VOGEL & GLOBAL COMPETITION NEWSLETTER

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ARGENTINA

TANOIRA CASSAGNE ABOGADOS

Four key updates about Argentine law

by **Francisco Rondoletti**

Antitrust Law No 27.442

• National Competition Authority: A public selection process of the members of the new antitrust authority took place in 2019. The list of potential candidates was passed for the approval of the Senate for its final endorsement. However, the new administration will review this process during 2020.

• "Ex-ante" control: the ex-ante merger control regime will come into force one year after the creation of the new authority, meaning that companies will not be able to close a transaction without obtaining prior authorization. In the meanwhile, the post-closing regime is applicable, i.e. transactions must be notified for pre-examination or within one week of the execution of the agreement.

Guidelines for the analysis of cases of exclusionary abuse of dominance

• In May 2019, the current authority published new guidelines on exclusionary abuse of dominance seeking to provide instructions for the analysis of cases regarding unilateral conducts that amount to possible abuses of a dominant position.

New Fair Trade regime.

• On April 22nd, 2019, presidential emergency decree No. 274/2019 was enacted, creating a new fair-trade regime (repealing Fair Trade Act No. 22.802), including a new section called "unfair competition acts "and introduces material changes in advertising regulation, incorporating legal provisions for comparative advertisements.

Supermarket Shelf Space regulation.

• On November 20th, 2019, Argentina´s Chamber of Deputies approved a bill whose aim is to promote and regulate the way products are exhibited on supermarkets shelves (retail, wholesale, etc.), as well as granting access to small or regional producers to supermarkets. The bill still needs the approval of the Senate, after which it will finally be passed to the Executive Power for its promulgation.

DENMARK

Gorrissen Federspiel

New Danish Supreme Court judgment limits companies' chances of engaging in consortia and bidding jointly

by **Christan Liborius, Assistant Attorney and Martin André Dittmer, Partner, Gorrissen Federspiel**

On 27 November 2019 the Danish Supreme Court rendered a judgment concerning a consortium agreement between two companies regarding their joint bid on a public tender for road marking work.

The judgment was the fourth and final in a case stemming from a 2014 public tender for road marking in three districts in Denmark. It was possible to bid on one, two or all three districts.

Eurostar Danmark A/S and LKF Vejmarkering A/S (now GVCO A/S) entered into a consortium and submitted a joint bid on each district and offered a total discount if two or three districts were won. The parties had agreed on a joint price as well as the distribution of districts between them if they won the tender. The consortium won the entire tender.

The Supreme Court found that the consortium infringed competition law, as the parties were to be considered as competitors and the agreement had as its object the restriction of competition.

The Court found that the assessment of whether or not the consortium were competitors should be objectively based on the content of the tender material. Since it was possible to submit offers for just one of the districts, it was irrelevant for the assessment that they did not have capacity to bid individually on all three districts. The consortium parties were found to be competitors as they both had the capacity to bid on at least one of the districts individually.

The court then found that the consortium agreement had the object of restricting competition be-cause the agreement had the characteristics of an agreement on sale through joint bidding and price fixing.

The judgment narrows companies' chances of engaging in consortia and bidding jointly. Following the judgment consortia should only be considered if it is clear that each party cannot take on the assignment individually.

FINLAND

BORENIUS

Short Update on Consumer Law Developments in Finland

by **Hanna Pohjola** and **Åsa Krook**

Recent developments in the field of consumer law encompass both case law as well as legislative changes and proposals.

The Finnish Market Court handed down a significant ruling in a dispute between the Finnish Consumer Ombudsman, which functions as the supervising authority and a retailer on comparison prices and misleading marketing practices in the spring of 2019. The case involved selling running trainers at a discounted price for several months after their main season. The advertisements for the trainers disclosed both the discounted price and the original selling price as a comparison price throughout the sale of these seasonal products after their main season.

The court dismissed the Ombudsman's claims, concluding that the comparison price had not become misleading in terms of the trainers' genuine selling price after two months' continuous sales and that it did not harm consumers' interests. The ruling confirms that, in certain circumstances, the real price benefit can be disclosed to consumers by including a seasonal product's original price as a comparison price even after two months' continuous sales.

