International Antitrust Bulletin

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Promoting Competition Protecting Consumers

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IN THIS ISSUE

What In The World Did I Miss?

A summary of the world's major competition law developments in the past quarter.

North America

South America

Asia

Europe

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What In The World Did I Miss?

Africa

John Oxenham
Nortons Inc., South Africa

South Africa — The private healthcare inquiry - Netcare claims KPMG is conflicted and inquiry panel now appointed. (Jan. 30, 2014)
www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-appoints-healthcare-inquiry-panel-media.pdf

South Africa — Privately agreed non-competition merger conditions problematic in setting precedent for large foreign direct investment matters. (Feb. 6, 2014)
www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Commission-recommends-an-unconditional-approval-of-the-Afgri-merger.pdf

Swaziland — Lengthy merger investigation results in conditional merger approval for Premier Swazi Bakeries (Pty) Ltd and milling business activities of Ngwane Mills (Pty) Ltd. (Feb. 10, 2014) www.times.co.sz/business/95444-premier-foods-buys-ngwane-mills.html

COMESA — New merger control regulations are expected after April. Additionally, "The Commission is reportedly working with the World Bank's International Finance Corporation to determine what the proper notification thresholds should be." (Feb. 27, 2014)
http://africanantitrust.com/2014/02/27/the-end-of-the-zero-threshold-contagion/

Kenya — Complaint against Kenya Airways lodged. (Mar. 11, 2014)
www.businessdailyafrica.com/Corporate-News/Fly540-terms-new-Kenya-Airways-carrier-a-monopoly/-/539550/2239942/-/k7lk7b/-/index.html

Kenya — Competition Authority of Kenya to investigate banking sector. (Mar. 30, 2014)
www.businessdailyafrica.com/Competition-watchdog-investigates-banks/-/539546/2263438/-/qcp9tz/-/index.html

What In The World Did I Miss?

Asia

Cecil Chung
Yulchon LLC, Korea

China, *It's Not Just Google and Qualcomm, but Microsoft and Nokia Also Face a Chinese Antitrust Probe* — Not to be outdone by the NDRC's torrid pace of "pricing-related" antitrust probes, China's MOFCOM (Ministry of Commerce) is handling its share of headline-catching international merger reviews. At least in part spurred by two Chinese mobile phone makers, Huawei and ZTE, MOFCOM is seriously examining the potential ramifications of Microsoft's proposed acquisition of Nokia's handset business. (Jan. 2, 2014)
http://timesofindia.indiatimes.com/tech/tech-news/software-services/Microsoft-Nokia-deal-Huawei-ZTE-want-China-to-set-conditions/articleshow/28278464.cms?referral=PM

China, *Qualcomm in the Dark in China* — In November 2013, China's NDRC (National Development and Reform Commission) opened an investigation into Qualcomm's practices. As of early January 2014, Qualcomm's CEO said he was still not sure exactly what the NDRC was investigating. A month later, the picture became a bit less dark, but not by much. Not surprisingly, the NDRC, being the pricing-related trade practice enforcer in China, is reportedly examining if Qualcomm determines its patent royalties in an unfair manner and/or if the royalty rates and amounts are unfairly too high. (Jan. 9, 2014)
http://in.reuters.com/article/2014/01/09/qualcomm-china-idINDEEA0801U20140109

Korea, *KFTC Clears Samsung From Apple's FRAND Abuse Allegations in Korea* — In late February 2014, the KFTC (Korea Fair Trade Commission) closed its probe of Samsung's alleged FRAND abuses without taking any actions. The KFTC based its decision on the fact that Samsung offered a number of commitments to the EU regarding the same issue and also the fact that the U.S. International Trade Commission found that Apple infringed on certain of Samsung's patents. The KFTC also noted that it was Apple that started the still on-going patent war between the two tech giants. Also note that on February 9, 2014 the U.S. Justice Department announced that it had closed its own similar investigation of Samsung in the U.S. in the aftermath of the USTR's rare reversal of the ITC's import ban on certain Apple products for patent infringements. (Feb. 26, 2014) http://appleinsider.com/articles/14/02/27/south-korea-rejects-apple-complaint-against-samsungs-use-seps-in-patent-litigation

China, New Merger Review Rules in China — Speaking of merger reviews in China, MOFCOM announced that it was planning to issue new draft rules sometime in 2014. As of February 2014, China blocked one proposed merger transaction and cleared with conditions twenty-one transactions since China adopted its antitrust law in 2008. (Feb. 27, 2014)
http://in.reuters.com/article/2014/02/27/us-china-mofcom-idINBREA1Q0BI20140227

Korea, *A Rare Total Merger Rejection, This Time by the KFTC Blocking a Lens Acquisition* — In a rare case of absolute ban on proposed merger transactions, the KFTC blocked French lens producer Essilor's proposed acquisition of a local Korean rival Daemyung Optical. The KFTC determined that the combined firm would have a 66% share of the single-focal lens market and 46% of the multi-focal lens market in Korea. The KFTC also noted that Daemyung was a maverick that constrained the world's largest player, Essilor, in Korea. This is reportedly the sixth time that the KFTC blocked a merger transaction in its entirety, with the last time being in 2009. (Mar. 17, 2014)
http://english.hankyung.com/news/apps/news.view?popup=0&nid=0&c1=04&newscate=1&nkey=201403171630121

What In The World Did I Miss?

Australasia

Linda Evans
Clayton Utz, Australia

Malaysia — The Malaysia Competition Commission (MyCC) urged the public in January 2014 to take part in public consultation regarding the Leniency Regime and Financial Penalties. The Leniency Regime is based on section 41 of the Competition Act 2010, which allows the MyCC to grant a reduction of up to a maximum 100% off any penalties that could otherwise be imposed on infringing parties. The Financial Penalties guidelines is based on section 17 of the Competition Commission Act and section 40(1) of the Competition Act 2010. Under these Acts, the MyCC has the ability to impose a financial penalty for any infringement of a prohibition in Part II of the Act. (Jan. 15, 2014) www.mycc.gov.my/news.asp?page=pressRelease_view&newsid=1471

New Zealand — On January 24, 2014, Bauer Media Group (NZ) LP (Bauer) was cleared to acquire all of the assets used by APN Specialist Publications NZ Limited (APNSP) in the publication of the New Zealand editions of various weekly magazines, including the New Zealand Listener. The New Zealand Commerce Commission considered the impact of the proposed acquisition on the production and supply of magazines, including the content of magazines and the sale of advertising. The Commission was satisfied that the proposed acquisition would not have, or would not be likely to have, the effect of substantially lessening competition in the supply of current affairs magazines, mass market weekly women's magazines, women's interest magazines and magazine advertising. (Jan. 24, 2014) www.comcom.govt.nz/the-commission/media-centre/media-releases/detail/2014/bauer-given-clearance-to-acquire-magazine-titles

