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Antitrust News

Newsletter of the International Bar Association Legal Practice Division

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10th IBA Competition Mid-Year Conference

7–8 March 2014 **Radisson Blu Hotel Waterfront, Cape Town, South Africa**

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

This conference will focus on African antitrust law developments (including the new COMESA supranational antitrust regime) and comparative international trends. The conference will include a regulators' round table with representatives from various regulators in South Africa, COMESA, the EU, the US, Kenya and Russia, as well as panels of experienced international and African practitioners and regulators.

Topics include:

- Regulators' round table
- The COMESA Merger Control Regime
- Current issues arising out of the regulation of dominance and market power
- New challenges in the prosecution of cartels
- An interview by IBA President Michael Reynolds with David Lewis, former Chair of the South African Competition Tribunal
- Issues and challenges arising from the interface between competition regulation and other sectoral regulation

Who should attend?

Antitrust and commercial lawyers in private practice, in-house counsel, officials from antitrust regulators, economists and academics involved in antitrust law.

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

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

Looking ahead to 2014

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We are pleased to present this edition of the IBA Antitrust Committee's newsletter, which provides updates on recent antitrust developments in 30 countries.

In light of the continued efforts by the competition authorities around the globe to coordinate their investigations and sanctions, many of the multinational and even domestic corporations with significant exports are required to stay informed of recent developments and trends in competition laws and their enforcement. To this end, the IBA Antitrust Committee, through its diverse working groups, conferences, publications and other activities, fosters connections among the international antitrust bar and constantly seeks to expand our geographic coverage.

Our conference programmes provide a global forum to stay informed and exchange ideas

In the last quarter of 2013, we successfully hosted our 17th Annual Competition Conference in Florence, Italy, the topics of which include the challenges in global merger control, various pricing strategies and evidentiary standards in cartel investigations. The conference was well attended by pre-eminent antitrust policy-makers, in-house counsels, enforcement officials and academics, as well as lawyers in private practice. Also, the IBA Annual Conference in Boston, in October consisted of interactive panels, including a number of sessions in cooperation with other IBA Committees. The Antitrust Committee has planned various other interesting activities for the year ahead, including a full programme of competition law conferences and working group activities which are indicated below. We hope to see many of you at these upcoming events, which provide excellent opportunities for in-depth learning, discussion and networking.

- ***International Cartel Workshop***
  19–21 February 2014, Rome, Italy
  A three-day conference co-presented with the American Bar Association's Antitrust Law Section

- ***IBA 10th Competition Mid-Year Conference***
  7–8 March 2014, Cape Town, South Africa
  A two-day conference supported by the IBA African Regional Forum

- ***25th Annual Communications and Competition Conference***
  5–6 May 2014, Prague, Czech Republic
  A two-day conference co-presented with the IBA Communications Law Committee and supported by the IBA European Regional Forum

- ***18th Annual Competition Conference***
  12–13 September 2014, Florence, Italy
  A two-day conference supported by the IBA European Regional Forum

- ***IBA Annual Conference***
  19–24 October 2014, Tokyo, Japan

All conference programmes are described in further detail on the IBA website.

Our newsletters focus on recent key developments in competition law and enforcement

Our tri-annual newsletters consist of contributions from our prominent members from around the globe. The current issue covers various topics, ranging from the detailed facts of the recent line of cases that show the broadened scope of antitrust enforcement in China to the implications of the eight amendments to German antitrust laws. Through publication of our newsletters, we provide our members with a broad update on the major changes in competitions laws and alert them of significant cases that may have international implications. We would like to express again our appreciation to the many Committee members who have contributed in publishing the newsletters.

You can get involved in our activities

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

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

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

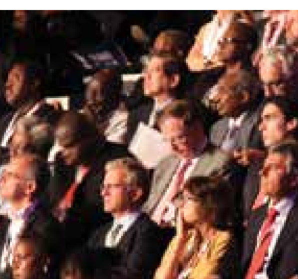
A word of thanks from the Co-Chairs

As we finish our term as Antitrust Committee Co-Chairs at the end of 2013, we would like to take this opportunity to thank you for your support and cooperation over the last two years. Starting in 2014, Dave Poddar and Andrea Appella will assume the role of Co-Chairs of the Committee. We are looking forward to their leadership and insight as well as to the continued input and support of our valued members.

We hope you enjoy reading this newsletter and hope to see you at one of our events over the next few months.

Films from the 2013 Annual Conference in Boston

To view these and other films from the conference, visit: **tinyurl.com/Bostonfilms**



TOKYO 19–24 OCTOBER 2014

ANNUAL CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

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With a population of more than 13 million, the capital of Japan and the seat of Japanese government is one of the largest metropolises in the world. A city of enormous creative and entrepreneurial energy that enjoys a long history of prosperity, Tokyo is often referred to as a 'command centre' for the global economy, along with New York and London. Not only a key business hub, Tokyo also offers an almost unlimited range of local and international culture, entertainment, dining and shopping to its visitors, making it an ideal destination for the International Bar Association's 2014 Annual Conference.

WHAT WILL TOKYO 2014 OFFER?

- The largest gathering of the international legal community in the world – a meeting place of more than 4,500 lawyers and legal professionals from around the world
- More than 180 working sessions covering all areas of practice relevant to international legal practitioners
- The opportunity to generate new business with the leading firms in the world's key cities
- A registration fee which entitles you to attend as many working sessions throughout the week as you wish
- Up to 25 hours of continuing legal education and continuing professional development
- A variety of social functions providing ample opportunity to network and see the city's key sights, and an exclusive excursion and tours programme

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COUNTRY REPORTS

Argentine Court of Appeals dismisses medical oxygen companies' appeal on statute of limitations grounds

On 6 August 2013, Courtroom III of the Court of Appeals on Federal Civil and Commercial Matters dismissed the appeal filed by the medical oxygen providers Air Liquide Argentina SA, Praxair Argentina SA and Indura Argentina SA, which argued that the Court of Appeals' prior affirming decision of an antitrust cartel fine was null and void since it was issued after the five-year statute of limitations provided in Law No 25,156 (the 'Antitrust Law') had long expired.

On 15 July 2005, the Secretary of Technical Coordination, based on the report prepared by the National Commission for the Defence of Competition (CNDC), issued Resolution No 119/2005, by means of which it sanctioned Air Liquide Argentina SA, Praxair Argentina SA, AGA Argentina SA and Indura Argentina SA with a fine totaling ARS70.3m (approximately US$12m) for allegedly colluding their tender offers for the provision of medical oxygen to private and public hospitals between 1997 and 2002. Said resolution was appealed by the medical oxygen companies and was upheld by the Court of Appeals on 10 August 2012, that is, more than seven years after the fine was imposed. In turn, the medical oxygen companies filed a new appeal against the affirming decision from the Court of Appeals, alleging that such decision was null and void since it infringed the five-year statute of limitations set forth in the Antitrust Law.

The Court of Appeals held that the statute of limitations was solely applicable to the administrative stage of the investigation carried out by the antitrust authority, but not applicable to the courts that review the administrative decision issued by the antitrust enforcement authority. Likewise, the Court of Appeals decided that the seven-year period it took to review the companies' appeal to finally confirm the fine imposed by the antitrust authority did not impair the companies' due process right, including their right to obtain a fair and effective court decision in a reasonable period time without any undue delays.

At present, the Court of Appeals is analysing whether to grant the extra-ordinary appeal filed by the medical oxygen companies, which, if granted, will allow the case to be reviewed by the Supreme Court of Justice.

Norcast v Bradken: Australia's first 'hardcore cartel' – auction processes and cartels in Australia

AUSTRALIA

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This is a novel case about the application of anti-cartel laws to corporate auction processes resulting in an outcome the M&A industry may not have fully considered.

Australia introduced complex laws imposing criminal and civil liability for serious cartel conduct in the Competition and Consumer Act 2010 (Cth) (CCA) as part of a worldwide push to introduce criminal sanctions for cartels.

The recent decision of Australia's Federal Court in *Norcast SarL v Bradken Limited (No 2)* [2013] FCA 235 (*Norcast v Bradken*) is the first decided case to apply these new cartel prohibitions. Unusually, the case was not the result of enforcement action by the Australian Competition and Consumer Commission (ACCC), but private litigation by the victim of the cartel. It relates to a buy-side bid rigging cartel in an auction process where a private equity firm was alleged to be a front for a trade buyer. It resulted in an award of damages of AUD20m.

One of the cartel members was an ASX-listed Australian company. Damages were also awarded personally against its Chair, Nick Greiner, former Premier of New South Wales. The secretive conduct of the cartel members, being careful not to disclose their 'proxy' arrangement to the seller, was also found to be misleading and deceptive conduct in breach of the Australian Consumer Law and further grounds for awarding the damages to the seller.

The case is currently on appeal to the Full Federal Court of Australia and the ACCC has sought leave to intervene in the appeal to argue points of interpretation.

Australia's cartel laws

Australia introduced the cartel prohibitions in 2009 to criminalise serious or 'hardcore' cartels in response to a 1988 OECD recommendation to criminalise four types of cartel conduct: price fixing, market sharing, restricting output and bid rigging.

The CCA provisions are long, verbose and complex. Essentially, they require:

- a contract, arrangement or understanding
- that contains a cartel provision (ie, a provision that has the purpose or effect of fixing prices, or the purpose of allocating customers or territories, restricting production or output, or rigging bids)
- whose parties include competitors or likely competitors for the supply or acquisition of the goods or services the subject of the cartel provision.

The contravention is in making such a contract (section 44ZZRF criminal or section 44ZZRJ civil) or giving effect to it (section 44ZZRG criminal or section 44ZZRK civil). The detailed elements of what constitutes a competitor and what constitutes a cartel provision are in section 44ZZRD. Some supporting definitions are in section 44ZZRB. There are also various exemptions and defences in other sections.

The factual background

The case specifically revolves primarily around two competitors: Bradken Limited (Bradken), a publicly listed Australian manufacturer of mining consumables, and Norcast Wear Solutions Inc (NWS), a Canadian mining consumables manufacturer. Both had operations throughout the world.[1]

The specific allegation in *Norcast v Bradken* was that the private equity firm, Castle Harlan, and trade player, Bradken, were competitors in the acquisition of the takeover target, but made an arrangement that contained a cartel provision that one of them would bid for the takeover target and the other would not.

Bradken and NWS were two of four main suppliers of grinding mill liners in the world. Bradken was the leading manufacturer and supplier in Australasia, while NWS was the leading manufacturer and supplier in Canada. Australia was the largest market for grinding mill liners in the world and Bradken had managed to be the only Australian supplier through a combination of acquiring

its other competitors and locking NWS out of the Australian market by successfully applying to have anti-dumping trade measures imposed on NWS imports by Australian Customs.

Bradken actively considered a strategic acquisition of NWS for many years. After an initial failed bid to buy the business, it made several approaches to buy NWS or gauge the owner's interest in selling.

By late 2010, Pala, the private equity owner of NWS, was keen to sell. Bradken heard about the possible sale process.

Pala appointed UBS as its investment advisors for a 'comprehensive, yet tightly controlled strategic sale only'. Pala and UBS identified Bradken as a potential buyer, but they were concerned about the risks in allowing a close competitor access to NWS's confidential information. It would be hard to know if Bradken was a serious bidder or just after sensitive information.

There was a lot of discussion at Pala and NWS about how to deal with Bradken in the sale process. They finally decided that Bradken was not to be included in the formal process. UBS was not to send the teaser to Bradken or contact Bradken. Instead, Pala mentioned the sale to Goldman Sachs knowing that Bradken was a Goldman Sachs client and that Goldman Sachs would in all likelihood pass on the information. Pala sent the teaser to Goldman Sachs with instructions not to show it to Bradken (while hoping that Goldman Sachs would). Goldman Sachs passed on the information about the sale process, but somehow managed to give Bradken the impression that Pala was deliberately excluding Bradken from the process out of some particular dislike for Bradken.

That is when Bradken contacted Castle Harlan, a New York-based private equity fund.

Bradken and Castle Harlan had a close history and connection. Castle Harlan has a 50 per cent interest in an Australian private equity fund (CHAMP) that was part of a consortium that originally bought Bradken in 2001, before listing it on the ASX in 2004. Greiner, the Chairman of Bradken, is Deputy Chairman and a non-executive director of CHAMP. Before its public listing, Greiner was CHAMP's nominee director on the board of Bradken. In 2006, they had ended up collaborating on an acquisition of AmeriCast with Bradken taking a minority position and then buying it outright from Castle Harlan.

The first thing Bradken did after learning of the NWS sale process was to tell Castle Harlan about it. Bradken later gave evidence that this was because it thought that if it could not buy NWS now, it would rather a friendly private equity house bought it so that there was still a chance Bradken could buy it down the track. However, at the same time, Bradken started seriously crunching numbers on whether an NWS acquisition made sense for it and sent Merrill Lynch hunting for an explanation of why Bradken was excluded from the NWS sale process.

Castle Harlan contacted UBS and was included in the sale process. There was an immediate suspicion that Bradken might be lurking in the wings somewhere. The solution was to have a tightly worded NDA that would prevent Bradken getting a copy of the Information Memorandum. In the end, the opposite happened. The NDA was worded so loosely that Bradken was appointed as a 'consultant' to Castle Harlan and able to get copies of the IM without having to disclose its involvement to Pala.

In parallel with the sales process, the discussions between Bradken and Castle Harlan seem to have moved quickly to include a quick on-sale of NWS to Bradken after Castle Harlan bought it, and what sort of return Castle Harlan would expect to make on the on-sale. An 'arrangement' was put to Castle Harlan by Bradken on 8 March 2011. Castle Harlan's main concerns with it were reputational risk and their internal rate of return.

Bradken was closely involved, but behind the scenes, in assessing the due diligence material. Bradken continued to work on its internal analysis of the value of NWS, including by using the data it was acquiring through its appointment as Castle Harlan's consultant. Both Castle Harlan and Bradken went to some lengths to keep Bradken's involvement secret. All the information Bradken received confirmed its view that NWS represented a valuable strategic acquisition for it.

Pala seem to have reached the view that Bradken was no longer interested on the basis that the price was too high and not worth it. It saw Castle Harlan as one of the few credible buyers.

Castle Harlan and Bradken had heated negotiations right up the 11th hour about the two outstanding parts of their arrangement of concern to Castle Harlan. Castle Harlan was concerned about being sued if the arrangement with Bradken was uncovered and wanted to be indemnified. Bradken was happy to indemnify Castle Harlan for breaching the non-disclosure agreement, but not more broadly. Castle Harlan was also insisting it should receive AUD25m for its role

in the purchase and quick on-sale. Bradken wanted to pay it AUD20m.

Castle Harlan submitted a final bid of AUD190m. There were only two bids, and Castle Harlan's was the higher of the two. It entered into a two-week exclusivity period to negotiate the share purchase agreement.

Bradken, a publicly listed company with continuous disclosure obligations, was concerned not to do anything that would have to be disclosed to the market, and wanted to avoid making its involvement known before Pala and Castle Harlan closed.

Castle Harlan became concerned about the risk it was facing in having to finance the arrangement itself until it could on-sell to Bradken and that the proposed 'fee' was not sufficiently commensurate. It said that it would ordinarily not pay more than around AUD112m in a deal like this.

Ultimately, Pala and Castle Harlan closed on the sale of NWS to Castle Harlan for US$190m. Within hours after that, Bradken had disclosed to the market that it would buy NWS from Castle Harlan and had closed on that transaction for US$212.4m.

The decision

Was there a contract, arrangement or understanding?

Gordon J first looked at whether there was a cartel provision (ie, whether there was a provision between the parties that had a bid-rigging purpose).

Having found there was, she then looked at whether there was a contract, arrangement or understanding that contained that cartel provision.

This is an unusual approach. The first inquiry would usually be whether there was a contract, arrangement or understanding between the parties (ie, had they had a meeting of the minds, were they acting on more than a mere expectation of how the other would act), and having found one, looking at the content of what was agreed.

Gordon J found that there was an arrangement between the parties based on their correspondence and surrounding circumstances. When the deal looked like it might collapse at the last minute, there was a frank exchange of emails reminding the parties of what they had originally arranged. While certain issues had been parked until they needed to be worked out, there was an overall arrangement between the parties.

Did it contain a provision with a bid-rigging purpose?

The detailed requirements of the provision are that it must have the purpose of ensuring that, in the event of a request for bids for the acquisition of goods or services, one or more parties to the arrangement would bid and one or more others would not.

The requirement that there be a 'request for bids' is one of the completely new aspects of the cartel prohibitions. There was significant argument in this case about what it meant.

Bradken argued that it had to have been invited personally by Pala to bid for NWS, and that that request had to occur in Australia. Since Bradken thought that Pala had deliberately excluded it from the process (ie, was deliberately not requesting it to bid), there was no 'request for bids'.

Gordon J found that the request for bids did not have to be addressed individually to Bradken or Castle Harlan. It did not matter that Bradken thought it was excluded. She found that both Bradken and Castle Harlan had, in fact, been requested to bid: Bradken through the approach from Goldman Sachs informing it of the sale process and Castle Harlan through hearing about it from Bradken and then being formally included in the process by UBS.

However, there is a further element that does not appear to have been considered closely in the case. The requirement of the legislation is that there be an arrangement to 'ensure' that one party bids and another does not. This suggests a level of certainty beyond what is required for there to be a 'contract, arrangement or understanding' in the first place. Bradken argued that it had not undertaken not to bid. Gordon J made findings that the corollary of agreeing that Castle Harlan would bid was that it then made no sense for Bradken to bid separately. Perhaps that is enough to 'ensure' that Bradken did not bid. But, teasing out the implications of the particular wording used by the legislature here is likely to feature in future bid-rigging cases, particularly any criminal prosecutions.

The wording of the bid-rigging provision arguably requires a reciprocity of purpose that is not usually needed to establish the existence of the underlying contract, arrangement or understanding. In this case, there was very little evidence from Castle Harlan. None of its representatives were called to give evidence,

and much of the documentary evidence from Castle Harlan was ruled inadmissible. This reciprocity may be a live issue in the appeal (and future cases).

Are shares 'goods' or 'services'?

A threshold question was whether an acquisition of shares is an acquisition of goods or services. 'Services' is defined very broadly in the legislation to include the conferring of rights or the granting of benefits. While there is an earlier case that decided that shares are not goods or services, Gordon J took the view that shares involve rights and benefits, so they are 'services'. That seems to be the orthodox view in Australia.

Were the parties competitors?

In most other contexts in Australian competition law, the relevant concept is 'competition' and invariably, that means 'competition in a market'. One therefore proceeds from a market definition to determine who the competitors are in that market. Generally, markets are limited to being markets in Australia.

However, for the cartel provisions, the relevant concept is 'competitors'. There is no mention of competition in a market, simply that two parties are competitors for particular goods or services. This means there is no need to proceed from concepts of close substitutability of goods or services to find the dimensions of a market in Australia. Instead, one looks at whether two players compete to supply or acquire particular goods or services.

This led Gordon J to find that Bradken and Castle Harlan were competitors because they were competing to buy shares in NWS, or would be but for their cartel arrangement. If Bradken had not informed Castle Harlan of the sale and encouraged it to buy it, Castle Harlan may never even have known NWS was for sale and, even if it did, may have had no interest in buying it. There was no evidence directly on this point. Gordon J simply found that it was possible Castle Harlan would also have bid for the business, without assessing how remote that possibility was. In addition, Bradken argued adamantly that it considered itself excluded from the process and so unable to bid, which meant it was not competing to buy NWS. Gordon J did not accept that argument. This is likely to be a significant aspect of the appeal. If allowed to stand, Gordon J's findings cast the net of who will be competitors or likely competitors in any given transaction very broadly.

Did the merger control anti-overlap apply?

There is an exception that provides that the cartel prohibitions do not apply to the extent the cartel provision provides for the acquisition of shares or assets.

The intent is for the competitive impact of any such provision to be assessed under the substantial lessening of competition test for mergers generally.

However, the approach that has been applied previously to similar exemptions for price fixing and now by Gordon J in *Norcast v Bradken* is to look at whether the very specific provision that provides for the bid-rigging provides for the acquisition of shares. The section says 'provides for' the acquisition not 'relates to'. Gordon J found that the provisions that provided for the acquisition of the shares were in the share purchase agreement between Castle Harlan and Pala, whereas the cartel provision was in the arrangement between Castle Harlan and Bradken, so the cartel provision did not 'provide for' the acquisition of shares.

While the very narrow approach taken may be the only one open to the courts, because of the wording of the provision, it demonstrates that the merger control anti-overlap may essentially be of no valuable meaning. It is hard to imagine a cartel provision that provides for the acquisition of shares.

The quantum of damages

Gordon J assessed Pala's loss to be AUD20m, the margin between what Castle Harlan paid Pala and what Bradken paid Castle Harlan. There was argument around whether the damages should have been based on the presumably higher price Bradken would have paid in a competitive process. Gordon J acknowledged that the assessment of damages is essentially a matter of estimation, and opted for a figure that could be easily demonstrated from the evidence before her.

Misleading and deceptive conduct

Australia also has a general prohibition on a company engaging in misleading and deceptive conduct in trade or commerce.

Castle Harlan and Bradken's conduct in keeping Bradken's involvement secret was found to be misleading and deceptive

conduct. This was used as a further basis for the overall award of damages, as the loss also flowed from this deceptive conduct.