Furthermore, amendments made to the Finnish Consumer Protection Act have introduced a mandatory 20% interest rate cap for credit granted to consumers with no possibility to agree on a higher interest rate. In addition to interest charges, the new provisions have imposed limits on other credit expenses in favour of the consumers.

New government bills (HE 54/2019 and HE 10/2020) propose new Acts that would substantially increase the Finnish Consumer Ombudsman's enforcement powers. Pursuant to the bills, the Consumer Ombudsman would e.g. be granted powers to impose a penalty payment on advertisers who intentionally or negligently violate the provisions of the Finnish Consumer Protection Act. This penalty payment could amount to 4% of the trader's turnover. The reform is expected to take effect in July 2020.

GREECE

BERNITSAS

Launch of sector inquiry into e-Commerce by the Hellenic Competition Commission (HCC)

by **Tania Patsalia**

By decision of 11.03.2020 the HCC has initiated a sector inquiry into e-Commerce pursuant to its powers under the Greek Competition Act (article 40). In initiating the above inquiry, the HCC has taken, in particular, into account the increasing reliance of Greek consumers on e-Commerce as an efficient channel for the distribution of goods and services, as well as the ability of contemporary technology tools to facilitate restrictions of competition in the digital environment.

Scope of the inquiry

The sector inquiry is intended to focus on the below sectors:

- clothing and footwear (emphasizing on the sportswear and footwear market);
- electrical and electronic devices;
- books;
- mediation services for the provision of travel tickets;
- mediation services for the provision of tickets for events;
- mediation services for the provision of catering services;
- accommodation finding and rental - AIRBNB;
- e-Pharmacies (emphasizing nutritional supplements and para-pharmaceutical products).

The HCC may further specify, limit and/or expand the scope of the inquiry depending on the findings on a case by case basis.

Objectives of the inquiry

The aim of the investigation is to help the HCC obtain an accurate understanding of the competitive conditions in the digital sector to allow the HCC to intervene at a later stage either by means of repressive measures or by means of initiatives for the promotion of specific competition policies/regulatory arrangements in the relevant sectors.

Launch of public consultation

In the context of the sector inquiry, the HCC announced on 31.03.2020 the launch of a public consultation and published an invitation to all interested parties for the submission of their views/comments on the competitive conditions in the e-marketplace. In addition, the stakeholders concerned have been invited to contribute to the public consultation by participating in the relevant teleconference to be held by the HCC in April, and/or by submitting their views in writing, in the form of a memo.

Timetable

The HCC has also set out a timetable for all steps to be undertaken in the context of the sector inquiry. A Final Report is expected to be published on 30.04.2021.

IRELAND

DAC BEACHCROFT

Four key updates about Irish law

by **Joanne Finn** and **Elaine Davis**

There have been a number of significant competition law developments in Ireland in 2019 including the first criminal prosecution for "gun-jumping" in a merger. This followed an investigation by the competition regulator, the Competition and Consumer Protection Commission (CCPC) into the suspected failure to notify the acquisition of Lilis O' Donnell Motor Company Limited by Armalou Holdings.

In Ireland, "gun-jumping" is prohibited by the Competition Act 2002 (as amended) and where "gun-jumping" is found to have occurred, the merger is void. In this case, each of the co-accused was required to pay a fine of €2,000 however merging parties found guilty can be subject to fines of up to €250,000 (on indictment) in addition to daily fines for each subsequent day the transaction is not notified.

The Irish merger control regime is a mandatory and suspensory regime modelled on the EU system. The CCPC also conducted a public consultation on the introduction of a simplified merger procedure in October 2019. The Simplified Merger Procedure Guidelines published by the CCPC are similar to the EU simplified procedure and will apply in principle where:

1. None of the companies involved in a notifiable merger compete or potentially compete in the same product or geographic market, or sell an input to a market where another company competes;
2. Two or more companies compete in the same product or geographic market but their combined market share is less than 15%;
3. One or more companies sell an input to a product market where one of the companies competes but the market share of each of the companies is less than 25%; or
4. The proposed transaction involves a move from joint control to sole control.

