VOGEL & VOGEL COMPETITION NEWSLETTER

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Latest news and reforms of competition law in the EU, the Member States and the World (Part One - Evolution of the substantive rules)

by **Louis** and **Joseph Vogel**

Following the United States which are debating new ways to regulate GAFA and a more general overhaul of its antitrust law, the European Union is conducting a series reviews of key legislation governing European competition law: the Notice on the definition of relevant market, the Merger Regulation, the Vertical Restraints Regulation and its guidelines, the Motor Vehicle Regulation, horizontal agreements, consortium agreements and collective agreements are all under review, not forgetting the Digital Services Act (DSA) and the Digital Market Act (DMA), which will have major implications for competition law. We are actively involved in these reforms and on Friday 26 March 2021 we replied to the European Commission's consultation on the problem areas of the revision of the Vertical Restraints Regulation.

The contributions of the Vogel network members to the present issue show that competition law is on the move all over the world: Gloor & Sieger informs us that in March 2021, Swiss competition law was reformed and now includes a particularly risky concept of relative market power. This very concept was recently used in Austria to convict a car manufacturer for abuse of dominance, even though it would certainly not have been recognized as dominant in most parts of the world. Paksoy details the revision of Turkish competition law. Shevyrev & Partners illustrates this relentless reform movement with an outline of the last five reforms in Russian competition law. Smaller countries have not been left out. Advel informs us about the risks arising from Icelandic competition law while Eurolex Andorra reports that the Principality of Andorra is to incorporate European competition law. Finally, Singh & Associates gives us a summary of the activities of the Indian competition authorities.

If competition law is constantly evolving, it is also due to the advances in the decision-making practice of the competition authorities and the civil, commercial, administrative and criminal courts, which are developing a rich and abundant case law. In trying to identify some of the main features of these developments and the current state of competition law, it seems reasonable to distinguish between developments in substantive rules and those in procedural rules and sanctions. This edition will focus on the changes in the substantive rules and our next issue will focus on the changes in procedures and sanctions.

Evolution of the substantive rules of competition law

Most competition laws have a common body of rules relating to restrictive agreements and cartels, abuse of dominant position and merger control. Within antitrust law, there is a tendency to make a clear distinction between the law pertaining to horizontal and vertical agreements. In addition to this fairly common body of rules, there are often special rules relating to abuses of economic dependence and abuses of relative dominance. We have also recently seen the emergence of rules specific to digital technology.

In an attempt to put these developments in some form of order, we will therefore address in turn horizontal and vertical agreements, abuses of dominant position and dependence, digital regulation and merger control.

1. Consistently severe repression of horizontal agreements

All the various competition law systems severely repress horizontal agreements, which are in principle the most serious since they occur between directly competing operators. In France, very large fines were recently imposed for horizontal agreements: EUR 93 million in the pork butchery case (ADLC - Autorité de la concurrence, decision No 20-D-09, 16 July 2020) and EUR 414.7 million in the restaurant voucher sector (ADLC, decision No 19-D-25, 17 December 2019). Beyond the severity of the fines, the method of establishing proof of horizontal agreements is getting stricter. The French Court of Cassation thus considers that participation in a single collusive meeting is sufficient to characterize an anticompetitive agreement until the undertaking in question expressly distances itself from the agreement by indicating that it no longer wishes to be invited to the meetings (decision of 10 February 2021 of the Commercial Chamber of the Court of Cassation).

There are a handful of exceptions to this general trend towards greater harshness. The European Court of Justice and the national courts tend to consider that Competition Authorities have an overly broad view of the restriction by object. Thus, for the French Court of Cassation, the concept of restriction by object is interpreted restrictively and can only be presumed in situations where experience makes it possible to identify a certain practice (judgment of 29 January 2020 of the commercial chamber of the Court of Cassation). Similarly, the intra-group agreement theory has been interpreted very liberally by the Court of Justice as making it possible to preclude the application of Article 101 TFEU in the case of concerted bids between subsidiaries of the same group in the context of calls for tenders. This European case law has resulted in a reversal of case law in France (ADLC, decision No 20-D-19 of 25 November 2020). European law is consequently becoming even more tolerant than American law with respect to the immunity of intra-group agreements.