There was only one element where Castle Harlan directly misled Norcast. It was asked if Bradken was behind their bid, and responded that Bradken was not involved. However, Gordon J was also prepared to find that the parties' secretive conduct was enough to constitute misleading and deceptive conduct. This likely goes beyond previous Australian cases about where silence or non-disclosure can be misleading.

Since all cartels inherently involve secretiveness and deception, this case may stand as a powerful suggestion that (leaving aside criminalisation) a simple prohibition on misleading and deceptive conduct is as powerful as the alphabet soup complexity of our new cartel provisions.

Jurisdictional questions

Gordon J made a number of findings on jurisdictional questions that mean the Australian cartel prohibitions will have a long arm to reach into cartel arrangements and conduct outside Australia. Bradken is an Australian corporation, so its conduct is governed by the CCA wherever it occurs. However, Gordon J also found that Castle Harlan was carrying on business in Australia (because of its part-ownership of CHAMP) and equally bound by Australia law as a result, wherever the conduct might occur. She also resisted a number of arguments that tried to read down the operation of the cartel prohibitions to Australia. She found that there was no need to find a market in Australia in which the parties compete, nor for the request for bids to be made in Australia, or the conduct leading to the arrangement to occur in Australia.

What's next

The appeal is set down for hearing in November 2013 before the Full Federal Court. Many of these issues will be argued extensively and the Full Federal Court's judgment on the appeal will be an important guide to understanding and developing Australia's cartel laws, particularly if the ACCC is able to intervene.

Note

1 All of the facts recited about the case are taken from *Norcast v Bradken* [21]–[207].

Did the Austrian Federal Competition Authority use 'illegal spyware' during its dawn raids?

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Currently, the Austrian Federal Competition Authority (Bundeswettbewerbsbehörde – BWB) is confronted with serious accusations by Spar, one of Austria's two leading grocery chains. According to Spar, the BWB used illegal spyware in its inspection of Spar premises in August 2013. In Spar's view, the software, allegedly developed by the FBI, caused damage of at least €1m. While Spar has taken various legal measures, the BWB denies the accusations and assumes that Mr Drexel, the CEO of Spar, 'watches too much science fiction'.

Besides Rewe (market share of approximately 34 per cent), Spar is the leading grocery chain in Austria with a market share of approximately 30 per cent. At the beginning of 2013, the BWB conducted an eight-day dawn raid at Spar's headquarters in Salzburg, Austria. The BWB continued its inspections in August 2013 in Salzburg and a regional office in Carinthia where – according to Spar – the illegal software was used.

The inspections are based on the BWB's suspicion that Spar coordinated its resale prices with upstream suppliers. Furthermore, the BWB suspects Spar of horizontal coordination ('hub and spoke' agreements between retailers via its suppliers). While Rewe, when confronted with similar allegations, settled its proceedings with the BWB and agreed to accept a fine of €20.8m in May 2013 (imposed by the Cartel Court), Spar announced that they would not accept any settlement, but rather challenge the BWB's allegations and investigations once the BWB initiates proceedings at the Cartel Court.

In connection to the BWB's allegations and inspections, Mr Drexel, the CEO of Spar, was interviewed by a newspaper in Austria in September 2013. In this interview, the BWB was fiercely attacked. Mr Drexel rejected the BWB's allegations in general and stated that the communication between supplier and grocery retailer concerning vertical retail prices and strategic price positioning is 'vitally important'. In his view, such behaviour does not infringe (Austrian) antitrust rules. On the contrary, the BWB 'limits the undertaking's freedom of trade' and therefore 'takes over the government's agenda with regard to its commercial, industrial and agricultural policy'.[1]

Referring to the inspections in August 2013, Mr Drexel claimed that the BWB used spyware that was developed by the FBI and that is illegal for dawn raid purposes, as the spyware can only be used in exceptional cases of criminal law (ie, crimes against life and health after judicial approval). Following the allegations of Mr Drexel, the Federal Criminal Police Office (Bundeskriminalamt), which was acting on behalf of the BWB, confirmed that they had used spyware by order of the BWB (to be precise, a software called 'osTriage') which they got from a from a 'friendly service'.

The spyware was in use for 30 minutes (according to FBI-experts, this is 'enough time to search the whole program'). Only after this period of time was the software detected and rejected by Spar's firewall system. Since the 'attack', Spar's IT department is working 'all the time' on the damage caused. Mr Drexel declared that the damage is at least €1m and that several legal measures have been taken. Spar backed up its allegations and legal position with the opinion of two external experts.

The BWB, on the other side, rejected Spar's allegations. Following the BWB, the authorities used a 'normal USB stick with standard software', which has been used by the Federal Criminal Police Office 'a hundred times'. Furthermore, it was published that the BWB 'so far assumed that the CEO of a big undertaking should be able to understand the content of a search warrant, which clearly also encompasses the inspection of electronic data'.

Beyond all polemics, the confrontation between Spar and the BWB focuses on topics which have not been issued, let alone answered in Austrian antitrust practice yet. For example, the question of whether the BWB is entitled to use its own software for its inspections and, if the answer to this is 'yes', which type and under which circumstances can it be used, is all new in Austria's antitrust practice. It is also not clear whether the use of software or the inspection of electronic data can be challenged at the Cartel Court or (since the reform of Austrian Cartel law in 2013) at administrative courts or both. However, following Spar's statements so far, Spar is willing to defend itself and challenge the BWB's inspections and allegations in substance. Therefore, from a legal perspective, it can be hoped that essential questions concerning inspections and the use of electronic data will be answered in the course of the proceedings in the near future.

Note

1 All of the 'quotes' of Spar are taken from interviews and press releases of the BWB, respectively.

New Belgian Competition Authority

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The new Belgian Competition Act, adopted in April 2013, entered into force in September 2013. To a large extent, the changes introduced by the new Act are of a procedural and institutional nature, including the launch of a revamped Belgian Competition Authority. The new Belgian Competition Authority has been fully operational since early September 2013. It is headed by Mr Jacques Steenbergen.

First merger control decisions of the new Authority

The new Belgian Competition Authority launched with a flying start with merger control investigations in two cases, which raised some delicate issues. The first case related to the acquisition of vehicle testing centres by a group with broader commercial interests in the vehicle sector. The second case was a three-to-two merger in the Flemish media sector. In both cases, the Authority issued conditional Phase 1 clearance decisions.

Vehicle testing centres and broader commercial interests

The new Authority's first merger control decision related to the acquisition by Touring of two companies operating a number of vehicle testing centres (decision of 24 October 2013). Touring is a diversified group, providing a number of services to car users, such as roadside assistance, insurance, car rental, diagnostic and repair services, etc.

In Belgium, vehicle testing centres are all privately owned, but they operate on the basis of government licences and are strictly regulated. Vehicle testing centres also hold official driving permit examinations. One of the concerns of the regulator is the objectivity and impartiality of the activities of the centres. In that context, there are rules on possible conflicts of interests between the regulated services and other activities of a commercial nature.

There was no overlap between the activities of Touring and the target companies, but the combination of Touring's commercial activities with the technical inspection and driving permit exam services raised some competition law concerns (apart from possible regulatory concerns). At the level of the vehicle testing centres, there was a level playing field concern. The combination of the two types of activities could indeed distort the level playing field between testing centres and have a negative impact on the competitive position of the independent technical centres. In addition, the proposed merger could also affect Touring's competitors who, post-merger, would have to use or refer members to vehicle testing centres owned by a competitor.

These concerns are reflected in the decision of the Belgian Competition Authority, which made its Phase 1 clearance decision conditional upon Touring observing the applicable legal requirements in terms of a strict separation between the two sets of activities. The Belgian Competition Authority declined to impose conditions that would go beyond the applicable regulatory framework.

Three-to-two merger in the media sector

In its second merger control decision, the new Belgian Competition Authority cleared a three-to-two merger in the Flemish media sector (decision of 25 October 2013). The parties involved were Corelio and Concentra, respectively the second and third largest newspaper publishers in the Flemish region. The parties to the proposed merger are due to become the largest Flemish newspaper publishing group, with De Persgroep left as the only other significant newspaper publisher in the Flemish region.

In previous decisions in the newspaper sector, the Belgian Competition Council viewed the newspaper business, from the perspective of the reader, as a distinct market. Further sub-distinctions were made between Dutch and French language newspapers and general newspapers as opposed to financial newspapers. The Belgian Competition Authority analysed the proposed Corelio/Concentra merger on the basis of the same market definitions.

In the advertising market, the Authority distinguished between national-wide and more regional types of advertisements.

Despite the high market shares of the parties to the concentration in each of the affected markets and the three-to-two nature of the merger, the Authority issued a Phase 1 clearance decision. Against the advice of the investigating unit, which had recommended the opening of Phase 2 proceedings, the Authority held that it was not in a position to articulate serious doubts against the proposed merger. In doing so, the Authority effectively set a high standard for opening an in-depth investigation.

The Authority further decided that remedies submitted by the parties, which addressed concerns that had been raised at distribution level and in the advertising markets, were not necessary. The sole Phase 1 commitments, which the Belgian Competition Authority eventually made binding, related to the commitment of the parties to keep all current newspaper titles in their product offer and to maintain a full editorial staff for each of the titles. In addition, with regard to one of the regional newspapers, there is a commitment to publish sufficient local content. The commitments will apply for a period of five years. These commitments seem to address concerns of media pluralism, although they also seek to achieve one of the benefits that the parties claimed their merger would bring about, that is, the strengthening of the viability of the newspaper titles as a result of the merger. On this basis, the Authority conditionally approved the proposed merger.

Standard setting in the cement sector

On one of its last days of existence, the Belgian Competition Council hit three Belgian cement companies, their trade association and a sectorial research center with fines for infringements of competition law (decision of 30 August 2013 involving CBR, Holcim, CCB, FEBELCEM and CRIC). Total fines amounted to more than €14.7m.

The facts go back to the early 2000s. The case was the result of a complaint lodged by ORCEM, a producer of ground granulated blast furnace slags (GGBFS). GGBFS can be used as an ingredient in cement (as a partial substitute for clinker) and in ready-mix concrete (as a partial substitute for cement). GGBFS is a lower-cost alternative. ORCEM claimed delays in the launch of its activities on the Belgian market as a result of the behaviour of the parties concerned.

Standardisation and quality marks play an important role for all materials used in the construction sector, including cement and ready-mix concrete. The allegations were that CBR, Holcim and CCB, together with their sector associations, colluded with the aim of delaying the adoption of the standards and quality marks that would facilitate the use of GGFBS in Belgium.

The Belgian Competition Council held that the behaviour of the incriminated parties went beyond lobbying and the normal participation in standardisation procedures. It established that the parties had engaged in anti-competitive collusion with the objective of foreclosing GGBFS suppliers such as ORCEM. In the context of the fine setting process, the Council held that the infringement was serious and even applied a factor for aggravating circumstances. The two sector associations each received a lump-sum fine of €100,000.

Appeals have been lodged against the decision, and the case is now pending before the Brussels Court of Appeal. ORCEM has already announced that it is considering a follow-up damages claim.

Brazil's first penalty for gun jumping

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The Brazilian authorities have for the first time imposed penalties for 'gun jumping' under the new Brazilian competition law, in force since May 2012. On August 2013, the tribunal of the Administrative Council for Economic Defense (CADE) accepted a penalty of BRL3m (approximately US$1.3m) as proposed by giant Brazilian oil company OGX, controlled by ex-billionaire Eike Batista, under a request for agreement for merger control (ACC). The transaction involved the acquisition by OGX of a 40 per cent stake held by state-owned giant oil company Petrobrás in Bloco BS-4 at the Santos oil basin. CADE considered that the transaction was implemented before clearance (gun jumping). In the event of gun jumping, CADE may impose a penalty ranging from US$26,000 to US$26m. In addition, CADE may consider the deal null and void for gun jumping or for failure to notify, as well as launch an administrative proceeding in the case that the transaction is deemed as anti-competitive. Moreover, penalties for gun jumping sanctions are applicable to mergers between companies with head offices abroad.

In the OGX case, OGX submitted to CADE a request for ACC whereby it admitted to the practice of acts that led to the anticipated consummation of the effects of the transaction (gun jumping), and undertook to pay a penalty corresponding to US$1.3m. Reporting commissioner Ana de Oliveira Frazão did not impose the sanction of nullity of the transaction, taking into account the following:

- the transaction has not generated any effects in the relevant market as the acquired assets (Bloco BS-4, at the Santos oil basin) has not yet entered into commercial operation;
- only acts involving payment of suppliers with no relevance to competition were carried out, such as payment for office supplies, building security, and inputs such water and power;
- the Federal Oil & Gas Agency (ANP) has started requiring prior clearance by CADE only as from April 2013; and
- the transaction does not present any competition concerns.

In her decision, commissioner Frazão also determined that the Superintendence-General of CADE initiates administrative proceedings for the assessment of other merger deals carried out in the oil and gas industry since the coming into force of the new Brazilian competition law (May 2012). In general, the new law allows for CADE to enter into negotiations with the parties in respect of the anticipation of certain acts in connection with a merger transaction, prior to final clearance.

Finally, there are two exceptions to the prior clearance requirement provided under the new Brazilian competition law: (i) mergers involving public takeover bids, provided that CADE still prohibits the exercise of any voting rights by the acquiring party before clearance; and (ii) mergers aiming at the participation in public biddings.

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Foreign investment and competition law updates

Accelero/Allstream transaction blocked on national security grounds

In what marks a first under the national security review provisions of the Investment Canada Act (ICA), on 7 October 2013, the Canadian Cabinet (the federal executive branch) issued an order precluding a foreign investor, Accelero Capital Holdings (Accelero), from completing a proposed acquisition of control of a Canadian business, the Allstream subsidiary (Allstream) of Manitoba Telecom Services Inc (MTS). The decision confirms the Canadian government's intention to balance foreign investment with its responsibility for protecting national security.

Proposed transaction

On 24 May 2013, MTS announced that it had signed a binding agreement to sell Allstream to Accelero for CAD520m. Accelero is an investment and management group with a focus on telecommunication, digital media and technology. Former executives of Orascom Telecom, Wind Telecom and VimpelCom established the company, which is backed by Naguib Sawiris, a global telecom entrepreneur and the former financial backer of Canada's WIND Mobile (WIND).

Allstream is a wholly-owned subsidiary of MTS, which is the fourth-largest telecommunications provider in Canada. The company has operations across Canada, owning a national fibre-optic network that provides telecommunications services to its customer base of approximately 65,000 Canadians and business (which includes the Canadian government).

The ICA review of the transaction took approximately five months to complete from the time the transaction was announced, which indicates that the Investment Review Division of Industry Canada, the Minister of Industry (the 'Minister') and the Cabinet undertook a full national security review of the transaction. Although investors have abandoned transactions in other cases following the receipt of a notice that a national security review would be conducted, this is the first transaction since the enactment of the national security review provisions in 2009 in which a complete national security review was undertaken to the point of a Cabinet order.

It was reported in the media that Accelero offered a number of commitments in support of its ICA application, apparently including commitments to cease carrying sensitive government data on the Allstream network. Moreover, Accelero also offered to invest CAD300m over three years to pursue Allstream's capital plans. As the Cabinet denied the application on 'national security' grounds, no 'net benefit' decision was made and no detailed reasons for the decision were offered.

Considerations

While the reasons for the Cabinet's decision have not been disclosed, we expect that the Cabinet weighed three factors when assessing the national security implications of the proposed transaction.

Identity of the investor

This consideration is particularly important where the investor is controlled by persons from a state that may not be that friendly to Canada or its allies and/or where the investor has business operations that have military or intelligence applications. By way of example, on 19 August 2009, the Minister issued a notice to George Forrest International Afrique, under the national security provisions, after that company made an offer to acquire an Ontario-based company with rights to a uranium lease in Namibia. While the nature of the Minister's concerns were not publicly disclosed in that case, media reports suggested that concerns related in part to the source of funding for the investment, which may have been linked to the government of Iran. Ultimately, the investment was abandoned in August 2009.

Media reports have suggested that the Canadian government may have based its decision, at least in part, on the activities

of Accelero's founders, who have been involved in the management of a number of interconnected telecommunications and investment companies in other countries (including North Korea), which may have raised issues for Canadian security agencies.

Nature of the Canadian business

Previous transactions reviewed on national security grounds in Canada and the US indicate that this consideration is particularly relevant where:

- the business supplies products or services to agencies of the government or the military;
- the business is located near a military installation;
- the business is important to the functioning of the transportation, communication or financial systems; and
- an aspect of the business is subject to export control.

In addition, in a recent speech given by the Hon James Flaherty, Canada's Minister of Finance, the Minister emphasised that the government's national security concerns are not limited to the traditional categories of national defence and security. Indeed, the government has been increasingly concerned about Canadian businesses being used as vehicles to 'cyber spy' on banks, law firms and others and, in this case, Accelero proposed to acquire control over a telecommunications network used by the Canadian government.

Degree of control

Investments that are passive in nature or where ultimate control lies in another entity can, in certain circumstances, mitigate national security risks notwithstanding the strategic value or national security implications of the assets being acquired or the products being produced. Considerations used to assess control may include the level of ownership interest, special shareholder rights (such as veto rights), board control, the ability to influence strategic decision-making, control over day-to-day management and operations, and financing and commercial arrangements.

Following the Competition Policy Review Panel's final report in June 2008, the Canadian government took steps to reduce foreign ownership restrictions in the telecommunications sector, by allowing foreign investors to acquire full ownership of Canadian telecommunications companies that have a market share of up to ten per cent. As the first notable test of this policy, VimpelCom recently proposed to acquire a controlling interest in WIND, but that transaction has been delayed as the government also raised a national security concern. WIND's wireless network was built using equipment supplied by Huawei, a Chinese supplier.

Implications

The decision raises a number of implications for foreign investors. First, it is important to remember that each investment is fact-specific and the Cabinet's decision in this case should not be taken as a signal that Canada is closed for business. Indeed, Canada has long had restrictions on foreign ownership in sensitive sectors, including telecommunications, and it is only now starting to allow foreign investors to make investments in these sectors. Secondly, the Canadian government may choose to review transactions under the national security provisions, even when a 'net benefit' review is underway and when the investor has offered substantial commitments in support of its application for review. Thirdly, it is important to understand the views of the Canadian government on such matters to the extent possible prior to commencing the ICA process.

Competition Bureau's new look: an update from the CBA autumn conference

On 3–4 October 2013, the National Competition Law Section of the Canadian Bar Association (CBA) held its Annual Competition Law Fall Conference in Ottawa. Key highlights from the conference include:

- The Commissioner of Competition, John Pecman, in an open interview with Brian Facey (of Blakes) renewed the Competition Bureau's commitment to collaboration and compliance. In particular, Commissioner Pecman discussed the concept of 'shared compliance', under which the Competition Bureau will promote compliance through publications, advocacy and enforcement, and the legal and business communities will reciprocate by increasing awareness of obligations under the Competition Act and putting in place and following credible and effective compliance programmes.
- In promotion of this goal, the Competition Bureau released two updated guidance documents in the weeks leading up to

the conference: (i) an updated Immunity and Leniency FAQs; and (ii) an updated version of its Information Bulletin on the Communication of Confidential Information under the Competition Act.

- Commissioner Pecman also announced the release of a draft bulletin regarding Communication during Inquiries, part of the Competition Bureau's Action Plan on Transparency.

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NDRC actions show broadened scope of antitrust enforcement in China

On 1 August 2013, China celebrated the fifth anniversary since the Anti-Monopoly Law (AML) came into effect. For the greater part of the AML's first five years of enforcement history, the National Development and Reform Commission (NDRC) sparingly exercised its power under the AML to investigate and penalise anti-competitive behaviour. However, recently, the NDRC has begun to flex its muscles and intensify enforcement.

In the second half of 2013, the NDRC brought a series of noteworthy cases. In August, it imposed record fines on six baby milk formula companies for engaging in resale price maintenance (RPM) practices. In September, the NDRC first penalised two companies processing river sand for 'excessive pricing' and 'hoarding', and then challenged the conduct of 39 companies in the tourism industry for artificial price inflation, cartel activities and 'bait-pricing'.

Baby milk formula cases

On 7 August 2013, the NDRC imposed record fines totalling CNY670m (approximately US$110m) on six infant formula companies, all of them foreign-owned. The probe began in March 2013, after price increases among foreign branded infant formulas resulting from the 2008 melamine milk scandal, which turned Chinese consumers away from domestic brands.

The NDRC found that the baby formula manufacturers followed RPM practices, contractually or through other forms such as suspension or termination of supplies, pecuniary penalties, rebate cancellation, etc.

The fines imposed are the largest of their kind in the history of Chinese antitrust enforcement. Amongst the six companies, one company was fined six per cent of its sales revenues in the previous year, while the fine on another one was approximately four per cent of its previous year's sales volume. The other four companies were imposed fines equivalent to three per cent of their respective sales revenues in the last year. These penalties are in line with the AML, which provides that a fine of one to ten per cent of sales revenues in the preceding year may be imposed.

At the same time, two foreign suppliers and one domestic supplier, which were also found to have violated the AML, were spared fines. The reason the NDRC indicated was that the companies had cooperated with investigators and had provided important evidence. Another explanation – not listed in the NDRC press release – may be that these companies were among the first to 'rectify' their conduct, promising to drop their prices more generally, in a way that may not have been directly related to the RPM practice.