Once in force, the CCPC considers that it will reduce the review periods for mergers and acquisitions which do not raise competition concerns in the State. We expect it to come into force early this year.

LUXEMBOURG

MOYSE BLESER
Avocats à la Cour

Decision 2019-C-02 – Decision to take no further action by the Luxembourgish Competition Council

by **Gabriel Bleser**

On December 20th 2019, the Competition Council dismissed without further action a complaint alleging, on the one hand, non-compliance with one of the commitments made by the Order of architects and consulting engineers (hereinafter "the OACE") following the Council's commitment decision no. 2014-E-02 and, on the other hand, an anti-competitive agreement between the OACE, Mr. Carlo Frank and other architects who are members of the said order.

According to the complaint received by the Council, the OACE had allegedly breached the commitment provided for in paragraph f) of the commitment decision, namely "Communication to OACE members in order to inform OACE members of the content of the undertakings imposed upon the OACE as a remedy to the concerns expressed by the Competition Council with regard to the application of competition rules". In this respect, the complainant alleged that the means deployed by the OACE to comply with said commitment are insufficient, arguing that some of its members, including Mr Carlo Frank, continued to refer to the old scales. By violating its undertakings, the complainant argues that the OACE should be held jointly responsible for having facilitated an anti-competitive agreement between Mr Carlo Frank and other architects who had coordinated their prices. However, the conclusion of the investigation by the appointed advisor of the Competition Council disagrees on both counts with the complainant.

In regard to the non-compliance with the commitment provided for in paragraph (f), after having requested information from the majority of the architects, the Council concluded that the OACE had duly complied with its undertakings. Furthermore, the Council considered that the mere fact that some of its members would still be using the old scales would not suffice to demonstrate the inadequacy of the efforts made by the OACE under that paragraph. Nevertheless, the Council mentions the persistence of a reference to the scales in three cases, in particular that of Mr Carlo Frank, the architect Eric Rongvaux and Feller S.à.r.l (Ltd.), a real estate agency. With regard to the last two, it should be mentioned that they are not members of the OACE and, even if a reference to the scales in question is present on their respective websites, it cannot have probationary value it refers the reader to the scales displayed on the OACE's website, which have been replaced by the communication to OACE members following the Council's 2014-E-02 commitment decision.

Concerning the alleged anti-competitive price-fixing cartel between Mr Carlo Frank and other competing architects, the Council concluded that such an infringement cannot be characterized in the present case. Indeed, the investigation did not find sufficient evidence to that effect and, in the view of the Competition Council, the mere fact that certain architects would continue to use the said scales to fix their prices would rather constitute a mere unilateral alignment of prices which, in and of itself, does not constitute a satisfactory basis for an eventual establishment of an infringement.

MOROCCO

KETTANI LAW FIRM

Competition Council under the regime of Law 104-12 relating to the freedom of prices and competition

by **Kettani Law Firm**

The year 2019 has been a year of discovery of the practices of the Competition Council under the regime of Law 104-12 relating to the freedom of prices and competition from several standpoints.

We, as legal professionals, now have the necessary track record of the Competition Council's positions, procedures and interpretations of the provisions of the law and its implementing decree.

The Competition Council has indeed organized several seminars around competition, issued a significant number of decisions on economic concentrations and initiated proceedings against companies for antitrust practices.

It is safe to say that this has been a very active year from a competition law perspective in Morocco.

As a result, the Council has gained a great deal of visibility nationally, through the conferences organized and the opinions issued concerning matters of a national importance such as the oil sector's situation, payment terms in Morocco and notary fees more recently, and on an international scale, the Council has organized several seminars and signed cooperation agreements with other international competition authorities. This is of great importance since more operations and antitrust issues dealt with in Morocco are of an international scale with an impact in Morocco.

Major ongoing cases before the Competition Council are the situations of oil companies under an investigation for anticompetitive practices, the building painting sector and the huge mergers at the moment that are Uber with Careem and FCA with PSA more recently.

