International Antitrust Bulletin

ABA Section of Antitrust Law | International Committee — March 2013 | Vol. 1

The International Antitrust Bulletin is published four times a year by the American Bar Association Section of Antitrust Law International Committee. The views expressed in the International Antitrust Bulletin are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the International Committee. If you wish to comment on the contents of the International Antitrust Bulletin, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654-7598.

Editor-in-Chief
John Taladay
john.taladay@bakerbotts.com

Assistant Editor
Jane Antonio
jane.antonio@bakerbotts.com

International Committee Leadership

Committee Chair
Fiona Schaeffer

Committee Vice-Chairs
Dara Diomande-Pincas
Matthew Hall
Amadeu Ribeiro
Sheridan Scott
John Taladay
Susanne Wachsstock

Follow us on:

In This Issue

Interview

Interview with Andreas Mundt, President, Bundeskartellamt 2
Evelina Kurgonaite

North America

In Re Vitamin C Antitrust Litigation: Unprecedented Trial Tests Limits of Foreign Sovereign Compulsion Doctrine and International Comity 5
William C. Lavery

High Inflationary Rates Cause a Comeback of Major Price Discrimination Probing in Argentina 7
Miguel del Pino & Santiago del Rio

Europe

Regulatory Reforms in Spain: The Proposed Merger of Competition Authority and Sector Regulators 9
Andrew Ward & Pablo Lavandeira

UK Government Announces Major Re-Design of Competition Litigation Landscape in the UK 11
Robert Bell

Not Everyone Can Become "Friend of the Court" in EU Competition Cases 13
Jessica Walch

EC Fining Practices Under the 2006 Guidelines 15
Kaj Rozga

Asia

Abuse of Dominance: The Indian Experience 17
Kalyani Singh

Vertical Issues Under Vietnam's Competition Law 19
David Fruitman

Meet the Authors 21

Contribute to the International Antitrust Bulletin

We are accepting articles for our next edition. Articles can cover any topic in the international antitrust area and should be approximately 800-1,200 words. If you have a topic idea, please contact our Editor-in-Chief, John Taladay at john.taladay@bakerbotts.com.

Join the International Committee

If you'd like to join the International Committee, please visit: http://apps.americanbar.org/dch/committee.cfm?com=AT311000.

COPYRIGHT NOTICE
© Copyright 2013 American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. To request permission, contact the ABA's Department of Copyrights and Contracts via www.americanbar.org/utility/reprint.

Interview with Andreas Mundt, President of the Bundeskartellamt, Germany's Federal Competition Authority

Evelina Kurgonaite
PaRR – Policy and Regulatory Report, Brussels

As the first career official at Bundeskartellamt (BKartA) who has become the head of the authority, can you share some insights about the evolution of the authority, the key achievements in the last years and the priorities ahead?

I believe that the successful implementation of structural reforms as well as the modernization of our investigation methods can be considered as key achievements in the last couple of years. While the BKartA has historically been very focused on merger control, we have also undertaken measures to strengthen our anti-cartel enforcement capabilities. These measures included the creation of a Special Unit for Combating Cartels and three Decision Divisions exclusively dedicated to cartel prosecution as well as the introduction of leniency and settlement policies. Also, further efficiency-enhancing reforms were introduced at legislative level. While these reforms have provided the BKartA with room for maneuver, priority setting remains an ongoing task. In this context, sector inquiries based on sound economic analysis have proved to be a useful tool in identifying competition issues in macroeconomic important markets and the results of our main sector inquiries have received much public and political acclaim. In my view, competition enforcement in Germany is now generally better balanced, and I consider that to be our key achievement as a competition agency in the most recent past.

You mentioned sector inquiries. Would you please tell us more about the sectors that are key areas of the authority's focus?

Actually, the BKartA does not define sectoral priorities in advance. Instead, our Decision Divisions are organized according to industry sectors and set priorities on the basis of their in-depth knowledge of the relevant markets as well as constant dialogue with market participants and other stakeholders. However, in response to this question, I would like to mention two recent sector inquiries. The Electricity Wholesale Sector Inquiry revealed that the monitoring of real-time data is essential in order to safeguard competition in these markets and laid the necessary groundwork for establishing a so-called 'market transparency unit' planned by the German Federal Government. Furthermore, the Fuel Sector Inquiry uncovered the structure and pricing patterns of a collectively dominant oligopoly of the five major oil companies. The detailed analysis of the relevant markets, including exact pricing patterns, enabled the BKartA to protect residual competition offered by independent petrol stations and prevent further concentration. Another inquiry, which is of rather high priority to us, concerns the food retail sector. With this sector inquiry we intend to take a closer look at buyer power in this sector and base the current debate on a solid body of data. The results should make proceedings in the food sector along the value chain easier and shed more light on the relevance of the buyer power.

Should we expect BKartA's investigations in these sectors as a follow-up to the ongoing and recently held sector inquiries?

Not necessarily. We believe that sector inquiries may have other benefits and we do not always launch formal proceedings afterwards. For instance, information gathered during the food retail sector inquiry is expected to be very useful for merger reviews. I also think that in certain sectors amendments to relevant legislation might even be a better outcome for consumers than launching formal antitrust proceedings. Generally, I am convinced that our sector inquiries have produced very useful results – not only for the BKartA.

Before becoming the chairman of the BKartA, you served as Head of Unit for International Competition Matters and were responsible for the authority's international relations and cooperation with other competition enforcers. We understand that you have been a very active member at the International Competition Network (ICN) since its creation, as well as at the OECD? Could you share some insights about the international aspects of your work and your thoughts about coordinating competition enforcement around the world, what has been achieved and what should still be done to improve it etc?

I guess it is fair to say that the BKartA as one of the longest-serving competition authorities in the world has always been a very active contributor to international cooperation among competition enforcers. Not only in my function as a Vice Chair, I have attended every annual ICN conference in recent years and I think the ICN has already achieved a lot in its first decade of existence. The membership of the ICN is very diverse and currently includes agency members from over 100 jurisdictions, making it the most extensive network of competition authorities worldwide. Moreover, the ICN is an organization that

has a direct impact on competition enforcement in many countries. For instance, in Germany, we have introduced a second domestic turnover threshold in our merger control regime following the ICN's guidelines on merger control. In this context it is worth noting that the close cooperation between the ICN and OECD also plays an important role. When it comes to influencing a broader sphere of policymakers or legislators, the impact of ICN guidelines or best practices is even greater when the OECD backs them up with corresponding recommendations on the same legal issues of competition enforcement. Experience shows that if corresponding recommendations are issued by two important international organizations, such as the ICN and OECD, national legislators tend to be more willing to bring their national rules in line with the international standards. And in fact, this is what we are trying to achieve in these organizations – to set certain standards and create a basis for more convergence. However, there is still a long way to go in order to reduce unnecessary costs and burdens from duplicative or inconsistent procedures. While competition authorities around the world have never cooperated more closely, one should not underestimate the difficulties involved in international convergence due to different legal systems, cultures and economic development.

Do you think the ECN (European Competition Network) has been as successful a project as well? What could still be improved?