After the *White liquor* case at the beginning of 2013, the decision against the baby milk formula makers is the second completed RPM investigation by the NDRC since the AML came into effect.

River sand case

On 4 September 2013, the Guangdong Price Bureau, a local office of the NDRC, found that the pricing practices of two

river sand companies constituted an abuse of dominance. The two companies were reported to belong to the same individual and, hence, the NDRC seems to have treated them as a single 'business operator'. The two companies' conduct consisted of 'excessive pricing' and 'hoarding' supplies, which were found to be in violation of Article 17(1) of the AML and the Regulation on Administrative Penalties for Illegal Pricing Conduct, respectively. The Price Bureau imposed a fine equivalent to two per cent of the defendants' annual sales revenues of the preceding year.

In deciding whether the two companies were dominant in the 'relevant market', the NDRC concluded that high transportation costs for river sand would limit the relevant geographic market to Qujiang district, one of the ten districts within the city of Shaoguan. The two companies were found to have an aggregate market share of over 75 per cent and hence hold a dominant market position in that (very small and specific) geographical market. The NDRC likely relied on the 50 per cent market share presumption of dominance in the AML.

As 'benchmarks' to assess whether the companies' prices were 'excessive', the NDRC looked at both their costs and the prices in other markets. In particular, the NDRC compared the companies' price increase (54.4 per cent) with the increase in costs (over 20 per cent), as well as their price levels with those prevalent in other river sand markets. The NDRC found that the existing differences demonstrated the excessiveness of the price charged. The authority held this conduct to amount to an abuse of dominance in violation of the AML, and imposed a fine on the companies equivalent to two per cent of their annual sales revenues.

Furthermore, due to quota controls and licensing requirements by the government, the NDRC considered that river sand is normally sold shortly after extraction and that the storage cycle is generally shorter than two years. The companies' hoarding reportedly led to an artificially exacerbated scarcity in supply and strong price fluctuations. This behaviour was deemed to violate the Regulation on Administrative Penalties for Illegal Pricing Conduct, which was issued to implement the Price Law, a statute with antitrust provisions as well as rules falling outside the antitrust realm. As can be seen, the NDRC continues to apply the Price Law in parallel with the AML.

Hainan and Yunnan tourism case

On 29 September 2013, the NDRC issued a press release reporting on its decision to impose sanctions on 39 companies in the tourism industry for three types of anti-competitive practices.

Artificially inflating prices before discounting

Gift shops in Sanya, Hainan and Lijiang, Yunnan offered local speciality products at a high mark-up, to which they would later apply a discount of around 15–25 per cent. The marked-up prices were as much as 100 times the cost price to the retailer. The exact legal base the NDRC relied upon is not clear. The high prices might have been considered to constitute 'exorbitant profits', illegal under Article 14(7) of the Price Law. Alternatively, the gift shops might have been considered to contravene Article 14(4) of the Price Law, which prohibits luring consumers to enter into transactions by employing fake or misleading pricing methods. The NDRC might have been concerned that the discount applied to the high prices gave customers a false impression that they were actually getting a good deal.

Cartel activities

The NDRC also challenged cartel conduct in both Sanya and Lijiang.

In Sanya, the NDRC revealed that three of the only four large-size gift shops in the city met on numerous occasions to agree on prices and discounts for crystals, and divided up the market amongst themselves. In mid-2012, the three companies entered into a written 'industry self-discipline agreement' to do the same, and even opened a joint bank account where each of them made a payment that served as a deposit to ensure that it would not deviate from the agreed prices and market shares. The NDRC held this conduct to be market partitioning between competitors, in breach of the AML. The authority imposed fines of two per cent and four per cent of the annual sales revenues on two of the cartel members, respectively, and imposed an additional fine of close to CNY100,000 (approximately US$16,000) on one of the above cartel members for non-cooperation with the NDRC during the investigation procedure. Interestingly, the third participant in the illegal agreements was let off without a fine because it had self-reported and had provided important evidence.

In Lijiang, the NDRC found eight travel agencies to have engaged in price-fixing of hotel rooms, meal vouchers and so forth. The companies reportedly met 24 times in 2011 and 2012 and entered into a written contract that allocated prices, discounts and market shares to each of the participants. The NDRC found this conduct to constitute a violation of the AML's anti-cartel provisions and ordered each of the eight companies to pay fines equivalent to five per cent of their annual sales revenues, totalling around CNY3.3m (approximately US$540,000).

Bait-pricing to lure customers

The NDRC further challenged the so-called 'zero/below-cost group fee' practice by tour operators in Sanya. With this practice, tour operators charge their customers a price for a tour that is below cost, but then receive commissions from the shops visited on the tour, often using pressure tactics to ensure the tourists purchase items within the designated shops.

The NDRC stated that this practice infringed Article 14 of the Price Law, and imposed a fine of CNY 300,000 (US$49,000). Although the NDRC did not explicitly state which paragraph in that provision was breached, the press release speaks about 'dumping'. This word seems to be a clear reference to Article 14(2), which prohibits 'dumping' at below-cost prices.

Takeaways

The three decisions issued over the course of August and September 2013 show that the NDRC has become more proactive in its antitrust enforcement. The cases also indicate that the NDRC is 'branching out' and tackling new legal issues and practices, going beyond classic cartel conduct. In particular, the regulator's focus appears to have shifted to aspects such as RPM and excessive pricing practices. For example, during the first four years since the AML's entry into force, the NDRC was not known to have issued any decision against RPM, yet the *Baby milk formula* decision is already the second decision in 2013 (following the *White liquor* case around Chinese New Year).

Similarly, while the *River sand* case was the first decision in the public domain where the NDRC directly relied upon the AML's 'excessive pricing' prohibition, that decision was followed – less than a month later – by the regulator's decision in the *Hainan and Yunnan tourism* case, which touched upon the 'exorbitant pricing' issue.

Another aspect that seems to be emerging from the NDRC's new 'jurisprudence' is that the regulator seems increasingly focused on products and services that are directly purchased by end users: this is certainly the case for baby milk formula and holiday tours. Hence, clearly, suppliers of consumer goods have been put on the NDRC's radar screen. In turn, the *River Sand* investigation stands for another field of prioritised antitrust enforcement in China: the construction sector.

In addition, in both the *River sand* and *Hainan and Yunnan tourism* cases, the NDRC resorted to antitrust (or antitrust-like) provisions in laws other than the AML. In the *Hainan and Yunnan tourism* case, both the artificial pricing/discounting and the bait-pricing practices were punished under the Price Law. It would likely not have been possible for the NDRC to have challenged these types of conduct under the AML, which requires a company to be in a 'dominant market position' for these types of conduct to be illegal. In contrast, the Price Law does not have the same requirement. As such, in the *Hainan and Yunnan tourism* case, none of the companies was in a dominant market position (which, as mentioned can be presumed at a market share of 50 per cent or above), as numerous gift shops and tour operators were involved, which indicates low market shares. Hence, when analysing the above-mentioned cases, a clear pattern in the NDRC's enforcement strategy seems to be starting to emerge: when the AML is applicable, the authority will probably rely on this law; when the AML does not apply – for example, because the perpetrator does not have a dominant position – then the NDRC may still initiate proceedings under the Price Law.

As a result, companies are well advised to look beyond the AML and factor in the Price Law, the Anti-Unfair Competition Law, and other laws and regulations with antitrust-type provisions in their competition law compliance efforts.

The first time a predatory pricing sanction has been upheld by the Highest Administrative Court (Student Agency)

CZECH REPUBLIC

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In a judgment of 30 September 2013, the Czech Highest Administrative Court handed down its much-awaited decision on the appeal by the Czech Antitrust Office against a decision by the first degree administrative court which had quashed the Office's first sanctioning of predatory pricing in the history of Czech antitrust law.

By way of reminder, in November 2010, after more than two years of investigation, the Czech Antitrust Office handed down its decision in the case of the dominant operator of public passenger bus services between the two largest Czech cities, Prague and Brno (Student Agency). The decision to issue a fine in the amount of about €250,000 was confirmed during administrative appeal proceedings but was appealed to the administrative court.

The case related to a time span of only three months during which time Student Agency reduced the fare for the trip of more than 200km to about €2 one-way (for the cheapest available ticket) after a competitor threatened to increase its market position by offering very low introductory fares (also €2) in order to gain market awareness and share. The fare charged by Student Agency was increased back to its previous levels once the competitor had left the particular route.

In order to prove a dominant position of Student Agency on the Prague-Brno passenger transport market, the Antitrust Office had first to establish that the railway passenger transport on the way from Prague to Brno constituted a different market from coach passenger transport, even though Czech railways also participated in a price war for passengers on this key connection in the country.

The Czech Antitrust Office was able to prove with the internal emails of Student Agency that the intent for the fare reduction below cost on this particular route was aimed at eliminating the much smaller and less financially strong competitor from the particular route – which it eventually succeeded in doing.

Using its internal economic analysis, the fact that the prices could in no way be defended under cost principles by the largest Czech coach company, the Czech Antitrust Office in unusually long proceedings decided to issue the fine. The decision was then considered by the first degree court which overturned it only on the basis of a wrong definition of the relevant market: rail connections should also have been considered and therefore Student Agency did not have a dominant position on general passenger transport between Prague and Brno.

Even though the full wording of the 30 September 2013 decision has not been published yet, it is clear that the Highest Administrative Court has, crucially, decided to consider only the narrower market definition (operation of bus services on the Prague-Brno line only) and not to take into consideration comparative train travel.

Ironically, the perpetrator, Student Agency, in the past and in the present has had to fight its way against the old monopolies and now competes with the much bigger Czech railways, not only on the route to Brno. It might also create another first in Czech Antitrust law: the first case of private enforcement of damages for abuse of a dominant position – but that will be another story.

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Merger control: expansion of the failing firm doctrine and use of diversion ratios and upward pricing pressure methods

On 25 September 2013, the Danish Competition Council (the 'Council') unconditionally approved a transaction in the Danish retail furniture market: *JYSK/IDdesign* (Case No 13/05691).[1] Two aspects of the case make it noteworthy: first, the main reasoning of the Council was essentially based on an expanded version of the failing firm doctrine; and secondly, when defining the relevant product markets and analysing the potential effects of the transaction, the Council partly relied on the diversion ratios and upward pricing pressure (UPP) methods that are finding their way into competition law practice over the past few years.

The transaction

The transaction involved the investment by JYSK in IDdesign, which would provide JYSK with an 80 per cent shareholding in IDdesign. JYSK operates two furniture and home accessories store chains under the JYSK and Bolia brands. IDdesign is the parent company of two furniture store chains, IDEmøbler and Ilva. The existing owner, a private equity fund, would retain a 20 per cent shareholding in IDdesign.

The Council identified three affected product markets that were all national:

- the retail market for sale of furniture, excluding beds and garden furniture;
- the retail market for sale of beds and mattresses; and
- the retail market for sale of garden furniture.

The parties would obtain combined market shares of 20–30 per cent on the furniture market, 30–40 per cent on the beds and mattresses market and 20–30 per cent on the garden furniture market.

In all three markets there would be only one significant national competitor to the combined JYSK/IDdesign. On the beds and mattresses market, the combined entity would become a clear market leader with furniture store chain IKEA as the only nationwide competitor of any importance. On the general furniture market and the garden furniture market, the parties' market shares would be at the same level as those of IKEA and Dansk Supermarked (a group of supermarkets and department stores) respectively.

Failing firm doctrine

For some years, IDdesign had been struggling financially. Its owners, a private equity fund, would contribute no more funds. The parties submitted to the Council that in the absence of the transaction, IDdesign was likely to cease operations. While some stores in attractive locations might be sold, according to the parties most of the stores would close.

The failing firm doctrine provides that an otherwise problematic merger may be approved if the alternative to the transaction is the bankruptcy of the target. Under European Union law, three cumulative conditions shall be met for the failing firm doctrine to apply:[2]

- the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking;
- there is no less anti-competitive alternative purchase than the notified merger; and
- in the absence of a merger, the assets of the failing firm would inevitably exit the market.

Neither the parties nor the Council considered these restrictive conditions to be fulfilled.

However, the Council went on to consider the bankruptcy risk as part of the analysis of the counterfactual scenario, thereby effectively expanding the scope of the failing firm doctrine. As part of this less-confining analysis, the Council found that absent the transaction the most likely scenario would be that the store chains owned by IDdesign

would close. Further, the Council assessed that the loss of competitive pressure resulting from the termination of the IDdesign stores was not likely to be offset in the short term by new players entering the market or existing players expanding their presence.

Diversion ratios analysis

The Council applied a diversion ratio analysis to assess the competitive situation on the market. Unlike information on market shares or HHI (the Herfindahl-Hirschman Index), this method is able to shed light on the actual competitive relationship between individual market players, thereby showing whether entities are close or distant competitors within the same market.

The Council asked respondents that had purchased goods at a furniture store to indicate the alternative store they would have chosen had the actually chosen store been closed.

This analysis indicated that JYSK and Ilva were rather distant competitors: four per cent of JYSK's customers would choose Ilva instead of JYSK, while zero per cent would choose JYSK as an alternative to Ilva. If JYSK was closed, 15 per cent of its customers would choose IDEmøbler. Only one per cent of IDEmøbler's customers would choose JYSK.

In respect of JYSK's other chain, Bolia, numbers were slightly higher. IDEmøbler and Ilva, respectively, were identified as the preferred alternative by 31 per cent and 11 per cent of Bolia's customers. In the opposite direction, only three per cent of Ilva's customers and one per cent of IDEmøbler's customers would go to Bolia if the original store was closed.

On this basis, the Authority concluded that the IDdesign stores put some competitive pressure on JYSK, while JYSK was not a competitive force of any importance in relation to IDdesign.

Upward pricing pressure test

An UPP analysis seeks to predict the potential price increases resulting from a structural change in the market. The analysis is based mainly on information on diversion ratios between the merging parties, profit margins and anticipated cost savings.

In the *JYSK/IDdesign* case, the Council applied the UPP test to examine the expected price increases in case the transaction was approved and in the counterfactual scenario in which IDdesign closed.

Both of the analyses indicated that price increases were likely; however, the most significant increased were to be expected in the counterfactual scenario.

Final assessment

On the basis of the analysis described above, the Council concluded that the counterfactual scenario was less attractive than the merger scenario. Accordingly, the transaction was approved.

The decision illustrates how novel econometric methods such as diversion ratios and UPP tests may be combined with a realistic view of the counterfactual scenario and thereby lessening the importance of traditional merger control tools such as market definitions and market shares and doctrines such as the restrictive failing firm defence.

Notes

1 Bruun & Hjejle represented IDdesign, the target of this transaction. This note is based only on the publicly available decision from the Danish competition authorities.

2 See the European Commission's Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, Official Journal of the European Union 2004/C 31/03, section VIII.

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New Finnish rules on competition neutrality

As of 1 September 2013, a new Chapter 4a of the Finnish Competition Act entered into force. It entrusts the Finnish Competition and Consumer Authority (FCCA) with a new supervisory task to enhance competition neutrality between public and private businesses. Pursuant to the amendment, the FCCA has the power to intervene with the business activities of municipalities, joint municipal authorities and the state, as well as entities over which they have control. A prerequisite is that such a public sector entity is distorting the conditions for competition or preventing the establishment or development of competition on the market.

The amendment of the Competition Act is connected with an amendment of the Finnish Municipalities Act, which introduces an obligation for municipalities to incorporate the business activities carried out by unincorporated municipal enterprises to the extent they operate on an open market. There are several statutory exceptions to the obligation to corporatise.

According to the new Chapter 4a of the Finnish Competition Act, the FCCA has the authority to intervene in the business activities of public sector entities if their operating models or operating structures distort or prevent competition or are apt to distort or prevent competition on the market. An operating model refers to all activities that result in an unfair competitive advantage compared to private undertakings, such as extraordinary aid received by the public sector undertaking or unfair pricing practices. An operating structure could mean, for instance, business activities undertaken directly by a municipality, as the municipality benefits from favourable tax treatment and protection against bankruptcy.

Competition neutrality issues bear similarities with the general competition law issues concerning, for instance, abuse of dominant position (such as unfair pricing practices). However, the competition neutrality issues are not assessed in the light of the rules and case law concerning dominant undertakings. Instead, it would be decisive whether the behaviour of the public sector entity distorts or prevents competition or is likely to do so.

The FCCA can start investigations either on its own initiative or pursuant to a complaint lodged by a third party, such as an undertaking or a trade association. The primary tool granted to the FCCA to rectify the competition neutrality issue is to negotiate with the public entity on how to eliminate the problem and to confirm the result by a decision. The municipality (or other public organisation) has a duty to present adequate measures for resolving the problem.

Unofficially, the FCCA has contemplated that a suitable time for negotiations should be approximately three months. If, however, negotiations prove to be unsuccessful, the FCCA can impose obligations or prohibit a certain activity. The prohibition can be enforced by a conditional fine. The prohibition, order or obligation is addressed to the municipality (or other public entity) even in cases where it is a undertaking under its control that distorts or prevents competition. In such cases, the public sector undertaking in question is nonetheless heard during the proceeding.

The threshold for the FCCA to take action in a competition neutrality case is arguably relatively high. It must be proven that the public sector competitor is distorting the conditions for competition or preventing the establishment or development of competition on the market. Therefore, the FCCA cannot understandably take any action merely to protect a private competitor against a public sector competitor on the basis of the neutrality provisions.

Moreover, there are several limitations to the FCCA's investigative powers towards public entities. The new Chapter 4a only applies to economic activities, not other means of offering products or services. Economic activity is interpreted under the same principles as under the EU competition rules, entailing offering of goods and services on the market. In addition, some of the

tasks entrusted to municipalities by law have expressly been excluded from the scope of Chapter 4a. Furthermore, the FCCA does not have authority if the competition neutrality issue stems from legislation and thus the FCCA will not handle claims to correct existing legislation. Also compliance with public procurement or EU state aid rules as such is excluded from the scope on Chapter 4a.

It is anticipated that, regardless of the considerable limitations, the new investigatory powers of the FCCA will invoke numerous complaints. The FCCA has in this connection reminded that the Competition Act includes a prioritisation provision. Consequently, the FCCA is entitled to decide not to investigate a case if it is unlikely that an operating model or structure will have a major impact on the conditions for healthy and functional competition. Similarly to competition law cases, the FCCA has also divided competition neutrality cases into so-called impact classes making it easier for the FCCA to focus its efforts on key cases. The first priority class includes, for instance, cases concerning significant volumes or bearing a significant importance in principle, cases where the primary purpose of the operating model in question is to prevent or distort competition, or cases concerning an evident violation of the EU state aid rules influencing the Finnish market.

Updates from France

FRANCE

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The Court of Appeal of Paris made an interesting decision involving a private action introduced after a decision made by the European General Court (EGC) in the so-called *Central Parts* case.

On 13 January 2004, the EGC confirmed the decision of the European Commission imposing a €39.6m fine to the company JCB Service, a manufacturer and supplier of construction equipment, for various anti-competitive practices, including discriminatory practices, refusal to sell, and prohibition to sell outside specific territories in the context of a selective and exclusive distribution system.

On the basis of this judgment, the victim, the company Central Parts, an importer and distributor of construction equipment, introduced an action for damages before the Commercial Court of the French city of Orléans.

The Court of Justice later confirmed the judgment of the EGC on 21 September 2006.

On 4 June 2008, the Commercial Court of Orléans condemned the companies JCB Service, JCB Sales, JC Branford Excavators Ltd and JCB Finances to pay damages in the amount of €600,000 to Central Parts.

On 1 April 2010, the Court of Appeal of Orléans confirmed the liability of the JCB Group, but excluded the liability of the company JCB Finances.

On 15 November 2011, the Cour de Cassation, the French Supreme Court, confirmed that JCB Finance Ltd was not concerned by the dispute, but annulled the judgment on the grounds that:

- the JCB Group is not a legal entity and cannot, therefore, be condemned as such; and
- the Court of Appeal failed to show the existence of a breach committed by JCB Sales and JC Bramford Excavators Ltd, leading to the loss suffered by Central Parts, in violation of Article 1382 of the civil code that requires such demonstration.

The Cour de Cassation finally referred the case to the Court of Appeal of Paris to make a new ruling on this case.

The Court of Appeal of Paris made its judgment on 26 June 2013.

After having recalled the findings of the European courts, thereby characterising the anti-competitive practices as well as the fact that under Article 16 of Regulation No 1/2003, national courts cannot make decisions that would run counter to the decision adopted by the Commission, the Court of Appeal of Paris also recalled that breach to European legislation constitute breaches in tort under French law.

The Court of Appeal then assessed the behaviour of each of the three companies involved and found that the holding company, JCB service, was the one leading the two others

and making the decisions, and that the decisions taken that have been condemned by the European Authorities, also constitute a breach in tort under French law. The Court of Appeal also found that the two operating companies, JCB Sales Ltd and JCB Bamford Excavators Ltd, applied the orders received from the holding companies which also constitute a breach in tort under French law.

In particular, the Court noted that 'the fact that they [JCB Sales Ltd and JCB Bamford Excavators Ltd] have not been condemned by the European community decisions does not prohibit the national court to assess, considering the elements submitted to it, including the European community decisions, the elements of their behavior constituting a breach', which means that French courts are free to assess whether the behaviour of a company constitutes a breach in tort, notwithstanding the fact that such company has not been condemned for a violation of Article 101 of the TFEU by the European courts.

