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FINLAND

BORENIUS

Finland must recover over EUR 50 million in incompatible State aid

by **Ilkka Aalto-Setälä**

The European Commission announced in June that Finnish bus transport company Helsingin Bussiliikenne Oy ("HelB") had received a total of EUR 54.2 million in incompatible State aid from 2002 to 2012.

According to the Commission, HelB received State aid in the form of four different aid measures. The first aid measure was an equipment loan granted to HKL Bussiliikenne, a public utility of the City of Helsinki (the "City"), in 2002. HelB was established in 2005 following the merger of HKL Bussiliikenne and a subsidiary of the City. At this point, their existing loans were converted into a capital loan, which was considered to constitute the second aid measure. The third and fourth measures were two capital loans from 2011 and 2012, which were granted to secure the continuity of HelB's business.

According to the Commission, no private market creditor would have granted the loans under such terms and conditions when taking into account HelB's financial difficulties at the time when the loans were granted.

During the investigation process, HelB's assets and business operations were sold to Koiviston Auto, whose subsidiary changed its name to HelB. Based on the principle of economic continuity, the Commission extended the recovery order also to the new HelB. With its continuous operational presence in the market, the new HelB continued to benefit from the State aid that the original HelB had received and continued to distort the market.

What makes the question of economic continuity interesting is the fact that Koiviston Auto was not called upon to submit its comments during the investigation procedure. This possible procedural mistake may play a major role in the proceedings before the General Court. Both Koiviston Auto and the City have brought actions for annulment while simultaneously also applying for a suspension of measures.

The firm Ilkka Aalto-Setälä is representing the City of Helsinki before the General Court.

HUNGARY

oppenheim

Assessment of RPM remains formalistic in the approach of GVH

by **Balázs Csépai**

The Hungarian Competition Authority (GVH) imposed a fine on the company Husqvarna and obligations for it to further develop its existing compliance program, having established its liability for operating an RPM scheme during a three-year period in case Vj-103/2014. Distributors participating in the scheme were not fined but they must also develop compliance programs.

Husqvarna is a supplier of well-known brands of gardening products. Its market share however barely exceeded 10% during the relevant period. It set up an RPM scheme aimed at freezing competition between offline and online platforms, with the aim of upholding brand image and preserving the viability of the distribution system by discouraging free riding.

Despite ample evidence of horizontal discussions among distributors, the GVH did not treat the case as a supplier-coordinated price fixing cartel among distributors. Instead it regarded the horizontal collusion as ancillary to the RPM scheme of the supplier. This was particularly interesting because as RPM is not excluded from the coverage of the Hungarian de minimis rule, the GVH had to look to EU law as well, to be able to treat the scheme as a hard core infringement and avoid material assessment of the case.

RPM is traditionally treated by the GVH as an infringement 'by object', and as usual it did not make an assessment of actual effects. To support the 'by object' nature, reference was made to a number of harmful negative effects possibly deriving from RPM as listed in the Commission's Vertical Notice, without specifying, however, how and if any of those were applicable in the given case. The reasoning thus remained a hollow repetition of possible theories of harm with the sole objective to protect price competition over all other possible consumer benefits.

As Husqvarna also chose to minimize exposure through unconditional cooperation, no defense was submitted to justify the scheme, only vague references were made to brand image and protection of the distribution system. Arguments under Article 101(3) were not submitted either. Instead it applied for leniency, as a 2016 amendment of the Competition Act extended the leniency policy to RPM.

Husqvarna received significant reductions under the leniency notice, a further reduction under the settlement rules and a reduction for the adoption of a compliance program. While the company probably came out of the case with the best possible outcome (massive 75% fine reduction), an excellent opportunity was also missed to challenge the excessively formalistic approach of the GVH in RPM cases and let reason prevail.

MALTA

GANADO ADVOCATES

Amendments to the Competition Act aim to restore public enforcement of competition law back on its feet

by **Sylvann Aquilina Zahra** and **Clement Mifsud-Bonnici**

Important amendments to the Competition Act found in Maltese law came into force on 29 July 2019. These long-awaited amendments will finally address the chilling effect on public enforcement of competition law in Malta following a constitutional case three years ago declaring competition proceedings as criminal in nature so that decisions finding a breach of the competition rules and imposing fines could only be reached by a court in terms of the Maltese Constitution.

