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Latest news and reforms of competition law in the EU, the Member States and the World (Part two – Trends and evolution of procedural rules and sanctions)

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

The European and national lawmakers constantly aim to increase the efficiency of measures implemented against anti-competitive practices, namely by ensuring that national competition authorities ('NCAs') have all means of effective actions to punish infringements of Articles 101 and 102 TFEU. On the other hand, sanctions imposed by NCAs, European and national jurisdictions are becoming increasingly severe nowadays. The question, however, is whether this tendency to severity is not going too far.

Procedural rules and trends in France and in the EU

1. The growing tendency of the criminalization of competition and antitrust law

In recent years, the French Autorité de la concurrence ('AdlC") is increasingly using tools from criminal procedure to conduct searches and raids by undertakings in order to demonstrate anticompetitive practices (based on the article 40 of the French code of criminal procedure). The main benefit for the competition authority conducting criminal search is to gather elements and evidence in a way that would not be considered admissible under commercial procedural rules applied during antitrust actions. However, this growing use of criminal law in actions against anticompetitive practices severely restricts the undertakings' procedural and defence rights: companies that are subject to a criminal search do not have right to reach out to their lawyer; their possibilities to bring an action against the search decision is very limited; judicial police officers are able to seize privileged documents that have not been made for the criminal defence of the undertakings. It is worth noting that this criminalization of competition law is in complete contradiction with the original spirit of the French ordinance from 1st December 1986 which precisely aimed to severely restrict the enforcement of criminal law to punish anticompetitive practices (on the criminalization of competition law, see the contribution of Sarah Keene regarding the New Zealand legislative update on competition law).

2. Recent reforms to strengthen the national competition authorities means of action

Many recent European and national reforms aim to allow NCAs to become more effective enforcers but, consequently, strongly reduce companies' procedural rights. In 2019, the so-called "Loi Pacte" (L. n°2019-486 from 22 May 2019) extended the means of actions of the AdlC to gather evidence of anticompetitive practices. For example, it allowed the French Autorité de la concurrence to have access to itemised bills (so called "Fadettes") provided by telecommunications operators. The AdlC can then use these data to establish the existence of a collusion between two competitors. In the same vein, the AdlC can now take into account hidden recordings made by persons who do not work for a public authority provided that said recordings are not the only source of evidence at hand. These new means of actions unfortunately create a severe discrepancy between the companies' rights and the AdlC's investigation powers in actions against anticompetitive practices.

More recently, the ordinance n°2021-649 of 26 May 2021, which was enacted to transpose the ECN + Directive into French law, further strengthens the AdlC's powers of investigation by allowing it to access companies' data that are stored on the cloud. The AdlC will also be able to bring an action on its own initiative to impose provisional measures. Finally, the French AdlC is now allowed to order not only behavioural enforcement measures but also structural enforcement measures (such as the disposal of a subsidiary) in order to end the suspected anticompetitive infringement (on the transposition of the ECN + Directive in other Member States, see the contribution of Andrea Oršulová regarding the new act on Protection of Competition in Slovakia and the contribution of Vladimir Ivanov regarding the competition rules reforms in Bulgaria).

We do not expect this tendency to slow down any time soon.

Latest trends regarding sanctions

1. Strong increase of financial penalties

In 2020, the French competition authority imposed a record total €1.8 billion in fines for anticompetitive practices. This is more than any other NCAs in the world. On the other hand, the European Commission imposed a total of €1.5 billion fines in 2019 and the German Bundeskartellamt fined a total amount of more than 646 million the same year (with a record fine of more than €646 million in the "Quartobleche" cartel case). These examples show the current tendency of competition authorities and jurisdictions to impose record fines to deter companies to enter anticompetitive practices. The transposition of the ECN+ Directive also serves this purpose: Articles 14 and 15 of the Directive, transposed into Article L. 464-2 of the French Commercial Code provide for a dissuasive system of fines for professional bodies or associations. While business associations were previously subject to a fine ceiling of € 3 million in France, this ceiling is now abolished. Business associations are now subject to a ceiling equal to 10 % of the turnover of the professional body or of the total turnover of the companies member of the association active on the market affected by the infringement of the association.

In France, this tendency is also likely to be maintained with the publication on July 2021 of the new Notice on fines ('Communiqué sanctions') and which aims to provide procedural clarifications on the calculation method of fines applied by the French AdlC. It is now taken into account that the duration is a fully-fledged parameter for determining fines, following the transposition of the ECN+ Directive. Therefore, in this updated version of the notice, the Autorité has aligned the coefficient for taking duration into account with that provided for in the European Commission's guidelines, with each full year of infringement now being taken into account. The notice also provides that when an infringe-

ment has a duration of less than one year, the participation of the company will be calculated pro rata temporis to the participation in it. Previously, the notice of fines issued in 2011 provided that, for anticompetitive practice that lasted more than one year, must be taken into consideration the sales value during the first business year and for the remaining years, half of said sales value. Thus, the application of the new calculation method should inevitably lead to an important increase of financial fines.