We do not perceive the ECN as an international organization. For us, cooperation within the ECN, among our European colleagues, has become so natural, so swift and effortless that we no longer consider it as "international" cooperation. Therefore, in my view, the ECN can be considered as a model of highly effective cooperation between agencies operating under different competition enforcement regimes. However, there are areas where we could and should cooperate more closely and obviously we can still improve things. For instance, it would be useful to have legislation at EU level that harmonizes competition procedures across the EU up to a certain level. Businesses in Europe often run into procedural hurdles when it comes to competition enforcement at national level. In this regard, I can think of at least three areas that could be improved. First, we need more convergence in the way we approach access to files in different EU countries. This applies all the more so after the *Pfleiderer* judgment by the European Court of Justice. We need to protect our leniency programs and common rules on access to file would be helpful in that respect. Another area that needs improvement is the coordination of leniency applications filed with different national competition authorities. The ECN model leniency program has been revised in November 2012. It now provides for "summary application markers" for so-called "type 2 applications" whereby companies apply for reducing fines after an immunity application had been filed. A marker template has been created. Companies also have more clarity on languages in which they can submit their "summary application markers" in different EU countries. While these are some welcome steps into the right direction, the refinement of the European leniency system is an ongoing process that will be further developed in the years to come. And finally the third area that needs improvement and, in my opinion, is a very important aspect of competition enforcement is the setting of fines. I appreciate that it will probably require quite some time before we agree on common principles on setting fines in antitrust cases. However, I do think that companies would welcome streamlined rules on fining across different EU countries.

Talking about fines in antitrust cases, in Europe, companies have been increasingly using the settlement possibility offered by regulators to avoid fines. The German competition authority is said to have been a pioneer in settling competition cases in comparison to other EU countries. Is that indeed the case and how did the authority manage to achieve that?

I think it is probably fair to say that the BKartA has gained a lot of experience in settling competition cases in recent years. Since November 2007, we have settled, either completely or partially, more than 30 cases. Even if there is no explicit legislation on settlements in fining proceedings brought by the BKartA, our law is very open to settlements. Furthermore, a settlement is a win-win situation for both the companies and the agency, saving time and other resources. But let me be clear about one important thing: discussions on possible settlements do not start before the BKartA has a clear idea of the facts of the case. So for us, settlements are not a tool to avoid investigation, but rather, a tool to avoid litigation.

It has been reported that there is one legislative gap in German competition law concerning parental liability allowing companies to avoid fines through restructuring their business. I understand that you have suggested that the European Commission should perhaps be better placed to assess those cases as the BKartA's jurisdiction is limited by its national law shortcomings.

It is true that we have certain weaknesses in German competition law, which makes it difficult for the BKartA to fine any legal entity other than the infringing one. In particular, we have to make great efforts to establish the liability of parent companies or of other companies within an economic unit in cases of legal succession. However, an amendment to the law is underway addressing some of the most prominent issues. It is at an advanced stage of the legislative process and we hope to get some improvement sooner rather than later. It is also true that the Euro-

pean Commission does not run into the same problems as EU competition law provides for much more comprehensive liability. Consequently, we have indeed considered the possibility to reallocate cases to the European Commission in which – at least for the moment – we could encounter difficulties in imposing a fine due to the shortcomings of German competition law. For the future, however, we are confident that the proposed amendments will help to improve the situation for the BKartA.

It would also be interesting to hear about the status and developments in Germany with respect to damages actions.

As a matter of fact, private enforcement of competition law in Germany has been up and running for quite some time. Based on statistics, and considering the population ratio in Germany, we may already have more cases than in the United States. Following an amendment to the German competition law, in 2005 according to which German courts are bound by the decisions of all the competition agencies within the EU, we have also seen an apparent increase in follow-on damages actions in Germany. Currently there are private damages actions pending before the German courts with a dispute value of approximately € 1.5 billion, excluding ongoing private settlement negotiations. So I think that the private enforcement system in Germany is really quite advanced. It remains to be seen whether there will be further improvements in light of the upcoming European Commission's legislative initiative on private damages. However, in Germany we will continue to take the utmost care in balancing public and private enforcement and we are going to work with the European Commission to maintain that subtle balance. In Germany, the emphasis has always been on public enforcement and I think this is a good thing.

In re Vitamin C Antitrust Litigation: Unprecedented Trial Tests Limits of Foreign Sovereign Compulsion Doctrine and International Comity

William C. Lavery
Baker Botts LLP, United States

Introduction

On February 25, an unprecedented antitrust trial began in the United States District Court for the Eastern District of New York. *In re Vitamin C Antitrust Litigation*[1] — a class action lawsuit alleging price fixing by Chinese manufacturers of vitamin C[2] — marks the first time that a Chinese company has been forced to defend itself in a United States court. This is also the first case in which the Chinese government has filed an amicus curiae brief in the United States.

Case Background

In *In re Vitamin C Antitrust Litigation*, purchasers of vitamin C allege that between 2002 and 2006, Chinese manufacturers engaged in an "illegal cartel to control prices and the volume of exports for vitamin C" to the United States, in violation of Section 1 of the Sherman Act[3] and state antitrust laws.[4] Plaintiffs allege that the Chinese defendants' conduct led to significant price increases for vitamin C in the United States.[5]

Notably, defendants do not dispute the allegations and readily admit they fixed prices and agreed on output restrictions.[6] Defendants, however, contend that they were compelled by the Chinese government to do so.[7] All defendants were members of the Chamber of Commerce of Medicines and Health Products Importers and Exporters ("the Chamber"), which regulates China's vitamin C export prices and output levels. Defendants contend that the Chamber is a regulatory pricing regime mandated by the government of China, with the power to "suspend and even cancel the Vitamin C export right" of a violating or non-participating member.[8] Defendants explained that they were "strictly" required to "execute export coordinated price[s] set by the Chamber," and non-compliance would result in a ban on exporting vitamin C altogether.[9] Thus, defendants argue that because their actions were compelled by the Chinese government, the foreign sovereign compulsion doctrine, act of state doctrine, and principles of international comity bar liability here.[10]

Plaintiffs, on the other hand, contend that the Chamber is a mere "trade association" that helped "facilitate" the agreements.[11] Plaintiffs allege that defendants voluntarily entered the series of undisputed agreements to coordinate prices, and acted independent of the Chinese government in doing so.

After plaintiffs filed suit, defendants moved to dismiss on the ground that their actions were compelled by the Chinese government. The Chinese Ministry of Commerce ("Ministry"), which is the highest authority in China authorized to regulate foreign trade, filed an amicus curiae brief in support of defendants' motion to dismiss, supporting defendants' claim. The Ministry explained that the regulatory pricing regime was "instituted to ensure orderly markets during China's transition to [a] market-driven economy and to promote, in this transitional period, the profitability of the industry through coordination of pricing and control of export volumes."[12] Thus, the Ministry argued that because China's "ongoing transition from a state-run command economy to a market-driven economy is utterly foreign to the economic history and traditions of the United States, there is a very significant risk of misunderstanding by U.S. lawyers and judges of the regulatory concepts China has adopted to manage this transition."[13] The Ministry further argued that "statements of a foreign government about the scope and meaning of its laws are to be given binding and conclusive effect," and if the Court "were to find the defendants' conduct violated U.S. antitrust laws, it would improperly penalize defendants for the sovereign acts of their governments and would adversely affect implementation of China's trade policy."[14]

The Court denied defendants' motion to dismiss, holding that the record at the time was "simply too ambiguous."[15] After additional discovery, defendants filed for summary judgment on the same grounds.[16] In its September 2011 opinion denying the defendants' motion for summary judgment, the Court questioned the credibility of the Ministry's statements and flatly rejected the defendants' contention that Chinese law compelled their conduct. The Court held that although "defendants and the Chinese government argue to the contrary, the provisions of Chinese law before me do not support their position, which is also belied by the factual record."[17] The Court found that the evidence "suggest[s] that the Ministry's assertion of compulsion is a post-hoc attempt to shield defendants' conduct from antitrust scrutiny rather than a complete and forward explanation of Chinese law during the relevant time period in question" and, thus, "decline[d] to defer to the Chinese government's statements to the court."[18]

In any event, the primary question for the jury to decide at this historic trial is whether the government actually compelled the defendants' behavior, or as plaintiffs contend, defendants voluntarily entered the price-fixing agreements and only got the Chinese government involved after plaintiffs filed suit.