The Court of Appeal then acknowledged that the Irish and English selective distributors of JCB refused to supply the company Central Parts, and that the breach committed by Central Parts, who managed to bypass the refusal to supply, has been caused by the anti-competitive practices committed by JCB, and finally that this breach committed by Central Parts has no incidence on the implementation of French tort law.

The Court finally confirmed the findings of the Commercial Court of Orléans according to which the breaches committed by the companies JCB Service, JCB Sales Ltd and JC Bamford Excavators Ltd have contributed to the occurrence of the loss suffered by Central Parts.

Concerning the assessment of the prejudice, the court ruled that the anti-competitive practices have been carried out between 1989 and 21 February 2001 and that the ten years prescription applied. It also recalled that the proceedings engaged before the European courts have as their object to punish violation of competition laws, not to rule on the loss caused and damages due. Therefore, the action engaged before the European courts does not suspend the period of prescription. The Court specified that Central Parts could have engaged the private action earlier and obtained a stay of proceedings while awaiting the European court's decisions.

This probably explains why Central Parts did not wait for the decision of the Commission to become final before introducing its action for damages in front of the Commercial Court of Orléans on 12 April 2005.

However, considering the preceding, only the effects of the anti-competitive practices that occurred after 12 April 1995 can be taken into account in the present case for the assessment of the loss suffered by Central Parts.

Concerning the amount of the damages due by to Central Parts, the Court estimated that it did not hold enough elements to appreciate it and ordered an expertise, as previously decided by the Court of Appeal of Orléans.

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Eighth Amendment to the Act Against Restraints of Competition

After a long legislative struggle, the 8th Amendment to the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) entered into force on 30 June 2013.

The cornerstone of the amendments is the introduction of the SIEC (significantly impede effective competition) test into German merger control. Germany has had the dominance test since 1973 when it was the first European country to institute merger control. When the EU finally adopted merger control in 1989, it followed the German model with the dominance test. When the debate between followers of the SLC

(substantial lessening of competition) test and those of the dominance test culminated in the introduction of the SIEC test in EU merger control in 2004, Germany, whose position had been that the so-called gap cases could easily be solved with the dominance test, was reluctant to follow suit. Germany's change of mind now is entirely due to its desire to align itself with the EU.

This legislative intent begs the question whether the German Federal Cartel Office (FCO) and German courts must now follow EU precedent when applying the SIEC test under German law. While the FCO would prefer a free hand in exploring its new powers, there are good reasons to say that where a national legislator consciously uses terms of EU law, the Court of Justice of the European Union must be the ultimate arbiter of what these terms mean. Under the so-called *Dzodzi* doctrine, conflicting interpretations must be avoided.

While Germany has now closed ranks with the adoption of the SIEC test, certain peculiarities of German merger control remain. These include statutory presumptions for dominance, which apply in merger control, but also for unlilateral conduct. The statutory presumption for single dominance has been amended. A market share of one third is no longer sufficient to trigger it; the threshold has been raised to 40 per cent. The presumption continues to be rebuttable. The presumptions for collective dominance remain unchanged.

Following the EU model, Germany also introduced a banking clause. Banks and insurance companies that acquire a stake in another company with a view to reselling it within a year are exempt from filing, provided they do not exercise the voting rights that the stake would normally confer upon them.

While transactions that only concerned *de minimis* markets used to be exempt from the filing requirement, they now have to be filed but the FCO still cannot prohibit a merger that only affects markets with a total market volume of less than €15m that have been in existence for more than five years. Filing requirements for press mergers were reduced to a certain degree. Also, there is now a statutory failing company defence for the acquisition of small and medium-sized newspaper and magazine publishers. Whether this adds anything to the general failing company defence as developed by case law remains to be seen.

While it used to be disputed whether the FCO could impose structural remedies such as divestiture on a company that had abused a dominant position, the law now specifically authorises such remedies. However, structural remedies may only be imposed if behavioral remedies are less efficient or more onerous for the company concerned.

The Hellenic Competition Commission approves the concentration between National Bank of Greece and First Business Bank SA

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By the decision of 15 July 2013, the Hellenic Competition Commission (HCC) approved the acquisition of certain parts of First Business Bank (FBB) by the National Bank of (NBG). The HCC concluded after its assessment that the transaction did not create serious doubts as to its compatibility with the functioning of competition in the relevant markets.

Background to the transaction

NBG is a credit institution listed on the Athens and New York Stock Exchange. It holds one of the most important positions in the Greek banking sector and has developed its business in 11 countries.

FBB was established in November 2001 in Athens. Its activities included banking products and services, especially corporate banking for shipping and tourism. One of the larger shareholders was the Agricultural Bank of Greece (19.6 per cent).

Since May 2013, FBB has been placed under liquidation and its licence has been revoked. The Bank of Greece (BoG) initiated the procedure for offers regarding the transfer of selected assets of FBB to another credit institution. The transferred assets included all the contractual obligations to third parties and the total of the assets and liabilities, with the exception of certain specific contracts and assets. More specifically, the transferred assets include:

- cash;
- contracts with other banks related to deposits and bank accounts;
- loan agreements with other credit institutions or private customers;
- sale agreements with Repos and Reverse Repos;
- leasing and purchase agreements;
- rights in rem and in personam;
- titles and trademarks;
- IP; and
- contracts for the provision of investment services and many more.

On the other hand, certain assets and liabilities were characterised as non-transferable, for example:

- employment contracts;
- obligations deriving from shareholding agreements;
- obligations to compensation;
- damages;
- unjust enrichment;
- obligations satisfied by the liquidation proceeds;
- taxes;
- social security obligations;
- contracts with insurance companies; and
- rights and obligations deriving from a letter of guarantee.

NBG did not pay any consideration for the acquisition due to the fact that the transferred liabilities exceeded the transferred assets. The rationale behind the acquisition was that the sudden revocation of RBB's licence would lead to the interruption of bank service provision by a significant credit institution. The potential loss of non-guaranteed deposits would cause significant instability to the Greek banking system, especially during the current financial situation.

The transaction

According to Article 5(2) of Law 3959/2011, a concentration results from a permanent change of control, when one or more persons already controlling one or more undertakings obtain directly or indirectly control over part or whole of one or more undertakings through the purchase of elements of the assets by contract or other means. Consequently, a concentration results from the transfer of specific elements of the assets of an undertaking on condition that these elements are part of the undertaking, in the sense of a business activity with an identifiable turnover.

Relevant markets

According to the established practice of the HCC and the EU Commission, the basic categorisation of banking products includes: (i) retail banking; (ii) corporate banking; and (iii) financial services. These categories can be further subdivided on the basis of demand and supply side substitutability of banking products. The relevant geographic market is Greece.

Affected markets

According to the HCC, the transaction affected the following markets:

- the market for retail banking for deposits and financing;
- corporate banking for deposits and financing; and
- the market for issuing debit cards.

The HCC evaluated both the non-coordinated and the coordinated effects of the transaction on the affected markets.

Non-coordinated effects

The HCC examined whether the transaction would lead to the creation or strengthening of NBG's dominant position in the affected (sub-)markets. In all of the markets, neither the position of NBG nor the structure of the market would change because of the transaction. As well as the parties involved, the HCC established that there are several strong

competitors active on the relevant markets, such as PIRAEUS Group, ALPHA Group and EUROBANK-ERGASIAS. The increase of NBG's market share was insignificant (up to five per cent) and therefore it would not alter the competitive conditions and the market structure, according to EU case law. Additionally, the increase of the HHI (the Herfindahl-Hirschman Index) pre- and post-transaction does not raise any concerns. Furthermore, FBB's commercial and pricing policy was such that if FBB left the market, it would not lead to the removal of a significant competitive pressure to the remaining players.

Coordinated effects

The HCC then examined whether the transaction would lead to the creation or strengthening of collective dominance in the affected (sub-)markets. At the level of the defined relevant affected markets and in their sub-markets, the four larger banks would still hold post-transaction a combined market share of more than 60 per cent, which means that these markets are highly concentrated. The bigger the degree of concentration in a market, the more it is vulnerable to the creation of coordinated effects. However, the probability of coordination is low due to the presence of several other smaller players on the market.

Additionally, there are no structural links between the existing players. Finally, the small increase in NBG's market share in each market does not lead to a substantial change in the competitive conditions in the affected markets. Therefore, there is no evidence that the concentration at hand would impair the competitive conditions on the affected markets.

Conclusion

On the above grounds, the acquisition by NBG of certain elements of the assets and liabilities of FBB was approved, since the transaction did not create serious doubts as to its compatibility with the competition rules in place.

Hong Kong competition law enforcement takes off 'with glamour' – television broadcaster fined for anti-competitive practices

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Introduction

On 14 June 2012, Hong Kong entered into a new era in terms of competition law. On that day, the Competition Ordinance was enacted. Since then, however, progress has been slow. The Hong Kong government is currently busy with the establishment of the two new institutions in charge of enforcing the ordinance – the Competition Commission and the Competition Tribunal. The substantive provisions of the Competition Ordinance have yet to come into effect.

While people are waiting for the antitrust regime revolving around the Competition Ordinance to take shape, Hong Kong has witnessed the adoption of one of the first antitrust decisions: in September 2013, the Hong Kong Communications Authority ('Authority') – formerly, the Broadcasting Authority – issued its decision to sanction Television Broadcasts Ltd (TVB) for anti-competitive practices. Its decision was adopted under the Broadcasting Ordinance (BO) – which contains sector-specific antitrust rules – but the implications may

be broader. The decision may give a boost to the antitrust 'institution building' as the Authority will also have powers to enforce the Competition Ordinance in the broadcasting and telecommunications sectors.

Investigation procedure

The Authority announced the ruling against TVB after a three-year investigation. The investigation was initiated by a formal complaint from Asia Television Ltd in December 2009, alleging that certain clauses in TVB's contracts with its artists and singers and certain informal policies and practices pursued by TVB violate the BO.

On 28 August 2010, the Authority decided to launch a full-blown investigation into some of the contractual clauses and policies of TVB, and its final decision was released on 19 September 2013.

On 17 October 2013, TVB appealed the Authority's decision to the Chief Executive in Council. TVB is reportedly also considering filing an application for judicial review.

The marketplace

The Authority started its analysis with the definition of the 'relevant markets'. It noted that the case concerned an issue of 'two-sided markets', with TV viewers on the one side and TV advertisers on the other. As to the viewers' side, the Authority ultimately left open the question of which products/services comprise the relevant market. Its analysis assumed that 'all TV viewing' would be the broadest possible relevant market, and focused on that area. The Authority proceeded on the basis of the broad scope of the relevant market, as this approach was more favourable for the defendant. It concluded that TVB possesses a dominant position in this market as a result of a variety of factors. Perhaps most importantly, the Authority found that TVB had a market share of over 60 per cent in the 'all TV viewing' market.

As for the television advertiser side, the Authority was more conclusive, finding that 'TV advertising' was the relevant market. It examined and ruled out the possibility that other types of advertising – such as advertising through traditional media including cinema, radio, print, billboards and buses or internet display advertising – would be in the same relevant market. TVB's share in the TV advertising market was found to be around 56 to 59 per cent from 2006-2009, dropping to 47 per cent in 2010. Again, the Authority looked at other factors such as high entry barriers, substantial sunk costs, brand loyalty, and weak countervailing buyer and supplier power to find dominance.

The anti-competitive conduct

In terms of anti-competitive conduct, the Authority concluded that TVB restricted competition in the TV programme service market by foreclosing rivals' access to artists and singers, thereby impairing their ability to compete with TVB and raising their costs.

TVB had restrictive clauses in its contracts, which required artists to be totally exclusive to TVB during the contractual period or required them to obtain consent from TVB before engaging in outside work. The Authority found that the consent requirement worked as de facto exclusivity. Artists did not frequently apply for consent between 2007 and 2010 – perhaps concerned about detrimental effects for their careers at TVB – and, in none of the instances, consent was granted for artists working for rival television stations in Hong Kong.

In short, the Authority held that TVB had 'secure[d] for itself exclusive supply of a large portion of an essential input in TV and music programme production, i.e. artistes and singers.' Referring to guidelines issued by itself and the European Commission, the Authority examined the degree of 'foreclosure' of the exclusivity practice, for example finding that over 90 per cent of singers in Hong Kong had signed contracts with TVB.

In addition, the Authority held that TVB had put in place so-called 'no original voice', 'no promotion' and 'no Cantonese' policies to back up its exclusivity practices. As such, TVB's contracts with artists prohibited them from performing in other TV stations' programmes with their original voices, from attending promotional activities or speaking Cantonese on the programmes of other TV stations in Hong Kong. The Authority found this 'no Cantonese policy' to be 'implicitly imposed' only (not in contractual clauses).

Overall, the Authority seemed to hold that these policies were ancillary to the main issue, the contractually imposed exclusivity. It held that the policies 'extend the reach of TVB's exclusivity provisions. They create an additional hurdle for other local TV stations…'

The Authority also examined a variety of defences and justifications put forward by TVB, but rejected them all.

Sanctions and remedies

As remedies, the Authority ordered the adoption of a series of measures. In particular, it:

- imposed a fine of HKD900,000 (approximately US$115,000) on TVB (the maximum penalty for the relevant violations being HKD1m);
- directed TVB to bring the infringement to an end, and to refrain from repeating or engaging in equivalent conduct going forward;
- ordered TVB to communicate to all artists and singers with contracts that it abandons the challenged contractual clauses and policies; and
- requested TVB to report back on the steps to implement compliance with the decision.

Some comments

The decision is one of the first antitrust decisions in Hong Kong. With its adoption, the Authority signals that it is to be reckoned with before and after the Competition Ordinance comes into effect – given its concurrent enforcement powers with the Competition Commission. In a broader sense, the decision may be an indication that Hong Kong authorities more generally are keen to show their commitment – and ability – to deal with anti-competitive practices.

The decision is important as it provides interesting reading for antitrust aficionados and companies looking for guidance on how to comply with the BO and – equally importantly – the Competition Ordinance. There is plenty of information – the full decision of the Authority spans over 115 pages.

The Authority's decision is about abuse of dominance, and focuses to a large part on contractual exclusivity. In a way, contractual exclusivity is one of the most straight-forward examples of potentially exclusionary conduct, if foreclosure is significant enough in terms of scope, intensity and time. Interestingly, however, the decision also finds TVB to have engaged in de facto exclusivity. This seems to be an indication that the Authority takes an effects-based approach, seeing through the form of the alleged restraint.

Finally, it is also interesting to see that the Authority referred to European Union competition law at various occasions. For the assessment of 'dominance', the Authority even explicitly stated that it will have regard to European case law, while bearing in mind that 'the law of Hong Kong demands independent interpretation'.

Substantial amendments to the Hungarian Competition Act

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Important changes concerning – among others – merger law and leniency rules have been enacted and the possibility of settlement in competition supervision proceedings has also been introduced into Hungarian competition law.

Contrary to the old regime, under which companies could bear the risk of going ahead with a concentration withoutformallyhaving obtained the approval of the Hungarian Competition Authority (HCA), the new provisions now prohibit this. Thus, the concentration may not be executed (for example voting rights may not be exercised) without the prior approval of the HCA. Nevertheless – similar to EU merger rules – an exemption may be granted by the Competition Council if the companies prove that the exercise of controlling rights prior to the formal approval of the HCA is necessary for running the business and for preserving the value of investments.

According to a new provision enacted on the basis of foreign models, the Competition Council now has the opportunity to initiate a consultation procedure in merger cases and before adopting a commitment decision in order to obtain the preliminary views of companies active on the affected markets.

It should also be mentioned that according a new rule, the government may decide that a concentration bears national strategic significance, for example in order to safeguard jobs or to protect supply, and does

not therefore fall under the authorisation obligation of the HCA.

According to the new leniency rules, a non-final, so-called 'marker' application, which is aimed to obtain full immunity from the cartel fine (type 'A' application), may only be submitted if the information submitted enables the HCA to carry out a dawn raid. The possibility of withdrawing the application is only permitted in type 'A' applications. In our view, it seems that giving certain benefits exclusively to type 'A' applications may result in other types of applications, ie, those that aim at the reduction of the cartel fine, becoming less attractive for companies that intend to confess their participation in a cartel agreement.

Detailed rules concerning a settlement procedure have also been introduced into the Hungarian Competition Act. This procedure aims at simplifying the competition supervision procedure for the company in question while rationalising the resources of the HCA.

The new settlement procedure allows a company to acknowledge the relevant facts of the case, the infringement as well as the fine and to accept that that it will not dispute the HCA's decision before the judicial court. The HCA then terminates the competition supervision procedure within a substantially shorter term.

It should also be mentioned that this possibility may also be beneficial in leniency cases. If the given company has previously submitted to the HCA a leniency application aimed at the reduction of the cartel fine, the fine may be further reduced by an additional ten per cent if the settlement procedure has been successfully completed.

We also add that as the settlement procedure is a completely new institution under Hungarian competition law, aspects of its implementation will be interpreted through the Hungarian Competition Council's decision-making practice and by the courts (for example definition of the term 'time frame which does not jeopardise the completion of the settlement procedure in a fast and efficient manner').

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Sector-specific thresholds and merger control in India

Despite its nascence, competition law in India already finds itself on the brink of undergoing massive change. In June 2011, merely two years after the introduction of the law itself, the government of India set up an expert committee to examine and suggest modifications to the Competition Act, 2002 (the 'Act'). Based on their recommendations, the government introduced the Competition Amendment Bill, 2012 (the 'Bill'), which is currently tabled for voting in Parliament. The Bill is currently being considered by the Parliamentary Standing Committee on Finance and, if passed, will significantly amend the scheme and scope of the Act.

The merger control regime in India mandates compulsory notification of mergers, amalgamations and acquisitions where the concerned parties together meet certain asset or turnover thresholds prescribed in section 5 of the Act. Transactions between smaller enterprises escape notification under this regime and for good reason; they are considered unlikely to adversely affect competition in India. In recognition of this underlying principle, in 2011 the government went a step further and included a *de minimis* exemption for acquisitions in target enterprises where the latter fall below certain lowered asset or turnover thresholds in India.

Among the Bill's more notable suggestions is an enabling provision that allows the government to specify asset and turnover thresholds 'for any class or classes of enterprise', the meeting of which could trigger the pre-merger notification requirement under the Act ('Sector Specific Thresholds'). The provision marks a radical

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departure from the uniform application of asset/turnover thresholds and the accepted rationale that certain transactions do not warrant *ex ante* intervention by the Competition Commission of India (CCI).

In August 2013, the Merger Working Group of the Antitrust Committee of the IBA (IBA-MWG) submitted their comments and suggestions ('Submissions') to the (Indian) Ministry of Corporate Affairs and the CCI. The Submissions caution against the possible introduction of sector-specific thresholds which, if successful, could have a sizeable impact on India's merger control regime.

Since the liberalisation of Indian industry in the early 1990s, economic growth in India has surged ahead, not least due to the frenetic level of M&A activity. Transactions have grown in size and sophistication and their successful completion is subject, among other factors, to the receipt of all necessary regulatory approvals. India's mandatory merger control regime captures a number of such transactions, which by their sheer size could have an adverse impact on competition in India. In the two years since the introduction of the merger control provisions, the CCI has examined over a hundred transactions. The business community at large is gradually coming to terms with this newly introduced regulatory requirement.

However, the inclusion of sector-specific thresholds is bound to create confusion as to applicable thresholds and to overly complicate the existing regime. To begin with, the provision is unaccompanied by any wording to clarify and suggest the parameters for classification. In theory, the government could introduce new thresholds by reference to any number of criteria, including: (i) the size of the enterprise(s) (eg, small and medium size enterprises); and/or (ii) the industry sector to which the enterprise(s) belongs. The lack of any guiding framework creates uncertainty for the business community, the CCI and other specialist regulators. At the very least, domestic and international businesses deserve the benefit of the Act specifying the sectors and/or classes of enterprise that would fall prey to this provision. Moreover, the Bill does little to clarify the manner in which these numbers will be computed. There is no provision for a consultation process with stakeholders each time the government wishes to introduce a new set of class-specific thresholds. The thresholds themselves could be articulated in many forms (eg, whole numbers, a formula or a percentage shareholding in a target enterprise belonging to a separate class or sector).

This is particularly interesting because of the self-sufficiency of the existing regime. In the short time since its commencement, the CCI has proven itself to be a rigorous, proactive and no-nonsense regulator. Merger reviews are conducted in a timely fashion and behavioural contraventions are heavily penalised. The move to grant the government the power to carve out sector-specific thresholds indicates an apprehension that certain low value transactions in sensitive sectors (such as the pharmaceutical sector) may escape review and yet adversely affect competition.

However, the proposed provision undermines the efficacy of several safeguards that are currently built into the Act. Failure by parties to notify a transaction is easily tackled by the CCI's power to initiate a *suo motu* inquiry for an entire year *after* consummation of the deal. Should the transaction fall below the section 5 thresholds and escape notification, parties and their practices could still be the subject of investigation on behavioural grounds, such as entry into anti-competitive agreements and abuse of dominant position. Finally, and most importantly, the Act itself specifies a mechanism for the government, in consultation with the CCI, to revise the thresholds every two years and take account of market realities.