The latest opinion issued by the Competition Council relates to a draft legislation aiming at capping notaries' fees. The Council issued a favorable opinion and considered that by capping notaries' fees, there will be more clients for new notaries and the profession will remain competitive compared to other legal professions.

POLAND

SOŁTYSIŃSKI KAWECKI SZLĘZAK

Polish Competition Authority adopts its first settlement decision

by **Krzysztof Kanton**

In February 2020 the Polish Competition Authority ("PCA") imposed a fine of approximately EUR 300,000 on Brother Central & Eastern Europe GmbH ("Brother"), a supplier of printers and office accessories.

The PCA concluded that between 2010 and 2017, Brother limited freedom of online retailers to set prices by requiring that retailers follow Brother's instructions on pricing. According to the PCA's findings, Brother's "recommended retail prices" communicated to distributors functioned in reality as fixed prices. Brother monitored retail prices and intervened if a distributor's price differed from Brother's "recommendation" by threatening to suspend supplies or worsen commercial terms.

What makes this particular case noteworthy is the substantial (40%) reduction of fine imposed upon Brother due to (i) a leniency application submitted by Brother in the course of proceedings and (ii) further settlement between Brother and the PCA pertaining to the fine. Although the settlement procedure was introduced to Polish law in 2015, this is the first time the PCA has adopted a settlement decision.

Although the Polish rules on leniency closely resemble the EU model, there are certain notable differences, for example, application of the Polish leniency program to vertical agreements. Although Brother – as the instigator of the price fixing mechanism – was ultimately not rewarded with full immunity under the leniency program but received a 30% reduction of fine, it has secured a further 10% reduction of fine pursuant to a settlement agreement with the PCA.

It is somewhat surprising that the PCA agreed to the settlement and further reduction of fine in the situation where the party was unlikely to file any appeal since it has admitted to an infringement. It is possible that the PCA wanted to send out a signal that cooperation with the Polish authority brings substantial benefits. It is uncertain whether this particular outcome will contribute in the future to substantial rise in the leniency applications being submitted in the context of vertical cases. In any event, business undertakings operating in Poland would be advised to take into account the increased risk of their partners commencing cooperation with the PCA in the event they are faced with the investigations pertaining to vertical price-fixing.

SINGAPORE

DREW & NAPIER

Singapore's competition and consumer protection regulator obtains court order against the use of subscription traps by an online fashion retailer

by **Lim Chong Kin**

On 6 January 2020, the State Courts of Singapore issued an order against Fashion Interactive and its director (the Parties) upon the application of the Competition and Consumer Commission of Singapore (CCCS). Pursuant to the court order, the Parties are ordered to cease engaging in an unfair trade practice known as "subscription traps". A "subscription trap" is a practice where consumers are misled into signing up for a recurring subscription, while under the impression that they are only making a one-off purchase of goods and/or services. If such subscriptions are not cancelled, typically within a grace period, the consumers would be liable to the supplier for recurring charges.

Under the Consumer Protection (Fair Trading) Act (CPFTA), it is an unfair trade practice to:

- omit to provide a material fact to a consumer;
- use small print to conceal a material fact from the consumer; or
- mislead a consumer as to a material fact, in connection with the supply of goods or services.

In this case, Fashion Interactive only displayed greatly discounted prices in its advertisements, product pages and payment pages to their customers without providing any notice that they were signing up for a membership with monthly fees at the point of purchase. Customers who had made purchases also did not receive any information or invoices or receipts relating to the membership subscription in the post-purchase email.

This is the second court action taken by the CCCS in relation to a consumer protection matter since assuming the mandate to investigate and enforce contraventions of the CPFTA in April 2018. In April 2019, the CCCS obtained its first court order under the CPFTA against motor vehicle traders who had made misrepresentations in their terms and conditions of sale for such vehicles to consumers. It is clear that the CCCS will not hesitate to take action against errant suppliers who persist in unfair trade practices, in order to better safeguard consumers' rights and interests.

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