Singapore — In January 2014, the Competition Commission of Singapore (CCS) was notified of a Proposed Strategic Alliance between Singapore Airlines and Air NZ. The Alliance relates to the provision of international air passenger transport services, with a specific focus on the Singapore origin and related destination cities and is intended to expand networks through code-sharing and offering a wider choice of journey options to passengers. The notification was made pursuant to section 34 of the Competition Act which prohibits any agreements or undertakings which may have the object or effect of distorting or preventing competition in Singapore. Public comment was sought in February 2014, and the CCS is yet to release a decision. (Feb. 5, 2014) www.ccs.gov.sg/content/ccs/en/Media-and-Publications/Media-Releases/ccs-consults-on-the-proposed-strategic-alliance-between-singapor.html

Indonesia — The Commission for the Supervision of Business Competition (KPPU) concluded that the acquisition of 95% of the shares in PT. Axis Telekom Indonesia (AXIS) by PT. XL Axiata, TBK (XL) will not lead to monopolistic practices and unfair business competition. KPPU has required that XL provide a report on "market development, product and charge" every three months for three years. This is because the market share of three businesses actors in the telecommunications services market (Telkom, Indosat, dan XL) was found to be 89.05% of the market. XL has stated that it is committed to remaining a market pioneer in competitive rates of mobile and telecommunication services. KPPU has said that it will conduct intensive monitoring of the telecommunications market going forward. (Feb. 18, 2014) http://eng.kppu.go.id/?p=2745

Philippines — On March 14, 2014, the Phillippines Department of Justice issued a statement that it will continue its inquiry into the Energy Regulatory Commission's (ERC) price hike that occurred in December 2013. ERC claimed that the price hikes were a result of certain power plants to offer capacity in the spot market. The price hike will be reviewed by the Department of Justice's Office for Competition (OFC). It was said that the high concentration in the energy market may have negatively affected prices – leading to an investigation of the abuse of market power in the electricity market. The Supreme Court in the Phillipines has already heard some oral arguments by interest groups like Bayan Muna and NASECORE. (Mar. 14, 2014) www.doj.gov.ph/news.html?title=DOJ%20Statement%20on%20the%20ERC%20Order%20Regulating%20WESM%20Prices&newsid=266

Australia — On March 27, 2014, the final terms of reference for the Government's "root and branch" review of competition law and the appointment of the review panel were released. The Harper review will be the first comprehensive examination of Australia's competition framework in more than twenty years. The Hon Bruce Billson MP, Minister for Small Business states the review will examine both current laws and the broader competition framework in order to identify ways to "increase productivity and efficiency in markets, drive benefits to ease cost of living pressures and raise living standards for all Australians." (Mar. 27, 2014) http://bfb.ministers.treasury.gov.au/media-release/014-2014

What In The World Did I Miss?

Europe

David Cardwell
Baker Botts LLP, Brussels

Spain, ***Spanish authority enforces against anticompetitive information exchange*** — In January, the Spanish competition authority (the NCMC) imposed fines totaling EUR 3.1 million on car rental companies active at thirty-one airports across Spain. The decision to investigate the companies and reach an adverse decision is particularly notable as it represents an example of a national competition authority in the EU finding that the sharing of certain types of sensitive information amongst competitors is, in and of itself, a punishable anticompetitive arrangement. (Jan. 9, 2014)
www.cnmc.es/Portals/0/Ficheros/sala_de_prensa/2014/01_Enero/20140109_Sancionador_AENA_aeropuertos.pdf

United Kingdom, ***UK increases enforcement of criminal cartel laws*** — A director of a company allegedly involved in price fixing in the market for galvanized steel tanks for water storage was charged on January 27 under the UK's criminal cartel offences legislation. The decision by the UK Office of Fair Trading to pursue a criminal conviction for cartel activities signals a willingness on the part of the UK authorities to use criminal enforcement options whenever possible. This development came shortly before the new Competition and Markets Authority ("CMA"), operational as of April 1, 2014, begins to enforce a more far-reaching criminal cartel regime which has been strengthened by legislators with the specific intention of making it easier for the CMA to secure more criminal cartel convictions. (Jan. 27, 2014)
www.oft.gov.uk/news-and-updates/press/2014/04-14

European Union, ***European Commission acts against alleged misleading information in merger case*** — The Commission announced on February 25 that it has begun to take formal enforcement steps against two parties for the provision of misleading information in a merger investigation. The two parties – specialty paper suppliers Ahlstrom Corporation and Munjksjö AB – had notified their merger to the European Commission in October 2012, and the Commission subsequently cleared the transaction. The Commission has since established that it has reasonable grounds to suspect that the parties failed to provide accurate market share data in their merger notification and has sent the parties a "Statement of Objections," effectively setting out the case against them. The case is notable as it is one of the few known examples of the Commission taking enforcement action against merging parties for failure to provide truthful information in a merger notification. (Feb. 25, 2014) http://europa.eu/rapid/press-release_IP-14-189_en.htm

European Union, ***EU proposes extension to special treatment for liner shipping consortia*** — A special exemption from the application of the main EU antitrust rules for the liner shipping sector looks set to be extended for another five years under European Commission proposals published on February 27. The current Consortia Block Exemption, meaning that certain agreements between liner shipping carriers are permitted due to the economies of scale they achieve, would be extended to apply until April 2020 – a move that has been strongly advocated by the liner shipping sector. A consultation period on the Commission's proposals closed on March 31, and the Commission is expected to adopt a new Block Exemption before the existing Regulation expires in April 2015. (Feb. 27, 2014)
http://ec.europa.eu/competition/consultations/2014_maritime_consortia/index_en.html

European Union, ***EU adopts new transfer of technology law*** — On March 21, the European Commission adopted new antitrust rules designed to govern the assessment of technology transfer agreements from May 1, 2014. The new package of measures amends both the Transfer of Technology Block Exemption Regulation and the associated guidelines. The new regime will not change radically from the previous one, although contract provisions such as passive sales restrictions and exclusive grant-backs will be treated more strictly than in the past. (Mar. 21, 2014)
http://ec.europa.eu/competition/antitrust/legislation/transfer.html#TTBER_and_guidelines

What In The World Did I Miss?

