2013 ANTITRUST YEAR IN REVIEW

ABA Section of International Law

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MESSAGE FROM THE COMMITTEE CHAIRS

The goal of the International Antitrust Law Committee is to publicize global developments in and provide a forum for discussion and analysis of competition law. The Committee is comprised of members from around the world, making up an international network of competition/antitrust practitioners and government officials. We take a leading role in policy development, frequently providing comments and input to assist competition agencies and government officials worldwide in the formulation and enforcement of their competition laws.

One of our Committee's principal functions is to keep our Committee and Section members informed about significant international competition law developments. We do this through regular reports on our Committee listserve, brown bags and teleconferences, presentations at the Section's Spring and Fall meetings, and through our "Hot Topics" bulletins and Committee newsletter.

Another major component of our outreach effort is our annual analysis and summary of key antitrust developments in jurisdictions around the world. We do this through two vehicles: the International Section's comprehensive "Year in Review" publication and through our committee's own Year in Review Monograph, the 2013 edition of which you are now reading.

The "Year in Review" requires substantial time and effort on the part of the contributors and editors. We are indebted to our 2013 editors, Marcelo den Toom, Claire Green, Kristin Hjelmaas Valla and Nikiforos Iatrou, and to all of the authors for their excellent contributions to this project.

Given the substantial lead time required to prepare this publication, we are already looking ahead to the 2014 edition. The 2013 Year in Review covers 34 jurisdictions. We would encourage all those who might be interested in contributing to this publication to contact us. You can also visit the International Antitrust Law Committee's website at http://www.abanet.org for more information about this and other of our activities.

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EDITOR'S NOTE

This "Year in Review" is a compilation of the latest antitrust/competition law developments in 34 key jurisdictions worldwide. Each contribution offers commentary on significant developments taking place across a number of areas, including legislation, mergers, cartels and anticompetitive practices, abuses of dominant position and court decisions.

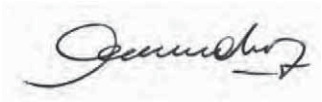
This is the International Antitrust Law Committee's 8th edition of "Year in Review", which debuted in 2006 with reports from 24 jurisdictions.

The 2013 Year in Review is the culmination of countless hours of work on the part of our authors and our editorial team including Claire Green, Kristin Hjelmaas Valla and Nikiforos Iatrou. I am extremely grateful for their dedication and commitment in producing this volume.

I also extend thanks to Bronwyn Roe and Andrew Brock of WeirFoulds LLP for their editorial assistance, and M. & M. Bomchil's marketing department for its help in making this work more attractive to read.

I hope you will enjoy this publication as much as we did during the compilation and editing process, and find it interesting and useful.

Sincerely,



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ARGENTINA

2013 ANTITRUST YEAR IN REVIEW

By Miguel del Pino and Santiago del Rio
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LEGISLATIVE DEVELOPMENTS

Jointly with the appointment of new Secretary of Domestic Trade Augusto Costa after the exit of its long-standing predecessor, the Executive Power issued a decree on December 12, 2013 (Decree 2136/2013)[1] which set out that the Secretary of Domestic Trade –ultimate enforcer of antitrust laws- will also overtake the functions of the former Secretary of International Trade.

As regards bills before Congress, there are currently two which may entail a significant change over the current scheme.

The first bill involving the amendment of the Antitrust Law advocates for the updating of the amounts included under sections 8, 10 and 46 of the Antitrust Law, mainly merger control thresholds, exemptions for filing and fines for anticompetitive conducts.

Regarding the merger control thresholds of Section 8 of the Antitrust Law, the bill contemplates an increase in the local turnover of the acquirer and target from the current ARS 200,000,000 (approximately USD 30,300,000) to the amount of ARS 600,000,000 (approximately USD 90,900,000). While the updating would certainly raise the bar for many transactions to be filed, it is important to bear in mind that it would still amount to almost one half of its 1999 value (year when the Antitrust Law was passed), when the ARS – USD exchange rate was 1:1. Accordingly, the bill seeks to increase the amount provided by Section 10.e) for those transactions that would benefit from the de minimis exemption. As a result of such amendment, the new de minimis provision would apply if each of the total local assets of the acquired company and the local amount of the transaction do not exceed ARS 60,000,000 (approximately USD 9,090,000), provided, however, that the exemption would not apply if any of the involved companies were part of economic concentrations in the same relevant market for an aggregate of ARS 60,000,000 (approximately USD 9,090,000) in the last 12 months or ARS 180,000,000 (approximately USD 27,300,000) for the last 36 months.

Finally, this bill provides that Section 46 of the Antitrust Law will be amended so as to increase threefold the amounts of the sanctions applicable to those who are found responsible of committing the acts prohibited under Chapters I and II and Section 13 of Chapter III of the Antitrust Law, namely anticompetitive practices.

As to the second bill, it envisages the creation of the Antitrust Prosecutor by means of the insertion of a Section 24 bis in the Antitrust Law. This Antitrust Prosecutor would have the following duties, among others: (i) file antitrust claims on its own; (ii) partici-

1 Decree No. 2136, December 13, 2013 [32785] BO, 1.

pate in all proceedings set out under the Antitrust Law and issue its opinion on the matter; (iii) request for preventive measures under Section 35 of the Antitrust Law; and (iv) request the collaboration of national, provincial or municipal authorities in order to carry out its mandate, if needed.

MERGERS

Although the Antitrust Commission was very active in 2013, only 39 resolutions were issued over the course of the year, of which 34 consisted on approvals without undertakings and five on conditioned approvals. Even when, as can be seen from these statistics, there have been no prohibitions over the course of the last year, the Antitrust Commission has continued to tighten up its use of remedies in two fronts, namely: (i) competitive concerns regarding the acquisition or exercise of substantial market power; and (ii) ancillary restraints.

Regarding the first issue, in merger control proceedings No. 863, "Conopco Inc., ACE Merger y Otro s/Notificación Art.8, Ley 25.156",[2] the Secretary of Domestic Trade conditionally approved the merger among Ace Merger Inc. and Alberto-Culver Company, which resulted in its acquisition by Unilever. In said resolution the approval was subject to the compliance of a two-sided irrevocable commitment which contained a structural component of divestment of certain businesses and a behavioral component. The divestment entailed the sale of two business units alongside the corresponding trademarks and the behavioral commitments included the non-hiring of exclusive transportation and logistics services, among other restrictions. As regards the second front for remedies, namely ancillary restraints related to non-compete clauses, it is worth pointing out that as of late the Antitrust Commission has issued several resolutions either reducing the non-competition term to two years (in those cases in which no know-how is transferred) or otherwise to the duration of a joint venture (but not allowing any post-termination term).

In what respects to Advisory Opinions regarding the correct interpretation of the Antitrust Law for merger control proceedings, the Antitrust Commission reinforced once again its analysis on family ties and how they must be analyzed so as to determine whether a notification is necessary, as shown in its resolution issued in Advisory Opinion No. 992, "Conosur Comunicaciones S.A. e Inverinter S.A. s/ Consulta Interpretación Ley 25.156".[3]

The Antitrust Commission referred in this case to the criteria developed by the European Commission which performs a case-by-case analysis when analyzing the existence of family ties in order to regard them as circumstances evidencing de facto control. In this particular case kinship links were considered since the family ties involved were between parents and their offspring, the Antitrust Commission therefore concluding that the shareholders acted as a group of control.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

An important case that was analyzed during 2013 entailed the analysis of the impact of the use of proprietary bottles by the most important beer manufacturer in Argentina. On December 2nd, 2011, Compañía

2 "Conopco Inc., ACE Merger y Otro s/Notificación Art.8, Ley 25.156", Secretary of Domestic Trade, Resolution No. 9 (February 8, 2013).
3 "Conosur Comunicaciones S.A. e Inverinter S.A. s/ Consulta Interpretación Ley 25.156", Secretary of Domestic Trade, Resolution No. 40 (May 8, 2013).

Industrial Cervecera S.A. ("CICSA") filed a claim before the Antitrust Commission against Cerveceria y Maltería Quilmes S.A.I.C.A y G. ("CMQ") for a presumed infringement to the Antitrust Law, alleging that CMQ had decided unilaterally and inopportunely to modify the existing system of free exchange of generic and returnable 970 cm^3 bottles by means of the release of new non-generic "proprietary bottles" of 1,000 cm3. According to CICSA competition was impaired since a consumer possessing a proprietary bottle of a certain trademark would only be able to exchange it for beer bottles of the same trademark, or, alternatively, would have to buy non-returnable bottles.

Within the framework of the claim, on December 26, 2012, CMQ and CICSA offered the following commitment: (i) until March 31, 2013, CICSA could implement its own proprietary bottles in the locations in which CMQ had already implemented its proprietary bottles; (ii) until March 31, 2013, CMQ could not implement its proprietary bottles in any other province or location; (iii) as of March 31, 2013, if any party decides to implement its proprietary bottles in other province or location, it will have to give prior notice to the other party; and, finally the parties (iv) committed not to impose costs to the consumers regarding bottles' exchange, and to educate the points of sale in order to avoid any confusion.

The Antitrust Commission considered the commitments to be appropriate without further explanation, merely referring to the fact that both CMQ and CICSA intended to have their proprietary bottles and to case law on the matter which showed that commitments were found to be acceptable in those cases in which there had not been a preliminary finding regarding harm to the general economic interest.

Other cases that were analyzed over the last year entailed restrictions and recommended practices involving trade associations. In investigation No. 880, "Asociación de Anestesia, Analgesia y Reanimación de Buenos Aires s/Infracción Ley 25.156",[4] the Secretariat of Domestic Trade imposed a fine of ARS 5,000,000 (approximately USD 75,000) to the defendant and also ordered the entity –an association of anesthesiologists- to refrain from setting prices for its associates as well as from setting exclusivity clauses for the provision of their services. Furthermore, in investigation No. 1021, "Asociación Civil Círculo Médico de San Pedro s/Infracción Ley 25.156",[5] the Secretariat of Domestic Trade imposed a fine of ARS 150,000 (approximately USD 23,000) to the defendant and also ordered the entity –a physicians association- to refrain from performing certain conducts, such as the imposition to its associates of a restriction not to carry out agreements with healthcare providers that do not have an arrangement with the entity, and the conduct that consisted on establishing discriminatory conditions to unaffiliated physicians. Finally, in investigation Nº. 554, "Cámara Argentina de In-

4 "Asociación de Anestesia, Analgesia y Reanimación de Buenos Aires s/Infracción Ley 25.156", Secretary of Domestic Trade, Resolution No. 139 (November 28, 2013).

5 "Asociación Civil Círculo Médico de San Pedro s/Infracción Ley 25.156", Secretary of Domestic Trade, Resolution No. 133 (November 27, 2013).

dustrias Ópticas (CADIOA) y Otros s/Infracción Ley 25.156",[6] the Secretariat of Domestic Trade imposed fines in the amount of ARS 733,000 (approximately USD 111,000), due to an accusation filed by an ophthalmologists trade association against glass manufacturers as well as their corresponding trade association, due to an agreement between said companies to increase prices in a range of 40% to 80%.

On a final note, it is worth pointing out that in the termination of a distribution agreement case analyzed in investigation No. 562, "Volvo Constructions Equipment do Brasil y Otro s/Infracción Ley 25.156",[7] the Secretariat of Domestic Trade considered that the defendants, companies of the Volvo group, had the right to terminate an exclusive distribution agreement with a local company and to vertically integrate the distribution within their own commercialization framework. By stating that within a competitive environment any practice carried out by a manufacturer regarding its resellers is oriented towards the optimal placement of its products in the market, the Antitrust Commission left on record that it would not be logical for a party to impose a vertical restraint in order to reduce the sales of its own product (as long as it is done within a competitive market), but rather that its main purpose had to be to optimize its commercial chain. It also took into account that the distributor with which Volvo ceased to operate could enter into similar type of agreements with Volvo competitors, and that Volvo did not have a dominant position in Argentina, thus concluding that no harm to competition could occur.

COURT DECISIONS

After almost eight years, the Supreme Court confirmed on May 7, 2013 the fines imposed to several cement companies as well as the cement trade association in the landmark price fixing cement case[8]. This case had been initiated by a tip from a disgruntled employee to a journalist back in 1999, stating that the main cement companies in the country were carrying out a collusive scheme within the framework of the Asociación de Fabricantes de Cemento Portland, the cement trade association. Upon a dawn raid at said trade association, the Antitrust Commission obtained information that an exchange of information had been set up for decades, by means of which there would be a monitoring of the production output of the main cement companies in Argentina. This case remains to this date the most important and relevant cartel investigation carried out by the Antitrust Commission.

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6 "CADIOA (Cámara Argentina de Industrias Ópticas y afines) y otros s/ Infracción Ley 25.156", Secretary of Domestic Trade, Resolution No. 139 (November 28, 2013).
7 "Volvo Constructions Equipment do Brasil y otros s/ infracción Ley 25.156", Secretary of Domestic Trade, Resolution No. 128 (November 27, 2013).
8 "Loma Negra Compañía Industrial S.A. y otros /s ley 22.262", CSJN L. 152, XLV (May 7, 2013).

AUSTRALIA

2013 ANTITRUST YEAR IN REVIEW

By Paul Schoff and Katrina Groshinski of Minter Ellison, with assistance from Eric White

LEGISLATIVE DEVELOPMENTS

There were no relevant amendments to the Competition and Consumer Act 2010 (Cth) ("CCA") in 2013. However, the Liberal-National Government which took office in September 2013 has announced a "root and branch" review of competition law. The unpublished draft terms of reference have been distributed to interested parties and are very broad. Government comments suggest that the review will have a particular focus on protecting small business.

The review panel has been tasked with considering broader economic reforms beyond alterations to the legislative framework. However, it is likely that some provisions of the CCA will come under heavy scrutiny, most notably the misuse of market power (abuse of dominance) provisions which have been described by the relevant minister as a "hunting dog that won't leave the porch."[1]

MERGERS

The mergers and acquisitions that have been subject to the review of the Australian Competition and Consumer Commission ("ACCC") have been predominately in the supermarket and airline industries. While many of the reviews have received significant media attention, only two proposed acquisitions have been opposed by the ACCC. In June 2013, the ACCC announced that it would oppose the proposed acquisition by H J Heinz Company Australia Limited ("Heinz") of Rafferty's Garden Pty Ltd ("Rafferty's Garden"). Heinz and Rafferty's Garden are the two largest suppliers of wet and dry infant food in Australia. The ACCC opposed the acquisition because it said it would create a highly concentrated market (the merged entity would account for 70-80% of sales) and the barriers to entry and expansion in the market are high due to brand recognition and preference.[2]

Also in June 2013, the ACCC announced that it would oppose the proposed acquisition by Woolworths Limited ("Woolworths") of a supermarket site at Glenmore Ridge in the western suburbs of Sydney. The ACCC found that the acquisition would likely result in a substantial lessening of competition in the local supermarket market. It came to this conclusion because Woolworths, Australia's largest grocery and liquor retailer, operates the only other supermarket in the suburb and the Glenmore Ridge site represents the only opportunity for a competing supermarket to enter the market in the foreseeable future other than an ALDI supermarket which is likely to open in 2014.[3]

In late 2012, the ACCC announced that it would oppose Carsales.com Limited's ("Carsales") proposed acquisition of assets associated with the Trading Post business ("Trading Post") from Telstra Corporation Limited. The ACCC found that the proposed

1 Anna Vidot, "Minister wants competition law with bite", ABC RURAL NEWS, October 30, 2013, http://www.abc.net.au/news/2013-10-30/food-and-grocery-forum-competition-law/5057728.

2 Press Release, Austl. Competition & Consumer Comm'n, "ACCC to oppose proposed acquisition of Rafferty's Garden", (June 6, 2013), http://www.accc.gov.au/media-release/accc-to-oppose-proposed-acquisition-of-raffertys-garden.

3 Press Release, Austl. Competition & Consumer Comm'n, "ACCC to oppose Woolworths' proposed acquisition of Glenmore Ridge site" (June 6, 2013),http://www.accc.gov.au/media-release/accc-to-oppose-woolworths-proposed-acquisition-of-glenmore-ridge-site.

transaction would substantially lessen competition in the markets for the supply of online automotive classified advertising to dealers and to private advertisers in Australia. The ACCC came to this conclusion on the basis that the proposed transaction would remove the closest and most effective competitor of Carsales, and due to Carsales' audience and inventory positions, other competitors (or new entrants) would be unable to place effective competitive constraints on Carsales to prevent substantial lessening of competition from arising.[4]

The ACCC has recently released an updated version of its Informal Merger Process Guidelines which set out the procedure for the most often used process for obtaining merger clearance. The updated guidelines, while not making major changes, attempt to provide more certain indicative timeframes for merger clearance, the length of which will depend on the complexity of the transaction.[5]

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

As of October 2013, the ACCC has stated that it has more than 20 current in-depth cartel investigations or matters before the court.[6]

The ACCC continued in 2013 to pursue proceedings against airlines for alleged involvement in price fixing in relation to fuel and other surcharges applying to the international carriage of air cargo. Since 2008, the ACCC has brought a total of 15 proceedings against airlines. Thirteen of those proceedings have now settled, resulting in penalties totaling AUD 98 million (approximately USD 87 million).[7] Proceedings continue against PT Garuda Indonesia Ltd and Air New Zealand Ltd with a judgment expected in 2014.

In April 2013, the Federal Court of Australia ordered Viscas Corporation, a Japanese cable supplier, to pay AUD 1.35 million (approximately USD 1.20 million) after Viscas admitted that it had entered into an anti-competitive arrangement with other Japanese and European suppliers of land cables in relation to an invitation to tender for a project. The Court also made orders restraining Viscas from engaging in similar conduct for a period of three years and requiring it to contribute to the ACCC's costs. Proceedings are continuing against two foreign corporations, Prysmian Cavi e Sistemi Energia S.R.L and Nexans SA, who are alleged to have also been involved in the anti-competitive arrangement.[8]

In July 2013, the Federal Court of Australia handed down its first decision applying the cartel provisions of the CCA, specifically the bid rigging provisions. The dispute arose from the sale of Norcast Wear Solutions ("NWS"), a mining consumables company owned by Norcast S.Ar.L's ("Norcast"). Bradken Limited ("Bradken"), a major Australian mining consumable company, was not directly contacted by Norcast's investment bank about the sale and therefore believed it had been excluded from the sale as a result of previous dispute with Norcast. Bradken approached Castle Harlan, a New York based private equity fund which had not known about the transaction. Bradken and Castle Harlan concealed Bradken's involvement in

4 Press Release, Austl. Competition & Consumer Comm'n, "ACCC to oppose Carsales Acquisition of Trading Post" (December 20, 2012),http://www.accc.gov.au/media-release/accc-to-oppose-carsales-acquisition-of-trading-post.

5 ACCC Informal Merger Review Process Guidelines 2013, http://www.accc.gov.au/publications/informal-merger-review-process-guidelines-2013.

6 Press Release, Austl. Competition & Consumer Comm'n, "ACCC releases discussion paper in cartel immunity policy review", (September 30, 2013), http://www.accc.gov.au/media-release/accc-releases-discussion-paper-in-cartel-immunity-policy-review.

7 Penalties have been imposed on Thai Airways, Cathay Pacific, Singapore Airlines Cargo, Emirates, Malaysia Airline System Berhad, Korean Air Lines Co. Ltd, Japan Airlines International Co., Ltd , Société Air France, Koninklijke Luchtvaart Maatschappij NV, Martinair Holland NV, Cargolux, Qantas Airways Limited and British Airways.

8 Australian Competition and Consumer Commission v Prysmian Cavi E Sistemi Energia S.R.L. (No 5) [2013] FCA 294 (April 5, 2013), available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2013/294.html?stem=0&synonyms=0&query=viscas.

the sale process. A few hours after Castle Harlan purchased NWS for USD 190 million, it on-sold NWS to Bradken for USD 212.4 million. The Court agreed with Norcast and held that there had been an unlawful bid rigging arrangement between Bradken and Castle Harlan by which Castle Harlan agreed to bid and Bradken agreed not to bid. A crucial element of the bid rigging provision of the CCA is that the two parties to the 'contract, arrangement or understanding' must have been in competition or likely to be in competition with each other for the supply or acquisition of the relevant goods or services (known as the "competition condition"). The Court found that the competition condition was satisfied because it was "at least possible" that Bradken and Castle Harlan would have been in competition with each other in relation to the acquisition of NWS despite Castle Harlan not being aware of the transaction prior to being approached by Bradken. Following an appeal of the decision, the parties have now settled the dispute and the decision of the Federal Court has been set aside but without detailed reasons.[9]

In September 2013, the Federal Court of Australia made interim declarations that Cement Australia Pty Ltd entered into contracts with four power stations in South East Queensland that contained provisions requiring the power stations to supply them with a minimum amount of unprocessed flyash. The Court held that in doing so the defendants engaged in conduct that had the purpose, effect or likely effect of substantial lessening of competition in breach of section 45 of the CCA. The Court found that the conduct did not amount to misuse of market power under section 46.[10]

In October 2013, the Federal Court of Australia found that Koyo Australia Pty Ltd ("Koyo Australia") made and gave effect to two separate cartel arrangements with two of its competitors to increase the price of ball and roller bearings to their aftermarket customers. The Court made orders, by consent, which require Koyo Australia to pay penalties of AUD 2 million (approx. USD 1.75 million) and implement a competition and consumer compliance training program.

In November 2013, the Federal Court of Australia dismissed proceedings brought by the ACCC alleging that by requiring a mortgage broker to limit the amount of refund it could provide to its customers, Australian and New Zealand Banking Group Limited ("ANZ") had breached price-fixing provisions of the Trade Practices Act (now the CCA). The Federal Court held that the mortgage broker and ANZ provided different services and therefore were not in competition with each other – meaning that the price-fixing prohibitions were not breached. The ACCC has appealed the decision.[11]

9 "Norcast S.ár.L v Bradken Limited (No. 2) [2013] FCA 235" (March 19, 2013), available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2013/235.html?stem=0&synonyms=0&query=norcast.

10 "Australian Competition and Consumer Commission v Cement Australia Pty Ltd" [2013] FCA 909 (September 10, 2013), available at http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2013/909.html?stem=0&synonyms=0&query=title(%222013%20FCA%20909%22).

11 "Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Limited" [2013] FCA 1206 (November 18, 2013), available at http://www.austlii.edu.au/au/cases/cth/FCA/2013/1206.html.

In an interesting contrast to the ANZ case, in December the Federal Court of Australia held that Flight Centre, a travel agent, attempted to enter into arrangements with various airlines which sought to eliminate differences in air fares so as to fix, control or maintain its retail or distribution margin. The Court found that while travel agents and airlines are not competitors in the provision of some services, in the provision of 'booking and distribution' services they are in fact competitors. Therefore, Flight Centre's attempts to enter into an agreement to fix its margin (or the price for its distribution and booking service), was a breach of the price fixing prohibitions.[12]

In December 2013, the ACCC filed proceedings in the Federal Court of Australia against Colgate, Cussons and Woolworths. It is alleged that in early 2008, Colgate and Cussons (together with immunity applicant, Unilever) entered into an arrangement to coordinate pricing, product formula and package sizes in relation to ultra-concentrate detergents. It is also alleged that Woolworths, a major supermarket chain, and a former sales director of Colgate were knowingly concerned in the alleged cartel.[13]

Also in December, the ACCC instituted proceedings in the Federal Court of Australia against ball and roller bearings seller, NSK Australia Pty Ltd ("NSK"). The ACCC allege that in 2008 and 2009, NSK and at least two of its competitors entered into cartel arrangements whereby they exchanged pricing information in order to control the price of bearings sold to aftermarket customers.[14]

The ACCC has announced that it is reviewing its immunity policy for cartel conduct. Following targeted consultation, the ACCC has issued a discussion paper that invites interested parties to make submissions. The discussion paper focuses on particular key issues including clarifying when an applicant may not be provided immunity and improving certainty as to when and in what circumstances the ACCC will revoke immunity. A revised policy is expected to be released in early 2014.[15]

ABUSES OF A DOMINANT POSITION

In a clear example of the ACCC embracing difficult and high profile litigation, the ACCC has commenced proceedings against Visa Inc ("Visa") and a number of related entities alleging breaches of the misuse of market power prohibitions in relation to dynamic currency conversion ("DCC") services. DCC services give international cardholders the choice of completing a transaction in their home currency or in the local currency of the retail store or ATM. Specifically, the ACCC alleges that Visa misused its market power for the purpose of preventing the expansion of DCC services to new merchant outlets in Australia (such as retail stores) and preventing businesses

12 "Australian Competition and Consumer Commission v Flight Centre Limited" (No 2) [2013] FCA 1313 (December 6, 2013), available at http://www.austlii.edu.au/au/cases/cth/FCA/2013/1313.html.

13 Press Release, Austl. Competition & Consumer Comm'n, "ACCC Takes Action Against Alleged Laundry Detergent Cartel" (December 12, 2013), http://www.accc.gov.au/media-release/accc-takes-action-against-alleged-laundry-detergent-cartel.

14 Press Release, Austl. Competition & Consumer Comm'n, "ACCC Takes Action Against NSK for Alleged Cartel Conduct" (December 13, 2013), http://www.accc.gov.au/media-release/accc-takes-action-against-nsk-for-alleged-cartel-conduct.

15 Press Release, Austl. Competition & Consumer Comm'n, "ACCC Releases Discussion Paper in Cartel Immunity Policy Review" (September 30, 2013), http://www.accc.gov.au/media-release/accc-releases-discussion-paper-in-cartel-immunity-policy-review.

in Australia from supplying DCC services on ATMs in competition with Visa's own currency conversion service. The ACCC also alleges that Visa engaged in exclusive dealing by supplying its payment network to Australian banks, and in turn to retailers, on conditions they do not acquire DCC services from other DCC suppliers.[16]

Following much media interest, the ACCC has confirmed that it is investigating the major supermarket chains, Coles and Woolworths, for potential breaches of the CCA.[17] The conduct focuses on the relationships with suppliers including demanding additional payments beyond those agreed, imposing penalties not agreed between the parties and threatening to remove products if the payments or penalties are not paid. Around 50 suppliers are assisting the ACCC on a confidential basis with its ongoing investigation.

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16 Press Release, Austl. Competition & Consumer Comm'n, "ACCC Commences Federal Court Proceedings Against Visa" (February 4, 2013), http://www.accc.gov.au/media-release/accc-commences-federal-court-proceedings-against-visa-inc.

17 Rod Sims, "Thoughts on Market Concentration Issues" (speech delivered at the Australian Food and Grocery Council Industry Leaders Forum, Canberra, October 30, 2013), available at http://www.accc.gov.au/speech/thoughts-on-market-concentration-issues.

AUSTRIA

2013 ANTITRUST YEAR IN REVIEW

By Dr. Axel Reidlinger (Freshfields Bruckhaus Deringer LLP) and Dr. Heinrich Kuhnert (bpv Hügel Rechtsanwälte OG)

LEGISLATIVE DEVELOPMENTS

On March 1, 2013, the first significant overhaul of Austrian competition law since 2006 came into force.[1] The amendment's main focus is on strengthening the Federal Competition Authority's (the "FCA") enforcement powers, in particular in the context of dawn raids. In addition, the amendment provides for certain improvements to the position of private applicants in follow-on damages proceedings, as well as a number of more limited substantive changes (such as the introduction of a new de minimis regime for restrictive agreements, which is based on the EU model, or the establishment of new market share thresholds at which the existence of collective dominance will be presumed unless rebutted).

MERGERS

Merger activity remained stable in 2013, with 299 merger notifications received by the FCA. Nine cases were referred to the Cartel Court for investigation in phase two, while one further case was cleared in phase one based on remedies.

In line with previous years, no mergers were formally prohibited. However, in a number of cases, clearance was granted conditionally on remedies entered into by the notifying parties. Remedies included, inter alia, a commitment to reserve capacity to competitors in a vertical merger between a waste management firm and an operator of an incineration plant,[2] and a pricing commitment regarding the annual acquirer fee, as well as individual transactions fees, in a merger in the payment services industry.[3]

Court practice in the mergers field largely focused on formal matters in 2013. In two cases, the courts imposed fines for failures to notify of EUR 10,000[4] and EUR 100,000[5] respectively. The latter decision is interesting insofar as the Cartel Court had only imposed a fine of EUR 4,500 on the grounds that the purchaser's negligence was minor and that the transaction had not produced adverse effects in Austria.[6] The Cartel Court found, in particular, that the purchaser had instructed an international law firm with considerable experience in cross-border M&A transactions. It held that it would be overly strict to require clients to check whether an experienced law firm had missed a filing requirement. The FCA appealed and asked for the fine to be increased to approximately EUR 5 million, mainly on the basis of the purchaser's large group turnover. The Austrian Supreme Court increased the fine, but only to EUR 100,000. It noted

1 Act Amending the Cartel Act and the Competition Act, January 11, 2013, Bundesgesetzblatt I [BGBl I] No. 13/2013 (Austria).

2 FCA, October 22, 2013, Case No. BWB/Z-2121 "Saubermacher Dienstleistungs-AG/Kärntner Restmüllverwertungs GmbH" (Austria); see also summary available in German at http://www.bwb.gv.at/Aktuell/Seiten/Saubermacher%20Dienstleistungs-AG;%20K%C3%A4rntner%2Restm%C3%BCllverwertungs%20GmbH.aspx

3 Cartel Court, September 5, 2013, Case No. 29 Kt 48, 49/13 "Six Austria Holding GmbH/PayLife Bank GmbH" (Austria); see also summary available in German at http://www.bwb.gv.at/Aktuell/Documents/Z-1993%20Six_PayLife_Auflagen.pdf.

4 Cartel Court, January 31, 2013, Case No. 25 Kt 67/12 (Austria); see also summary available in German a thttp://www.bwb.gv.at/Zusamm schluesse/verbotene%20Durchführung/Seiten/BWBZ-1828.aspx.

5 Oberster Gerichtshof [OGH] [Supreme Court], June 27, 2013, Case No. 16 Ok 2/13 (Austria), available at http://www.ris.bka.gv.at/.

6 The Cartel Court had initially imposed a fine of EUR 4,500 in 2011. On remand by the (Oberster Gerichtshof [OGH] [Supreme Court], December 5, 2011, Case No. 16 Ok 2/11, available at http://www.ris.bka.gv.at/), the Cartel Court re-affirmed its findings and again imposed a fine of EUR 4,500.

that the law firm had not even requested a country-by-country breakdown of the turnover of the parties. In the absence of such a data request, the purchaser could not rely on the assumption that the law firm had carried out a multijurisdictional filing analysis. In re-assessing the level of the fine, the Supreme Court held that infringements of formal requirements, such as the obligation to notify, should be subject to lower fines than cartels or abuses of dominance, and therefore settled for a much lower amount than applied for.[7]

Two other cases in the merger field bring out the difficulty in obtaining formal confirmation that a merger is not notifiable in Austria. The difficulty stems from the fact that the FCA does not have decision-making power, and thus cannot formally reject notifications. In the first case, which concerned a statutory merger between two companies,[8] one of which was 51% owned by the other,[9] the parties filed a precautionary notification with the FCA. Given the fact that it does not have the power to refuse jurisdiction over this intra-group transaction, the FCA initiated Phase 2, combined with an application to the Cartel Court to reject its Phase 2 application for lack of a notifiable transaction.[10] In its judgment, the Cartel Court confirmed that this is indeed the way foreseen by Austrian law to refuse jurisdiction.

In the second case, the parties opted for a different approach and applied directly to the Cartel Court for a declaratory judgment that the transaction in question was not notifiable. The case involved an existing JV in the area of press distribution, which was controlled by two Austrian newspaper publishers. The publishers argued that the intended transfer of further distribution activities by the parents to the JV did not trigger the notification requirement, as the turnover of the additional activities transferred to the JV was below the filing thresholds. Both the Cartel Court and, on appeal, the Austrian Supreme Court disagreed.[11] When the parents of an existing JV transfer additional activities to the JV, both parents are to be regarded as "undertakings concerned," whose turnover is relevant for establishing merger jurisdiction. Since the two publishers clearly met the filing thresholds, the limited turnover of the transferred business was irrelevant, and the transaction had to be notified. The difficulty with this approach is that, unlike merger control proceedings, actions for declaratory judgment are not subject to statutory deadlines. Both approaches to obtain formal confirmation that a transaction is not notifiable (precautionary notification followed by a Phase 2 request on the one hand, and action for declaratory judgment on the other hand) therefore entail a significant time commitment, which in practice will not always be acceptable to merging parties.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2013, the FCA continued its pursuit of resale price maintenance ("RPM"). The authority's on-going investigations focus on RPM between manufacturers and retailers in various industries, including food, DIY markets, and consumer electronics. The FCA carried out a number of dawn raids in these sectors, and obtained fines in several cases, all of which were settled between the authority and the defendant firms.[12] Fines ranged from EUR 52,500, imposed on a regional brewery,[13] to EUR 20.8 million, imposed on

7 Id.

8 Cartel Court, June 26, 2013, Case No. 24 Kt 60/13 (Austria), available at http://www.edikte.justiz.gv.at/.

9 The acquisition of a 51% stake had previously been notified. see FCA, February 9, 2012, Case No. BWB/Z-1647 (Alpenmilch Salzburg GmbH/Käsehof GmbH) (Austria); See also summary available in German at http://www.bwb.gv.at/Zusammenschluesse/Zusammenschluesse_2012/Seiten/BWB_Z-1647.aspx.

10 Cartel Court, supra note 8.

11 Oberster Gerichtshof [OGH] [Supreme Court], June 27, 2013, Case No. 16 Ok 3/13, available at http://www.ris.bka.gv.at/.

12 See An overview of the fines imposed by the Cartel Court, available at http://www.bwb.gv.at/KartelleUndMarkmachtmissbrauch/Entscheidungen/Seiten/default.aspx.

13 Cartel Court, October 15, 2013, Case No. 26 Kt 104/13, Rieder Bier (Austria); see also summary available in German at http://www.bwb.gv.at/Aktuell/Seiten/EntscheidungRiederBier.aspx.

Austria's largest food retailing chain.[14] In addition to its case work, the FCA also published Draft Guidance on Resale Price Maintenance.[15] The draft contains a several examples of conduct that, in the FCA's view, may amount to illegal RPM. It reflects a rather strict construction of the prohibition of RPM, both regarding the question when bilateral contacts will be considered to give rise to an implicit agreement on price, and regarding the circumstances in which such agreements may be justified.

In the "Vienna municipal housing sanitary installations" proceedings in December 2013, the Supreme Court rejected appeals by the FCA and the Federal Cartel Prosecutor ("FCP") and thus confirmed the Cartel Court's 2012 rejection of the FCA's application to impose fines on a number of suppliers for bid-rigging (a summary of the case is available in the 2012 edition of Year in Review). Like the Cartel Court, the Supreme Court also held that the agreement was exempt under the old Austrian de minimis regime, which, until February 2013 (i.e. prior to the amendments, see Legislative Developments, above) also exempted infringements provided the market share thresholds were not exceeded.[16] The decision focused on market definition in procurement markets, as the appeals had contested the rather wide market definition adopted by the Cartel Court in accordance with the economic expert opinion (which had led to the application of the de minimis exemption).

German magazines are popular with Austrian readers but usually are up to 30% more expensive in Austria for a variety of reasons (logistics, lack of advertising revenues, etc.). This price premium was attacked by the FCP in a request to the Cartel Court in 2007, which then investigated agreements between publishers and press wholesalers and found that they granted absolute territorial protection to the wholesalers and imposed a fixed resale price for the consumer. The Cartel Court decided on March 3, 2013 that the agreements were exempt from the prohibition of anti-competitive agreements under Art. 101(3) TFEU. In its decision, the Cartel Court largely followed the arguments of the defendant, a German publisher of magazines. It claimed that without RPM the return system established in Austria (i.e. the return of unsold copies by retailers free of charge) could not be maintained. As a consequence, the number of press titles sold would be reduced and various retail stores could not be supplied anymore, thus erasing consumer benefits from a diverse product range ("diversity of titles") and the supply of as many areas and as many retailers as possible ("availability everywhere" or "ubiquity"). In regards to the requirement that a "fair share of resulting benefits" be passed on to consumers, the Cartel Court found that the maintenance of a wide range of products offered constituted a substantial benefit that could not be offset by price reductions of a few cents per copy. Furthermore, the Cartel Court found that the agreements do not lead to an elimination of

14 Cartel Court, May 13, 2013, REWE (Austria); see also summary available in German at http://www.bwb.gv.at/KartelleUndMarkmachtmissbrauch/Entscheidungen/Seiten/K-252.aspx.

15 See FCA, Draft Guidance on RPM, available at http://www.bwb.gv.at/Fachinformationen/Bußgelder/Documents/L%20E%20I%20T%20F%20A%20D%20E%20N%20final%2012062013.pdf.

16 Not yet published; see case summary available at http://www.bwb.gv.at/KartelleUndMarkmachtmissbrauch/Entscheidungen/Seiten/BWB_K-266-EntscheidungInstallateure.aspx.

competition between publishers and press wholesalers for customers.

A major Austrian matter in the area of cartels is the so-called "freight forwarders" case initiated at the Cartel Court in 2010 by the FCA against members of the so-called Freight Forwarding Agents Consolidated Consignment Conference ("SSK"), an interest group that in the mid-1990s concluded an agreement fixing road/rail consolidated consignment rates to be charged to shippers and to end consumers. These rates were updated every year until the agreement was terminated at the end of 2007. In 1996 (shortly after Austria's accession to the EU), the Cartel Court had declared, in accordance with a request from the Freight Forwarders Association, that the SSK was a "minor cartel" (de minimis), which meant under Austrian competition law that it could be lawfully implemented (the Austrian de minimis exemption at the time also covered so-called "hard-core" restrictions such as price-fixing and market-sharing). The parties had also sought legal advice on the matter from an Austrian law firm. In 2011 the Cartel Court rejected the application by the FCA to fine the SSK members, arguing that a fine required not only an infringement of competition law but also some degree of fault (intention or negligence), which was in the court's view lacking in this case because the SSK members could rely on the Cartel Court's 1996 decision and on their lawyer's advice. On appeal by the FCA and the FCP, the Supreme Court decided to request a preliminary ruling from the European Court of Justice (the "ECJ"). The ECJ, in its judgment of June 18, 2013,[17] stated that an undertaking which has infringed Article 101 TFEU may not escape imposition of a fine where the undertaking erred as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer or of the terms of a decision of a national competition authority. According to the ECJ, undertakings which directly coordinate their behavior in respect of their selling prices cannot be unaware of the anti-competitive nature of their conduct. The Austrian Supreme Court based its decision of December 2, 2013,[18] on the ECJ's judgment and annulled the Cartel Court's 2011 decision. It instructed the Cartel Court to continue the proceedings and then impose fines against the SSK participants (except the whistleblower which had reported the case to the FCA). It gave the Cartel Court some guidance on how to set the fines. The Supreme Court ruled that either of the two defense arguments granted by the Cartel Court and excluded by the ECJ (see above) could be regarded as attenuating circumstances. In respect of the whistleblower, the Supreme Court deviated from its previous decisions and confirmed that a declaratory decision stating the infringement (without imposing a fine) could be adopted by the Cartel Court, in accordance with the ECJ's findings on that procedural aspect of the matter.

ABUSES OF A DOMINANT POSITION

Like in previous years, in 2013 there was low enforcement of the antitrust rules in the field of unilateral conduct. The relatively low chances of success in bringing applications for abuses of a dominant position in the Cartel Court were confirmed once again in the case Taxi Apps, where the Supreme Court rejected the FCA's appeal against the Cartel Court's 2012 rejection of its request to prohibit exclusivity clauses applied by Vienna's two radio taxi centers in their agreements with taxi operators (which in the FCA's

17 ECJ, June 18, 2013, Case No. C-681/11 (Austria), available at http://curia.europa.eu/juris/celex.jsf?celex=62011CJ0681&lang1=de&lang2=EN&type=NOT&ancre=.

18 Oberster Gerichtshof [OGH] [Supreme Court], December 2, 2013, Case No. 16 Ok 4/13, available at http://www.ris.bka.gv.at/.

view effectively prevented the latter from cooperating with taxi app systems for smartphones). The Supreme Court also argued that the exclusivity clauses did not lead to anticompetitive foreclosure of suppliers of taxi apps due to the short formal term of the taxi center agreements (one month).[19]

COURT DECISIONS

In 2013, judgments in follow-on damage claim cases relating to cartels were scarce. The only significant Supreme Court decision was adopted in December in a case where the City of Vienna was the plaintiff. The Supreme Court confirmed judgments by the two lower courts that a claim brought in April 2011 was not time-barred because the trigger date for the statute of limitations for such damage claims was the date of publication of the final and binding decision in the cartel proceedings (which were dated November 2008), rather than media reports on the cartel from 2007 or the announcement of such claims by the plaintiff in January 2008.[20]

In another case of significant importance for cartel damage claims, an industry association had requested in 2011 to access the files of the Cartel Court in order to prepare damage claims against the cartelists that had been fined by the Cartel Court in 2010 for price-fixing. An Austrian statutory provision (section 39, paragraph 2 of the Cartel Act) makes access by prospective damage claimants to the Cartel Court's case files conditional upon consent by both the authority and the cartelists. When reviewing the request, the Cartel Court had doubts whether this provision complied with EU law, and submitted the case to the ECJ with a request for a preliminary ruling. The ECJ ruled on June 6, 2013, that the Austrian restriction of access to the file was contrary to Art 101 TFEU, as it violated the so-called effectiveness principle of EU competition law.[21] This principle also generally applied to documents submitted as part of a leniency application. The ECJ argued that refusal of access to such documents could prevent claimants from bringing claims and could therefore allow competition law infringers to escape liability. Any refusal of access should therefore be considered document by document. Disclosure should be withheld only on the grounds of overriding reasons, in particular on the basis that it might undermine the effectiveness of leniency programs by deterring prospective applicants from coming forward. The Cartel Court will have to rule on the request for access to the file on the basis of the ECJ decision, disregarding the Austrian statutory provision.

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19 Oberster Gerichtshof [OGH] [Supreme Court], June 27, 2013, Case No 16 Ok 7/12, available at http://www.ris.bka.gv.at/.
20 Oberster Gerichtshof [OGH] [Supreme Court], December 16, 2013, Case No. 6Ob186/12i, available at http://www.ris.bka.gv.at/.
21 ECJ, June 6, 2013, Case No. C-536/11 (Austria), available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-536/11&td=ALL.

BELGIUM

2013 ANTITRUST YEAR IN REVIEW

By Bruno Lebrun and Laure Bersou
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LEGISLATIVE DEVELOPMENTS

On September 6, 2013, the new Competition Act of April 3, 2013 on the protection of competition (the "Act") came into force. This new Act aims at strengthening the independence of the regulator and has introduced new procedures. Under the new Act, the Belgian Competition Authority ("BCA") has replaced the former Competition Council and the Directorate-General of Competition of the Belgian Ministry of Economy. The BCA is now composed of the Presidency (a President, a General Counsel, a Chief Economist and the Auditorate General), the Auditorate and the Competition College. None of them is under the supervision of the Ministry of Economy. The Auditorate is in charge of investigating cartels and anti-competitive practices, as well as assessing mergers. It prepares draft decisions under the supervision of the Auditorate General. The Competition College issues the actual decisions. The Presidency's tasks relate to the definition of policy priorities and guidelines.

The Act provides for procedural novelties, among which (i) a new settlement procedure (article IV.51); (ii) fines and immunity for employees or individuals involved in cartel (articles IV.46 and IV.70); and (iii) stricter deadlines for decisions on interim measures (article IV.64).

The Act also creates a so-called Pricing Authority that can refer a case to the BCA when it observes an abnormal trend of prices or margins in a specific market or industry, or any other structural difficulties.

MERGERS

2013 was a mixed year with respect to mergers: more notifications were filed but essentially under the simplified procedure. Two mergers were assessed under the normal procedure.

On October 24, 2013, the Competition Authority cleared the acquisition by Touring Club Royal de Belgique ("Touring"), a roadside assistance company, of Autoveiligheid company and its subsidiary Bureau voor Technische Controle N.V., active in the sector of vehicle inspections. The clearance was made conditional upon the commitment by Touring to create an operational and structural separation between the inspections and testing activities, on the one end, and the rest of the group's commercial activities, on the other end.[1]

On October 25, 2013, the Competition Authority approved the creation of Mediahuis, a joint venture between the press publishers Corelio N.V. and Con-

1 Decision of October 24, 2013 in case MEDE-C/C-13/0023.

centra N.V. The approval was conditioned on the commitment by the notifying parties to continue to publish their respective newspapers, and to staff each newspaper with sufficient editorial and/or correspondent teams, and will be managed by its respective editorial committee. The commitments will last five years.[2]

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The BCA was quite active in busting cartels in 2013. On February 28, 2013, the former Competition Council decided that five flour mills (Werhahn, Meneba, Ceres, Dossche and Brabomills) infringed both Belgian and European competition law. According to the Competition Council, these companies were involved in a cartel by exchanging commercially sensitive information and coordinating price increases.[3] The investigation was carried out following leniency application made by Werhahn and Meneba. In parallel to the Belgian investigation, other competition regulators investigate the same conduct in other Member states, such as Germany and The Netherlands. In setting the amount of the fine, the former Competition Council took into account the fines imposed on the companies by the regulators in the other Member States. Dossche, Brabomills and Ceres were each fined for an amount of EUR 100,000. Meneba was granted a leniency reduction and was fined EUR 70,000. Werhahn was totally exonerated as it was the first company to denounce the cartel.

On March 5, 2013, the President of the former Competition Council rejected the request for interim measures introduced by Comptoir de Russie, a company active in sheltered workshops. In July 2012, Comptoir de Russie lodged a complaint with the Auditorate against the cooperation agreement concluded between the public institutions in charge of workshops in prisons and the regional organizations for adapted works. In its reasoned report, the Auditorate came to the conclusion that the requirements for the adoption of interim measures were satisfied because the agreement caused serious, immediate and irreparable harm to Comptoir de Russie and to the general economic interest. Accordingly, it requested the President of the Competition College to order the termination of the restrictive practices pending the investigation. But the President of the Competition College rejected the request for interim measures because the cooperation agreement was no longer in force and the urgency condition was, therefore, not met.[4]

On August 30, 2013, the former Competition Council imposed a fine of EUR 14,700,000 on cement producers CBR, CCB, Holcim, the trade association Febelcem and the research institute for the cement industry CRIC/OCCN (Nationale Centrum van Wetenschappelijk en Technisch Onderzoek voor de cementnijverheid/Centre national de Recherches Scientifiques et techniques pour l'industrie cimentière).[5] The Competition Council found evidence that CBR, CCB and Holcim had collusive contacts designed to delay the grant of a license and definition of standards necessary for competitors to use Ground Granulated Blast Furnace Slag as a component of ready-mix concrete. The companies were found to attempt to foreclose competitors from "their market" with the cooperation of Febelcem and CRIC/OCCN.

In June 2013, the former Competition College carried out dawn-raids at the premises of companies

2 Decision of October 25, 2013 in case MEDE-C/C-13/0023.
3 Decision of February 28, 2013 in case MEDE-I/O-08/0009.
4 Case CONC-V/M-12/0016.
5 Decision of August 30, 2013 in case CONC-I/O-05/0075.

active in the baking yeast sector. The former Competition College looked for evidence of collusive foreclosure of competitors from the Belgian market regarding pricing policy imposed on wholesalers vis-à-vis bakers and/or other wholesalers as well as exchange of information on the proper enforcement of the agreed pricing policy. The investigation is still ongoing.

In July 2013, the former Competition College conducted dawn-raids at Loterie Nationale/Nationale Loterij, a company active in the gambling sector in Belgium. The Auditorate looked for evidence of concerted practice and/or abuse of dominant position concerning exclusivity clauses with retailers; the practice of cross-subsidization from the market for lotteries and scratch cards (where the company has a legal monopoly) to the market for sports betting (opened to competition); and the use of information acquired through its activity on the monopoly market on the market for sports betting. The investigation is still ongoing.

On August 27, 2013, the former Competition Council put an end to its investigation concerning laboratories performing BSE testing (bovine spongiform encephalopathy, commonly known as mad cow disease). In 2009, a leniency application had been filed about alleged price-fixing and market foreclosure in this sector. The former Competition Council considered that these practices resulted exclusively from the rules established by the Federal Agency for Safety of Food. It, then, concluded that the laboratories were not involved in anti-competitive behavior.[6]

ABUSES OF A DOMINANT POSITION

On February 7, 2013, the former Competition College submitted a reasoned opinion (equivalent of a statement of objections under EU antitrust rules) to the former Competition Council, finding that the Belgian energy supplier Electrabel abused its dominant position. The alleged infringements concerned, on the one hand, capacity withholding on the Belgian market for generation, wholesale and trading of electricity from 2007 to 2010, and, on the other hand, fictive sales and double use of tertiary reserves on the Belgian market for the supply of tertiary reserve services from 2006 to 2007.

The opinion followed a report submitted by the Belgian Regulator for Electricity and Gas (CREG)[7]. In this report, the CREG considered that, during 2007 and the first six months of 2008, Electrabel did not use all its available capacities, while submitting at the same time purchase orders with very high bid prices on the Belgian power exchange called Belpex. These conducts contributed, among others, to a global price increase on Belpex. Electrabel submitted its observations in response in October 2013. On November 29, 2013, the Auditorate (i.e. the former Competition College) submitted a draft decision to the President of the Competition Authority, upholding the findings in its opinion of February 7, 2013. The case will now be assessed by the Competition College. The decision is likely to be issued in the next few months.

6 Decision of August 27, 2013 in case MEDE-I/O-09/0001.

7 Commissie voor de Regulering van de Electriciteit en het Gas/Commission de regulation de l'Electricité et du Gaz.

COURT DECISIONS

In 2013, the Brussels Court of Appeals issued several judgments that have a procedural impact on the day-to-day practice of the BCA.

On February 13, 2013, the Brussels Court of Appeals annulled the decision of the Competition Council imposing a fine on VEBIC, a Flemish Federation of Bakers and Confectioners, Ice-Cream Makers and Chocolate Makers. Following a request from the Belgian Minister of Economy to conduct an investigation, the Competition Authority decided that VEBIC had fixed the sale prices for bread. Under the former Act, the Ministry of Economy could request to conduct an investigation in case of "serious indications" of an infringement. In this case, the Brussels Court of Appeals considered that no serious indications could be found in the documents available at the time of the investigation. Consequently, the former Competition College was not authorized to launch the investigation concerned.

On March 5, 2013, the Brussels Court of Appeals issued a judgment recognizing the legal privilege to in-house lawyers.[8] In October 2010, the former Competition Council had conducted inspections at the Belgian telecommunication company Belgacom. The Competition Council seized documents containing, inter alia, legal advices from Belgacom in-house lawyers. Belgacom challenged the seizure before the Brussels Court of Appeals. The later observed that the regulation of the Belgian Institute of In-house lawyers (IJE/IBJ)[9] provides the confidentiality of any advice given by in-house lawyers. The Court of Appeals considered that the concept of "advice" must be construed broadly, and that in-house lawyers are entrusted with a mission of general interest (within the meaning of Article 8 of the European Convention of Human Rights), so that in-house lawyers must therefore benefit from a high level of confidentiality. The Brussels Court of Appeals concluded that the in-house lawyers' communications are covered by the legal professional privilege. Interestingly, the Court of Appeals expressly rejected the application of the long-standing EU case-law, considering that Belgian law and European law are separate legal orders. This judgment will no doubt make investigations in Belgium quite complex, in particular when the BCA will act in parallel to the European Commission in an investigation under EU antitrust rules that denies such a privilege to in-house lawyers, or in investigations grounded on both EU and Belgian antitrust rules.

On March 26, 2013, the Brussels Court of Appeals annulled three interim measures decisions forcing De Beers, a diamond merchant in Antwerp, to continue supplying diamonds to Diamanthandel A. Spira ("Spira"), a diamond retailer.[10] Spira experienced difficulties to be selected in the distribution system of De Beers. It lodged a complaint with the Competition Council, considering that De Beers abused its dominant position. In 2010, the President of the Competition Council ordered De Beers to deliver diamonds to Spira and upheld these interim measures several times. The Brussels Court of Appeals decided that these interim measures had ceased to have effect since 2012 because the requirements for their extension were not met. It also considered that these repeated measures were not justified, given the absence of investigation on the substance of the case.

On May 24, 2013, the Brussels Court of Appeals decided that the Competition Council was entitled to voluntarily intervene in judicial proceedings. In a decision of November 2, 2005, the Competition Council

8 General docket: 2011/MR/3.
9 Institut des Juristes d'Entreprise/Instituut voor Bedrijfjuristen.
10 Unpublished.

considered that Bpost abused its dominant position and imposed a fine of EUR 37,399,786. Bpost appealed this decision before the Brussels Court of Appeals. The former Competition Council requested to intervene in the proceeding. The Court noted that the Competition Act in force at that time was silent on this possibility. The Court relied on the EU VEBIC judgment[11] and considered that the effective application of competition rules required that the Competition Council should be entitled to participate in judicial proceedings that challenge its decision.[12]

On September 27, 2013, the Brussels Court of Appeals dismissed the action of annulment introduced by Presstalis against the former Competition Council's decision of July 30, 2012, imposing a fine of 245,530.[13] The Competition Council considered that Presstalis, a company active in the export of French press products, abused its dominant position by applying a rebate scheme with fidelity-inducing effects. The Brussels Court of Appeals affirmed the decision and clarified that Presstalis' rebate-scheme affected the Belgian market, although its services were provided to French publishers.

On December 20, 2013, the Belgian Supreme Court decided that the full jurisdictional review exercised by the Brussels Court of Appeals on the BCA decisions is limited to the infringements established in the BCA's decisions.[14] On June 28, 2013, the Brussels Court of Appeals referred a preliminary ruling to the Belgian Supreme Court on the notion of "full jurisdictional review" exercised on the BCA decisions. This issue was raised in the context of the judicial proceeding between the telecommunication companies Belgacom, Base and Movistar. According to the Supreme Court, the Brussels Court of Appeals could not rule on facts which are neither established in the Competition College's decisions nor in the Auditorate's reasoned opinions. The Brussels Court of Appeals could also rule on infringements established in the Auditorate's reasoned opinions and rejected by the Competition College, without being required to annul the Competition College's decision. However, the Supreme Court decided that the Brussels Court of Appeals could not decide on infringements rejected by the Competition College in conformity with European competition law (Articles 101 and 102 of the Treaty on the functioning of the European Union).