Apart from the ensuing uncertainty about the regulatory regime, another danger of introducing sector specific thresholds is the possibility of 'threshold shopping' by parties, particularly conglomerates. To take an example, seller enterprise 'A' could be a conglomerate with several diverse business divisions (eg, cement, tyres and steel) of which one (eg, the tyre production division) is being sold to buyer enterprise 'B'. The transaction is one that does not meet the regular thresholds under section 5 of the Act and would ordinarily not be notifiable. However, the government introduces specific thresholds for the steel sector that are lower than those stipulated in section 5. The Act currently does not make specific provision for the sale of business divisions/assets, thus making it possible for the 'steel' thresholds to become applicable to 'A'. This could potentially make the transaction notifiable and subject to prior clearance from the CCI. Alternatively, 'A' could simply pick the set of thresholds that are better suited to the transaction and/or its own interests under each individual set of circumstances.

These statutory measures are in and of themselves adequate to remedy anomalies in the competitive landscape in India. The current regime with uniform thresholds provides a degree of certainty to both industry and regulator. It is in line with other sophisticated competition law jurisdictions including the European Union and the United States, as well as developing ones such as South Africa and Pakistan. Sector specific thresholds at this stage of India's merger control regime seem poised to promulgate uncertainty, higher costs and, quite importantly, a largely unnecessary administrative burden on the time and resources of the CCI. The successful passage of this provision will also add significantly to the cost of doing business in India. The Submissions of the IBA-MWG urge the Ministry of Corporate Affairs to adopt a balanced view that is encouraging of the development of an emerging competition law regime, cognisant of the limited time and resources of its regulator and supportive of national interests.

New block exemption for non-horizontal arrangements that does not include certain price restrictions

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The IAA promotes its 'self-assessment' policy and publishes a new and precedent block exemption for most popular vertical arrangements

By the end of July 2013, the Israeli Antitrust Authority (IAA) published a new block exemption for non-horizontal arrangements that does not include certain price restrictions. The IAA's declared intention is to decrease the bureaucracy hassle on the business sector and to reduce criminal exposure in cases it is not required.

The new block exemption exempts from the duty to submit supplier–client arrangements for its approval, and passes the responsibility to the parties themselves and their professional advisors to check whether there is significant competition in the relevant market as a result of the relevant arrangement. If it turns out that the arrangement does raise significant harm to competition in the market, the IAA shall be able to challenge this arrangement retroactively, as in the US and the European antitrust laws, and it shall be able to use, inter alia, the administrative fines tool.

The new block exemption recognises that in arrangements between non-competitors, quite often the arrangement has a legitimate business justification and it does not harm competition, and sometimes even promotes it. Most of the arrangements between suppliers and their clients are included in the new block exemption, except for those in which the supplier dictates a minimum resale price maintenance (for example, in a situation in which the supplier dictates to a reseller a minimum resale price to the consumers, that the reseller is not allowed to charge less than such a minimum resale price).

The new block exemption determines a horizontal arrangement as a restrictive arrangement in which at least two of its parties are competitors, dealing with goods they are competing about, or a restrictive arrangement that is an investment of one competitor in another that does not reach to be a companies' merger.

Competitors are defined as any of the following:

- Those that during the term of the restrictive arrangement or during the three years before had an overlap between any goods one of them supplies and any goods supplied by the other party, where both supply those goods to similar or identical purchasers, or where there is an overlap between any goods purchased by one of them and any goods that the other is purchasing, where both purchase those goods from similar or identical suppliers ('overlap' means identity or similarity between the goods supplied or purchased by one to those supplied or purchased by the other, or that it has been used for identical or similar purposes).
- Parties that it is reasonable to assume that they will be competitors, as above-mentioned, unless there is a restrictive arrangement.
- Parties that the restrictive arrangement is intended to prevent them from being competitors, as above-mentioned.

For the purposes of this determination, it does not matter whether the competitors are included or not included in the same market according to economic tests of market definition, and the determinations of 'competitor' and 'potential competitor' in the general instruction and definitions for the block exemptions, shall not apply.

Price restriction is defined as a restriction in an arrangement between a supplier of goods and a purchaser of goods that is regarding the price in which certain goods shall be sold by a certain purchaser, except a restriction that limits the ability to raise the price in which goods shall be sold by a purchaser as above-mentioned.

According to the new block exemption, a restrictive arrangement that is non-horizontal and that does not include certain price restrictions is exempted from the duty to obtain the prior approval of the Antitrust Tribunal (or a specific exemption from the Antitrust Commissioner) if the restrictions in it: (i) do not limit competition in a significant part of the market influenced by the arrangement; or (ii) if they might harm competition in a significant part of a market as above-mentioned, but they are not able to significantly harm competition in a market and that the essence of the restrictive arrangement is not the reduction or the prevention of competition, and the restrictions do not include restrictions that are not necessary for the implementation of its essence.

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Recent developments

Sector inquires launched by Italian Antitrust Authority

Sector inquiry into the role of organised large-scale retail trade

In November 2010, the Italian Antitrust Authority (IAA) opened an investigation into the role of organised large-scale retail trade (*Grande Distribuzione Organizzata* – GDO) in the agri-food supply chain. In particular, the IAA has decided to conduct an analysis on the competitive dynamics of this sector due to their impact on final prices. This sector inquiry was aimed at analysing some criticalities related to the agri-food sector as, for example, the degree of competition that exists in GDO groups, the alteration of competitive dynamics that are originated by the pooling of corporate functions, the role of private labels in the establishment of contractual relations with suppliers, the nature and the impact that the increasing number of requests that large-scale retailers have issued to their suppliers in order to obtain a contribution with respect to their promotional and distribution activities, which are separated from the purchase quantities and prices.

As explained by the IAA, the increasing degree of concentration in the market, as well as the inter-business sharing of certain business functions (affiliate relations, consortia, group and mega-group of purchasing organisations, etc) in the mass retail sector, are capable of distorting the dynamics of competition; in particular, it is important to take into account the heightened influence of the group purchasing organisations that has significantly increased the contracting power of GDO

groups in their relations with small and medium-sized manufacturers.

As a result of the sector inquiry, the IAA's report, published in August 2013, indicates that in Italy the GDO groups have increased their market power with respect to trade relations with suppliers, including the strengthening of the role of central purchasing organisations (seven in Italy); in particular, the effects of this situation are reflected in the economic conditions on the upstream market of supply and on the downstream market of sales, with negative effects also on the consumer side.

In particular, the sector inquiry has shown the presence of some critical elements and problematic relationships between suppliers and GDO companies. In this respect, the first critical point that has been analysed is the role of the central purchasing organisations that have contributed to ensure transparency on contractual terms with producers, by complicating contractual relationship and decreasing the degree of competition between different retail chains, with possible negative effects on the reduction of prices on the downstream market. Secondly, the IAA has examined the phenomenon of trade spending – the amount of fees paid by suppliers to major retail chains for promotional services, distribution and sale – that appears to have contributed, on the one hand, to increase the conflict between producers and distributors and, on the other hand, to weaken competition on final prices, raising the benchmark for the cost of price competition between chains.

In conclusion, in light of the increasing market power of GDO organisations, the IAA will take all the steps of intervention required by the competition law and, specifically, it will assess the possible anti-competitive effects on consumer welfare. In particular, in addition to the provisions of antitrust law, regulations were issued in Italy with the aim of monitoring the structure of the retail sale agri-food market as well as the actions of large-scale food distributors. In this regard, Article 62 of Law No 27 of 24 March 2012 is the legislative response, on the one hand, to the growing tensions in Italy between primary agricultural producers and the food processing sector and on the other hand, to the organisation of commercial distribution sector, with particular regard to negotiation of payment terms. This provision, conferring the IAA with the institutional responsibilities and powers to monitor its application, has introduced certain restrictions in order to ensure more transparency and to balance relationships among the different agri-food supply chain operators.

Sector inquiry into costs of bank services

The IAA has recently published the results of the inquiry that it has been carrying out for three years in the bank services sector, with the purpose to verify the existence of anti-competitive practices in this market, particularly with regard to the bank account services, and to the related cash-in and payment services. The Authority has analysed account costs in 52 banks since 2011, by comparing them to the costs recorded in 2007 during an investigation of the IAA in the same market, in order to assess the enhancement that has been achieved in the bank sector. In this respect, the recent investigation conducted on the basis of the Synthetic Index of Cost has shown a reduction of service prices limited to some groups of costumers, as young people (-19 per cent), families (-2.8 per cent) and retired people (-3.6 per cent); in reverse, the Authority has observed that major banks, which hold 70 per cent of Italian bank accounts, have increased the basic costs of accounts.

The investigation has pointed out the main issues related to bank commercial policies and, specifically, the analysis has outlined that:

- standard service prices and fees related to particular bank services exceed the European average;
- some contractual conditions and restrictions are aimed at customer retention;
- information that concerns content and prices of services is not immediately and easily accessible for consumers since the provided details are not concise nor comparable; and
- consumers are discouraged from switching by economic, administrative and time-related costs that are referred to the closure and transfer of some bank services, such as bank accounts and loans.

Therefore, the IAA has stated that some legislative initiatives have to be taken in order to improve the awareness of consumers and the degree of competition in the sector. In this respect, it has to be mentioned that in the past few years the IAA has already granted to the customer specific tools (such as the Synthetic Cost Indicator) and it has taken some actions with the purpose to enhance competition in the market, and specifically it has fostered and increased consumers' access to simple and immediately accessible bank information. Moreover, the IAA has imposed on banks not to charge fees for switching, and to grant a minimum time to close the bank

account and open a new one. The Authority has supported the settlement of new rules for the determination of fees, and it has promoted among consumers the switching to online bank services that are more advantageous (the fees are at least 30 per cent less than normal).

Even though competition in the bank sector has been enhanced in the past, nevertheless, in the IAA's opinion, the sector is still affected by practices that hinder the reduction of prices and demand switching. Thus, in order to strengthen competition it is necessary to:

- boost transparency in the relations between banks and customers, and provide consumers with new tools in order to simplify the access to and the comparison of information;
- to separate at a contractual level bank account services from other bank services, such as loans, indirectly managed investments and insurances; and
- to make the closure of bank accounts easier and more expeditious (the IAA suggests 15 days).

Main interventions of the IAA in the field of consumer protection

Consumer protection action, in collaboration with the Italian Tax Police, continues to evolve. Indeed, in the last few months the Consumer Protection Directorate General, chaired by Giovanni Calabrò, has taken several initiatives and many significant and innovative decisions, in particular concerning e-commerce, and the first investigation aimed at protecting micro-enterprises.

Websites that allowed Italian consumers to buy drugs without prescription online

The IAA, adopting a precautionary measure, blocked sales on websites in relation to which it had received several complaints by consumer associations. In particular, the measure was adopted in light of a joint report by AIFA (Italian Pharmaceutical Agency), the Ministries of Health and Economic Development, the Special Unit of the Financial Policies, the Pharmacists' Association (Federfarma) and the Association of Italian Pharmacists' (Federazione Ordine Farmacisti italiani). The websites **121doc.net**, **it.121doc.net** and **121doc.it** have offered consumers the chance to buy without a prescription drugs needing a prescription and medical supervision, thus putting the health of consumers at risk. The IAA ordered the websites' owners, the English Company Hexpress Ltd, to stop selling drugs to Italian consumers without a prescription online immediately, giving a five-day deadline to suspend any type of activities related to the sale of those products on these websites.

Fashion websites that sell counterfeit products

Another interesting decision that was taken on 11 June 2013 by the IAA is regarding a fashion website claiming to be related to Emporio Armani watches, in relation to which a precautionary measure has been adopted for unfair competition practices as consumers were provided with incorrect information about the products they could purchase. In particular, the owner of the website led consumers to believe that it was an official reseller of Armani watches and had omitted to provide consumers with its contact details as well as details in the 'Return and exchange' page to inform them of their two-year statutory warranty.

Services for micro-enterprises

The IAA has for the first time investigated some professional subjects that provide services for micro-enterprises. The Authority took this innovative action in order to protect micro-enterprises against unfair commercial practices since the protection granted by the Italian Consumer Code (Legislative Decree of 6 September 2005, No 206) has been recently extended by the legislator (Article 7 of Law Decree No 1/2012, as transposed into law with modifications by the law of 24 March 2012, No 27) to companies that have less than ten employees and an annual turnover that does not exceed €2m.

In particular, the Authority has fined the group Index €324m for misleading advertising and unfair commercial practices. Indeed, the investigated companies had set up and promoted an IT network that would have granted to its members (cafes, newsstands and small restaurants) the possibility to provide their customers with 'topping up' their pre-paid mobile phone, postal dispatches and online betting services.

However, the advertisements omitted to disclose to the clients that some services would not have been effective or immediately available; consequently many micro-enterprises that had joined the network have suffered economic damages and their images have been affected by the unfair practice of Index companies.

Updates from Japan

JAPAN

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Cooperation with the Philippines and Vietnam

The Japan Fair Trade Commission (JFTC) signed two memoranda in Manila, the Philippines, concerning cooperation with the Philippine Ministry of Justice and the Competition Agency of Vietnam on 28 August 2013. These memoranda were made between the JFTC and the Philippines and Vietnam to implement the 'Competition' clause included in the Economic Partnership Agreement and to foster cooperation between the JFTC and the respective competition authorities of both countries by furnishing technical assistance of competition law experts from the JFTC with the support of the Japan International Cooperation Agency.

JFTC initiated second investigation

The JFTC received a report concerning a plan for a proposed business integration between MH Power Systems Inc, a subsidiary company of Mitsubishi Heavy Industries Co, Ltd, and Hitachi Manufacturing Co, Ltd. The JFTC initiated an investigation and requested on 6 September 2013 that MH Power Systems and Hitachi Manufacturing provide a more detailed plan for further review (the second investigation). In addition, the JFTC solicited the opinion of a third party. However, the JFTC stated that the above request does not necessary indicate a problem under the Antimonopoly Law (AML).

Refusal to shift consumption tax

The Act for Countermeasures Against Refusal to Shift Consumption Tax (the 'Act') was enacted on and enforced from 1 October 2013. The purpose of the Act is to prevent entrepreneurs from refusing to shift consumption tax.

After 1 April 2014, the consumption tax rate will increase from five per cent to eight per cent. In this connection, the JFTC announced that price cartels shifting consumption tax (concerted practices concerning measures to shift consumption tax) and cartels that indicate consumption tax methods used by and between small and medium-sized companies or trade associations shall be exempt from the application of the AML.

Hearing procedures survive

As reported in the September 2013 *Antitrust Committee Newsletter*, a bill to amend the AML, including abrogation of its hearing procedures, was submitted to the Diet (parliament) on 24 May 2013. However, the bill was not voted on before the regular session of the Diet closed in June but has been resubmitted for the deliberation by the extraordinary diet session as of 25 October 2013. On 11 October 2013, the JFTC initiated a hearing procedure requested by Kato Chemical Co, Ltd in connection with the JFTC's 2013 cease and desist and surcharge payment orders. On the other hand, on 2 October 2013, the JFTC dismissed the requests for hearing procedures submitted by Matsushita Co, Ltd and Daito Construction Co, Ltd in connection with the cease and desist and surcharge payment orders issued against them.

The amendment of the AML is supported by the Federation of Economic Organizations but it is uncertain whether the bill will be passed.

KENYA

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Thresholds, approvals and notifications in Kenya

The Kenya regulator appears to be actively applying recently published thresholds for merger control despite these not yet having been passed into law. Apparently, the thresholds are applied in the exercise of powers to exclude transactions from merger control. The move to refine the previous (very broad) change of control test previously applied to Kenyan M&A under the Competition Act is a most welcome development.

In essence, the new thresholds, which are published as guidelines and modified slightly since the previous Kenya update, distinguish between merger transactions which will not be considered for exclusion. That is, they require the prior approval of the Competition Authority, and, transactions which may be considered for exclusion – in each case on the basis of prescribed turnover thresholds.

Mergers will not be considered for exclusion if:

- Undertakings have a minimum combined turnover threshold of KES 1bn and the turnover of the target undertaking is more than KES 100m;
- In the healthcare sector, undertakings have a minimum combined turnover threshold of KES 500m and the turnover of the target undertaking is more than KES 50m;
- In the 'carbon-based mineral sector' ie, oil and gas sector (but not downstream retail), the value of reserves, rights and associated exploration assets to be held as a result of the merger exceed KES 4bn. If the merger involves pipelines and pipeline systems that receive oil and gas from processing fields belonging to, and passing through the meters of the target undertaking, merging parties are required to obtain approval, notwithstanding that the value of the reserves is less than KES 4bn.

Mergers that meet the following criteria will be considered for exclusion:

- Undertakings that have a minimum combined turnover threshold of between KES 100m and KES 1bn;
- In the healthcare sector, where the combined turnover threshold is between KES 50m and KES 500m;
- In the 'carbon-based mineral sector' – if the value of reserves, rights and associated exploration assets to be held as a result of the merger is below KES 4bn.
- Other excluded undertakings/undertakings not included above.

In these circumstances, applicants may request the Authority to be excluded from merger control. There is no prescribed form of application. The latest audited accounts of the merging entities should be submitted. The Authority will inform applicants within 14 days if the transaction is excluded. If a response is not received within this period, merging parties must formally apply for approval.

The development and application of merger thresholds is encouraging. We are also buoyed by recent steps taken by the Authority to confirm that merger control does not apply to bare asset sales or internal group restructurings that do not result in any change to ultimate beneficial control (single entity doctrine). This will no doubt go some way to alleviating the not-insignificant costs of regulating benign mergers and shifting the focus on to transactions that are likely to have potentially significant anti-competitive consequences in the local market.

The implications of the Competition Act and any new regulations that are published under the Act and their inter-relation with The COMESA Competition Regulations, 2004 remains a problem. We understand that the regulatory authorities are in discussions to try and harmonise the various areas of overlap/conflict.

Recent Lithuanian practice on obstruction of an inspection

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Investigation

The Council launched an investigation after the officers of the Lithuanian Competition Council (the 'Council') had carried out an inspection on the premises of an undertaking suspected of bid rigging. The inspection was conducted at the Department of Public Procurement of UAB LitCon (LitCon).

During the inspection, the officers of the Council were precluded from taking a certain document (a personal workbook/calendar) potentially having evidential value in the investigation. Regardless of the warnings and explanations about liability under law, an employee of the company being inspected left the premises taking the requested document with her. The employee returned and provided the workbook to the inspectors after five minutes.

Obstruction of an inspection

According to the Lithuanian Law on Competition ('Law on Competition'), the Council enjoys a wide range of rights to be exercised during the process of an investigation, including the right to seize any documents and articles having evidential value in the investigation of the case. The Council further has the right to examine documents necessary for its investigation (irrespective of the medium on which they are stored), obtain their copies and extracts, gain access to the notes of the employees of the economic entity, related to their work activities, also to copy such notes and the information stored on computers and any other media.

The Law on Competition also indicates that requests made by authorised officers of the Council while performing investigatory actions are obligatory to undertakings and members of their bodies and administrative staff, and sanctions apply for failure to comply with such requests. Consequently, the Council concluded that the conduct of LitCon's employee amounted to obstruction of the inspection, thus impeding the investigation, and found that LitCon infringed the Law on Competition.

Obstructions of inspections make the finding of the alleged infringements of the Law on Competition more difficult, if not impossible. Moreover, according to the Council, the conduct of LitCon's employee gave rise to risks that the requested document could have been damaged or modified, thus, its evidential value could have been lost.

It is important to note that the workbook contained various information related to public procurement, that is, company names, prices, contact details of other companies, etc. After the workbook had been returned and provided to the inspectors of the Council, it was identified that several pages for different dates were missing, therefore, the Council concluded that important information regarding the bid-rigging investigation was potentially lost.

As a defence argument, LitCon indicated that the workbook did not belong to the company and was a personal possession, therefore, information contained in such workbook could not be used for the purposes of the inspection. However, the Council stated that the officers of the Council enjoy a discretionary right to determine which document of the entity subject to an inspection should be seized and examined and which one can potentially have evidential value in the investigation.

Moreover, the company also claimed that the respective employee was not aware that leaving the room with her personal workbook would result in a breach of the Law on Competition. However, the Council stated that before the start of the inspection, the employee had been informed about the purpose of the inspection and was therefore capable of understanding that the information contained in her workbook could be important for the inspection.

Fine imposed

The Law on Competition stipulates that a fine of up to one per cent of the annual turnover of an undertaking can be imposed for obstructing an investigation. Such fines

can be imposed regardless of whether or not the alleged infringement having led to an inspection has been established.

Consequently, on 17 July 2013, the Council imposed a fine of LTL 615 000 (€178,000) on LitCon for obstructing the inspection and thus impeding the investigation (0.6 per cent of LitCon's annual turnover). The Council indicated that due to the fact that obstruction of the inspection occurred in a suspected restrictive agreement case, the amount of the fine imposed had to be material and had to serve as a deterrent. Moreover, taking into account the Council's practice in obstruction of the inspection cases, the fine imposed on LitCon can be considered a material fine.

To conclude, based on the recent practice of the Council on obstruction of an inspection, it can be stated that any cases of such obstruction are going to be treated very seriously with material fines to be imposed on the respective undertakings. Therefore, during an inspection of the Council undertakings should be cautious that they do not take actions obstructing such an inspection.