North America

Fiona Schaeffer
Jones Day, United States

United States — The United States Department of Justice wins a jury trial against Bazaarvoice, Inc., a leading provider of internet platforms for product ratings and reviews, requiring the company to unwind the non-reportable and consummated acquisition of PowerReviews, Inc. (Jan. 9 2014) www.justice.gov/atr/public/press_releases/2014/302941.htm

United States — Bridgestone Corp. agrees to plead guilty and pay a $425 million criminal fine for its role in a conspiracy to fix prices of automotive anti-vibration rubber parts. In determining the $425 million fine, the United States Department of Justice emphasized that Bridgestone did not disclose this conspiracy during a 2011 investigation that led to a Bridgestone guilty plea for price-fixing in the marine hose industry. (Feb. 13, 2014) www.justice.gov/opa/pr/2014/February/14-at-157.html

United States — Showing that even state enforcers can use antitrust laws to protect local businesses from foreign conduct, the Oklahoma Attorney General brings a state law action against a Chinese manufacturer of valves used in the petroleum industry, alleging the manufacturer's use of pirated software violates Oklahoma's deceptive trade practices and antitrust laws. (March 14, 2014)
www.ok.gov/triton/modules/newsroom/newsroom_article.php?id=258&article_id=13831

Canada — Canada's Competition Bureau proposes new Price Maintenance Enforcement Guidelines, providing transparency on the Bureau's approach to common business practices, such as minimum resale pricing, suggested resale pricing, and minimum advertised pricing. (March 20, 2014) www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03697.html

Canada — Canada's Competition Bureau proposes an update of its Intellectual Property Enforcement Guidelines and announces a plan for better coordination with the Canadian Intellectual Property Office. (April 2, 2014)
www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03715.html ; www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03710.html

United States — The United States Department of Justice obtains its first successful extradition to the United States on an antitrust charge. Romano Pisciotti, an Italian national and former executive with Parker ITR Srl, was transferred from Germany to the United States to face criminal price-fixing charges. (April 4, 2014) www.justice.gov/atr/public/press_releases/2014/304888.htm

Mexico — Mexico's Congress approves a new competition act, the Federal Law of Economic Competition. If published by the president (as expected), the law will significantly expand antitrust enforcers' powers in Mexico, due to the new (a) premerger clearance requirement and (b) ability to require divestitures or access to "essential facilities" in industries that have "barriers to competition." (April 29, 2014) http://gaceta.diputados.gob.mx/PDF/62/2014/abr/20140425-I.pdf

South America

Amadeu Ribeiro
Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados, Brazil

Brazil — Brazil's CADE submits draft regulations on the review of collaborative agreements and other topics for public consultation. (Feb. 19, 2014)
http://cade.gov.br/Default.aspx?9bae7f8a9b71878c9eabbd92ac93

Brazil — Brazil and Russia sign a cooperation agreement for the exchange of information in the antitrust area. (Feb. 26, 2014)
www.cade.gov.br/upload/Conv%C3%AAnio%20assinado%20federacao%20russa%20Ingl%C3%AAs.pdf

Brazil — Brazil's CADE publishes sector study on the gasoline retail market. (Mar. 12, 2014) www.cade.gov.br/Default.aspx?5bee3fca5acf24ef3a0759f54204

Brazil — Brazil's CADE launches investigation into alleged cartel in public tenders for trains and subways in five states. (Mar. 20, 2014)
www.cade.gov.br/Default.aspx?df53a3758c81979c69d669c593bb

Seven Months In: The U.S. Antitrust Agencies' Joint Model Waiver of Confidentiality

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Anne Newton McFadden* *U.S. Department of Justice, Antitrust Division, United States*

On September 25, 2013, the U.S. Department of Justice Antitrust Division and U.S. Federal Trade Commission (the U.S. antitrust agencies) issued a joint model waiver of confidentiality for entities to use in merger and civil non-merger matters involving concurrent review by a U.S. antitrust agency and competition authorities in other countries (joint model waiver).[1] At the same time, the U.S. antitrust agencies released a "Frequently Asked Questions" document to explain the cooperative process and the role of waivers.[2] In the seven months since the agencies released these documents, the joint model waiver has been widely used. The joint model waiver is regarded as fulfilling its intended goals of streamlining the process of providing waivers and reducing time and resources spent negotiating waivers.

Why Provide a Waiver?

As more U.S. companies and consumers do business overseas, and as more jurisdictions review merger transactions and conduct antitrust investigations, the U.S. antitrust agencies' cooperate more frequently with competition authorities in other jurisdictions. Confidentiality waivers, granted either by parties or third parties to an investigation, can facilitate this cooperation. Confidentiality waivers enable the U.S. antitrust agencies to discuss with non-U.S. competition authorities confidential information provided by the waiving party or third party. Without a waiver, confidentiality provisions in the laws, regulations, and rules governing an agency's practices generally preclude sharing confidential information between or among competition authorities.[3]

Confidentiality waivers facilitate free and open discussion between competition authorities, allowing them to identify issues of common interest, improve their analyses, avoid inconsistent outcomes and remedies, and often expedite review. In some cases, waivers also may help to streamline investigations by assisting staff in identifying relevant product and geographic markets, or eliminating theories of harm that have been thoroughly assessed, developed, and explained by the other jurisdiction.

Typically, confidentiality waivers are provided simultaneously to the cooperating agencies in the U.S. and abroad, and there has been a steep increase in the use of waivers to facilitate cooperation in the past decade. In 2003, an OECD report found that most jurisdictions had no experience with waivers in merger transactions.[4] By 2013, at least sixteen competition agencies reported use of waivers, and many countries "having no or limited experience in 2003" reported in 2013 that they were "using waivers as 'a routine practice.'"[5] At least thirty-five jurisdictions accept waivers and can use waivers as a legal basis for cooperation.[6]

The Need for a Joint Model Waiver and Guidance from the U.S. Antitrust Agencies

Prior to the release of the joint model waiver, FTC and DOJ had separate model waivers that did not explicitly address certain issues, including the treatment of privileged information. Significant agency and entity time and resources often were spent negotiating waiver language to address privilege and other issues. Based on the U.S. antitrust agencies' experience and feedback from entities and their counsel, the agencies created the joint model waiver and FAQ. These documents were intended to significantly reduce transaction costs and harmonize the practices of the two U.S. antitrust agencies.

The joint model waiver and FAQ promote greater transparency and better understanding of the agencies' policies and practices related to waivers. The FAQ provides introductory information on waivers and on the confidentiality rules applicable to the information provided under the joint model waiver, describes the process for providing a waiver to either agency, and explains specific provisions of the joint model waiver.[7]

It is important to note that the joint model waiver does not change the protections that are provided to entities that chose to waive confidentiality to permit cooperation based on confidential information; the joint model waiver simply puts them in writing in a single place. Importantly, the joint model waiver minimizes the need for protracted negotiations over the contents of the waiver.

U.S. antitrust agency practice reflected in the joint model waiver includes:

1. *Limitations of the waiver* – the joint model waiver makes explicit that the party granting the waiver does not waive its rights to protection from disclosure to any third party other than the non-U.S. competition authority named in the waiver. It also makes explicit that the waiver is limited to

confidential information obtained in the course of the investigation named in the waiver.

2. *Treatment of privileged information* – the joint model waiver includes provisions addressing the U.S. antitrust agencies' treatment of privileged information. Those provisions provide that: (1) the U.S. antitrust agencies will not seek from non-U.S. competition authorities information that is protected by U.S. legal privilege; and (2) the U.S. agencies will treat the receipt of any information that is claimed as privileged as inadvertently produced privileged information.[8] To help ensure that information privileged in the United States is not produced to a U.S. antitrust agency by a non-U.S. competition authority pursuant to a waiver, the joint model waiver instructs that entities should, to the extent possible, clearly identify any documents that are privileged under U.S. law that are provided to non-U.S. competition authorities.