Possible Repercussions for U.S. Companies Doing Business in China

This case brings some interesting issues to light. The application of U.S. antitrust laws to China's managed economy could have an effect on the way Chinese companies do business. Some argue that allowing Chinese defendants to skirt U.S. antitrust laws with the improper assertion of the foreign sovereign compulsion doctrine could create a trend that would "undermine global competition."[19] Others argue that there is very little evidence suggesting that giving deference to the Ministry's statement here (acknowledging that the defendants were compelled to engage in cartel-like behavior) will lead to a pattern of abuse by Chinese companies, and therefore the court should respect the interests of the foreign sovereign.[20]

Regardless, if the jury finds the defendants liable, it is likely that U.S. companies doing business in China may face trade retaliation from the Chinese government. It is clear from the Ministry's amicus brief — noting that "the possibility of insult to China is significant" — that the Chinese government already views this case as a hostile action by the United States against their sovereign interests,[21] and continued aggression against U.S. companies on China's part can be expected.

---

[1] Case number 1:06-md-01738, in the United States District Court for the Eastern District of New York.

[2] The four main defendants are Heibei Welcome Pharmaceutical Co. Ltd. ("Heibi Welcome"), Aland (Jiangsu) Nutraceutical Co., Ltd. ("Aland"), Northeast Pharmaceutical Group Co., Ltd. ("NEPG") and Weishang Pharmaceutical Co., Ltd. ("Weishang"). Aland settled prior to trial.

[3] 15 U.S.C. § 1.

[4] Complaint ¶ 43; *In re* Vitamin C Antitrust Litigation, 584 F. Supp. 2d 546, 548 (E.D.N.Y. 2008); *In re* Vitamin C Antitrust Litigation, 810 F. Supp. 2d 522, 525 (E.D.N.Y. 2011).

[5] Complaint ¶ 43.

[6] 810 F. Supp. at 525.

[7] *Id.*

[8] Defendant's Memorandum in Support of Motion to Dismiss ("Motion to Dismiss") at 1; The Ministry of Commerce of the People's Republic of China's Brief of Amicus Curiae ("Ministry Br.") at 10.

[9] Ministry Br. at 10.

[10] Motion to Dismiss at 1.

[11] 810 F. Supp. at 525.

[12] Ministry Br. at 6.

[13] Ministry Br. at 6.

[14] Ministry Br. at 1-2.

[15] 584 F. Supp. at 548.

[16] 810 F. Supp. at 522.

[17] 810 F. Supp. at 524

[18] *Id.* at 524, 552.

[19] Andrew Longstreth, *U.S. Courts Confront China's Involvement in Price Fixing*, REUTERS, Mar. 11, 2011, *available at* http://www.reuters.com/article/2011/03/11/us-china-vitaminc-idUSTRE72A4XH20110311.

[20] *See, e.g.,* Lee, Jane, *Vitamin "C" is for Compulsion: Delimiting the Foreign Sovereign Compulsion Defense*, 50 VA. J. INT'L L. 757 (2010).

[21] *See* Ministry Br. at 22 ("It cannot be denied that the possibility of insult to China is significant - 'the granting of any relief would in effect amount to an order from a domestic court instructing a foreign sovereign to alter its chosen means' of regulating domestic conduct.").

High Inflationary Rates Cause a Comeback of Major Price Discrimination Probing in Argentina

Miguel del Pino & Santiago del Rio
Marval, O'Farrell & Mairal, Argentina

Introduction

An interesting comeback is currently taking place in anticompetitive investigations in Argentina due to the re-emergence of price discrimination investigations as one of the Antitrust Commission's primary objectives in its enforcement agenda. These investigations were widely used during the 1980's as a barrier to an ever-increasing inflationary rate, with a specific target towards those customer sensitive markets in which an important rise of prices was taking place.

After reaching its most important landmark case in 1999, few price discrimination investigations have been seen during the last decade as the Antitrust Commission placed its focus on certain high-level collusion cases and merger control. However, now there is an upsurge of price discrimination cases which clearly show that this trend has now reversed.

Price Discrimination Enforcement in Argentina

The notion of price discrimination is set out in Section 2.k) of the Antitrust Law No. 25,156, which states, "*To impose discriminatory conditions for the acquisition or selling of assets or services without reasons based on usual commercial practices of the corresponding market*."

The first precedents in this regard set out certain guidelines for the analysis of the conduct. In *Unión General de Tamberos v. Cooperativa Popular de Electricidad de Santa Rosa* (Docket No. 104.084/81, 1982), the Antitrust Commission stated that the freedom to buy or sell and of the manner to do so in the most convenient manner is limited in the case in which a dominant position is held since a reasonable justification would be needed. A reasonable justification was found to be a shortage of production output, as decided in *Safety SACIF v. Carboquímica Argentina* (Docket No. 10.307/81, 1984) or the granting of volume discounts, as stated in *Castro* (Docket No. 307.353/91, 1992) and *Jacoubian v. Shell* (Docket No. 064-009518/2001, 2002). In *Autrotransportes Cita* (Docket No. S01:0250619/2005, 2006) the Antitrust Commission held that a price difference generated by a public regulation refund could not be construed as price discrimination.

The current guidelines for the determination of price discrimination can be found in *Lafalla v. Juan Minetti* (Docket No. 064-006002/2000, 2000) in which it was considered that for price discrimination to take place three factors were necessary, namely: (i) the possibility to effectively carry out a segmentation of the market; (ii) the encumbering or restriction of reselling the product; and (iii) the existence of market power. Additionally, an adequate geographical market definition was proved to be essential as set out in *Falcioni v. EG3* (Docket No. 064-19885/2000, 2001) since that could be a factor to be taken into account for the differentiation in the pricing.

The YPF Case

The most important case regarding price discrimination in Argentina was the "YPF" case (Docket No. 064-002687/97, 1999) which was initiated due to increases in the price of liquid petroleum gas ("LPG"), an essential source of energy for many residences in Argentina. The relevant market was determined to be the bulk supply of LPG. The Antitrust Commission determined that *Yacimientos Petrolíferos Fiscales* ("YPF"), a local petroleum company, had a dominant position in all phases of LPG production and supply. It also found out that the market entry barriers were high and that imports were not a constraint on domestic producers.

The conduct assessed by the Antitrust Commission was YPF's practice of exporting a high amount of LPG at prices that were lower than in Argentina. Further, YPF's export contracts prohibited the re-importing of LPG to Argentina. The Antitrust Commission concluded that this conduct was harmful to the general economic interest and ordered YPF to cease its price discrimination as between the domestic and export markets and to eliminate the prohibition of re-importing LPG. Additionally, it imposed on YPF a fine of Argentine Pesos 109,644,000 (which amounted to the same amount in US dollars at the time). The decision was upheld by the Supreme Court of Argentina.

This case has also spurred the first case of antitrust private litigation in Argentina. This claim was initiated by Auto Gas S.A. ("Auto Gas"), a company that claimed that it had been affected by the anticompetitive conduct performed by YPF. Auto Gas stated that at the time of the conducts analyzed by the Antitrust Commission, Auto Gas was a company created for the distribution of LPG. It based its claim on the fact that the abuse of dominant position performed by YPF had a twofold effect: an undue increase of prices and a diminishment in the quantities of LPG that were commercialized by Auto Gas.

The claimant requested damages based on the following: (i) abuse of dominant position; (ii) breach of contract; (iii) supply cut; (iv) coordinated activities regarding pricing and retention and use of Auto Gas' canisters; and (v) bulk transfer of business.

After disregarding YPF's defenses, the Judge left on record that it would not analyze YPF's anticompetitive conducts, since that had already been analyzed and sanctioned by the Antitrust Commission and ratified by the Supreme Court. Thus, it considered that the existence of the conduct had already been proved, as well as the fact that it had been performed by means of deceit. The analysis was therefore focused on whether there had been damages to Auto Gas and whether it had been caused by the already proved act.