2. The upcoming revision of the European vertical restraints regime confirms the preferential treatment of vertical restraints

In most competition law systems, vertical agreements between undertakings at different levels of the production and distribution chain are treated more favorably than horizontal agreements, so that vertical agreement law has become largely autonomous. This is the case in Europe with the Vertical Block Exemption Regulation (VBER), which expires in May 2022 and is in the process of being revised. In this context, the Commission has launched several rounds of consultations. The last one ended on 26 March 2021. The purpose of the consultation was to take a position on eight central or specific matters identified by the European Commission as requiring possible amendments.

Vogel & Vogel have contributed to the new consultation. We have taken a stand in favor of the efficiency and legal certainty of distribution networks, which are essential for their economic success. In particular, we have made a clear case for the need:

- to continue to allow dual distribution (sales from suppliers to their distributors and directly to final customers) to benefit from the block exemption and to extend it to wholesalers and importers;
- to be able to combine genuine exclusivity at the wholesale level with selective distribution at the retail level;

- for better protection of selective distributors against disruption resulting from sales by distributors from other territories under exclusive distribution in selective territories in the event of recourse to different distribution systems in different Member States;
- to regulate the practices of online platforms with regard to parity clauses;
- to clearly allow differentiated remuneration between online sales and sales in physical stores for distributors carrying out both activities, as the distribution costs and services rendered are not the same;
- to put an end to the rule of equivalence of the distribution criteria for online and physical sales, taking into account the specificities of each;
- for greater recognition of the efficiencies generated by resale price maintenance (RPM);
- for recognition that RPM is justified when there is strong inter-brand competition;
- to adopt a more neutral approach in the treatment of in-store sales without giving preference to online sales due to the Covid-19 crisis - which has further amplified the development of online sales;
- to better distinguish between the notions of agreement and unilateral act, in particular with regard to the refusal of approval within selective distribution networks;
- to authorize shared exclusivity arrangements;
- to continue to allow the requirement of a physical store as a quality criterion in the context of selective networks when suppliers deem it appropriate;
- for greater tolerance with regard to the non-application of the competition law prohibition in relations with agents who also operate as distributors;
- to clearly affirm the right to restrict sales by distributors on third-party platforms – currently a controversial issue in certain Member States.

3. Stricter judicial control in cases of abuses of dominant position

A trend towards stricter control of abuses of dominant positions is perceptible in the decision-making practice of the authorities and in the case law. Several national rulings rejected the Continental Car case and refused to review mergers under the rules on abuse of dominant position. For example, the French Competition Authority refused to review the takeover of Itas by TDF, rejecting the complaint of abuse of dominant position put forward by TowerCast and the investigating authorities (Decision No 20-10-01 of 16 January 2020). The same result was adopted by the Luxembourg Competition Authority, which is more surprising as there is no merger control in Luxembourg.

Similarly, even if European law and the law of the Member States continue to regulate excessive pricing by undertakings in a dominant position, contrary to American competition law, several recent decisions are moving in the direction of a stricter framework for the sanctioning of excessive pricing. For example, the Paris Court of Appeal recently ruled that even a significant increase (+60%) in waste disposal tariffs could not be considered as excessive pricing as long as the prices were considered fair (judgment of 14 November 2019, RG No 18/23992). Following the Intel ruling of the CJEU (Case C-413/14, 6 September 2017), we also observe a pragmatic assessment of exclusivity arrangements by the courts of the Member States (Umicore judgment, Commercial Chamber of the Court of Cassation of 2 September 2020).

4. Development of abuse of dependence

A noticeable trend can be observed in various countries with regard to the development of legislation on the abuse of economic dependence in addition to the abuse of a dominant position as such. Belgium and the Netherlands have adopted such legislation. In the German-speaking countries, an increase in cases of abuse of relative dominance has been observed. Switzerland has just adopted such a regime and the Austrian Supreme Court recently handed down a very noteworthy and contentious decision on that basis (Oberster Gerichtshof, 17 February 2021). Finally, in those countries where abuse of dependence regulations exist but are little used, they are increasingly being relied on and acknowledged. In France, Apple has been fined EUR 1.1 billion among other objections on the basis of abuse of economic dependence in relation to its distributors (ADLC decision No 20-D-04 of 16 March 2020).

5. Towards digital-specific regulations

The power of certain GAFAs and their abuses have led several competition authorities around the world to adopt specific tools in reaction to these phenomena or to initiate reforms in this area. This is happening in the United States, and also in Europe. While the generalized structural injunction envisaged for a while in Europe has been abandoned, the DSA (Digital Services Act) and DMA (Digital Market Act) package on digital services and markets are moving forward with a view to regulating gatekeeper platforms.