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11 Case of December 7, 2010, C-439/08.
12 General docket: 2013/MR/2.
13 General docket: 2012/MR/5.
14 General docket: H.13.0001. F.

BRAZIL

2013 ANTITRUST YEAR IN REVIEW

By Maria Cecilia Andrade and Ana Carolina Estevão
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LEGISLATIVE DEVELOPMENTS

After the first year of effectiveness of Law No. 12,529/11 (The "New Antitrust Law"),[1] it can be concluded that the new pre-merger notification system reduced the time required by CADE to issue its decisions. Now, the average time for reviewing mergers under the fast track procedure (available, as a rule, for cases in which the vertical integration or horizontal overlap is below 20%) is 19 days and under ordinary proceedings is 61 days, compared to 154 days under the former competition law, Law No. 8,884/94.[2]

Law No. 12,850/13,[3] entered into force in July 2013, established the conduct of "criminal organization", defined as an organized association of four or more people which are assigned specific tasks, aimed at obtaining, directly or indirectly, any kind of advantage through the practice of criminal offenses which maximum penalties are higher than four years). This conduct, according to some Public Prosecutors, would be applicable to cartel practices. The penalty is imprisonment from three to eight years, which would be added to that applicable to cartels under Law No. 8137/90[4] (fine and imprisonment from two to five years).

In addition, Anticorruption Law No. 12,846/13[5] contemplates fines that may vary from 0.1% to 20% of the gross sales of the companies involved in the last fiscal year preceding the initiation of the investigation. This Law may be applicable, for example, to bid rigging, in addition to cartel penalties.

MERGERS

CADE's Tribunal approved with restrictions, subject to a Merger Control Agreement[6] ("ACC"), the transactions involving Ahlstrom Corporation and Munksjö AB[7] and WP Roaming III S.A.R.L. (MACH) and Syniverse Holdings Inc,[8] in cooperation with the European Commission.

CADE also reviewed the decisions issued by its General Superintendence ("GS") in several cases involving soybean license agreements entered into by Monsanto and several players in the chemical sector.

1 [New Antitrust Law] (Law No. 12,529/11 of November 30, 2011, effective on May 29, 2012) available at http://www.cade.gov.br/upload/LAW%20N%C2%BA%2012529%202011%20%28English%20version%20from%2018%2005%202012%29.pdf.

2 [Former Antitrust Law] (Law No. 8,884/94 of June 11, 1994, effective from this date to May 28, 2012) available at http://www.cade.gov.br/english/internacional/Law-8884-1994b.pdf.

3 [Criminal Organization Law] (Law No. 12,850/13 of August 2, 2013, effective on July, 2013 available in Portuguese at http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12850.htm.

4 [Law of Economic Crimes] (Law No. 8137/90 of December 27, 1990, effective as from the same date available in Portuguese at http://www.planalto.gov.br/ccivil_03/leis/l8137.htm. This Law was also amended by the New Antitrust Law.

5 [Brazilian Anticorruption Law] (Law No. 12,846/13 of August 1, 2013, is effective as from February, 2014), available in Portuguese at http://www.planalto.gov.br/ccivil_03/_Ato2011-2014/2013/Lei/L12846.htm.

6 An ACC is an Agreement entered into by and between CADE and the parties involved in the transactions in the cases approved with restrictions. This agreement may provide structural or behavioral commitments.

7 Ahlstrom Corporation and Munksjö AB. Merger: 08700.009882/2012-35 (May 28, 2013), available in Portuguese at http://www.cade.gov.br/temp/D_D000000744951300.pdf.

8 WP Roaming III S.A.R.L. (MACH) and Syniverse Holdings Inc., Merger: 08700.006437/2012-13 (May 28, 2013), available in Portuguese at http://www.cade.gov.br/temp/D_D000000741741338.pdf.

According to CADE, those agreements should be considered 'associative agreements', which are subject to CADE's review under Article 90 of the New Antitrust Law.[9] With the exception of one case that is still under review,[10] the remaining ones were approved with restrictions[11] aimed at reducing Monsanto's influence in the licensees' commercial decisions.

For the first time the practice of gun jumping was reviewed by CADE, in the case of OGX's acquisition of 40% of the participation of Petrobras in an oil block located in the Santos Basin. OGX agreed to pay BRL 3 million (USD 1.4 million).[12] The amount was defined through the negotiation of an ACC and will be collected by the Brazilian Diffused Rights Fund, which entrusts the money to public agencies and civil nonprofit organizations. In the decision, the reporter commissioner took into account the fact that the agreement entered into by OGX and Petrobras did not condition the closing of the deal to CADE's merger clearance and also that OGX confessed that the deal was indeed consummated before merger clearance (by participating in meetings of the target's Board).

CADE has approved with restrictions the acquisition of 50% of the Company Brasilcel by Telefónica S/A.[13] The restriction aimed at blocking the acquisition of the total control of Brasilcel – majority shareholder of Vivo S/A – by Telefónica, considering that Telefónica is an indirect Tim's shareholder. Both Vivo and Tim compete at the Brazilian telecommunication market, and for this reason CADE's decided that the transaction could only be authorized if Telefónica did not hold any direct or indirect financial position on Tim Brasil. Alternatively, the acquisition could be approved upon the entrance of a new shareholder in Vivo, with experience on the sector and without participation in other telecommunication company in Brazil.

In addition, Telefónica entered into a contract that increased its interest in Telco and thus its influence at Tim. CADE understood that this contract harmed the Performance Agreement ("TCD", similar to the ACC introduced by the New Antitrust Law) signed in 2010 as a condition to approve the entry of Telco S.p.A. in Telecom Italia (controller of Tim),[14] which stated several obligations to maintain the activities of Telefónica (Vivo) and Telecom Italia (Tim) separate and independent.

Considering the TCD's non-compliance, CADE determined the undoing of any unjustified increase of Telefónica's shares in Telco and fined Tim BRL 1

9 [Please refer to Footnote No. 1]
"Art. 90. For the purposes of Article 88 of this Law, a concentration act shall be carried out when:
I - two (2) or more previously independent companies merge;
II - one (1) or more companies acquire, directly or indirectly, by purchase or exchange of stocks, shares, bonds or securities convertible into stocks or assets, whether tangible or intangible, by contract or by any other means or way, the control or parts of one or other companies;
III – one (1) or more companies incorporate one or other companies, or
IV - two (2) or more companies enter into an associative agreement, consortium or joint venture.
Sole paragraph. What is described in item IV of the Section, when destined to biddings promoted by direct and indirect public administration agencies and to contracts arising there from, shall not be considered concentration acts, for purposes of Article 88 of this Law."

10 Bayer S.A. and Monsanto do Brasil Ltda. Merger: 08700.004957/2013-72. Pending judgment before CADE's Tribunal.

11 Monsanto do Brasil Ltda and Don Mario Sementes Ltda., Nidera Sementes Ltda, Syngenta Proteção de Cultivos Ltda, and Cooperativa Central de Pesquisa Agrícola. Mergers: 08700.003898/2012-34, 08700.003937/2012-01, 08012.006706/2012-08 and 08012.002870/2012-38 (August 28, 2013), available in Portuguese at
http://www.cade.gov.br/temp/D_D000000717061889.pdf; and
http://www.cade.gov.br/temp/D_D000000753281775.pdf.

12 Petrobras and OGX. Merger: 08700.005775/2013-19 (August 28, 2013), available in Portuguese at http://www.cade.gov.br/temp/D_D000000753431007.pdf.

13 Merger No. 53500.021373/2010 (December 4, 2013), available in Portuguese at http://www.cade.gov.br/temp/D_D000000765321339.pdf.

14 Merger No. 53500.012487/2007 (April 28, 2010). Fines on TCD's non-compliance imposed on December 4, 2013. Available in Portuguese at http://www.cade.gov.br/temp/D_D000000522391756.pdf. TCD available in Portuguese at
http://www.cade.gov.br/temp/D_D000000546881774.pdf.

million[15] and Telefónica BRL 15 million.[16]

The acquisition of the Uruguayan company American Chemical I. C.S.A by Oxiteno S.A. Indústria e Comércio was approved by CADE conditioned to the signing of a TCD, despite of the recommendation of CADE's General Superintendence in the sense to reprove the transaction.[17]

Under the terms of the agreement, the company commits itself to provide lauryl alcohol ethoxylate ("LAE") to sodium lauryl ether sulphate producers in a specific price flotation band. Although the TCD does not fix prices or any business conditions, it limits what can be considered "commercial usages and practices in the LAE market" and what does not configure refusal to supply or abusive discrimination.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On August 28, 2013 CADE fined several fuel stations for cartel practices in the State of Paraná[18] and Rio Grande do Sul,[19] and also in the cities of Manaus, Baturu, Londrina, Teresina and Caxias do Sul.[20]

On March 20, 2013 CADE fined the Central Office of Collection and Distribution – ECAD (a musical artists' copyright collection agency) and six associations with voting rights representing copyright holders for cartel activity. The fines imposed amounted roughly to BRL 38 million (USD 19 million).[21]

On August 28, 2013 CADE sanctioned airlines ABSA Aerolineas Brasileiras S.A., Varig Logistica SA, American Airlines Inc., and Alitalia Linee Aeree Italiane S.P.A., plus seven individuals for participating in a cartel in the international air cargo sector. The aggregate fines exceeded the amount of BRL 293 million (USD 134.5 million).[22]

On July 4, 2013 the GS carried out down raids at the headquarters of 13 companies related to the market of train wagons and maintenance and construction of rail and metro lines. The investigation was prompted by a leniency application filed by Siemens indicating the existence of bid rigging. The investigation is ongoing.

15 Roughly USD 425,000.

16 Roughly USD 6,355,000.

17 Merger No. 08700.004083/2012-72 (November 20, 2013). Available in Portuguese at http://www.cade.gov.br/temp/D_D000000765561215.pdf. General Superintendence recommendation available in Portuguese at http://www.cade.gov.br/temp/D_D000000736491500.pdf.

18 Police Department of the State of Paraná vs. Auto posto Exposição and others, Administrative Proceeding 08012.011668/2007-30 (August 28, 2013), available in Portuguese at http://www.cade.gov.br/temp/D_D000000761311377.pdf. The fines amounted roughly BRL 9.3 million (USD 4.3 million).

19 Public Prosecutor of the State of Rio Grande do Sul vs. Postos Santa Lúcia and others. Administrative proceeding 08012.004573/2004-17 (June 19, 2013). Available in Portuguese at http://www.cade.gov.br/temp/D_D000000746881672.pdf The fines amounted roughly BRL 19 million (USD 13.3 million).

20 Public Prosecutor's Office and SDE vs. Fuel Stations. Administrative Proceedings 08012.002959/1998-11, 08012.004472/2000-12, 08012.010215/2007-96, 08012.001003/2000-41, 08012.007301/2000-38 and 08012.000547/2008-95 (March 6, 2013). Available in Portuguese at http://www.cade.gov.br/temp/D_D000000734141103.pdf, http://www.cade.gov.br/temp/D_D000000730271311.pdf, http://www.cade.gov.br/temp/D_D000000728641921.pdf, http://www.cade.gov.br/temp/D_D000000730321287.pdf; and http://www.cade.gov.br/temp/D_D000000733341375.pdf. The fines amounted roughly BRL120 million (USD52.6 million).

21 Brazilian Association of pay TV – ABTA vs. ECAD and others. Administrative Proceeding 08012.003745/2010-83 (March 20, 2013), available in Portuguese at http://www.cade.gov.br/temp/D_D000000737031498.pdf.

22 Administrative Proceeding No. 08012.011027/2006-02 (August 28, 2013). Available in Portuguese at http://www.cade.gov.br/temp/D_D000000763641445.pdf, http://www.cade.gov.br/temp/D_D000000763651844.pdf; and http://www.cade.gov.br/temp/D_D000000763661910.pdf.

ABUSES OF A DOMINANT POSITION

On July17, 2013 the GS initiated an administrative proceeding aimed at investigating an alleged abuse of dominance in the stainless steel market,[23] and on October 11, 2013 three administrative proceedings addressed to investigating potential anticompetitive practices carried out by Google Inc. and Google Brasil Internet Ltda. in the market of online searches.[24]

Also in October the GS made public the existence of an administrative proceeding aimed at investigating alleged anticompetitive violations by Unilever Brazil Ltda. / Kibon and Nestlé in the ice cream resale market.[25]

In December 2013 the GS decided to close an investigation initiated by a complaint of Vigor, a Brazilian diary company, against Kellogg's, reporting the refusal of the latter to supply frosted cereal for a "combo yogurt", which would lead Vigor to exit that market. According to Vigor, the refusal was related to a contract entered into by Kellogg's and Danone for cereal supply, and there was no other cereal supplier in Brazil capable of meeting Vigor's needs in terms of quality and quantity. According to the GS, there was no evidence that Kellogg's breached the law. The decision may still be reviewed by CADE's Tribunal.[26]

COURT DECISIONS

On September 25, 2013 a federal judge substantially reduced the fines imposed by CADE on ECAD (for a reference of the case please see point Cartels and Other Anticompetitive Practices above) and six associations representing musicians for alleged cartel practices. The fines were reduced from roughly BRL 39 million to roughly BRL 3 million.[27]

23 Inox-Tech Comércio de Aços inoxidáveis Ltda. vs. Aperam Inox Suth America S/A. Administrative Proceeding 08700.010789/2012-73. Pending judgment before CADE's General Superintendence.

24 E-commerce vs. Google. Administrative Proceeding 08012.010483/2011-94 investigates whether Google would be unduly favoring its own specific search websites, such as Google Shopping, in detriment of competing websites. Administrative Proceeding 08700.009082/2013-03 investigates so-called "scraping" practices, i.e. the practice whereby Google would delete competitor-related content included in rival-specific search websites for use in Google's specific search services, and Administrative Proceeding 08700.005694/2013-19 investigates alleged anticompetitive restrictions within the contracts of Google's online advertising platform, known as AdWords.

25 Unilever Brasil Ltda. vs. Nestlé Brasil Ltda. Administrative Proceeding 08012.007423/2006-27. Pending judgment before CADE's General Superintendence.

26 Administrative proceeding No. 08700.005241/2013-92. Public documents in Portuguese available at http://200.198.193.169/SiCADEExternoPesquisaProcessosPublicos.html.

27 Lawsuit No. 27455-03.2013.4.01.3400. CADE filed a clarification motion against the decision reducing the fines. This motion is pending judgment before the First Federal District Court.

CANADA

2013 ANTITRUST YEAR IN REVIEW

By Sandy Walker and Adrian McWilliams
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In 2013 the Competition Bureau ("Bureau") required significant remedies before approving several high profile mergers, and a number of fines were imposed for anti-competitive practices, including the largest bid-rigging fine imposed by a Canadian court to date. There were also significant developments through decisions of both the Competition Tribunal ("Tribunal") and court decisions, particularly in the area of indirect purchaser class actions.

LEGISLATIVE DEVELOPMENTS

There were no significant legislative changes in 2013. However the Competition Bureau published revised Immunity and Leniency Frequently Asked Questions providing further guidance on the Bureau's approach in the context of criminal investigations.[1] The revised FAQs contain more detailed guidance than previous versions of the FAQs regarding issues such as the scope of activity for which a leniency marker will be given (offences relating to the obstruction or destruction of records are excluded), obligations of the immunity or leniency applicant once the application has been made (e.g., the ongoing obligation to provide information as it comes to the attention of the applicant) and the availability of immunity and leniency programs to parties that do not sell products directly into Canada, but who may nevertheless have committed an offence in Canada.[2] [3] The Bureau also announced the launch of its whistleblowing initiative designed to encourage members of the public and business to provide information about possible violations of criminal cartel provisions of the Competition Act in May 2013. The initiative does not represent new whistleblowing legislation, but is intended to bring public attention to whistleblowing protections that have not received much publicity since they came into force in 1999.[4]

MERGERS

The Bureau has entered into a number of consent agreements in 2013. In March a consent agreement was reached in respect of the acquisition of Astral by Bell Media. Bell Media is a subsidiary of Bell, Canada's largest communications company, and one of Canada's largest distributors of television programming services, while Astral was the largest independent owner of specialty programming services in Canada. The focus of the Bureau's review was on the degree to which Bell's market power would be enhanced following the acquisition, in particular in relation to bargaining power with distributors of television programming services. In order to obtain Bureau clearance, Bell agreed to divest Astral's ownership interest in a significant number of specialty programming services.[5]

1 See Press Release, Can. "Competition Bureau, Competition Bureau Publishes Revised Immunity and Leniency FAQs" (September 25, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03609.html.

2 See Can. Competition Bureau, "Immunity Program: Frequently Asked Questions", available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03594.html.

3 See Can. Competition Bureau, "Leniency Program: Frequently Asked Questions", available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng%20/03593.html.

4 See Press Release, Can. Competition Bureau, "Competition Bureau Launches Whistleblowing Initiative" (May 28, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03573.html.

5 See Can. Competition Bureau, "Competition Bureau Review of the Proposed Acquisition of Astral by Bell" (March 4, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03544.html.

The Bureau also required remedies (largely divestitures) in several retail merger transactions during 2013. Under separate but related proposed transactions, Cineplex and Landmark purchased all of Empire's movie theatre business in Canada. The Bureau determined that out of the 24 theatres proposed to be purchased from Empire by Cineplex, the purchase of two theatres in Ontario raised competitive concerns. As a result, the parties amended the transactions so that Landmark purchased the two Ontario theatres in order to alleviate the Bureau's concerns.[6] In another retail merger, the acquisition of the Safeway grocery chain by Sobeys (also a supermarket chain), Sobeys entered into a consent agreement pursuant to which it was required to divest 23 grocery stores in Western Canada.[7] Remedies were also obtained in respect of the sale of Viterra's agri-products business to Agrium[8] and La Coop fédérée's proposed acquisition of a minority interest in Groupe BMR[9] (retail sale of hardware products and building materials).

The Bureau also sought a remedy in the proposed acquisition of Public Mobile by TELUS, both companies that sell mobile wireless telecommunications services. Interestingly, the remedy was limited: TELUS was only required to continue to provide an "Unlimited Talk" plan previously provided by Public Mobile at least through to the end of 2014. This case is also noteworthy in that the Bureau did not obtain a consent agreement, as is normally the case, but instead only issued a position statement summarizing its approach.

The Bureau also relied on remedies obtained in jurisdictions outside of Canada. In the case of proposed acquisition of Life Technologies Corporation by Thermo Fisher Scientific, Inc. ("TFS"), corporations involved in the production of life sciences products, the Bureau's concerns regarding the proposed transaction were resolved by the European Commission's requirement that TFS divest a number of businesses.[10]

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The Bureau actively pursued price fixing and bid rigging conspiracies in 2013. There were further convictions related to price fixing in the retail gas sector.[11] In addition, in June 2013, charges were laid against Nestlé, Mars and ITWAL (a national network of independent wholesale distributors), as well as three individuals, for price fixing relating to chocolate products.[12] In respect of bid-rigging, Yazaki Corporation, a Japanese supplier of motor vehicle components was fined $30 million dollars for its role in an international bid-rigging conspiracy relating to wire harnesses supplied to Toyota and Honda, the largest fine levied to date for a bid-rigging offence in Canada.[13]

Regarding price maintenance, in June 2013 the Competition Tribunal dismissed the Commissioner's application against Visa and MasterCard regarding allegations of price maintenance relating to "merchant restrictions" (including the "no surcharge" and "honor all cards" rules) in credit cards. This was the first

6 See Press Release, Can. Competition Bureau, "Competition Bureau Concerns Result in Changes to Proposed Movie Theater Merger" (October 10, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03617.html.

7 See Press Release, Can. Competition Bureau, "Competition Bureau Requires Significant Divestiture in Sobeys/Safeway Deal" (October 22, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03618.html.

8 See Press Release, Can. Competition Bureau, "Competition Bureau Secures Remedy in Sale of Agri-Products Business to Agrium" (September 5, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03601.html.

9 See Press Release, Can. Competition Bureau, "Agreement Preserves Competition in the Retail Sale of Hardware Products and Building Materials in Rural Quebec" (November 1, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03625.html.

10 See Press Release, Can. Competition Bureau, "International Remedy Resolves Competition Concerns in Canada" (December 5, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03639.html.

11 See Press Release, Can. Competition Bureau, "Three Individuals Sentenced in Quebec Gas Cartel" (August 16, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03591.html.

12 See Press Release, Can. Competition Bureau, "Charges laid in a Price-fixing Cartel in the Chocolate Industry" (June 6, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03569.html.

13 See Press Release, Can. Competition Bureau, "Record $30M Fine Obtained by Competition Bureau Against Japanese Auto Parts Supplier" (April 18, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03560.html.

case brought forward regarding resale price maintenance since the 2009 amendments to the Competition Act which made resale price maintenance civilly reviewable conduct and not a criminal and per se offence. The Competition Tribunal held that there was no resale of a product, a necessary component for finding a civil violation. Moreover, even if there had been a finding there was a resale of a product, that the Competition Tribunal would not have exercised its discretion to grant a remedy as the alleged price maintenance and associated anti-competitive effects would be more effectively mitigated through a regulatory approach. This decision was based on a technical interpretation of the provision rather than whether the practice challenged had anticompetitive effects. In September 2013 the Commissioner announced the decision would not be appealed.[14]

ABUSES OF A DOMINANT POSITION

The Competition Tribunal rejected the Commissioner's abuse of dominance application challenging rules of the Toronto Real Estate Board ("TREB") that restrict how its members communicate information about listings to customers. The Tribunal ruled that TREB, as an incorporated trade association, does not compete with its own members in the real estate brokerage market and therefore could not contravene the abuse of dominance provision. The Tribunal's decision was based on interpretations of the provisions of the Competition Act contained in earlier decisions that an anticompetitive act for the purposes of the abuse provisions must be one intended to have a negative impact on a competitor. The Commissioner has appealed the ruling to the Federal Court.[15]

Interac Association, which is responsible for the development and operations of the Interac network, a national payment network for debit card services, and the Bureau entered into a consent agreement, approved by the Competition Tribunal, amending a consent agreement first entered into in 1996. Under the amended agreement, Interac will be allowed to be restructured as a corporation with an independent board in the place of its current structure as an unincorporated association. The amended agreement is intended to ensure that there remains non-discriminatory access to the Interac network, and will last until 2018.[16]

COURT DECISIONS

The Alberta Court of Appeal allowed an appeal from the Court of Queen's Bench which awarded significant damages to the plaintiff in a private damage law suit that alleged an agreement by Husky Oil Operations and Exxon Mobil to use a single fluid hauling service provider for their jointly and separately owned facilities violated section 45 (the criminal cartel provision). The Court of Appeal determined that Husky and Exxon Mobil's conduct was not the type of con-

14 See Press Release, Can. Competition Bureau, "Competition Bureau Will Not Appeal Credit Cards Decision" (September 30, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03614.html.

15 See Press Release, Can. Competition Bureau, "Competition Bureau Appeals Competition Tribunal Ruling in Toronto Real Estate Board Case" (May 14, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03567.html.

16 See Press Release, Can. Competition Bureau, "Interac Requests Amendment to Consent Agreement" (July 12, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03584.html.

duct covered by the criminal cartel provision.[17] The Plaintiff has applied to the Supreme Court of Canada for leave to appeal the Court of Appeal's decision.[18]

The Supreme Court of Canada granted leave to appeal in Tervita Corporation, et al. v. Commissioner of Competition[19] in which the Commissioner had successfully argued before lower courts that a transaction would lead to a substantial prevention of competition in the market for the disposal of hazardous waste. Tervita is notable as the Commissioner's first court challenge of a merger since 2005 and the first case involving a non-notifiable merger.[20]

The Supreme Court of Canada ("SCC") addressed indirect purchaser actions in the "Microsoft trilogy"[21] of cases, in decisions published October 31, 2013. The SCC provided its reasons for allowing indirect purchaser actions in Pro-Sys Consultants Ltd. v. Microsoft Corporation[22] ("Pro-Sys"). In Pro-Sys, Pro-Sys Consultants brought a class action against Microsoft, claiming that Microsoft overcharged for its operating systems and software applications, and seeking certification of a class consisting of indirect consumers who acquired Microsoft's products from re-sellers. The SCC confirmed its rejection of the "passing-on" defense, pursuant to which the argument was advanced that if the direct purchaser who suffered the loss passed the overcharge on to the final consumer, the gain received by the original overcharger was not at the expense of the direct purchaser, and as such the direct purchaser suffered no loss and therefore had no cause of action against the original overcharger. The SCC went on to hold that the rejection of the use of "passing-on" as a defense does not lead to a corresponding rejection of an "offensive" use of passing-on, as the indirect purchaser should not be foreclosed from claiming losses passed on to them. The Court noted that the risk of multiple recovery by both direct and indirect purchasers through multiple suits advancing in parallel in the same or different jurisdictions could be managed by the court, and that the likely complexity involved with proving damages should not be a general bar to an action as each case would be decided on its own burden of proof. Furthermore, the SCC wrote that allowing indirect purchaser actions may, in some cases, be the only way to promote deterrence of such overcharging.[23]

The analysis contained in Pro-Sys was further developed in Sun-Rype Products Ltd. v. Archer Daniels Midland Company ("Sun-Rype"), under which the SCC applied the framework regarding class action certification for indirect purchasers to a scenario in which both direct and indirect purchasers brought a class action alleging price fixing in the sale of high fructose corn syrup. The court held that the inclusion of both indirect and direct purchasers in the same class did not on the face of it produce difficulties that would warrant dismissing the action.[24] However, on the facts of Sun-Rype the court found that there was insufficient evidence to show that two or more members of the class of indirect purchasers would be able to self-identify as members of the class, and that as a

17 321665 Alberta Ltd v. Husky Oil Operations, 2013 ABCA 221 (Can.).

18 See Supreme Court of Canada, Docket No. 35529, 321665 "Alberta Ltd. v. Husky Oil Operations Ltd., et al.", available at http://www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35529.

19 2013 CanLII 42521 (July 11, 2013) (SCC) (Can.), available at http://canlii.ca/t/fzn96.

20 See Press Release, Can. Competition Bureau, "Federal Court of Appeal Decision Clears the Way For Restored Competition in Hazardous Waste Disposal Market" (February, 11, 2013), available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03535.html.

21 "Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57" (Can.) [hereinafter Pro-Sys]; See also" Sun-Rype Products Limited v. Archer Daniels Midland Company, 2013 SCC 58" (Can.) [hereinafter Sun-Rype]; See also "Infineon Technologies AG v. Option consommateurs, 2013 SCC 59" (Can.) [hereinafter Infineon].

22 Pro-Sys, id.

23 Id.

24 Sun-Rype, supra note 21.

result the class action regarding indirect purchasers was not certified.

The third case in the "Microsoft trilogy", Infineon Technologies AG v. Option consommateurs, originated in Quebec, and addressed an application for authorization for a class regarding damages from international manufacturers that were alleged to have conspired to inflate the price of microchips. As in Sun-Rype, the class sought to be authorized contained both direct and indirect purchasers. The Court of Appeal granted the motion for authorization of the class, and the SCC upheld that decision, as, based on the provisions of Quebec's civil code and the facts alleged, there was nothing to preclude the class from containing indirect purchasers.[25]

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25 Infineon, supra note 21.

By Peter Wang and Yizhe Zhang of Jones Day

LEGISLATIVE DEVELOPMENTS

In 2013, the National Development and Reform Commission ("NDRC"), the agency responsible for price-related antitrust enforcement, issued several implementing rules under China's Anti-Monopoly Law ("AML"), including:

(1) Procedural Rules on Price-related Administrative Penalties, which specifies the rules and procedures applicable to penalty decisions for price-related violations, including jurisdiction, simplified procedures, investigation, statements, defense and hearing, decision-making, service and enforcement;[1]

(2) Evidence Rules for Price-Related Administrative Penalties, which specify the rules and procedures governing the collection, review and evaluation of evidence during NDRC investigations;[2] and

(3) Rules on Handling and Review of Cases on Price-Related Administrative Penalties, which specify the rules and procedures for handling and reviewing price-related cases after investigation and before penalty decisions.[3]

The Ministry of Commerce ("MOFCOM"), the agency responsible for merger review, published two draft rules for public comment:

(1) Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings (Draft for Public Comment), which set out procedures for imposing and implementing merger remedies;[4] and

(2) Interim Provisions on the Determination of Simple Concentrations of Undertakings (Draft for Public Comment), listing the types of transactions eligible for simplified review.[5] The latter set recently was reviewed and passed by MOFCOM in principle.[6]

At the intersection of antitrust and intellectual property rights, the Standardization Administration ("SAC") and the State Intellectual Property Office

1 See "Jiage Xingzheng Chufa Chengxu Guiding" (价格行政处罚程序规定) [Procedural Rules for Price-Related Administrative Penalties] (Order by the National Development and Reform Commission, April 9, effective July 1, 2013), available at http://jjs.ndrc.gov.cn/zcfg/t20130311_532093.htm.

2 See "Jiage Xingzheng Chufa Zhengju Guiding" (价格行政处罚证据规定) [Evidence Rules for Price-related Administrative Penalties] (Order by the National Development and Reform Commission, April 9, effective July 1, 2013), available at http://jjs.ndrc.gov.cn/zcfg/t20130423_538005.htm.

3 See "Jiage Xingzheng Chufa Anjian Shenli Shencha Guize" (价格行政处罚案件审理审查规则) [Rules on Handling and Review of Cases on Price-Related Administrative Penalties] (Order by the National Development and Reform Commission, September 30, 2013, effective January 1, 2014), available at http://jjs.ndrc.gov.cn/zcfg/t20131017_562802.htm.

4 See "Jingyingzhe Jizhong Fujia Xianzhixing Tiaojian De Guiding (Zhengqiu Yijian Gao)" (经营者集中附加限制性条件的规定（征求意见稿）) [Provisions on the Imposition of Restrictive Conditions on Concentrations of Undertakings (Draft for Public Comment)] (Draft for Public Comments by the Ministry of Commerce, March 27, 2013, comments closed on April 26, 2013), available at http://tfs.mofcom.gov.cn/article/as/201303/20130300068492.shtml.

5 See "Guanyu Jingyingzhe Jizhong Jianyi Anjian Shiyong Biaozhun De Zanxing Guiding (Zhengqiu Yijian Gao)" (关于经营者集中简易案件适用标准的暂行规定（征求意见稿）) [Interim Provisions on the Determination of Simple Concentration of Undertakings (Draft for Public Comment)] (Draft for Public Comments by the Ministry of Commerce, April 3, 2013, comment closed on May 2, 2013), available at http://fldj.mofcom.gov.cn/article/zcfb/201304/20130400076870.shtml.

6 Press Release, MOFCOM, "MOFCOM Held 10th Ministry Conference to Review Regulations such as Rules on the Administration of Catering Industry", (December 11, 2013), available at http://www.mofcom.gov.cn/article/ae/ai/201312/20131200421609.shtml. (Although passed in principle, MOFCOM has not yet released the full text of these Rules as of this writing).

("SIPO") jointly issued the Provisions on the Administration of National Standards Involving Patents (Interim) which concern standard-essential patents ("SEPs").[7] These Rules provide, inter alia, that (i) participation in Standard Setting Organizations ("SSO") and failure to disclose SEPs may lead to unspecified liabilities; (ii) declarations by patent holders in connection with SSO participation should include a commitment to license SEPs on fair, reasonable, and non-discriminatory ("FRAND") terms; and (iii) SIPO, SAC and patent holders need to negotiate solutions in cases where SEPs have been incorporated into compulsory standards and patent holders refuse to make FRAND commitments.

Separately, the State Administration for Industry and Commerce ("SAIC"), the agency responsible for non-price non-merger antitrust enforcement in China, is understood to be drafting rules addressing patent issues related to antitrust enforcement, but has not yet published any official draft for public comments.

MERGERS

As of October 2013, MOFCOM had received 185 merger filings during the calendar year, an increase of 13.5% from 2012, and had completed the review of 161 cases, with 21 cases (13%) completed during first stage review, 130 cases (80.7%) completed during further (i.e., second stage) review, and 10 cases (6.2%) completed during extended (i.e., third stage) review.[8] For the full year 2013, 211 cases were approved without conditions[9] while four cases were imposed with conditions, as summarized below:

(1) Glencore/Xstrata: MOFCOM required Glencore to divest its ownership interest in a copper project being developed by Xstrata and required the parties to continue to offer to supply Chinese customers with copper, zinc and lead concentrate on the same terms using long-term contracts until the end of 2020, including setting minimum volume and benchmark pricing for copper concentrate. It also required Glencore to appoint an independent supervising trustee for compliance;

(2) Marubeni/Gavilon: MOFCOM required the parties to hold separate their soybean export businesses to China for two years, including establishing separate entities, personnel teams and firewalls to protect against the exchange of competitive information, and also required Marubeni to appoint an independent supervising trustee for compliance;

(3) Baxter/Gambro: MOFCOM required Baxter to divest its global Continuous Renal Replacement Therapy business, gradually terminate the China portion of an OEM supply agreement with competitor Nipro relating to hemodialysis filters, and engage a supervising trustee for compliance; and

(4) Mediatek/MStar: MOFCOM required the parties to hold separate their liquid crystal panel display ("LCD") television semiconductor chip business with Mediatek entitled only to very limited shareholder rights such as receiving dividends. It also required compliance updates from the parties on a quarterly basis.[10]

7 See "Guojia Biaozhun Sheji Zhuanli De Guanli Guiding (Zanxing)", (国家标准涉及专利的管理规定（暂行）) [Provisions on the Administration of National Standards Involving Patents (Interim)] (Order by the Standardization Administration and the State Intellectual Property Office, December 23, 2013, effective January 1, 2014), available at http://www.sipo.gov.cn/zcfg/flfg/zl/bmgfxwj/201401/t20140103_894910.html.

8 Press Release, "Ministry of Commerce, 2013 Annual Work Review Series Three: Efforts to Conduct Merger Reviews & Protect Fair Competition Order", (December 4, 2013), available at http://www.mofcom.gov.cn/article/ae/ai/201312/20131200412789.shtml.

9 MOFCOM quarterly releases a list of approval decisions without conditions. This number is an aggregation of the figure of the four quarters of 2013. "Case List of Approvals of Concentration of Undertakings in the 1st Quarter of 2013", Press Release by Ministry of Commerce, April. 2, 2013: http://fldj.mofcom.gov.cn/article/zcfb/201304/20130400075697.shtml; "Case List of Approvals of Concentration of Undertakings in the 2nd Quarter of 2013", July 3, 2013, http://fldj.mofcom.gov.cn/article/zcfb/201307/20130700184718.shtml;
"Case List of Approvals of Concentration of Undertakings in the 3rd Quarter of 2013", October 8, 2013, http://fldj.mofcom.gov.cn/article/zcfb/201310/20131000336357.shtml; "Case List of Approvals of Concentration of Undertakings in the 4th Quarter of 2013", January 11, 2014,http://fldj.mofcom.gov.cn/article/zcfb/201401/20140100457358.shtml.

10 MOFCOM's conditional approval decisions are available in Chinese at http://file.mofcom.gov.cn/search.shtml?file_cate=17.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The NDRC and its local branches ("DRCs") investigated and issued monetary fines in several high-profile cases during 2013, including: (i) imposing the highest fine in China's AML history, totaling CNY 669 million, on six infant formula manufacturers for resale price maintenance ("RPM"), while exempting three other manufacturers from penalty based on their voluntary submission of evidence, cooperation during the investigation and active correction of their business practices;[11] (ii) penalizing six global LCD manufacturers a total of CNY 144 million, plus confiscation of CNY 36.75 million in illegal gains and restitution of CNY 172 million in customer overpayments, for their involvement in a global cartel;[12] and (iii) fining two leading China luxury liquor manufacturers over CNY 200 million for RPM restraints on distributors.[13]

SAIC so far has issued penalties in fourteen publicized cases, mostly involving cartels.[14] Two cartel cases during 2013 included: (i) a city-wide tourism association and a tourist agency association was each fined CNY 400,000 for organizing dozens of travel agencies to enter into a monopolistic self-discipline agreement;[15] and (ii) three local brick and tile manufacturers in a city-wide cartel were fined a total of CNY 1.06 million.[16] In addition, SAIC published news of notable cases involving abuse of dominance, including a public water supply enterprise that was fined CNY 2.36 million, plus confiscation of CNY 860,000 illegal gains, for forcing customers to deal with itself or other companies it appointed.[17] SAIC press releases and other media reports have indicated at least another dozen competition-related cases are now under SAIC investigation,[18] including Tetra Pak for alleged abuse of dominance by tying its technological advantage in the liquid food packaging market to the sales of packing materials and for other discriminatory conduct.[19]

COURT DECISIONS

The PRC courts issued judgments in several prominent AML cases in 2013:

(1) 360 vs. QQ. In China's first Internet anti-mo-

11 See Press Release, "Nat'l Dev. Reform Comm'n, Biostime and Other Milk Powder Manufacturers were Fined RMB 668.73 Million for Anticompetitive Conducts in Violation of Antimonopoly Law", (Aug. 07, 2013), available at http://www.sdpc.gov.cn/xwfb/t20130807_552991.htm.

12 See Press Release, "Nat'l Dev. Reform Comm'n, Six Foreign Enterprises Investigated and Penalized for Monopolizing the Price of LCD Panels", (January 4, 2013), available at http://www.ndrc.gov.cn/xwfb/t20130104_521958.htm.

13 See Press Release, "Sichuan Nat'l Dev. Reform Comm'n, Wuliangye was Fined RMB 202 Million for Price Monopoly", (February 22, 2013), available at http://www.scdrc.gov.cn/dir25/159074.htm; See also Guizhou Price Bureau Announced Ticket Moutai was Fined RMB 247 Million for Price Monopoly, CHINANEWS, February 22, 2013, http://finance.chinanews.com/cj/2013/02-22/4588648.shtml.

14 The SAIC penalty decisions are available in Chinese at http://www.saic.gov.cn/zwgk/gggs/jzzf/.

15 See Press Release, "State Admin. Of Indus. & Commerce, Monopoly Agreements by Business Operators in the Tourist Industry Organized under the Auspices of the Association of Tourism of Xi Shuang Ban Na Prefecture and the Association of Tourist Agencies of Xi Shuang Ban Na Prefecture in Yunnan Province", (July 26, 2013), available at http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136768.html.

16 See Press Release, "State Admin. Of Indus. & Commerce, Case against Monopoly Agreements by Industry Operators Organized under the Auspices of Brick and Tile Association of City of Yibin in Sichuan Province", (July 29, 2013), available at http://www.saic.gov.cn/zwgk/gggs/jzzf/201307/t20130726_136767.html.

17 See Press Release, "Guangdong State Admin. Of Indus. & Commerce, The Abuse of Dominance Case of Guangdong Huizhou Dayawan Yiyuan Water Co., Ltd., (December 16, 2013)", available at http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201401/t20140106_140962.html.

18 See Press Release, "State Admin. Of Indus. & Commerce, Sword Drawn to Protect Fairness-Overview of Enforcement Activities of Administration of Industry and Commerce", (August 28, 2013), http://www.saic.gov.cn/jgzf../fldyfbzljz/201308/t20130828_137651.html.

19 See Press Release, "State Admin. Of Indus. & Commerce, Investigation was Initiated Against Tetra Pak for Being Suspected of Abusing Market Dominance", (July 10, 2013), available at http://www.saic.gov.cn/ywdt/gsyw/zjyw/xxb/201307/t20130714_136373.html.

nopoly case, the Guangdong Higher Court denied 360's claim against QQ for abuse of dominant market position through refusals to deal and illegal tying or bundling of sales. In its judgment, the Court defined a global relevant market on the basis that QQ's instant communication service is not limited only to customers in mainland China, but is provided and accessible worldwide with no additional transportation, pricing or other costs. In this global market, the court found that QQ did not have monopoly power, given fierce competition with other social media outlets such as Weibo (a Chinese provider similar to a Twitter-Facebook hybrid). Thus, the Court denied 360's CNY 150 million compensation claim as unsubstantiated and required 360 to pay CNY 796,800 to QQ for litigation costs.[20] On appeal, the Supreme People's Court held two hearings in late 2013, on November 26 and December 4, and final judgment remains pending.[21]

(2) Rainbow vs Johnson & Johnson. The Shanghai Higher Court overturned a first instance ruling in this case and ordered Johnson & Johnson ("J&J") to pay CNY 530,000 to Rainbow, a former distributor that had been terminated for violating J&J's RPM requirements. The appeal court decision found that RPM was not per se illegal, but should be determined under the specific circumstances based on four factors: (i) whether there is sufficient competition in the relevant market; (ii) whether the defendant has a strong market position in the relevant market; (iii) the motivation for the defendant to require RPM ; and (iv) the competitive effects of the RPM restraints. Based on these considerations, the Court ruled that J&J had the motivation to illegally avoid price competition, had a strong market position in China's insufficiently competitive market for medical sutures, and restricted competition in the market.[22]

(3) Huawei vs. InterDigital. In an important precedent at the intersection of the AML and IP/standards issues, the Guangdong Higher Court confirmed a judgment of the Shenzhen Intermediate Court finding InterDigital liable for abuse of dominance based on unfairly high pricing and improper tying or bundling in the licensing of its SEPs with its non-essential patents. The court ordered InterDigital to pay compensation of CNY 20 million. The appeal court found that each of the SEPs reading on the 3G telecommunication technology standards in China (WCDMA, CDMA2000 and TD-SCDMA) constitutes a separate relevant market. Given the uniqueness and indispensability of these patents, the court found that InterDigital had undoubted market dominance with its 100% market share in each of these markets in both China and the United States. InterDigital not only charged unfairly high loyalties from Huawei, in comparison to the licensing rates it charged to non-Chinese licensees such as Apple and SAMSUNG, but also tied licenses for its other, non-essential patents to those for its SEPs. The court found that this constituted a failure by InterDigital to honor its obligations as contained in its undertakings provided to the SSO, ETSI, in violation of FRAND principles, and violated the AML

20 See "Qihoo v. Tencent", Guangdong Province High People's Court Civil Judgment No. Yuegaofaminsanchuzi 2/2011 (March 20, 2013), available at http://www.gdcourts.gov.cn/gdcourt/front/frontIcontent.action?lmdm=LM41&gjid=20130328040159946185.

21 See "The Supreme Court Heard the Appeal of 360 v. QQ on Abuse of Dominance", China Court, November 26, 2013, http://www.chinacourt.org/article/detail/2013/12/id/1150648.shtml. See also "QQ v. 360 the Supreme Court Held a Second Instance Hearing Today", China Court, December 4, 2013, http://www.chinacourt.org/article/detail/2013/12/id/1156618.shtml.

22 See "Rainbow v. Johnson & Johnson", Shanghai High People's Court Judgment No. (2012) Hugaominsan(zhi)zhongzi 63 (August 1, 2013), available at http://www.hshfy.sh.cn:8081/flws/text.jsp?pa=ad3N4aD01JnRhaD2jqDIwMTKjqbumuN/D8cj9KNaqKdbV19a12jYzusUmd3o9z.

as an abuse of its market dominance. [23]

(4) Xiaoqin Wu vs. Shaaanxi Broadcast & TV Network. Finally, the Shaanxi Higher Court overturned a judgment of the Xi'an Intermediate Court, finding that the cable TV service combination offered by the Shaaanxi Broadcast & TV Network – packaging additional value-added digital TV programs with basic viewing and maintenance service – did not constitute tying or bundling and denying customer Xiaoqin Wu's claim for abuse of dominance. When considering whether such sales constitute tying or bundling, the appeal court adopted a different approach than that taken by the first instance court, refusing to base the decision on whether the nature and transaction customs of the disputed services are differentiable, but set the benchmark based on whether customers have other purchase options rather than being limited only to purchase the combined service.[24]

23 See "Guangdong High People's Court Found IDC was Monopolist and Ordered it to Compensate Huawei in the Amount of CNY 20 Million", Xinhua Net, October 30, 2013, http://news.xinhuanet.com/fortune/2013-10/30/c_117928934.htm.
24 See "Xiaoqin Wu v. Shaanxi Broadcast & TV Network", Shaanxi High People's Court Judgment No. (2013) Shaanminsanzhongzi 38 (September 12, 2013), available at http://sxfy.chinacourt.org/public/paperview.php?id=1220547.

COLOMBIA

2013 ANTITRUST YEAR IN REVIEW

By Jorge A. De Los Ríos of Posse Herrera Ruiz

LEGISLATIVE DEVELOPMENTS

During the past years, Colombia has undertaken a considerable effort to develop a strong anti-trust policy aimed at invigorating the economy, promoting private investment, increasing efficiency, promoting consumer welfare policies and encouraging economies of scale, thus broadening supply in different sectors of the economy. This tendency is evidenced not only in the enactment and modernization of laws in accordance with international standards, but also in the Government's and Competition Authority (Superintendence of Industry and Trade, hereinafter "SIC")'s intention to enforce available regulations and strengthen the technical capabilities of its institutions and officials.

In 2013, the SIC imposed fines for a total of COP 160.8 billion (approximately USD 84 million), contrasting with COP 7.2 billion fines imposed in 2009 (approximately USD 3.7 million). Qualitative aspects also show progress: there was a significant improvement in the timing for carrying out investigations for anticompetitive conducts, as currently an investigation takes an average of seven months and a half, when the average before 2013 was of around eleven months.[1]

Progress was made in merger review as well: during the last three years, the number of notified transactions increased, matching the increase in Colombia's private investment.

In spite of the above, and according to the most recent National Report on Competitiveness from the Colombian Private Council of Competitiveness,[2] it is necessary to continue to deepen the scope of legal reforms, something which is expected to occur in the next few years given the determination shown by the National Government to modernize and strengthen its antitrust policy and achieve the best standards in economic development.

MERGERS

In 2013 more than 130 cases were filed before the SIC, which led to the development of an insightful and significant doctrine on merger control. It is worth noting that a number of those filings can be explained by the uncertainties prompted by the existence of a market share threshold, which determines whether there is a need for obtaining prior approval for a merger transaction or not. In this sense, if the joint market share in the relevant market of the parties to the transaction is below 20%, no prior approval would be required.

One line of investigation that has been frequently pursued by SIC is that of vertical transactions. This vertical requirement has proved to be ambiguous and in many cases debatable, as evidenced for example in a case involving the creation by a group of construc-

1 Private Council of Competitiveness. National Report on Competition 2012 – 2013, available at http://www.compite.com.co/site/wp-content/uploads/2012/11/Competencia.pdf.

2 Private Council of Competitiveness. National Report on Competition 2013 – 2014, available at http://www.compite.com.co/site/wp-content/uploads/2013/11/CPC_INC2013-2014-13-Competencia.pdf.

tion companies of a joint venture to create and publish a magazine aimed at the promotion of their housing projects. The transaction was not reported or submitted for the SIC's review because it did not appear to meet the formal conditions for doing so. Nonetheless, the SIC applied the concept of vertical transactions and opened an investigation against the construction companies[3], ultimately however concluding that the joint advertising of housing projects did not modify the market structure of the construction market.[4] This precedent is very important because defines in which cases joint ventures may be interpreted by the SIC to constitute business integrations subject to its review.

In February 2013, in the merger case between Farmacéutica Roma S.A., Distribuciones AXA S.A., Eve Distribuciones S.A.S., Represander Ltda. and Comercializadora Multidrogas de Colombia S.A.S.,[5] the SIC marked the difference between a notifiable horizontal merger and a collaboration agreement among competitors. The case involved a group of pharmaceutical distributors, who submitted for review the formation of a sales and marketing joint venture with the purpose of creating a marketing scheme to distribute and promote their products. The SIC ultimately concluded that agreements among competitors are not mergers, and therefore do not require or are subject to prior review, provided, however, that they could be subject to ex-post control for anticompetitive conduct.

The global Pfizer/Nestlé case,[6] in which Nestlé acquired Pfizer's infant milk formula business, was approved with heavy divestment conditions and remedies. The main conditions in this case were (i) the obligation to license Pfizer's milk formula brands to a third party for a term of 10 years; (ii) Nestlé could not reintroduce or otherwise sell the divested products in the Colombian market for an additional period of 10 years, and; (iii) the divestment of Pfizer facilities and manufacturing plant in Vallejo, Mexico.

Finally, one of the most relevant cases in 2013 from a substantive perspective dealt with the acquisition by Bodytech of Informa's gym business in the city of Medellín, involving significantly high market shares that initially triggered competitive concerns leading to the SIC's objection of the transaction.[7] However, the parties were successful in convincing the SIC that the lack of high barriers to entry would allow the preservation of the dynamics of competition, thus reversing the initial decision and achieving the approval of the transaction.[8]

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The SIC has been very active in opening cartel investigations in different sectors of the economy, such as the following:

· The public sanitary and waste management system, against the Empresa de Acueducto y Alcantarillado de Bogotá, the Unidad Administrativa Especial de Servicios Públicos UAESP, Aguas de Bogotá S.A. ESP and some public officials including the Mayor of Bogotá.[9] According to the SIC, the investigated parties carried out actions that may have seriously obstructed some private operators' access to the sanitary and waste management markets, through the adoption of several changes in market conditions. In this respect, the Mayor of Bogotá and State-owned companies such as Empresa de Acueducto y Alcantarillado de Bogotá incurred in collusive conducts aimed at not renovating the concession agreements with the private operators of the public sanitary and waste system,

3 Superintendence of Industry and Commerce, Resolution No. 42,857, August 18, 2011.
4 Superintendence of Industry and Commerce, Resolution No. 533, January 21, 2013.
5 Superintendence of Industry and Commerce, Resolution No. 4851, February 15, 2013.
6 Superintendence of Industry and Commerce, Resolution No. 20,968, April 23, 2013.
7 Superintendence of Industry and Commerce, Resolution No. 42,659, July 22, 2013.
8 Superintendence of Industry and Commerce, Resolution No. 74,281, December 5, 2013.
9 Superintendence of Industry and Commerce, Resolution No. 14,902, April 4, 2013.

whose presence in the market was then obstructed.

· The cement market, against Cementos Argos S.A., Cemex Colombia S.A., Holcim Colombia S.A., Cementos Tequendama S.A.S. and Cementos San Marcos S.A. and certain directors of those companies, for an alleged price fixing and market allocation cartel.[10] Such conducts would have resulted in sustained and unjustified increases in the prices of gray cement from January 2010 up to date. This case is currently under investigation.

· The sugar market, against certain sugar mills, distributors and the Colombian association of sugar cane growers (Asocaña),[11] due to alleged exchanges of sensitive information and distribution of production quotas. This case is currently under investigation.

· The cattle market, based on alleged coordination and fixing of commissions paid to intermediaries in auctions, charged to cattle sellers and purchasers.[12]

· Government procurement practices, against individuals and corporations related to the Nule Group (under liquidation for alleged corruption conducts).[13] In this case a decision was issued imposing a fine of more than USD 15 million for alleged bid rigging in the Government Institute for Family Welfare's procurement processes. The sanctions were applied in the context of the adjudication of auditing contracts for the supervision of the concession agreement for the operation of food supplement production's plants and the technical and administrative supervision of emergency rations programs, children's breakfasts and nutritional recovery, and are based on the alleged facts that the Nule Group presented several bid proposals through different companies simulating competition between them in the selection processes, thereby increasing its chances of being awarded the various contracts, as was finally the case.

ABUSES OF A DOMINANT POSITION

In 2013, the following companies, inter alia, were fined for abuse of dominance practices:

· Claro (América Móvil), a mobile communications company with over 60% market share, was fined COP 87.7 billion (approximately USD $46 million) for, among other practices, obstructing third mobile operators' access to marketing channels, through mobile equipment's band locking and the subsequent prevention of competitors' access to former Claro customers willing to change their mobile operator.[14]

· Empresa de Energía de Boyacá S.A. E.S.P. ("EBSA"), a power supply company, was fined COP 4.7 billion (approximately USD 2,350,000) for conditioning the calibration of power meter's information to the payment of an additional fee by customers and demanding the payment of a substantially higher fee to customers wishing to calibrate their power meters with a different company.[15]

10 Superintendence of Industry and Commerce, Resolution No. 49,141, August 21, 2013.
11 Superintendence of Industry and Commerce, Resolution No. 15,294, April 8, 2013.
12 Superintendence of Industry and Commerce, Resolution No. 59,624, October 11, 2013.
13 Superintendence of Industry and Commerce, Resolutions No. 54,693 and 54,695, September 16, 2013.
14 Superintendence of Industry and Commerce, Resolution No. 53,403, September 3, 2013.
15 Superintendence of Industry and Commerce, Resolution No. 3694, February 5, 2013.

· Gases de Occidente S.A. E.S.P., a natural gas supplier, was fined COP 1.3 billion (approximately USD 700,000) for obstructing the entry of third competitors to the market of internal natural gas networks (connections from the network to the individual household) by requiring conditions exceeding statutory requirements to certify and connect such networks them to the main utility network.[16]

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16 Superintendence of Industry and Commerce, Resolution No. 4907, February 18, 2013.

DENMARK

By Gitte Holtsø, Lise Aaby Nielsen and Anne Louise Dalsgaard of Plesner

LEGISLATIVE DEVELOPMENTS

On May 30, 2013, the Danish Parliament adopted an amendment to the Danish Competition Act introducing a fee for the notification of mergers of up to DKK 1.5 million (approx. EUR 201,500). The amendment took effect on August 1, 2013.

The fee for submitting a simplified notification amounts to DKK 50,000 (approx. EUR 6,700). The fee for submitting a complete notification amounts to 0.015 per cent of the aggregate annual turnover in Denmark of the undertakings concerned, however, with a maximum of DKK 1.5 million (approx. EUR 201,500). Accordingly, the maximum fee will apply in mergers where the undertakings concerned have an aggregate annual turnover in Denmark of DKK 10 billion (approx. EUR 1.3 billion) or more.