Finally, when calculating a fine to be imposed on companies for their participation in the most serious horizontal agreements or abuses of dominance, the AdlC can add to the basic amount a sum of between 15 % and 25 % of the value of sales.

It is now to be hoped that the update of notice will not lead to a significant increase of financial penalties in the near future since the AdlC shall endeavour to define fines that comply with the obligations of necessity and proportionality. We shall also hope that this new notice will deter the AdlC to diverge from the previous notice when calculating fines, as it often tends to be the case in recent decisions (dec. 19-D-19, 16-D-20).

2. Accumulation of sanctions

Companies which participate in anti-competitive practice will be imposed an administrative fine by the European commission or NCAs and may also be subject to criminal penalties in certain jurisdictions. In France, the natural person who took a personal and decisive part in the anticompetitive practice at stake can face criminal convictions (art. L. 420-6 of the French Commercial Code). This accumulation of sanctions leads to concerns regarding the application of the non bis in idem principle set out in Article 50 of the EU Charter of fundamental rights. In his opinion on cases C-117/20 bpost and C-151/20 Nordzucker, Advocate General Bobek recently reaffirmed that the non bis in idem principle should apply uniformly across all areas of European law and that it primarily aims to protect parties against new actions brought before a jurisdiction. He proposed a unified test for the protection against double jeopardy under the EU Charter of Fundamental Rights. This test should rely on a threefold identity: of the offender; of the relevant facts; and of the protected legal interest. This last criterion is not very appropriate as various legal protected interests can easily be found to try to justify a double sanction.

3. The rise of private enforcement

Since the implementation of the directive 2014/104/EU, private enforcement of anticompetitive practice has strongly emerged with a total number of damages claims of 239 in 2019. Companies engaged in anti-competitive practices are now required to pay massive damages to victims of said practices. For example, a telecommunication operator was recently awarded a record €249 million damages by the Paris Court of appeal (CA Paris, 17 June 2020, n°17/23041). But the application of the private enforcement rules remains somewhat unclear and sometimes leads to practical difficulties which must be addressed by the CJEU, the NCAs and national jurisdictions. In many cases, victims of anticompetitive practices invoke the retroactive application of the rules deriving from the directive 2014/104/EU although the directive's provisions were not applicable rationae temporis and many prejudicial questions were brought before the CJEU (see e.g., CJEU, 5 July 2018, case n° C-27/17; 24 October 2018, n° C-595/17; 14 March 2019, n° C-724/17; 28 March 2019, n° C-637/17; 29 July 2019, n° C-451-/18 and 12 December 2019, n° C-435/18).

Other questions had to be addressed by national jurisdictions, namely on limitation periods: the French Court de cassation considered in a recent decision that the starting point of the limitation period for damages claim should be the date of the decision rendered by the AdlC and which established the anticompetitive practice's reality and scale (Cass., com., 27 January 2021, n°18-16.279; CA Paris, 14 April 2021, RG n°19/19448).

Given all these trends, competition law must be taken very seriously.

BULGARIA

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Bulgarian competition rules face reforms

by Vladimir Ivanov

In 2021 the Bulgarian competition rules faced one of the biggest reforms since the adoption of the current Competition Protection Act (CPA) in 2008. On 11 February 2021 the national parliament adopted the latest Act amending and supplementing the CPA. The main aim of the amendments is to implement into national law two European directives, namely:

- Directive (EU) 2019/1 on empowering the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Directive ECN+)
- Directive (EU) 2019/633 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain (Directive 2019/633).

The amendments, however, are broad and go beyond the scope of the two directives. On 18 June 2021 they were supplemented by four new sets of rules:

- rules for prioritization of requests for initiation of proceedings under Chapter Nine and Chapter Twelve of the CPA – their purpose is to determine the criteria and procedure under which the Commission for Protection of Competition (CPC) defines its priorities for law enforcement and assesses whether a request for initiation of proceedings falls under the scope of these priorities
- rules for consideration of proposals for undertaking obligations under the CPA - regulating the criteria and procedure on the basis of which the CPC may approve commitments proposed by undertakings
- methodology for determining the sanctions imposed under the CPA - regulates the methods applied by the CPC in determining the individualized amounts of property sanctions, fines, periodic property sanctions and periodic fines imposed on undertakings, associations of undertakings or to natural persons
- a program for exemption or reduction of sanctions and rules for its implementation, which ensure transparency of the commission's leniency policy.

