recognised as mitigating circumstances when implemented before the results of the investigation.

Recent cases confirm this IAA trend: in *Mercato del calcestruzzo in Veneto* (Case No 25801 of 22 December 2015) and in *Tassi sui mutui nelle province di Bolzano e Trento* (Case No 25882 of 24 February 2016) the IAA recognised ACPs as mitigating circumstances for fines, respectively five per cent and ten per cent.

In this context, Confindustria, the main association representing manufacturing and service companies in Italy, sent a clear signal about the importance that characterises ACPs, launching – in April 2016 – its Guidelines, entitled *Comply or Pay*, wherein companies may find useful practical information about the adoption and the consequent implementation of an effective ACP. Specifically, ACPs are principally based on informative and training activities and development of behavioural rules and control systems, directed to the company staff (management in particular), and aim towards the propagation of detailed antitrust law knowledge, as well as dissemination of awareness on the risks in case of non-compliance.

Driven by Confindustria's Guidelines, several undertakings (including small and medium sized entreprises) are in the process of adopting efficient ACPs, considering the actual benefits that each company may gain, including inter alia, preventing the opening of antitrust proceedings with subsequent administrative sanctions and relevant damages to brand image, as well as avoiding private antitrust enforcement claims.

Recent developments in private antitrust enforcement

By 27 December 2016, the European Union Member States will bring into force the laws, regulations and administrative provisions necessary to comply with Directive 2014/104/EU, 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 EU.

In Italy, where the transposition of the said Directive is still ongoing, the Tribunale di Milano (Court of Milan) recently provided some legal clarification on procedural aspects of private antitrust enforcement. In a judgment published on 13 April 2016, the Tribunale dismissed the actions brought by Arslogica Sistemi Srl against IBM Italia Spa, seeking to establish an abuse of a dominant position engaged in by the latter.

Although the Italian Supreme Court advocated a broad interpretation of national procedural rules in order to ensure the effective judicial protection of applicants in standalone competition damages actions,[4] the Tribunale di Milano ruled that the statements of Arslogica Sistemi in the case at hand were too general and lacked substance. In particular, the alleged dominant position of IBM Italia was not demonstrated, in the absence of any definition of the relevant market. The Tribunale di Milano stated that the powers of national courts in standalone actions, even if interpreted extensively, cannot encompass the identification of the relevant market, which must always be provided by the plaintiff.

Television broadcasting rights of Serie A

On 19 April 2016, the IAA imposed a fine of €66m on the most important operators in the pay-tv market, RTI/Mediaset Premium and Sky, as well as to the Italian Football league ('Lega Calcio') and its advisor Infront, ending a procedure that started on 13 May 2015.

The Authority imposed this fine after having demonstrated the existence of an illicit agreement, in violation of Article 101 TFEU, concerning the broadcasting television rights (for the period between 2015 and 2018).

Remarkably, this decision also confirmed the responsibility of the Lega Calcio and its advisor, which permitted the said planned agreement to be converted into a contract, in defiance of the rules of fair competition.

The investigation of the IAA revealed that this particular agreement was put in place through a planned assignment of lots and via the comparison of offers presented by broadcasters on 5 June 2014.

IAA imposes fines totalling more than €100m to the main operators in the vending industry

On 8 June 2016, the IAA imposed a fine on several companies in the automatic and semi-automatic distribution sector (the so-called vending industry), as well as their trade association, totalling over €100m.

According to the findings of the IAA, the parties implemented an anti-competitive agreement in infringement of Article 101 TFEU to keep prices high and preserve economic viability, by sharing markets and customers between themselves. The trade association CONFIDA (Associazione Italiana Distribuzione Automatica) took part in the coordination of prices by limiting aggressive price policies in those circumstances where external events could undermine the collusive behaviour of the parties.

The single, complex and continuous agreement found by the IAA was concluded between 2007 and 2008, and continued at least until the period between July 2014 and March 2015, when the IAA carried out inspections at the premises of the parties with the assistance of the Italian Special Antitrust Police.

Notes

1 See Enrico Adriano Raffaelli, 'Italy – recent developments' (April 2015) IBA Antitrust News.
2 See Enrico Adriano Raffaelli, 'Italy – recent developments' (September 2014) IBA Antitrust News.
3 See Enrico Adriano Raffaelli, 'Italy – recent developments' (May 2016) IBA Antitrust News.
4 Judgment No 11564 of 4 June 2015. Corte di Cassazione

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Updates from Japan

International cooperation with the EU

The *Nihon Keizai Shinmbun* (a Japanese newspaper), dated 15 March 2016, reported that the Japan Fair Trade Commission (JFTC) decided to open negotiations on an agreement with the European Union on joint rights to use evidence on international cartels. The principle to date has been to not allow joint use of such evidence by multiple competition authorities as such evidence contains a significant amount of the relevant enterprises' confidential information. However, the globalisation of activities of enterprises has made the collection of evidence on international cartels by individual competition authorities difficult. The JFTC has concluded a similar agreement with Australia, and the EU has done so with Switzerland.

If an agreement is reached, the JFTC will gain access to evidence on cartels collected by the EU competition authorities in 28 EU countries.

JFTC investigation of further bid-rigging in the Kanto area

As reported in the April 2015 issue of the Antitrust Newsletter, the JFTC investigated alleged bid-rigging by paved road construction firms in connection with the reconstruction of highways in the Tohoku area damaged by the 2011 Great East Japan Earthquake and Tsunami. In that case, on 10 February 2016, the Tokyo District Public Prosecutor's Office filed charges against ten construction firms and 11 individuals from the firms for the alleged bid-rigging.

On 24 March 2016, the JFTC again commenced an investigation into alleged bid-rigging by the northern Kanto area branch offices of eight paved road construction firms in Tokyo, including Nihon, Maeda, Nippon, Kajima, Obayashi, Taisei, Seiki tokyu and Toa in connection with highway reconstruction work in the Kanto area ordered by the Kanto area branch office of East Japan Highway Co Ltd.

Three principles for assisting an enterprise under rehabilitation

On 31 March 2016, the JFTC announced three principles in its guidelines allowing government-backed financial institutions (GFI) to assist a company which is under rehabilitation, namely that: (1) public support for rehabilitation should be provided only if private banks are unable to rehabilitate the company smoothly; (2) the GFI should assist the company only to the minimum extent necessary; and (3) the company must disclose the bailout process to the public as much as possible. These guidelines aim to prevent the easy rendering of financial assistance to a company using public funds (ie, tax revenue) and to avoid placing the company's competitors at a disadvantage. The JFTC has been examining this issue since 2014 in response to public criticism of the ¥350bn in financial assistance provided to the bankrupt Japan Airlines Co Ltd in 2010.

Exchange of M&A information with China

The JFTC reached an agreement on 11 April 2016 with the Chinese Commerce Agency to exchange information on mergers and acquisitions (M&As). The JFTC had previously reached an agreement in October 2015 with the Chinese State Development and Reform Committee to exchange information on cartels. These agreements include obligations to meet annually and to exchange information on individual cases by telephone.

Agricultural cooperative accused

The *Asahi Shinmbun* (newspaper) reported on 31 May 2016 that the JFTC would issue a cease-and-desist order to TosaAki Agricultural Cooperative (TAAC), which had been pressuring member farms to sell all of their eggplant to the TAAC, constituting an unfair trade practice.

Certain activities by cooperatives are exempt from the application of the anti-money laundering (AML) (Article 22). However this exemption only applies to actions by a cooperative which do not impose a substantial restraint on competition in the relevant market (for sales of eggplant).

Unification of the management of Show Shell and Idemitsu Kosan

On 17 June 2016, Showa Shell Oil Co Ltd ('Showa Shell') and Idemitsu Kosan Co Ltd ('Idemitsu Kosan') announced that Idemitsu Kosan had concluded a stock purchase contract in 2015 with a subsidiary of Royal Dutch Shell to acquire a total of 125,261,200 shares of Showa Shell (33.3 per cent of the total voting right), and that as the aforesaid share acquisition is subject to prior review by the JFTC, the parties would schedule a date for the unification of management between October 2016 and April 2017.

However, since the JFTC's prior review is likely to extend beyond this timeframe, Showa Shell and Idemitsu Kosan announced that the scheduled unification date would be amended to 1 April 2017 (subject to further amendment as needed) and that the share acquisition deal had already been reviewed by the competition authorities of the other relevant countries.

Framework agreement between the COMESA Competition Commission and the Competition Authority of Kenya

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The Cooperation Agreement

The Common Market for Eastern and Southern Afric (COMESA) Competition Commission (CCC) and the Competition Authority of Kenya (CAK) (CCC and CAK, each 'a Party') entered into a Framework Cooperation Agreement ('Cooperation Agreement') in April 2016. The purpose of the agreement is to promote and facilitate the coordination and harmonisation of regional and national competition and consumer legislation.

The terms of the Cooperation Agreement are general in nature and appear to set a base on which to enhance further future cooperation without infringing upon existing laws. The agreement is also terminable.

A summary of the salient features of the Cooperation Agreement include:

Notification

Each Party is required to notify the other whenever it becomes aware that its enforcement activities may affect important interests of the other Party. Important information would seem to include, for instance, anti-competitive activities carried out in a 'significant' part of the Common Market or 'significant' information in connection with regional mergers.

Exchange of information

Each Party is required to provide the other with any information that comes to its attention regarding anti-competitive business practices that it believes is relevant to, or may warrant enforcement activity by, the other Party.

Coordination of enforcement activities

The Parties will, within the limits of their respective laws, interests and resources reasonably available to them, afford assistance to each other with regard to enforcement activities. Under the Cooperation Agreement, the Parties are expected to work together to ensure the enforcement of competition laws through assisting each other:

- in locating and securing evidence;
- with such information that is relevant to the enforcement of the COMESA Competition Regulations, 2004 (that is within the other Party's possession); and
- with information on anti-competitive activities that comes to the attention of a Party and that may be relevant to or may warrant enforcement activity of the beneficiary Party.

A Party may also notify and request the other Party to initiate appropriate enforcement activities. Enforcement of such notification/request, however, is not mandatory and is subject to the discretion of the receiving Party.

Avoidance of conflicts over enforcement activities

The Parties agree that it is in their common interest to minimise any potentially adverse effects of their enforcement activities in as far as the application of their respective competition laws is concerned. In this regard, the Parties are required, at all stages in their enforcement activities, to take into account the interests of the other Party in deciding whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding and the nature of remedies or penalties sought.

Consultation

The Parties agree to consult promptly in relation to the Cooperation Agreement and ensure the expeditious resolution of matters. In particular, a Party is now obligated to inform, as soon as is practical, the other Party of any changes in their competition laws as well as enforcement practices and, upon request, may hold consultations on the consequences of any such changes.

Technical assistance and capacity building

The Parties, through integrated strategies, are also supposed to engage in technical assistance and capacity building, agreeing on the joint mobilisation of resources, for instance, in order to strengthen their respective competition laws.

Confidentiality of information

Neither Party is obligated to provide information to the other party if this is prohibited under law. Each Party is required to maintain confidentiality to the fullest extent possible.
Any efforts made to enhance further cooperation and harmonisation of competition laws is encouraging, particularly if this results in diminishing the potential for regulatory duplication. It seems that any proper assessment of the workings of the Cooperation Agreement will, however, need some time. Broad references to 'significant information' and 'significant market' will have to be clarified as well.

Other recent developments in the Kenya competition landscape

In the recent budget, the Cabinet Secretary for Finance announced proposals to introduce information and penalty provisions and refine existing merger control tests. The proposals include:

- making it obligatory for stakeholders to provide information to CAK when asked to do so in connection with market enquiries;
- specifying the financial penalty for engaging in restrictive trade practices (previously only applicable to merger control); and
- setting a threshold in order to exclude mergers whose effect has no great impact on competition or restrictive trade practices.

The specifics are yet to be published. We are particularly buoyed by any proposal to introduce additional thresholds for mergers in this country simply to avoid over-regulation and facilitate investment.

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Update from Malaysia

My EG Services Berhad

The Malaysian Competition Commission (MyCC) commenced investigation into MY EG Services Berhad ('MyEG') after receiving a number of complaints filed by various parties. The complainants alleged that MyEG had abused its dominant position in the 'provision and management of online Pas Lawatan Kerja Sementara (PLKS) or Foreign Workers Permit Renewal applications, by applying different conditions to equivalent transactions with other trading parties to the extent that may harm competition'.[1]

The MyCC issued a proposed decision on 6 October 2015, imposing a 'fine of RM 307,200.00 and an additional penalty of RM 15,000.00 for each day the MyEG fails to comply with remedial actions'.[2] The proposed decision further required that MyEG terminate all existing agency agreements in relation to mandatory insurances and to provide an efficient gateway to its competitors to allow them to compete at the same level.

MyEG had 30 days from receiving the proposed decision made by MyCC to make any representations to the MyCC.