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Updates from Norway

The new Norwegian merger control regime will enter into force on 1 January 2014. The most significant change is the substantial increase in the turnover thresholds, which must be met in order for a concentration to trigger notification to the Norwegian Competition Authority (NCA). Effective from 1 January 2014, notification is only mandatory if the undertakings concerned have a combined annual turnover in Norway exceeding NOK 1bn (approximately €125m), and each of at least two of the undertakings concerned have an annual turnover of NOK 100m (approximately €12.5m). Currently the thresholds are NOK 50m (approximately €6.25m) as regards total turnover and NOK 20m (approximately €2.5m) for individual turnover.

It is to be noted that the turnover thresholds do not affect the NCA's competence to intervene in a specific case. Thus, the NCA may intervene in cases where the thresholds are not met. Under the current regime, this has, in practice, not raised any issues since most transactions would trigger the filing obligation. This situation will change after 1 January 2014, as the number of transactions *not* meeting the turnover thresholds will increase substantially. Thus, intervention under the new regime will clearly be more than a theoretical risk. This legal uncertainty is somewhat mitigated by the fact the NCA must take action (by imposing a filing obligation) within three months from when the agreement was signed or the time of closing, whichever comes first.

However, for the undertakings concerned this gives little comfort in itself. It should be mentioned that in order to impose a filing obligation, the NCA must find that it can reasonably be suspected that competition is affected. However, in practice this will not be an effective mechanism to safeguard companies from such a decision. For all practical purposes, it is for the NCA to decide whether the parties must notify or not.

Further, there will be no standstill obligation for transactions not meeting the thresholds. This raises the question of how to handle a situation where, for example, closing has taken place or assets have been transferred and the NCA, after three months, starts its investigation and subsequently prohibits the transaction. The transaction must then be reversed, which can be a costly and time-consuming process.

On the other hand, the parties still have several paths to choose. The possible options and the pros and cons of the different alternatives are discussed below.

First, the parties can submit a voluntary notification. The most obvious argument in favour of such an approach is that the parties will get legal certainty.

The second possible option is to initiate pre-notification discussions with the NCA. At the outset this seems like a sensible and cost-efficient approach. The parties can inform the NCA of what they are planning to do, and

put forward their arguments as to why the transaction does not pose any competition problems. One caveat with this approach is that the NCA normally does not give any clear feedback early in the process, leaving the parties with the risk of the NCA ordering a notification based on the information given. It might be that the undertakings concerned then would be better off with the third option: doing nothing (see below). On the other hand, if time and legal certainty is of the essence, it might be preferable to trigger the process with the NCA as soon as possible. This may be a more efficient route than waiting for a possible order three months down the road. On the other hand, if the transaction most likely would have gone under the radar, a wait-and-see approach might be advisable.

The last option is to do nothing and hope for the transaction to pass below the NCA's radar. Such an approach is well within the legal limits, as the parties are under no obligation to notify below the turnover thresholds. Moreover, the rationale for the substantial increase in the thresholds was, inter alia, to save resources both for businesses and the NCA. If in practice every concentration would be notified, the new turnover thresholds would have no effect. Thus, it cannot be presumed that parties to transactions that are not notified have something to hide.

It follows that the regular approach in non-problematic cases would be to sit still and not approach the NCA. However, if the transaction may raise competition law issues, the question arises as to whether to notify voluntarily. The answer will in practice depend on the likelihood of intervention. If the transaction may raise competition law issues, notifying it to the NCA would most likely be the best advice.

Based on the above, analysing the risk of intervention from the NCA will be increasingly important under the new regime. Further, the parties should carefully consider how to regulate the risk of intervention in the transaction documents.

Soccer fans could have paid less, absent the agreement on prices: Polish competition authority intervenes on the pay-per-view TV market

POLAND

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Competition insight

The introduction of a pay-per-view system has not been welcomed by fans of the national football team. The way this new system has been implemented by broadcasters also caused scrutiny from the competition watchdog.

On 21 August 2013, the President of the Polish Office of Competition and Consumer Protection (OCCP) fined pay-per-view (PPV) providers a total amount exceeding PLN 3.6m (approximately US$1.9m) for setting a minimum resale price for the PPV transmission of sports events. In September 2012, Sportfive (holder of the broadcast rights) proposed the sale of a licence to broadcast the football matches Poland v Montenegro and Poland v Moldova (2014 World Cup qualification matches) to the TVP (the state-owned Polish national channel) on the free-to-air channel. TVP did not accept the proposed remuneration, so Sportfive signed contracts with 11 other broadcasters – satellite network DTH and cable TV operators (UPC Poland, Cyfrowy Polsat, Vectra, Multimedia Polska, Toya, Inea, Echostar Studio ZTS Tele 4, SGT, ZUA Antserwis, TK Antserwis and Asta-net Asta Group), which decided to transmit the matches on a PPV

basis. The OCCP started antitrust proceedings in November 2012.

With regard to the market determination, the OCCP defined the relevant markets as follows:

- the national market for the trading of TV rights for broadcasting football matches of the Polish national team (market where the collusion was concluded);
- the local market for access to the paid TV services (affected market); and
- the national market for access to the paid broadcast of sport events via the internet (affected market).

Cyfrowy Polsat has been hit with the biggest fine of PLN 2m (approximately US$700,000). It was the first broadcaster to which Sportive offered the cooperation. In a draft agreement, Cyfrowy Polsat proposed to set a minimum price for viewers at the level of PLN 20 (approximately US$6) for the PPV transmission of the matches. Sportfive confirmed the minimum resale price and agreed with Cyfrowy Polsat that it would require the other operators to abide by it too. In fact, throughout the negotiation with the other broadcasters, Sportfive used the model agreement, including the minimum resale price clause, prepared by Cyfrowy Polsat.

In light of the above, the OCCP stated that Cyfrowy Polsat was an initiator of the agreement. In fact, throughout the negotiation with the other broadcasters Sportfive used the model agreement, including the minimum resale price clause, prepared by Cyfrowy Polsat.

Even though this particular licence agreement was bilateral (between Sportfive and the particular operator) the OCCP concluded that all of the licence agreements formed a single collusive arrangement. The entire collusion was qualified as similar to ‘hub and spoke’ cartel, and Sportfive was deemed to be the coordinator of the collusion. As a result of the price fixing, consumers were deprived the opportunity to buy the broadcast at a price lower than PLN 20.

All the other operators, except for Cyfrowy Polsat, were considered passive participants (they did not have the ability to change the agreement as offered by Sportfive). Hence their fines were decreased by the OCCP.

Sportfive submitted a leniency application to the Polish competition authority for the penalty not to be imposed and subsequently avoided any financial sanction. Sportfive submitted information including correspondence with the other participants to the agreement, and significantly contributed to proving the existence of prohibited practices. Multimedia (one of the broadcasters) had their fine reduced by 30 per cent for cooperating with the OCCP.

This case illustrates quite a rare situation where the holder decided to sell rights to many different PPV broadcasters. Usually there is no competition between TV providers on this level because those rights are granted to one operator on exclusive basis. Such exclusive operator creates a marketing plan to increase public interest in the event. It is also responsible for the organisation of further distribution of such rights to cable operators. An exclusive operator can offer its programmes indirectly to the customers of competitors, in exchange for payments of per-subscriber fees. The appointment of an exclusive distributor can result in higher prices and lower consumer welfare and some economists have suggested that it should be banned. The sale of rights to numerous competitors can be viewed as a much better solution as it does not permit the holder of the rights to transfer their monopoly power downstream.

Regulatory insight

Another side of this issue is how this case was regarded by the National Broadcasting Council (NBC). In Poland, the NBC is a constitutional body that preserves the freedom of speech, the right to information and the public interest in radio and television broadcasting. When the NBC found out that the Polish national football team’s matches for the 2014 World Cup qualification campaign were provided only on the basis of a PPV system, it raised doubts about the legality of this practice.

Law relating to TV transmissions of semi-finals and finals of world and European championships in football as well as all other matches played as part of those events with the participation of the Polish national team are regulated in the Broadcasting Act. A TV broadcaster is under an obligation to transmit live coverage of a major event (including the above-mentioned category of matches) via open nationwide channels available at no charge. Such an obligation does not apply if none of the broadcasters expressed willingness to sign a contract for the transmission.

After the investigation, the NBC issued an official standpoint where it proposed changes to the Broadcasting Act, introducing

a statutory definition of the paid media service (pay-per-view) and granted the NBC power to determine the procedure where the exemption of broadcasters from the above said obligation would be necessary.

Additionally, in the course of the investigation, the NBC stated that Cyfrowy Polsat broadcasted the programme (the match broadcasting studio, the matches as well as other transmitted messages including advertisements) without their permission. The NBC decided to notify the Prosecutor's Office of a potential offence; however the Prosecutor's Office stated that Cyfrowy Polsat did not break the law.

Update on Singapore competition law

SINGAPORE

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This is an update on significant developments in Singapore competition law since our previous update.

CCS clearance of the Visa Multilateral Interchange Fee (MIF) system

CCS 400/001/06: In relation to a Notification for Decision by Visa Worldwide Pte Ltd of its MIF system as formalised in the Visa Rules

Visa Worldwide Pte Ltd (Visa Worldwide) had on 1 January 2006 sought a decision from the Competition Commission of Singapore (CCS) as to whether its MIF system, as set out in the Visa Rules (the current by-laws and operating regulations of the Visa Inc group of companies' operating affiliates), would infringe section 34 of the Competition Act, Chapter 50B of Singapore (the 'Competition Act'). On 18 September 2013, the CCS issued a clearance decision and concluded that the MIF system has not infringed section 34 of the Competition Act.

Of note in the decision is that while the corporate structure of the Visa Inc group of companies (Visa Group) underwent restructuring from October 2007 to April 2009, the CCS was of the view that the MIF system, post-restructuring of the Visa Group, nonetheless constitutes an agreement between undertakings and/or a concerted practice between the members of Visa in Singapore ('Singapore Members') and the Visa Group.

Prior to October 2007, the Visa Enterprise (defined term used in the CCS decision) was a membership organisation comprising of, inter alia, Visa International Service Association (Visa International) and wholly owned and controlled by its members, which are entities that participated in the Visa network as an issuer or acquirer of Visa cards ('Members'). The Singapore Members were members of Visa International. Visa International had acknowledged in its application to the CCS that prior to restructuring, the Visa Rules could be regarded as decisions of an association of undertakings between members of the Visa network.

After restructuring, Visa International became a wholly owned subsidiary of Visa Inc. The Singapore Members became non-equity members of Visa International and the operations of the Visa Group in Singapore were transferred to Visa Worldwide which is an indirect subsidiary of Visa International.

The CCS found that, notwithstanding the restructuring:

> 'there exists a commonality of interests between Visa Group and all the Singapore members in respect of the MIF… The composition of the Visa Network is such that they would all have an interest in setting the MIF at a common level, even if they may hold different views on the actual level of the MIF, and they would all have a common interest in the perpetuation of the MIF system, post-restructuring'.

The CCS further considered the structure of the two-sided platform of the card-acquiring and issuing markets and took the view that the MIF system is most likely to harm competition in the acquiring market. With

respect to the counterfactual scenario, the CCS eventually concluded that it was not clear whether competition would be greater in the absence of the MIF system given higher barriers to entry and expansion for new and smaller acquirers. In the issuing market, the CCS found that it is likely that there may, in fact, be less competition in the counterfactual. Overall, the CCS was of the view that the evidence did not suggest that the MIF system has resulted in an appreciable adverse effect on competition in Singapore in any of the relevant markets identified.

The CCS, in the decision, reserved its position to further consider the Visa MIF system in the event of a material change of circumstance, specifically, significant changes to any conditions relating to the MIF, including but not limited to:

- the way in which the MIF is determined;
- the structure of the acquiring, issuing and card scheme markets;
- any significant competition concerns raised by any relevant party, as a result of any change related to the level of the MIF and/or MDR; and
- any amendments to the Visa Rules that results in merchants being prevented from promoting the use of an alternative method of payment.

CCS review of proposed cooperation between low cost carriers

CCS 400/002/12: Notification for decision by Qantas Airways and Jetstar Airways

On 23 September 2013, the CCS issued a clearance decision in relation to the proposed conduct under the Jetstar Pan-Air Strategy (the 'Proposed Strategy'). The Proposed Strategy would enable the establishment of joint ventures in a number of jurisdictions to operate low-cost carriers (LCC) under the Jetstar model. The CCS was of the view that the Proposed Strategy is likely to give rise to net economic benefits and would be excluded from section 34 of the Competition Act pursuant to the net economic benefits exclusion.

Of note in the clearance decision is the CCS's approach towards the market for air passenger transport services where the CCS found that the market could be further segmented based on categories of passengers. The CCS agreed with the applicants that there are 'fundamental differences between leisure and non-leisure passengers for air services' and that leisure passengers who are price-sensitive may be less concerned about travel time and fare flexibility relative to passengers who travelled by business class or first class. The CCS was of the view that the relevant market should only comprise of economy class passengers, which represented leisure passengers, and that non-leisure passengers, travelling by business class or first class, should be placed in a separate market.

In considering the net economic benefits of the Proposed Strategy, the CCS noted that there would be increased competition and capacity as a result from the introduction of an additional LCC. Accordingly, consumers in Singapore may benefit from additional flight options. The CCS also noted, in general, that the presence of LCCs has increased the level of competitiveness and eroded the market share of full service airlines. The CCS also accepted that the introduction of LCCs on routes have led to increased capacity and reduced prices from existing airlines on those routes.

In the decision, the CCS reserved its position to reconsider the Proposed Strategy in the event of a material change of circumstance, which include, but are not limited to the following:

- a reduction in the number of competing carriers in the respective origin and destination pairs, which form the second and third relevant markets (as defined in the CCS decision);
- significant changes to the scope of the Proposed Strategy; and
- changes in the operations of the parties that have a significant impact on the Singapore market.

Conclusion

As of 30 June 2013, the CCS has completed 201 cases, including market studies, preliminary enquiries and competition advisories as set out in the table below:[1]

Classification of cases	Cases completed
Preliminary enquiries and investigations	87
Notification for guidance/decision[2]	17
Mergers[3]	36
Leniency cases	7
Appeals	7
Competition advisories[4]	35
Market Studies	12
Total	**201**

The foregoing illustrates the intensity of antitrust enforcement in Singapore and the CCS's commitment to the rigorous enforcement of competition law in Singapore. The recent developments underlines the importance that businesses in Singapore should place on antitrust compliance. The CCS continues to keep a close watch on business practices in Singapore. An infringement of the Competition Act may attract heavy financial penalties. Since the CCS was established in 2005, there have been 78 sets of financial penalties imposed, amounting to more than SGD3m. Where businesses are unsure if their conduct would infringe the Competition Act, they should consider making a notification to the CCS.

Notes

1 CCS, *Competitive Edge*, Issue 06.
2 Businesses may notify their agreements or conduct to the CCS for guidance or a decision under a non-mandatory scheme as to whether they are infringing the Competition Act.
3 Merger parties may notify the CCS for a decision under a non-mandatory scheme as to whether their anticipated merger will, if carried into effect, infringe, or whether their merger has infringed, the Competition Act.
4 The CCS may provide confidential advice and input to government agencies on competition matters early in the policy-formulation process.

South African Competition Law – 2013: a year in review

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South Africa ranked eighth in world

The recently published World Economic Forum Global Competitiveness Report 2013–2014 ranked South African competition policy as eighth out of a possible 148 countries in terms of its effectiveness. As far as our competitiveness overall is concerned, South Africa ranked 53rd, securing it a podium placing among BRICS countries, beating Brazil for second place.

The Report, which uses 12 categories to rate competitiveness, follows on the heels of the three-star rating received by South Africa's Competition Commission (thereby maintaining its previous rating) in the 12th annual survey of the world's competition authorities conducted by Global Competition Review.

Construction fast-track settlement process comes to an end

The Competition Commission's fast-track process with regard to widespread collusion within the construction industry, culminated in penalties totalling ZAR1.46bn (approximately €106m).

The settlements come after an intensive investigation process, which commenced in February 2011, with the publication of an invitation by the Competition Commission for construction firms to come forth with information about collusive practices within the construction industry. In the hope of acquiring immunity from prosecution by the competition authorities, over 300 instances of bid-rigging came to light and, after whittling them down to projects that commenced after September 2006, the Commission reached settlements with 15 firms in the construction industry, including a number of the country's biggest players.

The settlements were confirmed by the Competition Tribunal following two days of hearings at the end of July 2013. The Commission has made clear its intention to prosecute those firms that failed to reach settlements with them.

However, the firms with which settlements were reached cannot yet close the book on this sordid chapter in their history. The possibility of civil damages actions by individuals and government departments harmed as a result of the bid-rigging and cover-pricing remains and such claims are likely to further cripple the balance sheets of the firms involved. Although such claims are notoriously hard to prove and none have succeeded to date, if ever there was a case to turn this on its head, the damages suffered as a result of the construction cartels provides a perfect opportunity.

It also remains to be seen whether the National Prosecuting Authority intends to bring criminal charges against those responsible.

The 'Bread Cartel' gives rise to first class action

South African competition law has seen the acceptance of class actions, in respect of damages suffered as a result of contraventions of the Competition Act, 89 of 1998, in the *Children's Resource Centre Trust* judgment delivered by the Supreme Court of Appeal earlier this year.

The general view of the legal position prior to this insofar as class actions were concerned was that class actions were only available when a constitutional right was at issue. The Supreme Court of Appeal found that 'it would be irrational for the court to sanction a class action in cases where a constitutional right is invoked, but to deny it in equally appropriate circumstances, merely because of the claimants' inability to point to the infringement of a right protected under the Bill of Rights.'

The Competition Commission a price regulator?

The recently published Industrial Action Policy Plan 5 has given rise to some concerns relating to the Competition Commission's proposed role as price regulator

Speaking at the Competition Commission's Seventh Annual Conference on Competition Law and Policy, the Competition Commission's Principal Policy Analyst, Ms Qobo, stated that 'there is somewhat of a contradiction between the competition authority's mandate of pursuing free and fair competition in markets with one set of tools, while simultaneously intervening in markets through price-setting, possibly towards uncompetitive outcomes' and that the Policy's proposed new roles for the Commission is demonstrative of 'the need for competition policy to respond to state intervention mechanisms, such as industrial policy, demonstrates that competition law does not exist in a vacuum, but within a complex policy environment.

The introduction of formal powers to conduct market inquiries

Section 6 of the Competition Amendment Act, 1 of 2009, came into force on 1 April 2013. This section provides the Competition Commission with formal powers to conduct market inquiries. When conducting market inquiries previously, the Commission relied on the general powers ascribed to it by the Competition Act as well as the cooperation of firms within that market. Its new powers, which include the selection, initiation, conduct and outcome of inquiries, mean that the Commission need not identify specific conduct when investigating a market.

The Commission announced that it will utilise its new powers for the first time in an inquiry into the healthcare sector.

SPAIN

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The new Spanish Competition Authority

On 7 October 2013, the new Comisión Nacional de los Mercados y la Competencia (CNMC) was launched. This body integrates four agencies that were previously separate (the competition authority, the energy council, the telecom market authority and the postal sector authority) and is integrated in the Ministry of Economy and Competitiveness.

The new authority will be headed by the Council, formed by a president, a vice-president and eight counsellors appointed by the proposal of the Spanish government. This Council will make the decisions related to adjudicative and advisory functions and, among other functions, will adopt the final decisions in competition proceedings.

The Council can sit in plenary (for those issues expressly assigned to it) or in chambers. There are two chambers – one for competition and another for regulatory oversight – to which counsellors will be

allocated. However, these chambers are not totally independent from each other: all the counsellors will rotate; on the other hand, there are some cases in which the chamber resolving an issue is required to inform the other chamber who will submit a report on that issue.

There are four directorates of investigation that will be responsible for investigating and processing the files: the Directorate for Competition, the Directorate for Telecom and Audiovisual Sector, the Directorate for Energy and the Directorate for Transports and Postal Sector, which are, in turn, further subdivided into sub-directorates.

The Directorate for Competition will be in charge of investigating, studying and drafting reports in the area of competition policy, anti-competitive practices and merger control. This Directorate is further sub-divided into five sub-directorates: one for industry and energy, one for information society, one for services, one for cartels and leniency and another one for surveillance.

Many critical voices, both national and European, have been raised against this new Authority since it was first planned, doubting about its independence and effectiveness. Moreover, the appointment of some of the positions has been strongly criticised. However, the practical effects and the pros and cons of this change in practice are still unknown and difficult to assess yet.

The Spanish Competition Authority fines four lift maintenance companies for unfair competition

According to Article 3 of the Spanish Competition Act (Competition Act 15/2007 of 3 July 2007 – LDC), any act of unfair competition that affects the public interest by the distortion of free competition is a prohibited practice and constitutes a serious infringement, which can be punished with a fine of up to five per cent of the total turnover of the infringing undertakings in the business year immediately preceding the one in which the fine was imposed. The consideration of this conduct as an antitrust infringement is a peculiarity of Spanish Competition Law and has not given rise to many successful cases, since the requirement of affecting public interest is difficult to meet.

In September, the Spanish Competition Authority (CNC) fined four lift manufacturers more than €4.8m on the basis of this provision. In particular, the CNC considered that these companies would have hindered the activities of their competitors in the market for the maintenance of lifts by means of unfair acts.