6. Merger control failings

In several legal systems, shortcomings in merger control have been reported. The discrepancy between the actual time-limits for investigation and the theoretical legal time-limits is a common problem in many countries. While in theory, the European Commission's phase 1 procedure lasts a maximum of 25 working days from the date of notification and phase 2 a maximum of 90 days from the date of initiation of the procedure, in practice, these time-limits are frequently greatly exceeded. In the Bayer/Monsanto case, for example, a decision was issued one and a half years after the notification of the merger. The number of transactions reviewed also would appear to be excessive. On 31 January 2019, 7260 transactions had been notified to the Commission in 30 years and only 29 prohibited. Since 2009, the French Competition Authority has issued more than 2,200 merger decisions and prohibited only one - in August 2020. These figures raise the question of excessive merger control. Germany made the same observation and raised its control thresholds at the beginning of 2021 in order to avoid controlling too many SME transactions that are unlikely to harm competition.

While merger control is criticized for controlling too many transactions, it is also criticized for allowing economically significant transactions to slip under the radar because the undertakings acquired do not yet have substantial sales but are eliminated from the market by powerful competitors. Several States have set control thresholds that take into account the volume of transactions in order to avoid these killer acquisitions. This is notably the case in Germany which took this step on the occasion of one of its most recent competition law reforms.

In addition to the important changes in the substantive rules of competition law worldwide, there are also significant developments in the rules relating to procedures and sanctions, which we will cover in our next issue of the Vogel Network Newsletter.

ANDORRA

EUROLEX

The evolution of the competition law system

by **Jean-Michel Rascagneres** and **Benjamin Rascagneres**

International trade and commercial activities were extremely limited before the 1930s in the Principality of Andorra. It was a rural country with a population of under 4,000 inhabitants and with an economy essentially based on agriculture and livestock. There were no roads but pathways connecting the State to its neighbors France and Spain.

Nowadays, Andorra's economy is mainly based on commerce and tourism and has a population of over 70,000 inhabitants.

Until 1985 there were no competition regulations or laws in Andorra. Basic principles were mainly provided by general civil and common law. Decisions were strongly influenced by French and Spanish laws, however, due to the lack of any strong economic activity at that time, no relevant case law emerged.

Since the 1980s, Andorra has built an economic model based mainly on commerce and tourism with more than 10 million visitors per year. Therefore, it became necessary and imperative to ensure consumers' rights and to provide a regulation on competition law which enforced basic principles. Consequently, on 31 July 1985 the first law on consumer protection was enacted with just 41 articles implementing a simple but effective legal framework. The objective was to determine accurately consumers' rights and to enforce concrete procedures to ensure consumers' health and security. A system governing infringements and sanctions was also set up.

Ten years later, it appeared essential to provide a more precise and detailed legal environment regarding competition law. In 1995 the Trademark Law was enacted whereby European principles concerning intellectual property were integrated into the Andorran legal system. This regulation guarantees intellectual property and trademark protection in accordance with international standards.

The legislative activity culminated in 2013 with the Effective Competition and Consumer Protection Act (Law 13/2013). This regulation introduced basic competition law principles that are enforced on an European and, for the most part, international level. Hence, it provides provisions on anticompetitive conduct, anticompetitive agreements and arrangements, abuse of a dominant position and market dominance. In a second part, it strengthens consumers' rights in greater detail than the 1985 law, including administrative and judicial procedures to guarantee the effectiveness of the protection.

Nowadays, the Andorran government is negotiating an Association Agreement with the EU. Thus, there is a continuity in the reflection of the need of reforms allowing to diversify and open the economy and to ensure a comprehensive competition law system accordingly to European standards. Therefore, Andorra will harmonize the national legal framework on competition law with the 'acquis communautaire'.

ICELAND

ADVEL ATTORNEYS

Record high fines imposed on MS Iceland Dairies

by **Dóra Sif Tynes**

In March 2021, the Supreme Court of Iceland confirmed the decision of the Icelandic Competition Authority (ICA) to impose fines in the amount of 480 m ISK (EUR 3.2 m) on MS Iceland Dairies for abuse of a dominant position in the dairy market. This is the highest single fine imposed for abuse of dominant position by the ICA. The case offers new guidance on the application of a procedural rule of the Competition Act by which the ICA is afforded the possibility to appeal decisions of the Competition Appeals Board in the courts.