The MyCC had recently on 24 June 2016 issued a final decision against MyEG, where the MyCC confirmed the financial penalty of RM 307,200 to be paid by MyEG. The MyCC however reduced the daily penalty proposed to RM 7,500 from 7 October 2015 to the date of the final decision issued by the MyCC.[3] As stated in the MyCC's press release on 24 June 2016, the total amount of the fine to be paid by MyEG as at 24 June 2016 would be RM 2,272,200.

According to the press release, the MyCC had imposed a daily penalty of RM 7,500 from 7 October 2015 to the date of the decision as they were of the view that MyEG has not ceased its abusive conduct.

Further to MyEG failing to cease their abusive conduct, the MyCC is also of the view that the MyEG has not provided 'an efficient gateway for all its competitors in the market of the sale of the Mandatory Insurances'. As a result of the lack of an 'efficient gateway' for its competitors, MyEG's competitors are not able to compete at the same level with MyEG, as the MyCC had indicated in the proposed decision issued on 6 October 2015.

The MyCC imposed remedial actions on MyEG, in additional to the financial penalty to be paid by MyEG. The MyCC further indicated that a higher daily penalty would be imposed in the event MyEG fails to comply with the remedial actions imposed. The remedial actions imposed by the MyCC are as follows:[4]

- MyEG to cease immediately from 'imposing different conditions to equivalent transactions in the processing of Mandatory Insurances for online PLKS renewal applications';
- MyEG to provide an efficient gateway to MyEG's competitors to 'compete at the same level within sixty (60) days from the date of the MyCC's decision'; and
- MyEG to 'provide an undertaking to be fully compliant with the rules and regulations of General Insurance Association of Malaysia (PIAM) within sixty (60) days from the date of the MyCC's decision'.

It appears from local media reports that MyEG will appeal against the decision of the MyCC to the Competition Appellate Tribunal (COMPAT), which is the next procedural step as provided for under the Competition Act 2010 for any company wishing to challenge the decision of the MyCC.[5]

Container depot operators

MyCC had recently issued a final decision against five enterprises for price-fixing, on 1 June 2016. The enterprises involved included an 'information service provider to the shipping and logistics industry',[6] Containerchain (M) Sdn Bhd ('Containerchain') and four container depot operators.

According to the press release by the MyCC, Containerchain and the four container depot operators were found to have infringed section 4(1) of the Competition Act (CA), where the container depot operators increased the depot gate charges to be paid by their customers from RM 5 to RM 25, whereas Containerchain had fixed a 'rebate of RM5 offered to hauliers in respect of the Depot Gate Charges'.

The four container depot operators were also found to have entered into a horizontal agreement to fix the depot gate charges at RM 25, which resulted in them 'significantly preventing, restricting or distorting competition in the market for the provision of empty container storage, maintenance and handling services within a five (5) to fifteen (15) kilometers radius of the Penang Port'.[7]

The total fine imposed on the five enterprises amounted to RM 645,774 with an additional penalty of RM 7,000 per day in the event the enterprises fail to comply with the remedial actions imposed by the MyCC. The following remedial actions were imposed by the MyCC and are to be implemented by the enterprises within 30 days from the decision of the MyCC:

- the container depot operators are to cease and desist from implementing the agreed rate for the depot gate charges and rebate which arose from their anti-competitive conduct;
- in line with the above direction, clause 7 of the Carrier Access Arrangement that stipulated the depot gate charge and the rebate or any similar clauses shall be removed as this clause is anti-competitive in nature;
- the Carrier Access Arrangement published on the Containerchain system shall not contain any clause which may allow the sharing of confidential information relating to any container depot operator who has subscribed to the Containerchain system;
- Containerchain is to provide an undertaking in the form and manner acceptable to the Commission to reconfigure the Containerchain system in order to ensure that it is not being used for any anti-competitive conduct including those mentioned above; and
- all future prices and other trading conditions should be determined

independently by all container depot operators who have subscribed to the Containerchain system.[8]

Containerchain have not lodged an appeal against the decision and additionally, the MyCC have announced that Containerchain will comply with their directions as stated in the above paragraph.[9] There is currently no information on whether the other companies which were found to have infringed the Competition Act 2010 will also appeal against the respective decisions of the MyCC.

Megasteel Sdn Bhd

The MyCC had on 9 October 2012 commenced investigation into Megasteel Sdn Bhd ('Megasteel') after receiving complaints from Melewar Industrial Group Berhad ('Melewar') alleging that Megasteel had abused its dominant position, as the only supplier of Hot Rolled Coil ('HRC') by charging higher prices compared to the international price of the HRC. Megasteel was also alleged to have undercut Melewar's prices in the Cold Rolled Coil ('CRC') market, in which the Megasteel group of companies competes with Melewar.

MyCC then issued a proposed decision with a finding of infringement against Megasteel together with a proposed infringement penalty of RM 4.5m on 30 October 2013.

After approximately four years of deliberations, the MyCC issued its final decision on 15 April 2016. As stated in the MyCC's press release dated 15 April 2016, the MyCC had 'carefully reassessed' Megasteel's case after taking into account written and oral representations submitted by Megasteel, before coming to a conclusion that there was no abuse of dominance on Megasteel's part.

The MyCC found that 'the HRC market is distorted due to the protection given by the Government to Megasteel which allows Megasteel to have a dominant position in the upstream (HRC) market'.[10] The MyCC found that such dominant position held by Megasteel in the HRC industry did not infringe Malaysia's Competition Act 2010.

The MyCC further stated in its press release that the information obtained by the MyCC in relation to the CRC market did not substantiate Melewar's allegations. Such inconclusive data further indicated that there was no margin squeeze by Megasteel as alleged by Melewar.[11]

There has thus far been no appeal lodged by Melewar against the decision of the MyCC. However, it should be noted that it was reported in the local media that Melewar had indeed filed an appeal to challenge the decision of the MyCC[12] but soon after, chose to withdraw it.[13]

Notes

1 MyCC issues proposed decision against MyEG, MyCC News Release, 6 October 2015: www.mycc.gov.my/sites/default/files/MyEG%20BI%20news%20release.pdf.

2 *Ibid*.

3 MyCC issues final decision against My EG Services Berhad, MyCC News Release, 24 June 2016: www.mycc.gov.my/sites/default/files/media-releases/MyCC%20ISSUES%20FINAL%20DECISION%20AGAINST%20MY%20E.G.%20Services%20Berhad.pdf.

4 *Ibid*.

5 MyCC fine: MyEG to file appeal, MyCC newspaper clipping, 27 June 2016: www.mycc.gov.my/newspaper-clipping.

6 MyCC issues final decision against five enterprises for price fixing, MyCC News Release, 1 June 2016: www.mycc.gov.my/sites/default/files/media-releases/NEWS%20RELEASE%20MyCC%20ISSUE%20FINAL%20DECISION%20AGAINST%20CDO%20.pdf.

7 *Ibid*.

8 *Ibid*.

9 Undertaking signed between Containerchain Malaysia Sdn. Bhd. and the Commission, 30 June 2016: www.mycc.gov.my/sites/default/files/Undertaking%20signed%20between%20Containerchain%20%28Malaysia%29%20Sdn%20Bhd%20%26%20Competition%20Commission%20dated%2030%20June%202016_0.pdf.

10 Decision of the Competition Commission, 15 April 2016: www.mycc.gov.my/sites/default/files/Finding%20of%20Non%20Infringement%20under%20Section%2039%20of%20Competition%20Act%202010%20-%20Megasteel%2015.04.2016.pdf.

11 *Ibid*.

12 'Megasteel views Melewar's appeal against it as "baseless"' *The Star Online*: (16 June 2016) www.thestar.com.my/business/business-news/2016/06/16/megasteel-claims-appeal-by-melewar-baseless.

13 Sangeetha Amathalingam, 'Melewar drops appeal against MyCC's findings on Megasteel' (22 July 2016) *The Edge Markets*: http://www.theedgemarkets.com/my/article/melewar-drops-appeal-against-myccs-findings-megasteel.

Collusion in public procurement and the implications in the Mexican pharmaceutical industry

MEXICO

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'Collusion and corruption are distinct problems within public procurement, yet they may frequently occur in tandem, and have mutually reinforcing effect. They are best viewed, therefore, as concomitant threats to the integrity of public procurement'[1].

Public procurement is a task of high social interest which should be performed with due care especially within the public health sector. The relevance of an efficient allocation of resources plays a huge role on the management of public funds, which mostly comes from taxpayers' resources.

The Organisation for Economic Co-operation and Development (OECD) has recognised that governments are expected to perform public procurements efficiently and with high standards of conduct in order to ensure high quality of service delivery and safeguard the public interest. Moreover, the OECD has stated that an effective procurement system plays a strategic role in governments for avoiding mismanagement and waste of public funds.[2]

According to recent studies,[3] during 2014, public spending in Mexico represented 26.69 per cent of the total public spending of the current Federal Administration and 5.32 per cent of Mexico's gross domestic product (GDP). Also in 2014, Mexico intended around MXN 1.2bn to its public health sector, which is almost equivalent to 6.2 per cent of its GDP.[4]

Nonetheless, public procurement in the public health sector is constantly affected by cartel and corruption behaviour. The International Competition Network has recognised that competition agencies around the world have identified a constant link between competition and corruption – where that is to say – more competition results in less corruption while, conversely, increased corruption results in decreased competition.[5] Mexico is not an exception.

In recent years, the Mexican competition authorities, the former Federal Competition Commission (Cofeco) and currently, the Federal Economic Competition Commission (Cofece), have placed the pharmaceutical industry under heavy scrutiny. Several investigations and landmark decisions have aimed to strengthen public policies and spread a dissuasive effect against anti-competitive conduct.

One of the most remarkable cases resolved by the former Cofeco was against a bid-rigging cartel that operated before the Mexican Social Security Institute (IMSS).[6]

In 2006, Cofeco sanctioned several pharmaceutical laboratories as a result of finding bid-rigging arrangements when they participated in tender procedures for the acquisition of: (1) human insulin; (2) electrolyte solutions; and (3) serum that derived from contracts executed between 2003 and 2006. According to the calculations from the competition authority, the damage assessed suggests that, on average, IMSS paid a surcharge equivalent to MXN 622.7m.

This case became of great relevance when, in around mid-April 2015, the Mexican Supreme Court of Justice confirmed a decision rendered by the former Cofeco. The relevance of the case relied on the fact that the decision issued by the Supreme Court not only affirmed the existence of bid-rigging conduct but also endorsed the constitutionality of performing economic analysis and relying on indirect evidence to prove the existence of cartel behaviour.

In the past, the former competition authorities have had great difficulty in proving the existence of cartels and had even more trouble when defending their accusations before the judiciary, as the use of indirect burden and economic analysis were heavily contested. The Supreme Court's decision relaxed the standard of proof that is required from the competition authorities to prove the existence of cartel behaviour and became one of the first foundations to fight collusive agreements in public procurements related to the public health sector.

Yet, notwithstanding the dissuasive effect the former case should have provoked among

the pharmaceutical industry, another bid – rigging cartel was recently exposed.

Around March 2016, a series of recordings were exposed on YouTube with alleged telephone conversations among executives of several integrating and distribution companies, with anti-competitive content discussing postures on different public tenders organised by the IMSS for the acquisition of diagnostic and blood bank services.

As a result, the IMSS issued a press release[7] informing that it had denounced this alleged bid-rigging behaviour before Cofece and around April 2016, the investigating authority of Cofece (administrative prosecutor) published in the Federal Official Journal the commencement of a new investigation identified under docket DE-011-2016.[8]

Cofece's announcement highlights that the objective of the new investigation is to assess the possible existence of a cartel offence triggered in the integral diagnostics services and blood banks markets. Cofece's investigating body has an initial 120 business-day period to perform all activities related to its investigation, which can be extended by four additional periods of times to a total 600-business day investigation period.

This new investigation brings another two additional ongoing bid-rigging cartel investigations, which are also related to the pharmaceutical industry. One of them relates to the acquisition of polyethylene curing materials by the public health sector identified under docket DE-020-2014 and the other one related to the production, commercialisation and distribution of latex products also acquired by the public health sector identified under docket DE-023-2013.

These investigations are timely aligned with the scandal connected to the world-trending leak of the *Panama Papers* and the implementation of an apparent off shore scheme to sham an acquisition.

Around mid-2015, Moench Coöperatief UA, a private equity firm based in the Netherlands, acquired Marzam/Gibart from Genomma Lab International, SAB de CV, a major Mexican pharmaceutical and personal care products manufacturer. This transaction was filed for clearance before Cofece who approved it as it would allegedly allow Moench Coöperatief, a new competitor, to enter the Mexican wholesale distribution pharmaceuticals market (a highly concentrated market) for the first time according to the decision rendered by Cofece.[9]

However, based on information leaked under the *Panama Papers*, several documents claim that the alleged owners of Moench Coöperatief could be the same or closely related to the owners of Grupo Nadro, one of the biggest pharmaceutical distributors in Mexico and one of its main competitors. According to the information that was leaked (which has not been confirmed nor proved to date), a close relative to the owner of Grupo Nadro was the individual who ultimately funded the acquisition through an off shore scheme.