As a result of its analysis, the Judge ordered YPF to pay Argentine Pesos 13,094,457 (approximately US $3,000,000 at the time of issuance of the sentence) to Auto Gas due to the above mentioned damages, plus attorneys' fees.

In 2009, on a follow up case to the original YPF investigation the Antitrust Commission decided not to impose a sanction on the same company since it considered that it no longer held a dominant position and thus, it could not carry out a price discrimination conduct (*"Lafalla v. YPF"*, Docket No. S01:0227185/2003, 2009).

The Current Scenario

In early 2012, the Antitrust Commission initiated two major investigations in the fuel related markets, namely one regarding an alleged discrimination between bulk and retail diesel oil, while the second one was related to the aerokerosene fuel used on aircraft.

The first case was based on accusation generated by the Secretary of Transportation stating that there was a price discrimination practice that could be detected by means of the comparison of the sale price of bulk diesel oil as compared to the same products under retail price. Pursuant to the claim, there was no justification for the difference. One of the key issues in the defense of several of the accused companies was that the Argentine State had reduced governmental grants that were provided to transport companies and was artificially trying to lower the price of the diesel fuel by means of this accusation.

The second case revolved around the notion that the aerokerosene supplier companies in Argentina were carrying out price discrimination conduct by excessively charging air transportation companies for this product. In its preliminary investigation, the Antitrust Commission took into account the sale price of the product in the United States and stated that there were no factors that would show that a different price would have to be charged in Argentina.

In both cases, the Antitrust Commission issued preliminary injunctions so as to preventively stop the alleged discrimination, which were subject to appeals. An interesting notion regarding the aerokerosene case preliminary injunction was that it "tied" the price for the local sale of the product to a ratio determined by the price of the same product in the United States.

Another recent investigation that the Commission is also actively pursuing revolves around the commercialization of cars in the Tierra del Fuego Province, which has a region-specific tax incentive. Pursuant to the Antitrust Commission, certain car manufacturing companies would make use of those incentives but still charge the same prices that in the rest of the country, which, in its opinion, would entail a price discrimination conduct.

Outlook

These major cases are but a sign of the importance that price controlling investigations have garnered in Argentina over the last years. With an estimated annual inflationary rate of thirty percent, it is quite likely that history will repeat itself and these investigations will become a top priority for the Antitrust Commission in order to contain their increase.

Regulatory Reforms in Spain: The Proposed Merger of Competition Authority and Sector Regulators

Andrew Ward & Pablo Lavandeira
Cuatrecasas, Gonçalves Pereira, Spain

Since its election at the end of 2011, the current Spanish government has been working towards a major reform of Spain's national regulators. Specifically, a draft law aimed at creating a new National Commission for Markets and Competition (*Comisión Nacional de Mercados y Competencia* or "CNMC"), a single entity that would combine the functions of both the National Competition Commission (*Comisión Nacional de la Competencia* or "CNC") and regulators responsible for the telecoms, energy, postal services, audiovisual, airport, rail transport and gaming sectors. The reform has given rise to considerable debate both within the national parliament and by the European Commission, and as a result some significant changes have recently been announced.

Background and Timeline

The proposed reform was first announced in the election manifesto of the current government in November 2011 and is one of a number of ambitious reforms currently under way. It has been compared to the so-called "German model," the creation in Germany in 2005 of the Bundesnetzagentur, which combines the electricity, gas, telecoms, postal services and rail transport regulators (but not the competition authority) and to a similar reform that was proposed in the Netherlands but has since been suspended.

The main elements of the intended reform were announced in February 2012 and a draft law was submitted to Parliament in September 2012. After several extensions to the original calendar, the draft law is still under debate in the Spanish parliament, as of the writing of this article. Nevertheless, the Government has announced that it expects the CNMC to be operational by September 2013.

Objectives of the Reform

The reform responded to a perceived proliferation of regulators during the previous legislature, when the then-ruling party legislated to create regulators for the postal, audiovisual, airport, rail and gaming sectors. Specifically, the stated objectives were to reduce costs through synergies (the government has announced expected costs savings of €28 million a year) and avoid the legal uncertainty caused by instances of conflicting decisions by the competition authority and the sector regulators. In fact, the November 2011 manifesto and the announcement of the reforms made clear that the intention was that competition policy would, to an extent, take precedence over other regulatory objectives.

The announcement of the reform also referred to the pursuit of the "single internal market." Spain is composed of 17 different "autonomous communities" each of which has a significant degree of legislative freedom and which have created, in the view of the current government, an artificially fragmented market. As such, as an interesting parallel to the role of EU competition policy in pursuing the objectives of the common EU market, the government announced a similar role nationally for the CNMC (and also announced separate proposed "single market" legislation).

Finally, it should also be noted that the government has been accused of party-political motives: that the reform is a means of replacing members of the existing regulators appointed by the previous government in its final months.

Outline of the Proposed CNMC

The reform will create a single entity that combines the functions of the competition authority and the regulators responsible for the telecoms, energy, postal services, audiovisual, airport, rail transport and gaming sectors.

That entity would be functionally independent of the government and would be governed by a nine member Council whose members would be appointed by the Government via royal decree for a single unextendable period of six years (as is the case with the current CNC).

The draft law also foresees the creation of four independent directorates responsible for, respectively: (i) competition cases (effectively maintaining the current structure of the CNC, with its Council and Investigation Directorate); (ii) the telecoms and audiovisual sector; (iii) the energy sector; and (iv) the postal and transport sectors. The Directors of each of these bodies would be appointed by the Government for renewable periods of four years and their powers would be determined by the CNMC itself.

Once established, the CNMC would then be charged with enforcing the competition rules (set out in Law 15/2007, of July 3, for the Defense of Competition, the substantive provisions of which remain unchanged) and with the supervision of the relevant sectors. However, not all of the existing functions of the existing regulators

would be transferred to the CNMC: certain functions considered not to be regulatory in nature would be transferred back to the relevant ministries.

Concerns of Opposition Parties and the European Commission

The creation of the CNMC has been the subject of criticism both from political parties in Spain and by the European Commission, which has even threatened to take action against Spain if its concerns were not taken into account.

First, almost all the opposition parties in Spain rejected the draft law when it was submitted to parliament, proposing instead a "total amendment" of the law based on the so-called "3+1" regulatory model. That model would involve maintaining the existing CNC (which was created in 2007 by the government in place during the last legislature) as a separate entity, so as to ensure a separation between regulatory and investigative functions, and merging the other regulators into three bodies responsible for energy, transport (both rail and air) and communications (including telecoms and postal and audiovisual services).

For its part, the European Commission has raised concerns (in letters of November 2012 and February 2013) that several features of the reform would reduce the independence of the regulator, making it *de facto* dependent on the Spanish government: *inter alia*, the plans for the funding of the CNMC (by government grant), the transfer of powers to government ministries, and the proposed direct appointment of senior officials by the Government. In fact, in February 2013, Commission Vice-President Neelie Kroes (Commissioner for Information Society) threatened Spain with an infringement procedure if these concerns were not resolved.

Finally, there has also been criticism from a number of stakeholders. Each of the major regulators affected (in particular, the CNC and the telecoms and energy regulators) have published reports setting out some quite severe criticisms of the proposals, and similar submissions have been published by industry and consumer associations. Moreover, there has been criticism of the transparency of the process, which unlike the creation of the CNC in 2007 did not involve the publication of a green and white paper for public consultation.

Expected Changes and Next Steps

Although the deadline for the parliamentary debate has been extended and the final form of the draft law is not yet known, the government is understood to be in the process of introducing changes to the draft law in response to the concerns expressed above.

Specifically, it is now expected that the CNMC Council will have separate sub-councils responsible for competition policy and regulatory policy, respectively, will generate its own funds through fees and fines, will appoint its own directors and will repatriate fewer powers. Nevertheless, the exact details – and their efficacy in practice – remain to be seen.