The investigation started following two complaints filed before the CNC by an owners' association as well as a competitor in the market for the maintenance of lifts (Citylift) who denounced several lift manufacturers and supplied the CNC with several communications (emails, fax or letters) sent by the lift manufacturers, in which they called into question the technical, professional and economic capacity of the companies active in the market for the maintenance of lifts which are not vertically integrated.

In order to establish an infringement of those considered in Article 3 of the LDC, a two-step assessment should be done: first, the existence of an unfair act should be established; secondly, it should be assessed whether this unfair act distorts competition and affects the public interest (the protected right).

Regarding the existence of an unfair act, the CNC considered that these communications sent by the lift manufacturers in which they stressed the lack of means, training and security measures of their non-vertically integrated competitors were done with the purpose of generating fear in consumers by misrepresenting the truth and affecting their decision-making process. Therefore, the CNC understood that this information could be considered unfair acts according to the Unfair Competition Act and, in particular, denigrating acts as they were suitable to harm third parties' reputation in the market and were not exact, neither true or appropriate.

According to the CNC's decision, unfair acts affect free competition when they affect or limit the ability of other companies to compete. When assessing the effect of these unfair acts on competition, the CNC paid special attention to the specific legal and economic environment. In this regard, it emphasised the strong position of lift manufacturers in the vertically connected market of lift maintenance in which, according to the CNC, they have a competitive advantage that generates entry barriers for those non-vertically integrated competitors. In this context, the CNC considered that the communications reinforced the existing barriers, obstructing competition and hindering the strengthening of non-vertically integrated competitors.

In view of the above, the CNC considered

that there had been four infringements of Article 3 LDC, consisting of hindering the competitors' activity in the market for the lifts maintenance by means of using unfair means, and fined Zardoya Otis, SA, Schindler, SA, Ascensores Eninter, SL and Ascensores IMEM, SL almost €5m, while it closed the case as regards Industrial de Elevación, SA as it considered that its infringement could not be proved.

The decision has raised criticism since the unfairness of the conduct seems more than disputable and the effect of public interest seems difficult to sustain. Also, the CNC seems to presume, as a proven fact, that the market of elevator maintenance does not work in a competitive manner, merely on the basis of an industry survey drafted by the CNC itself several years ago (unrelated to any specific file).

The Food Chain Act will be enforceable as from January 2014

According to the Explanatory Memorandum of the Spanish Food Chain Act (Act 12/2013 of 2 August 2013, hereinafter referred to as LCA), which was published last August and will be enforceable as from next January, this Act is intended to improve the functioning of the food chain so as to increase the effectiveness of the Spanish agricultural sector while reducing the imbalance in commercial relationships. That is, the Act aims at guaranteeing a fare, loyal and effective competition in this sector.

The LCA applies to those commercial relationships in the food chain where: (i) the amount of the transaction exceeds €2,500 and (ii) there is an imbalance. An imbalance is considered to exist in any of the following situations:

- when one of the operators is a SME and the other is not;
- when one of the operators is a primary producer of agricultural, animal, fishing or forestry products; or
- when one of the operators depends economically on the other operator.

It should be noted that the LCA gives its own definition of 'economic dependence', establishing a threshold of 30 per cent of the operator's sales/purchases. The concept of economic dependence, which is also used in the Spanish Unfair Competition Act 3/1991, is therefore defined by reference to a specific threshold for the first time.

As stated above, the LCA aims at guaranteeing competition and, to that end, it regulates, among other rules, abusive practices for this specific sector. In particular, the LCA considers as abusive practices four specific conducts when they appear in transactions under its scope and establishes a sanctioning system according to which the relevant authorities can impose fines on the infringing companies.

First, the LCA regulates the modifications of the contractual conditions, which might only be changed if both parties agree. Accordingly, any unilateral modification thereof would be considered abusive. Secondly, the LCA prohibits any additional payment to the agreed price, except in some specific cases in which this additional payment would not amount to an abuse. Thirdly, the LCA regulates the exchanges of sensitive information between parties to a contract, which should be expressly established in the contract and should be proportionate and justified according to its subject. The Act also regulates the uses allowed for that kind of information. Hence, any information exchange that does not comply with these requirements could be considered an abuse. Finally, the Act contains provisions relating to category management.

In view of the above considerations, when facing a transaction under the scope of the LCA, the parties to it do not only have to comply with the Competition Act and the Unfair Competition Act (which still apply) but also with the provisions foreseen in this new Act, as otherwise they could be sanctioned. Accordingly, the LCA establishes a stricter approach for the transactions under its scope and put a focus on the conduct of companies operating in the food chain. However, we should wait until its enforcement in order to see its practical implementation and specific effects.

Recent developments in merger control

SWEDEN

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Certain trends and developments of general interest have recently been possible to observe in the Swedish merger control area. In the text below, the most notable developments and trends have been highlighted and briefly discussed. These developments include, for example, proposed legislative changes in terms of implementation of sharpened supervisory tools for the Swedish Competition Authority (SCA) under the Swedish Competition Act, introducing the possibility to 'stop the clock' in merger filing procedures. Other observed trends in recent filings are increased references to the failing firm doctrine and enhanced use of advanced economic analysis and tools in merger assessments. An interesting development is the increased actions of the SCA against small transactions. In several recent cases the authority has used its mandate to require submissions of filings even when the set out thresholds are not met.

Proposed implementation of new 'stop the clock' provisions

New sharpened tools to make the supervision of the SCA more efficient have been presented in the Swedish inquiry report SOU 2013:16, *More efficient supervision of competition* (in Swedish '*Effektivare konkurrenstillsyn*'), which was released in February this year. The report examines whether additional regulation needs to be incorporated under the Swedish Competition Act in order to ensure effective monitoring of the current legislation. In relation to merger filing procedures, the report suggests for 'stop the clock' provisions to be introduced under the Swedish legislation. Implementation of such provisions is, as familiar, nothing new as such, since it is already a part of the merger control systems in many of the other European countries and also in line with the merger filing procedures of the Commission.

The possibility to 'stop the clock' in Swedish merger filing procedures is introduced in cases where the notifying parties have failed to provide requested information by the SCA after filing and will make it possible for the authority to suspend examination periods until correct and/or sufficient information has been provided.

The inquiry report suggests for 'stop the clock' provisions to be available during both the statuary periods, that is, phase I and phase II. The report further states that it may be necessary for the notifying parties to be allowed to provide additional information during phase I without affecting the set out examination period. It should thus also be possible to 'stop the clock' on the request of a notifying party during phase I. The suggested law amendments and the new 'stop the clock' provisions are expected to enter into force by the summer of 2014.

References of the failing firm doctrine in recent merger filings

It is interesting to note the recurrent use of the failing firm doctrine in Swedish merger filing procedures. In several recent cases, the notifying parties have referred to the arguments of the doctrine in order to promote clearance of the relevant transaction. The basic rationale behind the failing firm doctrine is that since the failing firm would have to exit the market under any circumstance because of its financial problems, any harm to competition due to the loss of an independent market player would be at hand regardless of whether the merger is carried out or not. In short, the doctrine enables for complicated mergers to be cleared even when the concentration could be seen to have negative effects on competition, provided that three cumulative criteria are met. To qualify for the failing firm defence, the following criteria thus have to be at hand. First, the allegedly failing firm would in the near future have to exit the market because of financial difficulties if not taken over by another undertaking, that is, it must be likely that the firm will enter into bankruptcy or equivalent proceedings in the absence of a merger. Secondly, there is no less anti-competitive alternative purchaser, that is,

there are no other realistic purchasers whose acquisition would lead to a better outcome from a competition perspective. And finally, in the absence of the merger, the assets of the failing firm would inevitably exit the market.

The failing firm doctrine was recently applied in Sweden in the acquisition of SPP Liv Pensionstjänst AB (SPP) by KPA Pensionsservice AB (KPA) in September this year. KPA focuses on pension insurance services whilst SPP operates a broader portfolio. A filing of the acquisition was submitted although the targets turnover did not meet the set out thresholds. The SCA's in-depth investigation showed that SPP was likely to leave the market irrespective of whether the proposed acquisition took place or not. This was due mainly to the poor financial status of SPP and the fact that there were no foreseeable alternative purchasers. Therefore, the SCA concluded that the acquisition would affect competition on the market only to a limited extent and accordingly approved the proposed acquisition.

The doctrine was also referred to in Assa Sverige AB's (Assa Sverige) proposed acquisition of Prokey AB (Prokey), but was not applied by the SCA. Assa Sverige is part of the international Assa Abloy group and is active in developing, manufacturing and marketing different security products and door lock solutions. Prokey is a Swedish wholesaler of security products to locksmiths and other security products installers. In January this year, the SCA ordered that the acquisition should be notified even though the relevant turnover thresholds were not met (since the turnover of the target undertaking was too low). The reason for this request was held to be the Assa Abloy group's considerable position in manufacturing and wholesale. In April 2013, the SCA initiated an in-depth investigation into the proposed acquisition which concluded that the implementation of the concentration would substantially prevent competition on the Swedish wholesale market of services to locksmiths. According to the SCA, the acquisition would have resulted in decreased supply and higher prices charged to companies delivering locksmiths' services and that it thereby would ultimately have been to the detriment of consumers. The notified merger resulted in the parties cancelling the concentration after the SCA brought an action before the Stockholm District Court in order to prohibit the merger. The SCA found that the failing firm doctrine was not applicable.

The failing firm defence was also used before the Commission in the Swedish undertaking Nynäs AB's (Nynäs) acquisition of certain refinery assets of Shell Deutschland Oil GmbH (Shell) in Harburg, Germany. Nynäs is active globally in the production of naphthenic base, process and transfer oils (TFO) and has its core business in Nynäshamn, Sweden. Shell is part of the Shell group of companies, which is a fully integrated global energy and petrochemical producer. The Commission conducted an in-depth, second phase investigation as the merged entity would have become the only naphthenic base and process oil producer and the largest producer of TFO in the EEA. Applying the failing firm defence, the Commission's in-depth investigation showed that even in the absence of the proposed acquisition, the Harburg refinery activities were likely to cease, significantly reducing (even below the level of demand) the production capacity in the EEA market for naphthenic base and process oils, leading to higher consumer prices. Thus, the Commission found that the reduction of the number of competitors in the market would occur even if the proposed acquisition did not take place. Accordingly, the Commission concluded that the proposed acquisition would not significantly impede effective competition in the EEA or any substantial part thereof.

Before the more recent references to the failing firm doctrine in Swedish merger filings, the doctrine was last tried in the takeover of Milko by Arla Foods in 2011. Arla Foods and Milko were at the time Sweden's largest and third largest dairy companies, respectively. Even if the merger was cleared by the authority, however, subject to the condition that Arla Foods sell Milko's largest dairy plant and brand, the failing firm defence was not approved by the SCA, which considered that all cumulative criteria were not fulfilled in the case. The SCA found that in many parts of Sweden, an unconditional clearance of the merger would result in limitation of competition in several dairy products, which would, in the end, cause detrimental effects to consumers. The SCA was also forced to take into account the difficult financial position of Milko, which was, at the time, in risk of bankruptcy. Since it was not clear that there was no other less anti-competitive alternative in terms of any potential buyer and it was not clear that all the assets of Milko would inevitably exit the

market as a result of a non-clearance of the merger, the criteria for a failing firm was not fulfilled.

The increased references to the failing firm doctrine is interesting since it may open up for clearance of otherwise complicated mergers, which would probably not be possible without application of the failing firm defence. For example, it provides the potential opportunity for undertakings to acquire its competitors. The recurrent references and use of the doctrine is most likely explained by the current economic climate, resulting in more undertakings suffering from economic difficulties and threatening bankruptcy.

Increased actions against small transactions below the thresholds

Another observation in relation to Swedish merger control is that it has become more common for the SCA to also require notifications to be submitted in relation to concentrations not exceeding the set out turnover thresholds. According to the Swedish Completion Act, the SCA may, if there are particular reasons, order submission of a notification for a concentration that is not subject to a mandatory notification requirement in cases where only the combined turnover threshold is met, but not the individual turnover threshold. Usually, this is applied in cases where the acquiring undertaking's turnover exceeds the set out individual threshold, but the target undertaking's turnover is too low (the individual threshold is currently SEK 200m, approximately €22m). For example, the SCA in January this year ordered a notification of Assa Sverige's acquisition of Prokey (the case is further mentioned above) even if the relevant turnover thresholds were not met. The SCA claimed the ground for its request to be the Assa Abloy group's considerable position in the manufacturing and wholesale market for security products to locksmiths and other security products installers. It did also refer to other earlier acquisitions of small companies by Assa Sverige.

The same scenario was also at hand in relation to Bonnier Förlagen AB's (Bonnierförlagen) purchase of Pocket Shop AB (Pocket Shop) in 2012 where the SCA ordered a notification of the transaction, though no mandatory notification was at hand. Bonnierförlagen is part of the Bonnier group, which is a family-owned media group consisting of a number of media companies established in over 20 countries. Pocket Shop is a bookstore chain selling paperbacks through several stores located in Sweden, however, its turnover was far from reaching the set out thresholds. Bonnieförlagen is also a purchaser of publication rights for paperbacks and a wholesaler of paperbacks. The SCA assessed that the acquisition included vertical and horizontal overlaps and that it was possible that the transaction could impede competition on the market. Eventually, the SCA however came to the conclusion to clear the transaction. The SCA moreover ordered submissions of notifications in Bonnierförlagen's acquisition of Pocket Grossisten in Sweden AB (Pocketgrossisten) in 2010 and Tidningarnas Telegrambyrå AB's (TT) acquisition of Retriever AB (Retriever) back in 2009.

During the past four years, the SCA has applied its powers to order a submission of a notification in a total of four cases (all mentioned above). Except from Assa Sverige's proposed acquisition of Prokey, all the referred mergers have been cleared by the SCA, either during the initial phase or after the authority carried out an in-depth investigation. Conclusively, it seems that the SCA's requests for submissions of filings in non-mandatory notification mergers have increased especially in relation to the total number of notifications submitted during the past few years. This is a development worth noting.

TURKEY

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Updates from Turkey

General

The TCA publishes merger and acquisitions (M&A) outlook for the first half of 2013

In the extent of Communiqué No 2010/4, the Turkish Competition Authority (TCA) analysed notified M&As and evaluated them with consideration of competitive conditions in a given market, and finalised its decisions within 15 days on average after the last notification date. Recently, the TCA published its report on these decisions.

There had been 134 M&As dealt with by the TCA in the first half of 2013. The total amount of proposed transactions was approximately TRY60bn (US$751m). M&As related to Turkish firms amounted to TRY14 bn (US$194m) out of which TRY6bn (US$462m) was from privatisations. The below charts furnish the proportions by country of origin in terms of numbers and size of the deals.[1]

Figure 1: Number of cases by parties' country of origin in an M&A

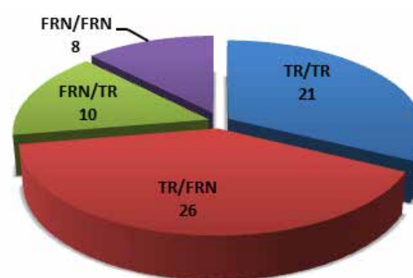
M&As between Turkish and foreign firms have taken the biggest share of the number of proposed transactions. M&As related to foreign undertakings alone also have a big proportion.

Moreover, data show that there is an asymmetry in the direction of the transfers, which is analysed in the charts below.

Figure 2: Number of cases by target firms' country of origin

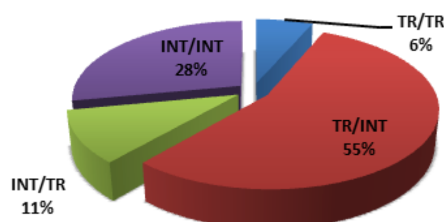
Similar to Figure 1, Figure 2 categorises the cases by looking at the origin of the target firm.[2] Although there are 22 cases where all parties are Turkish in Figure 1, there are 72 cases in Figure 2 where the target is Turkish, which implies that Turkish undertakings' acquisition by foreign undertakings was the case in most of the international transactions. This can be seen more clearly by looking at acquisitions alone.

Figure 3: Number of acquisitions by the country of origin – target/acquirer (in per cent)



In 40 per cent of cases, there has been an acquisition of a Turkey-based undertaking by a foreign one, whereas the opposite was the case only ten times (16 per cent).

Figure 4: Amount of acquisitions by the country of origin – target/acquirer (in per cent)



When the value of the firms are accounted for, the direction of the transactions becomes even clearer as more than half of the volume of transactions come from Turkish firms' acquisition by foreign firms, while the opposite type of transaction constitutes only 11 per cent.

Since previous analysis suggests a foreign investment flow in the form of M&As; the report also includes an overview of investors.[3]

According to the breakdown with respect to the countries of origin in the report, the leading countries are Germany (seven), the Netherlands (seven) and Luxembourg (six) in the 40 cases where either the merging entity target firm in an acquisition is established under the Turkish law. In terms of all transactions that have an effect in Turkey (76 cases), the leading countries are Germany (14), the US (11), the Netherlands (eight), Japan (eight) and Luxembourg (eight). Therefore, operations in the US and Japan are where big M&As have an impact on international markets (including Turkey).

In the first half of 2013, electricity generation and distribution ranked first in terms of number of all operations. Regarding the operations within Turkey, most operations occurred in the electricity generation and distribution and hospital services. In terms of operation volumes, software, consulting and related activities had the biggest share in all operations (37 per cent), whereas electricity generation and distribution had the biggest share of the operations within Turkey (24 per cent).

The total value of privatisations during the first half of 2013 was TRY6bn (US$462m) in Turkey. This amounts to 11 per cent of the aggregate volume of all transactions, and 83.6 per cent of the transactions within Turkey.

It is observed that the privatisations are concentrated in one sector, which is electricity generation and distribution with six state-owned undertakings being privatised. A similar trend also exists among the privatisations that were approved but not yet finalised in the relevant period.

The TCA reported that out of all operations (134 cases), private equities invested in 23 of them. These investments have a 12 per cent share in total transactions. The biggest private equity investment in volume[4] was the acquisition of Gardner Denver, a company operating in industrial machinery design and production, by US-based private equity fund KKR & Co.

Looking at the transactions in Turkey alone, out of 72 cases, private equities took place in 15 of them. Investments that were made to Turkish firms in the first half of 2013 constitute 25 per cent of the aggregate private equity investments and 3.6 per cent of the total volume of transactions in Turkey (including all M&As). The highest private equity investment in volume was the establishment of a joint entity by Ronesans Holding AŞ and Luxembourg-based Meridiam Infrastructure Easterneuropa SARL, the PPP project of Adana Integrated Health Campus).

Privatisations are completed in electricity distribution industry

An era is closed in the electricity distribution industry in Turkey. After nine years of a privatisation agenda of the electricity distribution, the last electricity distribution area/firm of the state owned enterprise EDAŞ is handed over to the private sector. With the closure of the transaction by share transfer, SOE will no longer be active in the distribution of electricity and the total 34 million customers in Turkey will now rely on the private firms.

As a crucial part of the industry, all electricity markets will be affected by the finalised privatisations. Now with the current situation in the distribution, the competition might improve and benefit the consumers and vertical layers of the industry. Although total liberalisation of the market may be improbable, the end of the direct intervention of the state as a participant is a very important step. The role of the state will now continue with the regulation in the distribution market only.

Major cases

Cement investigation

The TCA has concluded its investigation into four cement undertakings in order to determine whether they have agreed on the terms and conditions of the sales made to their dealers and concrete producers. The investigation was initiated upon a complaint regarding alleged anti-competitive communication between those undertakings. As a result, the TCA imposed administrative fines on three of the four undertakings. One of the most important issues regarding the decision was the application of recidivism on the calculation of the fine as the administrative

fine was increased from one per cent to 1.5 per cent. However, there was a controversial issue in relating to the inspection of personal items during on-the-spot inspection conducted during the investigation period. Even though the Competition Act explicitly states that examinations at undertakings can only be conducted over undertaking's properties, books and documents, the TCA neither questioned the validity of the evidence obtained from a personal handbag nor refrained from using the evidence in its decision.

Frito Lay investigation

The TCA initiated an investigation into Frito Lay, the dominant player in the packed chips market, in order to determine whether there had been an abuse of a dominant position, concerted practices and covenants not to compete through excluding competitors from the market, granting exclusivity or closing down the market. Finally, the TCA came to a conclusion after 15 months of investigation and imposed a fine totalling US$9.18m.

As a matter of fact, the above-mentioned investigation had been initiated to determine whether Frito Lay is in violation of a past decision dated 2004. Indeed, the TCA conducted more than five reviews over Frito Lay up to now. One of these had been an extensive investigation conducted in 2004; with this decision, an exemption granted to Frito Lay had been revoked in accordance with the Block Exemption Communiqué and it had been prohibited that any exclusivity leads to prevention of the sale of packed chips of competitors at any sales point.

According to the TCA's announcement on its website, Frito Lay is executing practices that resulted in single branding and the TCA researched whether these practices are common and systematic. In conclusion, the TCA determined that Frito Lay is in violation of Article 4 of the Competition Act. We will provide detailed comments regarding the case following the publication of the reasoned TCA decision.