The *Panama Papers* leak led the investigating authority of Cofece to open a new investigation to verify the 'compliance of the Federal Economic Competition Law'.[10] Although not much information is available, it is possible to identify that the new investigation is being processed under docket VCL-001-2016, that started around March 2016, and that several companies and individuals will be under Cofece's scrutiny.[11]

These undergoing investigations will most certainly be terminated following other landmark cases to fight collusive agreements over public procurements in this sector. Moreover, they may also become some of the first cases where Cofece will try to use its new powerful tools and harsh legal consequences provided by the June 2013 Constitutional amendment and the new July 2014 competition statute.

It is important to remember that cartel behaviour is a highly sanctioned conduct by the Mexican competition policy. Currently, cartel offences can be sanctioned with between five to ten years imprisonment and a fine equivalent of up to ten per cent of the offender's annual income. Furthermore, the Federal Economic Competition Law contemplates a disqualification sanction against board members, executives and directors and in case of recidivism, a possible divesture of assets.

Moreover, the afore-mentioned conduct could also be considered as a violation of local anti-corruption law,[12] which contemplate additional sanctions that might restrict companies and individuals from contracting with government entities over a period from three months to eight years.

Furthermore, civil damages may also be claimed as a result of the decisions issued by Cofece. Local civil legislation and the Competition Act contemplate the possibility for claiming civil damages and initiating class or individual actions against offenders once the decisions from the competition authority become unappealable. Although for now no civil damage claim has been resolved in Mexico, these cases seem to be suitable prospects for such purpose.

Given the constant collusion behaviour Cofece has found over public procurement procedures (and not only within the public health sector), Cofece recently issued a series of recommendations to promote competition within public procurement procedures, which will work as non-binding guidelines.[13]

These recommendations contain practical guidelines that aim to incorporate and spread competition rules when designing and implementing procedures for public procurements and are an effort to consolidate best practices worldwide and Cofeco's experience in these matters. Besides, these recommendations can be considered part of a preventive tool to fight and detect cartel behaviour early in the future.

The United Nations has recognised that the pharmaceutical industry 'plays an important role in improving global health care' and that competition becomes of great relevance as it 'compels industry to provide higher quality goods and services at lower prices'.[14] The need to eradicate corruptive practices and specifically the need to eradicate cartel behaviour in public procurement is vital as the existence of both correlated factors not just affects government bodies, but also consumer welfare and consumers health opportunities.

Notes

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1 Organisation for Economic Co-operation and Development: 'Policy Roundtables, Collusion and Corruption in Public Procurement', (2010) available at: www.oecd.org/competition/cartels/46235884.pdf.

2 Organisation for Economic Co-operation and Development: 'OECD Principals for Integrity in Public Procurement', (2009), available at: www.oecd.org/gov/ethics/48994520.pdf.

3 Cofece, 'Recomendaciones para promover la competencia y libre concurrencia en la contratación pública' (2016); available at: www.cofece.mx.

4 Lizbeth Pasillas and Zacarías Ramírez, 'La verdadera enfermedad del sistema de salud mexicano' *Forbes* (11 August 2014) available at: www.forbes.com.mx/la-verdadera-enfermedad-del-sistema-de-salud-mexicano/.

5 International Competition Network, 'Anti-Cartel Enforcement Manual, Relationships between Competition Agencies and Public Procurement Bodies', (April 2015). Available at: http://internationalcompetitionnetwork.org/uploads/library/doc1036.pdf.

6 Formally known as Instituto Mexicano del Seguro Social.

7 Identified as PR 028/2016, available at: www.imss.gob.mx/prensa/archivo/201603/028.

8 Cofece's announcement is available at: www.dof.gob.mx/nota_detalle.php?codigo=5432958&fecha=13/04/2016.

9 Public version of the decision is available at: www.cofece.mx:8080/cfcresoluciones/docs/Concentraciones/V1215/0/2151317.pdf.

10 Public information related to the investigation is available at: www.cofece.mx/cofece/index.php/lista-de-notificaciones.

11 In fact, some of the individuals related to this new investigation have filed motions before the judiciary claiming several unknown aspects related to the investigation. This information can be identified under dockets SV-026-2016 and SV-025-2016 processed by Cofece. Public information related to the investigation is available at: www.cofece.mx/cofece/index.php/lista-de-notificaciones.

12 See: Law for Acquisitions, Leasing and Services of the Public Sector (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*), Art 60, s IV and Federal Anti-corruption Law for Public Contracting (*Ley Federal Anticorrupción en Contrataciones Públicas*), Art 8, s II and Art 27, s I.b.

13 Cofece's recommendations are available at: www.cofece.mx.

14 United Nations, UNCTAD, 'The role of competition in the pharmaceutical sector and its benefits to consumers'. UN Conference on Trade and Development. April 2015. Available at: http://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d3_en.pdf.

Developments in NZ Competition Law: merger fever in the media sector, domestic price-fixing penalties and review of monopolisation laws

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Merger fever in the media sector

Two high profile mergers have been announced in the last few months, representing further consolidation in the media, telecommunications and content space in New Zealand. Both mergers are

conditional on Commerce Commission ('Commission') approval.

On 27 May 2016, the Commission registered a joint application from Wilson & Horton ('NZME') and Fairfax seeking authorisation to merge their media operations in New Zealand ('NZME/Fairfax'). The merger would essentially be a 'two to one' in newspaper supply (national dailies), with overlap in community publications, magazine supply and (news) websites. The merger is in 'response to the dramatically transforming media landscape [where] print readership and revenue [are] in decline and revenue from online news/information provision [is] becoming highly competitive.'

The parties have sought authorisation, which means that clearance can still be granted if there is no substantial lessening of competition, but if there is a substantial lessening of competition the transaction could be 'authorised' by the Commission if the public benefits (essentially economic efficiencies) exceed anti-competitive detriments. Those benefits must be quantified, although the Commission can account for qualitative factors.

On 14 June 2016 the Commission issued its statement of preliminary issues, noting that it will be 'focusing on the unilateral and vertical effects that might result from this merger.' (Unlike some other jurisdictions, the Commission generally issues a statement of preliminary issues before it has conducted a substantive competition analysis. If the Commission has concerns about potential competition concerns it may issue a letter of issues (and potentially a letter of unresolved issues) to the parties, although those are usually private as between the parties.) The applicants have emphasised the growing trend towards increasing competition across different media such that all media may be in the same market for both the advertiser and reader sides of the platform. They submitted that it is no longer appropriate to draw distinctions between online and print advertising, and print and online news/information services, and have invited the Commission to 'revisit historic approaches to [narrow] market definition as they do not reflect the reality of a converged market'. The notion of convergence is increasingly being taken into account by antitrust regulators overseas.

Following widespread market rumors, SKY TV and Vodafone NZ confirmed in early June 2016 that they are considering a merger of their respective businesses, whereby Vodafone Group plc would directly or indirectly own 51 per cent of the shares in SKY, and SKY would own 100 per cent of Vodafone NZ ('SKY/Vodafone'). Following that confirmation, the Commission received and subsequently registered two applications for clearance in relation to the merger on 29 June 2016. According to the parties, the SKY/Vodafone merger would create 'a leading integrated telecommunications and media group in New Zealand [with] the ability to offer New Zealand's best entertainment content across all platforms and devices in a rapidly evolving media and telecommunications market.' This is likely seen as an important strategy given the recent growth in prevalence and popularity of 'over the top' premium content providers.

The parties are both well known to the Commission. Vodafone NZ claims that it is New Zealand's leading mobile and 'number two' broadband provider, with over 2.35 million mobile connections and 500,000 fixed line connections as at 31 March 2016. SKY is New Zealand's leading pay TV provider with over 830,000 subscribers of its premium content. While some market analysts have struggled to see the value in a SKY/Vodafone match up, the parties see a raft of benefits for their shareholders and customers (including greater innovation, accelerated data growth, and greater utilisation of New Zealand's ultra-fast broadband infrastructure), and the combined entity is expected to be one of the largest companies listed on the New Zealand Stock Exchange's main board.

As noted in the application, 'the parties currently enjoy a successful and complementary strategic relationship, under which Vodafone resells SKY's pay television services, and SKY promotes Vodafone's broadband products and refers customers to Vodafone.' Questions have been raised about whether the merger would allow the parties to bundle their services in an anti-competitive way. However, the parties have pre-empted such arguments, noting that the combined group 'would not have the ability or incentive to engage in any foreclosure strategy' and 'will continue to make inputs available on a wholesale basis [and] offer SKY services and Vodafone telecommunication services separately.'

Interestingly, the Commission has noted the expected date for a decision as 'TBA' on its website.[1] We would expect the Commission to conduct a comprehensive investigation

in relation to the merger - especially given the relatively complex deal structure and concurrent applications – and it is likely to run on for a number of months. Given the track record of recent complex applications which have taken upwards of six months (and in some cases almost 12 months), it is not unrealistic that a decision is not reached until early 2017.

Increase in number of domestic price-fixing penalty cases

After a relatively quiet period on the penalties front, we have seen a marked increase in the number of domestic price- fixing penalty cases work their way through the New Zealand courts. Since November 2015, the Commission has collected just shy of NZ$8m in price fixing penalties from national businesses in the real estate, livestock and waste oil sectors. Over that same time period, there have been no penalty decisions in New Zealand relating to multijurisdictional cartels.

Government invites cross-submissions on monopolisation laws

In the April 2016 newsletter we reported on the Ministry of Business, Innovation and Employment's ('MBIE') publication of its Targeted Review of the Commerce Act 1986 – Issues Paper ('Issues Paper'), which focused on whether New Zealand's misuse of market power (monopolisation/unilateral conduct) test in section 36 of the Commerce Act and alternative enforcement mechanisms work, and whether New Zealand needs formal powers specifically aimed at analysing competition across markets. MBIE received 39 submissions on the Issues Paper, and has now invited interested parties to make cross-submissions. While some of the submissions were 'pro-reform' (or at least encouraged further consideration of the issues), the majority – perhaps unsurprisingly from large businesses and the law firms who advise them – were not supportive of reform.

The cross-submission process appears to have been at least partly influenced by a letter sent from the Chair of the Commission, Dr Mark Berry, to the Minister of Commerce, Hon Paul Goldsmith on 2 June 2016. The letter confirmed the Commission's position that 'reform of section 36 is necessary', and that 'an effective unilateral conduct provision is especially important for a small economy with concentrated markets'. Dr Berry has been a strong proponent for reform of section 36, and in his letter to Hon Goldsmith, referred to the test as 'not currently effective in promoting competition in New Zealand domestic markets.' Cross-submissions were due on 21 July 2016.

Note

1 As at 1 July 2016.

Updates from Peru

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In Peru, the National Institute for the Defence of Competition and Intellectual Property (INDECOPI) – is the administrative entity in charge of implementing competition law, consumer protection law and matters related to intellectual property, among other things. INDECOPI's Antitrust Commission is the administrative body in charge of implementing competition law and authorising acts of concentration in the electricity sector under Law No 26876. The Antitrust Commission's Technical Secretariat is the instructive body, in charge of conducting dawn raids and initiating exofficio investigations, among other functions.

The organism in charge of supervising the private investment in Telecommunication (OSIPTEL) is the administrative entity in charge of implementing competition law in matters related to the telecommunications sector.

In the first semester of 2016, the Antitrust Commission's Technical Secretariat (hereinafter, 'Technical Secretariat') initiated a punitive administrative proceeding against 17 container shipping companies for price-fixing. Also, the Antitrust Commission sanctioned 34 hemodialysis centres for price-fixing in public selecting processes. Moreover, INDECOPI issued a Draft of the Leniency Programme Guidelines. Finally, INDECOPI's Tribunal confirmed a first instance resolution which declared a complaint for abuse of dominant position unfounded.

Below we present details on these current developments.

The Antitrust Commission's Technical Secretariat initiated a punitive administrative proceeding against 17 container shipping companies for price-fixing

By Resolution No 022-2015/ST-CLC-INDECOPI issued on 21 October 2016, the Technical Secretariat initiated ex officio a punitive administrative proceeding against 17 international maritime transportation cargo carriers, by an alleged cartel for fixing prices and commercial conditions between 2009 and 2013.[1]

The collected evidence comes from minutes of meetings, communications and emails, obtained through inspections, which could show that the investigated shipping agents would have implemented price-fixing agreements involving freight rates and surcharges to the cargo transported on the Peru-Asia route.

The defendants are expected to file their respective defence briefs as part of the procedure in the following months, which the Commission will assess in order to decide whether the cartel took place or not.