3. *Treatment of information received from another competition authority* – the joint model waiver makes clear that the U.S. antitrust agencies will afford materials received from a non-U.S. competition authority pursuant to a waiver the same protections under the laws, regulations, and rules that govern information provided directly to the U.S. antitrust agencies. This includes the return or destruction at the end of an investigation and treatment under the Freedom of Information Act.

Use of the Joint Model Waiver

Since the adoption of the model waiver, entities providing waivers have relied on the joint model waiver without making changes, and in the seven months since its issuance, the document has been praised for its ease of use. Parties and third parties have raised fewer questions about providing waivers, and the additions to the waiver have eliminated the most common reasons for negotiating the content of waivers. Counsel for entities and staff at the U.S. antitrust agencies have found that using the joint model waiver increases efficiency and reduces transaction costs.

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[1] Model Waiver of Confidentiality, *available at* www.ftc.gov/sites/default/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/model_waiver.pdf and www.justice.gov/atr/public/international/docs/300917.pdf. *See also* DOJ Press Release, *available at* www.justice.gov/atr/public/press_releases/2013/300932.htm and FTC Press Release, *available at* www.ftc.gov/news-events/press-releases/2013/09/federal-trade-commission-and-justice-department-issue-updated.

[2] "Model Waiver of Confidentiality For use in civil matters involving non-U.S. competition authorities, Frequently Asked Questions," (FAQ), *available at* www.justice.gov/atr/public/international/docs/300916.pdf and www.ftc.gov/sites/default/files/attachments/international-waivers-confidentiality-ftc-antitrust-investigations/waivers_faq.pdf.

[3] *Id.*

[4] See OECD, "Report by the Competition Committee on Country Experiences with the 2005 Recommendation of the Council on Merger Review, p.29, *available at* www.oecd.org/daf/competition/ReportonExperienceswithMergerReviewRecommendation.pdf (citing Information Exchanges in International Co-operation in Merger Investigations, DAFFE/COMP/WP3(2003)3). The report was based on the questionnaire responses of thirty-three participating jurisdictions.

[5] *Id.*

[6] OECD, "Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation," 2013 at 20 and 54, *available at* www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf. The report and figures were based on the responses of 55 competition agencies that completed The OECD/ICN Survey on International Enforcement Co-operation – Status Quo and Areas for Improvement.

[7] *See* FAQ, *supra at* n. 2.

[8] Model Waiver of Confidentiality, *supra at* n. 1.

Illinois Brick Rejected in Canada

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On October 31, 2013, the Supreme Court of Canada released long awaited decisions in three high profile antitrust class action cases involving alleged price-fixing conspiracies: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*;[1] *Sun-Rype Products Ltd. v. Archer Daniel Midland Company*;[2] and *Infineon Technologies AG v. Option consommateurs*[3] collectively, the "Antitrust Trilogy"). All three appeals were from certification motions. At stake, the fate of indirect purchaser antitrust class actions in Canada.

Specifically, the Court in all three appeals considered the threshold question of whether indirect purchasers can, as a matter of law, recover losses that were "passed on" to them by someone else. Expressly rejecting the U.S. Supreme Court's decision in *Illinois Brick*, Canada's highest court concluded unanimously that indirect purchasers do have antitrust standing. The Supreme Court also considered the applicable standard of proof on a certification motion, and on a motion for authorization as it is called in Quebec.

Background

In *Sun-Rype,* the plaintiffs commenced a class action in British Columbia to recover alleged overcharges related to high-fructose corn syrup (HFCS), a food additive found in many snacks and beverages. In *Pro-Sys,* the plaintiffs commenced a class action claim in British Columbia against Microsoft for allegedly overcharging for its PC operating systems and PC applications software. The *Sun-Rype* class included both direct and indirect purchasers, while the *Pro-Sys* class was made up entirely of indirect purchasers. Both cases were certified at first instance, but the certification decisions were reversed by a majority of the British Columbia Court of Appeal, which concluded that indirect purchasers could not, as a matter of law, recover losses resulting from alleged overcharges.

In *Infineon,* the plaintiff applied for authorization to institute a class action in Quebec to recover alleged losses from overcharges for Dynamic Random Access Memory (DRAM) chips that are found in various electronic devices. The motion judge declined to authorize the proposed class action on the ground that the Quebec courts lacked jurisdiction. The Quebec Court of Appeal reversed and authorized the class action, also affirming that indirect purchasers have standing to bring claims to recover losses from alleged overcharges.

Illinois Brick Rejected

Most of the Supreme Court's analysis of the "indirect purchaser" issue is found in the *Pro-Sys* decision. Repeatedly referring to and quoting with approval from the dissenting opinion of Justice Brennan in *Illinois Brick* and criticism of the U.S. federal bar on indirect purchaser antitrust claims, the Court concluded that indirect purchasers have a right of action. In so doing, it addressed (and rejected) the various arguments raised by the defendants and relied on by the majority of the British Columbia Court of Appeal, including: (1) denying indirect purchaser claims is a necessary corollary to the rejection of the "passing on" defence because otherwise defendants will be exposed to the risk of double or multiple recovery; and (2) indirect purchaser actions are not viable because of the complexity associated with proof of damages for overcharges allegedly passed on to indirect purchasers.

The Court began by clarifying the scope of its decision in a case called *Kingstreet Investments v. New Brunswick (Finance)*[4] (a case that did not involve a price fixing conspiracy), in which it rejected "passing on" as a defence. The Court confirmed that its rejection of the "passing on" defence was not limited to the narrow circumstances of that particular case but instead was generally applicable to restitutionary law.

The Court then rejected the notion that the unavailability of "passing on" as a defence necessarily meant that "passing on" could not be used *offensively* by indirect purchasers to ground their claims. The respondents/defendants in all three cases argued that in the absence of a passing on defence, defendants would be vulnerable to multiple overlapping claims from direct and indirect purchasers, each seeking to recover 100% of the alleged overcharge. The Court acknowledged that the potential for double or multiple recovery could not be lightly dismissed. However, the Court suggested that in cases like *Sun-Rype* where the class is made up of both direct and indirect purchasers, an aggregate damages award that reflects the entirety of the overcharge will preclude double recovery. Further, in the Court's view, in cases where there are parallel proceedings with direct and indirect claims pending, trial courts will be able to manage the various suits to ensure that defendants are not subjected to multiple recovery.

The Court also rejected the argument that indirect purchaser claims should be barred as a matter of law because of the complexity associated with proving damages for overcharges that may be passed down through numerous levels of a distribution chain. The Court observed that plaintiffs willingly take on the burden of proving their damages at trial, which may require "expert testimony and complex economic evidence," and whether plaintiffs are ultimately able to discharge their burden of proof at trial will have to be determined on a case-by-case basis.