A merger notification will only be subject to review when documentation of payment of the fee is received by the Danish Competition and Consumer Authority ("DCCA"). If a notification is submitted without this documentation, the notifying party will receive a request from the DCCA of payment within five working days.

The merger is declared void if the fee it not paid within five days. Furthermore, the time limit of 25 working days from the receipt of a complete notification in Phase 1 starts running when the DCCA has received documentation of payment.

The fee is not refundable unless:

· there is no obligation to notify the transaction

· a notification is withdrawn prior to declaring the transaction complete

· a notification is withdrawn (i) before a decision has been made by the DCCA; and (ii) the withdrawal is the result of another Danish authority's refusal to allow the merger.

If a simplified notification has been submitted, but the DCCA subsequently requires a standard notification instead, the fee related to a standard notification (with a deduction of the fee paid when submitting the simplified notification) must be paid. The DCCA will request payment of the (additional) fee within five working days from submitting the standard notification, and failure to meet this deadline will result in the merger being declared void.

The notifying party may appeal the DCCA's decision to submit a standard notification instead of a simplified notification to the Danish Competition Appeals Tribunal ("DCAT"). If so, the time limit for the DCCA's review of the notification will be suspended until the DCAT has reached a decision in the case.

MERGERS

On September 25, 2013, the Danish Competition Council ("DCC") cleared the acquisition by JYSK Holding A/S ("JYSK") of IDdesign A/S ("IDdesign"), the owner of the two furniture retail chains IDEmøbler

and ILVA. JYSK notified the acquisition of IDdesign to the DCCA on May 3, 2013. The merger involved JYSK's acquisition of sole control (80 % of the share capital) of IDdesign.[1]

In order to assess whether the merger would significantly impede effective competition, the DCCA declared that the merger had to be compared with the counterfactual scenario, i.e. the competition in the relevant markets if the merger was not completed. The DCCA considered that the likely counterfactual scenario would be the bankruptcy of IDdesign. However, the DCCA held that the failing firm defense was not applicable, as the assets of IDdesign would not inevitably exit the market. In the event of the bankruptcy of IDdesign, the DCCA did not expect a new significant player to enter the market within a sufficiently short time frame and thus, there would be no substitute for the competitive pressure that would vanish from the market.

Based on analyses of market shares and HHI, illustrative price rises and potential competition, the DCCA found that JYSK's acquisition of IDdesign would not significantly impede effective competition in the markets compared to the counterfactual scenario. Even though the acquisition might increase the concentration in the market, the analyses showed that the counterfactual scenario would be more harmful to competition than the proposed merger.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On January 16, 2013, Georg Jensen (a producer of lifestyle products) accepted to pay a fine of DKK 1 million (approx. EUR 134,000) for resale price maintenance. Georg Jensen had instructed its dealers to apply the company's recommended resale prices as a minimum resale price to consumers. This conduct had been carried out towards several dealers during a period of no less than two years.[2]

When setting the fine, the DCCA took into account the duration of the infringement, the size of Georg Jensen's turnover and the fact that the agreements on resale price maintenance were entered into with several dealers. As a mitigating circumstance, the DCCA emphasized that the management of Georg Jensen had contacted the DCCA immediately after realizing that resale price maintenance had taken place and that Georg Jensen had cooperated with the competition authorities throughout the case.

On July 18, 2013, Miele A/S accepted to pay a fine of DKK 1.2 million (approx. EUR 161,000) for resale price maintenance and preventing parallel imports on white goods in at least one instance. In addition, each of two individuals from the company's management accepted to pay a fine of DKK 20,000 (approx. EUR 2,700) for having participated in the infringements.[3]

In 2011, the DCCA conducted an unannounced inspection of Miele's premises and subsequently referred the matter to the Public Prosecutor for Serious Economic and International Crime. The DCCA found that Miele had instructed some of its dealers to raise prices when selling to consumers. Furthermore, Miele was held to have prevented parallel imports of Miele's products to Denmark, inter alia, by stopping parallel imports from a German dealer. The duration of the infringements was approximately one year.

When setting the fines, the Prosecutor took into account that Miele had cooperated with the competition authorities.

1See the DCC's decision of September 25, 2013, Case 13/05691 available in Danish at http://www.kfst.dk/Afgoerelsesdatabase/Konkurrenceomraadet/Afgoerelser/2013/20130925-Moebelfsion?tc=D0D5EF6487E34C97BCE60E1BFB412C96.

2 See the DCCA's fixed-penalty notice accepted on January 16, 2013, Case EKA-12/16540-3 available in Danish at http://www.kfst.dk/Afgoerelsesdatabase/Konkurrenceomraadet/Straffedomme-og-boedevedtagelser/20130116-Boede-vedtaget-den-16-januar-2013-vedroerende-Georg-Jensen-AS?tc=E538038EB1E04A96B9964BE4C0F85F46.

3 See the Prosecutor's fixed-penalty notice accepted on July 18, 2013, Case SØK-91250-00019-11 available in Danish at http://www.kfst.dk/Afgoerelsesdatabase/Konkurrenceomraadet/Straffedomme-og-boedevedtagelser/20130718-Boede-vedtaget-18-juli-2013-af-Miele-AS?tc=E538038EB1E04A96B9964BE4C0F85F46.

DENMARK

On October 30, 2013, the clothing company, Vila A/S accepted to pay a fine of DKK 1.6 million (approx. EUR 213,333) for resale price maintenance. For a period of no less than two and a half year, Vila had instructed its dealers to apply the company's recommended resale prices as a minimum price to consumers. Also, each of two individuals from the company's management accepted to pay a fine of DKK 22,000 (approx. EUR 2,933) for having participated in the infringement. One had been aware of the anti-competitive practice but not taken any actions to stop them and the other had been actively involved in the infringement.[4]

When setting the fines, the DCCA took into account the duration of the infringement, the size of Vila's turnover and the fact that the agreements on resale price maintenance were entered into with several dealers. As a mitigating circumstance, the DCCA took into account that Vila and the two individuals from the management had cooperated with the authority.[5]

COURT DECISIONS

On February 15, 2013, the Danish Supreme Court overturned the DCC's decision in which it was held that Post Danmark A/S ("Post Danmark") had abused its dominant position in the market for the distribution of unaddressed mail.[6]

The case arose in 2003-2004 when Forbruger-Kontakt A/S ("Forbruger-Kontakt") submitted a complaint to the DCCA) claiming that Post Danmark abused a dominant position in the market for unaddressed mail (advertising, newspapers, etc.) primarily by practicing a policy of price and rebate discrimination. In the second half of 2003, Forbruger-Kontakt had lost three major clients to Post Danmark. According to Forbruger-Kontakt, Post Danmark's pricing strategy sought to eliminate Forbruger-Kontrakt from the market, thereby abusing its dominant position contrary to Section 11 of the Danish Competition Act and Article 102 TFEU. Specifically, the price that Post Danmark offered one customer did not allow Post Danmark to cover its average total costs. However, the average incremental costs were covered. The prices that were offered to the two other customers were at a level higher than the average total costs. Forbruger-Kontakt also complained that Post Denmark prices were predatory.

On September 29, 2004, the DCC held that Post Danmark had abused its dominant position in the Danish market for the distribution of unaddressed mail by placing some customers at a disadvantage in competition downstream ("secondary-line price discrimination") and, secondly, by offering Forbruger-Kontakt's former customers lower prices compared to prices charged to its own pre-existing customers without justification relating to costs ("primary-line price discrimination"). However, the DCC found that Post Danmark prices were not predatory.

The Danish Competition Appeals Tribunal ("DCAT") upheld the DCC's decisions on July 1, 2005. Post Danmark subsequently brought the issue of primary-line discrimination before the Eastern High Court, which affirmed the DCC and the DCAT's findings in this respect on December 2, 2007.

4 See the DCCA's fixed-penalty notice accepted on October 30, 2013, Case 13/10961 available in Danish at http://www.kfst.dk/Afgoerelsesdatabase/Konkurrenceomraadet/Straffedomme-og-boedevedtagelser/20131030-Boede-vedtaget-30-okt-2013-af-Vila?tc=E538038EB1E04A96B9964BE4C0F85F46.

5 Besides Georg Jensen A/S, Miele A/S and Vila A/S, other companies have also accepted fines for resale price maintenance in 2013.

6 See the Danish Supreme Court's judgment of February 15, 2013, Case 2/2008 available in Danish at http://www.kfst.dk/Afgoerelsesdatabase/Konkurrenceomraadet/Domsafgoerelser/20130215-Hoejesterets-dom-afsagt-15-februar-2013-Post-Danmark-AS-mod-Konkurrenceraadet?tc=CF6A31315C2D401DA6C537E3A404C71A.

Post Danmark appealed the High Court's decision to the Supreme Court. On appeal, Post Danmark requested that the case was submitted to the European Court of Justice ("ECJ") for a preliminary ruling. The ECJ reached a decision on March 27, 2012 (Case C-209/10, Post Danmark A/S v. Konkurrencerådet). Firstly, the ECJ stated that a dominant undertaking charging different customers or different groups of customers different prices for goods or services with similar costs or, conversely, charging similar prices to different customers, is not in itself sufficient for establishing exclusionary abuse (primary-line discrimination). The ECJ noted that to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for an equally efficient competitor to compete without suffering losses that are unsustainable in the long term.

The ECJ went on specifying that it is for the national court in question to decide whether this is the case. In any event, the ECJ noted that it appeared from the documents before the ECJ that Forbruger-Kontakt managed to maintain its distribution network despite losing the volume of mail related to the three customers involved, and managed to win back two of the three customers.

Ultimately, the ECJ found that a policy by which a dominant undertaking offers lower prices to certain major customers of a competitor does not constitute exclusionary abuse merely because the price offered does not cover the average total costs, but cover the average incremental costs.

On February 15, 2013, the Supreme Court reached a decision. In light of the ECJ's judgment, the DCC had decided to withdraw its claim that the prices charged to two of the customers were, in themselves, an indication of an abuse of a dominant position, as these prices were assessed to be higher than Post Danmark's average total costs, and therefore could clearly not be considered to have anti-competitive effects according to the ECJ's ruling.

The Supreme Court confirmed that Post Danmark held a dominant position in the relevant market; however, dismissed the claim that Post Danmark's pricing policy constituted an exclusionary abuse. In this regard, the Supreme Court referred to the ECJ's ruling.

Furthermore, the Supreme Court held that the DCC had not shown that the prices offered which did not cover the average total costs, but covered the average incremental costs, would be likely to have eliminated Forbruger-Kontakt from the market to the detriment of competition. The Supreme Court, inter alia, based its assessment on the fact that (i) Post Danmark's average prices to all its customers exceeded its average total costs; and (ii) Post Danmark's customers could terminate their contracts with Post Danmark with one or three months' notice, which would make it possible for Forbruger-Kontakt to compete with Post Danmark's prices if it were as efficient as Post Danmark.

Næstved convicted the owner of a driving school

of agreeing on prices for driving lessons with the owners of two other driving schools. During a period of six weeks in 2011, the driving schools inserted a joint advertisement in a local newspaper announcing a common price for driving lessons at the three driving schools. Two of the owners accepted a fine in the autumn of 2012 of DKK 25,000 (approx. EUR 3,333) each. The third owner refused to accept a fine and the matter was brought before the courts. The City Court in Næstved found that the price fixing agreement constituted a horizontal agreement, which restricted competition between the three driving schools contrary to Section 6 of the Danish Competition Act and fined the owner DKK 25,000. The level of fines was increased significantly by Parliament effective from August 1, 2013, but as the infringement occurred in 2011, this case was decided pursuant to the old rules.[7]

7 See the Danish City Court in Næstved's judgment of September 11, 2013, Case 6508/2012 available in Danish at http://www.kfst.dk/Afgoerelsesdatabase/Konkurrenceomraadet/Straffedomme-og-boedevedtagelser/20130911-Dom-Retten-i-Naestved-Birgits-Koereskole?tc=E538038EB1E04A96B9964BE4C0F85F46.

EUROPEAN UNION

2013 ANTITRUST YEAR IN REVIEW

By Michael Clancy and Laurie-Anne Grelier
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LEGISLATIVE DEVELOPMENTS

In 2013, the European Commission (EC) took another significant step concerning private antitrust enforcement, issuing a proposed directive to facilitate damages claims by victims of antitrust violations while at the same time protecting statements from leniency applicants.[1] The EC also continued its review of the rules for technology transfers,[2] extended the scope of the simplified merger notification procedure,[3] and considered extending the merger notification system to also apply to the acquisitions of minority shareholdings.[4] In contrast, the EC decided not to prolong its guidelines for the maritime transport sector (which expired in September 2013).[5]

MERGERS

Like 2012, 2013 had a number of high profile merger cases. The EC notably blocked UPS' proposed acquisition of rival TNT Express, a deal that would have reduced the number of major players from three to two in many EU countries.[6] It also blocked low-cost air carrier Ryanair's third attempt to acquire Irish compatriot Aer Lingus.[7] In contrast, it cleared Greek carrier Aegan Airlines' second attempt to acquire national rival Olympic Air, in light of Olympic Air's imminent market exit,[8] and also cleared the merger of US Airways and American Airlines, subject to slot releases.[9]

Consolidation in the mobile telecommunications sector has also kept the EC busy in 2013, with in-depth examinations of Hutchison Whampoa's proposed acquisition of rival Telefónica Ireland[10] and of Telefónica Deutschland's proposed acquisition of rival E-Plus.[11] In both cases, the EC is concerned that the contemplated transactions will bring the number of mobile network operators from four to three in certain EU countries, and may thus lead to higher prices and impede MVNOs' and service providers' access to telecommunications networks. In the related sector of roaming data clearing, after an in-depth investigation, the EC cleared Syniverse's acquisition of its main rival Mach, subject to the divestment of certain assets.[12]

1 See: http://ec.europa.eu/competition/antitrust/actionsdamages/proposed_directive_en.html.

2 See: http://ec.europa.eu/competition/consultations/2013_technology_transfer/index_en.html.

3 European Commission Press Release, December 5, 2013, "Mergers: Commission cuts red tape for businesses", available at http://europa.eu/rapid/press-release_IP-13-1214_en.htm.

4 See: http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html.

5 European Commission Press Release, February 19, 2013, "Antitrust: Commission decides not to prolong maritime transport antitrust guidelines", available at http://europa.eu/rapid/press-release_IP-13-122_en.htm.

6 European Commission Press Release, January 30, 2013, "Mergers: Commission prohibits proposed acquisition of TNT Express by UPS", available at http://europa.eu/rapid/press-release_MEMO-13-48_en.htm.

7 European Commission Press Release, February 27, 2013, "Mergers: Commission prohibits Ryanair's proposed takeover of Aer Lingus", available at http://europa.eu/rapid/press-release_MEMO-13-144_en.htm.

8 European Commission Press Release, October 9, 2013, "Mergers: Commission approves acquisition of Greek airline Olympic Air by Aegean Airlines", available at http://europa.eu/rapid/press-release_IP-13-927_en.htm.

9 European Commission Press Release, August 5, 2013, "Mergers: Commission approves proposed merger between US Airways and American Airlines' holding company AMR Corporation, subject to conditions", available at http://europa.eu/rapid/press-release_IP-13-764_en.htm.

10 European Commission Press Release, November 6, 2013, "Mergers: Commission opens in-depth investigation into Hutchison's 3G UK's acquisition of Telef□nica Ireland", available at http://europa.eu/rapid/press-release_IP-13-1048_en.htm.

11 European Commission Press Release, December 20, 2013, "Mergers: Commission opens in-depth investigation into Telef□nica Deutschland's acquisition of E-Plus", available at http://europa.eu/rapid/press-release_IP-13-1304_en.htm.

12 European Commission Press Release, May 29, 2013, "Mergers: Commission clears Syniverse's acquisition of Mach, subject to conditions", available at http://europa.eu/rapid/press-release_IP-13-481_en.htm.

In another related sector, the EC gave its green light to Microsoft's acquisition of Nokia's Devices & Services business.[13]

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2013, the Commission has maintained its practice of imposing high fines, the most significant of which was a record EUR 1.71 billion total fine (approximately USD 2.3 billion) on eight financial institutions for participating in a Euro interest rate derivatives cartel and/or in Yen interest rate derivative cartels. The total fines may raise even higher, as the EC is continuing to investigate four companies that refused to settle.[14] The EC has also issued its first decision in the car part "supercartel" investigation, imposing fines totaling EUR 141 million (approximately USD 189 million) against automotive wire harnesses suppliers.[15] Vice President Almunia has announced that more decisions and fines are to be expected in this sector.[16] In the other cartel decision adopted in 2013, the EC imposed a total EUR 28 million fine (approximately USD 38 million) on four European North Sea shrimps traders for fixing prices and sharing sales volumes.[17] The EC also launched or continued cartel investigations into companies in the following sectors: smart card chips[18], sugar[19] and cargo train transport services.[20]

In addition to its cartel enforcement activities, the EC imposed fines totaling EUR 79 million (approximately USD 108 million) on Telefónica and Portugal Telecom for agreeing to an allegedly problematic non-compete clause in the context of a transaction.[21] The EC also opened an investigation against container liner shipping companies over concerns that they engaged in anti-competitive price signaling,[22] and sent formal charges to 13 investment banks, taking the initial view that they colluded to prevent exchanges from entering the credit derivative business.[23] The EC has also market tested commitments offered by Visa Europe with a view to close its probe into multilateral interchange fees for consumer credit cards transactions.[24] Likewise, the EC accepted commitments offered by Air Canada, United and Lufthansa to end its investigation into the companies' revenue sharing joint venture concerning the New York-Frankfurt route.[25]

Finally, in the pharmaceutical sector, the EC issued its first ever decision concerning reverse-pay-

13 European Commission Press Release, December 4, 2013, "Mergers: Commission clears acquisition of Nokia's mobile device business by Microsoft", available at http://europa.eu/rapid/press-release_IP-13-1210_en.htm.

14 European Commission Press Release, December 4, 2013: "Antitrust: Commission fines banks €1.71 billion for participating in cartels in the interest rate derivatives industry", available at http://europa.eu/rapid/press-release_IP-13-1208_en.htm.

15 European Commission Press Release, July 10, 2013, "Antitrust: Commission fines producers of wire harnesses €141 million in cartel settlement", available at http://europa.eu/rapid/press-release_IP-13-673_en.htm.

16 Speech, 13 September 2013, http://europa.eu/rapid/press-release_SPEECH-13-697_en.htm.

17 European Commission Press Release, November 27, 2013, "Antitrust: Commission fines four North Sea shrimps traders €28 million for price fixing cartel", available at http://europa.eu/rapid/press-release_IP-13-1175_en.htm.

18 European Commission Press Release, April 22, 2013, "Antitrust: Commission sends statement of objections to suspected participants in smart card chips cartel", available at http://europa.eu/rapid/press-release_IP-13-346_en.htm.

19 European Commission Press Release, May 15, 2013, "Antitrust: Commission confirms unannounced inspections in the sugar sector", available at http://europa.eu/rapid/press-release_MEMO-13-443_en.htm.

20 European Commission Press Release, June 19, 2013, "Antitrust: Commission confirms inspections in the sector of cargo train transport services", available at http://europa.eu/rapid/press-release_MEMO-13-586_en.htm.

21 European Commission Press Release, January 23, 2013, "Antitrust: Commission fines Telef□nica and Portugal Telecom €79 million for illegal non-compete contract clause", available at http://europa.eu/rapid/press-release_IP-13-39_en.htm.

22 European Commission Press Release, November 22, 2013, "Antitrust: Commission opens proceedings against container liner shipping companies", available at http://europa.eu/rapid/press-release_IP-13-1144_en.htm.

23 European Commission Press Release, July 1, 2013, "Antitrust: Commission sends statement of objections to 13 investment banks, ISDA and Markit in credit default swaps investigation", available at http://europa.eu/rapid/press-release_IP-13-630_en.htm.

24 European Commission Press Release, June 13, 2013, "Antitrust: Commission market tests Visa Europe's commitments," available at http://europa.eu/rapid/press-release_MEMO-13-554_en.htm.

25 European Commission Press Release, May 23, 2013, "Antitrust: Commission renders legally binding commitments from Star Alliance members Air Canada, United and Lufthansa on transatlantic air transport passenger market", available at http://europa.eu/rapid/press-release_IP-13-456_en.htm.

ment patent settlements, and imposed fines totaling EUR146 million (approximately USD 195 million) on Lundbeck and four generic pharmaceutical companies.[26] In addition, the EC imposed a fine of EUR 16 million (approximately USD 22 million) on Johnson & Johnson and Novartis for entering into a co-promotion agreement allegedly destined to artificially delay the entry of Novartis' generic version of Fentanyl.[27]

ABUSES OF A DOMINANT POSITION

2013 marked a year in which the EC attempted to wrap up a number of ongoing abuse-of-dominance cases, in advance of the expiry of the five-year term of the current commissioners. To this end, the EC and Google tried, but so far failed, to resolve the numerous allegations concerning Google's search and related advertising services, with Google submitting two rounds of commitments, both of which the EC rejected.[28] The EC also issued formal objections against Google's Motorola Mobility, for allegedly seeking to enforce a standard-essential patent against a willing licensee (Apple),[29] while at the same time exploring potential settlement on a similar case.[30]

In the energy sector, the Commission concluded its case against the Czech energy company CEZ, following commitments that CEZ would divest a significant portion of its generation capacity.[31] The investigation against Russia's Gazprom into alleged excessive pricing also was heading for possible settlement, with Gazprom issuing proposed commitments at the end of the year.[32]

The EC also launched investigations against Orange, Deutsche Telekom and Telefónica, into allegations that they provided favorable internet connectivity to their own online services and degraded access to competing services.[33] The EC also took steps to finalize its case against Altstoff Recycling, issuing a statement of objections and holding a hearing into allegations that Altstoff prevented competitors in the Austrian packaging waste market from accessing the household collection infrastructure.[34]

COURT DECISIONS

The EC had a successful year in front of the EU Courts, with the EU Courts upholding EC cartel de-

26 European Commission Press Release, June 19, 2013, "Antitrust: Commission fines Lundbeck and other pharma companies for delaying market entry of generic medicines", available at http://europa.eu/rapid/press-release_IP-13-563_en.htm?locale=en.

27 European Commission Press Release, December 10, 2013, "Antitrust: Commission fines Johnson & Johnson and Novartis €16 million for delaying market entry of generic pain-killer fentanyl", available at http://europa.eu/rapid/press-release_IP-13-1233_en.htm.

28 See Aoife White," Google Antitrust Settlement Offer Rejected by EU's Almunia", Bloomberg.com, December 20, 2013.

29 European Commission Press Release, May 6, 2013, "Antitrust: Commission sends Statement of Objections to Motorola Mobility on potential misuse of mobile phone standard-essential patents", available at http://europa.eu/rapid/press-release_IP-13-406_en.

30 See Lewis Crofts, "EU, Samsung settlement talks going in 'good direction', Almunia says", MLex, January 14, 2014.

31 European Commission Press Release, April 10, 2013, "Antitrust: Commission accepts commitments from CEZ concerning the Czech electricity market and makes them legally binding", available at http://europa.eu/rapid/press-release_IP-13-320_en.

32 See Vanessa Mock, "Gazprom Submits Written Proposals to EU in Antitrust Case", Dow Jones, December 13, 2013.

33 European Commission Press Release, July 11, 2013, "Antitrust: Commission confirms unannounced inspections in Internet connectivity services," available at http://europa.eu/rapid/press-release_MEMO-13-681_en.htm.

34 European Commission Press Release, July 18, 2013, "Antitrust: Commission sends statement of objections to ARA for suspected abuse of dominance on Austrian waste management markets", available at http://europa.eu/rapid/press-release_IP-13-711_en.

cisions in the following sectors: gas insulated switchgear, synthetic rubbers, bleaching agents, industrial plastic bags, elevators and escalators, raw tobacco, international removals and bathroom fittings and fixtures. The EU Courts also confirmed Commission decisions rejecting complaints by Vivendi (alleging excessive pricing by France Telecom) and Cisco (contesting the Microsoft/Skype merger). Nevertheless, a few companies were successful on appeal, especially Trane, Inc., which had its fine reduced from EUR 259 million to EUR 93 million because the Commission failed to prove the entire period of the alleged cartel.[35]

In other cases referred by the national courts to the EU Court of Justice, the Court confirmed that competition authorities can impose fines for antitrust infringements even if companies have received advice that the behavior is allowable from their external counsel or from a national competition authority.[36] The Court also confirmed that an agreement to exclude a competitor from the market is illegal even if that competitor is operating unlawfully on the market.[37]

35 Case T-380/10 Wabco Europe and Others v European Commission, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=141401&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=236823.

36 Case C-681/11 Bundeswettbewerbsbehörde v Schenker, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=138602&pageIndex=0&doclang=EN.

37 Case C-68/12 Protimonopolný úrad Slovenskej republiky v Slovenská sporitel'ňa, available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=133622&pageIndex=0&doclang=EN.

FINLAND

2013 ANTITRUST YEAR IN REVIEW

By Ami Paanajärvi of Roschier Attorneys Ltd.

LEGISLATIVE DEVELOPMENTS

Two significant amendments to the Competition Act were prepared, and one was adopted, during the course of 2013.

Firstly, as of September 1, 2013, the Finnish Competition and Consumer Authority ("FCCA")'s jurisdiction has been broadened to cover also the supervision of business activities operated by the public sector.[1] The aim of this amendment is to ensure that competition between companies in the public and private sectors is fair (in accordance with the neutrality principle). According to the Government Bill, if conduct of business activities by a municipality, a municipal federation, the state or an entity under the control of one of the foregoing would distort competition in the market or prevent the development of healthy competition, the FCCA can, primarily through negotiations strive to remove such distortion. If negotiations are not successful, the FCCA has the power to prohibit the conduct or impose obligations on the infringing party. The FCCA's supervisory power does not cover statutory operations of municipalities, such as the authorities' official actions and social security.

The second more recent amendment to the Competition Act relates to the specific situation in the Finnish market for the retail of daily consumer goods and has come into force on January 1, 2014. A new Section 4(a) of the Competition Act containing a specific definition of a dominant position in the daily consumer goods sector has been added to the Act. According to the new section, a dominant position shall be deemed to be held by one or more business undertakings or association of undertakings holding at least a 30% market share in the market for retail trade of daily consumer goods in Finland. This definition is an exception to Section 7 of the Competition Act under which the existence of a dominant market position is assessed on a case-by-case basis, based on competition conditions within the relevant markets. According to the Government Bill, the Finnish daily consumer goods sector is one of the most concentrated in Europe, with the two largest players, K-Group and S-Group, holding a joint market share of over 80%. Despite this, they have not — individually or jointly — been considered to be in a dominant position under the current provisions of the Competition Act. As a result of this amendment, however, both aforementioned retailers will be considered to be in a dominant market position and they will, therefore, have to refrain from certain business practices considered abusive.

1 New Section 30(a) – (d) of the Competition Act.

FINLAND

MERGERS

Of the 20 cases notified to the FCCA in 2013, 18 were approved unconditionally within the standard one month first phase procedure.

Of the two remaining cases, one, the acquisition of PPO-Yhtiöt Oy, Kymen Puhelin Oy and Telekarelia Oy by Elisa Oyj was examined in a second phase procedure following which it was cleared with conditions on April 24, 2013.[2] The second concerned, the setting up of a joint venture by Uponor Oyj and KWH-Yhtymä Oy, was examined in a second phase procedure following which the FCCA submitted the suggestion to block the transaction to the Market Court on February 25, 2013.[3] The latter mentioned case was the first in which the FCCA attempted to block a merger on the basis of the SIEC test. According to the FCCA, the proposed transaction would have combined the two biggest players in the market for plastic pipe systems in Finland. The FCCA found that both parties have a significant market position in many of the relevant markets. Further, the FCCA found that the acquisition would likely lead to increases in prices and costs of infrastructure solutions. The FCCA stated that it had no other choice but to propose the prohibition of the proposed transaction, as it did not find the commitments proposed by the parties sufficient to efficiently remove the competition concerns. On May 24, 2013 the Market Court, however, rejected the FCCA's proposal to block the creation of the joint venture and approved the transaction, subject to conditions.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2013 the Supreme Administrative Court ("SAC") handed down two interesting decisions concerning the prohibition against anticompetitive agreements and trade associations.

Firstly, on January 30, 2013 the SAC imposed fines on members of the Finnish Home Appliance Servicing association for participating in price agreements in the context of the trade association. Secondly, on June 20, 2013 the SAC imposed a fine on the Finnish Association for Professional Hairstylists for price recommendations issued during 2000 - 2006 by the association.

ABUSES OF A DOMINANT POSITION

On June 28, 2013 the Market Court rejected Valio's application to temporarily prohibit implementation of the FCCA's decision concerning Valio's abuse of dominant position. In December 2012, the FCCA proposed to the Market Court that a fine be imposed on Valio for abuse of a dominant position in the market for production and wholesale of fresh milk through a predatory pricing scheme. Further, the FCCA ordered Valio to cease the abusive conduct. Valio appealed the FCCA's decision to the Market Court and requested it to prohibit the implementation of the FCCA's decision until it hands down its judgment on the main appeal. According to the Market Court, Valio decided on January 9, 2013 to raise the prices of fresh milk by 30% from the beginning of February 2013. Valio's appeal against the FCCA's decision was made only after the decision to raise prices. The Market Court held that since Valio had already acted according to the FCCA's decision there was no reason to prohibit the implementation of the FCCA's order to cease the abusive conduct. Further, it is unclear whether Valio

2 FCCA decision of April 24, 2013 available in Finnish at http://www.kkv.fi/File/e9d28080-b7ba-4548-bd92-cfe98a42757a/r-2012-10-0261.pdf.
3 FCCA submission to the Market Court of February 25, 2013 available in Finnish at http://www.kkv.fi/File/1c29395a-9d5b-4694-a190-efbb6b4ec18f/r-2012-10-0661.pdf.

will suffer any economic loss as a result of the implemented price increase and the implementation of the FCCA's decision does not render Valio's appeal futile. Therefore, the Market Court rejected Valio's application.[4] The Market Court's interim decision does not deal with the issue of whether Valio has abused its dominant position. The oral hearing of the main appeal in the Market Court was held in autumn 2013 and the decision is expected in the course of spring 2014.

COURT DECISIONS

The landmark case in private antitrust enforcement was handed down on November 28, 2013 by the Helsinki District Court in the form of 41 judgments in the asphalt cartel damages case. In 2009, the SAC found that Lemminkäinen Oyj, VLT-Trading Oy, Skanska Asfaltti Oy, NCC Roads Oy, SA-Capital Oy, Rudus Asfaltti Oy and Super Asfaltti Oy had participated in a cartel that operated on the Finnish asphalt market in 1994 - 2002. The SAC ordered the companies to pay a total of EUR 82.55 million in fines for their participation in the cartel. Following the SAC's decision, the Finnish State and 40 local authorities filed claims before the Helsinki District Court, claiming damages from the asphalt companies and one other company for the overcharges they had paid for paving work. As regards the claims of the 40 municipalities, the District Court accepted the claims for the most part. The District Court found that the local authorities had mostly been overcharged by 15% for asphalt work, some by 20%, and ordered the companies to pay damages of altogether EUR 37.4 million (the applicable interest rates increase the amount of payable damages considerably). The District Court dismissed the claim of the State as it found, based partly on new evidence, that the National Board of Public Roads and the Finnish Road Enterprise, both state agencies, had participated in the cartel at least from the year 1998. The District Court also found that the representatives of the National Board of Public Roads had been aware of the existence of the cartel as early as in 1994. The District Court considered that no damage had been caused to the State on the basis of the activity which the State had approved at the time when it took place, which the State had participated in, and from which the State itself considered to have benefited from. The District Court ordered the State to compensate the legal costs of the companies by a total sum of EUR 2.6 million.[5]

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4 Market Court decision of June 28, 2013 available in Finnish at http://www.oikeus.fi/markkinaoikeus/62573.htm.
5 Helsinki District Court press release available in English at http://www.kkv.fi/File/75dceb51-fdd7-4dd7-a14f-1c1287d81d63/Media-release-28-11-2013.pdf.

FRANCE

2013 ANTITRUST YEAR IN REVIEW

By François Brunet and Eric Paroche
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LEGISLATIVE DEVELOPMENTS

After two unsuccessful initiatives under the Chirac and Sarkozy administrations, partially due to resilient objections by French trade associations, the French Parliament is currently voting on a bill that would create an opt-in class action for antitrust infringements.[1] The class action will enable consumers to be awarded damages for the losses they suffered as a result of anticompetitive agreements and abuses of dominant position, once a final decision of the European Commission or the French Competition Authority (the "FCA") has established that the defendant firms have committed an antitrust infringement. In order to prevent abuses of class actions, safeguards were introduced in the bill: (i) the action could only be brought by one of the country's 16 official consumer associations, (ii) only material losses could be compensated for and (iii) only consumers who opt to join the class action would be part of it.

Also, the FCA published revised guidelines on merger control that reflect its experience since 2009.[2]

MERGERS

In 2012, the FCA observed in an opinion that the Paris food retail market was highly concentrated.[3] Therefore, on January 7, 2013, when Casino notified its intended acquisition of sole control of the retailer Monoprix -until then a joint-venture between Casino and Galeries Lafayette- it is unsurprising that the FCA subjected the acquisition to divestment of more than 50 food retail outlets. The transaction amounted to approximately EUR 1.2 billion (approximately USD 1.5 billion). Culminating in a Phase II investigation, the FCA stressed that such commitments were necessary due to the already significant market share of Casino in the Paris food retail market, which was often above 50%.[4] Interestingly, the transaction did not affect the structure of the market, since it consisted in a mere change from joint to sole control, but the FCA profited from this change of control, which is reportable under French law, to impose remedies.

The acquisition by Eurotunnel, the operator of the Channel Tunnel, of three cross-Channel ferries from recently liquidated, SeaFrance SA ferry company, resulted in differing assessments on the two sides of the Channel. In June 2012, SeaFrance SA underwent liquidation proceedings before the French Commercial Court, which accepted Eurotunnel as the appropriate purchaser of the ferries. But whilst the FCA only imposed commitments preventing price discrimination between freight carriers,[5] the UK Competition Com-

1 Text of the consumer bill "Hamon Law" modified by the French Senate and submitted by the Prime Minister to the President of the National Assembly of September 16, 2013, available at http://www.assemblee-nationale.fr/14/projets/pl1357.asp.

2 French Competition Authority "The Autorité de la concurrence publishes its revised guidelines on merger control and a guide on submitting economic studies to the Autorité", July 10, 2013, available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=483&id_article=2147.

3 French Competition Authority, Opinion 12-A-01 January 11, 2012, "Relating to the Competitive Situation in the Paris food retail sector", available at http://www.autoritedelaconcurrence.fr/pdf/avis/12a01.pdf.

4 French Competition Authority, Decision No.13-DCC-90, July 31, 2013, "Relating to the Acquisition of Sole Control of the Company Monoprix by the Company Casino Guichard-Perrachon", available at http://www.autoritedelaconcurrence.fr/pdf/avis/13DCC90decision_version_publication.pdf.

5 French Competition Authority, Decision No.12-DCC-154 of November 7, 2012, "Relating to the Acquisition of Sole Control of Assets of the Company SeaFrance by the Eurotunnel Group", available at http://www.autoritedelaconcurrence.fr/pdf/avis/12DCC154decision_version_publication.pdf.

mission went significantly further by ordering Eurotunnel to either divest two ferries or be subject to a ten-year commitment not to operate a ferry service from Dover in the UK.[6]

South of the Channel, the FCA observed that the transaction was unlikely to give rise to unilateral effects insofar as any increase of prices by Eurotunnel would be unprofitable because of the reaction of rival ferry operators. In addition, it highlighted that coordinated effects were also unlikely in light of asymmetrical distribution of market shares in the UK-continental Europe passenger and cargo freight markets as well as the fact that the main players in these markets had excess capacity. However, with regards to conglomerate effects, the FCA found that Eurotunnel would be in a position post-transaction to bundle its ferry and shuttle services pertaining to freight transport. The FCA also noted that vertical effects were likely post-transaction with a possibility of foreclosure strategies.

North of the Channel, however, the UK Competition Commission's conclusions on the transaction were considerably less favorable, noting that a possible increase in prices for all rail services was likely. Moreover, it noted the probable exit of ferry competitors in light of the excess capacity on the market, which would result in only two operators between the UK and the European continent. To further complicate matters, on December 4, 2013, Eurotunnel's appeal before the Competition Appeal Tribunal was partially successful: the special appeal court quashed the Competition Commission's decision on the ground that the Commission lacked jurisdiction to review the transaction and sent the matter back to the Commission for its consideration.[7] Specifically, according to the Tribunal, the assets in question may not have given rise to the relevant merger situation that triggers review under the UK Enterprise Act 2002. The Tribunal held that the ferries may only be "bare assets", which would not constitute the activities of a business and therefore not an "enterprise". The Tribunal noted that the Commission will need to also consider whether acquisition of the assets placed Eurotunnel in a different position than if it had simply gone out into the market and acquired the assets. Therefore, the Tribunal referred the matter back to the Commission for it to examine in detail the mere notion of an enterprise, and whether an entity that has been wound up can qualify as such. Consequently, the entire saga is far from over. The Eurotunnel chronicle ostensibly underscores the necessity of merger filing coordination between national competition authorities and highlights the ramifications that diverging merger control decisions can produce on the deal process.

In the bricks market, after a Phase II investigation the FCA subjected the acquisition of Imerys assets by Bouyer-Leroux to rather unusual behavioral commitments, i.e., a transfer of 25,000 tons of bricks per year to two of its competitors at cost price in the Aquitaine region for a term of five years. But for the commitments, the FCA feared that Bouyer-Leroux would have had an exclusive monopoly over the manufacture of partition bricks in the West of France.[8]

6 UK Competition Commission, June 6, 2013 Groupe Eurotunnel S.A. and SeaFrance merger inquiry, available at http://www.competition-commission.org.uk/assets/competitioncommission/docs/2012/eurotunnel-seafrance/final_report_excised.pdf.

7 Groupe Eurotunnel S.A. v Competition Commission [2013], Competition Appeal Tribunal 30, December 4, 2013, available at http://www.catribunal.org.uk/237-8052/1216-4-8-13-Groupe-Eurotunnel-SA.html.

8 French Competition Authority, Decision No.13-DCC-101, July 26, 2013, "Relating to the Acquisition of Sole Control of the Company Imerys TC "structural materials´ assets by the Company Bouyer-Leroux", available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=483&id_article=2245.

FRANCE

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

MasterCard and Visa took commitments to reduce their interbank payment fees by 49% and 44% respectively, and their interbank withdrawal fees by 8% and 26%, in order to put an end to the proceedings of the FCA.[9] The FCA's competition concerns centered on the possibility that interbank payment fees could restrict competition between banks insofar as they represented the minimum fee that a bank may charge a merchant for cash withdrawal services. The FCA also considered that as interbank withdrawal fees are multilaterally fixed, this may restrict competition as the fees set do not reflect the costs incurred from withdrawals operated by a competing bank network.

The FCA imposed a total fine of EUR 79 million (approximately USD 102 million) against Brenntag, Caldic Est and Univar for cartel practices.[10] Solvadis was granted full immunity pursuant to the leniency program. From 1998 to mid-2005, the companies implemented a global and single strategy to allocate customers and coordinate prices. They represented more than 80% of the commodity chemicals distribution market in France.

ABUSES OF A DOMINANT POSITION

Plavix® is noted to be the one of the best-selling medicines in the world and a reputed "blockbuster" in the pharmaceutical industry. It is used to prevent relapses of serious cardiovascular diseases and notably for the prevention of blood clots. In 2008, the French public health care system reimbursed this medicine for an amount of EUR 625 million (approximately USD 803 million). Sanofi-Aventis owned the patent on this drug and marketed it in France from 1999, but this patent was due to expire in 2008. In or around July 2008, Sanofi filed additional patents to extend its initial protection, although this attempt only succeeded in covering certain salts used in Plavix®, generic versions being thus required to use different salts. Nonetheless, the French health authorities highlighted that this did not prevent generic versions of Plavix® being launched in the market and that generics were in

9 French Competition Authority, Decisions 13-D-17 and 13-D-18, September 20, 2013, "Relating to practices implemented by Master / Visa in the card payment sector", available at http://www.autoritedelaconcurrence.fr/pdf/avis/13d17.pdf and http://www.autoritedelaconcurrence.fr/pdf/avis/13d18.pdf.

10 French Competition Authority, Decision No.13-D-12, May 28, 2013, "Relating to the Practices Implemented in the Commodity Chemicals Marketing Sector", available at http://www.autoritedelaconcurrence.fr/pdf/avis/13d12.pdf.

fact substitutes. To tackle the stance of the health authorities, Sanofi implemented a global and structured disparaging communication strategy that aimed at influencing doctors and pharmacists to hamper the generic substitution. It convinced doctors to indicate on its prescriptions for Plavix® the words "non-substitutable", and even encouraged pharmacists to substitute Plavix® by Sanofi's own generic medicine. According to the FCA, which was alerted to the practices by a complaint from generic drugs manufacturer Teva Santé, these practices were considered an abuse of Sanofi's dominant position.[11] The FCA considered that but for the disparaging practices, the launch of generic versions of Plavix® would have resulted in EUR 200 million (approximately USD 257 million) savings for the French government. The FCA considered the practices as particularly serious and therefore imposed a EUR 40.6 million (approximately USD 52 million) fine on Sanofi.

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11 French Competition Authority, Decision No.13-D-11, May 14, 2013 "Relating to Practices Implemented in the Pharmaceutical Sector", available at http://www.autoritedelaconcurrence.fr/pdf/avis/13d11.pdf.

GERMANY

2013 ANTITRUST YEAR IN REVIEW

By Susanne Zuehlke and Dr. Tobias Kruis
of Latham & Watkins LLP

LEGISLATIVE DEVELOPMENTS

On June 30, 2013, the 8th amendment to the German Act against Restraints of Competition (8. GWB-Novelle) entered into force.[1] The amendment brings German competition law closer in line with EU law and introduces several changes to merger control, cartel enforcement and control of other abusive practices. The most significant change is the introduction of the SIEC-Test which replaces the "market dominance test" (Section 36 (1) of the Act against Restraints of Competition (ARC)). Further adjustments of the merger control regime concern (i) the calculation of turnover, pursuant to Section 38 (5) ARC partial transactions between the same persons or undertakings within a period of two years will be treated as a single transaction if the notification thresholds are otherwise not met; and (ii) the introduction of an exemption from the standstill obligation for public takeovers bids comparable to Article 7 (2) of the EU Merger Regulation. Moreover, the exemption from merger control for de-minimis markets (i.e., markets that have existed for at least five years with a total volume of sales in Germany of at most EUR 15 million in the last calendar year) has been moved from the notification threshold to the substantive test (Section 36 (1) Sentence 2 No. 2 ARC) with the effect that mergers relating to de-minimis markets have to be notified, even though the Federal Cartel Office (FCO) cannot prohibit them. Furthermore, the four months review period for Phase II will be suspended if the parties do not correspond correctly to a request for information (Section 40 (2) Sentence 5, 6 ARC). According to Section 40 (2) Sentence 7 ARC, the review period will be extended by one month if the parties offer commitments. In this context, parties will also gain the possibility to offer behavioral commitments in order to achieve clearance. However, this will not permit constant control of conduct. Finally, Section 41 (1) Sentence 3 No. 3 ARC clarifies that a merger that has not been notified is provisionally invalid, but will become valid if unwinding proceedings initiated by the FCO are subsequently closed due to the absence of competition concerns.

Outside the merger control regime, the amendment increases legal presumption for dominance from 33% to 40% (Section 18 ARC). Furthermore, Section 32 (2) ARC clarifies that the FCO may also impose unbundling measures to remedy antitrust law infringements. Pursuant to the new Section 81 a ARC, legal entities and associations will have no right to refuse to provide information relevant for the calculation of the fine and the 10% cap, in particular information relating to their turnover. Due to an amendment of the Act on Regulatory Offences (ARO), the legal successor will be held liable for a fine imposed by the FCO. However, this new provision will not apply, for ex-

1 German version of the amended act available at http://www.bmwi.de/DE/Service/gesetze,did=22072.html.

ample, in case of an asset deal (Section 30 (2a) ARO).

Sector-specific amendments concern the increase of the threshold for merger notification requirements in the print media sector (Section 38 (3) ARC) and the application of the German merger control regime to statutory health insurance funds.

In addition, the German legislator created a Market Transparency Unit (MTU) for Fuels at the FCO.[2] This measure was introduced after a sector inquiry that had been completed by the FCO in May 2011 revealed oligopolistic structures in the German fuel market. The creation of the MTU aims at improving competitive conditions in the fuel market by monitoring the pricing behavior of fuel station operators. The MTU is also supposed to improve the intervention possibilities of the FCO against future breaches of competition law. Under the new law, oil companies and petrol stations are obliged to report fuel price changes within five minutes to the FCO, which will then pass this information on to consumer information providers. Consumers are able to access this information via the internet or through smartphone apps. The MTU started its operation on December 1, 2013.[3]

MERGERS

On December 5, 2013, the FCO published a draft guidance paper on domestic effects in merger control.[4] The draft paper examines the conditions under which foreign-to-foreign mergers have to be notified. The FCO's approach in this paper is very restrictive. According to the FCO, in case of a concentration that involves only two parties (i.e., a merger or acquisition), domestic effects are sufficiently proved if the revenue thresholds are met by the parties. The guidance paper introduces a safe harbor for joint ventures that are not actually or potentially active in Germany provided the parent companies do not have actual or potential activities in Germany that are horizontally or vertically related to the activities of the joint venture abroad and the parents are not actual or potential competitors in any other market that includes Germany. In all other cases, the FCO recommends that a merger is notified. Another viable option is to discuss the question of domestic effects informally with the FCO.

In 2013, the FCO has issued two prohibition decisions. In February 2013, the FCO prohibited plans by Kabel Deutschland to acquire cable network operator Tele Columbus.[5] According to the FCO, the disappearance of Tele Columbus would have further strengthened the nationwide oligopoly of the two major regional cable network operators, Kabel Deutschland and Unitymedia KabelBW, in the retail TV services market. Moreover, the FCO retroactively prohibited a transaction in the hospital sector that was originally cleared with conditions, after hospital operator Asklepios, who had planned to acquire a 10.1% stake in rival Rhön-Klinikum, had informed the FCO that it no longer intended to comply with the conditions.[6]

In October 2013, the German public broadcasting groups ARD and ZDF announced that they had abandoned their plans to set up a joint online video platform called "Germany's Gold" that was regarded as problematic by the FCO.[7] The FCO cleared the joint venture in 2011, but it subsequently instituted cartel

2 The legislative act (German version) creating the legal basis for the MTU is available at http://dip21.bundestag.de/dip21/btd/17/100/1710060.pdf.
3 See FCO press release (English version) of November 29, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/29_11_2013_MTS_Regelbetrieb.html?nn=3599398.
4 English version of the draft guidance paper available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Merkblaetter/Leaflet%20-%20Guidance%20 document%20domestic%20effects%20-%20consultation.pdf?__blob=publicationFile&v=2.
5 See Case B7 – 70/12, FCO press release (English version) available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/22_02_2013_KDG.html.
6 See Case B3 – 132/12, FCO press release (English version) available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/30_07_2013_Asklepios_Rh%C3%B6n.html.
7 See FCO press release (English version) of September 16, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/16_09_2013_%20Germanys-Gold-aufgeben.html.

proceedings to examine potential anticompetitive effects arising from the platform that were not covered in the examination under merger control.

Other interesting cases resolved in 2013 include the acquisition by Precision Castparts Corporation of Permaswage Holding SAS (supply of components to the aerospace industry) unconditionally cleared in Phase II,[8] the acquisition by Prosegur Compañía de Seguridad SA of Brink's Deutschland GmbH and Brink's Transport und Service GmbH (cash handling services) cleared subject to conditions in Phase II,[9] the acquisition by Ziemann Sicherheit Holding GmbH of unicorn Geld- und Wertdienstleistungen GmbH (cash handling services) unconditionally cleared in Phase II[10] and the acquisition by Frankfurter Allgemeine Zeitung GmbH and Frankfurter Societät GmbH of Frankfurter Rundschau (daily newspapers) unconditionally cleared in Phase I.[11]

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Following a judgment rendered by the Federal Court of Justice (FCJ) in the cement cartel case,[12] the FCO had to revise its fining guidelines. The case relates to a decision in 2003 in which the FCO imposed a fine of more than EUR 380 million on several members of the so-called cement cartel, which constituted the highest fine ever imposed in a FCO proceeding.[13] As part of its review, the court had to assess whether Section 81 (4) Sentence 2 ARC (which caps the maximum amount of fines at 10% of the total turnover of the company) violates the constitutional principle of legal clarity. The FCO had previously interpreted this provision, in parallel to the practice of the European Commission, as a maximum cap of the total fine that only comes into play once the total amount of the fine has been calculated. The court confirmed the constitutionality of this provision. However, it also held that the provision has to be interpreted as providing an upper limit within a framework of fines.

As a consequence, the FCO published new fining guidelines on June 25, 2013[14] that take into account the FCJ's interpretation. According to the amended guidelines, the framework ranges from EUR five as lower limit up to 10% of the total turnover of the company achieved in the last completed financial year preceding the authority's decision. Within this framework, the FCO will consider 10% of the domestic turnover achieved from the infringement during the infringement period as a starting point for the calculation. The FCO will further take into account the size of the concerned company (by multiplying the

8 See Case B9 92/13, FCO press release (English version) of October 24, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/24_10_2013_Permaswage.html.

9 See Case B4 – 18/13, FCO press release (English version) of July 19, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/19_07_2013_Geldtransportunternehmen.html.

10 See Case B4 44/13, decision (German version) of July 18, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2013/B4-44-13.html.

11 See Case B6 – 9/13, FCO press release (German version) of April 8, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2013/B6-9-13.pdf?__blob=publicationFile&v=6.

12 See Federal Court of Justice, judgment of February 26, 2013, KRB 20/12.

13 See FCO press release (English version) of April 10, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/10_04_2013_BGH-Zement.html.

14 See the "Guidelines for the setting of fines in cartel administrative offence proceedings", English version available at http://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.html?nn=3590024.

amount with a factor that is based on the company's total turnover) as well as aggravating and mitigating factors (such as duration of the infringement, extent of intention, recidivism, financial capacity, etc.).

Furthermore, on November 26, 2013, the FCO terminated proceedings against Amazon after the latter had agreed to abolish its so-called price parity clauses in a legally binding manner.[15] These price parity clauses obliged sellers on Amazon's Marketplace platform not to sell their products cheaper through any other sales channel. In the eyes of the FCO, these clauses restricted competition between platforms and, thus, were in breach of competition law. It is particularly noteworthy that, according to the press release, the FCO cooperated in these proceedings with the British Office of Fair Trading in order to ensure an EU-wide abandonment of these clauses.

In a similar proceeding against the hotel booking platform HRS, the FCO issued a decision on December 20, 2013 that prohibits HRS to use so-called best price clauses according to which hotel operators are not allowed to offer hotel rooms for a cheaper price on any other platform.[16] In addition, the FCO initiated proceedings against other hotel booking platforms using similar clauses, namely Booking and Expedia.

Finally, the FCO has taken actions against several companies that tried to restrict online sales of their products, such as Sennheiser,[17] Gardena,[18] and Bosch Siemens Hausgeräte.[19]

Cartel cases resolved in the course of 2013 include manufacturers of household porcelain, fined approx. EUR 900,000 (approx. USD 1.1 million),[20] further fines on rail manufacturers amounting to EUR 100 million (approx. USD 130 million),[21] manufacturers of drugstore products fined EUR 39 million (approx. USD 50 million),[22] flour mills fined EUR 65 million (approx. USD 83 million)[23] and confectionary manufacturers fined EUR 60 million (approx. USD 77 million).[24]

COURT DECISIONS

In a decision of April 16, 2013, the Higher Regional Court Düsseldorf increased the fines imposed by the FCO on five members of the liquefied gas cartel from

15 See FCO press release (English version) of November 26, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html?nn=3591568.

16 See FCO press release (English version) of December 20, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html?nn=3599398.

17 See Case B7-1/13-35, FCO case summary (German version) available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B7-1-13-35.pdf__blob=publicationFile&v=4.

18 See Case B5 – 144/13, FCO case summary (German version) available at http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Kartellverbot/2013/B05-144-13.pdf?__blob=publicationFile&v=3.

19 See Case B7-11/13, FCO press release (English version) of December 23, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23_12_2013_Bosch-Siemens-Haushaltsger%C3%A4te.html?nn=3599398.

20 See Case B12 – 14/10, FCO press release (English version) of October 17, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Meldungen%20News%20Karussell/17_10_2013_Porzellan.html.

21 See Case B12 – 16/12, B12 – 19/12, FCO press release (English version) of July 23, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/23_07_2013_Schienen.html.

22 See Case B11 – 17/06, FCO press release (English version) of March 18, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/18_03_2013_Drogerieartikel.html.

23 See Case B11 – 13/06, FCO press release (English version) of February 19, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/19_02_2013_M%C3%BChlenkartell.html.

24 See Case B11 – 11/08, FCO press release (English version) of January 31, 2013 available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/31_01_2013_S%C3%BC%C3%9Fwarenhersteller.html.

EUR 180 million to EUR 244 million.[25]

Moreover, in a decision of August 14, 2013, the same court overturned the FCO's decision of December 15, 2011 by which it cleared the acquisition by Liberty Global of Kabel BW.[26] The transaction concerned two of the three largest cable network operators in Germany, Unitymedia (which was already owned by Liberty Global) and Kabel BW. Although the FCO qualified the transaction as a three-to-two merger on a national market for TV retail services, it cleared the transaction subject to several conditions (i.e., Liberty Global undertakes to grant special termination rights for retail TV services, to end encryption of digital free TV programs, to abandon certain exclusivity clauses in retail TV services contracts and to forego certain ownership rights with regard to household cable connections). On appeal by several of Liberty Global's rivals, such as Deutsche Telekom AG and Netcologne, the Higher Regional Court overturned the decision. The court held that the FCO had wrongly defined the geographic scope of the market for TV retail services as national where it should have concluded that these were regional markets. Moreover, the court found that the FCO had not duly taken into account that the transaction eliminated KabelBW as a potential competitor of Unitymedia. Finally, the court ruled that the commitments accepted by the FCO were not sufficient to counterbalance the negative effects on competition arising from the transaction. At the time of this writing, the decision was not yet final, as Liberty Global appealed the judgment before the German Federal Court of Justice.[27] Should the latter reject the appeal, the FCO would have to review the transaction again, and, in case it cannot grant a clearance decision, Liberty Global would have to unwind the transaction.