The major thrust of these amendments is that the national competition authority, i.e. the Office for Competition (OC), will no longer be able to issue infringement decisions imposing fines. Rather, if after an investigation, the OC considers that a breach of the antitrust rules has taken place, the OC will have to file a lawsuit before the Civil Court (Commercial Section) (the Court) against the suspected undertaking/s. The procedure before the Court is adversarial, so that the OC will have to produce evidence, while the respondent undertaking/s may challenge the allegations made by the OC and produce evidence of its/their own.

The Court will pronounce itself on the matter in a judgment. If it finds a breach of competition law it may impose fines (penalties) as well as behavioural and structural remedies. The amendments provide a non-exhaustive list of aggravating and mitigating circumstances that the Court may take into account when determining the penalty. Provision has been made to ensure that judicial and legal costs associated with this lawsuit are moderate.

The Court's judgment is subject to appeal on points of law and fact before the Court of Appeal. The appeal must be appointed for hearing within six months.

The OC's extensive powers to investigate an alleged breach either on its own motion or following a complaint have been maintained, including the ability to carry out dawn raids which must now in all cases be supported by a warrant issued by a magistrate. The amendments clarify that whilst there is no obligation to answer incriminating questions during investigations, factual questions must be answered and requested documents must be provided. In surprise inspections, officers may wait a reasonable time for legal counsel to arrive and may take reasonable measures to ensure that the evidence is not tampered with and other undertakings are not informed of the investigation.

Apart from cartels, the settlement procedure can now be applied to abuse of dominance cases and the penalty may be reduced by 10% to 35%. Decisions to terminate the investigation or court proceedings by means of settlement together with the imposition of a penalty will be taken by the Court following the joint demand by the OC and the undertaking/s concerned.

Decisions making commitments binding upon the undertaking/s offering them will also be taken by the Court, rather than by the OC.

ROMANIA

NNDKP Legal & Tax

Cement sector in Romania under the scrutiny of the competition authority

by **Georgeta Dinu**

The cement sector in Romania finds itself under the radar of the Romanian Competition Council, which has recently conducted two types of investigation.

The first concerned the entire sector in a context where the approximately equal market shares of the main producers and their stability over time raised suspicions in terms of competition, especially taking into account their differing production capacities (which implies an asymmetrical degree of utilization).

The second concerned the main cement producers (Holcim Romania, CRH Romania and HeidelbergCement Romania), suspected by the competition authority of concluding an anticompetitive agreement consisting in market sharing/ limitation of output, marketing, technical development and investments / potential price coordination.

The investigated undertakings are vertically integrated in order to streamline the production process, reduce costs and facilitate access to resources. They are also present on several related markets, such as the market of the production and sale of certain cement products.

The competition authority noticed that the prices of certain types of cement had the same evolution, which could indicate possible coordination. Moreover, the considerable number of customers located within 350 kilometers of the point of sale could point to potential geographical market sharing.

The Competition Council therefore concluded that there may be some coordination on what is produced and delivered to customers which could lead to market sharing enabling producers to keep some customers captive in order to maintain symmetrical market shares.

Furthermore, the Council recommended reducing the period provided by law for which an aggregate's exploitation license is granted. The same recommendation was made concerning the prolongation of the license. The reason was that both the long period for which an exploitation license is granted (20 years) and the possibility of unlimited prolongation may result in limiting or blocking access to the market and, consequently, in restricting competition.

SINGAPORE

DREW & NAPIER

Singapore's competition regulator gains new consumer protection mandate and other significant competition and consumer law developments in Singapore

by **Corinne Chew** and **Lim Chong Kin**

On 1 April 2018, the Competition Commission of Singapore was renamed the Competition and Consumer Commission of Singapore (CCCS), reflecting the competition authority's new consumer protection mandate.

With regard to other significant developments in competition and consumer protection laws in Singapore:

• In respect of merger control under the Competition Act, on 5 July 2018, the CCCS imposed a first-ever financial penalty for an infringement of section 54 of the Competition Act, which prohibits mergers which lead to a substantial lessening of competition in any market in Singapore. The case involved an investigation initiated by the CCCS into the merger of ride-hailing companies, Grab and Uber, who were fined a total of approximately S$13 million. Interim measures to preserve market conditions were also ordered by the CCCS for the first time in the course of its investigation into the merger. Uber has appealed against the infringement decision.