U.S. "Rigorous Analysis" Standard Also Rejected

The Supreme Court also addressed, for the first time in more than a decade, the standard of proof on a certification motion. It also addressed the standard in Quebec on a motion for authorization.

In particular, the Court considered the standard of proof to be applied to plaintiffs' proposed methodologies for establishing at the certification stage that harm can be proved on a common basis in indirect purchaser class actions. The Court confirmed that the standard to be applied outside of the province of Quebec is "some basis in fact."

In discussing that standard, the Court rejected the "rigorous analysis" standard mandated by the U.S. Supreme Court for certification under Rule 23,[5] but arguably gave potentially conflicting signals as to the appropriate level of scrutiny required to be applied by Canadian courts. On the one hand, the Court emphasized the importance of the courts' gatekeeper function at the certification stage, expressly "reaffirming the importance of certification as a meaningful screening device."[6] In *Pro-Sys*, the Court was clear that more than "symbolic scrutiny" is required.[7] Rather, the certification motion judge must find that "[t]here [are] sufficient facts to satisfy [her] that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage."[8] Applied to expert evidence put forward by plaintiffs to satisfy the court that a methodology exists by which loss can be proved on class-wide basis, this standard requires that the proposed methodology "must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e., that passing on has occurred).[9] Further, "[t]he methodology cannot be purely theoretical or hypothetical but must be grounded in the facts of the particular case in question" and "[t]here must be some evidence of the availability of the data to which the methodology is to be applied."[10] On the other hand, the Court said that a certification motion judge is not required to resolve conflicting facts or weigh evidence on a balance of probabilities because at the certification stage courts are "ill-equipped" to handle that level of evidentiary analysis.[11]

In *Infineon*, the Court found that the standard of proof for authorization of a class action pursuant to art. 1003 of Quebec Civil Code of Procedure (CCP) is that of establishing an "arguable case," which is "less demanding than the ["some basis in fact" standard] that applies in other parts of Canada."[12] The Court explained that, applying that standard at the authorization stage, the motion judge plays the role of filter, dismissing frivolous motions and authorizing only those proposed class actions that meet the low legal threshold requirements of art. 1003 CCP.[13]

Comment

The long-term impact of the Supreme Court's Antitrust Trilogy remains to be seen. Class actions on behalf of indirect purchasers were already common in Canada; indeed, indirect purchasers frequently comprise the whole or a significant part of proposed antitrust class actions in this country. In this regard, the trilogy merely confirms the *status quo ante*. The more important and interesting question is how lower courts will interpret and apply the Court's comments regarding the standard of proof at certification (and authorization) in subsequent cases. Interpreted (incorrectly in the authors' view) as authorizing a "wait and see"/"take it on faith" (*i.e.*, leave it to the trial judge) approach to certification, the trilogy could invite significant unfairness to defendants (who will be denied the opportunity to meaningfully contest certification) and mischief (particularly in those Canadian provinces with no -costs class action regimes) by incenting frivolous class action litigation and, to use the phrase coined by Judge Posner, "blackmail settlements," raising the twin specters of over-deterrence and over-compensation. The coming jurisprudence on this issue should be closely watched.

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* Davit Akman appeared as counsel for the Canadian Chamber of Commerce in the *Sun-Rype Products Ltd. v. Archer Daniel Midland Company* appeal. The views expressed in this article are not necessarily those of the Chamber of Commerce.

[1] 2013 SCC 57 [*Pro-Sys*].

[2] 2013 SCC 58 [*Sun-Rype*].

[3] 2013 SCC 59 [*Infineon*].

[4] 2007 SCC 1.

[5] See, *e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S Ct 2551 (2011); *Comcast Corp. v. Behrend*, 569 U.S. __ (2013).

[6] *Pro-Sys*, *supra* at para 103.

[7] See *ibid.*

[8] *Ibid.* at para 104.

[9] *Ibid.* at para 118.

[10] *Ibid.*

[11] See *ibid.* at para 102.

[12] *Infineon*, *supra* at para 128.

[13] See *ibid.* at paras 59 and 61.

Price Freezing Agreements, Market Investigations and Price Reporting Obligations: The Battle Against Inflation in Argentina

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Introduction

In December 2013, the former Secretary of Trade, Guillermo Moreno, tendered his resignation and as from December 2, 2013 Augusto Costa was appointed to replace him in this position. Upon his appointment to office, the main priority of the new official has been to decrease the currently increasing inflationary rate in Argentina.

A three fold-approach in order to achieve this objective is currently being implemented, which will be analyzed as follows.

"Controlled Prices"

On January 3, 2014, by means of Resolution No. 2/2014, the Secretary of Trade issued a template for price freezing agreements to be carried out between supermarkets, their suppliers and the Secretary of Trade regarding certain products. This campaign, known as "*Precios Cuidados*" ("Controlled Prices") is currently a priority for the current administration and there have been public announcements as regards its application on other markets as well.

Resolution No. 2/2014 established, among other provisions, the model agreements with supermarkets and their supplying companies, based on the Consumer Protection Law No. 24,240, which is normatively integrated to the Antitrust Law No. 25,156 and Commercial Loyalty Law No. 22,802. In these models, there are several points worth highlighting, namely:

- A normal supply obligation is established for the supermarkets and supplying companies.
- A quarterly periodical review is established based on the evolution of production and distribution conditions of the products that compose them. A specific model is set based on the variation structure of the value of the raw materials in national currency and productive inputs, wage cost of the production and distribution product chain, energy value, fuel value, taxation and fees.
- In the case of *force majeure* issues that impede the provision of a product, the Secretary of Trade and the supplying company will agree on a replacement for another product of similar characteristics, considering price, quality and consumer use.
- Manufacturing companies and supermarkets bind themselves to report in due time and in a certain way to the Secretary of Trade any new product launched into the market with similar characteristics to those included in the agreement.

Market Investigations

At the end of February 2014, the Antitrust Commission has initiated four market investigations. Under these investigations, the Antitrust Commission issued several requests of information to over 250 companies on a wide range of markets in order to determine the costs and margins of companies and their influence in the vertical structural pricing of said markets.

Due to the fact that there have been problems with the enforcement of the "Controlled Prices" campaign, the current administration ordered the commencement of four major market investigations in order to obtain a greater degree of visibility and control over consumer-sensitive industries. Thus, the following investigations were initiated:

- Investigation on the pharmaceutical market and the vertical relations in the industry.[1]
- Investigation on the sale of consumer goods in supermarket and hypermarkets and the vertical relations in the industry.[2]
- Investigation on raw materials for industry.[3]
- Investigation on raw materials for construction.[4]

The Antitrust Commission is following the same pattern in all of these investigations, namely the issuance of extensive requests of information regarding sensitive information followed by witness hearings in which the questions follow rather closely the matters inquired by means of the request of information.

The type of information being requested includes, among others: trade names and trademarks by product line; price lists of the past five years; main customers; market shares; main competitors; products which are imported or are locally manufactured; distribution channels; cost structures; profit margins; installed capacity; expected plans to increase the installed capacity; exports, for which products and in which conditions; and financial statements for the last five years.