Furthermore, the German Federal Constitutional Court held the Section 81 (6) ARC, according to which interest is charged on cartel fines, to be constitutional.[28] Finally, in the above-mentioned decision in the cement cartel case, the FCJ confirmed the compliance of the fining provision with the German constitution.[29]

25 Higher Regional Court Düsseldorf, judgment of April 16, 2013, VI-4 Kart 2-6/10 (OWi). FCO Press release (English version) available at http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/16_04_2013_Fl%C3%BCssiggaskartell-OLG.html.

26 Higher Regional Court Düsseldorf, judgment of August 14, 2013, VI Kart 1/12 (V). Decision (German version) available at http://www.justiz.nrw.de/nrwe/olgs/duesseldorf/j2013/VI_Kart_1_12_V_Beschluss_20130814.html.

27 See press release of August 14, 2013 available at http://www.reuters.com/article/2013/08/14/libertyglobal-germany-appeal-idUSWEB009XA20130814.

28 Federal Constitutional Court, judgment of December 19, 2012, 1 BvL 18/11.

29 See above, footnote 12.

HUNGARY

2013 ANTITRUST YEAR IN REVIEW

By Dr. Kornelia Nagy-Koppany, Dr. Annamaria Klara and Dr. Abigel Csurdi of KNP LAW Nagy Koppany Varga and Partners

LEGISLATIVE DEVELOPMENTS

Astrologists projected that 2013 would bring major shifts and changes to Earth, greatly affecting our life on the planet. We leave it for you to decide whether their foretelling was correct, and in this summary, we focus rather on those legislative developments that took place in Hungary in 2013 and are likely to have multi-year implications.

Following more than a decade of scientific and legislative consultations and preparations, Parliament adopted Act V of 2013 on the Civil Code.[1] The new Civil Code of Hungary entered into force on March 15, 2014. The Civil Code incorporates many different areas of private, public, and corporate laws that were earlier embodied in separate legislation. The changes in the new Civil Code will have wide-ranging effects on many other laws and regulations, including those on competition.

In the area of competition law, there was no need to pass a brand new law to replace Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition ("Competition Act").[2] Instead, considering that an extensive review of the Competition Act was last completed in 2009, the legislator decided to introduce changes into the existing Competition Act to (i) secure coherence within the Competition Act and with other legislation; (ii) incorporate domestic judicial practice; and (iii) comply with international competition trends and tendencies.[3] As a result, Parliament passed Act CCI of 2013 on the Amendments to the Competition Act ("Amendments"). Provisions of the Amendments take effect on January 1, 2014 and July 1, 2014.[4]

One of the Amendments' most important changes concerns the merger control process and the relationship between merger authorization and merger implementation. Provisions of the Competition Act did not expressly prohibit the implementation of mergers prior to obtaining formal authorization of the Economic Competition Office ("Competition Authority")[5] and allowed the parties to implement the transaction at their own risk. In such cases, however, several problems arose when the Competition Authority, following completion of its internal review procedure, did not authorize the merger, or prescribed certain mandatory conditions in the authorization decision. In order to prevent these situations, the amended Section 29 of the Competition Act expressly stipulates that mergers cannot be implemented without the prior authorization of the Competition Authority. This prohibition primarily applies to voting rights and to the appointment of executive officers of the merged entities, both of which can now be exercised only after obtaining the formal authorization decision of the

1 2013. "évi V. törvény a Polgári Törvénykönyvről" (Act V of 2013 on the Civil Code) (Hung.), available at http://njt.hu/cgi_bin/njt_doc.cgi?docid=159096.239298. This Act came into force on March 15, 2014.

2 (Hung.), available at http://njt.hu/cgi_bin/njt_doc.cgi?docid=26902.250701.

3 The Competition Act was repeatedly amended in the past years to reflect and comport to changes in other laws but lacked detailed and thorough reconciliation, which was done in 2013.

4 (Hung.), available at http://njt.hu/cgi_bin/njt_doc.cgi?docid=165228.252924. See also http://njt.hu/cgi_bin/njt_doc.cgi?docid=165228.252923. See also http://njt.hu/cgi_bin/njt_doc.cgi?docid=165228.252925.

5 Translation in Hungarian: Gazdasági Versenyhivatal or "GVH".

Competition Authority. The Amendments also introduced one exception to this rule: at the request of the parties, the Competition Authority can approve the exercise of certain control rights prior to the merger authorization if it is necessary to preserve the value of the investment.[6]

Another modification concerns the conditions that the Competition Authority can set forth in a merger decision. Under the Competition Act, these conditions were determined solely by the Competition Authority, irrespective of the consent of the undertakings. Under the amended Section 30 (3) of the Competition Act, the Competition Authority, instead of blocking the merger, may authorize it if the parties are willing to amend their agreement and eliminate the detrimental market effect by accepting certain pre- and/or post-merger conditions, such as the sale of certain assets or the release of control over indirect parties.

In order to expedite competition supervision proceedings and follow the established practice of the European Commission and other national competition authorities, the legislator introduced the possibility of settlements with the Competition Authority.[7] This means that following establishment of relevant facts, and provided that the parties are willing to cooperate, the Competition Authority can enter into settlement negotiations with the parties. Within the framework of these negotiations, the Competition Authority informs the parties of the facts it has established, the evidence gathered, and the penalty range of the fine to be imposed. On the basis of this information, the parties are free to make a settlement declaration, in which they admit their participation in the presumed illegal conduct, set the maximum amount of fine they are willing to pay, and announce that, in the event that the final decision of the Competition Authority reflects the content of their settlement declaration, they will not request further negotiations and will abstain from raising any judicial challenge. According to amended Section 73/A(5) of the Competition Act, the parties can withdraw their settlement declarations until the expiry of the judicial review deadline if the decision of the Competition Authority is substantially different than the content of the settlement declaration. This would include the case where the size of the fine imposed by the Competition Authority exceeds the maximum amount of the fine proposed by the party in the settlement declaration. Settlements not only shorten the competition and judicial review procedures, in some cases by years, but also provide significant financial benefit to the central budget through the immediate and voluntary payment of the imposed fine.

MERGERS

On December 10, 2013, the Competition Authority approved the joint direct control by SQ-INVEST Kft and Közép Európai Média és Kiadó Zrt of online book sales company Shopline-webáruház Nyrt ("Shopline") and the joint indirect control of book sales company LIBRI Kft ("LIBRI").[8] The Competition Authority identified horizontal competition issues with regard to the transaction[9] and prescribed specific conditions relating to the price margin of LIBRI and a 1% price margin return from Shopline and LIBRI to publishers that have direct contractual relationships with the companies for retail online sales for years 2014, 2015 and 2016.

6 See Competition Act, supra note 2, § 29/A.

7 See id. § 73/A.

8 Gazdasági Versenyhivatal (GVH) [Competition Authority] December 10, 2013, Vj/52-169/2013 http://www.gvh.hu/domain2/files/modules/module25/2477929269E00C3E6.pdf (Hung.).

9 The price margin of Shopline is lower than that of LIBRI, so the merger may indicate a rise in the price margin, which could possibly adversely affect the consumer prices and publisher activity.

HUNGARY

On April 12, 2013, the Competition Authority approved the direct sole acquisition of global solutions provider Nypro Inc. ("Nypro") by electronic manufacturing solutions provider Jabil Circuit Inc. ("Jabil"). In addition to Hungary, notification of the merger was made in China, Germany, Mexico, Russia, and the US. As a result of the transaction, Jupiter Atlas Acquisition Corp., a subsidiary of Jabil, merged into Nypro, and the shareholders of Nypro received cash consideration.[10]

On August 5, 2013, the Competition Authority unconditionally authorized Magyar Villamos Művek Zrt to acquire control of natural gas trader company E.ON Földgáz Trade Földgázkereskedő Zrt. and natural gas storage company E.ON Földgáz Storage Földgáztároló Zrt.[11] Similar competition review procedures were initiated in Austria, Germany, Romania, Ukraine, and Serbia. Competition authorities in these countries also approved the acquisition without setting any conditions.

In a separate transaction aimed at the acquisition of additional natural gas storage facilities, the Competition Authority authorized the acquisition of sole direct control over natural gas storage company MMBF Földgáztároló Zrt. ("MMBF"), a member of MOL Group, by state-owned bank MFB Magyar Fejlesztési Bank Zrt. ("MFB"), on December 16, 2013.[12] MFB, whose independent decision-making was again confirmed by the Competition Authority, acquired 51% of the shares of MMBF.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On November 19, 2013, the Competition Authority ruled that twelve banks and mortgage lenders[13] violated the Competition Act by coordinating their strategies between September 15, 2011 and January 30, 2012: the banks and mortgage lenders exchanged information qualifying as business secrets in order to reduce the full prepayment of foreign currency-based mortgages on fixed exchange rates by limiting access to loans which would have been suitable to redeem (and repay early in full).[14] On the basis of the available information, and in particular based on written evidence (e-mails, internal notes, etc.), the Competition Authority concluded that in order to reduce the number of replaced loans and the full prepayment of loans on fixed exchange rates, the involved financial institutions coordinated their practices in a uniform, comprehensive scheme. The banks not only shared information about their strategies relating to full prepayment and interested clients, but conducted internal consultations to coordinate their strategies.[15] In its decision, the Competition Authority ordered the banks to pay fines in the total amount of HUF 9,488,200,000.00 (approximately USD 43 million).[16] Individual fines were calculated in accordance with

10 Gazdasági Versenyhivatal (GVH) [Competition Authority] April 12, 2013, Vj/024-12/2013, http://www.gvh.hu/domain2/files/modules/module25/23315819CC28CA302.pdf (Hung.).

11 Gazdasági Versenyhivatal (GVH) [Competition Authority] August 5, 2013, Vj/31-145/2013, http://www.gvh.hu/domain2/files/modules/module25/23935C643D91CCFE6.pdf (Hung.).

12 Gazdasági Versenyhivatal (GVH) [Competition Authority] December 16, 2013, Vj/85-12/2013, http://www.gvh.hu/domain2/files/modules/module25/2479031BE3FD56C5F.pdf (Hung.).

13 Specifically (using abbreviated names): Budapest Bank, CIB Bank, Citibank branch, ERSTE Bank, FHB, K&H, Takarékbank, MKB, OTP, Raiffeisen, UCB Ingatlanhitel Zrt., UniCredit.

14 See Press Release, "HUF 9.5 billion fine in the 'full prepayment loan banking case'", available at http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=133&m5_doc=8456. (Hung.).

15 Gazdasági Versenyhivatal (GVH) [Competition Authority] November 19, 2013, Vj/74-873/2011, http://www.gvh.hu/domain2/files/modules/module25/2458168963FF1F688.pdf (Hung.).

16 One bank (FHB) was exempted from the fines and the GVH terminated the proceedings with respect to Magyar Cetelem Bank Zrt.

Notice No. 1/2012[17] of the President of the Competition Authority and the Chairman of the Competition Council, which provides information about the factors which must be taken into consideration when fines are imposed. The differences in the fines imposed reflected the fact that the revenues gained by the banks as a result of the violation significantly differed, as did the participation of the individual banks.

COURT DECISIONS

In its July 3, 2013 judgment, the Curia of Hungary[18] upheld the decision of the Competition Authority and dismissed the complaints of EGÚT Egri Útépítő Zrt ("EGÚT"), belonging to the COLAS Group Zrt ("COLAS"), and Strabag Építő Zrt ("STRABAG").[19] In the Competition Authority's decision, issued January 29, 2009,[20] the Competition Authority found that, between 2006 and 2009, the practices of STRABAG and EGÚT were likely to restrict economic competition when they divided the market and fixed their prices in bids that they submitted in response to public procurement tenders for bridge and road construction works in Hungary. The Competition Authority also fined COLAS for its price-fixing practice in another, related public tender. The participants were ordered to pay a total of HUF 3,000,000,000.00 (approximately USD 13.8 million) in fines.

On March 25, 2013, the Metropolitan Administrative and Labor Court dismissed the claims of five taxi companies and upheld the decision of the Competition Authority[21] in which it imposed a fine in the amount of HUF 24,500,000.00 (approximately USD 110,000). In the challenged decision, the Competition Authority established that the companies concluded an agreement to restrict competition and to acquire the contractual partners of one of their competitors.

17 See Notice No. 1/2012 of the Hungarian Competition Authority, available at http://www.gvh.hu/domain2/files/modules/module25/19939E3741DB36983.pdf (Hung.).
18 Formerly known as the Supreme Court of Hungary.
19 The claim of COLAS was already dismissed by the first and second instance courts, and the Supreme Court confirmed the previous instance judgments.
20 Gazdasági Versenyhivatal (GVH) [Competition Authority] January 29, 2009, Vj-130/2006, http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=113&m5_doc=6011 (Hung.).
21 Fővárosi Közigazgatási és Munkaügyi Bíróság [Metropolitan Administrative and Labor Court] March 25, 2013, 16. K. 28 .069/2013/1, http://www.gvh.hu/gvh/alpha?do=2&st=1&pg=11&m5_doc=8348 (Hung.).

INDIA

By Vinod Dhall of Vinod Dhall and tt&a[1]

Competition law in India continued to gain ground in 2013. While there were no high profile orders by the Competition Commission of India ("CCI"), there were some much awaited decisions by the Competition Appellate Tribunal ("COMPAT").

LEGISLATIVE DEVELOPMENTS

On January 8, 2013, the Ministry of Corporate Affairs issued a public interest notification[2] under Section 54 of the Competition Act, 2002 ("Act"), exempting loss-making and failing banks from the purview of the Competition Commission of India ("CCI") until 2018 with regard to mergers and takeovers.

The CCI amended the Merger Control Regulations[3] with respect to the transactions that are ordinarily not likely to cause an adverse effect on competition in India:

1. Exemption of 'creeping acquisitions when there is an additional acquisition of 5% of shares/ voting rights in another enterprise in a financial year (where the acquirer already holds between 25% or more but less than 50% of the shares/ voting rights) and the acquisition does not result in a change of 'control' of the target enterprise.

2 An intra-group merger or amalgamation of two enterprises is exempt when (i) one of them has more than 50% of shares/ voting rights in the other, or; (ii) the enterprise(s) belong to the same group (i.e., a single enterprise holds more than 50% shares/voting rights in both the parties to the merger). However, a notification to the CCI will be required if there is a change from joint to sole control.

MERGERS

The CCI cleared 46 combinations in 2013; majority of the transactions were notified in the Short Form (Form I) except five in the Long Form (Form II). The CCI has not blocked any transaction to date.

Two significant penalties were imposed on multinational companies for delayed filings; INR 5 million (approx. USD 79,085) on Temasek for delaying the filing of its notification by 399 days[4] and INR 10 million (approx. USD 158,170) on Titan International for its failure to notify within the stipulated time.[5] Although the maximum penalty that could be imposed on Titan was approximately INR 1,450 million (approx. USD 2.3 million), the CCI took note of the fact that the combination was between two foreign enterprises, both based outside India, and the parties, notwithstanding the delay, voluntarily submitted the notification.

The CCI has validated non-compete obligations so long as they are reasonable, particularly in respect of the duration over which such restraint is enforceable

1 Mr. Dhall was assisted in writing this chapter by Ms. Sonam Mathur and Ms. Kabyashree Chaharia, who are associates at the firm.

2 S.O.93(E) Notification dated January 8, 2013, available at http://cci.gov.in/images/media/notifications/S.O.%2093%20(E)_08012013.pdf (Last visited November 15, 2013).

3 The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 as amended up to April 4, 2013, available at http://cci.gov.in/images/media/Regulations/CCICombination%20Regulations%20asat%20040413.pdf (Last visited November 15, 2013).

4 Combination Registration No. C-2013/06/124 dated August 1, 2013, available at http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/P-C-2013-06-124.pdf.

5 Combination Registration No. C-2013/02/109 dated April 2, 2013, available at http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-02-109.pdf(Last visited November 15, 2013).

and the business activities, geographical areas and person(s) subject to such restraint. This was explicitly stated in two cases in the pharmaceutical sector where the CCI required the parties to modify their transaction documents to comply with the CCI's standards of non-compete before giving its approval.[6]

In the CCI's first Long Form clearance, commitments were undertaken by the acquirer, GSPC for its acquisition of shares in Gujarat Gas before the transaction was cleared.[7] GSPC was required to review all its contracts entered into with its customers to ensure that they are in compliance with the provisions of the Act and to submit a compliance report within six months after consummation of the transaction.

CARTELS AND OTHER ANTICOMPETITIVE AGREEMENTS

On the issue of imposition of penalty, the CCI has outlined reasons for the quantum of penalties imposed by it in an order passed this year. The case related to a cartel in the pharmaceutical industry, where the CCI imposed the maximum permissible penalty of 10% of the turnover arguing that the severity, duration and gravity of the offence demanded maximum punishment.[8] This issue is likely to develop further in the coming years as appeals from the Competition Appellate Tribunal ("COMPAT") go to the Supreme Court of India.

In a reference[9] by the Government department for Supplies & Disposal in the Ministry of Commerce and Industry, the CCI sought to lay down a standard of proof for establishing a cartel with respect to a tender. The Government department had alleged that the suppliers of ankle boot soles rigged its tender and also shared the market; the CCI held that the suppliers violated the Act by quoting identical/ near identical rates. The CCI observed that there is rarely any direct evidence of action in concert to determine whether those involved in such dealings had some form of understanding and were acting in co-operation with each other. In light of the definition of 'agreement', it held that evidence on the basis of 'preponderance of probabilities' would be sufficient to prosecute parties involved in a cartel. This sent out a powerful message to industry that the CCI will be strict in punishing cartels in public procurement, which are suspected to be widely prevalent.

Interestingly, the CCI in two of the most important cartel cases brought before it, viz the Tire cartel and the Cement cartel, evaluated the available circumstantial evidence on price fixing. In both cases, the DG could not adduce direct evidence of price fixing.

In the Tire Cartel case,[10] CCI rejected the findings made by DG and held that there was no 'substantive evidence' to prove the existence of a cartel amongst the tire manufacturers. It observed that 'on a superficial basis, the industry displays some characteristics of a cartel', but concluded that there was no evidence of cartelization. On the contrary, in the Cement Cartel case,[11] the CCI took the view that parallelism in pric-

6 Combination Registration No. C-2012/09/79 dated December 21, 2012 available at http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-09-79.pdf (Last visited November 15, 2013); Combination Registration No. C-2013/04/116 dated June 20, 2013 available, at http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-04-116.pdf (Last visited November 15, 2013).

7 Combination Registration No. C-2012/11/88 dated January 8, 2013, available at http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-11-88.pdf (Last visited November 15, 2013).

8 Case No. 20/2011, "M/s Santuka Associates Pvt. Ltd. V. All India Organization of Chemists and Druggists", available at http://cci.gov.in/May2011/OrderOfCommission/202011.pdf (Last visited November 15, 2013).

9 Ref. Case No. 01 of 2012, "M/o Commerce, Govt. of India v. M/s Puja Enterprises & Ors.", available at http://cci.gov.in/May2011/OrderOfCommission/012012.pdf (Last visited November 15, 2013).

10 MRTP Case RTPE No. 20/2008, "All India Tyre Dealers' Federation v. Tyre Manufacturers", available at http://cci.gov.in/May2011/OrderOfCommission/202008.pdf (Last visited November 15, 2013).

es, production and dispatch were a result of a cartel; it did not consider such parallelism to be a result of non-collusive oligopolistic market conditions. In the Tire Cartel case also, the CCI found signs of parallelism in terms of prices, capacity utilization and dispatch but unlike the Cement Cartel case, it did not conclude that the parallelism was a result of collusion. Instead, the CCI took note of external factors which could explain such parallelism e.g. competition from imports in the tire industry and capacity suppression due to the global slump in demand. It is hoped that the CCI would bring clarity on what to its mind distinguished the two —the Tire case and the Cement case.

In another cartel case, the CCI found the parties guilty of cartelization, but noted that circumstances in the particular case required the issue of penalty to be looked into differently from other cases. It observed that the parties were small-micro enterprises and demonstrated a complete lack of awareness to the extent that the replies of many were effectively incriminating in nature; coupled with the fact that the bids submitted by them were not the lowest and they could not have been awarded the contract. No penalty was imposed and a cease and desist order was considered sufficient; departing from the well-known principle that ignorance of law was no defense.

The CCI has been pro-active in pinning down cartels functioning under the garb of industry or trade associations. In a case this year, it also recognized the legitimate role of industry bodies for building consensus among the members on policy/other issues affecting the industry and to promote these policy interests with the government.[12]

The CCI took a view that reasonable restrictions may be permitted where they are imposed to protect intellectual property rights.[13] While the CCI did not identify specific restraints that may be permitted, the decision reflects a differentiated approach towards franchise agreements from other distribution agreements, where no license to use intellectual property is granted. In a sense, the CCI took note of the spirit of Section 3(5) of the Act extending certain protection to agreements related to intellectual property.

ABUSES OF A DOMINANT POSITION

In the past year, the CCI has looked at a number of cases dealing with alleged abuse of dominance by government bodies/ departments where the first step was to determine whether at all the role of the government can be considered as an "enterprise" under the Act.

It was alleged that the Ministry of Civil Aviation ("MOCA")[14] framed guidelines imposing unfair terms which limit and restrict the provisions of air transport services. Further, MOCA being the regulator as well as the provider of air transport services through its units/division, viz. Air India was in a position to pro-

11 Case No. 29/2010, "Builders Association of India vs Cement Manufacturers' Association & Ors.", available at http://cci.gov.in/May2011/OrderOfCommission/292011.pdf (Last visited November 15, 2013).
12 Case No. 35 of 2013, "Advertising Agencies Guild v. Indian Broadcasting Foundation & its members", available at http://cci.gov.in/May2011/OrderOfCommission/352013.pdf (Last visited November 15, 2013).
13 Case No. 81/2012, "M/s. Official Beverages v. M/s. SAB Miller India, SKOL Breweries Limited", available at http://cci.gov.in/May2011/OrderOfCommission/812012.pdf (Last visited November 15, 2013).

vide unfair advantage to its units. The CCI held that the regulation of civil aviation sector by the MOCA per se cannot be considered a commercial activity under the term 'enterprise' defined in the Act.

In another case, the CCI held that Central Bureau of Narcotics ("CBM") and Narcotics Control Bureau ("NCB") are not 'enterprises' as defined under the Act;[15] both being are regulatory agencies appointed by the Government. The activities of CBM and NCB cannot be compared to a commercial organization and hence they are not 'enterprises'.

In a case related to alleged abuse of dominance by the Department of Industrial Policy & Promotion ("DIPP") in the "formulation, promotion, approval and facilitation of Foreign Direct Investment ("FDI") policy in civil air transport services in India", the CCI held, somewhat inexplicably that the DIPP is an "enterprise" as the policy of pronouncement on FDI through Press Notes by DIPP amounts to "control of provision of services". However, while stating that the DIPP is constitutionally empowered to frame policy on FDI, the CCI held that it is not in violation of the Act since there was no appreciable adverse effect on competition in India.

In another case, the CCI distinguished between the two roles of the Board of Control for Cricket in India ("BCCI"); one as a commercial enterprise while organizing the Indian Premier League ("IPL") series and another as the custodian of cricket in India by virtue of its membership of the International Cricket Council ("ICC"). It was observed that where a sports governing body such as the BCCI in this case, is conducting an economic activity, it is in fact acting as an "enterprise" and would fall within the ambit of competition law review. The CCI imposed a substantial penalty on BCCI for abuse of its dominant position.

COURT DECISIONS

The COMPAT had the opportunity of deciding on the issue of determination of penalty this year in appeals from the orders of the CCI. The COMPAT passed an order reducing significantly -by 90%- penalties levied by the CCI on explosives suppliers in a cartel case[16] relating to an electronic reverse auction by Coal India Limited ("CIL") for the supply of explosives for its mining activities. The said auction was collectively boycotted by the explosives suppliers who were found guilty of bid rigging and of limiting supplies. The COMPAT upheld the order as far as the contravention of the Act was concerned; but it reduced the penalty amount to a mere 10% on account of certain "mitigating circumstances" e.g. appellants were not 'repeat offenders', supply of explosives to CIL was never interrupted etc. The COMPAT observed that CCI must not only lay down reasons while imposing a fine, but also consider 'mitigating circumstances'.

There has been concern in the business community over the CCI's practice of considering the total turnover of a company instead of the relevant turnover while imposing penalties. A recent COMPAT order might put this issue to rest for the time being;[17] it has been appealed by the CCI. Penalties were imposed by the CCI on manufacturers of aluminum phosphide tablets for cartelization and collusive bidding in a tender floated by a state-owned enterprise, Food Corpo-

14 Case No. 18 of 2013, "Shri Vineet Kumar v. Ministry of Civil Aviation", available at http://cci.gov.in/May2011/OrderOfCommission/182013.pdf (Last visited November 15, 2013).

15 Case No. 41/2013, "Om Prakashv. Central Bureau of Narcotics, Ministry of Finance & Ors", available at http://cci.gov.in/May2011/OrderOfCommission/412013.pdf (Last visited November 15, 2013).

16 Ideal Industrial Explosives Manufacturers & Others vs. CCI & Others; Appeal No. 82-90 of 2012. The penalty levied by the CCI was 3% of the turnover of the concerned enterprises, against a cap of 10% of the turnover allowed under the Act.

17 Appeal No. 79 of 2012; M/s Excel Corp and ors. v CCI.

ration of India. Although, the COMPAT confirmed the violations, it observed that the CCI was not justified in imposing the penalty at the rate of 9% of the entire turnover of the companies and reduced the penalty on the basis of the "relevant turnover".

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ISRAEL

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LEGISLATIVE DEVELOPMENTS

In December 2013, the Law to Promote Competition and Reduce Concentration, 5774-2013 was published in the official records of the State of Israel ("Competition and Concentration Law").[1] The objective of the Competition and Concentration Law is to reduce market concentration and promote competition in the economy. The Competition and Concentration Law consists of three substantial chapters regarding: (i) the obligation of the relevant regulator to take into account economy-wide concentration and industry-wide competitiveness, when awarding rights; (ii) the limitation of control in pyramid- structured companies; and (iii) the separation of major financial institutions and non-financial corporations.

In July 2013, a new block exemption was enacted for non-horizontal arrangements without price restrictions ("New Block Exemption").[2] The New Block Exemption significantly reforms the supervision of restrictive arrangements in Israel, as it introduces a self-assessment mechanism for all forms of restrictive arrangements that are not between competitors or between a supplier and a customer regarding the resale price in the supply chain. These arrangements are exempt from the Antitrust Tribunal's ("Tribunal") approval or a specific exemption from the General Director of the Israel Antitrust Authority ("General Director") if they do not restrict competition in a substantial part of a relevant market or do not cause significant harm to competition, and if the restraints in the arrangement are essential for its execution. In other words, the restrictions must be ancillary and not naked. According to the New Block Exemption, the General Director will have the right to examine arrangements ex post which were not submitted for prior approval, as well as the right to impose sanctions (including criminal sanctions) should he/she find that the arrangements raise concern that a significant harm to competition exists, or that they do not fall within the block exemption.

In October 2013 the Israel Antitrust Authority ("IAA") published draft guidelines for the enforcement of excessive pricing ("Draft Guidelines")[3] which reflect a new approach towards monopoly pricing. According to the Draft Guidelines, the prohibition in the Restrictive Trade Practices Law, 5748-1988 ("Law") on "unfair pricing" does not only apply to predatory pricing, but also to excessive pricing. The Draft Guidelines include a "safe harbor" whereby the IAA will not initiate enforcement actions against a monopoly that does not set its prices above 20% of its manufacturing costs (i.e., long run average incremental costs). Nevertheless, a company that the General Director declared a monopoly, and which sets its prices higher than the aforementioned "safe harbor",

1 Law to Promote Competition and Reduce Concentration, 5774-2013, 2420 (SH) 92 (Isr).

2 "Israel Antitrust Auth., Block Exemption for Non-Horizontal Arrangements without Price Restrictions Rules" (2013), http://www.antitrust.gov.il/subject/130/item/32760.aspx.

3 Press Release, General Dir. Of the Israel Antitrust Auth., "The IAA Draft Guidelines on the Enforcement of Excessive Pricing" (October 31, 2013), http://www.antitrust.gov.il/subject/131/item/32891.aspx.

could be subject to sanctions, particularly monetary sanctions up to a maximum of NIS 24 million (approximately USD 6.9 million), as well as a "Determination" by the General Director that excessive prices were set. A Determination is a decision stating that the Law has been breached and serves as prima facie evidence in any legal proceeding. When deciding whether to impose sanctions, the IAA will consider, inter alia, whether a market regulator exists, whether the relevant market is a market in which significant initial investments in R&D are required, the period in which the excessive price was collected, and the market share of the monopoly.

In October 2013, a legislative proposal considerably amending the Law was published ("Legislative Proposal").[4] The primary revision set forth in the Legislative Proposal grants courts the power to award treble damages (damages up to three times the actual proven damages). In addition, the Legislative Proposal expands the General Director's authority to publish a Determination with respect to the following matters: (i) an unreasonable refusal of a monopoly to provide or purchase an asset or service over which a monopoly exists; (ii) a violation of instructions given by the General Director to a monopoly or to a concerted group; (iii) a violation of conditions prescribed by the General Director in a decision to approve a merger or a restrictive arrangement; and (iv) an infringement of a consent decree. The Legislative Proposal also states that a breach of a consent decree or a prohibitive order issued by the Tribunal will be considered a criminal offence.

In March 2013, the IAA published draft guidelines concerning the transfer of information between actual or potential competitors in the stages prior to the consummation of a merger between them, such as due diligence ("Due Diligence Draft Guidelines").[5] According to the Due Diligence Draft Guidelines, under certain circumstances the disclosure of information may harm competition and constitute a restrictive arrangement, and may even be considered gun jumping.

In November 2013, the IAA published draft guidelines concerning Trade Associations (the "Trade Associations Draft Guidelines"),[6] which set forth specific provisions with respect to the regular activities of trade associations. The accurate and bona fide implementation of these provisions by trade associations will be considered by the IAA as reasonable steps ensuring compliance with the Law. The Trade Associations Draft Guidelines seemingly include severe restrictions on trade associations, in particular restrictions regarding the trade association's ability to collect information.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In September 2013, the General Director published a Determination declaring that a global cartel existed in the electricity infrastructure sector (Gas Insulated Switchgear, GIS).[7] Two class actions were filed following this Determination, as well as a private lawsuit by the Israel Electric Corporation Ltd. During the past year two "follow-on" class actions have also been filed in Israel following criminal proceedings around the world regarding alleged global cartels (in the air cargo shipping industry, and production of panels for LCD screens).

In January 2013, the IAA announced its intention to file an indictment against a major bookstore and its

4 Draft Bill Amending the Restrictive Trade Practices Law (No. 14), 2013, HH 801, (Isr).

5 Press Release, General Dir. Of the Israel Antitrust Auth., "The IAA Draft Guidelines on the Disclosure of Information Pursuant to Due Diligence Prior to a Transaction Between Competitors", (March 14, 2013), http://www.antitrust.gov.il/subject/131/item/26081.aspx.

6 Press Release, General Dir. Of the Israel Antitrust Auth., "The IAA Draft Guidelines on Industrial Associations and their activities", (November 21, 2013), http://www.antitrust.gov.il/subject/131/item/32925.aspx.

7 Press Release, General Dir. Of the Israel Antitrust Auth., "Israel Electric Corp. and the Israeli Public were Victims of a Global Electricity Infrastructure Cartel", (September 17, 2013), http://www.antitrust.gov.il/eng/subject/182/item/32855.aspx.

CEO regarding an alleged breach of conditions previously prescribed by the IAA for a merger that was approved in the past.[8]

In November 2013, the IAA published draft terms of approval of the merger between two leading telecommunication companies. This is the first time that draft terms of approval have been made available for public review and comment.[9]

In July 2013, the State Attorney and the IAA filed three indictments against over forty defendants regarding a bid rigging cartel in the tree pruning market.[10]

Pursuant to the 2011 amendment of the Law regarding concerted groups,[11] the General Director issued hearing notices to members of alleged concerted groups in three markets, concerning his intention to determine that a concerted group exists and to provide each group with certain operative instructions.[12] In November 2013, the General Director published a Determination declaring that the Ashdod and Haifa ports constituted a concerted group ("Concerted Group Determination"). The Concerted Group Determination includes operative provisions.[13] This was the first time that the General Director exercised his authority with regard to concerted groups.

ABUSES OF A DOMINANT POSITION

In February 2013, the General Director published his intention to determine that a leading telecom company abused its dominant position by engaging in prohibited "price squeeze" practices.[14] This is the first time that the General Director has announced his intention to take enforcement measures regarding alleged price squeezing practices.

In July 2013, the General Director published a Determination stating that a recycling corporation controlled by major beverage companies abused its position by preventing the entry of one of its customers into the market through withholding rebates.[15]

COURT DECISIONS

In December 2013, the Supreme Court dismissed an appeal of the Tribunal's decision and upheld the IAA's decision to exempt long-term restrictive arrangements (rental exclusive arrangements) between a big manufacturing and marketing company in the mattress and sleeping solutions market, and several

8 Press Release, General Dir. Of the Israel Antitrust Auth., "The IAA will conduct a hearing to Steimatzky and its CEO regarding the IAA's intention to file an indictment" (January 16, 2013), http://www.antitrust.gov.il/subject/151/item/26709.aspx.

9 Press Release, General Dir. Of the Israel Antitrust Auth., "The IAA Published For Public Comment a Draft for Conditional Approval of Merger Between Bezeq Israel Telecom Ltd. and D.B.S. Satellite Services (1998) Ltd.", (November 6, 2013), http://www.antitrust.gov.il/subject/151/item/32894.aspx.

10 Press Release, General Dir. Of the Israel Antitrust Auth., "Indictments were filed regarding a bid rigging cartel in the tree pruning market", (July 15, 2013), http://www.antitrust.gov.il/subject/151/item/32728.aspx.

11 Restrictive Trade Practices (Amendment. No. 12) Law, 2011.

12 Press Release, General Dir. Of the Israel Antitrust Auth., "Four Baby Food Compound Companies to be Declared Concerted Group Subject to Hearing", (February 27, 2013), http://www.antitrust.gov.il/subject/151/item/26718.aspx.; Press Release, General Dir. Of the Israel Antitrust Auth., "Ashdod and Haifa Ports to be Declared Concerted Group Subject to Hearing", (May 16, 2013), http://www.antitrust.gov.il/eng/subject/182/item/32857.aspx (please see footnote 14); Press Release, General Dir. Of the Israel Antitrust Auth., "Two Air Cargo Services Companies to be Declared Concerted Group Subject to Hearing", (August 7, 2013), http://www.antitrust.gov.il/subject/151/item/32771.aspx.

13 Press Release, General Dir. Of the Israel Antitrust Auth., "Ashdod and Haifa Ports are Declared a Concerted Group", (November 26, 2013), http://www.antitrust.gov.il/subject/151/item/32933.aspx.

14 Press Release, General Dir. Of the Israel Antitrust Auth., "The IAA is Considering to determine that Bezeq Abused Its Position As a Monopoly in the Internet and Telephone Market", (February 11, 2013), http://www.antitrust.gov.il/subject/151/item/26716.aspx.

15 Press Release, General Dir. Of the Israel Antitrust Auth., "The General Dir. Published a Determination: The Recycling Corporation Owned by the Big Drinks Companies Abused Its Position As a Monopoly to Exclude a Competitor", (July 14, 2013), http://www.antitrust.gov.il/subject/151/item/32724.aspx.

commercial centers.

In September 2013, the Supreme Court upheld an IAA appeal of a District Court decision regarding a bid rigging cartel, ruling that the IAA did not exercise its criminal enforcement measures selectively.[16]

In July 2013, the Supreme Court upheld the major banks' appeals of a District Court's decision to certify a class action regarding an alleged cartel with respect to interest rates. The Supreme Court ordered the case to be reheard by the District Court, and directed the District Court to review the influence of the General Director's Determination with respect to exchange of information relating to banking fees.[17]

In December 2013, the District Court convicted Israel's largest retail chain, its former CEO and company president, and its former trade and marketing vice president, for two offences regarding the breach of conditions previously prescribed by the IAA for a merger that was approved in the past, and four offences of an attempted restrictive arrangement.[18]

In August 2013, the Tribunal dismissed an appeal of the IAA's decision to object to a merger in the shopping centers market because the merger transaction was cancelled and subsequently the appeal became theoretical.[19]

In April 2013, the District Court indicated that when a competing company becomes a minority shareholder in a rival company anti-competitive concerns will arise, and there may be unlawful conflicts of interest between the minority shareholder and the company. Under certain circumstances such a minority shareholder's voting rights should not be considered when a transaction requires a special majority in the General Assembly.[20]

In March 2013, a District Court rejected an abuse of process claim made by members of an alleged cartel in a criminal case and ruled that the IAA is authorized to continuously wiretap members of suspected cartels, without intervening when a crime is being committed, in order to enable it to finalize an indictment.[21]

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16 CrimA (Jer) 6328/12 State of Israel v. Foldi Peretz [2013] (Isr).
17 CA (Jer) 3259/08 Sharnoa Comuterized Machines Tel-Aviv Ltd. v. Hapoalim Bank Ltd. [2013] (Isr).
18 CrimC (Jer) 118-10 State of Israel v. Rosenhause [2013] (Isr).
19 RT (Jer) 29767-12-12 Azrieli Group Ltd. v. General Director [2013] (Isr).
20 DC (TA) 18327-12-11 Chemipal Ltd. v. NeoPharm Ltd. [2013] (Isr).
21 CrimC 49530-12-11 State of Israel v. Altman [2013] (Isr).

ITALY

2013 ANTITRUST YEAR IN REVIEW

By Alberto Pera, Michele Carpagnano and Michela Furlan of Gianni, Origoni, Grippo, Cappelli & Partners

LEGISLATIVE DEVELOPMENTS

On January 31, 2013, the Italian Antitrust Authority ("ICA") updated its Model Leniency Program ("MLP") under Article 15 of the Italian Competition Law (Law No. 287/1990), in accordance with the changes introduced on November 22, 2012 to the MLP of European Competition Network (ECN). According to the ICA, the update was necessary in order to allow ECN competition authorities to align their own leniency procedures and avoid that different procedures may harm the effectiveness of such programs.

On April 2, 2013, the ICA updated the thresholds that trigger pre-merger filing obligations. Currently the combined turnover in Italy of all the undertakings concerned in the last financial year must exceed EUR 482 million (formerly EUR 474 million), while the aggregate turnover in Italy of the target in the last financial year must exceed EUR 48 million (formerly EUR 47 million). It is worth noting that as from January 1, 2013 the duty to notify a merger is triggered only if both the mentioned thresholds are satisfied.

On May 9, 2013, the ICA decided to reduce by 25% the compulsory contribution that capital companies with revenues higher than EUR 50 million must pay for financing the ICA.[1] The choice to reduce the contribution was adopted having in mind the current economic crisis and is a part of a whole spending review process undertaken by ICA.

On February 6, 2013, the ICA concluded a sector inquiry into automobile liability insurance launched in May 2010 to verify why insurance prices marked significant increases in recent years. Those increases occurred despite of the legislative and regulatory interventions aimed at intensifying competition in the sector.[2] The ICA found several antitrust concerns with reference to compensation methods and exclusive mandate.

On July 24, 2013, the ICA closed a sector inquiry on costs of bank accounts launched in March 2011. The inquiry highlighted that there are still obstacles to the full unfolding of competition in the banking sector that prevent a reduction in prices to the benefit of final consumers and an increase in the demand's mobility.[3] According to the ICA, the following measures are essential: (i) the improvement of the information transparency; (ii) the cutting of links between the bank account and the other bank services; (iii) the reduction of bank accounts' closing time.

On July 24, 2013, the ICA closed a further sector inquiry into the agri-foodstuffs sector, which showed that the market power of large-scale retail channels has increased vis-à-vis their commercial relationships with suppliers.[4] This increase was partly due to the strengthening of the role of retailers' purchase centers and its influence on the economic conditions of both

1 The contribution – which was introduced in 2012 by Decree Law No. 1/2012, subsequently converted into ordinary Law No. 27 of March 24, 2012 – ranged from a minimum of EUR 4,000 to a maximum of EUR 400,000.

2 Italian Competition Authority IC42, "Procedura di risarcimento diretto e assetti concorrenziali del settore RC Auto", available in Italian at www.agcm.it.

3 Italian Competition Authority IC45, "Indagine conoscitiva sui costi dei servizi bancari", available in Italian at www.agcm.it.

4 Italian Competition Authority IC43, Settore della Grande Distribuzione Organizzata, available in Italian at www.agcm.it.

supply and sale markets, with subsequent possible detrimental effects on final consumers.

MERGERS

In 2013, the ICA reviewed 81 mergers. This number significantly decreased over the previous year, when notified mergers were 466. This is a consequence of the 2012 amendment of Article 16 of the Italian Competition Law (effective from January 1, 2013) providing that the two thresholds that trigger pre-merger filing obligations are cumulative, and not alternative as under the previous regime.

Of the mergers reviewed in 2013, only two were involved in an in-depth phase two analysis:

- in the publishing sector the acquisition, by M-Dis Distribuzione Media S.p.A. e Servizi Stampa Liguria S.r.l., of joint control of the new entity formed of Ge-Dis S.r.l. and the distribution branch of Servizi Stampa Liguria S.r.l. was authorized by the ICA on February 20, 2013;[5]

- in the gas distribution sector, the acquisition of joint control over Isontina Rete Gas (IRG) by Acegas-Aps and Italgas was prohibited by the ICA on April 17, 2013.[6] In the authority's view, the operation would lead to the creation of a dominant position held by IRG, capable of eliminating or reducing market competition in future tenders for natural gas distribution concessions in the defined minimum geographical areas of some Italian provinces.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2013, the ICA closed nine proceedings[7] and opened 14 investigations for possible anticompetitive agreements.[8] Of those which were closed, six were examined under Article 2 of the Italian Competition Law[9] and three under Article 101 of the Treaty on the Functioning of the European Union (the "TFEU").[10] We recall the attention on the following cases.

On June 11, 2013, the ICA fined under Article 101 of the TFEU some maritime transport companies for a total amount of over EUR 8 million for having entered into a restrictive agreement aimed at coordinating prices for maritime transport services for the summer of 2011 on the connections from Italian peninsular harbors and Sardinian harbors. More specifically, the ICA found that, during the summer of 2011, all the above companies applied price increases of more than 65%.

On June 13, 2013, the ICA levied fines on Notary Councils of the cities of Milan, Bari and Verona for three autonomous restrictive agreements. According to the ICA, the Notary Councils breached Article 2 of the Italian Competition Law by adopting several acts aimed at uniforming their fees. Therefore the ICA imposed fines for a total amount of about EUR 130,000.

5 Italian Competition Authority Case C11824, "M-Dis Distribuzione Media-Servizi Stampa Liguria-Società di Edizioni e Pubblicazioni/Ge-Dis", available in Italian at www.agcm.it.

6 Italian Competition Authority Case C11878, "Italgas-Acegas-Aps/Isontina Reti gas", available in Italian at www.agcm.it.

7 Italian Competition Authority Cases I749, "Consiglio notarile di Milano/Delibera n. 4/2012; I750, "Consiglio notarile di Bari/Conformità alla Delibera n. 4/2012"; I753, "Consiglio notarile di Verona-Delibera del 9 febbraio 2012"; I747, "Consiglio notarile di Lucca/Controlli sull'applicazione della tariffa"; I719, "Ordine degli avvocati di Brescia"; I743, "Tariffe traghetti da/per la Sardegna"; I745, "Consigli degli ordini degli avvocati/Diniego all'esercizio di avvocato"; I758, "Accordo strategico Impregilo/Salini"; I739, "Mondadori Electa Reunion des Musées Nationaux/Jvco", all available in Italian at www.agcm.it.

8 Italian Competition Authority Cases I760, "Roche-Novartis/Farmaci Avastin e Lucentis"; I761, "Mercato dei servizi tecnici accessory"; I702, "Agenti monomandatari"; I765, "Gare gestioni fanghi in Lombardia e Piemonte"; I748, "Condotte restrittive del CNF"; I738, "Restrizioni deontologiche Federazione nazionale degli ordini dei medici chirurghi e degli odontoiatri"; I718," Enervit/Contratti di distribuzione"; I766, "Inverter solari ed eolici/ Imposizione prezzi minimi"; I768, "Centrale d'acquisto per la grande distribuzione organizzata"; I771, "Servizi di Post-produzione di programmi televisivi RAI", all available in Italian at www.agcm.it.

9 Italian Competition Authority Cases I749, "Consiglio notarile di Milano/Delibera n. 4/2012"; I750, "Consiglio notarile di Bari/Conformità alla Delibera n. 4/2012"; I753, "Consiglio notarile di Verona-Delibera del 9 febbraio 2012"; I747, "Consiglio notarile di Lucca/Controlli sull'applicazione della tariffa"; I719, "Ordine degli avvocati di Brescia"; I739, "Mondadori Electa Reunion des Musées Nationaux/Jvco", all available in Italian at www.agcm.it.

10 Italian Competition Authority Cases I743, "Tariffe traghetti da/per la Sardegna"; I745, "Consigli degli ordini degli avvocati/Diniego all'esercizio di avvocato"; I758, "Accordo strategico Impregilo/Salini", all available in Italian at www.agcm.it.

For the same reasons on April 2, 2013, the ICA levied fines of about EUR 20,000 on Notary Councils of the city of Lucca.

On October 17, 2013, the ICA closed a proceeding under Article 2 of the Italian Competition Law against the City of Brescia Bar Council by stating that there was no evidence showing that the Council put in place an anticompetitive agreement in the market of legal services. On May 16, 2013 the ICA fined under Article 101 of the TFEU five Italian Bar Councils for having hindered the access of EU lawyers to the Italian market of legal services.

As regards the new proceedings opened in 2013 by the ICA concerning alleged anticompetitive agreements, please note the following, which are on-going at the time of this report.

On February 15, 2013, the ICA opened a proceeding under Article 101 of the TFEU against Hoffmann-La Roche Ltd, Novartis AG, Genentech Inc., Roche S.p.A., and Novartis Farma S.p.A. for an alleged cartel related to the sales in Italy of the pharmaceutical products Avastin and Lucentis, respectively marked by Roche and Novartis. According to the ICA, Roche and Novartis would have agreed to exclude the marketing in Italy of Roche's pharmaceutical product Avastin (used for the treatment of sight diseases) for the benefit of the product Lucentis, marketed by Novartis.

On April 4, 2013, the ICA launched an investigation under Article 101 of the TFEU into a possible agreement in the wholesale market of ancillary technical services for the fixed telephone network. More specifically, the investigation aims at ascertaining if the companies providing maintenance services on such network entered into an anticompetitive agreement through which they fix prices of corrective maintenance services for rectifying network faults (termed assurance), which also includes line activation services (delivery).

On June 5, 2013, the ICA opened a proceeding under Article 101 of the TFEU in order to verify whether eight insurance groups representing 80% of the insurance premiums within the sectors of damages and tort liability entered into vertical agreements aimed at hindering insurance agents from carrying out their multimandate, thus restricting competition. More specifically, according to the ICA, the agents' contractual clauses could represent non-compete obligations, able to prevent them to sell insurance products competing with those included in the agency contracts.

On June 21, 2013, the ICA launched an investigation to verify if six companies active in the waste water treatment sector entered into an anticompetitive agreement under Article 2 of Italian Competition Law, aimed at restricting competition during the participation in tendering procedures. In particular, according to the ICA, the companies would have created a sharing plan as regards call for tenders which took place from 2008 to 2012 in two Italian Regions.

On July 16, 2013, the ICA started an investigation

under Article 101 of the TFEU into the National Lawyers Council (CNF) in order to ascertain the possible existence of two distinct anticompetitive agreements aimed at limiting the independence of individual lawyers as regards the prices and the promotion of their services.

On September 3, 2013, the ICA opened a proceeding under Article 101 of the TFEU in order to verify whether the National Federation of Physicians and Dentists, through the provisions of the Deontological Code and its related guidelines, unduly restricted the possibility for its members to use advertising. According to the ICA, the risk of facing disciplinary proceedings in case of infringements of the Deontological Code or its guidelines on advertising could represent an antitrust infringement.

In November 2013, the ICA started two proceedings under Article 101 of the TFEU concerning vertical agreements able to restrict competition in the market of nutritional supplements (alleged resale price restrictions, absolute exclusive arrangements, non-compete obligations) and in the markets of manufacturing and marketing of inverters (alleged RPM case).

On December 4, 2013, the ICA launched an investigation into the central purchasing body Centrale Italiana, an alliance between chains operating in the large-scale retail sector, and into five distribution chains in order to ascertain if they are in breach of Article 101 of the TFEU. The proceeding focuses on whether the alliance reduces the ability of non-participating, equally efficient but weaker retailers to compete (with negative effects on the variety and quality of products, innovation efforts and investments) and the possible existence of price coordination.

On December 10, 2013, the ICA opened an investigation under Article 2 of the Italian Competition Law into 23 companies which provide post-production television services to the exclusive dealer of public service broadcasting in Italy (RAI), suspected to set up an anticompetitive agreement. The proceeding will scrutinize the meaning of several anomalies related to the results of 20 selective procedures run by RAI. The possible distortion of competition could concern a partitioning mechanism characterized by reappointing the same companies of the previous season, by way of lower rebates and, consequently, higher prices.

ABUSES OF A DOMINANT POSITION

In 2013, the ICA concluded five cases[11] and opened five investigations for abuse of dominant position.[12] Of those which were closed, one was examined under Article 3 of the Italian Competition Law[13] and four under Article 102 of the TFEU.[14] One case was closed on the basis of commitments from the parties,[15] two cases without ascertaining an infringement[16] and one case without imposing fines.[17] We highlight the following cases.

On January 31, 2013, the ICA closed a proceeding opened under Article 3 of the Italian Competition Law against Aeroporti di Roma ("AdR") – the company managing the Fiumicino Rome Airport – by accepting the commitments offered by the company. The investigation was launched in April 2012 in order to

11 Italian Competition Authority Cases A442, "Assofort/Adr-servizi aeroportuali"; A418C, "Procedure selettive lega calcio 2010/11 e 2011/12"; A441, "Applicazione dell'IVA sui servizi postali"; A428, "Wind-Fastweb/Condotte Telecom Italia"; A429, "RTI/Sky-mondiali di calcio", all available in Italian at www.agcm.it.

12 Italian Competition Authority Cases A443, "NTV/FS/Ostacoli all'accesso nel mercato dei servizi di trasporto ferroviario passeggeri ad alta velocità"; A473, "Fornitura acido colico"; A474, "SEA/Convenzione ATA", A444, "Akron/Gestione rifiuti urbani a base cellulosica"; A407C, "Conto Tv/Sky", all available in Italian at www.agcm.it.

13 Italian Competition Authority Case A442, "Assofort/Adr-servizi aeroportuali", available in Italian at www.agcm.it.

14 Italian Competition Authority Cases A418C, "Procedure selettive lega calcio 2010/11 e 2011/12"; A441, "Applicazione dell'IVA sui servizi postali"; A428, "Wind-Fastweb/Condotte Telecom Italia"; A429, "RTI/Sky-mondiali di calcio", all available in Italian at www.agcm.it.

15 Italian Competition Authority Case A442, supra note.

16 Italian Competition Authority Cases A418C, A429 supra note.

17 Italian Competition Authority Case A441, supra note.

verify whether AdR has abused its dominant position in the market for the supply of the goods and spaces required to do business inside the airport. The ICA considered the commitments adequate to exclude the anticompetitive concerns.

On February 6, 2013, the ICA closed a proceeding under Article 102 of the TFEU against the Italian Football Leagues (Lega Nazionale Professionisti Serie A and Lega Nazionale Professionisti Serie B) without ascertaining an abuse of dominant position. The case has a long history that can be summarized as follow: in July 2009 the ICA launched an investigation against the Italian Football League in order to verify a possible infringement of article 102 TFUE in the sale of "Serie A" and "Serie B" TV rights for the 2010-2011 and 2011-2012 seasons. In the ICA's view, the Italian Football League's the method for making up the 'football packs' seemed to be custom-made for the main pay-TV operators, thus not ensuring a truly competitive procedure and hindering the entry and growth of other businesses. The investigation was closed in January 2010 with the commitments offered by the Italian Football League. The ICA decision to close the investigation by accepting the League's commitments was then annulled by an Italian Administrative Court that also order the ICA to re-open the proceeding. On the basis of the conclusions of the 2013 investigation, the ICA was of the view that there were no longer grounds for enforcement actions against the League.

On March 27, 2013 the ICA found that the Italian Postal Services Company (Poste Italiane) abused its dominant position under Article 102 of the TFEU for not applying VAT to services which -although part of its universal service- are negotiated individually. This behavior allowed Poste Italiane to exclude competitors from the relevant markets since they were not able to make competitive offers, given that the currently applicable VAT rate was 21% (now is 22%). In accordance with the EU case law, the ICA did not impose fines on the company as the VAT exemption was provided for by a national law, which clashed with EU legislation. However, the ICA gave Poste Italiane a term to provide all the necessary requirements to apply the VAT to the services concerned.

On May 10, 2013, the ICA imposed a fine of almost EUR 103.8 million to Telecom Italia after having ascertained that it infringed Article 102 of the TFEU by excluding its competitors through two abusive conducts: (i) deliberately providing unjustified and specious technical reasons in order to impede competitors to access to the telephone and broadband network.