UK Government Announces Major Re-Design of Competition Litigation Landscape in the UK

Robert Bell
Speechly Bircham LLP, United Kingdom

Introduction and Executive Summary

The UK Government has just announced a major re-design of the competition litigation landscape in the UK.

The proposals are likely to further promote the UK as one of, if not the most, favourable jurisdiction in Europe for litigants seeking redress for breaches of competition law and will lead to a considerable increase in competition litigation in the UK Courts.

The reforms signal speedier and more cost-effective justice for claimants in competition cases but also serve as a warning to those at risk of challenge to prepare themselves for the new system.

The key proposals contained in the Government announcement include:

- **Opt-out collective actions** under which businesses and consumers and/or representative bodies acting on their behalf can bring collective actions for damages on a stand-alone or follow-on basis;
- **New emphasis on alternative dispute resolution** for competition litigation by the introduction of a new framework for the settlement of collective actions based on the Dutch Mass Settlement Act 2005; and
- **The Competition Appeal Tribunal (CAT)** becoming the main forum for private competition law actions, with a new "fast track" procedure to provide swifter and more accessible justice for victims of anti-competitive behaviour in appropriate cases.

Background

On 29 January 2013 the UK Government published its response to its consultation entitled "Private Actions in Competition Law: a consultation on options for reform," in which it set out certain proposals to reform the UK regime for bringing private actions against infringers of competition law.[1]

The majority of the UK Government's proposals are to be welcomed. However there are concerns about certain aspects of the new opt-out collective action regime and how the new CAT fast track procedure will be implemented in practice.

Nevertheless, overall the proposed reforms are likely to promote swifter and more efficient access to justice under competition law for consumers and business alike, including (crucially, in many cases) the granting of injunctions against anti-competitive conduct, which may, for instance, threaten the existence of a claimant's business.

Opt-Out Collective Actions

The most controversial aspect of the reforms is the proposal to switch the regime for collective redress to an "opt-out" rather than the current "opt-in" system. Claimant representatives can bring actions on behalf of a whole class (e.g., cartel victims), with the members of that class being included in the assessment of damages unless they volunteer themselves out of the proceedings.

The Government's determination to press ahead with a change to an "opt-out" system signals a potential watershed for consumer and SME enforcement of competition law

However a number of important limitations will be imposed on the opt-out system. These are:

- Claimants will be limited to consumers and companies and their representative bodies (trade associations and consumers groups)- Law firms, special purpose vehicles and litigation funders will not be able to launch claims;
- The CAT has to certify that collective action is the best way for the case to be brought and that the claimant class is appropriate;
- The opt-out system will only apply to claimants based in the UK (although non-UK claimants will still be able to opt in);
- There will be no additional "exemplary" (or "treble") damages awarded against defendants;
- The loser will pay the winner's costs, as a general rule; and
- Any collective damages sums left unclaimed will be paid to the Access to Justice Foundation.

There is real concern about the proposal to pay any unclaimed damages in a collective action to the Access to Justice Foundation. This will impose a further punitive levy on defendants which have arguably already been imposed in the public interest through regulatory fines by

the OFT or the European Commission. It also threatens the defendants' ability to finalise the settlement of all claims as foreign EU courts would not necessarily recognise the UK judgment as binding on any claimant bringing proceedings in their jurisdiction which has not specifically recovered damages. It appears that even the Government itself is unsure about the wisdom of its own policy on unclaimed sums. New legislation is likely to include a power for the Secretary of State to make an Order to alter the recipient of residual damages at a future date.

Alternative Dispute Resolution

The Government reforms signal greater emphasis on using alternative dispute resolution (ADR) mechanisms to broker settlements in competition cases.

The reforms do this in two ways. Firstly, they provide cost incentives for parties before the CAT to encourage early settlement, aligning CAT procedures with the practice of the High Court. Secondly, the Government is toying with the idea of promoting ADR through the introduction of a collective settlement framework based upon the Dutch Mass Settlement Act 2005. The popular Dutch system has seen Holland become an attractive alternative place for resolving international competition law collective actions. Parties can settle collective actions if they jointly agree on a scheme for compensating claimants and a judge approves the approach. Likewise, the new UK system will require CAT approval of an agreed settlement package.

Central role of the CAT

The Government proposes to make the CAT the main forum for private competition law actions recognising its track record as an expert tribunal whose panel members possess the skill and expertise to ensure fair and accurate decision-making in potentially complex competition law cases. The proposals extend the jurisdiction of the CAT to hear stand-alone as well as follow-on actions, including collective actions (and for such cases to be transferred to or from the High Court, if necessary). The Government's key proposals for the CAT's new role are as follows:

- Limitation periods for bringing actions before the CAT will mirror those in the High Court;
- The CAT will be granted the power to order injunctions; and
- The new fast-track procedure will be introduced, aimed in principle at SMEs but potentially open to any type of claimant, if suitable to the dispute in question.

The key part of the reforms is the introduction of the fast track procedure, which will ensure speedier and more cost-effective justice in competition cases. There will be a compulsory cap on legal costs (set according to the circumstances of each case) and on any cross-undertaking in damages (see below) required in relation to injunctions. The CAT will also be able to limit the amount of evidence and expert witnesses in fast track cases.

---

[1] *See* Press Release, United Kingdom Dep't for Bus., Innovation and Skills, New Help for Consumers and Businesses to Take Action Against Price Fixing (Jan. 23, 2013), *available at* http://news.bis.gov.uk/Press-Releases/New-help-for-consumers-and-businesses-to-take-action-against-price-fixing-686c8.aspx; United Kingdom Dep't for Bus., Innovation and Skills, *Private Actions in Competition Law: A Consultation on Options for Reform—Government Response* (Jan. 2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf.

Not Everyone Can Become "Friend of the Court" in EU Competition Cases

Jessica Walch [*]
Sidley Austin, LLP, Brussels

We have all been amused or slightly irritated by the *Amicus Curiae*[1] brief filed in the form of a comic strip to object to the antitrust settlement proposed by the U.S. Department of Justice with three publishers of e-books. Various reports on both sides of the Atlantic have made it rather difficult to ignore.

Some have praised California lawyer Bob Kohn's creativity when faced with the five-page limit required by U.S. District Judge Denise Cote of Manhattan, whereas his original brief was 55-pages long. Others have considered an *Amicus Curiae* brief in this form to perfectly illustrate the author's significant lack of legal analysis.

By reference perhaps to Judge Cote's decision to approve the Justice Department's proposed settlement[2] – hence to disregard Bob Kohn's arguments – the fundamental question certainly is: what is the actual impact of an *Amicus Curiae* brief on the final Court's decision in antitrust cases, regardless of its form?

Filings of *Amicus Curiae* briefs in U.S. antitrust proceedings are accepted provided that they bring new aspects of the case to the attention of the Court. In stark contrast, courts at the EU level are considerably more favorable to interveners than U.S. *Amicus Curiae*. In national competition cases, however, the use of *Amicus Curiae* is very limited in scope. Why is this and does it have a negative impact on how competition cases are litigated in the EU?

Amicus Curiae in National Competition Cases

Since 2004, the European Commission ("Commission") and the Member States' competition agencies have been granted, pursuant to Article 15(3) of Regulation 1/2003, the power to file *Amicus Curiae* briefs with national courts in competition cases.[3]

According to the Commission's guidelines,[4] which further explore the concept of filing written observations as *Amicus Curiae*, the Commission will limit its analysis to the economic and legal aspects of the facts underlying the case pending before the national court. In this context, relevant Member State's procedural rules and practices will apply, provided that they are compatible with general principles of EU law, fundamental rights of the parties involved and principles of effectiveness[5] and equivalence.[6]

Since 2004, the Commission has submitted written observations on its own initiative in fewer than ten instances. More often, the national judge has formally requested that the Commission submit *Amicus Curiae* observations – yet still on only approximately twenty five occasions so far.