MS Iceland Dairies is a cooperative organisation for milk production and other dairy products. Under Icelandic agricultural legislation, certain arrangements between milk producers are exempted from competition law including exclusivity agreements for certain products and productions. In this case, MS had sold non-pasteurised raw milk in wholesale to an independent new entrant in the dairy market at a higher price than the members of the cooperative. The discriminatory pricing was considered to constitute an abuse of a dominant position contrary to Article 11 of the Competition Act (corresponding to Article 54 EEA and Article 102 TFEU). The Supreme Court confirmed the ruling of the District Court and the Appeals Court and found that the exemption from competition law had to be interpreted strictly and therefore discriminatory practices of this kind had to be excluded from its application.

The decision to impose fines was adopted by the ICA stressing the gravity of the breach. The Competition Appeals Board however significantly reduced the fine, arguing that the agricultural legislation gave the cooperative organization a wide margin of discretion on market behavior. The ICA made use of a provision in the Competition Act which allows the ICA to appeal decisions of the Competition Appeals Committee in court. The Supreme Court confirmed that this provision did not breach any constitutional principles. The case thus offers an important confirmation of the validity of the provision and the standing of the ICA in such a case.

INDIA

SINGH & ASSOCIATES

The Commission grants interim relief in the interests of justice

by **Reeta Mishra**

On 9 March 2021, the Competition Commission of India (Commission) granted interim relief under section 33 of the Competition Act, 2002 (Act) to the Federation of Hotel & Restaurant Associations of India (Fab Hotels) and Rubtub Solutions Pvt. Ltd. (Treebo) against two online travel agencies – MakeMyTrip India Pvt. Ltd. (MMT) and Ibibo Group Private Limited (Go-Ibibo) (collectively referred to as MMT-Go).

MMT-Go was already under investigation since October 2019 on allegations of abuse of dominant position and entering into anticompetitive agreements with Oravel Stays Private Limited (OYO), a company providing travel and tourism related services to customers through online booking.

In November 2020, while the investigation was ongoing, Fab Hotels and Treebo had approached the Commission to direct MMT-Go to re-list their properties on all the portals in which MMT-Go had de-listed them due to its commercial arrangement with OYO to not list the closest competitors of OYO on its platform.

Despite the delay on the part of Fab Hotels and Treebo in seeking the relief, the Commission granted the relief in the interest of justice. The approach of the Commission was that as long as the criteria of (i) prima-facia case (ii) balance of convenience in favor of the party seeking the relief and (iii) irreparable damage if the interim relief is not granted, have been demonstrated to exist, the Commission would not be constrained by any delay on the part of a party while granting the interim relief. The Commission observed that the provisions of section 33 of the Act have to be read and understood in the context of the markets which are dynamic in nature, and more so in the context of digital markets.

The Commission's order illustrates that, while deciding applications for interim relief in competition matters, the Commission is "guided by the wider interest of ensuring fair and competitive markets which are neither in the nature of *lis* before a court nor an adjudication *in personam* of the rights of the parties".

RUSSIA

Shevyrev and Partners

Reforming the anti-monopoly legislation

by **Igor Kokurin**

The evolution of the anti-monopoly legislation in the Russian Federation started in 2006 when the so called First Anti-monopoly Package was adopted, including the law "on the protection of competition". This law replaced the first Russian anti-monopoly law "on the competition and limitation of monopoly activities on commodity markets" dated 1991. This new law clarified the concepts of goods, the commodities market, group of companies and criteria for referring economic entities to a certain group. The definition of coordination of economic entities' activities by a third party was included. The criteria of monopolistic high prices were updated.

Following the Second anti-monopoly package adopted in 2009:

- powers of the Federal Anti-monopoly Service of the Russian Federation (FAS) were expanded and specified;
- the procedure for inspecting compliance with anti-monopoly legislation was regulated;
- dawn raids were authorized;
- the provisions on the procedure of turnover-based fines were clarified;
- the new version of article 178 of the Criminal Code of the Russian Federation was adopted "on liability for the most serious violations of the anti-monopoly legislation for anticompetitive activities – price collusions, repeated abuse of dominant position and so on, up to 3 years of imprisonment";
- anti-monopoly immunity for intellectual property was fixed.

In 2012 the Third Anti-monopoly Package was adopted. The term "cartel" was instituted as were cautions and warnings by anti-monopoly authorities on the violators of the legislation.