What are some of the major changes to the CPA?

Strengthening the independence and widening the powers of the CPC

The CPC members' mandate is extended from five to seven years.

The CPC can now carry out dawn raids in non-business premises and vehicles, including the homes of directors, managers, and other members of staff in case of a reasonable suspicion that records related to the business and to the subject matter of the dawn raid are stored there.

In order to prevent any conflict of interests, within one year after leaving the CPC, former members and employees are not allowed to represent and consult undertakings in pending proceedings, instituted during the exercise of their powers or obligations.

The CPC can refuse to commence proceedings if the case does not fall within the scope of its enforcement priorities.

The prohibition of abuse of stronger bargaining power is repealed and replaced by rules on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

As the CPC claims, the general cross-sectoral prohibition of abuse of stronger bargaining power "did not lead to significant real results regarding the prevention of existing unfair trade practices in the relations between retail chains and their suppliers". Now, this institute is replaced by rules strictly limited to a single sector - the supplies of agricultural and food products (in accordance with Directive 2019/633).

Formally introducing the SIEC test in merger control cases

The amended CPA formally recognizes the SIEC (significant impediment of effective competition) test as part of the merger control proceedings. It replaces the former wording of Art. 26, para. 1 of the CPA which stated that the CPC "shall authorize the concentration if it does not lead to the establishment or strengthening of a dominant position which would significantly impede effective competition in the relevant market". In any event, it must be acknowledged that even before the amendment, the CPC has applied the SIEC test in line with the European Commission's practice.

Clarification of the conditions for sanctioning a controlling entity or a legal or economic successor

The new methodology for determining the sanctions imposed under the CPA clarifies the criteria pursuant to which the CPC can impose sanctions on an economic successor of the undertaking that has breached Art. 101 - 102 of the TFEU or their national equivalent. According to the methodology, the CPC can sanction the economic successor where the infringing undertaking transfers the activity with which the infringement was committed, or it is carried out by another operator in circumstances which fall outside normal market conditions and which can only be explained by an attempt to avoid liability. There is no relevant Bulgarian case-law so far.

New rule concerning sanctions imposed on associations of undertakings

In case a sanction is imposed on an association of undertakings which is unable to make the payment, the association shall require its members to make contributions to cover the amount of the sanction within a time limit set by the CPC.

New rule concerning the allocation of costs

Following the amendments, where the CPC finds that no infringement has been committed, or where the proceedings have been terminated due to the withdrawal of the complaint, the CPC must assign the costs incurred to the complainant, if requested by the opposing party.

NEW ZEALAND

Russell McVeagh

New Zealand Legislative Update on Competition Law

by **Sarah Keene**, **Troy Pilkington** and **Lina Kim**

Cartel Criminalisation

After a decade of debate and a two-year trAfter a decade of debate and a two-year transitional period, on 8 April 2021, cartel conduct became a criminal offence under New Zealand's Commerce Act 1986 (the Commerce Act). The offence prohibits individuals and businesses from "intentionally" engaging in cartel conduct (and will operate in parallel to the existing civil prohibition, which does not require any element of "intention"). Those found liable under the criminal offence will be subject to:

- imprisonment of up to seven years or a criminal fine of up to $500,000 for individuals; or
- a criminal fine up to the greater of $10 million or three times the commercial gain of the offence, or 10% of the company's turnover for businesses.

The Commerce Act has also introduced a defence against criminal (but not civil) prosecution for defendants who reasonably believed that any of the relevant exceptions to cartel conduct applied (but the defence will not apply "if the defendant's belief is based on ignorance, or mistake, of any matter of law").

The Commerce Amendment Bill 2021

Earlier this year, the Commerce Amendment Bill (the Amendment Bill) was introduced to New Zealand Parliament proposing a number of significant amendments to the Commerce Act that, when implemented, will significantly alter New Zealand's competition law framework. The Amendment Bill is currently awaiting its second reading in Parliament and is expected to be implemented into law in early 2022.

Most notably, the Amendment Bill adopts the recently implemented Australian market power test that prohibits firms with a substantial degree of market power from engaging in any conduct that has the purpose, effect or likely effect of substantially lessening competition in a market. While the New Zealand Commerce Commission (NZCC) has said these changes will improve the enforceability of these provisions, there is concern from the business community about the difficulty of self-assessing their compliance under the new regime.