In recent years, national cases have shown that the observations filed by the Commission as *Amicus Curiae* generally focus on very specific points of law (*e.g.* whether fines imposed for infringement of EU competition rules can benefit from tax deductibility in Belgium)[7] or further interpretation of the case law when existing notices and guidelines do not offer sufficient guidance (*e.g.* whether *inter partes* disclosure of documents prepared in the context of a leniency application is appropriate in follow-on damages actions).[8]

More interestingly, provided that the *Amicus Curiae* brief raises a question on the interpretation of EU law, the national court may also refer the matter to the Court of Justice of the European Union for a preliminary ruling. This illustrates the fact that acting as *Amici Curiae* in national competition cases can have further reaching implications on the interpretation of novel legal issues at an EU level.

Intervention at the EU Level

Although slightly different from acting as *Amici Curiae,* interveners in competition cases can bring new aspects of the litigation case to the attention of the Court of Justice, provided that they do so in support of one of the parties to the proceedings.

Competition litigation typically arises from actions for annulment of Commission decisions imposing fines for infringement of Article 101 or 102 TFEU. At the EU level, the courts may grant a leave to intervene to any natural or legal persons who can establish an interest in the outcome of the case.[9]

In practice, intervening companies will have to demonstrate that the decision challenged and the form or order sought by one of the parties to the proceedings have a significant impact on their legal or economic position. As the legal standard is very hard to satisfy, only a limited number of applicants have successfully obtained leave to intervene:

- A competitor of an undertaking that allegedly violated Article 102 TFEU (because it had a direct in-

terest that the decision finding an abuse of a dominant position be upheld).[10]

- Another addressee of the infringement decision under Article 101 TFEU being challenged, when no appeal was brought against the contested decision.[11]
- Trade associations or associations composed of competitors or customers, when opposing alleged anti-competitive agreements containing restrictive clauses.
- Parent companies or affiliates forming part of the same corporate group as the undertaking challenging the decision, when being held jointly and severally liable.

More importantly, the EU Court of Justice recently reaffirmed that a party that claims it was harmed by the infringement for the purpose of follow-on actions for damages does not have sufficient interest to intervene in support of the Commission when the infringement decision is contested.

The analysis of the Court suggested that the applicant/customer affected by high prices caused by the alleged cartel did not have a sufficient interest in the outcome of the case considering that its situation was not sufficiently distinct from the other economic operators also affected by the alleged cartel.[12] However, the Court appears to broadly extend the application of the test of direct and individual concern – whereby an applicant must establish that it is affected by an act of general application when challenging it – whereas it should simply apply the test of a "direct, existing interest in the result of the case."

Concluding Remarks

When comparing antitrust proceedings on both sides of the Atlantic, it appears that considerably more experts and interested parties have been allowed to share their views on legal issues in US Courts. In Europe, the combination of a stringent legal test for intervention before the Courts at the EU level with a narrow scope for filings of *Amicus Curiae* briefs in national competition cases has resulted in a significant reluctance by EU and national courts to receive expert views from third parties in competition cases.

In fact, one way for different views to be heard in European competition cases could arise from the ability to act as *Amici Curiae* in damages actions brought in national civil courts as a result of infringement decisions punishing anti-competitive behaviour.

---

* The views expressed in this article are exclusively those of the author and do not necessarily reflect those of Sidley Austin LLP, its partners, or clients. The author is very grateful to Stephen Kinsella, partner in the Brussels office of Sidley Austin LLP, for his valuable comments.

[1] Literally "Friend of the Court". A person with strong interest in or views on the subject matter of an action, but not a party to the action, who offers information that bears on the case but has not been solicited by any of the parties to assist the Court.

[2] Opinion and Order of 5 September 2012 in Civil action No. 12-CV-2826 (DLC), USA v. Apple, Inc et al., United States District Court for the Southern District of New York, Document 113.

[3] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 04.01.2003, L 1/1.

[4] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 27.04.2004, C 101/54.

[5] The submission of written observations is not excessively difficult or practically impossible.

[6] The submission of written observations is not more difficult than the submission of observations in court proceedings where equivalent national law is applied.

[7] Amicus curiae observations submitted by the Commission in case No 5285, Tessenderlo Chemie NV v the Belgian State, 8 March 2012.

[8] Amicus curiae observations submitted by the Commission in claim No HC08C03243, National Grid Electricity Transmission plc v. ABB and others, 3 November 2011.

[9] In addition, EU institutions and Member States are privileged interveners who do not have to show such interest.

[10] Order of the President of the Court of First Instance of 26 July 2004, Microsoft Corp. v Commission of the European Communities, Case T-201/04, ECR [2004] II-02977.

[11] Order of the Court of First Instance (First Chamber) of 28 November 1991, Eurosport Consortium v Commission of the European Communities, Case T-35/91, ECR [1991] II-01359.

[12] Order of the President of the Court of Justice of the EU of 8 June 2012, Schenker AG v Deutsche Lufthansa AG and Others, Case C-602/11, not yet published.

EC Fining Practices Under the 2006 Guidelines

Kaj Rozga
Weil, Gotshal & Manges LLP, United States

Since updating its fining guidelines on September 1, 2006,[1] the European Commission has levied eight of its ten largest cartel fines ever.[2] Other EC firsts under the new framework have included a pair of billion-euro case fines—including a record-setting €1.47 billion in the recent CRT investigation—and several individual firm fines of over one-half billion euros. EC cartel investigations in the last five years alone have led to over €9 billion ($12 billion) in fines.

The up-tick in fines should come as little surprise. The EC explicitly crafted the 2006 fining guidelines "with a view to increasing the deterrent effect of fines,"[3] out of a concern that the previous framework had led to fines that "were too low for large companies, particularly ones in long-lasting cartels covering a large volume of products, as well as for repeat offenders."[4]

Increasing fines mean that not only do clients face higher potential liability in an EC investigation, they also have a stronger incentive to seek leniency. First-in-time leniency applicants can get complete immunity from fines, and even subsequent applicants can receive reductions of up to 50%. For example, second-in-time leniency applicant Sasol avoided half of a €636 million fine in the EC's 2008 investigation into a wax producer cartel.

Given the importance of predicting fine risk, what can practitioners take away from EC fining practices since the new guidelines went into effect? What factors help to explain the recent record-breaking fines?

The 2006 guidelines establish fines according to the level of affected sales (overall economic impact, as well as the conspiring firms' market shares) and the duration of the conduct. The EC's formulaic method starts with calculating the annual value of sales (*i.e.*, revenues) of the relevant products. Next, the sales figure is increased by up to 30% if certain aggravating factors are present (*e.g.*, ring leader). The figure is then multiplied by the duration of the conduct (measured in half-year increments). Additionally, the 2006 guidelines increased the maximum penalty that can be applied to the final fine for repeat offenders from 50% to 100%, and introduced a new "entry fee" that permits an additional penalty (15% to 25% of annual sales) for the most severe types of anticompetitive conduct (*e.g.*, price fixing, market allocation, etc.).

All of these factors help to explain the large cartel fines imposed by the EC since 2007. However, the highest fines were imposed on what the EC viewed as the serious and patently harmful cartel conduct (what the guidelines call the "nature of the infringement") that lasted for a long period of time ("duration") and affected customers EU-wide ("geographic scope") in large consumer markets ("value of sales").