Recently opened investigations

Here is a list showing recently opened investigations:

- Renault trucks: As a result of the annulment of the TCA's prior decision by the 13th Chamber of the Council of State, the TCA re-evaluated the complaint concerning Renault Trucks and initiated an investigation in order to determine whether the concerned undertaking violated Article 4 of the Competition Act by failing to ensure that 'authorised service standards' were prepared in compliance with the Block Exemption Communiqué in the motor vehicles sector and by discriminating between authorised and private services.
- Turkish Airlines: The TCA has decided to open an investigation against Turkish Airlines in order to determine whether the undertaking has violated Article 6 of the Competition Act, in respect of excluding competitors at the Istanbul-based domestic and international flights.
- Turkcell: The TCA has re-evaluated the complaint regarding the lease of areas to be used for the construction and operating of base stations. The TCA's decision on the complaint of Avea was overruled by the Counsel of State and the TCA will re-evaluate whether Turkcell has violated the Competition Act by prohibiting the rental of the Kule Services' base station areas to other communication services.
- Fresh baker's yeast producers: The TCA has opened an investigation against four fresh baker's yeast producers in order to determine whether these undertakings have increased the yeast prices in collusion and violated Article 4 of the Act.
- Cement producers: The investigation has been initiated into cement producers in order to determine whether these undertakings determined the white cement prices through anti-competitive agreements.
- 3M: The TCA has initiated an investigation into 3M upon the Counsel of State's decision, which annulled the previous decision of the TCA. The intention is to establish whether 3M has violated Article 4 of the Competition Act by making discriminatory practices between its dealers as customers and region restrictions.
- Turk Telekom: The TCA has decided to initiate an investigation concerning Turk Telekom, following the Counsel of State's decision. The TCA aims to define whether Turk Telekom has violated Article 4 of the Competition Act by setting its retail tariffs for final consumers below its wholesale tariffs for operators of long distance services. In addition, after the preliminary inquiry conducted in response to the complaint claiming that Turk Telekom sold its product called TT Card to its own dealer/agencies at below-cost prices, the TCA has also initiated an investigation.

- Mey İçki: As a result of a complaint concerning Mey İçki, owned by Diageo, the TCA has opened an investigation to determine whether the undertaking has violated the Competition Act by exclusivity and obstruction of competitors.

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

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

Website of ACTECON: www.actecon.com

Notes

1 The TCA determines the country of origin by looking at under which country's legal system the firm was established.
2 Acquired undertaking.
3 The TCA defined an investor as any party in a merger and the acquirer in an acquisition.
4 Out of the operations where the values are announced.

Ukrainian merger control: don't forget to check your transaction

UKRAINE

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In the light of the recent enforcement actions taken by the Ukrainian Antitrust Authority (the 'Authority') – the Antimonopoly Committee of Ukraine (AMCU) – in particular areas of antitrust regulation, the legal society is expecting some serious steps by the agency in the merger control sector. The Ukrainian antitrust agency, which was previously associated mostly with extremely low notification thresholds, is now becoming the respected watchdog famous for its huge fines. Its impact has become more frequent if not to say regular. The AMCU officials have already announced their ambitious intentions with regard to merger control infringements, emphasising their impact on the economy. They promised an imposition of maximum possible fines in the near future on companies breaching the filing obligation regardless of their local or foreign origin.

Now that 2013 is coming to an end, businesses all over the world are racing to closings having already overcome numerous stages of obligations fulfillment under conditions precedent sections of their transaction agreements. Some companies simply forget to check if Ukrainian antitrust laws are applicable to their multijurisdictional transactions, which is, however, fraught with serious financial losses. It is certainly quite complicated to keep in mind legal regulation peculiarities of all jurisdictions involved, especially when a transaction does not affect the assets of some particular countries where the merging parties are present via their business activities, which may even relate to completely different markets.

Meanwhile the merger control regime of some countries catches foreign-to-foreign transactions; Ukraine is one of these countries. Foreign-to-foreign transactions are notifiable in Ukraine, subject to meeting certain financial thresholds by the merging parties. Moreover, notification procedure is obligatory on the pre-closing stage, otherwise the merging parties may face revenue-based fines for violation of Ukrainian antitrust laws. With this, the liability for breach of the filing obligation is imposed regardless of transaction 'nationality'. This should be a considerable reason to run the transaction through Ukrainian lawyers before the closing to mitigate the filing obligation-related risks.

In cases where the analysis will show that the parties have to include Ukraine on the list of jurisdictions requiring antitrust agency approval, the parties would definitely need to be aware of all the recent developments in merger control regulation.

Traditionally Ukrainian merger control raises the issues. Though the legislation provides for general procedural regulation, one of the main peculiarities of merger control in Ukraine shall be a great discretion of the Authority in a number of important issues. The practice of the AMCU is being developed in quite a speedy manner case by case and the official practice overviews have not been presented to the public for quite a long period of time. Thus, the necessary knowledge is accumulated by the lawyers handling filings. This article aims to explain the recent developments in AMCU practice to help foreign lawyers and companies in navigating Ukrainian merger control.

Below we provide our practical tips for those who plan to undergo the notification procedure in Ukraine.

Carve-out impossibility

The most frequently asked question by foreign clients relates to the possibility of the carve-out of transaction parts affecting Ukrainian business. Merger regulations of many jurisdictions provide for such possibility releasing the parties from excess timing pressure. Ukrainian merger control regime does not provide for the carve-out possibility due to the following.

Any transaction shall be notifiable in Ukraine if the parties meet the thresholds set by the law. They are the: (i) group threshold (€12m in assets or annual revenues for all the parties); (ii) proportionality threshold (€1m in assets or annual revenues for each party); and (iii) Ukrainian threshold (€1m in assets or annual revenues in Ukraine for any party). Meeting the group threshold by the parties proves that the merger will have an effect on competition due to the market power of merger participants. At the same time the proportionality threshold's mission is to confirm a transaction's impact on competition given the proportionality of the parties' size. And, finally, Ukrainian threshold provides for an effect of the merger on Ukrainian markets. The latter is, however, quite disputable. Nevertheless, the parties are obliged to notify their transaction exactly on the reason of meeting these thresholds and regardless of targeting Ukrainian assets. Thus whatever the essence of the transaction, should the thresholds be met, the whole transaction is prohibited before obtaining merger clearance from the AMCU.

Additional filings

While analysing the transaction, one should be very attentive to merger qualification issues. First of all the merger regulations provide for submission of transaction documents to the AMCU. Most of the typical transaction agreements fixing the contemplated actions of the parties considered a merger under Ukrainian law containing non-compete clause provisions. The AMCU has been very attentive to this issue recently as a non-compete clause is also subject to antitrust law regulations. The provisions where the parties agree not to compete with each other are treated as concerted practices and are subject to the Authority's approval by means of a separate filing procedure. The latter is similar to a merger control filing, however it takes much more time and may delay the closing of the transaction. While the merger control filing timing takes a month and a half, concerted practices filing takes three and a half months. So it is important to build non-compete clause-related risks into the timing.

Another important detail raising issues is joint venture (JV) establishment qualification. Ukrainian laws provide for double treatment of such mergers, that is, JV establishment may be considered either a merger or concerted practices depending on the aim and possible results of the contemplated transaction. The laws provide that the main criterion for distinguishing between these shall be the possible coordination of competitive behaviour by the JV partners or the JV partners and the JV after its establishment. There is certain ambiguity in this issue and the AMCU's practice shows that both types of qualification are admissible. So, for time-saving purposes (just as a reminder, the procedures are significantly different from a timing perspective), we advise seeking a 'merger qualification' of the JV establishment.

Market borders

Although the following trend is applicable to transactions affecting Ukrainian markets, it is still worth noting. While the commodity and territorial borders of one part of the markets where mergers take place can be

easily determined, another can be quite complicated or even confusing. It is worth saying that Ukrainian antitrust laws empower the Authority with exclusive competence in the market borders determination. This means in practice that the AMCU may object to the market borders determined by the parties and disprove their market shares stated in the application based on the merging parties own calculation. While this peculiarity does not illustrate the severity on first sight, it may lead to undesirable if not fatal consequences. In particular, legislatively the only reasonable ground to block the transaction will be the signs of the market monopolisation or, in simpler words, the market share increase (to 35 per cent) resulting from the merger. Determination of the market borders will definitely influence this threshold depending on whether the market will be determined as local or international. The most recent practice includes the case where the parties managed to prove the international market borders in the course of the in-depth investigation initiated by the Authority (the so-called Phase II). The AMCU has requested the expert opinion from the economic institution, which helped to understand the specific market functioning peculiarities. The expert opinion supported the argument of the parties that a particular market does not exist within local borders despite the presence of product sales in Ukraine. However, it is worth saying that based on our knowledge, this case has been a single instance so far.

Disclosure of beneficiaries

The last, although definitely not least, issue worth noting is the great attention of the Authority to the beneficiaries of the merging parties, that is, the persons gaining profit from their business activities. Most of the clients are not willing to provide the information that is very personal on the owners of their business. However, the latest trend shows that this information now goes to the completeness of the application. In some cases, the client's business is handled by trust management institutions, however the AMCU's questions mostly concern the profit gaining rather than the formal corporate organisation of business. In our practice, we have faced several cases when beneficiary information disclosure was a matter of principle for the Authority. This can be explained by the necessity to analyse all possible connections of the parties with Ukraine and its business entities, which can be hidden behind nominal shareholders or managers. Moreover, the AMCU is planning to take serious steps in this direction in the near future, namely to adopt amendments to the current laws providing for the possibility to block transactions of merging parties hiding their beneficiaries offshore. These changes are planned for 2016.

We would also like to say a few words with respect to the further developments expected in Ukraine. An overview has been provided by the AMCU within the Draft Law 'On the State Programme of Competition Development for 2014–2024'. The draft was brought to the Parliament on 10 October 2013 by the Cabinet of Ministers of Ukraine. It was registered and assigned for the first review by the Parliament.

The Programme elaborated by the AMCU provides for sufficient amendments in the merger control sector. In particular, the following steps are to be taken within the proposed timing:

- adoption of simplified procedure for mergers which do not threaten competition and the Ukrainian economy – 2016;
- adoption of methodology on fine amount calculation for infringements of antitrust law – 2016;
- amendments to legislation regarding the possibility of transaction blocking for parties hiding their beneficiaries offshore – 2016;
- notification thresholds increase – 2018;
- adoption of methodology on assessment of horizontal mergers – 2018; and
- adoption of procedure for determination of marginal asset value which can be engrossed – 2020.

We will further keep you informed of all the developments in Ukrainian merger control regulations in future editions of this newsletter.

To summarise, currently foreign-to-foreign transactions are subject to the Ukrainian Antitrust Authority special interest. The liability provided for breaches of the filing obligation can amount to five per cent of the merging parties annual revenues. In absence of the methodology on the fine amount calculation, the Authority has much discretion in determining the exact fine amounts, in particular on the basis for their calculation. The law does not specify whether only Ukrainian or worldwide revenues shall be counted. Neither does the law provide for the liable parties specification indicating that the fines shall be imposed on the

undertakings breaching the laws. While the undertaking shall mean both legal person and a group of persons defined as persons related by control relations. Thus, it can be interpreted as the legally provided possibility to impose the fine on all the merging parties and to calculate it based on the parties' groups worldwide revenues for the year preceding the merger. Though we have been unaware of such practices by the Authority so far, we would also expect sufficient fines in the merger control sector taking into account the recent trends on the other infringements of antitrust laws (cartels, abuse of dominance and unfair competition cases announced in 2012-2013). Given the latest developments, we strongly recommend checking transactions for availability of a notification obligation in Ukraine with Ukrainian lawyers to mitigate unnecessary risks.

And, finally, even if the analysis results show that the AMCU approval was required when the transaction has already been closed, there are still some ways to minimise the fine amount as well as to legalise the transaction post factum. We will be delighted to assist with any issues concerning Ukrainian merger control. May your transactions be successful!

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Investigation into the hotel online booking sector: OFT consults on proposed commitments

The UK Office of Fair Trading (OFT) is considering accepting (under section 31A Competition Act 1998) commitments offered by InterContinental Hotels and online travel agents (OTAs), Booking.com and Expedia (the 'Parties'), to address the OFT's concerns, thereby closing its *Hotel Online Booking Sector* investigation (without any finding of infringement).

The OFT investigation

The OFT launched an investigation into pricing arrangements in the hotel online bookings sector in September 2010 following a complaint from another OTA. Similar investigations are underway in other jurisdictions.

A statement of objections was issued to the Parties in July 2012. Subsequently the Parties proposed commitments. The OFT is considering responses received to its public consultation on the proposed commitments and currently envisages coming to a decision on whether to accept them in December 2013.

Whilst the OFT's investigation is limited to a small number of major players, it has emphasised that it understands the alleged practices are potentially widespread.

The OFT's theory of harm

It is alleged that Booking.com and Expedia each entered into separate agreements with Intercontinental Hotels in respect of the Intercontinental London Park Lane Hotel (ILPL) which restricted the OTAs' ability to discount the rate at which ILPL room-only accommodation bookings were offered to customers, in breach of Article 101 TFEU/Chapter I Competition Act 1998. Each OTA agreed not to offer ILPL accommodation at a lower rate than the rate set and/or communicated by ILPL, for instance by funding a discount from its own margin or commission. The OFT alleged that this was an infringement by 'object', and therefore it did not need to consider its effects.

The OFT is concerned that the restrictions on discounting mean that there may be no competition on room rates between OTAs, and between OTAs and the hotel's own online sales channel. Such restrictions may also create barriers to entry for new OTAs (for example, by preventing them from offering discounts to help them to establish market share and achieve sufficient scale).

Although the original complaint to the OFT included concerns about 'rate parity' obligations/'room rate most favoured nation clauses', under which a hotel agrees to provide an OTA with hotel accommodation at a booking rate to end-users at a rate which is no less favourable than the lowest booking rate available through other online distribution outlets, the OFT states that it has not assessed such clauses as part of its investigation.

The proposed commitments

In summary, the commitments proposed by the Parties provide that:

- OTAs would be free to offer discounts/ reductions off headline room rates to 'closed groups' (for example members of loyalty schemes) up to the level of the relevant OTA's commission or margin;
- OTAs could publicise information regarding the availability of such discounts to all customers but would not be free to publicise details of the specific level of discounts to non-members of a closed group; and
- hotel partners would not be permitted to impose accounting requirements on OTAs that may restrict OTAs from being able to offer discounts.

The Parties proposed that the commitments:

- would apply to bookings made by UK residents for rooms in hotels located in the EU;
- would remain in force for three years; and
- will also apply to their dealings with other hotel partners and other OTAs (as applicable).

The OFT's view of the proposed commitments

The OFT provisionally considers that the commitments would address its concerns by introducing a degree of price competition where none may currently exist, as well as reducing barriers to entry.

In relation to the restrictions that would remain, given the limited nature of the commitments, the OFT appears to accept that these are capable of producing benefits to consumers and thus constituting sufficient justification for the practices. For example, the Parties argued that:

- a limitation on discounting assists with yield management by the hotels;
- consumers benefit from hotels independently setting their room rates as this functions as an indicator of quality; and
- unrestricted discounting would cannibalise the hotels' direct online sales channel, and risks other websites free-riding on the investment of the OTAs.

Issues not addressed by the proposed commitments or the OFT's invitation to comment

In addition to the relatively novel commitments being considered by the OFT, and its apparent recognition of efficiency agreements even in an 'object' context, the OFT's invitation to comment is notable for the topics it does not address.

First, the OFT does not express any view whether rate parity/MFN provisions could themselves cause competition concerns. It states that the Parties may need to amend such clauses if this is necessary to meet the commitments, and that it might take further action if the rate parity/MFN clauses undermine the commitments. It says it may investigate MFN clauses in other industries.

Secondly, the OFT does not address whether the OTAs should be regarded as genuine agents or independent distributors in competition law terms (nor how this question should be assessed in the online world), although, given the theory of harm, it must be proceeding on the assumption that the latter is the correct analysis.

CONFERENCE REPORT

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International Competition Network 2013 Meeting, Warsaw, Poland

23-26 April 2013

International co-operation is a policy priority for a vast majority of competition agencies; respondents emphasized that the globalization of markets, and consequently of anti-competitive activity, requires increasing and enhanced co-operation in enforcement.
Report on the OECD/ICN Survey on International Enforcement Co-operation, 2013

The International Competition Network (ICN)[1] held its 2013 annual meeting in Warsaw in April. It has come a long way since the small group of competition agencies and a smattering of non-government advisors first met in Naples, Italy, 12 years ago. Since that meeting ICN membership, open to competition agencies around the world, has grown steadily from 16 original members to 104 agencies from 92 jurisdictions today.

An overview of the ICN

For those unfamiliar with the ICN, it is an informal network of competition agencies with the common aim of addressing practical antitrust enforcement and policy issues. As its mission statement says: 'By enhancing convergence and cooperation, the ICN promotes more efficient and effective antitrust enforcement worldwide to the benefit of consumers and businesses.'

The ICN is not underpinned by any international treaty. It has no rule-making authority. It does not have a permanent secretariat, or even headquarters. It is led by a part-time Steering Group currently chaired by Andreas Mundt, President of the Bundeskartellamt, and relies for its success on members reaching consensus through goodwill is pursuing the common goal of fighting anti-competitive conduct in all its forms.

Although it is an organisation of competition agencies, since inception the ICN has had a policy of inviting the participation of experts from the legal and economic professions, business, consumer groups to participate in its work as non-governmental advisors. This reflects a recognition by the Steering Group that experts outside the various member agencies can and do provide valuable insights on best practice and inputs to the ICN's work programme.[2]

ICN Working Groups

The ICN is organised into a number of working groups, three of which – the Cartels Working Group, the Mergers Working Group and the Unilateral Conduct Working Group – are of particular interest to legal practitioners.

The Merger Working Group has, since its formation in 2001, developed recommended practices and practical guidance for the design and operation of merger review systems across issues of merger notification, investigation and analysis. These have included Recommended Practices for Merger Notification and Review Procedures, Recommended Practices for Merger Analysis and a Merger Guidelines Workbook.

The Cartel Working Group addresses, through workshops and practical manuals, the challenges of anti-cartel enforcement. This includes the prevention, detection, investigation and punishment of cartel conduct, both domestically and internationally. It has focussed in particular on hard-core cartels – price fixing, bid

rigging, market allocation and output restrictions. The Group's published work has included a report on Trends and Developments in Cartel Enforcement, an Anti-Cartel Enforcement Manual and a report on Co-Operation Between Competition Agencies in Cartel Investigations.

The Unilateral Conduct Working Group, the newest of the three, promotes greater convergence and sound enforcement of laws governing anti-competitive unilateral conduct of dominant firms and firms with market power, through workshops and reports. Its published work has included Recommended Practices on the Assessment of Dominance/Substantial Market Power and Recommended Practices on the Application of Unilateral Conduct Rules to State-Created Monopolies.

The Warsaw Meeting

The annual ICN meeting provides an opportunity for the working groups to report on, and seek endorsement for, their work products, through plenary sessions and breakout groups, and to discuss their future work programme.

Officials and NGAs from 78 jurisdictions attended the Warsaw meeting. They ranged from established jurisdictions such as the EU, the US, Canada and Australia, to new agencies from countries such as Malawi, Indonesia and the Philippines.

The ACCC members attending the meeting in addition to chairman Rod Sims, were Brian Cassidy, Marcus Bezzi and Tim Lear. The BLS Competition and Consumer Committee was well represented by Stephen Ridgeway, Dave Poddar, Russell Miller, Ayman Guirguis and Allan Fels. Stephen Ridgeway spoke on the plenary panel on anti-cartel enforcement.

At the Warsaw meeting:

- The Cartel Working Group presented a new chapter for its Anti-Cartel Enforcement Manual dealing with international cooperation and information sharing. That chapter explained: *many of the methods currently being used to share information and cooperate at the international level, [but] the list is not exhaustive, and the anti-cartel community continues to develop and encourage new, innovative tools and mechanisms of international cooperation and information sharing.*[3] The Group continued its work at its annual workshop that was held in Cape Town in October 2013.
- The Mergers Working Group presented a plenary session on trends in merger review economic analysis and ran breakout sessions on a number of issues including evaluating economic evidence and on merger remedies. The Group is now working on enforcement cooperation in merger reviews and an ICN framework for merger review cooperation between agencies.
- The Unilateral Conduct Working Group presented a plenary session on key issues with exclusive dealing and ran breakout sessions including on the current state of economic research with regard to exclusive dealing and on justifications and defences for unilateral conduct. The Group is now working on a workbook on unilateral conduct dealing with the objectives of unilateral conduct laws, assessment of dominance/substantial market power, predatory pricing and single branding. The Group continued its work at a workshop on exclusive dealing that was held in Stockholm in September 2013.

Conclusion

As Chairwoman Ramirez, the chair of the US Federal Trade Commission, said, summing up the progress the ICN has made:

> 'This 12th annual ICN conference demonstrated how competition agencies from around the world can come together both to advance convergence toward best practices in antitrust enforcement and to strengthen the voice of competition policy as our governments confront common economic challenges.'

There is little doubt that, through discussion and persuasion, the ICN members are achieving a level of convergence and cooperation that few thought possible at the start.

Notes

1 www.internationalcompetitionnetwork.org

2 Indeed, the International Bar Association played an important role in bringing agencies together to form the ICN in the first place.

3 See http://icnwarsaw2013.org/docs/icn_chapter_on_international_cooperation_and_information_sharing.pdf.