The Antitrust Commission sanctioned 34 hemodialysis centres for price-fixing in public selecting processes

By Resolution No 019-2016/CLC-INDECOPI issued on 10 February 2016,[2] the Commission sanctioned 34 providers of hemodialysis services after conducting an investigation procedure that led to evidence of price-fixing in the framework of five public procurement processes, convened by ESSALUD (National Health Service), between the years 2010 and 2012. It took four years for the Commission to issue its decision.

During the investigation the Technical Secretariat evidenced that 34 of the 39 providers under investigation presented quotations with concerted reference values which were superior to the ones paid by ESSALUD, with the aim of increasing the current reference value.

As a consequence, the Commission imposed a total fine of UIT 1671.06 (approximately US$2m). It is worth mentioning that the decision adopted by the Commission may be appealed before INDECOPI's tribunal.

INDECOPI issues a Draft of the Leniency Programme Guidelines for public discussion

The leniency programme proscribed in Legislative Decree No 1034 – Law for the Repression of Anti-competitive Conducts, and recently modified by Legislative Decree No 1205 – offers a leniency benefit (full exemption from sanction) to the first economic agent that comes forward to INDECOPI and confesses being a participant in a cartel, cooperating with the Technical Secretariat in the detection, prosecution and sanction of the co-offenders. The leniency programme also offers those who enter at a later stage the reduction of administrative fines imposed by INDECOPI. In that regard, the Technical Secretariat has published a Draft of the Leniency Programme Guidelines and its Explanatory Notes[3] in order to receive commentaries and recommendations about the programme implementation. These deadlines expired on Friday 24 June 2016.

The principal issues developed by the guidelines are: (1) the marker system, that will ensure the priority order in which requests for benefits will be processed in case of multiple applications; (2) the meaning of 'significant added value' regarding the evidence to be provided by an applicant in order to qualify for a reduction of fines; (3) the economic agents eligible to apply for benefits and the information required in their applications; (4) the requirements of timeliness, diligence and procedural behaviour that applicants shall meet in order to comply with their cooperation duty; and (5) the stages and deadlines applicable.

INDECOPI'S Tribunal confirmed the Commission's decision to declare a complaint for abuse of dominant position had no grounds

On 9 June 2016, INDECOPI's Tribunal issued Resolution No 0304-2016/SDC-INDECOPI confirming the Commission's decision in Resolution No 048-2013/CLC-INDECOPI, which declared a complaint filed by IRRADIA SRL against the members of the Camisea Group had no grounds. IRRADIA claimed that the Camisea Group abused its dominant position in the natural gas supply market by refusing to reschedule the date of commencement of the supply contract signed between both parties, without any reasonable justification.

As the Commission did, INDECOPI'S Tribunal considered that while the Camisea Group held a dominant position on the relevant market for wholesale natural gas market: (1) the refusal to reschedule the start of the contract was both commercially valid

and economically efficient; and (2) it did not produce exclusionary effects nor generate an anti-competitive harm.

Notes

1 Available in Spanish at: www.indecopi.gob.pe/documents/51771/197841/nota+22/bef71a99-ffcc-4556-9959-c75cac5f2155.

2 Available in Spanish at: www.indecopi.gob.pe/documents/51771/384089/019+Hemodialisis.pdf/04700ed7-4801-4541-a35c-92e381708a01.

3 Available in Spanish at: www.indecopi.gob.pe/documents/20182/429684/PROGRAMA+DE+CLEMENCIA/d1996668-3efc-42e8-8311-6e18d0dbfb96.

The Polish Competition Authority will have new powers to guard fair trade in a food supply chain and to impose hefty fines on wrongdoers

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The Ministry of Agriculture presented in June the draft of the Act on Countervailing the Unfair Use of a Contractual Advantage in the Trade of Agricultural and Food Products (the 'Draft', or the 'Act'). The aim of the Draft is to protect the weaker parties in an agricultural and food product (the 'Products') supply chain by authorising the President of the Office of Competition and Consumer Protection (OCCP) to investigate unfair trade practices in this sector and issue administrative decisions, including fines up to three per cent of the annual turnover.

Both suppliers and purchasers are the addressees of the new regulation

The OCCP can investigate practices against undertakings both on the suppliers' or purchasers' side:

- The definition of a supplier is that of an undertaking which is involved in the process of the production, or processing, of the Products; therefore, wholesalers are excluded from this definition.
- A purchaser is defined as any undertaking which purchases the Products in order to sell, or resell them. Therefore, the Act applies to the practices of wholesalers directed against the suppliers. However, because of the definition of a supplier, the Act will also apply in the relations between farmers and food-processing undertakings.

The OCCP can intervene, provided that two conditions regarding turnover have been simultaneously satisfied:

- that the turnover between the supplier and the purchaser, in the year of the instigation of the investigation or in any of the two preceding years, exceeds approximately €11,000 (PLN 50,000); and
- that the turnover of the party suspected of the infringement (or of the capital group[1] to which it belongs to), in the year preceding the year of the initiation of the proceedings exceeds approximately €23m (PLN 100m).

These thresholds seem to be very low, thus allowing the OCCP to intervene in the majority of cases with participation of larger retail chains.

Severe fines and investigative powers

According to the Draft, the OCCP can impose a financial penalty of up to three per cent

of the total turnover for the year preceding the year in which the fine was imposed, on an undertaking which infringed even unintentionally the provision of the Act.

Additionally there are fines for a breach of the procedural provisions. The office can impose a fine of up to €50m for even an unintentional refusal to provide information, or for the obstruction of an inspection. For a delay in the implementation of a final decision, the office can impose a fine of up to €10,000 for each day of delay.

In order to efficiently protect the weaker parties in the supply chain, the OCCP has been granted very broad investigative powers similar to those that it enjoys under the competition law regime, such as, for example, the right to request information and carry out inspections (dawn raids) with the obligation to provide the inspectors with the documentation, email correspondence and IT data carriers.

Contractual advantage

The Draft aims to protect an undertaking when the other party uses its contractual advantage. The definition of a contractual advantage is very broad and covers situations falling outside the definition of holding a dominant position in the meaning of competition law based upon the notion of market power.

The contractual advantage is to be found in a specific bilateral relationship between the parties. The definition is twofold and applies where:

- the affected party does not have a real and sufficient possibility to sell/purchase the Products to/from another party; and
- there is a significant disproportion of economic potential between the parties (in favour of the suspected infringer).

This broad definition allows the authority to intervene in situations where the particular interests of a participant in the food chain is threatened. Therefore, the new regulation can apply in individual cases and there is no need to prove an actual threat to the public interest.

Unfair use of contractual advantage

The actions of an entrepreneur can be qualified as unfair if they are contrary to good practice and threaten or violate the substantial interests of the other party. This is a very general clause which, in fact, allows the OCCP a broad scope of discretion in the qualification of practice as unfair. The Draft gives a number of examples as to what can be qualified as unfair:

- unjustified termination of a contract;
- granting only one party the right to terminate a contract;
- making the conclusion, or the continuation, of a contract conditional upon the fulfilment of granting benefits which have neither a substantial nor customary relation with the subject of an agreement; or
- unjustified extension of the payment deadlines.

Procedure

The OCCP holds the discretionary power to instigate proceedings, that is, it can instigate proceedings as a result of an application from an undertaking, or under its own initiative by virtue of its mandate. Before the main proceedings (which should be concluded within five months) the office can also instigate an explanatory proceeding which should not take more than four months, and in particularly complex cases, no more than five months. In its decision, the OCCP can order the undertaking to cease the practice in question and impose a financial penalty. Such a decision is not enforceable as the addressee can lodge appeal to the Court of Competition and Consumer Protection and if not satisfied subsequently to the Appeal Court. However, if the unfair practice threatens further functioning of the injured party, the OCCP can adopt a decision with an immediate enforceability clause.

The OCCP can also adopt a so-called commitment decision where it obliges the suspected infringer to undertake certain obligations in order to cease the possible practice, or to remove its effects. However in such a decision the OCCP refrains from fines and from formally finding that infringement took place.

The instigation of proceedings by the President of the OCCP is time barred after two years from the end of the year in which such practices were discontinued.

Comments

The relations between the parties within a food supply chain have been a point of interest for the authorities in Europe for several years. The European Commission adopted on 29 January 2016 a Report to the European Parliament and the Council on

unfair business-to-business trading practices in the food supply chain. It assesses the existing regulatory frameworks tackling unfair trading practices in Member States. Moreover, it specifically states that out of the 20 Member States that already have legislation, 15 have introduced it in the last five years and some of the Member States have enhanced their older frameworks in the last five years. Recent example from the United Kingdom shows increased empowerment of public bodies to intervene in the food supply chain. Since April 2015, the UK Groceries Code Adjudicator can apply fines of up to one per cent of the relevant retailer's annual UK turnover.

The proposed Polish legislation follows the strong trend spreading throughout the majority of European Union Member States. The prevailing opinion is that the Draft aims to protect food producers from the abuse of power of retail chains. The existing civil law instruments, that is, claims based on the infringement of the prohibition on slotting fees, stemming from the Polish Act on Combating Unfair Competition, are seen by the new government as not sufficient to protect the interests of suppliers of food products, due to the limited scope of application and lengthy private litigation.

The Draft is currently subject to intergovernmental and public consultation, and the crux of this debate will probably be the concept of unfairness of certain practices. This concept already has been subject to judicial review both in the private law area on the grounds of the Act on Combating Unfair Competition, and also in the public law sphere as provided in the Act on Competition and Consumer Protection (also enforced by the OCCP) where imposing the unfair trade conditions can constitute the abuse of a dominant position.

A separate issue to be resolved is the relation between the Draft and the prohibition of the abuse of a dominant position based on competition law. In the event that an undertaking abuses its dominant position and at the same time commits unfair practice under new regulation, it is not clear whether the two regulations can be applied together. This question has a practical dimension since the fine for a breach of the Act is up to three per cent of the undertaking turnover; while the fine for an abuse of a dominant position is up to ten per cent of the turnover. If the Draft becomes law, it would inevitably cause far-reaching structural consequences to the contractual dealings and increased regulatory risk to the agricultural and food market in Poland.

Note

1 All the entities controlled by one and the same ultimate parent.

Code of good practice in the pharmaceuticals industry

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Work on development and implementation of compliance procedures is currently being conducted all over the world. In Russia, the history of this question began approximately in 2011, and in 2013 the Russian Federal Anti-Monopoly Service (hereinafter – the 'FAS') included antitrust compliance in the long-term strategy as the independent direction of further work of the authority and has accurately designated it as a priority for development of the antitrust legislation and law enforcement practice because the main objective of the authorities is not only suppression of violations committed, but also their prevention.

Any measures aimed at prevention of antitrust violations are encouraged and approved by the anti-monopoly service. Compliance procedures such as development of codes of conducts and policies in the industry are exactly directed to the prevention of committing such offences. Implementation of compliance procedures is not a coercion, it is a 'soft' instrument of implementation of the state competition

policy. Adoption of various codes of conduct and policies are efficient mechanisms of suppression of offences as establishing correct behaviour models and those provisions to which the anti-monopoly authority pays close attention. The FAS has also recently suggested involving more actively the companies of Member States of the Eurasian Economic Union (EAEU) in development of rules of self regulation in those markets where now a large number of violations of the antitrust law could be observed.

On 19 April 2016, the Association of European Business presented the Code of Good Practice in the Pharmaceuticals Industry (hereinafter – the 'Code'). The full text of the Code (both in Russian and English) is available on the official website of the anti-monopoly authority.[1]

The Code continues a new trend in Russian antitrust legislation aimed at the creation of rules of conduct by industry associations and unions in collaboration with the FAS and a trend aimed at the creation of compliance procedures by the companies and industries.

Among the most interesting examples of the conducts already elaborated are the Code of Good Practice between Retail Chains and Suppliers of Consumer Goods and the Code of Conduct between Vehicle Manufacturers and Auto Distributors on the Markets of Sale of New Vehicles and Spare Parts to them.

Codes of Conduct developed in different industries are important in law enforcement. Often they are created when the anti-monopoly authority is particularly active in the market and adoption of codes is the result of the reached compromise: players in a particular market change their behaviour according to such rules while the FAS decreases the level of its supervision over them.

Historically, the pharmaceutical market has remained under the close supervision of the FAS for a long time. The basis for the Code of Pharmaceutical Manufacturers is from experience gained by the FAS in the course of interaction with market participants. In general, the Code establishes the approaches already formed from the practice of the FAS and of courts, in particular, that the dominant players in the market should develop a policy on interaction with their customers.

The major aims of the Code are as follows:

- the creation of an effective self-regulation system in the pharmaceutical industry in Russia; and
- the creation of transparent and fair rules of competitive interaction in this sector.

The Code regulates many aspects, as discussed below.

Selection of distributors

The Code states that the participants shall endeavour to ensure that they implement an effective system for monitoring compliance with legislation, including anti-corruption legislation and the law on the protection of competition, in particular through the adoption of a commercial policy governing work with customers and incorporating the provisions stipulated by the Code.