Pursuant to public information released by the Antitrust Commission, as of March more than forty witness hearings have taken place, in their majority to commercial, financial and production managers of the companies under review.

Regarding the issue of confidentiality, the Antitrust Commission does not provide access to the file in market investigations, i.e., no party, even those that have received a request for information, would be able to access them. Furthermore, the request of confidentiality is only contemplated in the Antitrust Law for merger control proceedings pursuant to Section 12, and this possibility is not provided for market or anticompetitive conduct investigations (although the Antitrust Commission has considered it to be applicable in anticompetitive investigations in certain cases).

Since the required information, detailed in the previous section, by the Antitrust Commission is sensitive data of the companies, many of them raised concerns about the disclosure of said information. On March 21, 2014, the Antitrust Commission issued four Resolutions (No. 24/14, 25/14, 26/14 and 27/14) in the context of the market investigations being conducted. In each of them, the Antirust Commission decided that the information submitted by the companies in those cases was confidential, except the names of the companies involved, the business segments, the product portfolios and/or individual products commercialized, corresponding data of total markets and companies market shares in percentage ranges. Additionally, it was also clarified that the Antitrust Commission may publish in its final report elaborated data, using indexes, averages, variations or ranges, as well as qualitative information about market performance.

Price Reporting Regime

On March 14, 2014 the Secretary of Trade issued Resolution No. 29, published in the Official Gazette on March 18, 2014 (the "Resolution 29"). Resolution 29 approved a "Price Reporting Regime" by means of which, among other provisions, manufacturing companies of inputs and final goods that have had total annual sales[5] greater than AR $183 million (US $22,867,282.29[6]) in 2013 and distribution and/or commercializing companies of inputs and final goods that have had total annual sales greater than AR $250 million (US $31,239,456.68) are required to report on a monthly basis to the Secretary of Domestic Trade the current prices of all of their products within the first five (5) working days of each calendar month.

According to the paragraphs of Resolution 29, the Price Reporting Regime is intended to create a regime of "*final goods and inputs for the production that will allow access to an updated and constant knowledge of them in its different stages of production, distribution and commercialization.*" Furthermore, it is ruled that the information sent in compliance to the regime "*will be private and confidential, for the exclusive use of the SECRETARY OF TRADE, and will be destined to the analysis and development of public policies to ensure compliance of the objectives provided in the normative quoted, without affecting in any way the free competition of the different actors in the argentine economy.*"[7]

Once correctly completed with the provision of the required information, the SIRIP system will issue an electronic record that will certify the compliance with the "Price Reporting Regime."

Conclusion

As it can be observed, the last three months have shown a steep increase in the interest of competition-related regulations and investigations in Argentina. All the aforesaid show three sides of one single objective: the control of the increasing inflationary rate.

It is important to bear in mind that this three-fold approach entails the different stages through which price formation takes place.

First, the "Controlled Prices" program represents a present enforcement on a price control over consumer-sensitive goods, the most visible face of inflation for the population. Second, new market investigations are attempting to uncover abuse pricing schemes over the span of the last five years, as well as preparing the groundwork for future price agreements. Third, the Price Report Regime looks towards the future by creating a monthly and systemic manner of providing updated information on pricing to the Secretary of Trade.

It remains to be seen whether these measures are the full extent of the plan envisaged by the newly appointed Secretary of Trade or whether these are but the beginning of the times to come for antitrust in Argentina.

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[1] *See* Case "*Investigación del mercado de medicamentos para uso humano y las relaciones verticales de la industria (C. 1486)*", Docket No. S01: 0019490/2014.

[2] *See* Case "*Investigación del mercado de venta de alimentos a través de las cadenas de supermercados e hipermercados y las relaciones verticales de la industria (C. 1487)*", Docket No. S01: 0019487/2014.

[3] *See* Case "*Investigación del mercado de insumos para la industria (C. 1493)*", Docket No. S01: 0037626/2014.

[4] *See* Case "*Investigación del mercado de insumos o materiales para la construcción (C. 1491)*", Docket No. S01: 0033403/2014.

[5] According to Section 2 of Resolution 29, total annual sales in the domestic market stand for the value of the sales carried out in the National Territory excluding VAT and the Internal Tax that may apply.

[6] Based on the Official Exchange rate (April 3, 2014): 1 USD = 8.003 AR$

[7] Emphasis added.

The Urgency for Vietnamese Firms to Introduce Competition Law Compliance Programs

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Not violating the law is the biggest profit of a firm. This simple rule of doing business is not simple in Vietnam, because a large number of companies still make a profit without taking notice of the law prohibitions.

The Competition Law of Vietnam took effect in 2005, but just three years later a majority of the members of the Vietnamese Insurance Association ("VIA") created a cartel by signing an agreement to fix the fee of motorized vehicle insurance (the "Insurance Case"). Firms joined this cartel not because they intended to undermine the competition law, but because they thought their price fixing agreement was legal. This case highlights the importance of having a corporate compliance program to prevent competition law violations, but which is still unusual among the Vietnamese business community.

On July 15, 2008, the VIA hosted its 6th conference for the non-life insurance Chief Executive Officers ("CEO") resulting in a co-operation agreement on cargo, insurance, and motorized vehicle insurances. This agreement, which included a provision on fixing fees for motorized vehicle insurance, was signed and sealed by nineteen out of twenty-five VIA members. According to the signing companies, before reaching this fee fixing provision, non-life insurance companies faced severe competition in terms of price in the form of insurance fee discounts, commission increases or both. The VIA members therefore initiated this agreement to prevent losses caused by such a price war.

A notable point of this case was the adverse behaviors of certain VIA members regarding the agreement. Some VIA members owned by foreign firms refused to join the agreement since this kind of agreement is *per se* illegal under the competition law of their home countries as well as their corporation's compliance program. Meanwhile, most of the Vietnamese-owned firms of the VIA joined the price fixing agreement with the full signature and seal of their CEOs. Perhaps most interesting, and suggestive that the companies were not aware of its illegality, the VIA posted the agreement on its official website and publicly forced signing parties to comply.

Working with the Vietnam Competition Agency ("VCA"), the investigated firms insisted that they had not done anything wrong because they merely agreed to use a standard formula to calculate insurance fees which could be found in any economic book. These companies did not know that they were investigated because of their price related agreement regardless of how standard the formula was. The case soon closed and the sanction imposed on nineteen members of the cartel was 1,707,186,000 VND (US $81,290). The sanctions imposed on these firms were at the lowest level, because the VCA took into account the cooperation of the firms during the investigation.

The different legal consequence between the VIA members who joined and those who refused to join the cartel shows the importance of having a competition law compliance program. This program aims at two basic goals. First, it helps firms to recognize risks of violating competition law and discipline their employees to comply. Second, this program enhances the culture of compliance among the business community so that the employees understand that not violating the law is the biggest profit of their business.