The possibility of applying to the court with civil claims for compensation for economic loss caused by violations of anti-monopoly legislation was provided; the list of instances of restrictions of competition was corrected.

With the Fourth Anti-monopoly Package adopted in 2015:

- compulsory and voluntary agreements on joint activities were introduced;
- responsibility for abuse of dominant position was limited;
- the scope of application of warnings was expanded;
- the FAS collegial bodies were organized;
- a provision was introduced to apply the rules of non-discriminatory access to undertakings having a dominant position;
- the number of agreements that fall under anti-monopoly regulation was expanded.

The Fifth Anti-monopoly Package is currently being developed and discussed.

SWITZERLAND

FLOOR SIEGER

New competition law risks

by **Stephan W. Feierabend**

On 18 March 2021 the Swiss Parliament adopted a partial revision of the Cartel Act (CartA). Under the new regulations (which are expected to come into force in the current year 2021 or at the beginning of 2022), prohibitions previously applicable to undertakings with dominant market power will be extended to undertakings with 'relative market power'.

The current prohibition of abusive conduct pursuant to article 7, CartA applies to market dominant undertakings only, i.e. primarily to those with market shares of more than 40-50%. Such undertakings are not allowed to hinder other undertakings from starting or continuing to compete or disadvantage trading partners, e.g. by refusing to deal, discriminatory conditions, predatory pricing, etc. By the revision, these rules of conduct will be extended to undertakings only having "relative market power", i.e. to undertakings on which other business partners are dependent in terms of supply or demand. Such dependence is assumed if the business partners do not have sufficient and/or reasonable possibilities to switch to other undertakings.

In contrast to the traditional determination of market dominance pursuant to article 4 para. 2, CartA, it is irrelevant whether an undertaking can behave independently of other market participants to a significant extent. The market share and size of an enterprise are no longer relevant. The assessment on whether an undertaking has "relative market power" is to be made in each individual case on the basis of the dependency relationship existing between two undertakings with regard to specific products or services.

The introduction of the "relative market power" concept will extend the rules on unlawful practices to a large number of medium-sized or even smaller undertakings. Due to the need to interpret the new rules there will be considerable legal uncertainty until the Swiss Competition Commission and the courts have handed down the first leading cases.

Domestic and foreign undertakings active in the Swiss market are advised to adapt their compliance measures to the new rules before they come into force in order to proactively reduce the risks of administrative proceedings and civil litigation.

TURKEY

Paksoy

Amendments to Turkish competition law

by **Togan Turan, Gülçin Dere** and **Sabiha Ulusoy**

Significant concepts have been introduced in to Turkish competition law with the amendments made in the Law No. 4054 on the Protection of Competition in June 2020. A summary of the main amendments is provided below.

• Introduction of commitment procedures

The commitment procedure allows the parties that wish to terminate an investigation conducted against them to apply to the Turkish Competition Authority (the Authority) to offer commitments during a preliminary investigation or a full-fledged investigation. The Authority has recently issued a Communiqué on the proposed commitments for preliminary investigations and investigations regarding anti-competitive agreements, concerted practices, decisions and abuse of dominant position to set out the rules for the commitment procedure (See. Official Gazette dated 16 March 2021).

• Introduction of the "*De Minimis*" principle

The Authority has recently issued a Communiqué on agreements, concerted practices and decisions and practices of associations of undertakings which do not significantly restrict competition (*Communiqué on De Minimis, ibid*). The Communiqué outlines that the Authority need not investigate the agreements, concerted practices, or decisions and practices of associations of undertakings that do not appreciably restrict competition.

• Introduction of settlement procedures

With the announcement dated 18 March 2021, the Authority has opened the draft Regulation on Settlements to public consultation. The settlement procedure enables the parties to reach a settlement with the Authority during a competition law investigation and allows a reduction of administrative monetary fines by up to 25%.

• Introduction of Significant Impediment to Effective Competition (SIEC) test

The amendment made to Article 7 of Law No 4054, which relates to the evaluation of mergers and acquisitions by the Authority, replaces the dominance test with the SIEC test applied in European Law. The SIEC test enables a more holistic evaluation of proposed mergers and acquisitions.

• Clarification on the Authority's dawn-raid authorities

The Authority has recently published the Guidelines on the examination of digital data during dawn raids to set out the rules to be applied in the processes of examining digital data during dawn raids in accordance with the amendment made to Article 15 of the Law No. 4054.

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