According to the ICA, Telecom's refusals cannot be qualified as "physiological" and "were not due to other licensed operators (OLO) inefficiency but were the result of Telecom's specific structural, organizing and procedural choices in the management of provisioning process"; and (ii) implementing a discounts policy to large business customers for the service of retail access to the fixed telephone network that did not allow a competitor as efficient as Telecom to operate cost-effectively and on a sustained basis in the same market (in particular, according to the ICA Telecom

"designed a pricing policy for large scale businesses (…) able to squeeze margins of equally efficient competitors, with restrictive effects on competition" in the relevant market).[18]

On May 9, 2013, the ICA concluded the investigation launched into Sky, a pay-TV broadcaster, with reference to the acquisition of TV rights for the UEFA Champions League (seasons 2012-2015) and for the World Cups (seasons 2010 and 2014) without ascertaining an infringement under Article 102 of the TFEU. More specifically:

a) With reference to UEFA Champions League, the ICA found that Sky's acquisition of exclusive broadcasting platforms for the 2012-2015 seasons derived from a competitive procedure among interested TV operators. Moreover, the ICA found that Sky sublicensed the rights concerning UEFA Champions League for the 2012-2013 and 2013-2014 seasons to RTI, the only competitor active in the pay-TV sector. Therefore, all the broadcasting rights relating to UEFA Champions League were available through a pay-DTT platform or through a satellite platform; and

b) Regarding the World Cups 2010 and 2014, the evidence collected during the investigation was not sufficient to prove that Sky's exclusive ownership of TV broadcasting rights effectively hindered competition of other operators and was aimed at excluding competitors.

As regards the new proceedings opened in 2013 by the ICA concerning alleged abuses of dominant position, please note the following, which are on-going at the time of this report.

On May 22, 2013, the ICA launched an investigation into the National Train Service Operator (FS Group) aimed at ascertaining whether the FS Group abused of its dominant position under Article 102 of the TFEU by means of a strategy aimed at hindering NTV (a company supplying high-speed passenger transport services) to access the national market of railway infrastructure, the high-speed passengers rail market and the market for management of advertising spaces in the main rail stations. In October 2013 the FS Group offered a set of commitments that, at the time of writing, were still under evaluation by the ICA.

On December 10, 2013 the ICA launched an investigation into the company Industria Chimica Emiliana, leader in the worldwide market of cholic acid, and into its subsidiary Prodotti Chimici e Alimentari, in order to ascertain if they are in breach of Article 102 TFEU by increasing supply prices of above-mentioned product and making the supply itself more difficult.

On December 20, 2013 the ICA opened an investigation under Article 102 TFEU to determine whether SEA, the managing operator of the Milan Linate and Malpensa airports, has abused its dominant position in order to impede the access of a potential competitor in the management of airports infrastructures. SEA is suspected to have upset the result of the competitive procedure to impede the acquisition of ATA, which operates in the airport handling sector, by Cedicor (a competitor active in the same sector).

COURT DECISIONS

On January 29, 2013 the Consiglio di Stato (Italian Council of State) annulled the decision by which the Tar Lazio (First Instance Administrative Court) overturned a EUR 5 million fine imposed by the ICA on Bayer Cropscience, a chemical company, for abuse of dominant position under Article 102 of the TFEU.[19]

18 See Italian Competition Authority Case, A428, "Wind-Fastweb/Condotte Telecom Italia".
19 Consiglio di Stato Judgment, January 29, 2013, Bayer Cropsience, available in Italian at www.giustizia-amministrativa.it.

According to the Council, the ICA correctly found the abuse on the refusal by Bayer Cropscience to provide toxicological studies that cannot be replicated by virtue of an EU law prohibition to repeat experiments on vertebrate animals and are necessary to achieve the re-registration of certain specialty plants and the subsequent authorization to market them. The refusal was deemed as a denial of an essential facility, with the effect of excluding a competitor from the relevant market.

On May 7, 2013 the First Instance Administrative Court annulled the decision by which the ICA considered as anticompetitive the temporary joint venture between two competitors active in the gas distribution sector because it was allegedly aimed at allocating the territory of some municipalities.[20] The Court excluded the existence of an anticompetitive conduct since the ICA failed to prove that the companies involved used the temporary joint venture in order to pursue anti-competitive purposes.

On May 21, 2013 the Italian Council of State dismissed the appeal brought by the company Saint Gobain, a glass and building materials manufacturer, against the Tar Lazio judgment that upheld the ICA decision imposing the company a fine in excess of EUR 2 million for abuse of dominant position in the market for the production and marketing of plasterboard.[21] According to the Council, it is not possible for the judge to substitute ICA's empowerments in assessing a possible infringement, except in the case of the imposition of penalties, where judges can make a deeper examination. Furthermore, the Council was of the view that, in order to evidence an abusive conduct, it is sufficient for the competition authority to draw a circumstantial picture, consistent and unambiguous, with ability to reverse the burden of proof on the distortion of competition.

On August 2, 2013 the First Instance Administrative Court annulled an ICA's decision which had imposed a fine of approximately EUR 4.5 million on a company active in the large-scale commercial chains sector for an alleged abuse of dominant position allegedly carried out through the company's participation in land use planning processes in order to hinder the opening of a competitor's new stores.[22] According to the Court, the ICA failed to prove the causal link between the company's conduct and the foreclosure effect.

On October 7, 2013 the First Instance Administrative Court upheld the appeal brought by three of the seven companies fined by the ICA with a EUR 37 million fine for an alleged anticompetitive agreement in the road barrier and motorways markets on the basis of the numerous and unjustified extensions of the proceeding's deadline, thus failing to comply with the principle according to which certainty of a reasonable deadline of the proceedings has to be granted to the parties involved in an antitrust investigation.

20 Tar Lazio Judgment, May 7, 2013, Eon Italia, available in Italian at www.giustizia-amministrativa.it.
21 Consiglio di Stato Judgement, May 21, 2013, Saint Gobain Italia Spa, available in Italian at www.giustizia-amministrativa.it.
22 Tar Lazio Judgment, August 2, 2013, Coop Estense, available in Italian at www.giustizia-amministrativa.it.

On November 20, 2013, the Italian Council of State confirmed the First Instance Administrative Court's decision that annulled the ICA's decision to accept commitments proposed by the companies involved in the cartel investigation regarding the market for high-way assistance services.[23] According to the Court, the acceptance of the commitments led the ICA to assume regulatory powers with the subsequent infringement of the EU proportionality principle.

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23 Consiglio di Stato Judgement, November 20, 2013, Aci Global, available in Italian at www.giustizia-amministrativa.it.

JAPAN

2013 ANTITRUST YEAR IN REVIEW

By Shigeyoshi Ezaki, Vassili Moussis and Ryoichi Kaneko of Anderson Mori & Tomotsune

LEGISLATIVE DEVELOPMENTS

In December the amendment bill of the Antimonopoly Act ("AMA"), which abolished the hearing procedure of the Japan Fair Trade Commission ("JFTC") for administrative appeals, was approved by the House of Councilors of Japan.[1] This fundamentally revises the appeal procedure for JFTC decisions by:

(i) Abolishing the JFTC's hearing procedure for administrative appeals;

(ii) Abolishing the jurisdiction of the Tokyo High Court as the court that reviews appeal suits pertaining to decisions of the JFTC in the first instance;

(iii) Introducing a system where any first instance appeal pertaining to cease-and-desist orders etc. shall be to the Tokyo District Court only (with a panel of three or five judges); and

(iv) Developing procedures for a hearing prior to issuing a cease-and-desist order etc. to ensure due process.

The amendment bill must become effective by June 2015 but the actual date of entry into effect has not yet been determined.[2]

With respect to the JASRAC case reported in the 2012 Year in Review, in November 2013 the Tokyo High Court declared that the "blanket license agreements" (agreements under which a licensee is allowed to use an unlimited number of music works managed by JASRAC, subject to the payment of a fixed license fee) which JASRAC adopted made it difficult for eAccess Ltd. to continue its business and for newcomers to enter into the relevant market. The Tokyo High Court concluded that the fact finding of the JFTC was not established by substantial evidence for a finding of exclusionary effect in the blanket license arrangement. The Tokyo High Court therefore annulled the withdrawal of the cease-and-desist order and requested the JFTC to examine whether the questioned action of JASRAC could be regarded as private monopolization.[3] The JFTC has appealed to the Supreme Court of Japan and the first hearing date has not yet been set.[4]

After the JFTC issued a final and binding cease and desist order to Seven Eleven Japan Co., Ltd. ("Seven Eleven"), the largest operator of a franchise retail chain in Japan, for the abuse of its dominant bargaining position, the franchisees of Seven Eleven claimed against Seven Eleven for JPY 139 million (approximately USD 1.3 million) in damages. The grounds for the appeal were based on the claim that Seven Eleven prevented its franchisees from selling discounted goods. In August 2013, the Tokyo High Court declared that although Seven Eleven did not systematically obstruct the sale of discounted goods

1 Press Release, Japan Fair Trade Commission, "Enactment of the Bill to Amend the Antimonopoly Act" (December 9, 2013), http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.html.

2 As of January 15, 2014.

3 Heisei 25 (gyou-ke) 8 Tokyo High Ct. November 1, 2013, available at (Japanese only) http://snk.jftc.go.jp/JDS/data/pdf/H251101H24G09000008_/131101.pdf.

4 As of January 4, 2014.

by its franchisees, there were some individual cases in which Seven Eleven prevented its franchisees selling discounted goods and Seven Eleven unfairly inflicted damage on its franchisees. This was found by the Tokyo High Court to be a violation of the AMA. As a result, the Tokyo High Court upheld part of the claim and ordered Seven Eleven to pay JPY 11 million (approximately USD 110,000).

MERGERS

The JFTC conducted Phase II reviews in five cases, four of which were cleared in 2013.

In January 2013 the JFTC cleared the acquisition (with conditions) by Daiken Corporation ("Daiken"), a manufacturer of wood-based materials including medium density fiberboard ("MDF") and interior materials made of wood-based materials, of C&H Co., Ltd. ("C&H"), a wholly-owned subsidiary of the MDF manufacturer Hokushin Co., Ltd.[5] The JFTC found that the acquisition would form vertical market foreclosure for a particular type of MDF provided by Hokushin and would disturb the competitive behavior of interior material manufacturers competing with Daiken. To remedy this concern, Daiken offered to have C&H supply the particular type of MDF to the interior material manufacturers on terms reasonable and substantively equivalent to those applied to products sold to Daiken and its subsidiaries etc. for five years after the completion of the acquisition.

In February 2013, the JFTC cleared the merger between Furukawa-Sky Aluminum Corp. ("FSA") and Sumitomo Light Metal Industries, Ltd. ("SLM"), both of which manufacture rolled aluminum products and copper tube products, among others.[6] FSA and SLM are the largest two manufacturers of rolled aluminum products in Japan. The JFTC concluded that the proposed merger would not substantially restrain competition for (i) "aluminum sheet products (general use)"; (ii) "aluminum sheet products (end/tab stock)"; (iii) "aluminum foil products"; or (iv) "pure copper tube products", for which the total market share of FSA and SLM after the proposed merger would be approximately: (i) 50%, (ii) 70%, (iii) 25% and (iv) 35%, respectively. Despite the market shares outlined above for each product and the seemingly significant impact on competition of the proposed merger, the JFTC cleared this case due to the existence of competitors with sufficient market share and with excess capacity, the existence of a sufficient degree of import pressure, and competitive pressure from neighboring markets.

In May 2013, the JFTC cleared the acquisition (with conditions) by ASML US Inc. which is a subsidiary of ASML Holdings N. V. ASML US manufactures and sells lithography systems used in the front-end process of semiconductor manufacturing, Cymer manufactures and sells light sources that compose an important part of the lithography systems[7] and ASML procures light sources from Cymer for manufacturing lithography systems. In the first phase review, ASML US asked the JFTC to explain its potential objections to the combination in order to enable the review process to proceed smoothly. The JFTC disclosed its potential objections and the parties' proposed measures to resolve those issues. The JFTC found a market for the manufacturing and selling of light sources (the upstream market) and a separate market for the manufacturing and selling of lithography systems

5 JFTC press release of January 24, 2013, available at http://www.jftc.go.jp/en/pressreleases/yearly-2013/jan/DAIKEN_CORPORATION.html.
6 JFTC press release of February 21, 2013, available at http://www.jftc.go.jp/en/pressreleases/yearly-2013/feb/Furukawa_Sumitomo.html.
7 JFTC press release of May 7, 2013, available at http://www.jftc.go.jp/en/pressreleases/yearly-2013/may/130507.html.

(the downstream market). Cymer and ASML were leading manufacturers in the upstream and downstream markets respectively. Prior to the combination, Cymer had only one competitor while ASML had two competitors. The JFTC's main concerns related to potential input or customer foreclosure issues that could arise from the closed nature of the market following the proposed merger. The parties offered the following main remedies which the JFTC accepted: (i) Cymer keeps doing business with competitors of ASML under Fair Reasonable and Non-Discriminatory ("FRAND") terms of trade, and (ii) ASML keeps selecting its suppliers of light sources on non-discriminatory terms. In addition, the parties agreed to keep confidential from each other any information they held prior to the combination as to each other's customers (competitors of the other party to the combination). Finally, the JFTC requested that the parties report the status of their compliance with the agreed remedies once a year for a period of five years.

Even though the JFTC launched a second phase review, it took the measures ASML US proposed into consideration and concluded that the proposed acquisition would not substantially restrain competition in the particular fields of trade. The Antitrust Division of the U.S. Department of Justice, the Korea Fair Trade Commission and other competition authorities also reviewed this case, and cooperated with the JFTC through exchanging information from each authority's respective investigation.

In July 2013, the JFTC cleared the acquisition by AEON Co., Ltd. which has subsidiaries and affiliates engaged in the supermarket business, of The Daiei, Inc, which is also in the supermarket business.[8] The JFTC concluded that in all of the geographic areas requiring specific consideration, active competition would remain post acquisition due to the presence of strong competitors and entry pressure, as well as competitive pressure from neighboring markets.

In December 2013, the JFTC cleared the integration of the thermal power generation systems businesses of Mitsubishi Heavy Industries, Ltd. and Hitachi, Ltd. without remedies.[9] The JFTC's clearance was based on the fact that there would still be active competition after the transaction given that there are a number of business operators in the concerned market that are purchasing and selling certain types of thermal power generation plants and associated components. More specifically, the JFTC relied on the presence of strong competitors in the market, the possibility of new entry, and pressure from the demand side.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The JFTC issued five cease-and-desist orders, three related to cartels and two related to bid rigging. Administrative surcharges[10] imposed by the JFTC for cartels and bid rigging cases in 2013 totaled JPY 21.6 billion (approximately USD 216 million) against 58 companies. The JFTC received 105 leniency applica-

8 JFTC press release of May 7, 2013, available at http://www.jftc.go.jp/en/pressreleases/yearly-2013/july/130719.html.

9 JFTC press release of December 12, 2013, available at http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131212.html.

10 In Japan, a surcharge is generally calculated by applying some multiple (basically, 10%) to the sales amount for the relevant products in respect of the period of infringement, for a maximum of 3 years.

11 JFTC Annual Report of FY2012, available at http://www.jftc.go.jp/en/topics/topics131024.files/AnnualReportOECD2012.pdf.

tions between April 2012 and March 2013.[11]

In March 2013, the JFTC issued cease-and-desist orders and imposed surcharge payment orders totaling JPY 13.3 billion (approximately USD 133 million) upon three automotive bearing manufacturers, NTN, NSK and Fujikoshi, for their participation in an illegal cartel.[12] Those three manufacturers and JTEKT Corporation had agreed to raise the price of industrial machinery bearings and automotive bearings in order to pass along the increased cost of steel. As reported in the 2012 Year in Review, JTEKT Corporation is understood to have filed the first leniency application and has not been named in either administrative or criminal proceeding.

In June 2013, the JFTC issued cease-and-desist orders and imposed surcharge payment orders totaling JPY 2.6 billion (approximately USD 26 million) upon ten manufacturers of specific high-fructose corn syrup, specific starch syrup and glucose, for forming an illegal cartel.[13] The violators concluded agreements on two occasions to raise the selling price of the specific high-fructose corn syrup, specific starch syrup and glucose, to JPY 10 per kilogram and to JPY 15 to 20 per kilogram, through the exchange of information at meetings attended by business operators.

In July 2013, the JFTC issued cease-and-desist orders to six enterprises and imposed surcharge payment orders totaling JPY 255 million (approximately USD 2.5 million) to seven enterprises that manufacture and sell starch adhesive for corrugated board.[14] The violators agreed to raise the selling price of the specific starch adhesive for corrugated board to the future price of corn according to the Chicago Board of Trade.

Regarding the Bearing Cartel Case of NSK Ltd., NTN Corporation and Nachi-Fujikoshi Corp. reported in the 2012 Year in Review, NSK Ltd. was fined JPY 380 million (approximately USD 3.8 million)[15] by the Tokyo District Court, and its former officials and employees were given suspended prison sentences[16] in February 2013.

In March 2013, the JFTC issued cease-and-desist orders to three automotive parts manufacturers and imposed surcharge payment orders of JPY 4.6 billion (approximately USD 46 million) upon two automo-

12 JFTC press release of March 29, 2013, available at (Japanese only) http://www.jftc.go.jp/houdou/pressrelease/h25/mar/130329_2.html.
13 JFTC press release of June 13, 2013, available at http://www.jftc.go.jp/en/pressreleases/yearly-2013/june/130613.html.
14 JFTC press release of July 11, 2013, available at http://www.jftc.go.jp/houdou/pressrelease/h25/jul/20130711.html (Japanese only) http://www.jftc.go.jp/en/pressreleases/yearly-2013/july/130711.html.
15 Using an approximate JPY to USD exchange rate of JPY 100 for USD 1.
16 NTK press release of February 25, 2013, available at (Japanese only) http://www.jp.nsk.com/company/presslounge/news/2013/press0225a.html.
17 JFTC press release of March 22, 2013, available at (Japanese only) http://www.jftc.go.jp/houdou/pressrelease/h25/mar/13032202.html.

tive parts manufacturers.[17] Koito Manufacturing Co., Ltd., Ichikoh Industries, Ltd., and Stanley Electric Co., Ltd. manufacture automotive headlamps and rear combination lamps and designated successful bidders amongst themselves to win the bids for headlamps and rear combination lamps ordered by automobile companies. This was meant to avoid a decline in prices.

In December 2013, the JFTC issued cease-and-desist orders to 39 engineering companies and imposed surcharge payment orders totaling JPY 746 million (approximately USD 7.4 million) upon 36 engineering companies.[18] The violators participated in bidding for particular overhead transmission facility works and particular underground transmission line works ordered by Tokyo Electric Power Company, Inc. ("TEPCO"). The JFTC found that TEPCO induced or facilitated the violations by inviting only certain companies to the bid. The JFTC therefore urged TEPCO to improve its procurement system as well as take appropriate measures to prevent recurrence of such conduct.

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18 JFTC press release of December 20, 2013, available at http://www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/131220.html.

MEXICO

2013 ANTITRUST YEAR IN REVIEW

By Lucía Ojeda Cárdenas of SAI Consultores S.C.

LEGISLATIVE DEVELOPMENTS

In June 2013 a major constitutional amendment on telecommunications and competition was enacted (the "Amendment")[1] which contemplates, inter alia, the following:

The creation of a new Federal Economic Competition Commission ("FECC" or "Commission") as a constitutional and autonomous entity, which budget will be directly allocated by the Congress, replacing the Federal Competition Commission, which was a de-concentrated agency under the Mexican Ministry of Economy. As such, its budget was allocated directly by the Ministry of Economy.

The appointment of seven new Commissioners, instead of five, as in the former competition agency.[2]

New powers were granted to the FECC to comply its functions, in particular to remove barriers to entry (a power that has important implications for regulated sectors) and to regulate the access to essential inputs and to order the divestiture of assets (currently the FCC has this power, but it is very limited and has never been exerted).

The creation of the Federal Institute of Telecommunications ("FIT"), also with seven Commissioners, as the authority with exclusive responsibility for competition matters and regulation with respect to the telecommunications sector.

The establishment of the indirect *amparo*[3] as the sole remedy available against the FECC's and FIT's final resolutions before specialized courts.

The creation of two District Courts and two Collegiate Courts as specialized courts to review the above-mentioned indirect *amparos*.

The inclusion of must carry and must offer obligations to require free-of-charge relay of open-air TV signals under specific conditions.[4] The foregoing implies that open-air TV operators shall allow the retransmission of their signals by pay-TV operators; and the former shall retransmit such open-air TV signals.

As a result of the Amendment, in October 2013 the FECC formally transferred to the FIT the files of all pending cases related to telecommunication matters

1 See "Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones" (Mex.) [Decree whereby several provisions concerning articles 6, 7, 27, 28, 73, 78, 94 and 105 of the United Mexican States' Political Constitution regarding telecommunications matters are amended and added], published in the Federal Official Gazette of June 11, 2013.

2 On September 11, 2013, the FECC and the Federal Institute of Telecommunications became operative. In the case of the FECC, the Plenum –deciding body- is integrated by six economists and only one lawyer, indicating an inclination towards an economics-focused approach in competition cases.

3. There are two sorts of amparo proceedings: the direct amparo, which proceeds against final judicial resolutions, and the indirect amparo, which proceeds against final resolutions by non-judicial authorities.

4 See "artículo transitorio octavo del Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o., 7o., 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones" (Mex.) [transitory article eighth of the Decree whereby several provisions concerning articles 6, 7, 27, 28, 73, 78, 94 and 105 of the United Mexican States' Political Constitution regarding telecommunications matters are amended and added], available at http://www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013.

which were being carried out with the previous competition agency and which now will be decided by the new telecommunications regulator.

It is expected that in 2014 the Mexican Congress will enact the secondary legislation required to implement all the substantive modifications introduced by the Amendment. Furthermore, the FECC will issue a work plan for the next four years, which must contain, among other issues, the sectors and priorities on which the FECC will focus its attention in the middle term, including particularly the financial sector.

MERGERS

During 2013 the FECC5 completed 10[5] merger reviews, denying authorization to only one thereof. Among the most relevant concentrations reviewed by the FECC were: (i) the global transaction between Nestlé S.A. and Pfizer Inc., authorized with conditions on April 4, 2013;[6] (ii) the transaction between Nestlé S.A. and Aspen Labs, S.A. de C.V., related to the compliance of conditions in the Nestlé-Pfizer merger, authorized on August 20, 2013;[7] (iii) the merger between Sherwin-Williams Company and Avisep, S.A. de C.V., denied on October 29, 2013 in the resolution of the motion of reconsideration;[8] and (iv) the merger between Cadena Mexicana de Exhibición, S.A. de C.V. and Cinemark Holdings México, S. de R.L. de C.V. on October 22, 2013, authorized without conditions in the motion of reconsideration.[9]

Finally, as part of the new powers granted to the FIT by the Amendment, on December 17, 2013, the FIT commenced an investigation for the possible commission of a prohibited concentration in the markets of fixed-line and mobile phone services, access to broadband Internet, dedicated links, interconnection, pay television, broadcast television, advertising media and audiovisual and audio content at a national and international level.[10] This is the first investigation commenced by the FIT and the case may involve the largest companies of the telecommunications and broadcasting sectors.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2013 the FECC commenced the investigation of six cases for absolute monopolistic practices, three of which relate to the sale of auto parts in Mexico (air compressors, angle sensors and automotive harnesses). Another investigation relates to alleged price fixing in the market of commercialization of corn in Colima, Mexico. The fifth investigation relates to the market of maritime transport services for cars and construction and agricultural rolling machinery, while the sixth investigation refers to the market of production, distribution and marketing of sugar.

Furthermore, during 2013 the FECC resolved six investigations for absolute monopolistic practices, one of which was for market segmentation in the distribution and marketing of natural gas, but this case was closed without fines due to lack of evidence.[11] The other five investigations ended with fines for the economic agents involved, and the most important resolutions in this matter are those mentioned below.

5 The Federal Competition Commission up to June 2013, and afterwards the FECC. For purposes of this report, they are indistinctively referred to as the FECC.

6 Comisión Federal de Competencia Económica [Federal Economic Competition Commission], Resolution No. RA-002-2013 (Mex.), available at http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Asuntos%20Juridicos/V72/6/1745115.pdf.

7 Comisión Federal de Competencia Económica [Federal Economic Competition Commission], Resolution No. CNT-075-2013 (Mex.), available at http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Concentraciones/V489/39/1763153.pdf.

8 This concentration was also denied by an initial FECC´s resolution issued on July 11, 2013; the parties submitted a motion of reconsideration against it but the FECC confirmed its original resolution under file No. RA-027-2013 (Mex.), available at http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Asuntos%20Juridicos/V80/12/1775697.pdf.

9 Comisión Federal de Competencia Económica [Federal Economic Competition Commission], Resolution No. RA-029-2013 (Mex.), available at http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Asuntos%20Juridicos/V80/12/1775312.pdf.

10 File number E-IFT/UC/DGIPM/CP/0003/2013.

11 Comisión Federal de Competencia Económica [Federal Economic Competition Commission], Resolution No. DE-022-2011 (Mex.), available at http://www.cfc.gob.mx:8080/cfcresoluciones/docs/INVESTIGACIONES/V354/75/1763113.pdf.

On April 18, 2013, the FECC confirmed its resolution fining three individuals and two companies along with their sales managers, for the amount of MXN 4.61 million (approx. USD 352,986), for price fixing in the marketing of processed chicken in Cancun, Quintana Roo.[12] The fine includes the amount of MNX 676,352 (approx. USD 51,788) for false testimonies from several individuals during the procedure. Also, on June 11, 2013, the FECC fined several companies and individuals for price fixing in the same market in Cordova, Veracruz.[13]

Finally, on September 10, 2013, the FECC fined six hospitals in Jalisco and their employees for the amount of MXN 14 million (approx. USD 1,071,975),[14] for conducting collusive practices in the market of services granted by hospitals and/or medical services establishments.[15] The practice involved fixing prices of medical services covered by insurance companies from 2009 to 2011, and was performed by the managers of the hospitals and the Asociación de Hospitales Particulares de Jalisco. In this case, the FECC conducted a dawn raid on the hospitals, obtaining relevant key evidence in the finding of liability of the parties involved.

On a different topic, and as a result of the financial reform enacted by the Mexican Congress on November 26, 2013,[16] in 2014 the FECC will conduct an investigation regarding the conditions of competition in the financial system and its markets, taking into account the non-binding opinion of the Ministry of Finance.

ABUSES OF A DOMINANT POSITION

In 2013 the FECC commenced two investigations for abuses of dominance. One relates to the market of access to the federal zone and parking area for the public service of federal transport of passengers to and from the International Airport of Mexico City. The second relates to the market of storage and shipment of non-crystallizable honey and its derived liquid products.

Furthermore, during 2013 the FECC solved nine investigations for relative monopolistic practices, two of which were closed without liability for lack of evidence, five concluded imposing fines to the economic agents involved in the practices and two concluded without liability subject to commitments undertaken by the economic agents involved.

Moreover, on August 20, 2013 the FECC issued a resolution to fine State-owned oil refinery Pemex-Refinación for MXN 653.2 million (approx. USD 50,015,313),[17] for selling fuel to gas stations subject to the condition of hiring transportation services for gasoline and diesel.

12 Comisión Federal de Competencia Económica [Federal Economic Competition Commission], Resolution No. RA-003-2013 (Mex.), available at http://www.cfc.gob.mx:8080/CFCResoluciones/docs/Asuntos%20Juridicos/V69/6/1740557.pdf.

13 Comisión Federal de Competencia Económica [Federal Economic Competition Commission], Resolution No. IO-005-2009-II (Mex.), available at http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Asuntos%20Juridicos/V73/7/1752399.pdf. This resolution was challenged by the economic agents involved but the FECC confirmed its decision in Resolution No. RA-022-2013, available at http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Asuntos%20Juridicos/V80/14/1779352.pdf.

14 The Exchange rate considered to estimate the USD amount of all fines identified in this contribution was published in the Official Journal of the Federation by the Bank of Mexico on December 31, 2013.

15 FECC's resolution No. IO-001-2011, available at http://www.cfc.gob.mx:8080/cfcresoluciones/docs/Asuntos%20Juridicos/V76/9/1767628.pdf.

16 The full text of this bill is available in Spanish at http://cdn.presidencia.gob.mx/reformafinanciera/Reforma_Financiera.pdf.

17 This resolution was challenged by Pemex through an indirect amparo trial, its outcome being pending.

In addition, one of the most important files reviewed by the Commission was related to the market of distribution services, marketing and sales of beer.[18] In this case the companies involved submitted commitments to the Commission, which accepted them and closed the investigation without liability to the companies. The commitments in this case implied the amendment of the supply agreements of Grupo Modelo S.A.B. de C.V. to eliminate the restriction imposed not to sell the products of other competitors.

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18 FECC's resolution No. DE-012-2010 available at http://www.cfc.gob.mx:8080/cfcresoluciones/docs/INVESTIGACIONES/V353/74/1755570.pdf.

THE NETHERLANDS

2013 ANTITRUST YEAR IN REVIEW

By Nima Lorjé and Winfred Knibbeler
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LEGISLATIVE DEVELOPMENTS

On April 1, 2013, the Dutch Competition Authority, the Dutch Telecoms Authority and the Netherlands Consumer Authority merged into one single entity, called "the Netherlands Authority for Consumers and Markets" (the "ACM").[1] The powers of the ACM are outlined in the General Administrative Law Act, the Competition Act, the Telecommunication Act, the Consumer Protection (Enforcement) Act and sector-specific Acts regarding, inter alia, the energy, transport and storage sectors. A legislative proposal that intends to revise the procedural powers of the ACM (the "Streamlining Act") is currently pending before the Upper Chamber of Parliament.[2] This proposal is intended to be adopted during the course of 2014. Furthermore, on April 24, 2013, the Dutch Ministry of Economic Affairs published new guidelines on setting fines and leniency.[3] These guidelines incorporate (i) the 2009 Fining[4] and Leniency[5] guidelines of the former Dutch Competition Authority, and (ii) the 2010 Fining Guidelines of the former Dutch Telecommunication Regulator.[6]

In addition, the new incorporated guidelines include Fining Guidelines for violations of the Consumer Protection (Enforcement) Act and public procurement rules. The new guidelines do not materially change the former guidelines, and the Ministry of Economic Affairs may reassess the guidelines once the Streamlining Act comes into force. The ACM has also released new guidelines as to how it will assess mergers and alliances in the hospital sector.[7] These guidelines are congruent with the priorities of the ACM, in that the focus of substantive review has become more consumer-oriented.

MERGERS

Like in previous years, significant consolidation took place in the healthcare sector in 2013. The ACM approved a number of hospital mergers in first-phase decisions and two after second-phase investigations. In the case "Lievenberg Ziekenhuis and St. Franciscus Ziekenhuis",[8] the ACM followed the new guidelines on hospital mergers and invited the Patients Associations of both hospitals to make submissions on the merger. After its first-phase investigation, the ACM indicated that the merger may reduce the relevant regional healthcare insurer's bargaining power, which could lead to lower quality health care and/or higher prices. The ACM had assessed the geographic market by looking at the origin of patients in both hospitals and the respective travel times to the merging hospitals and to other hospitals in the area. On that basis the ACM came to the preliminary conclusion that

1 See Wet van 28 februari 2013, "houdende regels omtrent de instelling van de Autoriteit Consument en Markt (Instellingswet Autoriteit Consument en Markt)", September 2013, 102, available at www.overheid.nl; See also https://www.acm.nl/en/about-acm/our-organization/the-netherlands-authority-for-consumers-and-markets/ for a brief high level overview in English.
2 See Eerste Kamer, 2013–2014, 33 622, A, available at www.overheid.nl.
3 See Staatcourant 2013, No. 11214, available at www.overheid.nl.
4 See Staatscourant 2009, No. 14079, available at www.overheid.nl.
5 See Staatscourant 2009, No. 14078, available at www.overheid.nl.
6 See Staatcourant 2010, No. 5163, available at www.overheid.nl.
7 See Beoordeling fusies en samenwerkingen ziekenhuiszorg, available at https://www.acm.nl/nl/download/publicatie/?id=12037.
8 ACM Decision, June 12, 2013, Case 7568, (Lievenberg Ziekenhuis/St. Franciscus Ziekenhuis) (Neth.), available at www.acm.nl.

the market might be limited to an operational area of both hospitals on which the merging entity would have a market share of 60-70% for clinical generic hospital care and 70-80% for non-clinical generic hospital care. In order to better understand the competitive dynamics, the ACM assessed which hospitals the patients generally switched to. The assessment showed that most patients would switch between the two merging hospitals. The Dutch Health Authority predicted on the basis of econometric models that the merger would result in price increases.

In the second-phase investigation, the ACM conducted an in-depth assessment of the relevant geographic market, the counterfactual and the impact on competition.[9] During that investigation, the ACM found that 30-50% of the patients in the area of the Lievenberg hospital travelled for clinical and non-clinical generic hospital care to the St. Franciscus hospital, and the remainder to two other hospitals in the neighborhood (inter alia the Amphia hospital). Furthermore, health insurers indicated that they considered the geographic market to consist of the area of the two merging hospitals and at least that of the Amphia hospital. On this basis the ACM considered that the geographic market may be wider than the area of the merging hospitals, but left the exact scope undecided. In its substantive assessment, the ACM concluded that the merger would not significantly impede competition as it anticipated that stricter quality and volume norms would not have allowed both hospitals to operate all types of treatments on their own.[10] Furthermore, the ACM considered that the market shares of the merging hospitals were significantly smaller on the wider market which now included at least Amphia hospital. Although the merging parties were considered to be very close competitors, the ACM considered that health insurers had indicated that they would have sufficient buying power left after the transaction and that the Amphia hospital indicated that competition might increase after the transaction.

The ACM conducted a very similar second-phase analysis in the second case concerning the "Bronovo – Medisch Centrum Haaglanden" hospital merger.[11] However, there were two main differences between both cases. In the "Bronovo Medisch Centrum Haaglanden" case, the Bronovo hospital and the Haaglanden hospital were not considered one another's main competitors. Secondly, the health insurers differed in opinion about the purchasing pressure they could exert on the combination after the transaction. Nevertheless, the ACM cleared the merger on the basis of similar reasoning as in the "Lievenberg - St. Franciscus case".

An interesting aspect of these cases is how the ACM assessed these hospital mergers with a stronger focus on the views of market players. In previous hospital mergers, cases were mainly based on the remaining pressure by health insurers. The ACM now considers the views of other market players and consumer collectives to also be of great importance. Furthermore, the fact that the health care sector is in flux due to regulatory changes seems to be a less important factor in these recent decision than previously evidenced.

Another interesting case is the Motorhuis case. This case is one of the few examples where the ACM has fined a company for failure to notify of a transaction. Although in this instance the fine was reduced

9 ACM Decision, September 30, 2013, Case 13.0438.24, (Lievenberg Ziekenhuis/St. Franciscus Ziekenhuis) (Neth.), available at www.acm.nl.
10 In particular, the ACM considered that offering complex acute care and oncology would not be sustainable for both hospitals.
11 ACM Decision, December 6, 2013, Case 13.0758.24, (Bronovo/Medisch Centrum Haaglanden) (Neth.), available at www.acm.nl.

significantly because of the relatively low value of the transaction, heavy fines can be imposed for failure to notify of a notifiable transaction. On March 28, 2013, the ACM imposed a fine of EUR 500,000 (approx. USD 683,666) jointly and severally on car dealer Motorhuis B.V. and its two parent companies for failure to notify of the acquisition of assets from Bulters Autobedrijven B.V. on January 1, 2012.[12] The parties only notified of the transaction after an inquiry by the ACM on August 10, 2012, and obtained clearance on August 24, 2012. In its report,[13] the ACM qualified Motorhuis B.V. and its parent companies Markeur Holding B.V. and Markeur Houdster B.V. as liable for the fine. However, according to the two parent companies, only Moterhuis B.V. could be held liable for the infringement because the violated provision in the Competition Act was only addressed to the "undertakings concerned," which, according to the defendants, were only the acquirer and the target (i.e. Moterhuis B.V. and the purchased assets). The ACM rejected the argument and ruled that the obligation to notify of a transaction and honor the stand-still obligation lies with the undertaking concerned, including controlling parent companies of the acquirer. Therefore, according to the ACM, the two parent companies of Motorhuis B.V. were liable as well. Regarding the fine, the ACM imposed a multiplier for gravity of the infringement of 1 (out of a range from 1 to 5), given the fact that the transaction did not impede competition. Furthermore, the ACM reduced the fine by 20% because the defendant had cooperated with the investigation and had immediately after the start of the investigation signed a stand-still agreement not to exercise control over the acquired assets until merger clearance was obtained. The ACM further reduced the fine on the basis of the principle of proportionality because of the limited deal value of the transaction in question.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The ACM imposed few fines for cartel infringements in 2013. Five companies active in the demolition of civil constructions were fined between EUR 2,000 and EUR 69,000 (approximately USD 2,737 and USD 94,410) for three cartel infringements in three separate decisions. The ACM found that demolition companies had infringed the Competition Act by offering cover prices in tender proceedings. One of the companies exposed the cartel by applying for leniency.

In the Geuneburg case,[14] the ACM found that Van Eijk B.V. had provided a pre-completed tender offer to Hofstede B.V., which Hofstede B.V. had submitted as its own tender offer to the customer. Accord-

12 ACM Decision, March 28, 2013, Case 7491, Motorhuis (Neth.), available at www.acm.nl.
13 A report in this context is similar to the Statement of Objections of the European Commission.
14 ACM Decision, May 24, 2013, Case 7400, Geuneburg (Neth.), available at www.acm.nl.

ing to the parties, the reason this was done was because Hofstede was not interested in obtaining this particular project, and by proceeding in this manner could rely on the fact that there was a lower bidder to win the project without having to fill out a full tender. This way Hofstede would still be "in the picture" for a subsequent project but would avoid incurring the cost of drafting a tender. For Van Eijk, the arrangement was advantageous because it knew the price Hofstede would submit and therefore had one less competitor for the tender. Although the cartel conduct in question concerned only one project, the ACM considered that the conduct appreciably affected competition because the relevant market in tender proceedings is limited to the tendering companies. As five companies participated in the tender proceedings, Van Eijk and Hofstede qualified as 40% of the market. Furthermore, the ACM considered that Van Eijk and Hofstede were important players on the wider market for demolition projects and should be considered close competitors. Therefore, according to the ACM, neither Van Eijk nor Hofstede fell under the de minimis threshold. In respect of the multiplier for gravity of the infringement, the ACM could, under the 2007 fining guidelines (as were applicable at the time), apply a multiplier between 1 and 3. The ACM concluded that cover pricing is a less serious form of bid rigging than classic bid rigging in which competition is completely eliminated and therefore imposed a multiplier of 1.75. However, the fines were relatively low because the ACM took the affected turnover as a basis for the fine. This turnover was considered the price of the winning offer which was EUR 398,800 (approximately USD 545,641). The fines that were imposed were EUR 69,000 and EUR 17,000 (approximately USD 94,410 and USD 23,267).

In the "Kanaalweg" case,[15] the ACM found an infringement similar to "Geuneburg". In this case, however, the parties also agreed on a compensation fee for the party they had agreed would submit the losing tender. This additional fact did not, however, lead to a higher multiplier for gravity, as the ACM used the same multiplier of 1.75 as in "Geuneburg". The fines were lower because the affected turnover (the price of the winning tender), which was used as basis for the fine, was only EUR 79,000 (approximately USD 108,108).

Finally, the third case, "Bergambacht & Dilettant",[16] concerned similar infringements regarding two tender projects. Due to the low affected turnover the amount fined was EUR 2,000 (approximately USD 2,737). An important take away from this case is the mechanical way in which the ACM follows the Fining Guidelines. In this case—following case law of the District Court of Rotterdam in previous cartel cases[17]—the ACM had to define the relevant market so narrowly that the affected turnover became so low that the eventual fine was disproportionately low in view of the relative size of the parties in question.

15 ACM Decision, May 24, 2013, Case 7401, Kanaalweg (Neth.), available at www.acm.nl.

16 ACM Decision, May 24, 2013, Case 7403, Bergambacht & Dilettant (Neth.), available at www.acm.nl.

17 District Court of Rotterdam, July 24, 2007, LJN:BB0750, (Erdo B.V./NMa) (Neth.); District Court of Rotterdam, July 1, 2010, LJN:BM9911, (Darthuizer Boomkwekerijen B.V./NMa) (Neth.); District Court of Rotterdam, May 6, 2010, LJN:BM5246, (Rendon Eindhoven/NMa) (Neth.), available at www.rechtspraak.nl.

THE NETHERLANDS

ABUSES OF A DOMINANT POSITION

The ACM rejected two complaints regarding alleged abuse of a dominant position in 2013. One complaint was rejected on the ground of priority; the other after a brief investigation. The latter case concerned a complaint by the "Vereniging Van Reizigers",[18] (the Association of Travelers (the "AOT")) alleging that the airlines KLM and Surinam Airways abused their dominant position on the route between Amsterdam and Paramaribo by offering excessive prices and low quality. The complaint dates back to April 16, 2003,[19] and was rejected by the NMa (now ACM) that same year as well as after an administrative review procedure in 2004,[20] but reassessed after a referral by the courts following a successful appeal.[21]

In the meantime, the Republic of Suriname and the Kingdom of the Netherlands amended their aviation treaty to allow an additional airline to operate the route between Amsterdam and Paramaribo, after which Martinair obtained a license to operate the route. The NMa considered that the new treaty would open the market to more competition and ruled that it found no indications of abusive behavior and therefore rejected the complaint again in 2006.[22] AOT appealed the decision again. The District Court of Rotterdam dismissed the appeal but the Trade and Industry Appeals Tribunal reversed the judgment of the District Court and ordered the NMa to conduct an investigation.[23] After its investigation, the ACM (which inherited the case from its predecessor entity) concluded that the market size was relatively small because of the limited passengers that travelled this route due to the limited number of Surinamese inhabitants and limited tourism to Suriname. Furthermore, the ACM found that the profitability of the route was limited and the yield[24] was amongst the lowest of all long-haul KLM flights. The ACM noted that even though more competitors operated on the benchmark routes, KLM generated a higher yield on those routes than on the Amsterdam–Paramaribo route. In addition, the ACM noted that its investigation showed that Martinair, which had ceased activities on this route, gen-

18 ACM Decision, May 8, 2013, Case 3475, (Vereniging Van Reizigers/KLM en SLM) (Neth.), available at www.acm.nl.

19 NMa Decision, May 15, 2003, Case 3475/5.b366, (Vereniging Van Reizigers/KLM en SLM); See also NMa Decision, June 21, 2004, Case 3475-70, (Vereniging Van Reizigers/ KLM en SLM) (Neth.), available at www.acm.nl.

20 NMa Decision, May 15, 2003, Case 3475/5.b366, (Vereniging Van Reizigers/KLM en SLM) (Neth.); see also NMa Decision, June 21, 2004, Case 3475-70, (Vereniging Van Reizigers/KLM en SLM), available at www.acm.nl.

21 District Court of Rotterdam, December 13, 2004, LJN:AS2354 (Neth.), available at www.rechtspraak.nl; see also Trade and Industry Appeals Tribunal, November 11, 2005, ECLI:NL:CBB:2005:AU6574 (Neth.), available at www.rechtspraak.nl. The Trade and Industry Appeals Tribunal is the Supreme Administrative Court in the Netherlands dealing with competition law matters.

22 NMa Decision, June 21, 2006, Case 3475-2, (Vereniging Van Reizigers/KLM en SLM) (Neth.); a summary has been published at https://www.acm.nl/nl/publicaties/publicatie/1796/VVR/.

23 Trade and Industry Appeals Tribunal, August 20, 2010, LJN:BN4700 (Neth.), available at www.rechtspraak.nl.

24 In this context, "yield" represents the average turnover per chair.

erated an even lower yield (in fact, a loss) and had therefore exited the market. Therefore, the ACM concluded that KLM's and Surinam Airways' prices were not excessive as Martinair applied the same prices and could not make a sustainable business case. Further, the fact that no other airline entered the market demonstrates that pricing is not excessive as entry could have taken place if profits were high. In respect of the complaint regarding the low service offered on the route, the ACM concluded that it did not find any indications that the service was lower than on comparable flights. Hence, after a decade of litigation, the ACM rejected the complaint once again.

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NEW ZEALAND

2013 ANTITRUST YEAR IN REVIEW

By Sarah Keene and Troy Pilkington
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LEGISLATIVE DEVELOPMENTS

The Commerce (Cartels and Other Matters) Amendment Bill ("Cartels Bill") proposes the most significant reforms to the Commerce Act 1986 since its inception, including expanding the cartel prohibition, introduction of a maximum seven-year jail sentence for cartel conduct and introducing a new "collaborative activities" exemption to replace the current joint venture exemption.[1]

During 2013, the Cartels Bill moved ever closer to enactment with the Select Committee reporting on the Bill in May.[2] The Select Committee recommended only minor suggestions to the Cartels Bill, including:

· Deleting the specific prohibition on bid-rigging on the basis that bid-rigging conduct would be caught by the other prohibitions on price fixing, market allocation or output restriction agreements;

· Providing for a grace period of nine months from enactment before the expanded prohibitions on market allocation and output restrictions apply to existing arrangements;

· Clarifying that the jurisdictional reach of the Commerce Act will cover conduct that occurs outside of New Zealand if any act or omission forming part of that conduct occurs in New Zealand; and

· Repealing the exemption from the Commerce Act for international shipping.

The Select Committee and Cabinet also recommended that the Commerce Commission ("NZCC") issue guidelines setting out when it will seek criminal sanctions, and guidelines on how it will interpret the new "collaborative activities" exemption:

· The NZCC issued a draft of its Competitor Collaboration Guidelines in October 2013.[3] The draft Guidelines provide a helpful high-level indicator of the NZCC's likely approach to the new prohibitions and some narrative on the new exemption. The NZCC is currently considering feedback on the draft Guidelines, with the intention of having final Guidelines ready for when the Cartels Bill is enacted.

· The NZCC is yet to issue specific guidelines on when it will seek criminal cartel sanctions (which are still being drafted). However, it issued Criminal Prosecution Guidelines and updated Enforcement Response Guidelines in October 2013 that set out its approach to seeking criminal prosecutions under its existing criminal powers (for example, under the Fair Trading Act 1986 and Crimes Act 1961).[4] These guidelines, mirroring the Solicitor General's guidelines,[5] provide that criminal sanctions will be sought where

1 Commerce (Cartels and other matters) Amendment Bill, available at http://www.legislation.govt.nz/bill/government/2011/0341/latest/whole.html#dlm4090009.

2 Commerce (Cartels and Other Matters) Amendment Bill Commerce Committee Commentary, available at http://www.parliament.nz/resource/0001871816.

3 NZCC Competitor Collaboration Guidelines, available at http://www.comcom.govt.nz/business-competition/guidelines-2/competitor-collaboration-guidelines/.

4 NZCC Enforcement Response Guidelines (October 2013) available at http://www.comcom.govt.nz/the-commission/commission-policies/enforcement-response-guidelines/. NZCC Criminal Prosecution Guidelines (October 2013) available at http://www.comcom.govt.nz/the-commission/commission-policies/criminal-prosecution-guidelines/.

5 Solicitor-General's Prosecution Guidelines (July 1, 2013) available at http://www.crownlaw.govt.nz/uploads/prosecution_guidelines_2013.pdf.

the NZCC considers it has a reasonable prospect of obtaining a conviction and criminal prosecution is in the public interest.

On December 5, 2013, Commerce Minister Craig Foss released a Supplementary Order Paper ("SOP") that provides that when the Cartels Bill is enacted cartel conduct will be a Category Four offence under the Crimes Act, the most serious possible and the same classification as murder, treason and terrorism.[6] This demonstrates the seriousness with which Government regards cartel conduct.

The Cartels Bill is expected to be enacted during the first half of 2014. As noted above, for existing arrangements, the new prohibitions on "market allocation" and "output restrictions" apply nine months from enactment. Criminal sanctions will apply two years from enactment.

The NZCC Chair, Dr Mark Berry, has made clear that the NZCC would like the Cartels Bill to also reform the market power prohibitions, in particular, to move from New Zealand's existing purpose based test, to include an effects based test.[7]

In December 2013, an opposition Member of Parliament released a SOP introducing a heavily amended market power prohibition, which is designed to remove the current case law developed counterfactual test (which asks whether the same conduct would have been engaged in by a firm without market power) in favor of a focus on whether the conduct had an anticompetitive effect.[8] However, opposition SOPs typically do not have any traction with the Government, so unless adopted by the Minister (which seems unlikely), this change is unlikely to become law, although that could change if the National-led Government loses the general election scheduled for late 2014.

The trend of competition regulators looking to enhance their cooperation efforts with overseas counterparts continued during 2013. For the NZCC these developments include:

· the Australian Competition and Consumer Commission ("ACCC") and NZCC entering a cooperation agreement in February 2013 that gives effect to the mutual information exchange regime provided for in the Commerce (International Cooperation and Fees) Act 2012 enabling the two regulators to share compulsorily acquired information;[9] and

· the commencement, in October 2013, of the Trans-Tasman Proceedings Act 2010 enabling penalties for breaches of New Zealand's competition laws to be directly enforceable in Australia and vice versa (as Australia passed corresponding legislation in March 2010).[10]

The NZCC released the much anticipated revised Mergers and Acquisitions Guidelines ("M&A Guidelines")[11] and Authorisation Guidelines[12] (updating the previous versions issued in 2003 and 1997 respectively).

The updated M&A Guidelines include the follow-

6 Commerce (Cartels and Other Matters) Amendment Bill Supplementary Order Paper 407 available at http://www.parliament.nz/en-nz/pb/legislation/sops/50DBHOH_SOP1840_1/commerce-cartels-and-other-matters-amendment-bill.

7 See for example: Berry, M. (2012). "New Zealand Antitrust: Some Reflections on the First Twenty-Five Years. Loyola University Chicago School of Law", available at http://www.luc.edu/media/lucedu/law/centers/antitrust/pdfs/publications/workingpapers/berry_november_12.pdf.

8 Commerce (Cartels and Other Matters) Amendment Bill Supplementary Order Paper 408, available at http://www.parliament.nz/en-nz/pb/legislation/sops/50DBHOH_SOP1842_1/commerce-cartels-and-other-matters-amendment-bill.

9 Media Release, ACCC (February 27, 2013), Closer ties across the Tasman as ACCC and NZCC sign cooperation agreement, available at http://www.accc.gov.au/media-release/closer-ties-across-the-tasman-as-accc-and-nzcc-sign-cooperation-agreement.

10 Media Release, New Zealand Government (October 10, 2013), "Trans-Tasman dispute resolution improved" available at http://www.beehive.govt.nz/release/trans-tasman-dispute-resolution-improved.

11 NZCC Mergers and Acquisitions Guidelines (July 2013), available at http://www.comcom.govt.nz/business-competition/guidelines-2/mergers-and-acquisitions-guidelines/.

12 NZCC Authorisation Guidelines (July 2013), available at http://www.comcom.govt.nz/business-competition/guidelines-2/authorisation-guidelines/.

ing changes from the NZCC's existing guidelines:

· The NZCC has moved with the current trend amongst international competition regulators and describes market definition as a guide only for considering the 'more important' questions of incentives and constraints on the parties post merger.

· Additional guidance on the NZCC's approach to acquisitions within bidding markets, how competition needs to be assessed in multi-sided platform markets, the NZCC's analysis of partial ownership structures, and mergers between competing buyers.

· Changes to established terminology, for example the 'safe harbours' are now called 'concentration indicators' (on the basis 'safe harbours' indicated a "degree of safety that did not exist"), and 'barriers to entry' are now 'conditions to entry'. While the NZCC has indicated these changes do not represent a substantive change in approach, the courts' approach to the changes is yet to be determined.

The draft Authorization Guidelines were well overdue. Key guidance includes:

· the NZCC, in assessing public benefits and detriments, will continue to consider total welfare standard (rather than focusing primarily on consumer welfare);

· benefits that may be taken into account in approving an authorization application are not limited to economic efficiencies. However, the list of broader benefits that an applicant might wish to raise (as set out in the previous guidelines) has been replaced with a list of categories of efficiencies;

· benefits and detriments will be discounted by the NZCC according to when they are expected to occur and how likely they are to occur.

· More detail and examples of the types of evidence that the NZCC will accept as supporting a party's claim of net public benefit.

MERGERS

Year 2013 saw just the second declined merger in four years. The NZCC declined Hamilton Radiology's application to acquire Medimaging, the only competing provider of MRI radiology services in Hamilton, as it considered high capital costs and access to radiologists would deter new entry, and it rejected the applicant's "failing firm" argument on the basis that it was not satisfied that Medimaging would exit the market in the absence of Hamilton Radiology's acquisition.[13]

The other nine merger applications in 2013 resulted in clearance. Notable clearance decisions include:

· Bertelsmann and Pearson's successful application to combine their respective consumer book publishing businesses. In addition to the constraint from remaining competitors, the NZCC cleared the combination on the basis of countervailing power of the key book retailers in New Zealand, because all sell products other than books that allows them to switch, or threaten to switch, volumes away from books to other products in response to an increase in book prices, thereby disciplining the merged entity.[14]

· Thermo Fisher's successful application to acquire Life Technologies Corporation. Both companies op-

13 "Hamilton Radiology Limited and Medimaging Limited" [2013] NZCC 7.
14 "Bertelsmann SE & Co. KGaA and Pearson plc" [2013] NZCC 6.

erate in the life sciences industry, with the key area of overlap the production of fetal bovine serum which is used in cell cultures to stimulate cell reproduction. Clearance was obtained on the basis of the worldwide divestment of Thermo Fisher's cell culture business. The clearance process included a high degree of international cooperation between regulators, including between the ACCC and NZCC.[15]

In June 2013 the NZCC opened an investigation into Wilson Parking's acquisition of 60% of the assets of competing car parking business Tournament Parking.[16] The NZCC's investigation is ongoing -if the NZCC decides to bring proceedings it will be the first merger control proceedings since it successfully challenged New Zealand Bus's acquisition of Mana Coach Services in 2006.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In June 2013 the High Court approved a settlement between the NZCC and Air New Zealand in which Air New Zealand agreed to pay a NZD 7.5 million penalty for price-fixing on international air cargo, the largest penalty for cartel conduct in New Zealand.