The Code provides the criteria of economic and technological justification, compliance with the Russian legislation (and the EAEU legislation) as well as with foreign legislation, if applicable to the participant, for the selection of distributors by manufacturers.

The Code introduces the requirements of clear, transparent and measurable, objectively justified and non-discriminatory selection criteria for distributors. Commercial policy should include regulatory procedures and timeframes of selection processes, standard contract terms and conditions, discount/bonus procedures and mechanisms, general payment terms and procedures for informing the existing distributors of the commercial terms and any changes (and be available on the official website of the participant).

The Code provides approximate (not exhaustive) criteria that may be taken into consideration during the selection procedure. Apart from standard criteria such as absence of tax arrears, and compulsory licences among others, there is a criterion stating that there are no documented violations of legislation on combating corruption, including foreign legislation if it is applicable to the participant.

It is also interesting that the Code states that for audit purposes the participants may have to take into account the Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act, as well as Russian legislation.

One more interesting provision relates to the possibility of the participants independently determining the commercial policy of a number of distributors if economically and technologically justified. This provision would allow manufacturers without violation of the Russian competition legislation to establish their own business model and not to enter into agreements with all potential distributors if this is not economically justified.

Termination of cooperation with distributors and setting discriminatory conditions

The Code lists examples of grounds for termination of cooperation with distributors such as being in the process of liquidation, absence of necessary licences, establishment of the fact of involvement in corruption offences, or arrears under the contract. The list is not exhaustive and the participants may introduce other grounds in their commercial policies.

The Code introduces provisions marking the differences between definitions of discriminatory conditions in contracts and different conditions that are not deemed to be discriminatory. Conditions that differ in contracts with several distributors are not deemed to be discriminatory if products that are the subject matter of the contracts relate to different markets, and if the products are traded on the same market, provided that the parameters of transactions are not of equal value, which makes the application of a variety of terms and conditions economically justified (for example, the price per unit may be lower for large product purchases in natural terms or if a payment includes advance payment rather than a commercial loan).

Transparency and validity of bonus models

The Code sets forth that the participants may offer bonuses and discounts; however, they should apply on a non-discriminatory basis (for example, for achievement of certain value or volume of purchases or the conclusion of a contract with a state customer).

Minimum amount of purchases

Based on the economic and technological capabilities, a member of the Code has a right to establish in a commercial policy the minimum amount of one-time shipping and the minimum amount of purchases in a certain period, both in quantity and in value terms. If the buyer fails to comply with these conditions, the participant will be entitled to terminate the contract and would not have to enter into an agreement with the purchaser for the next period.

Credit limits

The Code establishes the criteria for setting credit limits for distributors. Such limits may be stipulated in local acts and calculated on the basis of objective criteria listed in the Code. In case of exceeding the credit limit, parties to the Code shall have the right to suspend the delivery of products to the distributor.

Exclusive agreement

As a general rule, the Code does not allow the conclusion of exclusive agreements between the party and the contractor if a party dominates on the market. The Code provides some exceptions that can be applied when there is the localisation of production in Russia.

Such exceptions seem to be reasonable due to the fact that localisation projects require large investments, from both foreign and Russian partners. In order to ensure that the Russian partner will return its investment, they should be given the opportunity to determine the policy and give the exclusive right to carry out sales in the territory of the Russian Federation.

Other provisions

In order to adhere to the Code, potential participants should sign the special accession declaration attached to the Code, send it to AEB and publish on its official website. AEB further also publishes the information on accession to the Code by the participant and sends this information to the FAS.

After one year of application of the Code, the participants will analyse the respective results and consider the possibility of the creation of a special collegial body for the resolution of disputes under the Code.

Conclusion

We believe that the Code introduces a number of important rules not provided for by the current legislation that would influence further activity of the players in the pharmaceuticals market. We expect that the Code will influence the manufacturers' conduct in Russia in part because of compliance with its rules for mitigation of risks of violation of the Russian competition legislation. Although the Code is not obligatory, it is likely that the pharmaceutical companies will have to review their existing commercial policies (or adopt them in case of absence) and standard distribution contracts to prevent the risks of conflicting with anti-monopoly legislation in day-to-day business and excessive attention from the FAS.

Note

1 See: http://fas.gov.ru/documents/documentdetails.html?id=14513.

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Upcoming liberalisation of Russian competition legislation with respect to small businesses

On 29 June 2016 the Federation Council of the Federal Assembly of the Russian Federation approved amendments to the anti-monopoly legislation (the Draft Law No 817991-6). It is expected that the Draft Law will be signed by the President of the Russian Federation very soon.

The Draft Law amends the Federal Law of 26 July 2006 No 135-FZ 'On Protection of Competition' (hereinafter, the 'Competition Law'), the Federal Law of 28 December 2009 No 381-FZ 'On the basis of the state regulation of trading activity in the Russian Federation' (hereinafter, the 'Trade Law'), and the Code of Administrative Offences of the Russian Federation.

According to the explanatory memorandum to the Draft Law, it is designed based on paragraph 25 of the plan of priority measures for sustainable economic development and social stability in 2015, approved by the Federal Government on 27 January 2015 No 98-p.

The main purpose of the changes is to reduce the administrative burden on small businesses and the promotion of small and medium-sized enterprises by reducing financial and administrative costs of small businesses that do not have market power.

Under the economic entity, not possessing market power, in the context of the Draft Law is understood as: (1) a legal entity, founded by one or few individuals (including entrepreneur); or (2) an individual entrepreneur, if income from the sale of goods (works, services) for the preceding calendar year of such entity does not exceed RUR 400m.

Exceptions from dominance

The Draft Law provides for a general rule prohibiting recognition of a dominant position of an economic entity not possessing market power.

Thus, a legal entity founded by one or few individuals, if its income from the sale of goods (works, services) for the preceding calendar year does not exceed RUR 400m, is actually exempt from Article 10 of the Competition Law prohibiting abuse of dominance.

At the same time, a new clause 2.1 of Article 5 of the Competition Law introduces a number of limitations to the aforementioned rule. In particular, the introduced exemptions do not cover the following legal entities:

- economic entity, entering into the same group of persons[1] with another economic entity (or entities), except for groups based solely on the basis of a family relationship (paragraph 7 of clause 1 of Article 9 of the Competition Law), and legal entities, members of which are individual entrepreneurs;
- financial institutions;
- subjects of a natural monopoly in the commodities market in a state of natural monopoly;
- economic entities whose shareholders/ participants are legal entities;
- economic entities in which the Russian Federation, a constituent entity of the Russian Federation, or a municipal entity participates in the authorised capital;
- individual entrepreneur entering into a group of persons with another economic entity, except for groups based solely on the basis of a family relationship, with an aggregate income for the last calendar year of which does not exceed RUR 400m.

Similar changes will be made to the Trade Law. In particular Article 1 will be supplemented with clause 4.1 excluding the application of antitrust prohibitions in trade activity (Articles 13 and 14 of the Trade Law) to the following types of entities:

- economic entities engaged in trade activity;
- economic entities supplying food products, which have a sales income not exceeding RUR 400m; and

- economic entities engaged in trade activity through an organisation of the trading network, with an aggregate income from the sale of goods which does not exceed RUR 400m in a single trading network for the previous calendar year.

Admissibility of agreements restricting competition

The Draft Law provides immunity for agreements restricting competition and entered into by economic entities, not possessing market power, except for cartels, prohibited vertical agreements (clause 1 of Article 11 of the Competition Law) and prohibited agreements in the electric power market (clause 3 of Article 11 of the Competition Law).

The above exclusion will be applied if the aggregate income of the parties to such agreement from the sale of goods (works, services) for the preceding calendar year does not exceed RUR 400m.

This measure may contribute to reducing the number of 'cane' decisions handed down by the anti-monopoly authority in respect of economic entities, not having market power, the actions of which *a priori* cannot lead to actual anti-competitive effects on the market.

Approval of unscheduled onsite inspections

The Draft Law will introduce a mandatory procedure of approval of unscheduled onsite inspections of small businesses[2] conducted by anti-monopoly authorities with prosecution authorities in the place of businesses of such entities, except for inspections of subjects of natural monopolies and cartels in dawn raids.

However, such prior approval of unscheduled onsite inspections of small businesses will be required only in the case where inspection is conducted in accordance with paragraphs 2 and 5 of clause 4 of Article 25.1 of the Competition Law, namely in the case of receiving messages and applications of individuals and legal entities, media reports pointing to signs of violation of anti-monopoly legislation or detection by the anti-monopoly authority of such signs.

In other cases, when an unscheduled on-site inspection is conducted pursuant to paragraph 1, 3 and 4 of Article 25.1 of the Competition Law, the anti-monopoly authority does not need to obtain such approval.

Merger control

The changes introduced also touch upon the preliminary approvals of transactions between economic entities specified in paragraph 1 of Article 28 of the Competition Law (acquiring material assets of shares and interests in commercial legal entities, and rights in respect to such entities).

The essentials and characteristics of transactions that are subject to preliminary approval have not changed, but the Parliament introduced higher thresholds. Now the total assets value of a target company and its group of persons on the latest balance sheet shall not exceed RUR 400m instead of RUR 250m.

Other changes

In accordance with the Draft Law, the list of bidding procedures that can be challenged in courts by the Federal Anti-Monopoly Service of Russia has been limited. Now the anti-monopoly authority may bring a civil action to invalidate auctions, tenders, requests for quotations, requests for proposals and contracts concluded upon the results of bidding only if the respective bidding procedures were mandatory in accordance with the Russian legislation. The private bidding procedures now cannot be challenged by the FAS Russia.

It is also worth mentioning that on 29 June 2016, the Federation Council of the Federal Assembly of the Russian Federation also approved a Draft Law No 1054599-6 on amendments to the Code of Administrative Offences of the Russian Federation, specifying the procedure for the appointment of administrative sanctions to small businesses, through the establishment of the possibility of replacing an administrative (pecuniary) fine with a warning.

However, despite the general liberalisation of the anti-monopoly legislation and mitigating the administrative interference in the activities of small businesses and economic entities that do not have market power, anti-monopoly restrictions and prohibitions are one of the only prohibitions for non-compliance of which an administrative fine may not be replaced by a warning.

Notes

1 The indicia of group of persons are provided for in clause 1 of Art 9 of the Competition Law.

2 A small business enterprise is a legal entity having not more than 100 employees and annual income of which does not exceed RUR 800m.

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Cartel participants face jail time and hefty fines

For the first time, directors and managers of companies involved in a cartel in South Africa will face criminal sanctions in terms of competition legislation.

Since its establishment in late 1999, the South African Competition Commission (SACC)[1] has aggressively prosecuted companies involved in price-fixing, market allocation and bid-rigging in South Africa. These practices between competitors are prohibited outright, and even a first time offence can attract a fine of up to ten per cent of turnover. In 2004, fines of just over R 6m were paid by companies who admitted to cartel conduct – in 2009, this had risen to more than R 340m in that year alone. Administrative penalties of more than R 3.5bn have been paid by companies involved in cartels in South Africa to date. However, despite substantial and increasing monetary fines, cartels remain rife in South Africa – in the last five years, the Commission has referred multiple complaints for adjudication by the Competition Tribunal against cartels in the key sectors of the economy like food and construction, as well as in other industries like automotive components, autobody repairs, furniture removal and edible oils.

This disturbing trend led South African lawmakers to pass legislation imposing liability on individuals for participation in cartels in 2009. However, this legislation languished on the statute books for over five years and was only signed into law by the President this year, on 1 May 2016.[2]

It is now an offence for any person 'engaged or purporting to be engaged in a firm in a position having management authority within the firm', to either 'cause' a firm to engage in a prohibited practice, or to knowingly acquiesce in' cartel conduct. Fines of up to R 500,000 or prison sentences of up to ten years – or both – may be imposed on individuals who are involved in price-fixing, market division or collusive tendering in contravention of section 4(1)(b) of the Competition Act. The new sanctions will only apply to cartel conduct which occurred after these provisions came into effect on 1 May 2016 (in line with the Constitutional requirement that criminal sanctions cannot be implemented retrospectively), so it is likely to be some time before we see the first criminal charges being laid in South Africa. Moreover, individuals can only be prosecuted if the company involved has acknowledged in a consent order that it contravened section 4(1)(b) of the Act, or the Competition Tribunal or Competition Appeal Court has made a finding to this effect. Tribunal cartel cases – and even settlement negotiations with the SACC – can take months, and sometimes years, to complete.

Because the South African competition authorities lack any criminal jurisdiction, prosecutions will have to be conducted by the National Prosecuting Authority, in the normal courts. However, these prosecutions are likely to be difficult: unlike contraventions of the Competition Act, these criminal offences will have to be proved beyond a reasonable doubt. South Africa's police and prosecuting authorities are already over burdened and under-resourced and they generally lack the specialised skills needed to investigate and prosecute commercial crimes. Despite strong civil society organisations like Corruption Watch, South Africa's record of punishing white collar criminals is poor.