A competition law compliance program is important for all companies regardless of their size. However, a competition compliance program is especially important for transnational corporations, firms that join industry associations, and those that possess substantial market power.

Turning first to the transnational corporations (TNCs), these companies operate in different countries. Therefore, on one hand, the competition compliance program helps their staff to adapt to rules and regulations of different host countries while, on the other hand, ensures the culture of compliance of the native employees. In countries like Vietnam, it is common for a company to encourage its staff to maximize the profit regardless of the law prohibitions. Thus, competition law compliance program of the TNCs in these countries has an important task to change this negative perception of the native staff and to prevent employees that are mobilized from other countries from infecting this culture of the host countries.

Regarding companies that join industry associations, a competition law compliance program is a shield which prevents members from forming a cartel unconsciously. The quotation that "birds of a feather flock together" reflects the relationship between members of an association. These companies have a tendency to strengthen their co-operation to survive despite the fact that they are competitors in the market. Moreover, sensitive matters that are

contents of the hardcore cartels, for example price, fee, or production, are favorite topics of the association members. Therefore, these companies are always at a high risk of violating competition law and the Insurance Case of Vietnam is a typical example. Thus, competition law compliance programs serve to keep the staff of these companies conscious and stay away from the temptation of the hardcore cartels.

Finally, a competition compliance program is especially important for firms possessing substantial market power because it is an alarm to remind these firms that their freedom to contract is limited in comparison to that of normal firms. In the theory of contract, all companies have right to contract or not to contract, or to offer their contracting partners unfavorable terms and conditions as long as the parties reach the agreement. However, since competition law protects the fair and free competition environment, firms that hold a dominant position or monopoly position are sometimes not allowed to refuse to deal or impose unfavorable conditions in the contract with other partners. For these companies, the boundary between a legal transaction and a violation sometimes are not clear. Thus, a competition compliance program helps firms holding substantial market power to scrutinize their business decisions so as to avoid violating the competition law, especially the abusive acts.

In Vietnam, after the VCA investigations led to severe sanctions on firms abusing a dominant position or joining in cartels, like the Insurance Case, some big firms have become more aware of the importance of the Competition Law 2004. However, Vietnamese firms do not seem to be familiar with competition law compliance programs. A group of experts at the VCA is working on a plan to introduce a campaign to encourage firms to build compliance programs. First, the VCA would publish a template compliance program. Second, the VCA will support companies or associations to personalize compliance programs that help them to recognize and prevent as many risks of violating the Competition Law 2004 as possible. Finally, the VCA would annually rank the firms based on the quality of the compliance program, training courses and number of violations. The ranking list will be published on the official website and in the annual report of the VCA.

In sum, although a compliance program is not a wand to eliminate violations, it is an effective tool for companies to recognize their risks and actively prevent their employees from infringing the Competition Law 2004. If the VCA's campaign to encourage firms to build compliance programs is initiated and becomes a success, the number of naïve violations like the Insurance Case will decline and the perception of the competition law will be enhanced among the business community of Vietnam. However, the success of this campaign strongly depends on the cooperation of the companies, because they, not the VCA, are the beneficiaries of the competition compliance program, and because not violating the law is the biggest profit of a firm.

The VCA Determines No Competition Law Infringement in Identical 3G Rate Increases

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On October 16, 2013, the leading mobile telecommunications operators in Vietnam – VinaPhone, MobiFone (both owned by the Vietnam Post and Telecommunication Group) and Viettel – increased their respective 3G data service fees after obtaining approval from the Vietnam Telecommunications Authority. The potentially troublesome issue was that the contemporaneous rate increases were identical. Given the circumstances, the Vietnam Competition Authority ("VCA") determined that an investigation was warranted to determine whether these increases were the result of an infringement of the Law on Competition ("Competition Law").

On December 20, 2013, the VCA issued a Vietnamese language press release to announce that, after concluding its investigation, it had not found any infringement of the cartel or abuse of dominance provisions of the Competition Law with respect to the identical price increases. The VCA's press release provided a detailed explanation of its reasons for determining the lack of infringing behaviour.

In relation to its investigation into a potential joint of abuse of dominance, the VCA stated the following relevant facts:

1. based on market share data and other information obtained, the three firms were deemed jointly dominant in the 3G data market as their combined market share exceeded 65%;
2. although the rate increases were within the scope of relevant government directives and orders; they were above the defined threshold for unreasonable price increases;
3. there was no evidence of any unpredictable changes to the production costs of providing 3G data services; and
4. the number of 3G data subscriptions had increased significantly and network traffic has exceeded the networks' capacity to provide quality service.

From a legal perspective, the VCA's analysis would likely have commenced with Article 11 (2) (b) of the Competition Law which deems enterprises acting together to restrain competition to be dominant if they have a combined market share of 65% or more in the relevant market. As noted above, the VCA determined that this threshold was met; therefore, the three competitors were to be considered jointly dominant. The VCA would likely then have turned to consideration of the impugned behavior itself. Article 13 (2) of the Competition Law prohibits enterprises from, among other things, fixing an unreasonable selling price that causes a loss to consumers. Article 27(2) of Decree 116, which provides guidance with respect to the interpretation and implementation of the Competition Law, elaborates on this prohibition by providing three conditions that must all be met for the determination that Article 13(2) of the Competition Law has been infringed:

a. demand must not have suddenly increased to a level exceeding designed capacity;
b. over a minimum period of sixty days, the average selling price must increase by more than 5% from the price prior to this period; and
c. there were no extraordinary events which resulted in an increase of production costs exceeding 5% prior to the price increase.

Based on the factual determinations noted above, it appears that the last two criteria had been met in this case; however, the VCA's finding that network traffic had exceeded capacity suggests that it determined that the first criteria was not satisfied and thus precludes a finding that this price increase constituted a joint abuse of dominance pursuant to the Competition Law.

In relation to the cartel provisions of the Competition Law, the VCA stated that it had not found any evidence of an agreement between these competitors in violation of Article 8 of the Competition Law. The VCA took care to state a number of issues related to the process of the 3G rate adjustment that were relevant to its conclusions including:

1. that each firm had filed its rate adjustment registration independently as evidenced by different dates of filings and the forms themselves;
2. that each firm published its new rates on different dates after they had been accepted by the regulator;
3. that there were numerous differences in the rates and the actual data packages offered by the three firms; and

4. in relation specifically to the fact that all the increases were the same, the VCA noted that these increases were approved, that only certain popular data packages were subject to the increase, and that each firm had many other data packages with differing pricing schemes and benefits.

The VCA also noted that the rate adjustments were in accordance with both government policies in this area and relevant telecommunications law.

Given the public concerns with respect to these rate increases as well as the reported high level government interest in this investigation, the detailed description of the VCA's reasoning for its determination that the joint rate increase had not infringed the Competition Law was appropriate. Hopefully, future investigations will also benefit from similar timely and transparent public reports. Such press releases will provide ongoing insight into the VCA's investigations and conclusions and enhance our understanding of the VCA's implementation and enforcement of the Competition Law.