In endorsing the settlement amount,[17] the court noted that Air New Zealand's conduct was not as culpable as some of the other airlines pursued by the NZCC and Air New Zealand had not been a participant in a cartel on a global basis. However, the magnitude of the penalty in comparison to other airlines reflected Air New Zealand's high volume of cargo business in New Zealand and a lower discount for its cooperation with the NZCC (of 20%) given it contested the proceedings for longer than all the other airlines.

In August 2013, Visy Board Pty Ltd ("Visy") reached a pre-trial settlement with the NZCC in which it agreed to pay a penalty of NZD 3.6 million, and its former senior executive John Carroll agreed to pay NZD 25,000, for price fixing in the corrugated fiberboard packaging ("CFP") industry.[18] Aside from ongoing proceedings against one senior Amcor executive, the settlement brings to a close the NZCC's long running litigation in the CFP industry, which followed earlier proceedings by the ACCC where Visy, and Mr Carroll (among other defendants), admitted that they were parties to a cartel with Amcor in the Australian CFP industry.

ABUSES OF A DOMINANT POSITION

As noted above, the NZCC and the opposition are seeking to introduce a heavily amended market power prohibition, which is designed to remove the current case law developed counterfactual test (which asks whether the same conduct would have been engaged in by a firm without market power) in favor of a focus on whether the conduct had an anti-competitive effect.

In October 2013 the NZCC concluded its investigation into pay TV provider SKY Network Television Ltd's ("SKY's") agreements with telecommunication retail service providers ("RSPs") through which the RSPs are able to bundle Sky's pay TV channels with their phone and broadband services.[19]

The investigation focused on the "key commitments" that Sky imposed in its contracts with three of the four largest RSPs in New Zealand, namely Vodafone, Telecom and Callplus. The "key commitment" is essentially an exclusivity clause that forced the RSPs to not partner with any other content providers

15 "Thermo Fisher Scientific Inc. and Life Technologies Corporation" [2013] NZCC 26.

16 Media Release, NZCC (June 21, 2013), "Commerce Commission opens investigation into Wilson Parking's acquisition of assets of Tournament Parking", available at http://www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2013/commerce-commission-opens-investigation-into-wilson-parking-s-acquisition-of-assets-of-tournament-parking.

17 "Commerce Commission v Air New Zealand Ltd", High Court Auckland CIV 2008-404-8352, June 7, 2013.

18 "Commerce Commission v Visy Board (NZ) Ltd", High Court Auckland, CIV-2007-404-007237, August 21, 2013.

19 NZCC, "Investigation report on Sky TV contracts" (October 8, 2013), available at www.comcom.govt.nz/dmsdocument/11184.

if they wanted to enter into a relationship with Sky.

The NZCC found that the "key commitments" were likely to have previously substantially lessened competition (i.e., in breach of s. 27) and were at risk of previously being a misuse of market power (i.e., in breach of s. 36), but that they no longer breached the Commerce Act due to "market developments" (namely the entry of new pay TV providers offering content via the internet).

On the basis that the NZCC did not consider there to be a continuing breach, it issued a formal warning rather than initiating proceedings.

This decision is a marked departure from the NZCC's previous enforcement responses, ironically against the RSPs, in which it continued to pursue market power proceedings years after the conduct was no longer relevant to the market (for example, it continued with proceedings against Telecom relating to conduct that occurred in 1999 in the dial-up internet space for 10 years after the conduct occurred, and when dial-up internet use had largely been replaced by broadband).

COURT DECISIONS

Consistent with the global trend, third party access to information obtained by antitrust regulators through cooperation with defendants or leniency applicants has been a contentious issue in New Zealand this year.

In April 2013, the Court of Appeal confirmed that the air cargo cartel proceedings case file, including an agreed statement of facts between the defendants and the NZCC, could not be accessed by Schenker, a freight forwarding business.[20] Schenker's request for the file was premised on it investigating whether it may have suffered loss as a result of the alleged conduct.

On balance, the Court of Appeal refused access even on a redacted basis to the documents sought, upholding the lower court's finding that redaction could not cure the harm to confidentiality and privacy interests.

While the Schenker decision provides guidance on how the courts will consider requests to access case files, the NZCC has not yet provided general guidance on how it will respond to requests for these same documents under the Official Information Act 1982 (the "freedom of information" legislation that the NZCC is subject to as a public body).

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20 "Schenker AG v Commerce Commission" [2013] NZCA 114.

NORWAY

2013 ANTITRUST YEAR IN REVIEW

By Kristin Hjelmaas Valla and Trygve Norum
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LEGISLATIVE DEVELOPMENTS

Extensive amendments to the Norwegian Competition Act (the "Act" or "Competition Act") were adopted in 2013.[1] These amendments entered into force on January 1, 2014. The Parliamentary Proposition was published March 15, 2013.[2]

As a consequence of the amendments to the Act, four regulations have also been amended in 2013. These are: (i) the Regulation on the notification of concentrations;[3] (ii) the Regulation on monitoring and divestiture trustees;[4] (iii) the Regulation on calculation of and leniency from administrative fines[5] and (iv) the Regulation on the obligation to submit information and on surprise inspections.[6]

The main amendments to the Act relate to merger control. The most important change is that filing thresholds will increase significantly. Following the amended Section 18, a concentration will only be subject to merger notification if (i) the combined aggregate Norwegian turnover of the undertakings concerned is more than NOK 1 billion (approximately EUR 125 million) and (ii) at least two undertakings concerned each have a Norwegian turnover exceeding NOK 100 million (approximately EUR 12.5 million). The NCA will still have the power to require notification of concentrations not meeting the thresholds and to intervene against such concentrations. In addition, the system with submission of standardized notification and complete notification respectively is replaced by a system with a single notification to the Norwegian Competition Authority ("NCA").

There have also been amendments to the rules pertaining to surprise inspections ("dawn raids") in order to increase legal certainty. These changes include, amongst others, amendments to Section 25 restricting the NCA's power to seize original documents. The NCA may, as a general rule, following the amendments only seize copies of documents they will bring for further investigation. Only if the original document has particular probative value that may not be visible on a copy (such as hand written notes), will the NCA now be able to seize original documents. In such circumstances the undertaking is, as a general rule, entitled to a copy. Other amendments to the same provision require that the Court decision authorizing a dawn raid now must define the scope of the search, including a description of the purpose of the surprise inspection, which type of infringements the NCA is investigating and the markets the NCA are looking into. Amendments also include codification of the treatment of electronic seizures. Pursuant to a new paragraph in Section 25, the undertaking is entitled to

1 "Lov om konkurranse mellom foretak og kontroll med foretaksammenslutninger (konkurranseloven)", March 5, 2004, as amended by Law No. 35 of June 14, 2013, available in Norwegian at http://lovdata.no/dokument/NL/lov/2004-03-05-12.
2 Prop. 75 L (2012–2013), available at http://www.regjeringen.no/nb/dep/nfd/dok/regpubl/prop/2012-2013/prop-75-l-20122013.html?id=717124
3 Regulation of December 11, 2013 No. 1466 available in Norwegian at http://lovdata.no/dokument/SF/forskrift/2013-12-11-1466.
4 Regulation of September 15, 2008 No. 1021, available in Norwegian at http://lovdata.no/dokument/SF/forskrift/2008-09-15-1021 as amended by Regulation December 11, 2013 no. 1467, available in Norwegian at http://lovdata.no/dokument/LTI/forskrift/2013-12-11-1467.
5 Regulation of December 11, 2013 No. 1465, available in Norwegian at http://lovdata.no/dokument/SF/forskrift/2013-12-11-1465.
6 Regulation of December 11, 2013 No. 1491 available in Norwegian at http://lovdata.no/dokument/SF/forskrift/2013-12-11-1491.

be present, either in person or by legal adviser, when the NCA examines electronic evidence, in order to identify legally privileged and exempted documents.

Another main change is the abolition of criminal sanctions for undertakings. As a result of the amendments criminal prosecution and sanctions will from January 1, 2014 only be applicable to individuals and not to undertakings. Accordingly, undertakings will only be subject to civil procedures and administrative fines from January 1, 2014.

Lastly, it should be noted that amendments to Section 12 empower the NCA to reach formal settlement decisions, modeled on the power of the European Commission to adopt Article 9 decisions. The new settlement procedure will enable the NCA to close investigations in cases under Section 10 on anti-competitive agreements and Section 11 on abuse of dominant positions, at an earlier stage.

MERGERS

The NCA intervened against two concentrations in 2013. On January 22, 2013 it blocked the merger between Nor Tekstil AS and Sentralvaskeriene AS.[7] The parties to the concentration were active within rental and cleaning of sheets, towels, etc. to professional customers. The NCA found the merger would significantly restrict competition within the Regions of Southern Norway and Central and Eastern Norway, respectively. In the Region of Southern Norway the concentration was a two-to-one merger and in the region of Central and Eastern Norway the merger would have combined the two major players. A parallel investigation of possible breach of Sections 10 and 11 of the Act (alleged market sharing and predatory pricing), based on a complaint by a third party, was closed without intervention on February 14, 2013.[8]

On March 20, 2013 the NCA blocked Retriever Norge AS's proposed acquisition of Innholdsutvikling AS.[9] The NCA found the acquisition would significantly restrict competition within the market for media monitoring which includes digital press clippings. Within this market the acquisition would have reduced the number of competitors from three to two.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The NCA issued one cartel decision in 2013 with all-time high fines, also the first major leniency case in Norway. In 2013, the NCA also adopted an interim prohibition decision in a case related to anti-competitive practices for the first time.

The major cartel case in Norway in 2013 is the long-awaited NCA decision in the asphalt sector.[10] The NCA found that NCC and Veidekke had been colluding, by way of market-sharing, price-fixing and bid-rigging and the exchange of other strategic information in connection with asphalt-tendering in the counties of Nord- and Sør-Trøndelag, including the city of Trondheim, during the period 2005-2008. The Statement of Objections of the NCA, issued in 2011, also included an alleged breach of the competition

7 Decision V2013-1 Nor tekstil AS – Sentralvaskeriene AS, available in Norwegian at http://www.konkurransetilsynet.no/ImageVaultFiles/id_6021/cf_5/2012-0642-249_Offentlig_versjon_-_V2013-1_-_Nor_Te.pdf.

8 Decision A2013-7, available in Norwegian at mhttp://www.konkurransetilsynet.no/ImageVaultFiles/id_6110/cf_5/A2013-7_-_Breeze_Tekstil_AS_-_avslag_p-_anmodning_.pdf.

9 Decision V2013-5 Retriever Norge AS – Innholdsutvikling AS, available in Norwegian at http://www.konkurransetilsynet.no/ImageVaultFiles/id_7104/cf_5/Vedtak_Retriever-_offentlig_versjon.pdf.

10 V2013-3 Veidekke ASA/ Veidekke Industri AS og NCC AB/NCC Roads AS, March 4, 2013, available in Norwegian at http://www.konkurransetilsynet.no/ImageVaultFiles/id_6947/cf_5/Offentlig_versjon_av_vedtak_V2013-3.pdf.

rules for information sharing in another region. However, this last allegation was dismissed by the NCA in the final decision. The fines imposed by NCA in this case are by far the most significant in cartel cases to date in Norway. NCC was fined NOK 140 million (approximately EUR 16.66 million). Veidekke was granted amnesty for a fine of NOK 220 million (approximately EUR 26.18 million) since it had applied for leniency and provided the NCA with information that led to the disclosure and proof of the collusion. NCC has appealed the NCA decision and the case was scheduled for court proceedings by the end of January 2014.

One of the major competition law cases in Norway in 2013 is the NCA's investigation of a joint purchasing and distribution agreement between NorgesGruppen and ICA (two of the four grocery retail chains in Norway). The agreement between ICA and NorgesGruppen includes cooperation on procurement and wholesale operations. On April 19, 2013 the NCA issued an interim prohibition decision blocking the implementation of the Agreement while the case is under investigation.[11] It is the first time the NCA uses this power. In order for the Authority to temporarily suspend cooperation there must be (i) a risk of irreversible and irreparable harm; and (ii) reasonable grounds to believe that the cooperation is contrary to Section 10 of the Act, which prohibits anti-competitive agreements. The NCA expressed concerns that if ICA closed down its wholesale unit in large parts of the country while awaiting a final decision on the legality of the cooperation it would be difficult for ICA to rebuild its wholesale operations if the NCA subsequently concludes that the distribution cooperation is illegal. The NCA was also concerned that the agreement could facilitate information exchange between competitors in a way that causes irreversible damages to competition. The NCA also concluded that there are reasonable grounds to consider that the agreement is contrary to Section 10 of the Act.

The interim decision was appealed to the Ministry, which is the administrative appellate body of the NCA's decisions. The Ministry partly annulled the NCA's decision.[12] The Ministry agreed that there were reasonable grounds to believe that the agreement is contrary to Section 10 of the Act. The Ministry also agreed that the implementation of the distribution cooperation could result in irreversible and irreparable harm. However, the Ministry did not agree with the NCA in that the implementation of the purchasing cooperation was likely to result in irreversible and irreparable harm. The temporary ban on the implementation on joint purchasing was therefore repealed.

In December 2013, the two other grocery retail chains in the Norwegian market informed they had also signed a joint purchasing agreement which would be implemented if the NCA approves the NorgesGruppen/ICA agreement. The NCA has informed they will investigate the two agreements. The

11 The decision is not yet public, but the NCA's press release is available in Norwegian at http://www.konkurransetilsynet.no/no/Aktuelt/Nyheter/midlertidig-stans-norgesgruppen-ica/.

12 The Ministry's decision is available in Norwegian at http://www.regjeringen.no/upload/FAD/Vedlegg/Konkurransepolitikk/ica.pdf.

case is still pending. On December 16, 2013 the NCA informed that the parties can expect the conclusions of the NCA by the end of February 2014 (in the form of either an approval or an SO).[13]

ABUSES OF A DOMINANT POSITION

The NCA has not adopted any decisions regarding abuse of dominance in 2013. The NCA is currently investigating Telenor (the incumbent in the Norwegian telecoms sector) for alleged abuses of dominance in the Norwegian mobile market. The NCA and the EFTA Surveillance Authority (ESA) conducted dawn raids at Telenor's premises in December 2012[14] and the investigation is still pending.

COURT DECISIONS

On February 8, 2013 the Follo District Court ruled in the case Ski Taxi BA/Follo Taxisentral BA og Ski Follo Taxidrift AS v. NCA[15] on the NCA's decision V2011-12 Ski Taxi BA/Follo Taxisentral BA/Ski Follo, issued on July 24, 2011, concerning taxi services in the region north of Oslo.[16] The taxi operators had been fined NOK 2.85 million (approximately EUR 360,000) by the NCA for violation of Section 10 (agreements restricting competition). The NCA found that competitors had restricted competition by object by submitting a joint tender for a public contract for delivering transportation services for a hospital's patients. The case was initiated by a complaint from the hospital. The NCA's decision was overturned by the Court. The Court disagreed with the NCA that the parties could have submitted separate and individual bids and found there was no illegal bid-rigging between competitors. The NCA has appealed the court judgment.

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13 Press release of the NCA available in Norwegian at http://www.konkurransetilsynet.no/no/Aktuelt/Nyheter/Dagligvarekjedenes-innkjopsavtaler-vurderes-samlet-/.

14 Norwegian Competition Authority Press Release, "Dawn raid at Telenor", available at http://www.konkurransetilsynet.no/no/Aktuelt/archive/Dawn-raid-at-Telenor/.

15 Follo tingrett, Case 11-202508TVI-FOLL, judgement dated February 8, 2012, available in Norwegian at http://www.konkurransetilsynet.no/ImageVaultFiles/id_6097/cf_5/2013-02-08_Dom_taxisak_Follo_tingrett.pdf.

16 NCA decision V2011-12 Ski Taxi BA/Follo Taxisentral BA/Ski Follo, issued on July 24, 2011 is available in Norwegian at http://www.konkurransetilsynet.no/no/Vedtak-og-uttalelser/Vedtak-og-avgjorelser/Ski-Taxi-BA-Follo-Taxisentral-BA-og-Ski-Follo-Taxidrift-AS--ileggelse-av-overtredelsesgebyr-og-palegg-om-opphor/.

PERU

2013 ANTITRUST YEAR IN REVIEW

By Alejandro Falla J. and Eduardo Quintana S.
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LEGISLATIVE DEVELOPMENTS

Within the framework of the XI Latin American Competition Forum, held in Lima in September 2013, Peruvian, Chilean and Colombian Competition Authorities signed a cooperation agreement for the efficiency and efficacy of the free competition defense (known as the Lima Declaration),[1] in markets that could affect one or more countries. The agreement constitutes a big step for Latin American integration in antitrust matters, since it constitutes a starting point for the authorities to share information and experiences, something which is relatively uncommon in the region.

Additionally within 2014 INDECOPI, the Peruvian competition authority, will chair the Regional Competition Center for Latin America ("CRC"). The CRC was founded in September 2011 and is integrated by several Latin American competition authorities from countries such as Argentina, Chile Costa Rica, Ecuador and El Salvador.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In December 2006, the Technical Secretariat of the Antitrust Commission of INDECOPI[2] initiated an ex-officio procedure against Praxair Perú S.R.L. (Praxair), Aga S.A. (Aga) and Messer Gases del Perú S.A. (Messer) for an alleged geographic market allocation agreement in several public tenders for the acquisition of medical oxygen issued by EsSalud (Peruvian Social Security Entity) from 1999 to 2004. This conduct was sanctioned by INDECOPI in August 2010 as a per se infraction of article 6 of the Legislative Decree 701 (former competition law).[3]

The decision was appealed by the three defendants before the Tribunal of INDECOPI,[4] which in July 2013 confirmed the Commission's decision and ordered to pay the following fines.[5]

· Praxair: 3836.82 UIT[6] (the largest individual fine in INDECOPI's history).

· Aga: 1288.14 UIT.[7]

· Messer: 493.84 UIT.[8]

According to the Tribunal, the medical oxygen public bids issued by EsSalud had features that favored the adoption and implementation of a horizontal cartel, such as:

· Structural characteristics, related to the existence of high barriers restricting the entry of new competitors and a high level of concentration in the market during the investigated period, which facilitated the reduction of transaction costs for implementing a cartel.

1 Available at http://programacompal.org/pdf/Declaracion-Lima-firmada.pdf.
2 The Competition Commission is the court of first instance charged with applying the antitrust regulation.
3 Decision No. 051-2010/CLC-INDECOPI, available at http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES_051_2010_CLC/Res051-2010.pdf.
4 The Tribunal for the Defense of Competition and Intellectual Property of INDECOPI acts as an administrative court of appeals.
5 Decision No. 1167-2013/SDC-INDECOPI, available at http://sistemas.indecopi.gob.pe/sdc_Jurisprudencia/documentos/1-93/2013/Re1167.pdf.
6 UIT = "Tax Unit". Approx. USD 5,162,267.
7 Approx. USD 1,732,945.
8 Approx. USD 664,439.

· Supply characteristics, such as the homogeneity of the medical oxygen required by EsSalud, which facilitated the execution of the agreement by reducing transaction costs.

· Features related to the demand of medical oxygen, such as the low substitutability of the product, growth of demand and the defendants' market power.

The Tribunal confirmed that the following facts were duly proved, and that they, taken as a whole, led to the conclusion that a restrictive practice had taken place:

(i) Each of the defendants always offered the best price for the tenders issued for the supply of some specific geographic areas, but not for the other regions: Aga catered to the north of Peru, Messer to the center and Praxair to the south and the city of Lima.

(ii) In the tenders carried out during 1999-2002, each defendant won only the bids to supply the areas mentioned above (Aga the north, Messer the center and Praxair the south of Peru plus Lima) offering prices close or equal to 110% of the reference value for each tender, which is the maximum acceptable offer value according to law, while the other defendants frequently offered prices above the maximum statutory amount, leading to their automatic disqualification from the bids for regions not designated to them within the agreement.

(iii) Defendants did not supply oxygen to EsSalud in regions that were geographically closer to their production and filling plants, where their supply of oxygen would be theoretically more efficient.

(iv) Defendants changed this pattern of behavior in September 2002, when EsSalud eliminated entry barriers in order to favor the entrance of new competitors. Thereafter, defendants offered prices under the maximum value allowed in tenders issued for the supply of regions not traditionally supplied by them.

It is important to notice that, in this case, no documentary evidence was used to demonstrate the existence of the anticompetitive agreement; both the Commission and the Tribunal considered that defendants' behavior in relation to the bids constituted enough evidence of a cartel. In order to arrive to this conclusion, new analysis tools, such as those of "critical event analysis", were applied.

The Tribunal's decision was already appealed before the Courts and the procedure is ongoing.

ABUSES OF A DOMINANT POSITION

In 2011, the Technical Secretariat of OSIPTEL, Peruvian Antitrust Authority for the telecommunications sector, identified evidence of an alleged tied sales practice in the ADSL internet market carried out by Telefónica, which consisted in conditioning the provision of this service to the prior or simultaneous hiring of its fixed telephone services, with the objective of leveraging its dominant position in the ADSL internet service to this second, more competitive market.

According to OSIPTEL, this conduct had generated exclusionary effects in the fixed telephone market, affecting Telefónica's main competitors and reducing consumer welfare.

In July 2012, in a first instance decision OSIPTEL found Telefónica responsible for the alleged abuse of its dominant position and imposed a 492 UIT fine.[9] Likewise, the authority ordered a corrective measure, by means of which Telefónica is now obliged to offer "naked" ADSL internet services in the retail market

9 Approximately USD 700,000.

and avoid any tying of this product.

The company appealed the first instance's decision. In January 2013, OSIPTEL issued a second instance decision confirming its prior judgment and the corrective measure, but reducing the fine to 407 UIT.[10]

It is worth noting that the fact that the participation of Telefónica's competitors in the fixed telephone services market grew during the last years was not considered sufficient evidence to demonstrate that the company's practices had not generated exclusionary effects. In other words, this controversial decision implies that had Telefónica not abused of its dominant position in the ADSL internet market, its competitors could have grown at higher and more sustainable rates.

Telefónica has appealed that decision before the Courts, the revision procedure being pending.

10 Approximately USD 550,000. The decision is available at http://www.osiptel.gob.pe/WebSiteAjax/WebFormGeneral/informacion_empresas/wfrm_Filtrado_Informacion_extens.aspx?CodInfo=60361&CodSubCat=312&TituloInformacion=A%C3%B1o%202011&DescripcionInformacion.

PORTUGAL

2013 ANTITRUST YEAR IN REVIEW

By João Paulo Teixeira de Matos of Garrigues

LEGISLATIVE DEVELOPMENTS

After the entry into force of Law No. 19 of May 8, 2012, which established the new Portuguese competition legal framework ("New Competition Law"),[1] the Portuguese Competition Authority ("PCA") has approved several regulations and guidelines in order to implement, clarify and further develop the rules foreseen therein.[2]

Hence, on January 17, 2013 the PCA issued the Guidelines on priority setting for the exercise of its sanctioning powers,[3] related to one of the most relevant changes introduced by the New Competition Law.

In fact, under the New Competition Law,[4] the PCA now has more discretion in determining how to carry on its activity, being less constrained by the principle of legality (which determines that all complaints must be investigated), and more able to act according to the principle of opportunity, by defining different degrees of priority when dealing with the matters it is called upon to analyze, taking into consideration the criteria of the public interest in the promotion and defense of competition.

In the referred Guidelines, with the purpose of rendering its activity more transparent and objective, the PCA explains in broad terms how it intends to exercise the higher degree of discretion that it has been given, notably by stating how it interprets the criteria guiding its sanctioning activity, and by describing the procedures that it will adopt whenever a new complaint is submitted.

In terms of legislative developments, note should also be made to Regulation No. 60/2013 of the PCA, of February 14, 2013, approving the new forms for the notification of concentrations,[5] which implements another relevant change introduced by the New Competition Law.

The New Competition Law[6] foresees that, in case of concentrations which, in a preliminary assessment, do not pose significant impediments to competition in accordance with the criteria laid down by the PCA, the notification may be submitted in a simplified form, a possibility that was not foreseen in the Portuguese competition law previously in force.[7]

Based on this legal provision, the referred Regulation not only includes a replacement to the previous form for the notification of concentrations (the regular form), but also approves a new simplified form (which substantially reduces the amount of required information) and establishes the criteria that allow notifying companies to use the latter.

1 Law No. 19 of May 8, 2012, available in English at http://www.concorrencia.pt/vEN/News_Events/Noticias/Pages/Law-No-192012.aspx.

2 Information on the PCA's Guidelines and Regulations is available in Portuguese at http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicados.aspx.

3 Guidelines on priority setting for the exercise of its sanctioning power issued by the PCA on January 17, 2013, available in Portuguese at http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/Linhas_de_Orientacao_Act_Sacionatoria.pdf.

4 See Article 7 of the New Competition Law.

5 Regulation No. 60/2013, of February 14, 2013, published in the Official Gazette (D.R. II Série. No. 32. p. 6353-6360), available in Portuguese at http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201307.aspx?lst=1&Cat=2013.

6 See Article 44 of the New Competition Law.

7 Law No. 18 of June 11, 2013, revoked by the New Competition Law.

The new simplified form is essentially meant to be used in cases where there is no overlap between the activities of the parties (no aggregation of market shares).

MERGERS

On March 21, 2013, the PCA issued a clearance decision subject to remedies concerning a concentration by which Arena Atlântida – Gestão de Recintos de Espetáculos, S.A. ("Arena") would acquire exclusive control over Pavilhão Atlântico and Atlântico – Pavilhão Multiusos de Lisboa, S.A. ("Atlântico").[8]

Arena was incorporated in August 2012 as a vehicle company for the purpose of the acquisition of Pavilhão Atlântico (the only multipurpose indoor arena in Lisbon with capacity exceeding 7,000 people) and Atlântico, and at the date of the decision was controlled by Luís Montez (who controls Música no Coração, S.A., one of the most relevant live music promoters in Portugal, and who prior to the decision also had a minority stake in Ticketline, S.A., a ticketing operator), Ritmos & Blues - Produções, Lda. (a live music promoter), and BES PME Capital Growth (a financial entity).

On the other hand, Atlântico's main activity is the provision of rental services for the organization of shows and other events at Pavilhão Atlántico, as well as the provision of ticketing services, by means of its subsidiary Blueticket – Serviços de Bilhética, S.A.

Pavilhão Atlântico and Atlântico were both owned by Parque Expo 98, S.A., a state-owned company. In fact, the transaction was the result of a decision of the Portuguese Government to sell Pavilhão Atlântico and Atlântico, after which Parque Expo 98, S.A. would be dissolved and wound-up.[9]

The concentration, as notified, raised relevant competition issues, mostly on a vertical level, since Pavilhão Atlântico is an important live music venue in Portugal, and two of the three shareholders of the acquiring undertaking are live music promoters, but also on a horizontal level, since Blueticket – Serviços de Bilhética, S.A. and Ticketline, S.A. are both ticketing operators.

Although three different sets of commitments were presented by the acquiring undertaking during the first phase of the proceedings, at the end of such phase the PCA concluded that the commitments presented were insufficient, and decided to initiate an in-depth investigation (second phase of the proceedings), by considering that the concentration could lead to significant impediments to effective competition in the markets for the promotion of indoor live music events, the provision of ticketing services, and the promotion of indoor venues for shows and large events.

The PCA's concerns were related to several factors, but in particular the unique features of Pavilhão Atlântico and the high concentration of the markets for the promotion of indoor live music events and the provision of ticketing services. The PCA also took into consideration that Pavilhão Atlântico was a public infrastructure being privatized and its access by competitors should be guaranteed.

Notwithstanding, during the second phase of the

8 PCA's Decision Ccent 38/2012 Arena Atlântida/Pavilhão Atlântico*Atlântico, of March 21, 2013, available in Portuguese at http://www.concorrencia.pt/FILES_TMP/2012_38_final_net.pdf.

9 Resolution of the Council of Ministers No. 21, of March 1, 2012.

proceedings Arena finally submitted a set of commitments that eliminated the PCA's concerns, amongst which the sale of the shares held by Luiz Montez in the share capital of Ticketline, S.A., and the implementation of a set of obligations which guarantee access to Pavilhão Atlântico by competing music promoters, according to objective, transparent and non-discriminatory conditions.

ABUSES OF A DOMINANT POSITION

On June 20, 2013, the PCA announced its decision to fine SPORT TV Portugal, S.A. ("SPORT TV") in the amount of EUR 3.73 million, for abuse of dominant position in the national market for premium sports pay-tv channels.[10]

SPORT TV owns the "Sport TV" television channels, which until very recently had a 100% market share in the Portuguese market for premium sports pay-tv channels, and is currently controlled by Controlinveste Media – SGPS, S.A., with activity in several media sectors, and by Zon Multimédia, Serviços de Telecomunicações e Multimédia, SGPS, S.A., which controls "ZON", one of the two most important pay-tv retail operators in Portugal.

Hence, the PCA concluded that, from January 1, 2005 until April 1, 2011, SPORT TV used its dominant position in the market for premium sports pay-tv channels to impose discriminatory contractual conditions, in particular in terms of price, in the distribution agreements executed with the different pay-tv retail operators for the broadcasting of the SPORT TV television channels.

This abusive conduct not only restricted competition in the market for premium sports pay-tv channels, where SPORT TV has a dominant position, but also in the downstream pay-tv retail market, in which one of the pay-tv retail operators, "ZON" (with which SPORT TV has corporate links), was favored to the detriment of its competitors.

Given the markets affected by the decision, before issuing the same the PCA consulted the regulatory authority for the media sector ("Entidade Reguladora para a Comunicação Social") and the regulatory authority for the telecommunications sector ("ICP - Autoridade Nacional de Comunicações").

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10 PCA's decision regarding SPORT TV is not publically available, but PCA's press release is available in Portuguese at http://www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Paginas/Comunicado_AdC_201315.aspx?lst=1&Cat=2013.

RUSSIA

By Vassily Rudomino, German Zakharov and Ksenia Konik of Alrud

LEGISLATIVE DEVELOPMENTS

On July 3, 2013, the Presidium of FAS Russia approved the final edition of the "Strategy of development of the competition and antimonopoly regulation in the Russian Federation for 2013 – 2024."[1]

The report outlines the four major priorities of the antimonopoly service:

· the creation of a favorable institutional and organizational environment for effective protection and competition development;

· a decrease in the administrative barriers interfering with the development of the markets;

· ensuring the non-discriminatory access of consumers to services of natural monopolies and the formation of effective mechanisms of tariff setting; and

·the creation of conditions for effective competition at placement of the state orders and the realization of state property at auctions.

In 2013, FAS Russia prepared a draft law that brought significant amendments to competition law in Russia. The amendments are better known as the "Fourth Antimonopoly Package".[2] As of December 27, 2013, it is apparent that only part of the amendments concerning notification procedures have been implemented.

In early 2014, certain commercial profit-making organizations will no longer need to notify FAS Russia on transactions and other actions directed towards economic concentration. In particular, it will not be necessary to notify FAS Russia about the reorganizations of legal persons in the form of mergers or acquisitions if the total value of assets according to the accounting balance sheets (as of the last reporting date preceding the date of the transaction) or the total proceeds from the sale of commodities within the calendar year preceding the merger exceeds RUB 400 million. For financial organizations, a different threshold is established by the Government of the Russian Federation in coordination with the Central Bank of Russia. These new laws will come into force on January 30, 2014, pursuant to the Federal law of December 28, 2013 N 423-FZ.[3] The full list of notifiable transactions and other actions is provided by Article 30 of the Federal law of July 26, 2006 N 135-FZ, which will have to be invalidated in light of the new laws coming into force.

The "Fourth Antimonopoly Package" further plans:

· to abolish the Federal law "On natural monopolies" and to include provisions covering state regulation of the activity of natural monopolies into Russian competition law;

1 See "Strategy of development of the competition and antimonopoly regulation in the Russian Federation for 2013 – 2024", available at http://www.fas.gov.ru/netcat_files/File/Str_razv_konk_i_antimonop_reg_13-14.pdf.

2 See "Draft of the federal law 'On amending Federal Law on the Protection of Competition'", available at http://asozd.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=199585-6.

3 See Press Release, "The Law 'On Introducing Amendments to the Federal Law on Protection of Competition' shall come into force at the end of January" (December 31, 2013), available at http://en.fas.gov.ru/news/news_33460.html.

· to amend through legislation the modern methods of tariff regulation as it pertains to the subjects of natural monopolies;

· to create legal and economic guarantees of availability of services to subjects of natural monopolies for consumers;

· to create quality assurances of services for subjects of monopolies;

· to incorporate industry-specific regulatory norms into the industry legislation;

· to cancel tariff regulation in the sectors of the economy which are sufficiently competitive and no longer require tariffs;

· to develop proposals for the government of the Russian Federation regarding reforms in the railway, transport and power industries and regarding the introduction of pro-competition regulation in the electricity and mail service industries;

· to assist in the approval of rules for non-discriminatory access for subjects of natural monopolies in the services of ports, mail, telecommunication, and transport terminal industries;

· to increase the transparency surrounding the purchases of natural monopolies;

· to create more detailed regulation of procedures for the purchase of goods, works, and services by subjects of natural monopolies, state corporations and economic societies which are under the control of the state.

The introduction of the Fourth Antimonopoly Package demonstrates the necessity for further developments.

MERGERS

In recent years the number of applications submitted to antimonopoly authorities within the merger control procedures under chapter 7 of the Competition Law and article 7 of the "Law on natural monopolies" (The Federal Law of August 17, 1995 No. 147-FZ) has steadily declined. According to the FAS Report on the state of competition in Russia for 2013 (the "Report"), in 2012 the antimonopoly authorities considered only 2494 applications—this represents a 25% decline from 2011.[4] The changes made to the antitrust law with the coming into force of the "Third Antimonopoly Package" (The Federal Law of December 6, 2011 No. 401-FZ) has been one of the main factors which has contributed to the decline in applications.

In particular, the threshold values for receiving preliminary consent for the creation and reorganization of commercial (excluding financial) organizations were almost doubled. The main goal of this measure was to reduce the administrative burden for business entities. Further, the threshold of total value of assets of commercial entities increased from 3 to 7 billion rubles, and the total proceeds from the sale of goods within the calendar year preceding the merger threshold increased from 6 to 10 billion rubles. With regard to the outcome of merger review and the statistics provided in the Report: 2% of the applications submitted were blocked, 9% were cleared under certain conditions (remedies) and 89% of applications were approved without conditions.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

Detection and cartel enforcement continues to be one of FAS Russia's priorities. In recent years, cooperation between competition and law enforcement authorities has strengthened and the process of initiat-

4 See "Report on the state of the competition in Russia for 2013" (July 29, 2013), available at http://www.fas.gov.ru/about/list-of-reports/list-of-reports_30077.html.

ing criminal cases against individuals upon detection of competition law violations is actively developing. According to the Report, a new system for fighting against cartels and anti-competitive agreements, and for coordinating measures that involve the participation of police and other federal offices, was created. FAS Russia carried out several "dawn" raids with the participation of the prosecutor's office, the police, and the Federal Security Service of Russia.

On June 18, 2013, the State Duma of the Russian Federation in its first hearing unanimously approved the draft of the federal law "On amending article 178 of the Criminal Code."[5] The draft law outlines an obligation on FAS Russia to transfer materials to law enforcement agencies concerning violations of antitrust law that also show evidence of criminal activity. Furthermore, the draft law makes changes to the law "On operational investigations", which gives FAS Russia the chance to utilize the results of operational investigations. Finally, the draft law also creates the power to grant releases from criminal liability for persons who provide key information that implicates participants in cartel activities. These whistleblowers will be indemnified for the loss caused and will be immune from criminal liability. The initiation of the criminal proceedings relating to cartel activities will be solely based on the documentation received from the antitrust authority.

In 2012, the number of proceedings with regards to violations of antitrust law by the execution of anti-competitive agreements and coordinated anti-competitive behavior decreased by 39%. The statistics also show that the total violations of articles 11 and 11.1 of the Law on protection of the competition accounted for 15% of the total proceedings initiated, with this number being reduced to 11% the following year. Of the cases commenced, 44% were initiated against cartels, while the remaining 56% were initiated against other anticompetitive agreements and practices.

One final important tendency is that FAS Russia has begun investigating international cartels. For example, in the Vietnamese fish cartel case,[6] FAS Russia found violations in the importation of Pangasius fish from Vietnam to Russia. This was the third cartel in the fish industry investigated by FAS Russia (following the Norwegian salmon and Far East pollock cartels). The above cases illustrate that FAS Russia is becoming more active and experienced in fighting against foreign cartels. Moreover, FAS Russia is establishing cooperative relationships with the competition agencies of other countries during the undertaking of these investigations.

ABUSES OF A DOMINANT POSITION

From 2010 through 2013, violations of article 10 (abuse of dominant position), article 14 (unfair competition) and article 17 (violation of antimonopoly requirements to the auction) of the "Law on protection of the competition" steadily increased. For instance, JSC Gazprom established an exorbitantly high price for liquid sulfur (used in the production of mineral fertilizers used in agriculture). The court of cassation confirmed the legality of the penalty imposed by FAS Russia on JSC Gazprom of RUB 17.5 million for abusing its position of dominance in the liquid sulfur market.[7]

5 See "Draft of the Federal Law 'On amending article 178 of the Criminal code'", available at http://www.fas.gov.ru/legislative-acts/legislative-acts_51154.html.

6 See Press Release, Fed. Antimonopoly Serv. of the Russ. "Fed'n, Pangasius set in implementation" (September 17, 2013), available at http://fas.gov.ru/fas-in-press/fas-in-press_37625.html.

7 See Press Release, Fed. Antimonopoly Serv. of the Russ. "Fed'n, Cassation upheld the decision of FAS Russia" (August 22, 2013), available at http://fas.gov.ru/fas-in-press/fas-in-press_37480.html.

Another example is the year-long lawsuit between the Baikal branch of Sberbank and the Irkutsk FAS regional office.[8] The antitrust authority considered that the bank abused its dominant position by setting high tariffs for banking transactions (300% higher than the direct sum of payments). The decision was confirmed by the Supreme Commercial Court.

COURT DECISIONS

According to FAS Russia, the majority of decisions rendered by the competition authorities have been upheld by the courts. In 2012 the courts heard remarkable cases against oil companies, transport companies, credit and insurance organizations.[9] For example, in July the Supreme Commercial Court considered the application of JSC RZD on a case concerning the violation of part 5 of article 11 of the Competition Law (anticompetitive economic coordination).[10] The Court came to the conclusion that signaling to independent economic entities (contractors) not to acquire the products of a specific producer is legally defined by FAS Russia as violation of the antitrust law. In this case, there are no grounds for a supervisory review of the case.

In respect of the court system, it is important to draw attention to the fact that in the near future, the introduction and establishment of group claims for the protection of rights and legitimate interests of a group of persons and the "multiple size" indemnification mechanism may be initiated.[11] This was provided for in the plan for "Development of the competition and improvement of antimonopoly policy," approved as the order of the Government of the Russian Federation of December 28, 2012 No. 2579-p. The draft of the "Law on collective actions" is currently under consideration by Parliament, but since the approach to the concept of "collective claims" by state authorities (for instance, FAS Russia and Ministry of Justice) differs from the claims described above, the law is unlikely to be adopted in the near future.

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8 See Press Release, Fed. Antimonopoly Serv. of the Russ. "Fed'n, Banks takes up the commission" (June 24, 2013), available at http://fas.gov.ru/fas-in-press/fas-in-press_36978.html.

9 See Decision of the Federal Arbitration Court of West Siberian Federal District of February 20, 2013, No. A27-9840/2012 (Russ.), available at http://kad.arbitr.ru/; see also Decision of the Federal Arbitration Court of Moscow of August 26, 2013, No. A40-163911/12-106-815 (Russ.), available at http://kad.arbitr.ru/PdfDocument/918fc5e7-38f4-4923-b038-407b2bbc578c/A40-163911-2012_20130826_Reshenija%20i%20postanovlenija.pdf; See also Decision of the Arbitration Appellate Court of August 1, 2013, No. 18A□-6895/2013, Case No. A47-3496/2013 (Russ.), available at http://kad.arbitr.ru/PdfDocument/7fbf32e8-67e0-4247-a9da-080002865a67/A47-3496-2013_20130731_Postanovlenie%20apelljacii.pdf; see also Decision of the Federal Arbitration Court of Moscow on August 12, 2013, No. A40-132261/12-122-826 (Russ.), available athttp://kad.arbitr.ru/PdfDocument/8ba64d18-8677-4b7c-a13f-50742ccdbd84/A40-132261-2012_20130812_Reshenija%20i%20postanovlenija.pdf.

10 See Decision of the Federal Arbitration Court of July 11, 2013, No. 5901/13 (Russ.), available at http://kad.arbitr.ru/PdfDocument/46b54ab6-2bb4-40ea-b135-13edaa2a06de/A40-41879-2012_20130711_Opredelenie.pdf.

11 See Press Release, "Fed. Antimonopoly Serv. of the Russ, Russian companies are threatened by claims about milliard losses" (April 19, 2013), available at http://fas.gov.ru/fas-in-press/fas-in-press_37451.html

SOUTH AFRICA

2013 ANTITRUST YEAR IN REVIEW

By Heather Irvine and Lara Granville
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The South African competition authorities remained active in 2013, most significantly concluding a major cartel investigation into the construction industry. However, the Competition Commission ("Commission") continued to face leadership and staffing challenges over the year, including the resignation of the Competition Commissioner ("Commissioner").[1]

LEGISLATIVE DEVELOPMENTS

One provision (Section 6) of the Competition Amendment Act 1 of 2009 was brought into effect on April 1, 2013. This section empowers the Competition Commission to conduct market inquiries and will grant the Commission extensive powers in order to conduct its planned investigation into the private health care market in 2014. The rest of the Amendment Act, which was signed in 2009 and includes provisions relating to the criminalization of cartel conduct, has still not been promulgated.

In addition, Section 18 (2) of the Competition Act 89 of 1998 was amended by the Financial Markets Act 19 of 2012 (FMA) in order to oust the Commission's jurisdiction to assess mergers which require approval under the FMA.

MERGERS

In the Commission's 2013 financial year, 324 mergers were notified – a 10% increase from the previous year. Of the 327 merger cases finalized, the Commission approved 278 without conditions and 37 with conditions; 12 cases were withdrawn.[2]

There were fewer prohibitions in the 2013 financial year and approximately the same proportion of approvals was granted conditionally. Two types of condition were regularly imposed: restrictions on cross directorships in order to minimize potential information exchanges,[3] and obligations to remove or to renegotiate exclusivity clauses in lease agreements in the

1 The South African Competition Commissioner resigned in October 2013, and was replaced by an acting Commissioner. The Deputy Commissioner resigned earlier in the year and was replaced by two acting deputy Commissioners. Both the Chief Economist and the Head of Mergers resigned in 2013 and have not yet been replaced.

2 See Competition Commission Annual Report, available at http://www.compcom.co.za/assets/Publications/Annual-Reports/Competition-Commission-2012-13-Annual-Report-Final.pdf.

3 "Business Venture Investments No. 1624 (Pty) Ltd and Another v. Waco Africa (Pty) Ltd and Another" (54/LM/May12), [2012] ZACT 65 (July 30, 2012) (S. Afr.); "Industrial Development Corporation of SA Ltd v. Scaw South Africa (Pty) Ltd and Another" (60/LM/Jun12), [2012] ZACT 92 (November 5, 2012) (S. Afr.); "ABSA Bank Ltd v. Private Label Store Card Portfolio of EDCON (Pty) Ltd" (70/LM/Jun12) [2013] ZACT 2 (January 23, 2013) (S. Afr.); "Humulani Marketing (Pty) Ltd v. High Power Equipment Africa (Pty) Ltd" (83/LM/Sep12), [2013] ZACT 12 (March 8, 2013) (S. Afr.); "Business Venture Investments No. 1658 (Pty) Ltd v. AFGRI Operations Limited and Others" (87/LM/Sep12), [2013] ZACT 30 (May 7, 2013) (S. Afr.).

context of property transactions.[4]

A novel condition was imposed in the merger of Nestlé's and Pfizer's infant nutrition businesses. Nestlé was required to divest of the Pfizer S26 and SMA product trademarks for a period of 10 years and, for another 10 years thereafter, is precluded from producing the licensed products.[5] This allows the acquirer of the divested brands (in this case, Aspen Nutritionals)[6] a 20-year period to establish equivalent Aspen branded products. The only merger prohibited in 2013 was a small merger between Van Schaik and Juta Bookshops.[7]

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The Commission received 195 complaints from the public in the 2013 financial year (18 of which were cartel complaints) and 11 complaints were initiated by the Commissioner (7 of which related to cartels). This represents a significant drop in the number of cases initiated by the Commission itself, perhaps reflecting the Commission's focus on tying up previous matters, such as the construction cartel. Eleven complaints were referred to the Competition Tribunal ("Tribunal"), bringing the total number of ongoing Tribunal prosecutions to 41. Notable new complaints included one lodged against Multichoice, the dominant pay-tv broadcaster for allegedly exclusively tying up premium sports content, and one lodged by mobile network operator Cell C against its two larger competitors, MTN and Vodacom, for allegedly engaging in price discrimination and other exclusionary conduct through differential on-net and off-net pricing. There was also a complaint lodged by the Association for meat importers and exporters against players in the poultry industry following the continued imposition of customs duties on imported poultry.

The Commission concluded 43 consent and settlement agreements in 2013 (pertaining primarily to cartel contraventions, but also in relation to restricted vertical practices and prior implementation of mergers). The most significant development in this regard was the conclusion of settlements with fifteen firms in the construction industry that admitted to collusive tendering. The firms agreed to penalties collectively totaling ZAR 1.46 billion. This was the culmination of the Commission's "fast-track" construction settlement process which began in February 2011, in terms of which the Commission invited firms in the construction industry to disclose bid-rigging conduct in

4 "Growthpoint Properties Ltd v. Liberty Group Ltd" (20/LM/Mar12), [2012] ZACT 55 (July 18, 2012) (S. Afr.); "New Glen Shopping Centres (Pty) Ltd and the Louis Group Platinum Trust in respect of the letting enterprise known as "The Paddocks" and The Louis Group Platinum Trust", 2012Apr0189 (S. Afr.); "Sycom Property Fund Collective Investment Scheme in Property v. AECI Pension Fund in respect of the property letting enterprise known as "Somerset Mall" and in Somerset Mall Property Management Company (Pty) Ltd" (016659), [2013] ZACT 85 (August 7, 2013); "Mediclinic Southern Africa Limited Solar Spectrum Trading 242 (Pty)", Government Notice (GN) 289/2013 (S. Afr.); "Synergy Income Fund Limited and Rainbow Beach Trading (Pty) Ltd and Westside Trading 600 (Pty) Ltd", Government Notice (GN) 874/2012 (S. Afr.); "Fortress Income 2 (Pty) Ltd v The immovable proprietary and property letting Enterprises of: Pick 'n Pay Rustenburg, Central Park Bloemfontein, Nelspruit Plaza, New Redruth Alberton, Sterkspruit Plaza, and Tzaneen Center" (016519), [2013] ZACT 52 (June 13, 2013) (S. Afr.); "JM Wragge and June Alexander Family Trust and Mountain Mill Shopping Centre (Pty) Ltd in respect of the letting enterprise known as "Mountain Mill Shopping Centre" and Mountain Mill Shopping Centre (Pty) Ltd", Government Notice (GN) 878/2012 (S. Afr.); "Foodprop Property Holdings (Pty) Ltd and Acucap Investments (Pty) Ltd", Government Notice (GN) 294/2013 (S. Afr.); "The Trustees for the time being of the Mergence Africa Property Investment Trust and Golden Pond 322 (Pty) Ltd, Salestalk 298 (Pty) Ltd and Rainbow Beach Trading 180 (Pty) Ltd", Government Notice (GN) 883/2012 (S. Afr.); "Char-Trade 246 cc and RDI Devco One (Pty) Ltd, in respect of the property letting enterprise known as The Grove (Phase 2)", Government Notice (GN) 228/2012 (S. Afr.); "Fairvest Property Holdings Ltd v. Portfolio of commercial properties of SA Corporate Real Estate Fund" (84/LM/Aug12), [2012] ZACT 94 (November 7, 2012) (S. Afr.); "Sizanai General Trading (Pty) Ltd and the Heathway Shopping Centre, owned by Momentum Property Investments (Pty) Ltd", Government Notice (GN) 287/2013 (S. Afr.); "Goldfields Mall (Pty) Ltd and Bridgeport 26 (Pty) Ltd and Shoprite Checkers (Pty) Ltd", Government Notice (GN) 726/2012 (S. Afr.); "Accelerate Property Fund Limited and The Trustees for the time being of the George Nicolas Trust", Government Notice (GN) 290/2013 (S. Afr.).

5 "Nestle SA v. the Infant Nutrition Business of Pfizer Inc.", (65/LM/Jun12) [2013] ZACT 16 (March 18, 2013) (S. Afr.), available at http://www.saflii.org/za/cases/ZACT/2013/16.html.

6 See "Tribunal approves Aspen Nutritionals deal", BDLive (December 20, 2013, 9:56 AM), available at http://www.bdlive.co.za/business/healthcare/2013/12/20/tribunal-approves-aspen-nutritionals-deal.

7 See Press Release, Competition Commission of South Africa, "Commission blocks Van Schaik from acquiring Juta Bookshops" (September 4, 2013), available at http://www.compcom.co.za/assets/Uploads/Commission-blocks-Van-Schaik-from-acquiring-Juta-Bookshops.pdf.

return for lower penalties, set according to a transparent and pre-determined formula.[8] Civil damages actions,[9] as well as possible criminal prosecutions,[10] may arise from these contraventions.

The Commission also finalized and published terms of reference for a market inquiry into the private healthcare sector. The market inquiry has commenced on January 6, 2014 and will be completed by November 30, 2015. The inquiry will probe the private healthcare sector holistically to determine the factors that restrict, prevent or distort competition and underlie increases in private healthcare prices and expenditure in South Africa.[11] This will be the first market inquiry conducted by the Commission in terms of the new provisions of the Competition Act which provide the authority with the jurisdiction to engage in such industry-wide investigations. (The Commission had previously conducted an investigation into the banking sector, but industry players participated on a voluntary basis since at that time there was no legislative basis for such an inquiry).

ABUSES OF A DOMINANT POSITION

In August 2012, the Tribunal imposed a penalty of ZAR 449 million on Telkom, the dominant fixed-line telecommunications operator, for abusing its dominance in the telecommunications market between 1999 and 2004.[12] Although Telkom initially planned to appeal this decision, it withdrew its appeal in April 2013.

Thereafter, Telkom also reached a landmark settlement agreement with the Commission for margin squeeze conduct in relation to the leasing of access lines to internet service providers. The settlement requires Telkom to pay a fine of ZAR 200 million, to implement a functional separation of its wholesale and retail businesses, and to adopt a transfer pricing policy to avoid discriminatory pricing and other exclusionary practices.[13]

The Tribunal heard a number of abuse of dominance complaints in 2013, including: the Commis-

8 See Press Release, Competition Commission of South Africa, "Construction firms settle collusive tendering cases with R1.5 billion in penalties" (June 24, 2013), available at http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Construction-Fast-Track-Settlement-Process-Media-Release.pdf; See also the settlement agreements, available at http://www.comptrib.co.za/cases/consent-order/.

9 There have been numerous statements from parties such as municipalities that they intend to pursue civil damages actions; See Lloyd Gedye, "Construction: Firms hit by cartel scam may sue for billions", Mail & Guardian, (February 15, 2013 00:00 AM), available at http://mg.co.za/article/2013-02-15-00-firms-hit-by-cartel-scam-may-sue-for-billions; See also Razina Munshi, "Cape Town sues World Cup construction firms", Financial Mail, (July 4, 2013 12:39 PM), available at http://www.financialmail.co.za/economy/2013/07/04/cape-town-sues-world-cup-construction-firms. There was also an unsuccessful attempt by the South African Local Government Association and the Gauteng Provincial Government to intervene in the hearing of the settlements; see "South African Local Government Association and Gauteng Provincial Government v. The Competition Commission and others" (017194/017269/017319/017376/017384) [2013] ZACT 92 (September 19, 2013) (S. Afr.), available at http://www.saflii.org/za/cases/ZACT/2013/92.html.

10 Heather Irvine & Laura Granville, "'Hot Topics' in International Antitrust Law", ABA Section of Int'l Law (March 8, 2013), available at http://meetings.abanet.org/webupload/commupload/IC722000/relatedresources/HotTopicsMarch82013.pdf.

11 See Competition Commission of South Africa, "Health Inquiry Site", available at http://www.healthinquiry.co.za/terms-of-reference.html.

12 "Competition Commission v. Telkom SA Ltd" (11/CR/Feb04), [2013] ZACT 39 (June 23, 2013) (S. Afr.), available at http://www.saflii.org/za/cases/ZACT/2011/39.html.

13 "Competition Commission v. Telkom SA SOC Limited" (016865), [2013] ZACT 62 (July 18, 2013) (S. Afr.), available at http://www.saflii.org/za/cases/ZACT/2013/62.html.

sion's complaint against South African Breweries (SAB) for discriminatory pricing and various other prohibited practices in relation to SAB's distribution of beer,[14] the Commission's complaint against Sasol Chemical Industries for excessive pricing in the plastics industry, and the Commission's complaint that media group Media24 engaged in predatory pricing in the community newspaper advertising market.[15] The Tribunal's judgments in these matters will be handed down in 2014.

During the 2013 financial year, the Commission finalized the following applications for exemption from the Competition Act:

· Shipping Lines;

· South African Airways (SAA); and

· South African Petroleum Industry Association (SAPIA).