In the meantime, however, the introduction of these criminal sanctions is likely to significantly impact on competition law enforcement by the SACC. Currently, the SACC has the power to summons any person who is believed to be able to furnish information on an investigation to be interrogated, and that person is required to answer any questions which are put to him or her about the complaint being investigated by the SACC. Now, however, individuals who caused or even just knew about the activities of a cartel are likely to exercise their right to remain silent, on the basis that their answers may be self-incriminating. This may make the Commission's investigations significantly more difficult.

To date, the vast majority of companies accused of participating in a cartel have

elected to conclude settlement agreements with the SACC, rather than face prolonged litigation in the Competition Tribunal and the resulting negative publicity and sanction. In the course of settling complaints, many companies have made sweeping admissions about the nature and duration of their participation in cartels, without too much concern that this would expose their staff to criminal charges. Going forward, however, more companies may be inclined to litigate Competition Tribunal complaints rather than expose their senior executives to damaging criminal prosecutions and jail time. Even if companies agree to settle cartel complaints with the SACC, their admissions are likely to be far more limited and carefully crafted. This in turn may impact on private actions for damages by customers – although civil damages actions, including class action suits, are still quite rare in South Africa.

Almost all successful prosecutions of companies participating in cartels in South Africa to date have been facilitated by applications for leniency in terms of the SACC's Corporate Leniency Policy (CLP),[3] which offers immunity from fines under the Competition Act to the company which is first to come forward and disclose the existence of the cartel and cooperate with the SACC investigation. Although there is now provision for the SACC to make submissions to the National Prosecuting Authority when it believes that an individual is '"deserving of leniency" because that individual has 'provided information to the Competition Commission or otherwise co-operated with the Commission's investigation', the procedures for applying for leniency for both companies and their directors and managers, and the criteria which will be applied by the Commission in deciding who merits a submission to the prosecuting authority for leniency and who does not, remain unclear. It is also not clear what stance the prosecuting authority will take on these submissions, especially in cases where there is significant political or public pressure to make an example of executives involved in high profile cartels. Although the SACC indicated some years ago that a framework for cooperation between the SACC, the prosecuting authorities and the police was being formulated, no draft has yet been published for comment.

Finally, since many South African cartels are involved in cross-border trade, the risk of criminal charges being brought in South Africa will also be considered by companies accused of participating in cartels in neighbouring states like Namibia, Botswana and Swaziland. This may impact on enforcement and settlements in those countries too.

South Africa has at least joined the ranks of many other countries who subject individuals involved in cartels to criminal prosecution. However, it remains to be seen how effective this will be in deterring companies from agreeing to fix prices, divide markets and rig bids, in the long term.

Notes

1. www.compcom.co.za
2. Available at: www.compcom.co.za
3. *Ibid*

Updates from Spain

SPAIN

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Documents casually found by competition authorities at dawn raids may be used to prove an infringement within a different investigation if the dawn raid was authorised and proportionate to the object of the authorisation

On 17 December 2009, the National Commission of Competition (CNC) carried out a dawn raid at the premises of Montesa Honda. Such dawn raid had been authorised by a judicial warrant and an investigation order issued by the CNC, according to which the CNC had information concerning possible anti-competitive practices in the market for the distribution and sale of motorcycles consisting of 'agreements on information exchange and the coordination of strategies for fixing prices and commercial conditions of sale of Honda's motorcycles and/or the commercial margins granted by the dealers to their agents (or subdistributors) for the sales they make'. Therefore, the possible anti-competitive

practices the CNC had knowledge about were of a vertical nature.

However, during such inspection and due to technical IT problems and to the impossibility filtering the large amount of documents *in situ*, the inspectors seized a vast number of documents in order to assess them at a later moment. Among the documents seized was an email between a Honda employee and a Suzuki employee, whereby they exchanged a list of prices. In view of such a document, the CNC opened new investigation proceedings for alleged horizontal collusion between Honda and Suzuki, and incorporated said email thereto.

Honda appealed the CNC's decision to incorporate said email between its employee and Suzuki's to the new file, inasmuch as it considered that the CNC infringed its right to the inviolability of the home. According to Honda, the CNC could not seize that document during the dawn raid conducted at its premises on 17 December 2009 as it could only seize documents related to the object of the dawn raid, which concerned vertical practices and not horizontal. The CNC rejected Honda's appeal against its decision, but the Appeal Court (Audiencia Nacional) upheld Honda's appeal and declared that the CNC infringed Honda's right to the inviolability of the home and that, therefore, the CNC's decision to include the email between Honda's and Suzuki's employees was null and void.

Following the Audiencia Nacional's judgment, the State Attorney lodged a cassation appeal before the Supreme Court, which has now overruled the judgment of the Audiecia Nacional and has declared that the email between the employees was validly seized by the CNC at the dawn raid conducted at Honda's premises.

In this regard, the Supreme Court considers that if a dawn raid is authorised by a judicial warrant and the seizure of documents is adequate and proportionate as regards the object of the dawn raid and the investigation, any document not related to the object of the dawn raid which is casually found may be validly used within investigations of different illegal conduct, as long as such document is an indicia of an illegal conduct and the proceedings followed after its finding are adequate from a procedural point of view. The Supreme Court notes however that the inspection should be restricted to the object of the authorised dawn raid and proportionate and directed to such objective, excluding general and indiscriminate inspections as well as inspections of documents and information which is demonstrably unconnected to the dawn raid.

In view of the reasoning explained above, the Supreme Court considered that the dawn raid conducted by the CNC's inspectors at Honda's premises was authorised and regular from a legal perspective and, therefore, declared that the casual finding of the controversial document could legitimately be used within different sanctioning proceedings aimed at verifying potential illegal conducts, different from those which justified the dawn raid.

The Supreme Court rejects the alleged infringement of L'Oreal's right of defence and confirms the sanction imposed although it was partially based on evidence previously annulled

In its judgment dated 15 June 2015, the Supreme Court annulled the sanction imposed by the Spanish Competition Authority to Cosmética Cosbar (Montibello) in the *Professional Haircare* cartel case, as it considered that the dawn raid was not in compliance with the legal requirements. According to the Spanish Competition Act, in order for the inspectors to conduct a dawn raid they need the express consent of the investigated company or a judicial warrant authorising them to carry out the dawn raid. In the case at stake, the Supreme Court considered that the dawn raid was illegal inasmuch as the Authority's inspectors requested the company's consent to be inspected, without mentioning the fact that they had previously requested a judicial warrant authorising the dawn raid, which had been rejected by the Court. In view of this, the Supreme Court considered that the consent granted by the raided company was null (as they did not have all the elements to adopt the decision about the consent) and the dawn raid illegal and annulled the fine imposed on Cosmética Cosbar as it considered that in the absence of the illegally obtained documents, the evidence in the file was not sufficient to prove the participation of Montibello in the cartel.

L'Oreal was also fined by the Authority for the same cartel and lodged successive appeals before the Audiencia Nacional and the Supreme Court. L'Oreal's cassation

appeal was decided by the Supreme Court just after Cosmética Cosbar's appeal; however, in L'Oreal's appeal the Supreme Court maintained the decision of the Authority and the fine imposed on it. In view of this, L'Oreal lodged an exceptional appeal for nullity ('*incidente de nulidad*') against the Supreme Court's judgment, as it considered that its right of defence had been infringed.

According to L'Oreal, the decision to annul the evidence obtained at Cosmética Cosbar's dawn raid, also affected the rest of the companies fined within the *Professional Haircare* case, inasmuch as such evidence could not be used to prove their participation in the infringement. In view of this, L'Oreal argued that the Supreme Court had infringed its right of defence as it should have given L'Oreal the opportunity to submit allegations on the incidence of the Cosmética Cosbar judgment in their appeal. Moreover, according to L'Oreal, the Supreme Court judgments in its case and the Cosmética Cosbar appeal were contradictory as regards the facts, which is against the duty to state reasons in judgments.

However, the Supreme Court has rejected L'Oreal's request for nullity. In particular, the Supreme Court declared that there were many pieces of evidence of the infringement in the file, which had been validly obtained (from other dawn raids and two leniency applications), and that therefore it considered it was irrelevant whether the evidence obtained at Cosmética Cosbar's dawn raid was declared null. Hence, the Supreme Court stated that the assessment made in the judgment concerning Cosmética Cosbar's appeal should not necessarily be extended to the other sanctioned companies. In the Supreme Court's view, the annulment of the documents seized at Cosmetica Cosbar's premises affected in a relevant way to such company, where documents were illegally obtained, and did not affect to the same extent the other sanctioned companies, whose participation in the anti-competitive conduct was sufficiently proven through other documents from different sources. Moreover, according to the Court, L'Oreal did not prove that the infringement was exclusively evidenced by the documents seized at Cosmética Cosbar or that such evidence was decisive in order to prove its participation in the infringement. In view of this, the Supreme Court considered that the decision adopted in regards Cosmética Cosbar could not be extended to the other companies involved in the infringement and rejected the alleged infringement of L'Oreal's right of defence.

The Spanish Competition Authority crusades against regulation hindering competition

According to Article 5.4 of Law 3/2013 creating the National Markets and Competition Commission (the current competition Authority in Spain which in 2013 replaced the National Competition Commission), the Competition Authority is enabled to appeal before the competent court those administrative regulations or decisions by entities of the public administrations which may lead to an obstruction of effective competition in the market.

In the last few months, the Competition Authority has made use of such power and has challenged before the courts several legal provisions which have been adopted recently which, in its view, obstructed effective competition.

In particular, the Authority challenged the municipal ordinances of the city hall of Málaga and Córdoba regulating the taxi service. In the view of the Authority, such ordinances hindered competition inasmuch as they included competition restrictions which were not justified, such as the determination of a quantitative limit for the number of taxi licences and a regulation of prices (tariffs) to be applied by taxis to their customers.

The Authority has also challenged two legal instruments adopted at a national level regulating overland transport, which in the Authority's opinion includes various competition restrictions hindering the entrance and competitive capacity of chauffeur-driven hire cars. In this particular case, the Authority sent a request to the Council of Ministers for the annulment of certain articles of the Royal Decree concerned in order to avoid the submission of an appeal against the legal provision. However, according to the information published by the Authority, the Council of Ministers did not reply or justify the restrictions identified in the legal provision by the Authority, who finally decided to lodge the aforementioned appeal. The potential restrictions identified by the Authority concerned a quantitative limit to the licences granted, the prohibition of this kind of transport to be directly contracted in the street (they would always need to be contracted ahead of time), geographical

restrictions for the provision of this kind of services, the inclusion of an obligation to have a minimum number of vehicles (which is prejudicial for self-employed drivers), among others.

The Authority has also challenged other legal provisions, such as the regulation adopted in the Autonomous Community of Canarias regulating the holiday homes within its territory. In the Authority's opinion, the regulation includes certain competition restrictions without a justification (ie, there is not a market failure which needs to be amended or the need to protect the general interest). Instead, the Authority states that these restrictions hinder entry into the market and the competitive capacity of these holiday homes, which have had a dynamic effect in the tourist accommodation market on the islands, increasing the offer and leading to more efficient prices and better quality in services. The restrictions identified by the Authority are, among other things, the prohibition of renting rooms of a holiday home separately, the need for the offeror to provide an affidavit and to be registered, as well as conditions as to how to provide the service.

The Competition Authority has been always vigilant as regards legal instruments regulating markets and has used its powers in order to promote competition and avoid the imposition of unjustified restrictions to competition in such legal instruments. Nowadays, as new technologies are introducing important changes to certain markets, the legislator is increasingly adopting new rules regulating such markets, which are also being carefully reviewed by the Competition Authority. In view of its recent activity, it seems that the Competition Authority will remain vigilant as regards new legal instruments and will use all its legal resources to promote competition and avoid the introduction of unjustified legal restrictions in the markets.

SWEDEN

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Swedish District Court: non-ancillary five-year non-compete not a 'byobject' restriction

Introduction

In 2006, the Swedish company Alfa Quality Moving ('Alfa') acquired NFB Transport systems' ('NFB') cross-border moving business and, five years later, Alfa acquired ICM Kungsholms' ('ICM') corresponding business. In both acquisitions, the business purchase agreements included non-compete clauses restricting the seller from competing with the sold business for five years.

In February 2013, the Swedish Competition Authority (SCA) raided the offices of Alfa, NFB and ICM. The dawn raid was part of a long investigation resulting in the SCA suing the three companies seeking SEK 42m in fines for infringing competition law. On 16 May 2016, the Stockholm District Court cleared the companies of any wrongdoing. The SCA has appealed the decision.

Ancillary nature of the non-compete

Alfa, NFB and ICM argued that the non-compete clauses were necessary in order to ensure that Alfa could assimilate the full value of the acquired business, thereby being ancillary to the acquisition. The SCA agreed that the non-compete clauses could be considered ancillary for the first two years of their five-year duration.