The Amendment Bill also proposes the removal of the current intellectual property (IP) rights exceptions under the Act. This, combined with the above changes, will mean that it could readily be found to be unlawful for a business to enforce its IP rights in circumstances where doing so would have the purpose, effect, or likely effect of substantially lessening competition in a market (for example, where a business's IP gives it a particular unique advantage in a market). This amendment will likely subject IP arrangements to closer NZCC scrutiny and potentially add uncertainty to the enforceability of IP rights in New Zealand.

SLOVAKIA

NEDELKA KUBÁČ ADVOKÁTI

New Act on Protection of Competition in Slovakia effective from 1 May 2021

by **Andrea Oršulová**

In connection with the transposition of Directive No 2019/1 to empower the competition authorities of the Member States to be more effective enforcers (the Directive), a new Competition Act (the Act) will be effective from 1 May 2021. In addition, new implementing regulations will be issued, also with effect from 1 May 2021. These will regulate:

- the de minimis thresholds
- the details of the notification of a concentration
- the details of the Leniency Programme
- the details of Settlement

At this stage, substantial changes to the above-mentioned decrees compared to their current wording are not expected.

The Act incorporates the provisions of the directive very consistently. In particular, new procedural measures have been introduced, namely the Measure and the Interim Measure. Substantial changes are taking place in the area of sanctions, the most important of which are:

- the method of fining an association of businesses and the liability of members of the association for payment of fines
- the criterion for determining turnover at the global level
- new legislation on regular penalty payments.

The Slovak Antimonopoly Office (the AMO), took advantage of the obligation to transpose the Directive to adopt more extensive changes in the competition legislation. One of the major changes that is also related to the transposition of the Directive is the extension of the definition of an undertaking in line with European doctrine. The current definition of an undertaking was based on legal personality. According to the Act, any "entity" carrying out an economic activity that may be related to competition will be regarded as an undertaking, while a group of legal and natural persons who are connected by control relations or other contractual, property, personnel or other relations will also be considered an undertaking. The change in question is subsequently followed by other changes concerning the imposition of fines, such as the joint and several liability of several companies within the business for infringements or the explicit regulation of the Economic Continuity Test.

There are no significant changes in the legislation on agreements restricting competition and abuse of dominant position. However, the legislation repeals the possibility to ask the AMO for an opinion on whether certain conduct of a business is an agreement restricting competition. The burden of proof on the party to the proceedings claiming to enjoy the protection of an individual exemption (Art. 101 (3) TFEU) is explicitly enshrined in the Act. In the area of merger control, the notification criteria were adjusted when a special notification criterion was removed from the Act, which was applied in the event of the creation of joint ventures to eliminate the assessment of extraterritorial joint ventures inactive in Slovakia.

SOUTH AFRICA

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South Africa Joins the Fray on Digital Market Regulation

by **Chris Charter**

In South Africa, the Competition Commission (Commission) recently announced three key interventions in the digital economy:

- a paper on the digital economy (Paper)
- the initiation of a market inquiry into online intermediation platforms (Online Platform Inquiry)
- a draft small merger guideline aimed at digital mergers (Revised Small Merger Guideline).

Paper

The Commission published a second edition of its seminal paper on the digital economy on 24 February 2021.

The Paper posits that competition law and various other regulatory interventions should work together to ensure inclusive economic growth, by enhancing employment levels and giving small and medium sized enterprises (SMEs), and firms owned or controlled by historically disadvantaged persons (HDPs), an opportunity to participate in fast-growing digital markets.

The Paper sets a broad framework to analyse the South African digital economy through a competition lens. It provides an overview of how competition in digital markets might be harmed in the context of mergers, cartel conduct, abuse of dominance and vertical restraints. The Commission identifies current challenges, emerging views from other jurisdictions and strategic action points on how it intends to enforce competition law.

The Commission argues that competition in the digital economy can be promoted with the collective intervention of regulatory and industrial policy and calls upon Government to invest inter alia in technological infrastructure, coupled with a data privacy and consumer protection regime, to ensure that SMEs and consumers are protected.

Online Platform Inquiry

The Commission's Paper recognises that market inquiries can be used to address anti-competitive outcomes in digital markets. With alacrity, the Commission has proceeded to launch one.

The Commission has a statutory period of 18 months to conduct market inquiries and so it proposes only to cover online intermediation platforms (which link businesses to customers in the provision of goods and services, including the generation of transaction leads).

Out of scope are search and social medial platforms and platform-based fintech offerings (eg.payment systems). The Commission indicates that the former might best be tackled through international policy coordination while the latter requires the intervention of other financial regulators through, for instance, the Intergovernmental Fintech Working Group.