The Shipping Lines application was withdrawn, while SAA and SAPIA were granted exemptions with conditions. In January 2013, the Tribunal dismissed, with costs, an appeal by Gas2Liquids against the Commission's granting of an exemption to SAPIA.[16]

COURT DECISIONS

In the case of "Competition Commission v Yara South Africa",[17] the Supreme Court of Appeal (SCA) significantly reduced the procedural requirements imposed on the Commission to formally initiate a complaint and ensure that its subsequent referral matches the terms of the initial complaint. In the decision, the SCA distinguished between a complaint submitted by a private party and one initiated by the Commission. It determined that complaints by third parties had to be submitted in the prescribed form, whereas complaints by the Commission require no more than an informal or tacit decision to open a case. It will be interesting to see how this is applied, since there is an applicable three-year time bar to initiating a case. Accordingly, it will be necessary to determine when the Commission's decision to initiate a case was taken.

Both the SCA[18] and Constitutional Court[19] made way for class actions in cases dealing with applications for certification for the purposes of instituting action against the participants in the bread cartel. In a High Court decision, also arising from the bread cartel, the Court found that a section 65(6)(b) notice can be issued against a named party, even where the party has not been cited as a respondent in the Tribunal proceedings. In this matter, Premier Foods had been granted leniency for its participation in the cartel and therefore had subsequently not been named as a respondent in the matter. It was unsuccessful in contending that the notice certifying its cartel conduct could not be issued to prospective civil damages applicants.[20]

In the case of "Competition Commission v ArcelorMittal South Africa",[21] the SCA ordered the Com-

14 See Amanda Visser, "SAB distribution deals harm independents, tribunal hears", BDLive (July 22, 2013, 2:27 PM), available at http://www.bdlive.co.za/business/retail/2013/07/22/sab-distribution-deals-harm-independents-tribunal-hears.

15 See SAPA, Media24 faces Competition Commission, Business Report, (October 31, 2013, 1:48 PM), available at http://www.iol.co.za/business/companies/media24-faces-competition-commission-116.

16 "Gas 2 Liquids (Pty) Ltd v. The Competition Commission and 15 Others" (13607) [2013] ZACT 3 (January 23, 2013) (S. Afr.), available at http://www.saflii.org/za/cases/ZACT/2013/3.html.

17 "Competition Commission v. Yara (South Africa) (Pty) Ltd and Others" (784/12) [2013] ZASCA 107, [2013] 4 All SA 302 (SCA), 2013 (6) SA 404 (SCA) (September 13, 2013) (S. Afr.), available at http://www.saflii.org/za/cases/ZASCA/2013/107.html.

18 "Children's Resource Centre Trust v. Pioneer Food" (50/2012), [2012] ZASCA 182 (November 29, 2012), available at http://www.justice.gov.za/sca/judgments/sca_2012/sca2012-182.pdf.

19 "Mukaddam v. Pioneer Foods (Pty) Ltd. and Others" (131/12), [2013] ZACC 23 (June 27, 2013), available at http://www.constitutionalcourt.org.za/site/MUKA.htm.

20 "Premier Foods (Proprietary) Limited v. Norman Manoim N.O. and Others" (38235/2012) [2013] ZAGPPHC 236 (August 2, 2013) (S. Afr.), available at http://www.saflii.org/za/cases/ZAGPPHC/2013/236.html.

21 "Competition Commission v. ArcelorMittal South Africa Limited and Others" (680/12), [2013] ZASCA 84, [2013] 3 All SA 234 (SCA), 2013 (5) SA 538 (SCA) (May 31, 2013) (S. Afr.), available at http://www.saflii.org/za/cases/ZASCA/2013/84.html.

mission to make available the leniency application and the Commission record (or those parts that are not subject to claims of confidentiality or are classified as "restricted information" in terms of the Commission Rules) to the respondents in order to enable them to plead. The SCA found that the leniency application is subject to litigation privilege, but that the privilege is waived when the Commission refers to the application's contents in its referral of the complaint. The SCA further found that any claims that the leniency application was "restricted information" under Rule 14 of the Commission Rules were also waived through references in the referral. This decision will enable the Commission in the future to refuse respondent parties access to leniency applications as long as it does not include detailed references in its litigation papers.

The Constitutional Court delivered a judgment at the end of 2013 which overturned a costs order against the Commission awarded by the Competition Appeal Court (CAC). It found that the CAC has no power under the Competition Act to order costs against the Commission in relation to Tribunal proceedings. While the CAC does have power to order costs against the Commission in appeal proceedings before it, the Court noted that when the Commission litigates in the course of fulfilling its statutory duties, it is generally undesirable for it to be inhibited by the threat of an adverse costs order. The Court found that the CAC had incorrectly exercised its discretion to impose costs in this case, since there was no indication that the Commission had acted in bad faith or committed any irregularity.[22]

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22 "Competition Commission v. Pioneer Hi-Bred International Inc. and Others" (58/13), [2013] ZACC 50 (December 18, 2013) (S. Afr.), available at http://www.saflii.org/za/cases/ZACC/2013/50.html.

SOUTH KOREA

2013 ANTITRUST YEAR IN REVIEW

By Youngjin Jung and Gina Jeehyun Choi
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LEGISLATIVE DEVELOPMENTS

On April 30, 2013, the National Assembly passed an Amendment to the Subcontracting Act.[1] The Amendment: (i) expanded the right granted to the Korea Federation of Small and Medium Business ("KFSMB") to negotiate supply prices with purchasers on behalf of small-to-medium sized suppliers and to request the Subcontracting Dispute Mediation Committee to mediate the price adjustment process if the renegotiation does not begin within 10 days from the purchaser's receipt of the request, if agreement cannot be reached within 30 days from the purchaser's receipt of the request, or if circumstances provide a clear indication that an agreement cannot be reached through renegotiation;[2] and (ii) increased the sanctions that can be imposed on purchasers for violation of the Subcontracting Act by expanding the scope of conduct that may be subject to punitive damages.[3] The Amendment also relaxed the statutory threshold for a finding of an unfair determination/reduction of supply price under the Subcontracting Act.[4]

On July 2, 2013, the National Assembly passed an amendment to the Subcontracting Act allowing a subcontractor to receive its security deposit from the guaranteeing organization in exceptional situations, such as when a contractor suffers financial difficulties. In addition, the Amendment prohibits certain types of unfair contractual terms and conditions that are disadvantageous to subcontractors.

The Korea Fair Trade Commission ("KFTC") implemented the amended Notification on Standard for Imposition of Administrative Fine for Violation of the Subcontracting Act ("Notification").[5]

· The Notification increased the scope of administrative fines from 1-8% to 3-10% of the contract amount, depending on the type and number of violation(s), and the amount of the contract amount involved.

· The Notification raised the ceiling from 20% to 40% for aggravated administrative fines for enterprises that have obstructed the KFTC's investigation. The maximum fine will depend on the nature of the obstruction (i.e., (i) up to 40% for violent language/assault and intentionally blocking or delaying entry into a site under investigation; (ii) up to 30% for concealing/discarding materials, refusing access to materials or forging/falsifying materials; and (iii) up to 20% for other types of obstruction of investigation.

· The Notification also increased the range (from 20% to 30% of the basic administrative fine), of aggravat-

1 Available in Korean at http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_X1I3K0Q4P0G9D1N8T0Z5W0O9X0J8Z6.
2 Article 16-2, paragraph 2 through 8 of the Subcontracting Act, available in Korean at http://www.ftc.go.kr/laws/laws/laws.jsp?lawDivCd=02.
3 Article 35, paragraph 2 of the Subcontracting Act, available in Korean at http://www.ftc.go.kr/laws/laws/laws.jsp?lawDivCd=02.
4 Article 11, paragraph 2 of the Subcontracting Act, available in Korean athttp://www.ftc.go.kr/laws/laws/laws.jsp?lawDivCd=02.
5 The KFTC Public Notification No. 2013-1. Available in Korean at www.ftc.go.kr.

ed administrative fines when there is retaliation by the prime contractor after a subcontractor has: (i) reported the prime contractor to the relevant authority for violation of the Subcontracting Act; or (ii) requested that the prime contractor adjust the subcontract price or has filed for mediation to the Subcontract Dispute Mediation Council because adjustment of the subcontract price is necessary due to the fluctuation in the price of raw material.

On June 25, 2013, the National Assembly passed bills to amend the Monopoly Regulation and Fair Trade Law ("FTL"),[6] the Fairness in Large-Scale Distribution Transactions Act ("Large-Scale Distribution Act"),[7] and the Fair Transactions in Subcontracting Act ("Subcontracting Act").[8]

The Amendments allow the KFTC to file a criminal complaint to the Board of Audit and Inspection and the Small and Medium Business Administration (and in the case of a FTL violation, the right is also granted to the Public Procurement Service) if it believes that the violation's social impact is significant (notwithstanding that the KFTC originally decided not to file a criminal complaint). If these agencies including the Board of Audit and Inspection, the Procurement Office and the Small and Medium Business Administration make such a request, the KFTC must file a criminal complaint.

On July 2, 2013, the National Assembly passed bills to relax the requirements for establishing unfair support under Article 23, Paragraph 1, Item 7 of the current FTL and to impose additional administrative fines on entities that have benefited from such unfair support as well.[9] The Amendment also added Article 23-2 to prohibit supporting "specially-related parties"[10] in ways such as entering into a transaction on terms substantially more favorable than those generally available to other companies, providing a business opportunity and entering into a transaction of substantial scale without an appropriate process irrespective of whether doing so impedes fair competition.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On May 6, 2013, the Seoul Central District Public Prosecutor's Office (the Sixth Criminal Division) ("Prosecutor's Office") dismissed price-fixing charges against three life insurers due to a lack of sufficient evidence that they formed an illegal cartel. On March 20, 2013, the KFTC found that nine life insurers fixed the commission rates applicable to variable life insurance products, and issued a corrective order and imposed administrative fines[11] (the KFTC filed a criminal complaint against only the three life insurers with high sales revenues). After investigating the case, the Prosecutor's Office decided to dismiss the KFTC's complaint because: (i) the Financial

6 Available in Korean at http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_A1H3U0O4U3Q0H0J9L5T7D2N5W7V1O9.

7 Available in Korean at http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_G1V3C0F3T1J2Z1G4R2S3S5W6X6V2U1.

8 Available in Korean at http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_N1O3Q0J4O3U0P0B9P5B8I3A8K8Y5I6.

9 Available at http://likms.assembly.go.kr/bill/jsp/BillDetail.jsp?bill_id=PRC_K1Y3K0J6P2Q6A1X2E3V2M0Z7B5K8T9.

10 Under Article 11 of the Enforcement Decree of the FTL, the term "Specially Related Party" means a person or entity that has de facto control over the concerned company; who is a related person; or who engages in the business combination with the joint purpose of controlling management. In connection with the above, the related person is defined as (i) a spouse, a blood relative within the sixth degree or a relative within the fourth degree (hereinafter referred to as "relative"); (ii) a non-profit corporation or organization (referring to an unincorporated association or foundation) to which the same person makes independently or in concert with a person related to the same person not less than 30/100 of contributions as the biggest contributor or which either the same person or a person related to the same person has established; (iii) a non-profit corporation or organization which is subject to dominant influence by the same person, directly or through a person related to the same person, with regard to the appointment of executives, or to the operation of business; (iv) a company, the business activities of which are in fact controlled by the same person; and (v) an employee of the same person or persons having relations falling under items (ii) through (iv) (referring to executives in cases of a juristic person, or trade employee or employees subject to contract of employment in cases of individuals.

11 The KFTC Case No. 2012 kachong 2751.

Supervisory Service had conducted an administrative guidance necessary to prepare the guidelines on variable insurance products, such as recommending the formation of an internal working group; (ii) there was insufficient evidence of an agreement among the life insurers; and (iii) there was evidence that the life insurers had acted inconsistently with the alleged agreement. By recognizing that an administrative guidance can be permissible in a broader range of instances in antitrust cases than what the KFTC has been willing to accept, this decision by the Prosecutor's Office assists in minimizing the discord between the Financial Supervisory Service and the KFTC in their respective regulatory authorities.

COURT DECISIONS

On November 29, 2012, the Supreme Court ruled that a purchaser that had paid a higher price due to price-fixing was entitled to damages even though the purchaser sold its products to the customers at a higher price after the price-fixing arrangement.[12] The Supreme Court found that there are many factors to be considered (e.g., labor cost, materials cost) when sellers increase the price and sellers also have to consider any potential negative impact on demand as a result of such price increase. Therefore, it would be unreasonable to presume that the price increase is merely due to the increase in the price of the specific material subject to the price-fixing arrangement unless there is a special circumstance such as an agreement that the price of the product corresponds with the price of the specific material.

On April 11, 2013, the Supreme Court reversed and remanded a lower court's decision regarding the "relevant product market".[13] The lower court had found that all beverages should be included in the relevant market as the cartel participants had agreed to restrict price competition in the entire beverage market. However, the Supreme Court ruled that the relevant market should be defined only to the extent that it includes "clear substitutes from the perspective of either a seller or end consumer in response to a small but significant increase (or decrease) in price over a significant period of time as the drinks differed in function, use, and buyers' perception of substitutability".

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12 Supreme Court Decision No. 2010 da 93970.
13 Supreme Court Decision No. 2012 du 11829.

SPAIN

2013 ANTITRUST YEAR IN REVIEW

By Susana Cabrera, Konstantin Jörgens and Enrique Colmenero of Garrigues

LEGISLATIVE DEVELOPMENTS

On June 4, 2013 the Spanish Parliament enacted Law 3/2013, creating the National Commission on Markets and Competition (the "CNMC").[1] This statute amended the current system of regulatory oversight, setting up a new agency formed by the former competition authority, the National Competition Commission (the "CNC") and the sectorial regulators responsible for Telecom, Energy, Railway, Postal, Audiovisual and Airports. Outside of the scope of this new body remain –as separate entities– the supervisory authorities for the financial sector (the National Securities Commission, the Bank of Spain) and the Nuclear Safety Council.

The Law mainly involves an overhaul of the institutional framework, introducing only a few minor amendments to the substantive and procedural antitrust regulation in place. In particular, it does not modify the definition of competition infringements, the merger control system, rules on state aid and the specific provisions of the different regulated sectors.

The CNMC is composed of a Council of ten members (Chairman, Deputy Chairman and eight members) and four Directorates (Competition, Telecommunication and Audiovisual Sector, Energy and Postal Sector). The Council is the decision-making body, having two Chambers: the Competition Chamber, responsible solely for competition enforcement, and the Regulatory Chamber, responsible for regulatory tasks. This structure guarantees functional separation between the competition enforcement and regulatory activities. The Directorates have investigative powers.

Although the reform sought to follow the model of regulatory oversight existing in other EU Member States (notably Germany and the Netherlands), the institutional merger of the antitrust authority and several sector regulators into one "super-regulator" is fairly unique and initially caused the European Commission to express serious concerns, especially in relation to the independence of the new authority. This led to a series of amendments to the draft Bill. On October 7, 2013 the CNMC took over the functions of the previous regulatory bodies.

MERGERS

In 2013, the CNC ruled on a total of 50 merger cases,[2] four of which required remedies and three a Phase II investigation.

On March 13, 2013 the CNC cleared in the first phase,

1 Law 3/2013 of June 4, 2013, published in the Spanish Official Gazette No. 134 of June 5, 2012.
2 Merger control decisions are available in Spanish at http://www.cnmc.es/es-es/competencia/.

subject to conditions, a "framework agreement for business collaboration and radio broadcasting of network programming" whereby Vocento, S.A. ("Punto Radio") as the owner of the radio licenses in more than 70 provinces in Spain, would broadcast programs and advertising managed by Radio Popular, S.A. ("COPE"), one of the main radio broadcasters in Spain. The commitments given by COPE and Vocento Group addressed an overlap in two small provinces and entailed the separation from a small affiliated radio broadcaster in Astorga (ABC Punto Radio), as well as the divestment and sale to a third party of another ABC Punto Radio broadcaster (in Écija).The case attracted substantial attention because prior to clearance the CNC had partially granted, for the first time since the entry into force of the Competition Act in 2007 ("LDC"),[3] the lifting of the prohibition to implement the transaction before clearance by allowing the parties to jointly broadcast sport programs (notably football) managed by COPE. This is all the more noteworthy because to date the CNC has rejected a high number of applications to lift the stand-still obligation in even quite straightforward cases (which were later cleared without commitments).

On March 25, 2013 the CNC cleared two concentrations, subject to commitments, after Phase II investigations. In its first decision, the CNC approved the acquisition of sole control by Deoleo, S.A. of the activity of the bottling and distribution of virgin olive oil under the brand name "Hojiblanca" owned by Hojiblanca, S.C.A.[4] The CNC considered that the operation could generate foreclosure problems in both the downstream and upstream markets and might lead to a risk of coordinated behavior. The commitments ultimately approved by the CNC aimed to (i) eliminate a clause from the Investment Contract entered into between the parties that could deter Hojiblanca, S.CA. from competing in the branded olive oil market; and (ii) ensure that the parties would not share relevant sensitive commercial information. These commitments were set for an initial term of three years, after which the CNC will reassess whether the market structure would require the commitments should remain in place for an additional period of two years.

In the second decision, the CNC authorized the acquisition by Disa Corporación Petrolífera, S.A. ("Disa") of joint control of Shell Aviation España, S.L. through the acquisition of 50% of its shares.[5] In this case, the CNC decided to start Phase II because of potential competition problems in different markets related to aviation fuel in the Canary Islands. To resolve those competition problems, the parties agreed for a period of three years (i) to grant access to third parties to Disa's fixed transport and aviation fuel storage facilities in the Canary Islands; (ii) to publish the necessary information for the contracting of services consisting in the inter-island maritime transport of aviation fuel in the Canary Islands; and (iii) not to strengthen the structural ties between them and those companies which provide onboard refueling services in airports.

In another case last year, on August 29, 2013 the CNC cleared, subject to commitments and after an

3 Law 15/2007 of July 3, 2007, published in the Spanish Official Gazette No. 159 of July 4, 2007.
4 CNC Council Decision of March 25, 2013 in Case C/0478/12 – "Deoleo/Hojiblanca".
5 CNC Council Decision of March 25, 2013 in Case C/0468/12 – "DISA/Shell/SAE/JV".

in-depth Phase II investigation, the purchase by Distribuciones Generales Boyacá, S.L. ("Boyacá") of shares held by the Prisa Group and the Unidad Editorial Group in companies from the newspaper and magazine distribution sector.[6] The operation enabled Boyacá to acquire control of a series of newspaper and magazine distribution networks in Spain, especially as regards daily newspapers. Boyacá submitted the following commitments to offset the possible competition risks identified by the CNC: (i) to maintain the commercial and service conditions that the target companies currently apply to its customers – editors, distributors and sales outlets–; (ii) to offer its services to new customers; (iii) to pass on efficiencies deriving from the operation to other market actors; (iv) to prevent specific customers from acquiring sensitive commercial information of other customers; and (iv) to amend existing exclusive distribution contacts signed with the Prisa Group and Unidad Editorial Group. These commitments are set for a period of five years.

As regards sanctions for failure to notify, France Telecom España, S.A.U. ("Orange") was fined EUR 61,600 by the CNC for failure to notify the acquisition of sole control of KPN Spain, S.L., through the sale of 100% of its share capital.[7] Although Orange did notify the operation on December 28, 2012 to the CNC, the acquisition was carried out before the aforementioned notification on December 14, 2012.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2013, fines imposed for anticompetitive practices by the CNC amounted to over EUR 225.5 million.[8]

On March 25, 2013 the CNC sanctioned fifteen companies with more than EUR 44 million for setting up and maintaining a cartel to share out the Spanish market in the paper envelopes sector for more than 30 years, from 1977 to 2012.[9] These agreements referred to: (i) price fixing and market sharing of envelopes for elections held between 1977 and 2010; (ii) market sharing in the pre-printed envelopes market; (iii) price fixing and the sharing of clients in the white envelope market between 1994 and 2010; and (iv) limitation on the technical development in the paper envelope market through the setting up of a company in which technological innovations would be shared among the participating companies. As in the previous case, the Adveo Group International, S.A. and its subsidiary Unipapel Transformación y Distribución, S.A. obtained fine immunity. In addition, the fines imposed on Antalis Envelopes Manufacturing, S.L. and the Tompla Group were reduced by 40% and 30%, respectively.

In another noteworthy cartel case, the CNC imposed fines of over EUR 35 million on seventeen companies and two regional associations in the car rental business for price fixing and agreeing jointly on

6 CNC Council Decision of August 26, 2013 in Case C/0508/13 – "Boyacá/Redeprensa/RDE".
7 CNC Council Decision of July 23, 2013 in Case SNC/0284/13 – "Orange".
8 Decisions of the CNC Council are available in Spanish at http://www.cnmc.es/es-es/competencia/.
9 CNC Council Decision of March 25, 2013 in Case S/0316/10 – "Sobres de Papel".

commercial conditions.[10] The cartel existed between May 2005 to October 2011, and its effects were felt particularly in the regions of Catalonia, Valencia, Andalusia and the Balearic Isles. The investigation procedure was initiated following a successful leniency application by Sol Mar Alquiler De Vehículos, S.L., which was granted immunity.

In 2013, the competition authority continued to investigate and to impose fines for possible anti-competitive practices in the market for the road transport of containers.[11] On January 10, 2013 the CNC fined two business associations, ALTC and COTRAPORT, and the Barcelona Port Authority over EUR 20 million for agreements to (i) fix prices and trading conditions; (ii) limit or control production; and (iii) share out the market for the road transport of containers originating from or destined for the port of Barcelona between January 2006 and March 2011.[12] In a similar case, on September 26 2013 the CNC imposed fines of more than EUR 43 million on several business associations involved in container transport in the Port of Valencia –AELTC, TRANSCONT, TRANSCONVAL, ANV and ATEIA-OLT –, depot-terminal concessionaire companies –TCV, MSTC and NOATUM– together with the Valencia Port Authority for the same kind of practices taking place from December 1998 to June 2011.[13] Both Port Authorities were fined EUR 100,000 for their participation in making agreements and arrangements in the road-transport of containers in the corresponding port. In the second case, although the Council did not impose a fine, the CNC considered that the Department of Infrastructure and Transport of the Valencia Community Government played an active role in organizing and monitoring the enforcement of the cartel and contribute to a serious breach of competition law.

In its Decision of February 28, 2013 the CNC fined ten companies, together with the relevant sectorial association, the Spanish Association of Polyurethane Foam Companies, a total of EUR 26,350,000 for forming a cartel in the Spanish market for the manufacture and marketing of flexible polyurethane foam used for comfort purposes between 1992 and 2011.[14] The participants agreed to limit and share the production and to apply a progressive increase in prices in the subsequent period. A peculiar feature of this case was the creation of a mechanism for the monitoring and maintenance of the agreement suggested and implemented by an external auditor, Coopers & Lybrand, in cooperation with another firm -Análisis e Investigación, S.L.- that collected the production data of different operators under the guise of environmental auditors. The investigation was triggered by a leniency application by Recticel, S.A., which was exempted from payment of the fine; and Flex 2000-Productos Flexiveis, S.A, which obtained a 40% fine reduction. The CNC rejected a leniency request filed by Copofoam, S.L because it was filed after the decision to start the sanctions proceeding and based on information that did not provide any significant added value.

In another interesting decision dated September 23, 2013, the CNC fined four lift manufacturers EUR 4,867,317 in a rare case of unfair trade practices under

10 CNC Council Decision of July 30, 2013 in Case S/0380/11 – "Coches de Alquiler".
11 Previous decisions in this market are the Tribunal de Defensa de la Competencia Decision of April 1, 2008 in Case 623/01 – Transportes Barcelona and CNC Council Decisions of March 17, 2011 in Case S/0012/07 – Puerto de Barcelona. In addition, the CNC imposed smaller fines in the region of Madrid by its Decision of September 16, 2013 in Case S/0397/12 – "Transportes Madrid".
12 CNC Council Decision of January 10, 2013 in Case S/0293/10 – "TRANSCONT".
13 CNC Council Decision of September 26, 2013 in Case S/314/10 – "Puerto de Valencia".
14 CNC Council Decision of February 28, 2013 in Case S/0342/11 – "Espuma Poliuretano".

the LDC for hindering the business of competitors in the lift equipment maintenance market.[15] Pursuant to the LDC, unfair acts can distort competition if they affect the public interest. In this case, the CNC considered this was the case stating that the communications sent by various large operators -Zardoya Otis, S.A., Schindler, S.A., Ascensores Eninter, S.L., and Ascensores Imem, S.L.- could only be interpreted as being intended to discredit and denigrate competitors that were not vertically integrated in that they pointed to the risks inherent in contracting their maintenance services by referring to their alleged lack of resources, adequate training and safety measures. Such conduct would seriously undermine their ability to compete in the lift equipment maintenance and repair market with respect to lifts manufactured and installed by other vertically integrated operators.

In 2013, the CNC published two decisions in which different operators in audiovisual and telecommunications markets in Spain were sanctioned for their failure to comply with the commitments imposed in previous CNC decisions. This shows that the CNC is giving top priority to the monitoring of compliance with commitments arising in infringement and merger control proceedings.

In the first decision, dated January 23, 2013,[16] the CNC found that Prisa Televisión, S.A. ("Prisa"), DTS Distribuidora de Televisión Digital, S.A. ("DTS") and Telefónica de España, S.A.U. ("Telefónica") had incurred in a very serious breach for failure to comply with the commitments imposed in the CNC decision of October 28, 2010.[17] The original file was opened as a result of different agreements of the parties concerned for the joint marketing –under the TRÍO+ brand– of telecommunications and pay TV services and the acquisition of audiovisual contents. After an investigation, the CNC settled the case by accepting commitments that included the obligation to ensure that the jointly marketed products could be acquired separately for the same price. On September 15, 2011, a new infringement proceedings was initiated as a result of the launch of the "DIGITAL+ mini" product, aimed at new DTS customers exclusively through TRIO+; which was found to be a breach of the commitments. The investigation led to fines of EUR 88,387 being imposed on Prisa and DTS, for which they were jointly and severally liable, while Telefónica was fined EUR 100,259.

In the second decision, dated February 6, 2013,[18] the CNC considered that Mediaset España Comunicación, S.A. ("Mediaset") had breached the commitments set forth in the CNC decision of October 28, 2010, issued in the Telecinco/Cuatro case.[19] These breaches were: (i) not to undertake the functional separation of PubliEspaña and PubliMedia as the members of their respective Board of Directors were the same; (ii) an unjustified delay in the waiver of the preferential purchase of certain audiovisual rights; (iii) inserting unlawful clauses in certain contracts for the acquisition of audiovisual content; and (iv) to

15 CNC Council Decision of September 9, 2013 in Case S/0410/12 – "Ascensores 2".
16 CNC Council Decision of January 23, 2013 in Case SNC/0016/11 – "Digital+Mini."
17 CNC Council Decision of January 10, 2010 in Case S/0020/07 – "Trio Plus".
18 CNC Council Decision of February 6, 2013 in Case SNC/0024/12 – "Mediaset".
19 CNC Council Decision of March 25, 2013 in Case C/0230/10 – "Telecinco/Cuatro".

implement a de facto strategy to link the sale of advertising to its channels. Accordingly, Mediaset was fined EUR 15,600,000.

In a recent decision dated December 2, 2013[20] widely covered by the press, the CNMC imposed fines of EUR 15 million on MediaProducción, S.L. and several football clubs (Real de Madrid Club de Fútbol, Fútbol Club Barcelona, Sevilla Fútbol Club and Real Racing Club de Santander SAD) for breach of the previous CNC decision of April 14, 2010 regarding the purchase of soccer broadcasting rights.[21] In this 2010 decision, the former CNC stated that the contracts between football clubs and the operators for the acquisition of broadcasting rights for Spanish League and Cup matches for more than three seasons would be anti-competitive, as well as the rights of first refusal and retraction and the right to an extension, which enable the contract to be extended beyond this maximum duration. In this case the contracts on soccer broadcasting rights should run for more than three seasons.

COURT DECISIONS

In 2013, the National Appeals Court (the "AN") upheld all the appeals brought by companies sanctioned by the CNC decision dated November 12, 2009 in Case S/0037/08 – "Compañías Seguro Decenal";[22] concerning the insurance and reinsurance market to cover damage caused to buildings ("decennial insurance"). According to the CNC, the parties arranged a minimum price agreement in order to avoid a drop in decennial insurance prices caused by competition and included this minimum price agreement in the pricing guidelines annexed to reinsurance contracts. As a result of the compulsory nature of these guidelines for insurers, the premiums proposed by underwriters in the decennial insurance market were the same throughout the country. The amount of the fines imposed by the CNC in its decision totaled around EUR 120 million, the largest fines imposed to date by the Spanish antitrust authority. However, the AN overturned the aforementioned decision stressing that the CNC had failed to take into account (i) the novelty of decennial insurance in Spain and the lack of precedents; (ii) the admissibility under Spanish and EU law of certain cooperation mechanisms between competitors in order to draw up common statistics to comprehend the risks that had to be covered; and (iii) the need to avoid under-insurance.

In another set of judgments, the AN upheld –totally or partially– around a third of the appeals brought by companies sanctioned by the CNC in its Decision dated October 19, 2011 in Case S/0226/10 – "Licitaciones carreteras",[23] in which an agreement to allocate and fix prices on government tenders for roadway maintenance works was found to be illegal. The legal grounds relied on by the AN in its judgments allowing the appeals essentially relate to two aspects of the judicial review of the CNC decision: the assessment of the evidence and the calculation of the fine. With respect to the assessment of the evidence, the AN ruled that the CNC had erred in its assessment of the circumstantial evidence relating to the alleged bid rigging. With respect to the amount of the fines imposed, the Court annulled totally or partially the fines imposed in the appeals brought by some sanctioned companies on the basis that the CNC had wrongly applied the criteria for the quantification of the sanctions

20 CNMC Council Decision of December 2, 2013 in Case SNC/0029/13 – "Mediapro/Clubs de Fútbol II".

21 CNC Council Decision of April 14, 2010 in Case S/0006/07 – "AVS/Mediapro/Club de Fútbol de 1ª y 2ª división".

22 AN Judgments of December 14, 2012 (appeal No. 869/2009); December 18, 2012 (appeal No. 865/2009); December 18, 2012 (appeal No. 861/2009); January 4, 2013 (appeal No. 864/2009); March 20, 2013 (appeal No. 866/2009) and April 10, 2013 (appeal No. 877/2009).

23 AN Judgments of October 25, 2012 (appeal No. 698/2011); November 30, 2012 (appeal No. 679/2011); January 8, 2013 (appeal No. 656/2011); January 25, 2013 (appeal No. 555/2011); January 25, 2013 (appeal No. 658/2011); March 5, 2013, (appeal No. 566/2011); and March 21, 2013 (appeal No. 699/2011).

laid down in both the LDC and in the CNC's own Communication on this point.

On another note, following the appeals against several CNC decisions related to sherry wines producers,[24] the AN has courted controversy by holding that unlawful conduct by members of a cartel cannot be justified under the concept of legitimate expectations even if a public entity is one of its members. Nevertheless, participants in such a cartel lack the required subjective element when committing the offense. Given the high degree of legal uncertainty, the penalty imposed would have to be waived or reduced. Contrary to settled case law, in these and some other cases,[25] several of the AN's rulings have reduced the fines imposed by the Spanish Competition Authority on the basis of a re-interpretation of the basic rules for calculating the fine. Thus, under the LDC, the financial liability of an undertaking with regard to the payment of the fine must not exceed 10% of its total turnover in the immediately preceding business year. According to the traditional interpretation, this 10% threshold is considered as a cap on the total amount of fines linked to consolidated total turnover. However, the court has ruled that the 10% limit should only apply to the company's turnover in the market affected by the infringement in the preceding business year. The Spanish Supreme Court (the "TS") has not yet ruled on this point.

On November 7, 2013 the TS delivered an important judgment in an action for damages by third parties, when it upheld an appeal lodged by several sweet producers against a previous judgment delivered by Madrid's Appeal Court confirming thereby the decision adopted by the former Tribunal de Defensa de la Competencia in Case No. 426/98 – "Azúcar";[26] regarding a price fixing cartel in the sugar for industrial uses market from February 1995 to September 1996. In its recent judgment, the TS stressed that while civil courts are free to examine the facts of the case pursuant to the civil rules, in a subsequent action for damages, they cannot depart from the conclusions reached in the judicial review of a competition case. In addition, the Court stressed that anyone can claim the damages suffered as a consequence of a breach of the competition rules. Since the direct purchaser did not succeed in passing on the full amount of the damage to its customers, the passing on defense was dismissed. TS held the defendant Ebro Food liable for the damages caused and ordered it to pay EUR 4.1 million in compensation.

Finally, on October 15, 2013 the AN upheld the appeal lodged by Joan Gaspart against the CNC Decision dated September 26, 2012 in Case S/0335/11 – "CEOE", in which he was personally fined EUR 50,000 for making a collective price recommendation as the Vice-President of the Spanish Confederation of Business Organizations ("CEOE").[27] Joan Gaspart had recommended hotel price increases of between 6% and 7% at the 2011 Spanish International Tourism

24 AN Judgments of November 22, 2010 (appeal No. 365/2009); March 6, 7, 8 and 21, 2013 (appeal No. 619/2010, no 535/2010, No. 540/2010 and No. 659/2011); April 10, 2013 (appeal No. 652/2011); and June 12, 2013 (appeal No. 582/2010).

25 Some recent rulings in 2013 include AN Judgments of April 10, 2013 (appeal No. 622/2010); June 17 and 24, 2013 (appeal No. 673/2011, No. 599/2010 and No. 29/2012); and July 18, 2013 (appeal No. 707/2011).

26 TS Judgment of November 7, 2013 (appeal No. 2472/2011).

27 AN Judgment of October 15, 2013 (appeal No. 658/2012).

Fair and in a subsequent press interview. However, the AN held that the statements were not made in his capacity as Vice-President of the CEOE but as President of two hotel groups. In addition, the silence of the CEOE with respect to those statements could not be construed as acceptance. The Court also considered that such a statement would be covered by freedom of expression regarding market developments, but would not amount to a collective price recommendation between two or more undertakings or an express recommendation to align undertakings' behavior.

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SWEDEN

2013 ANTITRUST YEAR IN REVIEW

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LEGISLATIVE DEVELOPMENTS

As of July 2013, a new law on the application of State aid rules in Sweden entered into force.[1] State aid rules, which are set out in Articles 107-108 of the Treaty on the Functioning of the European Union, prohibit advantages in any form whatsoever conferred on a selective basis to undertakings by national public authorities where competition is distorted or may be distorted and the intervention is likely to affect trade between Member States. The new Swedish Act governs the obligations of both providers and beneficiaries of State aid and primarily codifies the case law of the Court of Justice of the European Union. However, it also introduces provisions on, among other things, the means of recovery of unlawful aid in Sweden.

MERGERS

In December 2012, Assa Abloy ("Assa"), an international safety products and door opening solutions company, announced their acquisition of a wholesale company of locks, alarms and security services, Prokey. The transaction was not subject to mandatory notification as only one out of two thresholds for notification was met. Nor was it voluntarily notified by the parties. However, in January 2013, the Swedish Competition Authority (the "SCA") used its power to order the notification of a concentration where there are particular grounds.[2] The SCA found that this was called for due to Assa's very strong market position in manufacturing as well as at the wholesale level (through its subsidiary, Copiax) for safety products. Following an in-depth review of the matter, the SCA found that the combination of Prokey and Copiax would lead to a monopoly position for Assa in the wholesale market of supply of safety products to locksmiths. This was considered to lead to higher prices, reduced offering and poorer service as well as foreclosure of Assa's competitors at the manufacturing level. The parties argued the failing firm defence with reference to Prokey's economic situation, but it was not accepted by the SCA, which commenced proceedings against the parties to prohibit the merger subject to a default fine of SEK 100 million (approximately USD 15.4 million). Following an unsuccessful attempt to get the case dismissed on procedural grounds, the merger was subsequently abandoned.

The SCA did however clear another merger taking into account e.g. the poor financial situation of the acquired business.[3] In this first of its kind decision, the SCA based its approval on a relevant counter factual different from the present competitive situation, namely one where the acquired business would in any event have disappeared from the market. This three to two merger concerned insurance company KPA's acquisition of the municipal pension business of rival SPP. Comparing the pre- and post-merger scenario, the SCA initially found that the concentration risked significantly impeding competition by strengthening KPA's already dominant position (77%) and removing the competitive pressure exerted by SPP in a market with high barriers to entry. However, following an in-depth review the SCA found that the competitive conditions were highly likely to change in such a way

1 Sw. "Lag (2013:388) om tillämpning av Europeiska unionens statsstödsregler".
2 If the first of the two turnover thresholds are met, but not the second, the parties may voluntarily notify the transaction. In these circumstances, the SCA may also, where it finds that there are particular grounds, order the parties to notify. It is mandatory to comply with such order.
3 SCA Decision dnr 276/2013 of September 4, 2013.

that the situation at the time of the concentration was not relevant for assessing its effects. The acquired business was found to objectively lack the ability to keep running and be highly likely to close down. Furthermore, there was no other realistic buyer of the business. Against this background, the SCA found that the concentration would not lead to a significant impediment to competition and cleared the merger in the second phase review.

The pharmacy market, which was deregulated in 2009, also saw consolidation with no less than two mergers, ApoPharm's acquisition of Vårdapoteket[4] and Oriola-KD's acquisition of Medstop[5]. The market was thus reduced from eight larger players to six, with incumbent Apoteket AB remaining the largest one. Interestingly, the two acquisitions were filed only a few days apart, thereby raising the question of how the SCA will handle parallel acquisitions in the same market. The SCA opted to appraise the concentration first notified (Vårdapoteket) disregarding the subsequent notification (Medstop), i.e. as if Oriola-KD and Medstop were two independent competitors. The SCA thereby used the same approach as the European Commission – "first come, first served". Both transactions were ultimately cleared with no conditions in the first phase review.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In one of few cartel cases brought to court in 2013, the SCA filed a summons application to impose an administrative fine of about SEK 30 million (approximately USD 4.6 million) on three health care companies for alleged coordination in the context of a public procurement of services within clinical physiology and clinical neurophysiology. Aleris is the company which faces the risk of the largest fine of almost SEK 27 million (approximately USD 4 million), while Capio and HjärtKärlgruppen are each facing fines of under SEK 2 million (approximately USD 300,000). The SCA claims that the companies shared information on areas where they planned to submit tenders and also agreed to share the volumes of the contracts notwithstanding the winning tender, a course of conduct which is allegedly confirmed by bilateral cooperation agreements between the companies. The Stockholm City Court's ruling is still awaited.

During the year, the first two court judgments concerning the new rules introduced in 2010 which limit the ability of public bodies to conduct business in a manner that limits competition – the prohibition of anti-competitive sales activities by public undertakings - were handed down. The first case involved the refusal of Räddningstjänsten i Dala Mitt to grant access to training grounds for fire fighters to a private operator. According to the SCA, this refusal distorted competition, but the court found that this was not shown to the requisite standard and rejected the claim.[6] The case has been appealed to the Market Court which has granted leave to appeal. The second case involved municipal bus company Skelleftebuss, which was found to have gone beyond its municipal duties when, in addition to providing public transport, also offered contract bus services to private customers in competition with private actors. The court prohibited Skelleftebuss from pursuing the activities.[7] Another handful of cases concerning the prohibition of anti-competitive sales activities by public entities are currently pending.

4 SCA Decision dnr 234/2013 of May 17, 2013.
5 SCA Decision dnr 246/2013 of May 22, 2013.
6 Stockholm City Court Case T 7924-11, January 30, 2013.
7 Stockholm City Court Case T 8160-11, July 12, 2013.

SWEDEN

ABUSES OF A DOMINANT POSITION

The SCA also sued the Swedish state-owned company in charge of running Arlanda airport, Swedavia, for SEK 340,000 (approximately USD 52,300) for abuse of dominance.[8] The disputed conduct consisted of charging SEK 25 for allowing taxi drivers to pick up customers which had pre-ordered taxis outside the customs clearance area using a badge provided by Swedavia's contractor, EuroPark. The two companies were considered to have a joint dominant position in the market for the provision of a cueing and pick up system at Arlanda airport and, considering that the badge itself cost SEK 0.85, the price charged was found to be excessive. Interestingly, the suit follows the SCA's initial dismissal of a complaint of the very conduct now fined. The complainant therefore took recourse to the Market Court, where they initiated a successful civil claim.[9] The Market Court ordered that the conduct must cease. The SCA subsequently opted to sue Swedavia to impose an administrative fine for the nine-month period up until the conduct ceased. According to the SCA the Market Court's ruling did not preclude imposing the fine since it was not of a criminal type. The subsequent administrative fine therefore did not breach the right not to be punished twice for the same offence ("ne bis in idem"). Rejecting Swedavia's claim that the case should be dismissed on this ground, the Stockholm City Court confirmed the SCA's point of view.

The high profile case against the Swedish telecom incumbent TeliaSonera for abuse of a dominant position by way of margin squeeze was also decided in the second and final instance court, the Market Court. In 2010 the Stockholm City Court imposed a record fine of SEK 144 million (approximately USD 22 million) on the company for margin squeeze in the ADSL broadband market during 2000-2003.[10] On appeal, the Market Court found, in contrast to the Stockholm City Court, that the abuse had occurred during limited periods during 2000-2003 and only towards specific competitors. According to the Market Court, dial-up connection to Internet exerted a competitive constraint on the ADSL broadband market during a part of the period, under which TeliaSonera was not dominant. Furthermore, interestingly, in contrast to EU case law, the Market Court did not accept the application of the LRAIC-method (long run average incremental costs) when assessing the alleged margin squeeze. Accordingly, the court found that the fine was to be reduced to SEK 35 million (approximately USD 5.4 million). Follow-on damage claims are also pending before the Stockholm City Court.

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8 Summon application dnr 378/20013 of June 18, 2013.
9 Market Court Case A 2/10, MD 2011:2, February 2, 2011.
10 Market Court Case A 8/11, MD 2013:5, April 12, 2013.

SWITZERLAND

2013 ANTITRUST YEAR IN REVIEW

By Dr. Patrick Sommer and Amr Abdelaziz
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LEGISLATIVE DEVELOPMENTS

Cooperation Agreement with EU

On May 17, 2013, after two years of negotiations, the European Commission and the Swiss Federal Government signed a Cooperation Agreement in Competition Matters (the "Agreement").[1] The Agreement is yet to be ratified and is expected to become effective in 2014, if not later.

The Agreement has been referred to by the European Commission as a "second generation" agreement. In contrast to existing cooperation arrangements between the EU and the USA (1991), Canada (1999), Japan (2003) and South Korea (2009), the Agreement with Switzerland allows the European Commission and the Swiss Competition Commission ("ComCo") to exchange information and documents obtained in the course of their investigations.[2]

ComCo expects that the cooperation with the European Commission will bolster its ability to enforce the Swiss competition rules vis-à-vis international cartels. However, several competition experts have voiced concerns over a perceived lack of sufficient procedural safeguards for undertakings potentially affected by an information exchange between the authorities.

For instance, the Agreement will allow the European Commission and ComCo to "discuss" case-related information without even notifying the affected parties in advance (Article 7(2)), and it seems possible, if not likely, that such "discussions" will include the exchange of written information. Even the exchange of documentary evidence will be relatively easy: The authority will be required to seek the consent of the undertaking from whom the evidence was obtained, but even in the absence of such consent the exchange will usually be possible anyway – and the agreement does not provide for a right to challenge the legality of an information exchange before it happens.

It remains to be seen whether these concerns will delay the ratification process and how the Agreement, once in force, will be applied by the authorities and the courts.

Revision of the Cartel Act

We have commented on the various proposals for revising the Federal Act on Cartels and Other Restraints on Competition (the "Cartel Act")[3] in previous editions of this publication.[4] The process is currently stuck in the Federal Parliament where the two chambers have struggled to agree on the scope of the amendments to make to the Cartel Act. The amendments under discussion include an institutional reform (introduc-

1 See the Agreement between the European Union and the Swiss Confederation concerning Cooperation on the Application of their Competition Laws of May 17, 2013, available at http://ec.europa.eu/competition/international/bilateral/agreement_eu_ch_en.pdf.

2 See Press Release, European Commission, "European Union and Switzerland sign Cooperation Agreement in Competition Matters" (May 17, 2013), available at http://europa.eu/rapid/press-release_IP-13-444_en.htm.

3 Kartellgesetz [KG] "Federal Act on Cartels and other Restraints of Competition" October 6, 1995 (Switz.), available at http://www.admin.ch/ch/e/rs/c251.html.

4 Dr. Patrick Sommer & Amr Abdelaziz, "Switzerland", ABA Int'l Section Year in Review (2012) [hereinafter "Swiss Antitrust Review 2012"]; See also Dr. Patrick Sommer & Amr Abdelaziz, Switzerland", ABA Int'l Section Year in Review (2011) [hereinafter "Swiss Antitrust Review 2011"]; See also Dr. Patrick Sommer & Amr Abdelaziz, "Switzerland", ABA Int'l Section Year in Review (2010) [hereinafter "Swiss Antitrust Review 2010"].

tion of a two-tier structure); strengthening private enforcement (by allowing consumer actions against cartels); changes to the merger control procedure (introduction of the significant impediment of effective competition ("SIEC") test); accelerating and improving the notification procedure by which undertakings may apply for ex-ante clearance of competition restraints; a per se prohibition of hardcore horizontal and vertical restrictions (form-based approach); mandatory fine reductions to benefit undertakings with "effective" compliance programs; criminal sanctions against individuals; and a controversial legislative proposal aimed at limiting the ability of foreign companies to charge higher prices in Switzerland than in the European Economic Area.

MERGERS

ComCo has not issued any important merger control decisions in 2013.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2013, ComCo continued to investigate suspected bid-rigging cartels.

On February 7, 2013, ComCo opened an investigation against three tunnel-cleaning companies and conducted dawn raids at locations in four different cantons.[5] According to ComCo, there was evidence suggesting that the three tunnel-cleaning firms had colluded to fix prices and had coordinated in other ways in order to obtain contracts under anti-competitive conditions.

On April 16, 2013, ComCo opened an investigation against various road and underground construction companies in the canton of St. Gallen and conducted dawn raids on their premises.[6] The affected companies are alleged to have engaged in customer and construction project allocation and other illicit coordination in tenders. ComCo expanded the investigation in October 2013 and conducted dawn raids on the premises of more undertakings in St. Gallen.[7] A week later, ComCo expanded a similar investigation opened in October 2012 and conducted dawn raids. The latter investigation targets construction firms in the canton of Grisons.[8]

On June 18, 2013, ComCo announced a decision imposing fines against a dozen road construction companies in the canton of Zurich.[9] The fines imposed ranged from CHF 3,000 to CHF 124,000. A leniency applicant that had filed the leniency application after the dawn raid was granted a full waiver from a fine. ComCo determined that the companies in question had engaged in bid rigging (price-fixing and customer allocation) in a total of 30 public and private tenders. In its press statement, ComCo emphasized that it will continue to fight against bid rigging and that it will continue to cooperate with the cantons and the Federal Administration in order to raise the awareness of the contracting authorities.

On May 27, 2013, ComCo found ten wholesalers of francophone books guilty of hindering parallel imports from France and imposed fines in the total amount of CHF 16.5 million.[10] The wholesalers were found to have developed exclusive distribution systems which made it impossible for bookstores to procure books from alternative channels in France (even

5 See Press Release, "ComCo, WEKO eröffnet Untersuchung gegen Tunnelreinigungsfirmen" (February 7, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=47686.

6 See Press Release, ComCo, "WEKO eröffnet Untersuchung im Bereich des Strassen- und Tiefbaus" (April 16, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=48531.

7 See Press Release, ComCo," WEKO dehnt Untersuchung 'See Gaster' im Bereich Strassen- und Tiefbau auf weitere Unternehmen aus" (October 23, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=50655.

8 See Press Release, "ComCo, WEKO dehnt Untersuchung im Bereich Strassen-, Tief- und Hochbau im Unterengadin auf den Kanton Graubünden aus" (April 24, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=48617.

9 See Press Release, "ComCo, WEKO büsst Strassenbauer im Kanton Zürich" (June 18, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=49306.

10 See Press Release, ComCo, "Die WEKO sanktioniert Grosshändler von französischsprachigen Büchern" (June 12, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=49225.

passive sales were not possible), thus maintaining artificially high wholesale price levels in Switzerland from 2005 until 2011. When calculating the fines, ComCo took into account the turnovers of the parties, the gravity and duration of the breach, and the ability of each wholesaler to pay the fine.

In recent years, ComCo was under considerable public pressure to act against importers of (consumer) goods suspected of cashing in on gains related to the slide of the Euro against the Swiss Franc. This pressure seems to have eased in 2013.

On October 21, 2013, ComCo ended an investigation into the cosmetics market without finding an infringement.[11] ComCo argued that the vertical restraints identified (territorial protection clauses, restrictions to online sales, recommended resale prices) did not appreciably restrict competition, taking into account the low market shares of the investigated companies, the low level of market concentration and the fact that prices in Switzerland were not considerably higher than in other countries. Furthermore, the investigated companies voluntarily changed the problematic clauses and declared the recommended resale prices as non-binding and informed the dealers accordingly.

In November 2013, ComCo also ended a preliminary investigation into a possible conspiracy of 22 suppliers of international branded articles and the three retail chains Coop, Migros and Denner to cash in on exchange rate gains.[12] ComCo failed to identify sufficient evidence of horizontal or vertical agreements not to pass on exchange rate gains to consumers, or any abuse of dominance having such effect. In order to come to this conclusion, ComCo relied on questionnaires sent to the investigated companies and the answers received from them. According to ComCo's press release, most suppliers claimed to have made exchange rate-related rebates to the retailers, and the retailers claimed to have largely passed on these rebates to the consumers. The suppliers further argued that less than 50% of their costs were affected by exchange-rate movements.[13]

Finally, ComCo opened two more investigations —one against a number of Swiss-based Volkswagen concessionaires (suspected horizontal fixing of rebates and other price elements),[14] another against a distributor of guitars and other stringed instruments (suspected vertical price fixing)—[15] and a preliminary investigation into a possible conspiracy of several banks to manipulate currency exchange rates.[16] Meanwhile, the ComCo investigation into the rigging of several reference interest rates ("LIBOR investigation")[17] is still underway.

11 See Press Release, "ComCo, WEKO stellt Untersuchung Kosmetikprodukte ein" (November 28, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=51120.

12 See Press Release, "ComCo, Sekretariat WEKO schliesst Vorabklärung zur Weitergabe von Währungsvorteilen bei Markenartikeln im Detailhandel ab" (May 12, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=51242.

13 See Final report, "WEKO, on the preliminary investigation into exchange rate gains" (short version) (November 7, 2013), available at http://www.weko.admin.ch.

14 See Press Release, "ComCo, WEKO eröffnet eine Untersuchung im Automobilmarkt "(May 23, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=48943.

15 See Press Release, "ComCo, WEKO eröffnet eine Untersuchung im Bereich Saiteninstrumente" (July 5, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=49592.

16 See Press Release, ComCo, "Sekretariat WEKO hat Vorabklärung wegen möglicher Absprachen von Währungswechselkursen eröffnet" (October 4, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=50486.

17 See "Swiss Antitrust Review 2012", supra at note 4.

ABUSES OF A DOMINANT POSITION

In 2013, ComCo finalized an abuse of dominance case and tackled three new ones.

Since June 6, 2011, ComCo had been investigating a decision by the Swatch group to discontinue the supply of certain components for mechanical movements to other watch-makers.[18] By a decision dated October 21, 2013, ComCo approved a final settlement with the Swatch group on this matter.[19] According to the settlement, Swatch's subsidiary ETA SA Manufacture Horlogère Suisse may gradually reduce the supply of mechanical watch movement blanks and, as of January 1, 2014, will no longer be under any obligation to supply. ETA is required to treat its customers with equal measure, although a preferential treatment of small and medium-sized customers would be permitted in exceptional circumstances pursuant to a hardship clause. In contrast, ComCo refused to allow the Swatch subsidiary Nivarox-FAR SA to reduce the supply of other components for mechanical movements ("assortiments"), judging that allowing such a supply reduction would for the time being be premature due to the prevailing market conditions and various uncertainties in this area.

After conducting a preliminary investigation, ComCo opened in April 2013 a formal investigation against Switzerland's telecommunication incumbent Swisscom and its subsidiary Cinetrade, a company that amongst other things holds long-term and comprehensive exclusive film and sports rights for pay TV, video on demand and pay-per-view.[20] ComCo is investigating whether Cinetrade abused a dominant position, e.g., by refusing to provide certain services to companies operating TV platforms that compete with Swisscom TV. Swisscom holds 75% of Cinetrade's shares.

On July 18, 2013, ComCo launched a second probe against Swisscom based on evidence that Swisscom may have abused a dominant position as a provider of broadband internet services for businesses.[21] Specifically, ComCo is investigating whether Swisscom won a tender for networking the Swiss Post's offices via broadband Internet by charging excessive wholesale prices to rival telecoms service providers, thereby hindering them from effectively participating in the same tender.

Finally, the Swiss Post's own practices have come under ComCo's scrutiny. An investigation announced on July 18, 2013 aims to clarify whether the Swiss Post has abused its dominant position for certain postal services for business customers.[22] The probe cen-

18 See "Swiss Antitrust Review 2011", supra at note 4; See also "Swiss Antitrust Review 2010", supra at note 4.

19 See Press Release, ComCo, "WEKO befürwortet Lieferreduktion von mechanischen Uhrwerken" (July 12, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=49663.

20 See Press Release, ComCo, 2WEKO untersucht die Übertragung von Live-Sport im Pay-TV" (April 4, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=48360.

21 See Press Release, "ComCo, WEKO eröffnet Untersuchung gegen Swisscom im Bereich Breitbandinternet" (July 19, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=49705.

22 See Press Release, "ComCo, WEKO untersucht Preissysteme der Post für Geschäftskunden" (July 18, 2013), available at http://www.news.admin.ch/message/index.html?lang=de&msg-id=49694.

ters around the pricing policies of the Swiss Post and whether these policies hinder competitors from doing business and whether they discriminate or otherwise disadvantage certain customers.