For example, the EC levied its largest case fine ever (€1.47 billion) in the CRT cartel investigation because it found that the conspiracy lasted nearly ten years, "operated worldwide," and involved "textbook cartels" that fixed prices and allocated markets—"the worst kinds of anticompetitive behaviour."[5] Similarly, the EC's €1.38 billion fine of car glass producers resulted from the "seriousness of the case" (which involved market allocation and price fixing), the large combined market share of the conspirators (90%), the significant volume of impacted sales (€2 billion market), and an EU-wide impact.[6]

The 2006 changes to the fining guidelines have also contributed to larger individual firm fines. For example, the EC increased the fine of one participant in an alleged wax producer cartel by 60% because it had "already been fined for cartel activities in previous Commission decisions."[7] Saint-Gobain's record-setting €900 million fine in the car glass producer cartel resulted in a 60% increase for the same reason.

Clearly, the stakes are getting higher for firms selling in large international markets who come under investigation for cartel conduct. Although market size and the nature, duration, and geographic scope of the conduct are important considerations for the EC when it sets fines, many other nuanced and case-specific factors also play a role. To keep track of the EC's evolving fining practices, practitioners can review press releases for a cursory overview of the rationale underlying the fines resulting from a completed investigation, or they can wait several months for a Summary of Commission Decision to get a more detailed explanation.

---

[1] Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/200, 2006/C 210/02, Jan. 9, 2006, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT.

[2] Cartel Statistics, Dec. 5, 2012, http://ec.europa.eu/competition/cartels/statistics/statistics.pdf.

[3] Competition: Commission Revises Guidelines for Setting Fines in Antitrust Cases, IP/06/857, June 28 2006, http://europa.eu/rapid/press-release_IP-06-857_en.htm.

[4] European Commission: Fines for Breaking EU Competition Law, Nov. 2011, http://ec.europa.eu/competition/cartels/ overview/factsheet_fines_en.pdf.

[5] Antitrust: Commission Fines Producers of TV and Computer Monitor Tubes €1.47 billion for Two Decade-Long Cartels, IP/12/1317, Dec. 5, 2012, http://europa.eu/rapid/press-release_IP-12-1317_en.htm. The EC has not yet published a Summary of Commission Decision.

[6] Antitrust: Commission Fines Car Glass Producers Over €1.3 Billion for Market Sharing Cartel, IP/08/1685, Nov. 12, 2008, http://europa.eu/rapid/press-release_IP-08-1685_en.htm?locale=en; Summary of Commission Decision (Case COMP/39.125 – Car Glass), July 25, 2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:173:0013:0016:EN:PDF.

[7] Antitrust: Commission Fines Wax Producers €676 Million for Price Fixing and Market Sharing Cartel, IP/08/1434, Oct. 1, 2008, http://europa.eu/rapid/press-release_IP-08-1434_en.htm?locale =en; Summary of Commission Decision (Case COMP/C.39181 – Candle Waxes), Dec. 4, 2009, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0017:0021:EN:PDF.

Abuse of Dominance: The Indian Experience

Kalyani Singh
Luthra & Luthra Law Offices, India

Since its enforcement, the Competition Act, 2002 (Competition Act) has made quite an impact. Recently the Competition Commission of India (CCI), in a landmark case, fined a real estate developer (Developer) a whopping US $115 million[1] (approx) for abusing its dominant position in the market[2] Notwithstanding the fact that the general consensus, amongst legal practitioners, was that the case related to issues on consumer protection laws rather than competition law, the CCI held the same to be a case within the scope of the Competition Act.

This article is an attempt to discern the philosophy adopted by the CCI in relation to the assessment of abuse of dominance under the Competition Act.

The case[3] was regarding certain clauses in the apartment buyers' agreement (Agreement) for sale of luxury apartments. The main issue was whether the Agreement was one-sided and whether the Developer had failed to perform its obligations as provided in the Agreement.

The CCI concluded that the Agreement was one-sided and imposed an undue burden on the buyers. The CCI observed that one of the main objectives of the Competition Act was to protect consumer interest and the Developer's conduct was in complete contradistinction with this objective as it was an absolute disregard of the consumers.[4]

The CCI held that this one-sided Agreement was an abuse of dominance since the Developer *would not have been able to execute such an Agreement had it not been for its dominance in the market*.[5]

In holding the Developer to have abused its dominance, the CCI focused on the direct harm caused to the consumer which was considered to be irredeemable despite the fact that there were competitors present and competing in the market. Interestingly enough, when considering the market and industry practices, the CCI observed that industry practices are not a justification since the Developer was a market leader. The CCI observed that a *market leader is the one that sets industry practice* and the other smaller competitors will invariably follow the practice.[6]

The conduct in the case that was held to be abusive is what is typically regarded as an "exploitative" conduct.

Exploitative Conduct as an Abuse of Dominance

At the outset, it is important to state that the law on abuse of dominance has traditionally been a very elusive and evolving area of competition law. As Franz Böhm eloquently stated, "*[i]t is easier to hold a greased pig by the tail than to control a firm for abuse of a dominant position*."[7] While there is a significant transatlantic convergence that dominance itself is not illegal, the question as to what kind of conduct constitutes an abuse of dominance has resulted in considerable divergence across jurisdictions.[8]

Abuse of dominance in India includes both exclusionary (conduct that results in exclusion of competitors and therefore reduces competition) and exploitative (conduct that directly harms consumers) conduct. However, both exclusionary and exploitative conducts arguably are interdependent as the main objective of every conduct is to be in a position to exploit.

The typical antitrust story is that a firm through exclusionary conduct reduces competition in order to exploit its market power.[9]

A natural corollary to this is to prohibit both exclusionary and exploitative conduct for being anticompetitive. However, exploitative conduct is not necessarily anticompetitive. Economic theory suggests that it may have a procompetitive element. The essence of procompetitive behavior is to increase market power, which will in turn increase rents by means of exploiting this very market power.[10] In fact, if there was no possibility to ever exploit ones market power, there would be no incentive to compete. This economic rationale is what lends a self-correcting attribute to an exploitative conduct.

Current Competition Law Jurisprudence Seems to Adopt a Cautious Approach towards Exploitative Conduct

The procompetitive attributes of exploitative conduct have been recognized in the jurisdictions that have played a pivotal role in the development of competition law, including the U.S. and EC.

In the U.S., exploitative conduct is not considered to be an abuse of dominance. The rationale for not condemning exploitative conduct is aptly explained by the U.S. Supreme Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*:[11]

> *The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth.*

Even in the EC, which the Competition Act seems to emulate, there has been a shift in assessment of abuse of dominance which puts more emphasis on exclusionary than exploitative conduct.

The formal EC law covers both types of abuse, and provides little guidance on whether exploitation or exclusion should be the greater concern.[12] As a practical matter however, the law has, over the years, placed more emphasis on exclusionary effects.

The discussion paper on application of Article 82[13] (now Article 102) and the guidance on commission's enforcement priorities in applying Article 82[14] (now Article 102), are concerned only with exclusionary conduct. This is a clear indication of the fact that the primary focus of the law in the EC, when assessing abuse of dominance, is on exclusionary conduct.

Assessment of Exploitative Conduct in India

The current approach of the CCI seems similar to that of erstwhile EC law; it considers both exploitative and exclusionary conduct as an abuse of dominance. Whether this jurisprudence on abuse of dominance, adopted by the CCI, will witness an evolution as experienced in the EC, however, remains to be seen.

The CCI judgment, discussed above, explicitly indicates that the core edifice on which the Competition Act is based is "consumer welfare." While it is true that the preamble of the Competition Act identifies protection of consumer interest as one of the objectives, it is important not to lose sight of the fact that the Competition Act is a mirror with two faces. A careful reading of the Competition Act makes it clear that its objective is protection of consumer interest *and* freedom of trade. This dual objective is best achieved if the main priority is to ensure that the competitive process is intact. This in turn implies forbearance on part of the authorities whilst assessing exploitative conduct.

A blanket ban on exploitative conduct is likely to result in excessive intervention,[15] which might harm rather than protect competition and hence ultimately cause harm to consumers.

