VOGEL & GLOBAL Competition Newsletter

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CHILE   FerradaNehme

Legislative amendments to the Chilean competition defense system

Law No. 20,945 of 30 August 2016 has significantly modified and strengthened the Chilean competition defense system. It introduced a per se rule for hardcore cartels: it will be enough to demonstrate the existence of an agreement or concerted practice to condemn, regardless of the agents' market power or the effects in the market. Moreover, criminal sanctions were re-established for collusive arrangements, sanctioning those involved with imprisonment from three to ten years, with a minimum term of one year of imprisonment.

Fines have also been increased. Fines prior to the reform were found to be insufficient to deter competitive infringements. This is the reason why a flexible ceiling was incorporated, which will allow the Chilean Competition Tribunal (TDLC) to impose a fine equivalent to 30% of the infringer's sales, or up to double of the economic benefit reported. If it is not possible to determine the latter, the maximum fine limit shall be US$50,000,000, approximately twice the maximum fine applicable prior to the reform.

Finally, a new merger control regime came into force on 1 June 2017, which provides for:

- a previous mandatory notification regime to the National Economic Prosecutor (FNE) for operations that meet the following turnover thresholds in Chile in the preceding financial year: at least a combined turnover of US$71m approximately and a turnover of US$11.5m approximately for at least two parties
- a suspension period until the FNE renders its decision or, in the case of an appeal, the TDLC's decision
- a two-stage investigation process (30 working days for phase I and an additional 90 working days for phase II)
- the possibility to offer remedies in both phases; and
- a substantial lessening of competition test.

DENMARK  BECH-BRUUN

New Danish Marketing Practices Act

The Danish Parliament has adopted a new Marketing Practices Act intended to simplify consumer legislation and ensure compliance with applicable EU directives. The new Marketing Practices Act enters into force on 1 July 2017.

Everybody, including traders, consumers and enforcement agencies in other EU countries has good reason to consider how the new Marketing Practices Act is likely to impact operations. Below are some of the most important changes brought by the Marketing Practices Act.

Warranties

Previously, all written warranties marketed to consumers were required to be written in the Danish language. In the future, this requirement will be eased, meaning that the Danish language requirement applies only if the product or service is marketed in Danish. This matches the general language requirement in Denmark regarding other types of legal notifications to consumers.

Unsolicited marketing

The rules on unsolicited marketing communications via electronic mail (spam) remain largely unchanged. This means that it is generally prohibited to contact consumers, organizations, public authorities and other traders without prior consent. However, the so-called opt-out consent allowing traders to market their "own similar products or services" via electronic mail, provided that the buyer has been given the opportunity to refuse receipt in connection with a sale, may now be used to submit marketing material for a much broader category of goods and services. Previously, the opt-out consents were restricted in such a way that they could only be used to market identical or almost-identical products or services.

Increased authority

The Consumer Ombudsman is granted increased authority to collect evidence at the premises of traders for the purpose of processing complaints received from consumer legislation enforcement agencies in other EU member states. This authority includes the right to search persons on-site and to create electronic copies of all data files and other materials reviewed.

ISRAEL 

Soft drinks company faces severe sanctions for abuse of monopoly status

The Israeli Antitrust Authority has announced its intention to impose financial sanctions of NIS 62m (approximately EUR 15.5m) on the Central Bottling Company (CBC), the exclusive distributor of Cola drinks in Israel.

CBC is a dominant player in the field of soft drinks. Its main brand, Coca-Cola is a strong brand with indisputable market strength. Together with this brand, CBC holds other brands in the field of carbonated beverages, such as Fuze Tea and Iced Tea, which also hold a high share of sales. CBC's total basket of soft drinks holds a sales share of approximately two-thirds of the market.

The sanctions relate to:

- abuse of monopoly status in the Cola soft drinks market
- breach of an agreed order
- breach of merger terms
- a potential financial sanction of NIS 340,000 on a senior officer of the company

CBC's investigation raised concerns that the company has exploited its monopolistic power and used its market strength, mainly through the Coca-Cola brand, to promote the sale of soft drinks in which it is exposed to more intense competition. Specifically, the concerns are that CBC:

- knowingly camouflaged its exclusivity agreements with its customers
- awarded its customers discounts based on the total basket of soft drinks purchased from it, so that the discount level for Coca-Cola was conditional on the volume of the total purchase together with the other products, including products for which the market strength of CBC has lower sales

CBC has the right to voice its claims before the Commissioner prior to the Commissioner formulating its final position. If the said financial sanctions are imposed, it will be the highest ever financial sanctions under Israeli Competition law.