COURT DECISIONS

In December 2013, the Federal Administrative Court published its long-awaited ruling in the matter "Hors-Liste Medikamente". In that case, ComCo had fined Pfizer, Bayer and Eli Lilly for issuing recommended resale prices for Viagra, Levitra and Cialis to pharmacies. In the opinion of ComCo, these price recommendations amounted to vertical price fixing.

In three separate (but largely identical) decisions of December 3, 2013, the Federal Administrative Court overturned the decision of ComCo and lifted the fines imposed on the above-mentioned companies.[23] Surprisingly, the court's ruling did not contain any considerations as to whether the price recommendations were pro- or anti-competitive. In the court's view, the Cartel Act did not apply at all in this case. The court shared ComCo's finding that there was a lack of competition in the investigated market. However, the judges ruled that this lack of competition was not caused by the price recommendations of the pharmaceutical companies but by a combination of regulatory restrictions, including a ban on advertising the above products in public, and a "shame factor" (the fact that "consumers" of drugs for erectile dysfunction are naturally not inclined to "shop around" and compare prices in different pharmacies). ComCo has appealed the decision to the Federal Supreme Court.

Finally, the Federal Administrative Court published two notable interim decisions relating to the LIBOR investigation and the duty of "[p]arties to agreements, undertakings with market power, undertakings concerned in concentrations and affected third parties [to] provide the competition authorities with all the information required for their investigations and produce the necessary documents" pursuant to article 40 of the Cartel Act. The decisions of the Federal Administrative Court became necessary when a foreign brokerage firm[24] and a foreign bank[25] refused to duly respond to information requests of ComCo. The brokerage firm alleged that it could not cooperate with ComCo due to the UK Data Protection Act. The court accepted that a breach of the UK privacy rules could cause irreparable harm. However, ComCo's information request was meant to preserve

23 See Press Release, Federal Administrative Court, "Viagra/Levitra/Cialis: Beschwerden von Pfizer, Bayer und Eli Lilly gutgeheissen" (December 12, 2013), available at http://www.bvger.ch/medien/medienmitteilungen/00704/index.html?download=NHzLpZeg7t,lnp6I0NTU042l2Z6ln1acy-4Zn4Z2qZpnO2Yuq2Z6gpJCDdX18e2ym162epYbg2c_JjKbNoKSn6A--&lang=de.

24 "Bundesverwaltungsgericht" [Federal Administrative Court] B-4416/2013, September 4, 2013, available at http://www.bvger.ch/publiws/download?decisionId=4f8c0cf7-c370-4f90-ae5b-b181cf89843b.

25 "Bundesverwaltungsgericht2 [Federal Administrative Court] B-4363/2013, September 2, 2013, available at http://www.bvger.ch/publiws/download?decisionId=eeecde6b-835f-41e6-a204-0ccb583ca9a1.

important evidence. Furthermore, the brokerage firm failed to establish that UK privacy rules really prohibited it from cooperating with ComCo and that its interest in avoiding a breach of UK privacy rules outweighed the public interest in a fast completion of the investigation. The legal justification for refusing to cooperate with ComCo was different in the second case: A Swiss subsidiary of a foreign bank received various communications and a questionnaire for the attention of its foreign parent company but refused to forward them and to ask its parent company to provide the requested information. The Federal Administrative Court rejected the appeal of the Swiss entity, finding that ComCo's interim decision was materially directed at the foreign parent company. The Swiss appellant only served as a formal recipient and intermediary and therefore was not entitled to lodge the appeal.

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TURKEY

2013 ANTITRUST YEAR IN REVIEW

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LEGISLATIVE DEVELOPMENTS

One of the most significant recent developments in Turkish competition law was the amendments made in Communiqué no.2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("Communiqué on Mergers and Acquisitions"), introduced in February 2013.[1] For example, all concentrations exceeding the thresholds specified below must now be notified to the Turkish Competition Authority ("Authority") under Law No. 4054 on the Protection of Competition ("Law on the Protection of Competition") in order to become legally binding, regardless of whether the relevant transaction affects any markets in Turkey.

Following these amendments, a concentration must be notified when:

(a) the aggregate Turkish turnover of the parties exceeds TRY 100 million (approximately USD 53 million) and the Turkish turnovers of at least two of the parties each exceed TRY 30 million (approximately USD 16 million); or

(b) (i) for acquisitions, the Turkish turnover of the transferred assets or businesses in the acquisition exceeds TRY 30 million (approximately USD 16 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY 500 million (approximately USD 263 million); or (ii) for mergers, the Turkish turnover of any of the parties in the merger exceeds TRY 30 million (approximately USD 16 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY 500 million (approximately USD 263 million).

In April 2013, the Competition Board ("Board") published Communiqué No. 2013/2 on the Procedures and Principles to be Pursued in Pre-Notifications and Notifications to be Filed with the Competition Authority for Acquisitions via Privatization to Become Legally Valid ("Communiqué on Acquisitions via Privatization"),[2] which replaced the former Communiqué No. 1998/4 applicable to acquisitions via privatizations. In line with the former Communiqué, the Communiqué on Acquisitions via Privatization structures privatization transactions[3] in two consecutive stages:

(i) pre-notification to the Authority before the announcement of the privatization tender specifications; and

(ii) a final authorization application to the Authority to be made after the announcement of the tender specifications, whereupon the Board evaluates the transaction under the provisions of Law on the Protection of Competition applicable to mergers and acquisitions. A notable development in the new Communiqué on

1 Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fTebli%C4%9F%2f2012_3.pdf.

2 Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fTebli%C4%9F%2fOzellestirme2013.pdf.

3 Privatization transactions are transactions through which the ownership and/or control of government or state assets, undertakings and activities pass over to private investors. (Definition in Turkish available at http://www.rekabet.gov.tr/default.aspx?nsw=fAb83fRZT4eFrfuL7qtt/g==-H7deC+LxBI8=.

Acquisitions via Privatization concerns pre-notifiability thresholds: in keeping with the Communiqué on Mergers and Acquisitions, the Communiqué on Acquisitions via Privatization sets out turnover thresholds for pre-notifiability only and does not contain any market share thresholds, in contrast to the former communiqué. Furthermore, it also introduces a "change in control" condition whereby share transfers that do not bring about a change in the control of at least one of the undertakings concerned will not be subject to the application of Communiqué on Acquisitions via Privatization.

The motivation of the Authority to enrich the secondary legislation also continued with the issuance of Block Exemption Communiqué No. 2013/3 on Specialization Agreements ("Communiqué on Specialization Agreements")[4] in July 2013, which establishes the conditions for granting block exemptions to specialization agreements between undertakings; in particular unilateral specialization agreements, reciprocal specialization agreements, and joint production agreements. This block exemption is applicable even where the relevant agreements contain exclusive sale or exclusive purchase obligations, or where the parties agree on the joint distribution of the products subject to the specialization agreement, instead of selling the relevant products independently. The Communiqué on Specialization Agreements further extends the exemption to licensing or intellectual property transfer agreements which are directly related to, or necessary for, the functioning of the exempted specialization agreements.

With a continued interest in developments in European Union competition law, the Authority published the following five guidelines, all in line with European Union antitrust and merger control rules:

(i) The Guideline on Cases Considered as Mergers and Acquisitions and the Concept of Control,[5] which discusses a range of significant issues with respect to mergers and acquisitions, such as negative control, conditions of full-functionality and interrelated transactions, and creates a significant improvement by clarifying elements which were discussed in the Board's past precedents.

(ii) The Guideline on the Assessment of Horizontal Mergers and Acquisitions,[6] which provides guidance on principles that the Authority applies to concentrations between undertakings that are actual or potential competitors. The topics discussed in the guideline include the assessment of market shares and concentration levels, possible anti-competitive effects of horizontal mergers, the role of potential entry of new firms as a competitive constraint on the merging parties, efficiency gains, and the failing firm defense.

(iii) The Guideline on the Assessment of Non-Horizontal Mergers and Acquisitions,[7] which discusses a variety of topics regarding concentrations between undertakings that are active in different relevant markets, such as the assessment of market shares and concentration levels, unilateral effects such as input and customer foreclosure, coordinated effects, and conglomerate mergers.

(iv) The Guideline on Horizontal Co-operation Agreements,[8] which categorizes co-operation agreements under six main sections: Information Exchanges, Research and Development Agreements, Production Agreements, Joint Purchasing Agreements,

4 Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fTebli%C4%9F%2fuzlasma2013.pdf.
5 Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKilavuz%2fkontrolk%C4%B1lavuz.pdf.
6 Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKilavuz%2fYatay+Birle%C5%9Fme+ve+Devralmalar%C4%B1n+De%C4%9Ferlendirilmesi+Hakk%C4%B1nda+K%C4%B1lavuz+.pdf.
7 Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKilavuz%2fYatay+Olmayan+Birle%C5%9Fme+ve+Devralamalar%C4%B1n+De%C4%9Ferlendirilmesi+Hakk%C4%B1nda+K%C4%B1lavuz.pdf.
8 Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKilavuz%2fYatayisbirligikilavuz.pdf.

Commercialization Agreements, and Standardization Agreements. The Guideline analyses each type of co-operation under the Law on the Protection of Competition and sets out particular competitive concerns under each section.

(v) The Guideline on Clarification of the Regulation on Active Cooperation for Discovery of Cartels (Leniency Regulation) ("Leniency Guideline"),[9] which sheds light on the scope of the Leniency Regulation[10] by providing clarification on the conditions and the procedural steps involved in leniency applications, as well as exemption from and reduction of fines in leniency cases.

MERGERS

Between January 2013 and October 2013, the Board assessed 181 merger and acquisition transactions,[11] which included 104 acquisition transactions, 57 joint ventures, 19 privatizations and only one merger. The Board cleared 138 of these transactions and found 43 of the transactions not notifiable/out of scope, and did not grant any conditional clearance or block any of the transactions. The most important merger and acquisition decision was Boyner Buyuk Magazacilik A.S.'s ("Boyner") acquisition of Yeni Karamursel Giyim ve Ihtiyac Mad. Tic. San. A.S.,[12] and YKM Yeni Karamursel Giyim ve Ihtiyac Maddeleri Pazarlama A.S. (together "YKM") and Yildız Holding A.S.'s ("Yildiz Holding") acquisition of DiaSA Dia Sabancı Supermarketler Ticaret A.S. ("DiaSA").[13]

In its Boyner-YKM decision published in July 2013, the Board cleared the acquisition of YKM by Boyner, two of the major department stores in Turkey. When determining the relevant market, the Board conducted thorough research on consumer preferences, online sales, sales at shopping malls and specialized stores. The research showed that specialized stores, and even online stores at times are substitutable on the demand side to Boyner and YKM, therefore the scope of relevant market could not be limited to department stores. The relevant market was determined as "department stores and specialized stores appealing to middle and high-income consumers" and the acquisition was cleared by the Board.

In June 2013, Yildız Holding, owner of the renowned brand of food products, Ülker, acquired DiaSa supermarkets after acquiring the Sok supermarket chain in 2011. However, before obtaining the clearance, Yildiz Holding made certain commitments in order to avoid a significant lessening of competition in the organized retail sector.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In March 2013, the Authority imposed the highest turnover-based monetary fines in its history against 12 banks.[14] Finding that the defendants engaged in collusion to harmonize their interest rates and the fees of credit, deposit and credit card services (an infringement of Article 4 of Law on the Protection of Compe-

9 Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fKilavuz%2fpismanlikkilavuz.pdf.

10 Regulation on Active Cooperation for Discovery of Cartels. Available at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fY%25c3%25b6netmelik%2fyonetmelik8.pdf.

11 Competition Board's Decision Statistics available only in Turkish at http://www.rekabet.gov.tr/default.aspx?nsw=HC4YIzN3I5EDzlFEux8Wdg==-H7deC+LxBI8=&nm=128.

12 Competition Board's Boyner/YKM Decision dated August 9, 2012 and numbered 12-41/1162-378. Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f12-41-1162-378.pdf.

13 Competition Board's Yildiz Holding/DiaSa Decision dated June 26, 2013 and numbered 13-40/513-223. Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-40-513-223.pdf.

14 Competition Board's Banks Decision dated March 8, 2013 and numbered 13-13/198-100. Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f13-13-198-100.pdf.

tition), the Board imposed a total fine of approximately TRY 1.1 billion (approximately USD 660 million) on all 12 of the investigated banks (including three state-owned banks, private Turkish banks, and several international banks) operating in Turkey.

In its assessment, the Board refrained from applying the normal levels of fine applicable to cartel infringements (between 2% and 4% of their annual turnover) set under the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ("Regulation on Fines"),[15] having recognized that the infringement in this case did not constitute a cartel. In the Board's decision, three of the banks were fined 1.5 %, five banks were fined 1%, three banks were fined 0.6% and one bank was fined 0.3%, of annual turnover.

Another important decision of the Board was published in August 2013 and concerned the steel straps sector.[16] The Board initiated the investigation to examine whether there was an agreement on sales prices of steel straps between MPS Metal ("MPS") and BEKAP Metal ("BEKAP"), which both manufactured steel straps used in protective packaging systems. The Board found that MPS and BEKAP colluded in steel strap procurement tenders by their customers, determined the pricing and sales conditions to be applied to their customers, and exchanged information on these matters. Being a cartel, the Board imposed a fine of 2% of annual turnover, but granted a 50% fine reduction to MPS under the Leniency Regulation as MPS had applied for leniency and qualified for a fine reduction (as opposed to full immunity).

ABUSES OF A DOMINANT POSITION

Recent practices of the Authority show that it is becoming more engaged with the pricing behavior of dominant undertakings. This is illustrated by the increasing number of investigations initiated by the Board with respect to different forms of abuse of dominance.

One of the recent investigations was initiated against U.N. Ro-Ro Isletmeleri A.S. ("U.N. Ro-Ro") for its abusive exclusionary conduct in the market for roll-on roll-off transportation between Turkey and Europe.[17] At the end of the investigation, the Board concluded that: (i) U.N. Ro-Ro was in a dominant position in the market for maritime transportation via ro-ro ships between Turkey and Europe; and (ii) U.N. Ro-Ro caused the exclusion of a competitor through predatory pricing and also impeded the commercial activities of its rival through other means, and therefore had abused its dominant position. The Board's U.N. Ro-Ro decision, published in November 2013, is a milestone in the Board's history, as the Board analyzed the conditions of abusive exclusionary conduct very thoroughly for the first time.[18]

Another recent decision of the Board regarding the abuse of dominant position was rendered after

15 Available at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fY%25c3%25b6netmelik%2fyonetmelik9.pdf.

16 Competition Board's Steel Strap Decision dated October 30, 2012 and numbered 12-52/1479-508. Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f12-52-1479-508.pdf.

17 Roll-on roll-off ships are vessels designed to carry wheeled cargo, such as automobiles, trucks, semi-trailer trucks, trailers, and railroad cars, which are driven on and off the ship on their own wheels.

18 Competition Board's UND Deniz Decision dated October 1, 2012 and numbered 12-47/1413-474. Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f12-47-1413-474.pdf.

an investigation against Kale Kilit ve Kalip Sanayi A.S. ("Kale Kilit"), a participant in the lock systems sector.[19] The subject matter of the investigation was whether Kale Kilit abused a dominant position by imposing single branding obligations on its dealers and distributors, and had engaged in abusive exclusionary conduct by predatory pricing through its rebate systems and other campaigns. As the first step in its assessment of predatory pricing, the Board did not make an evaluation of whether Kale Kilit was in a dominant position but put the emphasis primarily on whether Kale Kilit made sales at a loss. As a result of this evaluation, since the Board found that the total income of the Kale Kilit in all the relevant markets was higher than the total cost of Kale Kilit during the campaigns, and since the Board did not find any evidence of Kale Kilit's exclusionary intent, no sanction was imposed.

COURT DECISIONS

The decisions of the Authority qualify as administrative acts and are subject to judicial review before the administrative courts under the Turkish Administrative Procedural Law. The judicial review is comprised of both procedural and substantive review. Decisions by the Ankara administrative courts are, in turn, subject to appeal before the High State Court.[20]

One of the recent decisions of the High State Council on March 26, 2013 was the annulment of the Board's decision to grant clearance to the acquisition of the brand "Tekel Birası" from Mey Alkollu Ickiler San. ve Tic. A.Ş. ("Mey Icki") by Anadolu Efes Biracılık ve Malt San. A.Ş ("Efes Pilsen"), which both operated in the beer industry.[21] Bimpas Bira ve Mesrubat Pazarlama A.S. ("Tuborg"), the biggest competitor of Efes Pilsen, had applied for the annulment.

The 13th Circuit of the High State Council found that, given the high market share of Efes Pilsen, there was no doubt that Efes Pilsen was in a dominant position in the market and the transaction would strengthen this dominant position due to the brand awareness of Tekel Birası in Turkey. The 13th Circuit also analyzed whether the transaction would significantly lessen effective competition in the market, taking into consideration the particularities of the beer market in Turkey; i.e. restrictions on alcohol advertising and issues regarding alcohol distribution to final sales points. Concluding that the brand awareness becomes even more crucial due to the said constraints in the Turkish market, and the brand awareness of Tekel Birası brought together with Efes Pilsen's dominant position would significantly lessen the effective competition in the market, the 13th Circuit set aside the decision of the Board.

Another important decision of the High State Council in 2013 was the decision of the 13th Circuit of High State Council on February 2, 2013 on the Market of Medical Consumables and Laboratory Instruments and Services.[22] The decision of the Board subject to the administrative review related to collusive bid rigging in tenders of hospitals and was approved by the 13th Circuit. The High State Council determined that

19 Competition Board's Kale Kilit Decision dated December 6, 2012 and numbered 12-62/1633-598. Available only in Turkish at http://www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fGerek%C3%A7eli+Kurul+Karar%C4%B1%2f12-62-1633-598.pdf.

20 Appeals of the Turkish Competition Authority Decisions used to be reviewed by High State Council directly until the change on Law No. 4054 in July 5, 2012.

21 13th Circuit of the High State Council Decision dated March 26, 2013 and numbered 2013/848.

22 13th Circuit of the High State Council Decision dated February 1, 2013 and numbered 2013/217.

even though the action at hand breached both administrative and criminal legislations, as the investigations were launched against two separate entities, i.e., the criminal investigation was launched against natural persons (the executives of the undertakings engaged in the bid rigging) and the administrative investigation was launched against the undertakings engaged, the Board's decision was upheld by the High State Council. The High State Council further held that (i) the Board was not required to suspend its proceedings until the ruling of the criminal courts; and (ii) the rule of ne bis in idem (i.e., double jeopardy) was not infringed.

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UKRAINE

2013 ANTITRUST YEAR IN REVIEW

By Timur Bondaryev and Maryna Alekseyeva of Arzinger

LEGISLATIVE DEVELOPMENTS

Legislative initiatives in 2013 focused on harmonizing Ukrainian antitrust regulations with international best practices in this area; particularly focusing on procedural initiatives to improve the Antimonopoly Committee of Ukraine ("AMCU")'s efficiency.

In October 2013, representatives of AMCU attended the European Competition Day in Vilnius[1] where the European antitrust authorities shared their experience in the enforcement of antitrust regulations. Given the necessity of transnational enforcement of antitrust regulations, the AMCU intends to increase the effectiveness of its available legal instruments, as well as ensure sufficient resources to investigate the antitrust violations.

One of the main initiatives is the amendment of Article 6 of the Law On Protection of Economic Competition, adopted in 2001 ("Law").[2] This Law is the principal source of antitrust regulation in Ukraine. Article 6 of the current version of the Law sets out the (non-exhaustive) list of anticompetitive practices. Part 5 of the article provides for the leniency program application to the "first – comers" who confess their involvement in restricted practices. However, the Law does not provide any incentive for subsequent parties to come forward. The proposed amendments[3] allow a measure of leniency for later parties who voluntarily confess to the AMCU their involvement in a cartel and provide essential information that may assist in the investigation.

Another proposed amendment relates to the enforcement of the antitrust laws. The Draft Law[4] provides for more stringent regulation as to how evidence can be collected and handled.

In October 2013, the Cabinet of Ministers of Ukraine approved and submitted to the Parliament[5] the Draft law introducing the Program on Competition Development in Ukraine for 2014 – 2024.[6] This Program outlines the country's competition strategy for the next 10 years. The most notable are the increase of merger control notification thresholds, adoption of a methodology for calculating fines, as well as amendments in liability-related provisions, in particular the introduction of criminal liability for some types of antitrust violations (currently antitrust violations are not subject to criminal charges). The Draft law is being reviewed by the Parliament.

1 See http://www.amc.gov.ua/amku/control/main/uk/publish/article/100197.

2 [On Protection of Economic Competition], (Law No. 2210-III, issued January 11, 2001, effective March 3, 2002,) (Ukraine), art. 64, available at http://zakon4.rada.gov.ua/laws/show/2210-14.

3 [On amendment of Art. 6 of the Law On Protection of Economic Competition re softening of liability], (Antimonopoly Committee of Ukraine, Draft Law, N/n, published June 19, 2013), available at http://www.amc.gov.ua/amku/control/main/uk/publish/article/97690.

4 On amendment of the Law On Protection of Economic Competition re perpetuation of evidence within the AMCU investigations], (No. 2955, Draft Law, issued April 30, 2013, registered in the Supreme Council of Ukraine May 7, 2013), available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=46859.

5 See http://www.amc.gov.ua/amku/control/main/uk/publish/article/100258;jsessionid=744FF7516925D2FB834D37DC01649B41.app1.

6 [On the National Program for Development of Competition in Ukraine for 2014 - 2024], (No. 3406, Draft Law, issued June 19, 2013, registered in the Supreme Council of Ukraine October 10, 2013), available at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=48634.

UKRAINE

MERGERS

In 2013 the AMCU did not attempt to block any transactions. However, it pursued several foreign-to-foreign transactions, and imposed significant sanctions. Ukraine has extremely low domestic notification thresholds (which have remained unchanged since 2001). The thresholds to be met for a transaction to be required to be preliminary cleared with the AMCU are EUR 12 million in global sales or assets, and EUR 1 million for each of at least two merging parties, and EUR 1 million in Ukraine for at least one merging party A number of global transactions have skipped filings in Ukraine, since there were no direct Ukrainian sales or assets and due to the infamously burdensome local filing proceedings. The AMCU has pursued some of these transactions and imposed significant sanctions (the details of which have not been published). In 2013 the AMCU proactively identified Ukrainian elements of foreign-to-foreign transactions that had not been notified and imposed fines on the domestic entities related to the parties to the completed transactions. Based on information available, these transactions were cleared by the authority post-factum after the parties provided respective information for analysis. Further details of the transactions have not been made public.

In fact there is no requirement or procedure available to notify a transaction after its closing, nor is there an official procedure for "legalizing" transactions which have closed in breach of the antitrust laws in Ukraine. As a rule the infringers apply to the AMCU for the merger clearance and confess a violation and the AMCU initiates a case that results in a fine and a merger clearance being granted subject to provision of all relevant data by the parties.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In October, the AMCU fined two Hyundai dealers UAH 77 million (approximately USD 8 million) in total between them for bid rigging for a truck tender held by the state enterprise Ukrpochta.[7] The AMCU relied on evidence such as identical typographical mistakes in the tender bids, and identical mistakes and misunderstandings of the tender conditions. The AMCU claimed that the dealership agreement concluded between the companies facilitated coordination of their actions.[8] The above decision is being appealed to the court of first instance.

In October, KLO Karta and Avtorukh, the Ukraine's major refueling stations and transportation service providers which operate all over the country, were fined UAH 210 million (approximately USD 21.5 million) for bid rigging in respect of the tender issued by the public utilities engaged in green space maintenance.[9] This is a record-breaking fine for the fuel sector. The AMCU emphasized that the violations were over a period of time – between 2010 and 2012. Neither company has admitted liability.[10] The decision was appealed to commercial court of Kyiv city, however the court ruled in favor of the AMCU.

The AMCU is currently conducting its most ambitious investigation to date – an alleged cartel involving the 18 major food retailers (including both domestic and international retailers). The likely fines are estimated to be approximately UAH 20 billion (approximately USD 2 billion).[11]

ABUSES OF A DOMINANT POSITION

The AMCU has mainly focused on markets consid-

7 See http://www.amc.gov.ua/amku/control/main/uk/publish/article/99997;jsessionid=AE3006E002154CEA0DD24C501B7D101B.vapp13:1.

8 See Dmitriy Ulyanitskiy, "The AMCU fine imposed on Hyundai distributors may lead to irregularities in this brand vehicles supplies to Ukraine", "Capital" Business Newsletter, No. 117, October 4, 2013, http://www.capital.ua/ru/publication/6637-shtraf-antimonopolnogo-komiteta-na-prodavtsov-avtomobiley-hyundai-mozhet-privesti-k-pereboyam-s-postavkami-tekhniki-etogo-brenda-v-ukrainu#ixzz2qwskEMxx.

9 See http://www.amc.gov.ua/amku/control/main/uk/publish/article/100122.

10 See Vasiliy Myshkin and Iryna Chukhleb, "The AMCU has launched large-scale campaign on inspection of oil companies", October 9, 2013, http://business.vesti.ua/20359-antimonopolwiki-razvernuli-mownuju-kampaniju-po-proverke-neftjanyh-kompanij.

11 Id. note 10.

ered to be natural monopolies due to their specific regulatory-based functioning, such as energy and water utilities and public transportation. In late 2012 the AMCU announced its intention to thoroughly monitor the socially sensitive markets which include markets of connection of construction objects, including housing objects as well as public transportation system to utilities (gas, energy, water, etc.).[12] The AMCU's investigations resulted in numerous fines for monopolists, the largest fines being issued to the regional energy suppliers PJSC Mykolaivoblenergo, PJSC Odessaoblenergo, and LLC Lugansk Energy Union, which were fined UAH 100 million (approximately USD 10 million) each.

Regional subdivisions of the State Railway were fined UAH 50 million (approximately USD 5 million) each. The AMCU found that the Lviv, Odessa, Prydniprovska, Donetska and Pivdenna regional railways used their market power to offer overpriced services to passengers. The AMCU noted that the infringements had lasted for five years and that the railways had failed to comply with its recommendations on revision of the tariffs for the stated services provided to them earlier in 2012.[13] The fines of two of the subdivisions were reduced by the AMCU several times for reasons that were not officially announced. The railways did not agree with the AMCU's findings and have appealed to the courts where the cases are being reviewed at the very first stage – the initiation.

COURT DECISIONS

Ukrainian courts tend to support the position of the AMCU. However the number of AMCU decisions being challenged in courts increased significantly in 2013 in comparison to previous years.

In February, the Kyiv Commercial Court of Appeal ruled in the case involving the Association Meblirderevprom and its members who were fined for bid rigging in the procurement of the raw wood.[14] The case attracted great attention due to the unprecedented amount of the collective fine – UAH 419 million (approximately USD 43 million). Some of the members, namely Ukrainian subsidiaries of the Swiss Kronо Group, Swiss group Kronospan and Swiss holding Sorbes, appealed the AMCU's decision. Although its appeal at first instance was unsuccessful, the Court of Appeal (while supporting the conclusions of the AMCU with regard to the existence of the infringement), focused on the lack of proportionality of the fine given the fact that the defendants had no prior infringements and had cooperated with the AMCU during the investigation.[15] Although the Court of Appeal was not able to decrease the amount of fine, it asked the AMCU to revise the fines. The AMCU did not appeal to the higher court and reduced the fines for the other defendants as well. There is no public information with regard to the final amount of fines paid.

As regards procedural matters of competition-related disputes review there has been a continuing display of the jurisdiction collision present in Ukrainian laws. In particular, Art. 60 of the Law stipulates that AMCU decisions can be challenged in commercial courts.[16] However, there is an established practice of reviewing

12 See http://www.amc.gov.ua/amku/control/main/uk/publish/article/93238;jsessionid=725E446F7EA25BAC39C6C6A36DDA2EFE.
13 See http://www.amc.gov.ua/amku/control/main/uk/publish/article/97915.
14 See http://www.amc.gov.ua/amku/control/main/uk/publish/article/93163;jsessionid=70A67A6C65FF85DC3386129524D743CB.
15 See "Swisspan Limited vs. The Antimonopoly Committee of Ukraine", Case: No. 5011-72/11785-2012, Judgment, (February 21, 2013) available at http://www.reyestr.court.gov.ua/Review/29490809.
16 Id. note 2.

competition law cases by administrative courts based on the fact that the state authority is the party to such disputes. There is, however, a material difference for the parties in their choice of jurisdiction. Thus, the Law provides that a review of the AMCU's decision in court will stay the decision until the outcome of the appeal. However, as the Law limits this provision to commercial proceedings, in practice this means that cases under administrative appeal do not stay the AMCU's decision and orders.

Ukrainian court practice is developing and the relevant regulations are far from thorough. In most cases the courts are limited to examining whether the AMCU has correctly applied the law and are not entitled to review essential factors influencing the decision such as the relevant market or the AMCU's assessment of the effect on competition. With this the rare cases where the courts rule in favor of business have become more substantiated and interesting in terms of the law enforcement.

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UNITED KINGDOM

2013 ANTITRUST YEAR IN REVIEW

By Matthew Hall of McGuireWoods LLP

LEGISLATIVE DEVELOPMENTS

On April 25, 2013, the UK Enterprise and Regulatory Reform Act 2013 passed into law.[1] The Act makes changes to a number of areas of UK law, including the competition enforcement regime. The most high profile competition law change is the establishment of the new Competition and Markets Authority (the "CMA"). The CMA will bring together the competition functions of the Office of Fair Trading (the "OFT") and the Competition Commission (the "CC"), which will both be abolished. The Act also makes various procedural changes to the enforcement of competition law concerning mergers, market investigations and the "cartel offence" (under which there is personal criminal liability in the UK for involvement in certain types of anti-competitive behavior, particularly cartels).

In April 2013, the Financial Conduct Authority (the "FCA") started operations. The FCA regulates the financial services industry, its aim being to protect consumers, ensure the industry remains stable and promote healthy competition between financial services providers. The Financial Services (Banking Reform) Act 2013, enacted in December 2013, gave the FCA competition powers, which it will operate concurrently with the CMA, probably from 2015.[2]

On June 12, 2013, the UK Government published its proposed legislative reforms which are aimed at encouraging private competition law actions.[3] The main proposals include allowing the Competition Appeal Tribunal (the "CAT") to hear stand-alone as well as follow-on cases, giving the CAT the power to grant injunctions, and creating a fast track for simpler cases in the CAT (this latter being aimed at empowering SMEs to challenge anti-competitive behavior that is restricting their ability to grow). The proposed reforms are subject to Parliamentary timing and approval.

On July 8, 2013, the OFT published revised leniency guidance.[4] To qualify for leniency, applicants must admit their involvement in unlawful cartel activity, cooperate fully with the OFT investigation and stop their involvement in the cartel from the time they come forward.

MERGERS

In 2013, the OFT took 73 merger decisions, including one in which the transaction was cleared subject to remedies. It referred nine cases to the CC for a detailed second stage review. The CC itself completed 11 merger inquiries during 2013.

1 Enterprise and Regulatory Reform Act 2013, available at http://www.legislation.gov.uk/ukpga/2013/24/contents/enacted.

2 See the FCA's website http://www.fca.org.uk/.

3 Draft Consumer Rights Bill, available at https://www.gov.uk/government/publications/draft-consumer-rights-bill.

4 OFT document OFT1495, July 2013, "Applications for leniency and no-action in cartel cases; OFT's detailed guidance on the principles and process", available at http://www.oft.gov.uk/shared_oft/reports/comp_policy/OFT1495.pdf.

In the most high profile case, on August 28, 2013, the CC required airline Ryanair to reduce its 29.8 per cent stake in competitor Aer Lingus down to 5 per cent.[5] This was accompanied by obligations on Ryanair not to seek or accept board representation or acquire further shares. The rationale for this decision was that Aer Lingus' commercial policy and strategy was likely to be affected by Ryanair's minority shareholding. Ryanair has appealed the CC's decision.

The CC announced that it had decided to prohibit the anticipated merger of two hospitals, finding that the proposed merger would give rise to a substantial lessening of competition in relation to the provision of a range of hospital services.[6]

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On March 27, 2013, the OFT issued a decision finding that Mercedes-Benz and five of its independent commercial vehicle dealers in the UK had infringed competition law and fined them a total of GBP 2.8 million (approximately USD 4.6 million).[7] The dealers involved were mainly active in areas within the North of England and parts of Wales and Scotland. The nature of the infringements varied but all contained at least some element of market sharing, price coordination or exchange of commercially sensitive information. One of the dealers avoided a fine, having been the first company to come forward after the investigation commenced to provide evidence of collusion in return for immunity from penalty under the OFT's leniency policy. Three of the other dealers and Mercedes-Benz settled with the OFT by admitting the infringement in return for a reduced fine. The remaining dealer did not settle.

On August 5, 2013, the OFT issued a decision finding that Roma Medical Aids Limited, a manufacturer of mobility scooters, and some of its retailers, breached UK competition law.[8] The OFT found that Roma had entered into arrangements with seven UK-wide retailers which prevented them from selling Roma-branded mobility scooters online and from advertising their prices online. The OFT found that these practices limited consumers' choice and obstructed their ability to compare prices and get value for money. No fines were imposed due to the small size of each of the companies involved.

On August 29, 2013, the OFT announced that Amazon had decided to end its price parity policy, which restricted its Amazon UK Marketplace sellers from offering lower prices on other online sales channels.[9] This applies across the EU since August 30, 2013. The OFT was concerned that the policy was potentially anti-competitive, since it may raise online platform fees, curtail the entry of potential entrants, and directly affect the prices which sellers set on platforms (including their own websites), resulting in higher prices to consumers. The OFT formally closed the case in November 2013 and specifically stated that it had not reached a decision as to whether there had been an infringement of EU or UK competition law.[10]

On December 6, 2013, the OFT issued a decision fining three companies for engaging in collusive tendering concerning the supply and installation of access control and alarm systems to retirement properties in

5 Competition Commission press release, August 28, 2013, "CC requires Ryanair to sell shareholding in Aer Lingus down to 5 per cent", available at http://www.competition-commission.org.uk/media-centre/latest-news/2013/Aug/cc-requires-ryanair-to-sell-shareholding.

6 Competition Commission press release, October 17, 2013, "CC makes final decision on hospitals merger", available at http://www.competition-commission.org.uk/media-centre/latest-news/2013/Oct/cc-makes-final-decision-on-hospitals-merger

7 Office of Fair Trading press release 30/13, March 27, 2013, "OFT issues five infringement decisions in the distribution of Mercedes-Benz commercial vehicles investigation", available at http://www.oft.gov.uk/news-and-updates/press/2013/30-13.

8 OFT press release 57/13, August 5, 2013, "OFT issues decision in mobility scooters case", available at http://www.oft.gov.uk/news-and-updates/press/2013/57-13.

9 Office of Fair Trading press release 60/13, August 29, 2013, "OFT welcomes Amazon's decision to end price parity policy", available at http://www.oft.gov.uk/news-and-updates/press/2013/60-13.

10 Office of Fair Trading case summary, "Investigation into suspected anti-competitive arrangements by Amazon relating to online retail", available at http://www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/online-retail/.

the UK.[11] A fourth party escaped fines since it had applied for leniency. The combined value of the at least 65 tenders involved amounted to only around GBP 1.4 million (approximately USD 2.3 million). The total fines amounted to only around GBP 50,000 (approximately USD 82,000). The OFT found that when bidding for the contracts, the leniency applicant had shared its proposal with one of the other three with the aim that they would submit higher bids, thereby enabling the leniency applicant to win the contracts.

On December 12, 2013, the OFT announced that a prescription medicine supplier, Hamsard, had agreed to pay a fine of GBP 388,000 (approximately USD 640,000) for entering into a market sharing agreement.[12] The cartel only ran between May and November 2011. The other party, Celesio, escaped a fine entirely since it was the whistleblower (first in). Hamsard's fine was reduced since it also used the OFT's leniency program (second in) and cooperated with the OFT under its settlement procedure, including by agreeing to pay the fine. This was a bald market sharing agreement; the companies agreed that Tomms Pharmacy (owned by Hamsard) would not supply prescription medicines to existing Lloyds Pharmacy (owned by Celesio) care home customers in the UK. In return, for at least some of the time, Lloyds also agreed not to supply prescription medicines to existing Tomms care home customers.

On December 20, 2013, the OFT consulted on commitments put forward by two online travel agents ("OTA"s) and InterContinental Hotels Group, which were designed to address the OFT's competition concerns in relation to the online offering of room-only hotel accommodation bookings by OTAs.[13]

There were developments in the area of market investigations, which concern entire business sectors as opposed to the behavior of individual companies. The most significant development was the CC's publication of its final report on statutory audit services to large companies in the UK.[14] The CC confirmed that competition is restricted in the audit market due to factors which inhibit companies from switching auditors and by the incentives that auditors have to focus on satisfying management rather than shareholder needs. The CC set out a package of remedies in response to these findings.

ABUSES OF A DOMINANT POSITION

On January 17, 2013, the UK water regulator Ofwat confirmed that it had accepted binding commitments from Severn Trent plc.[15] Severn Trent plc agreed to divest Severn Trent Laboratories Limited, which provided water analysis services to Severn Trent Water Limited and other companies, so as to address concerns raised by Ofwat following a complaint. The complainant, ALcontrol UK Ltd, had alleged that Severn Trent Laboratories had been able to win contracts by pricing below cost, which was enabled by the structural links between Severn Trent Water Limited and Severn Trent Laboratories Limited.

11 OFT press release 81/13, December 6, 2013, "Retirement home security suppliers breached competition law, OFT decides", available at http://www.oft.gov.uk/news-and-updates/press/2013/81-13.

12 Office of Fair Trading press release 82/13, December 12, 2013, "Pharmaceutical group agrees to pay over £380k in care home medicine cartel", available at http://www.oft.gov.uk/news-and-updates/press/2013/82-13.

13 Office of Fair Trading press release 86/13, December 20, 2013, "OFT consults on amendments to proposed hotel online booking commitments", available at http://www.oft.gov.uk/news-and-updates/press/2013/86-13.

14 Competition Commission press release, October 15, 2013, "CC finalizes measures to open up audit market", available at http://www.competition-commission.org.uk/media-centre/latest-news/2013/Oct/cc-finalises-measures-to-open-up-audit-market.

15 Ofwat press release IB 02/13, January 17, 2013, "Ofwat accepts commitments from Severn Trent plc", available at http://www.ofwat.gov.uk/mediacentre/ibulletins/prs_ib0213alcontrol.

UNITED KINGDOM

COURT DECISIONS

On March 28, 2013, the CAT awarded damages in a private claim relating to an abuse of dominance.[16] The claim was based on the finding, also made by the CAT, that water company Dŵr Cymru had infringed the UK prohibition on abuse of dominance (it was therefore a "follow-on" claim).[17] This earlier finding of the CAT was that the price at which Dŵr Cymru was prepared to offer Albion Water a common carriage service to carry water through its pipes (the "First Access Price") amounted to an abuse by Dŵr Cymru of its dominant position in that it imposed on Albion a margin squeeze and was both excessive and unfair in itself. Albion's claim comprised three heads: if Dŵr Cymru had offered a lawful price for common carriage, rather than the abusive First Access Price, Albion would have been able to supply its customer, Shotton Paper, on the basis of common carriage, which would have been more profitable than the existing arrangements; as a result of the abuses, Albion lost the chance to win a potentially lucrative contract to supply another business, Corus Shotton, and it was, therefore, deprived of further profits; and a claim for exemplary damages. The CAT awarded Albion damages in the amount of GBP 1,694,343.50 (approximately USD 2.8 million) in respect of the first claim and GBP 160,149.66 (approximately USD 260,000) in respect of the second claim, together with interest. The claim for exemplary damages was dismissed.

In November 2013, the English High Court granted interim injunctions in two cases concerning an alleged refusal to supply by Barclays Bank plc.[18]

16 Competition Appeal Tribunal, Albion Water Limited v Dŵr Cymru Cyfyngedig (March 28, 2013), available at http://www.catribunal.org.uk/238-7977/Judgment.html.

17 Competition Appeal Tribunal, Albion Water Limited & Albion Water Group Limited v Water Services Regulation Authority (Dŵr Cymru/Shotton Paper) (April 9, 2009), available at http://www.catribunal.org.uk/237-610/1046-2-4-04-Albion-Water-Limited–Albion-Water-Group-Limited.html.

18 Dahabshiil Transfer Services Ltd v Barclays Bank plc and Harada Ltd and another v Barclays Bank plc [2013] EWHC 3379 (Ch), available at http://www.bailii.org/ew/cases/EWHC/Ch/2013/3379.html.

UNITED STATES

2013 ANTITRUST YEAR IN REVIEW

By Alicia J. Batts, John R. Ingrassia
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In 2013, U.S. antitrust enforcers continued under new leadership to pursue enforcement in all areas and had several noteworthy matters. Transaction flow and premerger notification filings were down slightly for fiscal year 2013, coming in at around 1,350 versus just over 1,400 for fiscal year 2012.[1] Notwithstanding, premerger compliance continues to be an area of interest for enforcement.

Our outlook is that 2014 will see new policy initiatives at the agencies -likely related to healthcare, energy or intellectual property- and additional coordination with agencies worldwide on merger and cartel enforcement.

LEGISLATIVE DEVELOPMENTS

The Federal Trade Commission (the "FTC") codified the so-called "pull and refile," a practice that allows an HSR notification to be withdrawn at the end of the statutory waiting period and refiled without having to pay a new filing fee. "Pulling and refilling" has been informally available for decades, and is typically used in transactions that do not have significant antitrust issues but require more than the statutory 30-day review period to give the reviewing agency a small amount of additional information needed to close the investigation. In transactions where the parties are working actively with an agency during the initial waiting period to satisfy substantive concerns, the approaching end of the waiting period can force the issuance of a Second Request if the agency is not otherwise prepared to close the investigation. The pull and refiling procedure begins a new HSR waiting period and allows the agency an additional 30 days to review the transaction.

Under the new rule, the procedure may be used only one time, and only under the following circumstances: (i) the proposed acquisition does not change in any material way; (ii) the resubmitted notification is recertified, and relevant parts of the submission are updated; and (iii) the resubmitted notification is refiled within two business days of the withdrawal.[2] This ideally avoids a more draconian Second Request investigation, which can last four to six months or sometimes more, and thus can streamline the review process dramatically for certain transactions.

MERGERS

In what was likely the largest merger news of the year, American Airlines' parent corporation, AMR Corp., merged with US Airways Group Inc. The merger created the world's largest airline by traffic, American Airlines Group Inc., which flies over 6,700 flights

1 See Hart-Scott-Rodino "Annual Report Fiscal Year 2012", available at http://www.ftc.gov/sites/default/files/documents/reports_annual/35th-report-fy2012/130430hsrreport 0.pdf
2 16 C.F.R. § 803.12.

daily to over 330 destinations in 50 countries.[3] Full integration of the companies is expected to take at least two years.[4]

The two carriers reached an agreement in February 2013 after months of talks.[5] However, the deal did not close until December, in part because the merger was contested on multiple fronts, including via a customer lawsuit and a separate challenge by the DOJ, six state attorneys general and the District of Columbia. The customer lawsuit was brought in U.S. Bankruptcy Court for the Southern District of New York (AMR Corp. entered bankruptcy in 2011) and alleged that the merger would crowd flights and increase prices. However, the bankruptcy judge permitted the merger to proceed, finding that the customer plaintiffs did not prove irreparable harm or demonstrate a likelihood of success on the merits.[6] The district court rejected the customers' appeal of the bankruptcy court's decision, thereby thwarting the customers' effort to block the merger.[7]

The DOJ, six state attorneys general, and the District of Columbia dropped their challenge, which was filed in August, after US Airways Group Inc. and AMR Corp. agreed to yield to seven low-cost carriers departure gates and 138 takeoff and landing slots.[8] The government enforcers had alleged that the combination would result in increased ticket fares and ancillary fees, and would make it easier for the remaining carriers to coordinate fee increases. The antitrusters were particularly concerned that the combined company would control 69% of the takeoff and landing slots at Reagan National Airport serving Washington, DC and would also have a monopoly on 63% of that airport's nonstop routes.

Another marquee merger caught the DOJ's attention when, in 2012, Anheuser-Busch ("ABI") agreed to purchase for $20.1 billion the share of Grupo Modelo ("Modelo") that it did not already own.[9] Both ABI and Modelo are non-U.S. based. ABI is headquartered in Leuven, Belgium and owns 200 different beer brands, including Budweiser, Busch, and Michelob. It has 12 breweries in the United States, and 39% share of the U.S. beer market.[10] Modelo is headquartered in Mexico City, Mexico and is the third largest beer brewer in the United States, with 7% market share. Modelo brews many well-known beers, including Corona Extra, Corona Light, Modelo Especial, Negra Modelo, Modelo Light, Pacifico and Victoria.[11]

The DOJ contested the merger in January 2013 and, three months later, entered into a settlement with the parties that permitted them to consummate the deal. The DOJ argued that the merger as proposed would reduce competition in the U.S. market (specifically in 26 metropolitan areas), decrease innovation in the beer market, and increase prices for consumers.[12] Under the settlement, ABI and Modelo divested Mod-

3 See AMR-US "Airways Merger Takes Effect", Law 360 (December 9, 2013), available at http://www.law360.com/articles/494189/amr-us-airways-merger-takes-effect.

4 See id.

5 Jad Mouawad, "American and US Airways Announce Deal for $11 Billion Merger", N.Y. Times, February 13, 2013, available at http://dealbook.nytimes.com/2013/02/13/american-and-us-airways-said-to-vote-for-merger/?_r=0.

6 In re "AMR Corp., et al., No. 13-01392-shl at 11, 15, 19" (Bankr. S.D.N.Y. November 27, 2013).

7 "Fjord v. AMR Corp. et al., No. 13-ap-01392" (Bankr. S.D.N.Y. December 6, 2013); See also "Customers Can't Block AMR-US Airways Merger", Law 360 (December 6, 2013), available at http://www.law360.com/articles/494068/customers-can-t-block-amr-us-airways-merger.

8 See Press Release, U.S. Dep't of Justice, "Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge" (November 13, 2013), available at http://www.justice.gov/opa/pr/2013/November/13-at-1202.html; See also US Airways,"AMR Settle DOJ Merger Suit with Divestitures", Law360 (November 12, 2013), available at http://www.law360.com/articles/487923/us-airways-amr-settle-doj-merger-suit-with-divestitures.

9 Michael J. De La Merced and Mark Scott, "Anheuser-Busch InBev Buys Rest of Grupo Modelo, Maker of Corona Beer", N.Y. Times, June 29, 2012, available at http://dealbook.nytimes.com/2012/06/29/the-beer-wars-heat-up-with-modelo-deal/.

10 See Press Release, U.S. Dep't of Justice, "Justice Department Reaches Settlement with Anheuser-Busch InBev and Grupo Modelo in Beer Case" (April 19, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/296018.htm.

11 See id.

12 See id.

elo's entire U.S. business to Constellation Brands Inc., headquartered in Victor, New York. The divestiture required Modelo to forfeit its newest, most technologically advanced brewery, Piedras Negras brewery, with the understanding that Constellation would expand it to meet current and future demand for Modelo brands in the U.S.[13] The settlement also required ABI and Modelo to divest perpetual and exclusive licenses of: the Modelo brand beers for distribution and sale in the United States; Modelo's current interest in Crown; and "other assets, rights and interests necessary to ensure that Constellation is able to compete in the U.S. beer market using the Modelo brand beers, independent of a relationship to ABI and Modelo."[14] The settlement also requires that during the expansion period ABI enter into supply and transition agreements with Constellation to ensure that Constellation becomes a fully independent competitor as soon as feasible.[15]

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The Antitrust Division's ongoing auto parts investigation yielded additional guilty pleas by nine companies and two executives and resulted in more than $740 million in new criminal fines.[16] In total, the DOJ has charged 20 companies and 21 executives in the auto parts investigation. All 20 companies have pled guilty or agreed to plead guilty and have also agreed to pay over $1.6 billion in criminal fines. 17 executives have been sentenced to jail time.[17]

In other cartel news, the Antitrust Division altered its approach to publicly naming uncharged third-party wrongdoers in corporate immunity deals in cartel cases. As of April, the DOJ: (i) no longer carves out of non-prosecution protection provisions employees for reasons unrelated to culpability; and (ii) no longer includes in the plea agreements themselves the names of carved-out employees, instead opting to list the names in an appendix filed under seal.[18]

ABUSES OF A DOMINANT POSITION

Marion HealthCare LLC, an outpatient surgical center, brought suit in federal court against a hospital network, Southern Illinois Healthcare, and a health insurance provider, Blue Cross & Blue Shield of Illinois.[19] The Complaint alleged that the defendants substantially suppressed competition for outpatient surgical services through exclusionary agreements, exclusive price dealing, price discrimination, and monopolization. Marion Healthcare alleged that Blue Cross grants Southern Illinois exclusive status on outpatient surgeries, and as such Marion Healthcare was repeatedly denied membership in Blue Cross' network. The court dismissed the Complaint, explaining that Marion's market definition was not plausible as

14 See id.

15 See id.

16 See Press Release, U.S. Dep't of Justice," Nine Automobile Parts Manufacturers and Two Executives Agree to Plead Guilty to Fixing Prices on Automobile Parts Sold to U.S. Car Manufacturers and Installed in U.S. Cars" (September 26, 2013), available at http://www.justice.gov/atr/public/press_releases/2013/300969.htm.

17 See id.

18 See Press Release, U.S. Dep't of Justice," Statement of Assistant Attorney General Bill Baer on Changes to Antitrust Division's Carve-Out Practice Regarding Corporate Plea Agreements" (April 12, 2013), available at http://www.justice.gov/opa/pr/2013/April/13-at-422.html.

19 "Marion Healthcare, LLC v. S. Ill. Healthcare et al.", Civ. No. 12-CV-00871-DRH-PMF, 2013 WL 4510168 (S.D.Ill. August 26, 2013).

stated, but gave Marion permission to file an amended complaint on certain counts.[20]

COURT DECISIONS

In February 2013, the Supreme Court issued an opinion in "FTC v. Phoebe Putney Health System, Inc.", a case whose facts we detailed in last year's submission.[21] In 2012, the Eleventh Circuit affirmed a lower court decision holding that the merger of two private hospitals was immune from antitrust scrutiny under the "state action doctrine."[22] The FTC appealed to the United States Supreme Court on the grounds that the decision was inconsistent with precedent.[23]

This year, the Supreme Court unanimously held that the hospital merger was not automatically immune from antitrust laws, and that a governmental entity acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition can be exempt from the antitrust laws only when the anticompetitive effect was a foreseeable result of the State policy.[24] The Court explained that a law that simply "allows a local government to acquire hospitals" does not "clearly articulate and affirmatively express a state policy of empowering the [local government] to make acquisitions…that will substantially lessen competition."[25] Rather, state action immunity is implied only "where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature."[26] The "Phoebe Putney" decision significantly changes the rules of play for government-owned hospital transactions and will undoubtedly impact the types of transactions we see in this space going forward.

Subsequent to the decision, the Hospital Authority and Phoebe Putney Health System settled the FTC charges.[27] Under the terms of the settlement, the Hospital Authority retained ownership of Phoebe Putney. The parties agreed that for the next decade the Hospital Authority and Phoebe Putney will not acquire an inpatient or outpatient clinic or facility or a physician group practice of five or more physicians within a six-county region identified by the FTC. Phoebe Putney and the Hospital Authority also agreed not to file any objections with the Georgia Department of Community Health to the issuance of a Certificate of Need for a new general acute care hospital in the same six-county region.[28] Lastly, Phoebe Putney must provide annual compliance reports for the next decade.[29]

In another marquee case, "FTC v. Actavis, Inc.", the Supreme Court reversed the Eleventh Circuit's dismissal of an FTC complaint challenging a phar-

20 Id.

21 John R. Ingrassia, Alicia J. Batts, and Courtney Devon Taylor, "United States", ABA Int'l Section Year in Review (2013) (discussing developments in U.S. antitrust law) [hereinafter "United States Antitrust Review"].

22 "FTC v. Phoebe Putney Health Sys., Inc.", 663 F.3d 1369, (11th Cir. 2011), cert. granted, 133 S. Ct 28 (U.S. 2012).

23 "United States Antitrust Review", supra note 21.

24 "FTC v. Phoebe Putney Health Sys., Inc.", 133 S.Ct. 1003 (2013).

25 Id. at 1012.

26 Id. at 1013.

27 See Press Release, Federal Trade Commission, "Hospital Authority and Phoebe Putney Health System Settle FTC Charges That Acquisition of Palmyra Park Hospital Violated U.S. Antitrust Laws" (August 22, 2013), available at http://www.ftc.gov/news-events/press-releases/2013/08/hospital-authority-and-phoebe-putney-health-system-settle-ftc [hereinafter "Phoebe Press Release"].

28 However, the Hospital Authority and Phoebe Putney may file objections to certificate of need applications for other projects, but must provide to the FTC copies of any such objections.

29 "Phoebe Press Release", supra note 27.

maceutical reverse payment settlement.[30] The Court held that pay-for-delay agreements are subject to antitrust scrutiny and should be analyzed by the rule of reason.[31] Among the factors appropriate for consideration are an agreement's "size, its scale in relation to the payor's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of any other convincing justification."[32] The Court thereby rejected a per se rule of legality based upon the "scope of the patent test," in which the antitrust laws do not govern any settlement resolving patent litigation that does not exceed the scope of the patent (excluding fraud in obtaining the patent or sham litigation).[33] The "Actavis" decision left unanswered, however, critical questions regarding how courts should apply the rule of reason in pay-for-delay settlements. In particular, the courts must determine "what constitutes a 'large and unjustified payment.'"[34]

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30 "FTC v. Actavis, Inc.", No. 12-416 (S. Ct. June 17, 2013).
31 Id. at 17-18.
32 Id. at 20.
33 Id. at 9.
34 Joshua D. Wright, "FTC v. Actavis and the Future of Reverse Payment Cases", Address at Concurrences Journal Annual Dinner (September 26, 2013).