It is important to remember that the potential for causing harm through intervention is greater in single firm conduct.[16] Therefore, a more cautious approach, when assessing exploitative conduct, would be an efficacious policy decision as it will allow for what Adam Smith referred to as the "*invisible hand*" to maintain a competitive equilibrium in the market.

---

[1] INR 6.3 Billion.

[2] Belaire Owners' Association v. DLF Limited, HUDA & Ors., Case No. 19/2010.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] F. Böhm in F. M. Scherer, Competition Policies for an Integrated Work Economy (Washington, DC: Brookings Institution, 1944) 70.

[8] David J. Gerber, Global Competition: Law, Markets, and Globalization 312 (2010).

[9] Lars-Hendrik Röller, ESMT; Exploitative Abuses; Business Brief No. BB-107-002; ESMT European School of Management and Technology, 2007.

[10] *Id.*

[11] 540 U.S. 398 (2004).

[12] Faull and Nikpay, The EC Law of Competition, 319 (2007).

[13] DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses (2005).

[14] 2009/C 45/02.

[15] Faull and Nikpay, The EC Law of Competition, 318 (2007).

[16] R. Hewitt Pate, The Common Law Approach And Improving Standards For Analyzing Single Firm Conduct, 13th Annual Conference on International Antitrust Law and Policy (2003).

Vertical Issues Under Vietnam's Competition Law

David Fruitman*
DFDL Legal & Tax, Cambodia

As Vietnam's Competition Law was enacted in 2004 (and applicable as of July 2005), it should probably not be considered new any longer; however, given the relative lack of relevant cases or regulatory guidance, there is still a significant degree of clarification needed in respect to the law and numerous areas for potential amendment have been identified. A recent report of a task force set up by the Vietnam Competition Authority ("VCA") in conjunction with the Japan International Cooperation Agency addressed a number of these areas.[1]

One area that was identified, in part, in the Amendment Report is the treatment of vertical economic concentrations and competition restriction agreements. Given the brevity of this article, only a summary treatment can be provided herein, but, essentially, the Competition Law defines both competition restriction agreements and economic concentrations in terms of enumerated forms that potentially incorporate both horizontal and vertical matters (as well as other forms of concentrations and agreements such as conglomerate mergers). Certain economic concentrations and forms of competition restriction agreements are subject to prohibition and/or notification requirements based on market share thresholds that require determination of the combined market share of the relevant parties.

The current statutory language does not explicitly restrict concentrations or agreements subject to these thresholds to those which are horizontal in nature and commentators have expressed various opinions on whether such restrictions are incorporated in the Competition Law. This has caused uncertainty in respect to 1) determining *ex ante* whether a proposed transaction falls within the scope of the notification or prohibition regimes in relation to economic concentrations; and 2) determining whether a particular agreement would be considered under Article 9 (competition restriction agreements) or, as applicable, Articles 13 or 14 (abuses of dominant or monopoly positions) or both.

With respect to economic concentrations, the VCA has stated its position that the relevant provisions only apply to horizontal mergers. In its Report on Economic Concentration Activities in Vietnam 2012,[2] the VCA stated, "In addition, the use of combined market shares as the threshold to trigger merger control shows that the Vietnam Competition Law only deals with horizontal economic concentration. Therefore, economic concentration activities between enterprises that are not in the same relevant market (vertical and conglomerate mergers) are not subject to the scrutiny of the Competition Law."[3] The purposive interpretation of this threshold is further explained as follows, "Some say that if an economic concentration case is happening between two enterprises which are not included in the same relevant market (as in the case of vertical or conglomerate mergers), it is still possible to calculate the market shares as in X% + 0% = X% in the respective markets of each side. However, that does not reflect the right meaning of the assessment of the inherent possibility to restrict competition and could lead to difficulties for enterprises because in many cases, these M&A cases could bring about economic efficiency. One needs to differentiate the ways to assess the impacts of restricting competition amongst different types of M&A."[4]

Clearly, this interpretation leaves a number of economic concentrations that may potentially have an adverse competitive impact or that may otherwise be prohibited under the economic concentration regime outside the scope of the Competition Law. The Amendment Report identifies this concern and recommends an expansion of the scope of the regulatory regime to incorporate other forms of economic concentrations.[5] However, the question remains as to why the VCA has taken such a narrow interpretation of the economic concentration thresholds and how this relates to the provisions on competition restriction agreements. The answer to both seems to lie within the Report on the Comments of the Members of National Assembly on the Project of Competition Law Issues – 2004 (the "NA Report"). Reports such as this are prepared by the National Assembly to explain its considerations of the law being enacted; in the case of the NA Report, the Competition Law. It is not a formal legal instrument; however, similar reports have occasionally been used to interpret a relevant law in court. In the section relating to competition restriction agreements, the NA Report states that Chapter II (which in the relevant draft dealt with competition restriction agreements) is designed for horizontal agreements and that the Ministry of Commerce's opinion was that the current provisions satisfy these requirements. Since this is not explicit in the statutory language, one assumes that the purposive interpretation of "combined market share" is the VCA's means of accomplishing the statutory intent of limiting the relevant provisions to horizontal matters.

Since the same "combined market share" language is used in the provisions dealing with economic concentrations, it would also appear that the VCA has maintained this purposive interpretation for the sake of consistent application of the statutory language.

As noted above, while the VCA has publicly stated its position with respect to the restricted scope of application of the provisions relating to economic concentrations, similar statements with respect to the restrictive scope of application of the provisions relating to competition restriction agreements are not evident. To the extent this is correct, explicit guidance from the VCA with respect to the application of the competition restriction agreements provisions of the Competition Law would be welcome. Further, while not an identified proposal in the Amendment Report, more explicit statutory language or an interpretative Decree in relation to competition restriction agreements would be useful in any future statutory reconsiderations of the Competition Law as contemplated by the Amendment Report.

---

* The author would like to thank Dr. Anh Tuan Nguyen of LCT Lawyers and Nguyen Nhu Nguyet of DFDL for their assistance with the research for this article; all opinions presented within are solely the responsibility of the author.

[1] Vietnam Competition Authority, *Review Report on Vietnam Competition Law* (Oct. 15, 2012), *available at* http://www.vca.gov.vn/Web/Content.aspx?distid=6115&lang=en-US [hereinafter *Amendment Report*].

[2] Vietnam Competition Authority, *Report on Economic Concentration Activities in Vietnam 2012* (Sept. 18, 20120, *available at* http://www.vca.gov.vn/Web/Content.aspx?distid=6045&lang=en-US [hereinafter *Economic Concentration Report*].

[3] *Id.* at 50.

[4] *Id.* at 49, n.35.

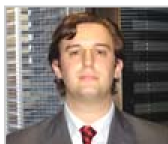
[5] *Amendment Report*, *supra* note 1, at 128.

Meet the Authors

Robert Bell is a Partner in the London office of Speechly Bircham LLP.

Evelina Kurgonaite is a lawyer and journalist based in Brussels. She is head of European coverage for PaRR - Policy and Regulatory Report.

William C. Lavery is a Senior Associate in the Washington office of Baker Botts LLP.



Santiago del Rio is an Associate in the Buenos Aires office of Marval, O'Farrell & Mairal..

Kalyani Singh is an Associate in the New Delhi office of Luthra & Luthra Law Offices.

Andrew Ward is a Partner in the Madrid office of Cuatrecasas, Gonçalves Pereira.

David Fruitman is Regional Competition Counsel/Senior Advisor based in the Cambodia office of DFDL.

Pablo Lavandeira is an Associate in the Madrid office of Cuatrecasas, Gonçalves Pereira.

Miguel del Pino is a Partner in the Buenos Aires office of Marval, O'Farrell & Mairal.

Kaj Rozga is an Associate in the New York office of Weil, Gotshal & Manges LLP.

Jessica Walch is an Associate in the Brussels office of Sidley Austin LLP.