• With regard to consumer protection, following an investigation and an injunction application filed by the CCCS against SG vehicles, a car supplier, the State Courts made an order, by parties' mutual agreement, for the SG group of companies to stop engaging in unfair trade practices, such as misrepresentations over the terms and conditions of sales agreements. The court order took effect from 18 April 2018. The CCCS has also found that Charcoal Thai 1 restaurant had breached the Consumer Protection (Fair Trading) Act by representing that its goods/services were available at a discounted price for a stated period of time when there was no end date to the discount period, misleading consumers into believing that there is a price benefit and scarcity in the availability of promotional prices. The CCCS closed its investigation following an agreement by Charcoal Thai 1 to cease the unfair practice.

• In respect of inter-agency cooperation, on 22 June 2017, the CCCS entered into a cooperation agreement with the Japan Fair Trade Commission, and on 30 August 2018, the CCCS signed a Memorandum of Understanding (MoU) with the Indonesian Commission for the Supervision of Business Competition to facilitate cooperation on competition enforcement between the agencies. On 17 September 2019, the CCCS signed an MOU with the Competition Bureau Canada in the enforcement of both competition and consumer laws.

SWITZERLAND

HARTMANN DREYER

In May 2013, the Swiss Competition Authority rendered a decision condemning thirteen distributors (several of them being Swiss daughter companies of French publishers) of French books in Switzerland from preventing direct sales from France to Switzerland

by **D. Dreyer**

The Federal Administrative Court in St-Gallen should, after more than 6 years, render its decision on the appeal in the Fall of 2019. The expected decision will be of particular interest for several reasons:

1. In its decision, the Competition Authority has not examined the question of the definition of the market: is it the market of books printed in French and sold in the French speaking Western part of Switzerland as a whole? Or do books in general (comics or novels or scientific books) constitute a specific market?

2. The vast majority of the books concerned were published in France where the selling price of a book is fixed by law.

According to Art. 3 Par. 1 let a of the Swiss Competition Statute, prices set by law fall outside the competence of the Competition Authority. But the question is: where the price is set by a French law, can such a law be taken into account in Switzerland? According to Art 19 of the Private International Law Statute, it may be possible to take into account overriding legitimate interests.

It is worth noting that the Swiss Parliament did adopt such a law a few years ago but, in a referendum vote, the Swiss people rejected it. Ironically, the statute was rejected mostly in the German speaking cantons whereas it was approved in all the French speaking cantons of the western part of Switzerland.

UNITED KINGDOM

SHEPHERD+ WEDDERBURN

Regulation of harmful content online

by **John MacKenzie**

'Fake news' – information or news that is proven to be either verifiably false or misleading – has become a major, global concern. The same is true of online trademark infringement, copyright infringement or hate speech.

These challenges have led to demands for greater regulatory intervention, whether such content is used as part of a deliberate attempt to influence people's opinion (political or otherwise) or merely to make money.

While UK regulators like Ofcom regulate broadcast media and the Independent Press Standards Organisation (IPSO) and Impress regulate newspapers (online and offline), these regulators have not taken any significant action to tackle fake news.

The UK Parliament's Digital, Culture, Media and Sport (DCMS) Committee has been investigating issues around fake news, particularly, what it is, its impact and the responsibilities of social media platforms and search engines in curbing it.

The Committee's initial report, published in July, 2018, recommended the term 'fake news' should not be used and that a separate working group should be created to target issues around the spreading of misinformation. On 18 February 2019, the DCMS Committee issued its final report, calling for:

- a compulsory Code of Ethics for tech companies, overseen by independent regulator – with clear legal liabilities to be established for tech companies if they do not act against harmful or illegal content on their sites;
- the regulator to be given powers to launch legal action against companies breaching the Compulsory Code of Ethics;
- government reform of the current electoral communications laws and rules on overseas involvement in UK elections; and
- social media companies to be obliged to take down known sources of harmful content, including proven sources of disinformation.

The UK Government has since published an Online Harms White Paper, setting out its plans for increasing online safety and proposals to establish in law a 'new duty of care' for large social media companies, which would hold them to account for tackling online harms, ranging from illegal activity to content that is deemed harmful but is not necessarily illegal.

All businesses that host content, whether user generated or not, should be following the drive by regulators to try and control the spread of harmful content. Larger platforms such as Facebook and Twitter will have their own takedown mechanisms, even they may need to adapt their processes so that the steps that they take as fair and transparent.

VOGEL & GLOBAL

30 avenue d'Iéna, 75116 Paris

Tél. +33 (0)1 53 67 76 20 Fax +33 (0)1 53 67 76 25

vogel-global@vogel-vogel.com www.vogel-vogel.com