The focus on intermediation platforms targets an emerging route to market for local businesses looking to enter the platform market or utilise platforms to sell goods and services. Promoting effective competition for, and between online sales platforms is in line with prevailing policy aimed at creating space for SMEs and HDP businesses to enter and flourish.

The inquiry will consider:

- the impact of price parity clauses (which may limit the ability of new entrants to compete on price); exclusivity (to prevent multihoming by sellers); loyalty incentives and predation (which could prevent new entrants from gaining critical mass); and conglomerate leveraging (by firms with multiple platforms in the digital ecosystem, allowing for greater data exchange, cross promotion and self-preferencing)
- terms that are discriminatory or unfair towards SMEs and HDI firms. The Commission will look at: self-preferencing by the platform owner; discriminatory pricing; restrictions on promotions; inflated access pricing; and use of, and fair access to transaction data
- the impact of ranking algorithms and "pay for position" promotional opportunities and any attendant effect on consumer choice.

The Commission can impose remedies to address "entrenchment strategies" by dominant platforms "to ensure that markets are contestable and prevent irreversible concentration". The Commission might also propose uniform rules or codes of conduct to apply to all platform operators.

Platform owners, new platform developers, platform users and those looking to enter the market will have an opportunity to participate and help shape the process with balanced and comprehensive input.

Stakeholders have an opportunity to participate and shape the process by completing surveys, which the Commission will supplement with requests for information from identified role-players. Thereafter, an updated Statement of Issues will be published in August 2021. Public hearings are slated for November 2021 with preliminary findings due in May 2022. After further public comment, the final report is expected November 2022.

Draft Revised Small Merger Guideline

Small mergers are notifiable only where the Commission formally calls on parties to do so (at any time within six months of implementation). Out of concern that the acquisition of nascent digital businesses (eg. at start-up phase) might be escaping regulatory scrutiny due to a lack of reportable revenue to meet the thresholds for compulsory notification, a draft Revised Small Merger Guideline calls on parties to inform the Commission of small mergers where any of the parties operate in a digital market and:

- the consideration for the acquisition or investment, or the effective value of the target exceeds ZAR190 million
- at least one of the parties to the transaction has a market share of 35% or more in a digital market, or
- the merger creates or reinforces dominance

Forewarned, the Commission will then decide whether parties must notify the small merger for investigation.

The onus will be on parties to self-assess and consider involving the Commission voluntarily, or face the uncertainty of an ex-post investigation and possible regulatory interference.

SLOVENIA

JADEK & PENSA

Slovenian Competition Protection Agency investigating distribution practices of major suppliers of LPG cylinders

by **Janja Zaplotnik** and **Aljaž Cankar**

In September 2020, the Slovenian Competition Protection Agency (the Agency) commenced the procedure for establishing an infringement of Article 6 of the ZPOmK-1[1] and Article 101 of the TFEU[2] against all major Slovenian suppliers of LPG in cylinders.

The Agency is investigating whether an agreement not to take over proprietary LPG cylinders (cylinders legally owned by such suppliers and not by end customers) from each other and adherence to that agreement was with the aim of sharing the market for selling LPG in cylinders in Slovenia.

The Agency is also analysing whether the general terms of the suppliers of LPG cylinders that prohibit distributors and consumers from transferring possession of proprietary LPG cylinders to anyone but their owners reinforce the allegation of market sharing. Moreover, general terms that make the refund of a deposit paid upon the first purchase of LPG in a cylinder subject to the submission of a deposit certificate are also investigated as allegedly hindering consumers when they want to change their LPG cylinder supplier.

This investigation of practices, which started soon after proprietary LPG cylinders were launched on the Slovenian market, may undermine some foundations of the sale of LPG in proprietary cylinders. Full control of possession and the filling of proprietary LPG cylinders down the distribution chain by cylinder owners seems to be one of the key principles of such a system, with the aim of guaranteeing the safety and quality of LPG cylinders. Likewise, deposits and deposit certificates are regarded as security for return and thus as the owners' investment in cylinders and to prevent the theft thereof.

It will be interesting to observe if the Agency finds restrictive agreements in practices that have long been regarded as engrained in the system of selling LPG in proprietary cylinders.

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1. Prevention of Restriction of Competition Act (in Slovenian: *Zakon o preprecevanju omejevanja konkurence*; Official Gazette of the Republic of Slovenia, no. 36/08 as amended, "ZPOmK-1").

2. Treaty on the Functioning of the European Union (in Slovenian: *Pogodba o delovanju Evropske Unije*; Official Gazette of the EU, no. C 325 as amended, "TFEU").

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