LATVIA  

Bid-rigging – a frequent competition law infringement

From 2012 to 2016, 70 per cent of decisions taken by the Competition Council of Latvia (the CC) were related to cartel agreements in public procurements. The total value of public procurements affected by the bid-rigging agreements was at least EUR 134m. Most often bid-rigging is detected in public procurements related to construction works. In the given period the CC adopted 19 decisions on bid-rigging, 89 companies were fined a total amount of almost EUR 10.7m. Although in four cases investigation was initiated on the basis of a leniency application claiming full immunity from fines, the motivation of the companies involved in the infringement to disclose information and evidence on their own initiative still remains low.

In 2017 the CC adopted two decisions on bid-rigging. In one case four providers of security services were fined a total amount of EUR 78.544. The investigation was initiated on the basis of an application received from a publicly-owned real estate property management company, VAS Valsts nekustamie ipašumi which had noted similarities in the applications submitted by several independent companies. The CC detected that four companies had coordinated their activities in procurements on provision of security services.

In the other case ten companies were fined for coordinating their participation in the tenders arranged by public and municipal authorities on the acquisition of professional video, lighting, sound and stage equipment. The aggregate fine imposed on these companies was EUR 473,083. The investigation was initiated as a result of a leniency application. Bid-rigging was mainly implemented by either asking other competitors not to submit their bids or agreeing in advance who will submit the winning bid on a contract to be awarded through a competitive bidding process.

LITHUANIA

SORAINEN
ESTONIA LATVIA LITHUANIA BELARUS

Revealing unnotified concentrations becomes a top priority in merger control

In recent years the Lithuanian Competition Council revealed several unnotified concentrations and fined undertakings for failure to submit merger notifications prior to the implementation of transactions. In Lithuania an unnotified concentration is considered as a very serious infringement, which may result in the imposition of a fine of up to 10% of the gross annual turnover of an undertaking. In addition, the undertakings that failed to notify the authority may be obliged to restore the pre-merger situation which, in some cases, may be practically difficult to implement.

For instance, in 2014 the Lithuanian Competition Council fined Lukoil Baltija approximately EUR 3.4m. This was the largest fine imposed on a single undertaking for failure to notify the authority. The fine was imposed for implementing two transactions without prior notification. The transactions concerned the acquisition of control over several petrol stations in Lithuania. Finally Lukoil Baltija notified the Lithuanian Competition Council and received clearance, however the courts confirmed the fines imposed on the company.

Furthermore, in 2017 the Lithuanian Competition Council imposed a fine of almost EUR 1m on a Lithuanian company, Kauno grudai operating in the grain market for an unnotified concentration. The authority found that, having acquired 51% of shares in the company Vievio paukštynas that operates in the market of poultry products, Kauno grudai implemented a concentration without prior notification. It is noteworthy that the authority opened the investigation according to information on fictitious transactions provided by the court. When imposing the fine, the authority took into consideration that Kauno grudai tried to hide the infringement and increased it.

Recently the Lithuanian Supreme Administrative Court confirmed that an unnotified concentration is a continuous infringement, therefore there is no statutory limitation period applied in such case.

LUXEMBOURG

MOYSE ■ BLESER
Avocats à la Cour

Luxembourg Administrative Court annuls Competition Council decision

The *State of Luxembourg v Entreprise des POSTES et TELECOMMUNICATIONS (EPT)* case concerned the failure of the Luxembourg Competition Council (the Competition Council) to comply with the following obligations during an abuse of dominance proceedings:

- conducting the investigation within a reasonable time frame (art 6 of the European Convention on Human Rights - ECHR)
- providing all the information requests elements
- carrying out a market definition analysis

EPT, a telecommunications and postal services operator in Luxembourg was fined EUR 2,520, 000 by the Competition Council in its decision (No. 2014-F0-07) of 13 November 2014. This was the highest fine ever imposed by the Competition Council.

EPT appealed this decision before the Administrative Tribunal which annulled the Competition Council's decision in its judgment of 21 November 2016 (Rule No. 35847a).

The Luxembourg Administrative Court confirmed this annulment (decision, number 38930C) in its judgment of 1 June 2017, holding that the Competition Council exceeded the reasonable time period to carry out the investigation. The first statement of objections took place eight years after the first complaint against EPT.

Regarding the information requests formalities, under the penalty of invalidity, the requests did not contain : the legal basis, the purpose behind the requests and the penalties in the event of the provision of inaccurate information.

The Luxembourg Administrative Court stated that it is not sufficient for EPT to have been well aware of the matter in which the request for information was made and to have understood the scope of that request. Moreover, it is unnecessary to establish a causal link between the request for information and the grievance experienced by the Luxembourg Competition Council in order to underpin its decision to convict.

In conclusion, the Competition Council must ensure compliance with procedural safeguards during its investigations, strictly enforce the law and carry out a proper analysis in order to determine the relevant market.

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