The non-compete clause in the agreement between Alfa and NFB was in force for the entire five-year term. However, the non-compete clause in Alfa's agreement with ICM was, in practice,

only in force for a period of nine months, due to ICM's termination of the non-compete clause.

The court referred to the ancillary restraints notice principle that non-compete clauses can be ancillary to an acquisition for a period of up to three years if the transaction includes a transfer of goodwill as well as know-how.[1] The court held that know-how was not included in the acquisition, inter alia because no key employees, other employees or relationships with suppliers were included in the transaction and that a three-year non-compete could therefore not be justified by reference to a transfer of know-how.

Again making reference to the ancillary restraints notice, the court held that non-competes of a period longer than two years could be acceptable if the seller needs extra protection due to exceptional circumstances in a particular case. A strong customer loyalty on the market and long product lifetime are elements that could justify a longerterm non-compete.

The court found that a term of three years could be acceptable for these non-compete clauses because the seller retained know-how, its reputation, customer knowledge, contacts and a presence in neighbouring markets. Given that conclusion, the court found that the non-compete clause between ICM and Alfa, which had been in force for less than three years, did not infringe the prohibition on anti-competitive agreements.

However, the anti-competitive clause in the agreement between Alfa and NFB had lasted two years longer than the acceptable three years and could not be considered ancillary for this period exceeding three years.

No 'by object' restriction

Since the non-compete clause included in the agreement between Alfa and NFB was not ancillary, the court was required to scrutinise the non-compete restriction under Article 101 and the corresponding chapter 2, section 1 of the Swedish Competition Act.

In assessing whether the non-compete restriction could be restricting competition by object, the court examined case law from the European Court of Justice (ECJ). From the case *Cartes Bancaires*,[2] and referenced case law, it is clear that certain forms of coordination between companies can be considered so harmful to competition that an evaluation of its effects is not necessary. As stated in *Cartes Bancaire*, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms part.

On the basis of this case law, the court held that a non-compete clause is only a restriction by object if there is a realistic reason to believe that the seller might actually want to start up a competitive business that is prevented by the anti-compete clause. The question is therefore whether NFB could be a potential competitor of Alfa. The assessment cannot be made strictly on theoretical grounds, but requires an analysis of the likelihood of NFB re-entering the cross-border moving market.

According to the court, there were no reasons (other than strictly theoretical reasons) for the NFB to re-enter the market. Also, as the non-compete clause was drafted, it would not be prohibitive in a situation where the NFB actually wanted to re-enter the market. For these reasons, the anti-competitive clause was not a restriction by object.

The court held that the SCA had presented insufficient evidence to prove a restriction *by effect*. Since no anti-competitive object or effect had been proved, the court cleared the companies of any wrongdoing. The SCA has appealed the decision to the Swedish Market Court.

Conclusions

The court came to the conclusion that the non-compete clauses in the business purchase agreements were ancillary for a period of three years even though the acquisition did not include any know-how. The factors that enabled the non-compete clause to be upheld for a longer period were that the seller retained know-how, its reputation, customer knowledge, contacts and a presence in neighbouring markets.

Even though the non-compete clause was not ancillary for the last two years of its duration, the court found that the cooperation between Alfa and NFB was not a restriction by object. The court followed the reasoning in *Cartes Bancaires* and ascribed to the more restrictive view of restriction by object.

Instead of receiving competition fines of SEK 42m, Alfa, NFB and ICM received a total amount of SEK 11m in compensation for their legal expenses. In a press release issued on 16 May 2016, the SCA announced that the authority will be appealing the court's judgment. According to the SCA, it is important that the matter is examined by the Swedish Market Court in order to clarify that it is not permissible to pay other companies to prevent them from competing for five years.

The SCA has appealed the decision.

Notes

1 Commission Notice on restrictions directly related and necessary to concentrations [2005] OJ C56/24/, para 20.

2 Case C-67/13 P Groupement des/v European Commission (ECJ, 11 September 2014) *Cartes Bancaires*.

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Swiss Federal Supreme Court landmark decision affirms the significance per se of price-fixing, quantity-limiting and market-allocating agreements

On 28 June 2016, the Swiss Federal Supreme Court rejected an appeal brought by Colgate-Palmolive Europe Sàrl in connection with a sanction of CHF 4.8m imposed by the Competition Commission (COMCO). The Federal Supreme Court found that a ban on passive sales from Austria into Switzerland constituted a significant restraint of competition. The Federal Supreme Court further held that such restraints are to be subject to first-time infringement fines.

In 1982, Gaba International Corp (the predecessor of Colgate-Palmolive) granted Gebro Pharma LLC the licence to produce and distribute Elmex toothpaste in Austria. The COMCO took the view that the licence contract included a market-allocating agreement which prohibited Gebro Pharma LLC from exporting directly and indirectly from Austria to other countries. It qualified the respective clause as a ban on passive sales pursuant to Article 5(4) of the Cartel Act which prevented parallel imports of Elmex toothpaste from Austria to Switzerland. In 2009, the COMCO imposed a sanction of CHF 4.8m, which was confirmed by the Swiss Federal Administrative Court in 2013.

In a long-awaited landmark decision, the Federal Supreme Court has now introduced the significance per se of price-fixing, quantity-limiting and market-allocating agreements pursuant to Article 5(3) and (4) on the Cartel Act in case a certain, unspecified de minimis threshold is exceeded. Going forward, every agreement of this kind (above the de minimis threshold) is unlawful and subject to first-time infringement fines unless the company succeeds in proving economic efficiencies of the agreement in question.

Significance per se of agreements pursuant to Article 5(3) and (4) of the Cartel Act

Pursuant to Article 5(3) and (4) of the Cartel Act, price-fixing, quantity-limiting and market-allocating are presumed to eliminate competition, and are therefore illegal. This legal presumption can be rebutted. In the case of a successful rebuttal, the question arises as to whether the agreement in question significantly restrains competition. In the past it was controversial if the COMCO had to evaluate significance based on quantitative or qualitative criteria. The Federal Supreme Court has now held that these agreements constituted significant restraints of competition solely because of their type and quality, regardless of their actual effects on the relevant market. The court found that quantitative elements such as market shares were not to be considered in the context of the assessment of significance. The relevance of quantitative criteria, according to the court, is limited to the purpose of excluding de minimis cases, which should not be reviewed by COMCO at all. However, the court did not further specify these de minimis cases. It stated that a decision based on rigid market share percentages was not appropriate as one should conduct an immateriality assessment in every individual case.

The majority of the justices came to this conclusion by applying the Federal Supreme Court's method of law interpretation – the pluralism of methods. They asserted that the wording of the law did not require a substantial or material restraint, but rather only a significant restraint of competition, which was why the threshold had to be low. They continued to assert that the legislative

materials, as well as the *ratio legis,* supported the mere use of quantitative criteria to exclude de minimis cases in order to alleviate the COMCO's caseload. According to the majority, it was the legislative intent behind Article 5(3) and (4) of the Cartel Act to declare these kinds of agreements as particularly harmful, for which reason they had to be qualified as significant, irrespective of quantitative criteria. Also, the majority found that this interpretation corresponded well with European Union provisions and thus created legal certainty.

In contrast, the minority of justices asserted that, in the past, the COMCO evaluated using both quantitative and qualitative criteria and that the Federal Administrative Court's case law in this respect was inconsistent. Also, the Federal Supreme Court had previously confirmed the evaluation of both elements. The minority's view was that the constitution and the Cartel Act did first and foremost require an effect on competition, whereas the intent behind and the purpose of an agreement was less important. The minority stated that if the relevant market share was low, and therefore an agreement restraining competition was irrelevant for the functioning of effective competition, and because the constitution required harmful effects on competition, the majority's interpretation was wrong.

First-time infringement sanctions for significant agreements pursuant to Article 5(3) and (4) of the Cartel Act

The Federal Supreme Court further concluded that price-fixing, quantity-limiting and market-allocating agreements pursuant to Article 5(3) and (4) of the Cartel Act can be sanctioned at the time of the first infringement pursuant to Article 49a of the Cartel Act even if the presumption of elimination of competition is rebutted, because they qualify as significant per se. The court noted that in this regard the government's explanatory report[1] was clear and did therefore not leave any room for an opposing opinion. The court went on that only agreements which were unlawful pursuant to Article 5(1) of the Cartel Act and which did not contain price-fixing, quantity-limiting and market-allocating agreements were out of scope of first-time infringement sanctions. The court conceded, however, that the fact of a mere significant restraint of competition instead of the complete elimination of effective competition had to be taken into account in the course of the calculation of a sanction.

Conclusions

The new case law of the Federal Supreme Court confirms the extensive application of the Cartel Act by the COMCO. The COMCO is not required to evaluate quantitative criteria in connection with price-fixing, quantity-limiting and market-allocating agreements pursuant to Article 5(3) and (4) of the Cartel Act, in cases in which the presumption of elimination of effective competition can be rebutted. Such agreements qualify as significant per se in the sense of Article 5(1) of the Cartel Act from the outset because of qualitative reasons. Only de minimis cases, in which the market share will likely be in the low single-digit range, but which still have to be assessed on a case-by-case basis, are excluded from the significance per se.

As a result, the importance going forward for companies to positively prove reasons for economic efficiency will increase substantially in cases when an agreement qualifies as a price-fixing, quantity-limiting and market-allocating agreement pursuant to Article 5(3) and (4) of the Cartel Act .

Note

1 Report (ie, the explanatory comments of the Federal Council to the bill) of the Cartel Act, dated 7 November 2001, p 2037.

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Uber Taiwan fined NT$1m on charges of false advertising

On 15 June 2016, the Taiwan Fair Trade Commission (TFTC) resolved to impose a fine of NT$1m (approximately US$30,900) on the ride-hailing service provider, Taiwan Uber Digital Service Co Ltd ('Uber Taiwan'), a subsidiary of Uber International Holding BV incorporated in the Netherlands (collectively as 'Uber Group'), due to its false advertising on the 'Information Website of Uber Drivers'[1] manager by Uber Taiwan. The said advertisements indicate that the drivers could 'drive your own cars, join the popular Uber Platform free of charge, enjoy flexible hours, and earn more than NT$10,000 (approximately US$309) per week.' Also, with the documents required by Uber Group, any drivers 'of the age of 21 or above, with general driving licences and cars conformed with the requirements of Uber Group, and without any record of crimes or substantial traffic offences' is eligible to join the Uber Platform, suggesting that, as long as all conditions described in the advertisements are met, with the documents required, drivers may join the Uber Platform and provide car transportation service in compliance with relevant laws and regulations in Taiwan. The aforementioned descriptions in the advertisements constitute false and misleading statements in relation to the services organised by Uber Group, which is sufficient to affect the decision of the public on whether to join the Uber Platform, and thus was found in violation of Article 21 of the Taiwan Fair Trade Act (TFTA).

Based on the opinions of the Ministry of Transportation and Communications (MOTC), the competent authority of the car transportation service, and Taipei High Administrative Court, pursuant to the Highway Act, without the proper approval as well as the transportation licence (also known as the 'taxi licence') issued by MOTC, it is illegal to provide car transportation services in Taiwan. Therefore, contrary to the implication of the advertisements, even if the drivers satisfied all of the conditions described in the advertisements published by Uber Taiwan and provide Uber Group with the documents required, drivers who participate in the Uber Platform and transport passengers through the designation of the platform without a taxi licence are still at risk of violating Article 77 of the Highway Act, which may result in the fine of no less than NT$50,000 (approximately US$1,547) but no more than NT$150,000 (approximately US$4,640) in addition to a suspension (for between two and six months) or revocation of the car licence plates. The TFTC indicated that the difference between the implication of the advertisements and the reality is so large that it cannot be accepted by the public and may very well generate an inaccurate impression or decision of the public.

Though there is no specific wording indicating that transporting passengers through the designation of the Uber Platform is legal in the aforementioned advertisements, the TFTC found that without revealing the risks of the imposition of fines and suspension or revocation of the car licence plate, the aforementioned advertisements published by Uber Taiwan not only misled the public with the false impression that both the Uber Platform and the participating drivers are in compliance with relevant laws and regulations in Taiwan, and thus make incorrect and uninformed decisions on that basis, but also amounted to unfair competition by posing a threat to other taxi drivers who had obtained the proper approval and taxi licences in accordance with the Highway Act. Therefore, Uber Taiwan is in violation of Article 21 of the TFTA.

From the TFTC's rationale above, it is notable that if the contents mentioned or implied in the advertisements (ie, transporting passengers through the designation of Uber Platform) may be in violation of certain laws or regulations (ie, the Highway Act), the publisher of such advertisements should explicitly reveal the risks in the said advertisements; otherwise, it will constitute false and misleading statements since it misleads the public that it is legal to act according to the said advertisements. This

rationale is consistent with previous decisions of the TFTC and is supported by the Supreme Administrative Court.