France Launches its Own Class-Action System For Antitrust and Consumer Protection Law Violations

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In an attempt to anticipate EU legislative developments on collective redress actions in the coming years and put to an end to many years of national debate on the introduction of a class-action system into French law, France is launching **a class-action system by a new legislation**, the so-called "*loi Hamon*" n°2014-344 of March 17, 2014.[1] At this stage, the new French class-action system has a **limited scope** as it only applies to **competition and consumer protection law infringements**.

New Developments on Private Enforcement of EU Antitrust Law

On April 17, 2014, the European Parliament approved a proposal for an *EU Directive on damages actions under national law for infringement of competition law*[2] made by the European Commission in June 2013. The EU Council of Ministers is expected to formally approve this EU directive in the coming weeks. The EU Member States will then have two years to adapt their national laws to comply with the provisions of this directive.

In its package of measures published in June 2013 designed to facilitate private actions for damages and more generally private enforcement in Europe, the European Commission also published *Guidance for national courts on the calculation of damages resulting from such infringements*.[3] Noteworthy, this package also included a non-binding *Recommendation for collective redress mechanisms in Member States for breaches of EU law*.[4]

If the first two above-captioned EU texts relate only to damages actions for infringements of *competition law*, the Recommendation has a larger scope as it also includes a class-action system for infringements of not only competition law, but also *consumer protection, environment protection, personal data, financial services, and investor protection law*.[5] Significant EU law developments regarding class-action systems in the Member States may be expected in the coming years if the EU Member States fail to embrace these mechanisms.

A New French Class-Action System With a Limited Scope

The scope of the new French class-action system is **limited to competition and consumer protection law infringements**[6] committed by businesses[7] to the detriment of consumers.[8]

Only a limited number of representative entities, duly authorized by public authorities can bring a class action before the first civil instance courts (*Tribunaux de Grande Instance*). More precisely, there are **fifteen nationally representative and accredited consumer protection associations**[9] which are able to bring such an action. These associations will be represented by attorneys in court. On the contrary, individuals or attorneys acting on behalf of a group of consumers are not permitted to bring a class action. Economic operators cannot be members of the class. The only way for them to obtain damages is through individual actions before the national courts or arbitration.[10]

The new French class-action system only deals with the claims for **material losses**.[11] This clearly excludes the possibility to initiate a class action for non-pecuniary losses, moral, or personal injuries, which may still be recovered through individual actions before the national courts or arbitration.

An Opt-In System

Unlike the U.S. class-action system which is based on an "opt-out" procedure, the new French class-action system is an "opt-in" procedure, which means that each member of the class must explicitly consent to the class action. The scope of this consent depends upon the type of proceedings.

As a general rule, each member of the class must **explicitly consent to its inclusion into the class** on behalf of which the class action has been brought.[12] However, where the identity and the number of the harmed consumers can easily be identified and where they have suffered from damages of the same amount, the class action procedure is simplified. In this case, the harmed consumers have only to consent to the execution of the remedies determined by the Court.[13]

Specificities of Class Actions For Antitrust Law Violations: A Follow-On Model[14]

As for infringements of either French competition law[15] or EU competition law,[16] the new French class-action system is based on **a follow-on model**.

Class actions can only be brought **within five years** from the date on which a French or EU antitrust agency

or court has adopted a "final decision" finding that there has been an infringement of either French or EU competition law.[17] To put it differently, within the meaning of the new French class-action system, such a "final decision" means a ruling which is no longer appealable as for the infringement itself. In practical terms, if an appeal against a ruling is limited to the fine or the procedural aspects and does not concern the infringement itself, the ruling will be deemed to be a "final decision" as for the infringement itself for the class action purpose. In this scenario, a class action could be brought.

The French follow-on class-action system may have a **negative impact on the French and EU antitrust agencies' leniency programs** as the leniency applicant may only be granted an exemption from fine by these agencies and not an exemption from follow-on class actions. Since a leniency applicant must refrain from appealing the agency's ruling in order to obtain an exemption of fine, the leniency applicant is the first in line to be targeted for a class action.

Conclusion

It is too early to determine whether the new French class-action system will have a significant impact on the number of private enforcement proceedings in France. It is also hard to say whether it will have any consequences on the **forum shopping issue within the EU** for plaintiffs in mass litigation and whether it will facilitate the **harmonization of the class-action systems in Europe** in the future. However, even though its scope is at this stage limited, there is no doubt that the introduction of a class-action system into French law represents a significant change for France.

In practical terms, the new French class-action system will enter into force as soon as the implementing decrees are published by the French government, which is expected to be in the coming months. The new legislation requires the French Government to send a report to the French Parliament on the implementation of this new class-action system in September 2016. Such a report must propose some adaptations and contemplate whether the scope of the French class-action system should be extended to **health and environment protection law infringements**.[18] The French timeline is consistent with the EU timeline as the EU Commission plans to assess in June 2017 if any EU legislative measure regarding collective redress mechanisms is needed.[19]

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* All views expressed herein are those of the author alone.

1 Law n°2014-344 of March 17, 2014 (so-called "*loi Hamon*"). Articles L.423-1 *et. seq.* of the French Consumer Code. The class-action system was previously approved by the French Constitutional Council (Decision n°2014-690 DC of 13 March 2014).

2 Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, June 11, 2013.

3 Communication from the EU Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, June 11, 2013; and Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, June 11, 2013.

4 EU Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under European Union Law, C(2013) 3539/3, June 11, 2013; and EU Commission communication "Towards a European Horizontal Framework for Collective Redress," COM(2013) 401/2, June 11, 2013.

5 EU Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States, *op.cit.*, §7.

6 Article L.423-1 al. 1 of the French Consumer Code.

7 More precisely, "*professionals*" as mentioned in Article L.L.423-1 of the French Consumer Code.

8 Article 3 of Law n°2014-344, *op.cit.* A "consumer" means any natural person acting for purposes which fall outside of his/her trade, business, craft, or profession.

9 INC, Le Guide des Associations de consommateurs, 2014.

10 This is clearly in contradistinction with the EU Commission's Recommendation dated 11 June 2013 which encourages the EU Member States to include the "*natural or legal persons*."

11 Article L.423-1 al. 3 of the French Consumer Code.

12 Article L.423-5 al. 3 of the French Consumer Code.

13 Article L.423-10 of the French Consumer Code.

14 Article L.423-17 *et. seq.* of the French Consumer Code.

15 As defined in Title II of Book IV of the French Code of Commerce.

16 Articles 101 and 102 of the Treaty on the Functioning of the European Union.

17 Article L.423-17 of the French Consumer Code.

18 Article 2-VI of Law n°2014-344, *op. cit.*

19 EU Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms, *op.cit.*, §26.

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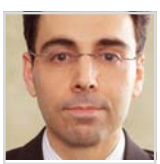

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