Pursuant to the TFTA, Uber Taiwan may appeal the TFTC's decision to the Taiwan High Administrative Court within two months after its receipt of the decision. As of the date of this report, Uber Taiwan has not commented on the decision yet, thus it is uncertain if it intends to appeal against the TFTC's decision at this stage.

Note

1 www.driveuber.tw

Presumption of concerted practice in Turkey: going back to the old days?

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Enforcement trends for the presumption of concerted practice in Turkish competition law have developed over the last decade to integrate the presumption of innocence. However, a recent decision by the Turkish Competition Board ('the Board') suggests the trend may have shifted back towards the older enforcement approach. A recent decision suggests the Board may have begun to treat any communication among competitors as evidence of concerted practice, even if this communication does not contain a clear link to anti-competitive outcomes.

As with its European counterpart, Turkish competition law has three pillars. One of these is anti-competitive agreements, decision of undertakings and concerted practices. Accordingly, all agreements are prohibited between undertakings, decisions made by associations of undertakings and concerted practices if such arrangement has the object or effect of preventing, restricting or distorting competition. Article 4 of Law No 4054 on the Protection of Competition addresses this pillar, akin to Article 101 of the Treaty on the functioning of the European Union (TFEU).

Although the basic infrastructure is the same, the Turkish competition law regime distinguishes itself from the European Union competition law regime with the presumption of concerted practice. In Turkey, enterprises can be presumed to have engaged in concerted practices even if no agreement is shown to exist. The presumption is triggered where price changes, supply-demand equilibrium, or fields of an enterprise's activity bear a resemblance to those in markets where competition is obstructed, disrupted or restricted. Once the presumption is triggered, parties bear the onus of showing that no concerted practice exists, based on economic and rational facts.

Turkish Competition Board's past approach to enforcement

Enforcing the presumption of concerted practice in Turkey has been a battle, with many ups and downs. About a decade ago, the Board would generally hold that parallel behaviour among competitors within certain time periods was sufficient to trigger the presumption of concerted practices. The Board would request each undertaking prove it had not engaged in concerted practices, using economic and rational grounds.

The Board's approach exposed undertakings in oligopolistic markets to serious competition law risks. The primary risk was the inherent difficulty of differentiating between anti-competitive conduct and normal market behaviour. Undertakings were required to demonstrate that any parallelism was not based on concerted practice, but is rather based on economic and rational reasons. The enforcement trend lacked the universally accepted presumption of innocence.

Evolving interpretations over the past decade

The Board's presumption of concerted practice has evolved over the last decade, injecting the presumption of innocence into

its assessment of concerted practice.

The latest in a series of decisions on the presumption of concerted practice is the Board's 2014 *White Cement* decision.[1] The Board held that competitors failed to plausibly explain parallel conduct by economic and rational reasons, thus failing to dispel the Board's presumption of anti-competitive conduct. However, despite this, the Board ruled that the investigated undertakings must be acquitted due to the lack of clear and consistent evidence proving anti-competitive communication among the competitors.

The Board held that individual interfirm parallel behaviour (specifically, parallel price increases) was not sufficient to prove concerted practice. Evidence of parallel conduct alone was deemed insufficient in these circumstances for the Board to conclude that a violation existed.

Thus, the Board has clearly integrated the universally accepted presumption of innocence into its 'presumption of concerted practice' enforcement. In the summer of 2015, vacant seats on the Board were filled with new members. Since this time, Turkish competition law circles have been wondering whether the new Board composition would continue with its predecessor's jurisprudence trend.

Enforcement trends changing again?

A recently published Board decision might indicate a return to the old days for enforcing the presumption of concerted practice In Turkey.

In the Board's decision in *Aegean Region Cement Manufacturers*,[2] it concluded that all six of the investigated cement manufacturers had engaged in price-fixing, imposing administrative monetary fines on all undertakings.

Aegean Region Cement Manufacturers decision 14 January 2016[3]

Six cement manufacturers in İzmir, Denizli and Muğla (cities in the Aegean region of Turkey) are alleged to have agreed to:

- significantly increase cement prices;
- share customers and territories based on the location of the cement manufacturing facilities; and
- prevent their distributors from selling cement from competing manufacturers.

The Board groups evidence into three different time periods.

Pre January – March 2013 (pre-violation period)

According to the Board, evidence obtained for this period suggests a competitive market structure. The Board's conclusion is based mainly on internal correspondence by cement manufacturers which indicates that competitors are stealing customers from each other via price competition.

January – March 2013 until October – December 2014 (anti-competitive period)

The Board heavily relies on evidence from this period. Among eight documents relating to this period, the Board considers email correspondence between competitors regarding two meetings at the Cement, Glass, Ceramic and Soil Products Exporters Union to be particularly important.

The decision indicates that two meetings (in December 2013 and February 2014) were held, ostensibly to share 2013 cement export statistics. However, the critical email exchange (quoted in the decision) reveals that discussions at the meetings extended to include:

- clinker stocks;
- volume and price details for a particular clinker shipment to Azerbaijan;
- cement export destinations and volumes;
- variable costs for clinker; and
- future export plans for clinker.

The Board concluded that the topics extended beyond merely sharing export statistics. Rather, the participants inappropriately shared competitively sensitive information.

Post October – December 2014 (post-violation period)

According to the Board, evidence from this period suggests separate market entries (by Limak Group and Oyak Group) triggered competitive processes in the market again and a downward price trend was observed.

The Board's assessment

The Board identified an extraordinary parallel price increase based on the evidence mentioned above, as well as analysing price trends for January 2013 to October 2014. The Board analysed price increases against the costs and level of demand in this period, concluding that no variable existed to explain the price increases.

The Board is convinced that the market displays a competitive structure during the pre-violation period. The Board observed a shift to a different market structure between the January – March 2013 and October – December 2014 period. It accepted the critical email exchange as evidence of contact among competitors regarding their future strategies. In particular, the Board held that competitors may potentially have discussed competitively sensitive issues during the export meetings. However, the Board concluded that the market entries by Limak Group and Oyak Group terminated the violation in October – December 2014.

The Board accepted that concerted practices, intended to share the market and increase prices, existed among the cement manufacturers between January – March 2013 and October – December 2014. It stated that:

> '… such information exchange … forms a basis for cooperation between undertakings and allows them to continue especially in homogenous concentrated markets that are characterised with stable demand and supply conditions and high investment costs. It has been concluded that in the case at hand, behaviours of undertakings and market performance could not be explained with reasonable and rational explanations other than the information exchange.'[4]

Dissenting opinion

A dissenting opinion clearly portrays the weakness behind the Board's reasoning. Highlights include:

- the only communication evidence shows communication only about clinker exports. The Board's jurisdiction is limited to Turkey's national borders. Therefore, any communication about exports clearly falls outside the Board's jurisdiction.
- To be deemed anti-competitive, an information exchange must eliminate market uncertainty and make the market prone to parties gaining a competitive advantage. In these circumstances, it is not proven exactly how the information in the critical email exchange (mainly information on exports) eliminates market uncertainty regarding competitors' pricing behaviour.
- Considering the information shared in the meetings was historic information, it is not clear how this would affect competitors' future market behaviour.
- The position taken in this decision contradicts prior positions taken about standards of proof for concerted practices (*Mediterranean Region Cement Producers* decision of 31 March 2011[5] and also for parallel conduct (see *White Cement* decision, of 25 June 2014).
- The casual nexus has not been established between the communication's content and the anti-competitive outcome (parallel price increases).
- The violation decision is based only on analysis on demand and costs, made by the case handlers. A more thorough economic analysis by the Department of Economic Analysis and Research should have been made to conclusively determine whether other reasons could potentially explain the parallel conduct.
- The decision lacks analysis on capacity utilisation rates in the relevant markets.
- The Board's reasoning for termination of the violation (market entries by Limak Group and Oyak Group) lacks concrete reasoning.

Conclusion: declining evidentiary standards?

In a sense, this latest decision indicates a decline in the standard of proof required in concerted practice cases.

The Board bases its conclusion about inappropriate conduct exclusively on the critical email evidence. The aspects of this e-mail which are reproduced in the Board's decision show communication between competitors about relatively benign topics. However, the email contains no clear smoking gun. Therefore, the primary evidence fails to establish a clear nexus between the meeting discussions and the alleged anti-competitive conduct. Rather, the email simply shows that competitors have communicated about matters which are not directly relevant to the issues under investigation.

Despite this weak causal link, the Board has accepted the fact that competitors have been in contact about arguably immaterial topics as evidence of what could have been discussed at the two meetings. Thus, email communication is treated as conclusive proof of inappropriate discussions having occurred elsewhere which led to anti-competitive outcomes.

Risks arise if the Board consistently adopts this (arguably) lower evidential standard. Treating any communication among competitors as evidence of concerted practice and not requiring a clear nexus between

the communication and anti-competitive outcomes is a slippery slope, contrary to natural justice principles (such as the presumption of innocence) and undermines the Board's gains made over the last decade in this respect. If this happens, the uphill battle must start over from scratch.

Notes

1 See: www.rekabet.gov.tr/en-US/News/Investigation-concerning-Cimsa-Cimento-Sanayi-ve-Ticaret-AS-ve-Adana-Cimento-San-TAS-concluded.
2 www.rekabet.gov.tr/en-US/News/Investigation-initiated-concerning-6-cement-producers-operating-in-the-Aegean-Region.
3 *Ibid*
4. *Ibid*
5 case No 11-20/378-117

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Inflation, abusive pricing and competition law

As many Latin American countries, Uruguay has also been experiencing an economic recession lately. In this context, recent polls reveal that inflation – which in February reached an annual rate of 10.2 per cent – is one of the main concerns of the Uruguayan government, causing continuous increases in basic living expenses, and food products in particular.

As a consequence, the Uruguayan government faces the challenge of implementing measures to withhold the constant increase in inflation rates and, simultaneously, to avoid the loss of purchasing power of the Uruguayan peso. In order to mitigate the problem, multiple alternatives have been considered.

Among these, the Executive Branch has issued Decree No 346/016, dated 14 April 2016 (hereinafter, the 'Decree'). The Decree, issued in the framework of the Consumer Protection Law, has created the Registry of Retail Establishments which will carry out an exhaustive control of prices through the information provided on a daily basis by certain retail establishments about specific products which will be determined by Área Defensa del Comsumidor (ADECO) (Consumer Protection Area).

The information will be processed by the Registry of Retail Establishments and uploaded to an application (app) which will be launched by the Ministry of Economy and Finances, in order to assure that the consumers are duly informed of the prices and places where the products and/or services are offered. Also, there will be information available about the establishments that offer the best and worst prices (in terms of lower and higher prices respectively), as well as those establishments that constantly vary their prices. Once this initiative is implemented, it will enable what was referred to by the Uruguayan government as 'social control of prices'.

Additionally, the Ministry of Economy and Finances and former vice President, Danilo Astori, has expressed his concern in adjusting competition law regulations to enable 'deeper conclusions' regarding price formation and more specifically, abusive pricing. He has also stated that there were 'obvious indications' of abuse of dominant position practices which led to 'surprisingly' excessive prices through the first quarter of this year and linked it to the inflation issue. Similarly, other high-profile government officials have publicly stated that competition law enforcement could be used as a 'relevant tool in the fight against inflation'.

On a press release, a representative of the Competition Authority (hereinafter, the 'Commission') stated that so far there was no sufficient evidence of abusive pricing practices. However, the Commission is expected to select highly concentrated markets to launch market studies and ex officio investigations in order to study the possible existence of abusive pricing practices more deep. The representative anticipated that the Decree is not necessarily related to competition law, but to consumer protection regulations, and emphasised that the Commission does not control prices.

Under Uruguayan competition law regulations, high prices are not considered anti-competitive per se. However, high pricing practices might be considered to be anti-competitive if said practice amounts to an abuse of dominant position under

the standards provided by Uruguayan Competition Law (hereinafter 'LPDC'). Yet, high prices do not necessarily represent an abuse of dominant position, particularly – but not exclusively – in cases where: (1) the production costs are also high; (2) the increases occur in the context of a competitive market; (3) the increases are temporary and part of a natural price fluctuation mechanism; and/or (4) investment of new agents is encouraged.

In this scenario, the standing of the Commission as the competition authority to regulate pricing has been questioned. In that regard, the LPDC only confers the Commission the power to investigate, analyse and punish anti-competitive practices which are prohibited by LPDC. Thereby, price control shall be separated from competition law, given that it constitutes an *ex ante* procedure of continuous intervention and systematic market monitoring, which is not necessarily directed to the finding of dominance. The above mentioned information has been validated by Organisation for Economic Co-operation and Development (OECD) 2011 Policy Roundtables on Excessive Prices.

Therefore, following comparative law solutions, competition authorities who do have the power to control prices shall rely on explicitly and legally provided powers in order to enable their intervention, which does not occur in Uruguay. Competition law enforcement shall be only sought selectively and as a last ratio solution.