VOGEL & GLOBAL Competition Newsletter

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BELARUS


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Upgrading the Belarusian anti-monopoly regulation

September 2016 marked an important stage in the formation of Belarusian anti-monopoly regulation: a new independent competition authority – the Ministry of Anti-monopoly Regulation and Trade (MART) – was established. The structure of MART embraced the territorial agencies for anti-monopoly and pricing policies, as well as the Pricing Policy Department previously subordinated to the Ministry of Economy.

MART is entrusted to prevent monopolistic activities and promote competition in the Belarusian market. It regulates and supervises activities of subjects of natural monopolies, prices and tariffs and monitors and regulates product markets, public procurement contracts, advertising and consumer protection activities.

Starting from autumn 2016 MART is actively increasing its activity in the field of competition. It investigates unfair competition claims, publishes results thereof on its official website (which has never happened before), performs obligatory merger clearance procedures and regulates trade activity of business entities. For instance, within the first six months of 2017 MART has conducted nine investigations that resulted in acknowledging unfair competition and imposing fines and prohibitions on business entities that breached legislation. At the same time, information on cleared mergers is not being made public and there are no general reviews on MART's activity in this sphere.

The reform of anti-monopoly legislation continues: the government introduced amendments to the main competition law in Belarus – the Law On Counteraction to Monopolistic Activity and Competition Development. The bill contains a range of amendments on reducing the dominance thresholds and clarifying the categories of unfair competition.

The government has refocused its attention away from price regulation by redistributing powers in favor of the anti-monopoly authority. The transfer of regulatory functions to a new body is just the beginning of active changes in the competition law regime.

CHINA


天地和津師事務所
T&D Associates

How to assess 'control' under MOFCOM's latest draft of measures for reviewing notification of concentrations

The Ministry of Commerce of China (MOFCOM) released the latest draft of the Measures for Reviewing Notification of Concentrations (Draft Measures) on 8 September 2017. It is regarded as one of MOFCOM's fundamental rule for implementing merger control under the China Anti-Monopoly Law.

The Draft Measures deals with an important issue: how to assess 'control', i.e. how to assess whether an undertaking is able to impose control or decisive impact upon another undertaking.

According to the Draft Measures, to determine whether an undertaking obtains control or the ability to exert decisive influence upon the target, one shall consider:

- the situation of voting right or similar rights and interests; and
- the influence on operating decision and management of the target such as appointment, dismissal of senior management, financial budget, business plan, etc.

To further assess the existence of control or ability to exert decisive influence, according to the Draft Measures, practitioners shall mainly base the assessment on related legal documents and consider the following factors:

- purpose of the transaction and business plan after the transaction;
- undertakings' equity structure and its changes before and after the transaction;
- matters decided by vote and the voting mechanism of shareholder meeting or general meeting of shareholders of undertakings;
- historical attendance and outcome of voting of shareholder meeting or the general meeting of shareholders of undertakings;
- constitution, matters decided by vote, voting mechanism and historical voting outcome of the board of directors, board of supervisors and other similar decision-making bodies of undertakings

Undoubtedly, with the coming into force of the Measures for Reviewing Notification of Concentrations, legal certainty of MOFCOM's merger review practice will be significantly increased.

ESTONIA   SORAINEN
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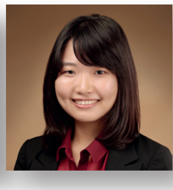
European Commission disapproves of Estonia's fining practices

In June 2017 the biggest cartel case in Estonia came to an end. The cartel concerned a hub-and-spoke price-fixing agreement implemented in 2009 between a leading Estonian alcohol producer and four retail chains. The agreement was to raise the retail price of cheap half-liter vodka bottles to a certain minimum price level. The total amount of fines imposed on the cartel participants was around EUR 11m, but only ten per cent had to be paid.

The release of the cartel participants from the payment of 90 per cent of the imposed fines was conditional on the convicted persons not committing any new intentional criminal offence within a one-year probation. The main reason for enforcing only ten per cent of the fines was that the limitation period for the criminal offence had almost expired and the events had taken place way back in 2009.

At the time of the cartel, Estonian law did not prescribe the calculation of fines as a percentage of the infringing undertaking's turnover. Nevertheless, the court still considered turnovers. The fines imposed on undertakings were in the range of 0.75%-1.5% of the relevant 2009 turnover. Considering that only ten per cent was actually enforced, the relevant range was 0.075%-0.15%.

Consequently, it comes as no surprise that Estonia is one of the Member States targeted by the European Commission's 22 March 2017 proposal for a directive to empower the competition authorities of the Member States to be more effective enforcers. The European Commission is concerned that in most Member States in which fines are primarily imposed in criminal proceedings, EU competition law is under enforced. While the Estonian courts are reluctant to impose fines anywhere near the maximum ten per cent for antitrust infringements, this is not necessarily due to the sanctions being imposed in criminal proceedings.

KOREA   KIM & CHANG

The Korea Trade Commission steps up regulation

Over the past several years, the Korea Fair Trade Commission (KFTC) has stepped up regulation over certain high-tech industries, reflecting concerns regarding monopolization and Intellectual Property Rights (IPR) abuse. In December 2016 the KFTC established a Knowledge Industry Anti-Monopoly Division to focus on abuses in sectors such as IT and healthcare. It also imposed the largest ever fine (KRW 1.03tr) in a single case against Qualcomm for alleged abuse of dominance. In May 2017, it launched a sector-wide investigation into the pharmaceutical industry, requesting detailed information from companies on their IPR and commercial agreements.

In December 2016, the Fairness in Distributor Transactions Act came into effect. This new legislation, as well as the existing Fairness in Franchise Business Transactions Act (Franchise Act) and Fairness in Subcontracting Transactions Act, reflect the authorities' ongoing interest in protecting businesses with less negotiating leverage from exploitation.

There have also been legislative efforts to increase monetary exposure for violations and generally tighten enforcement. For example, a recent amendment to the Franchise Act permits treble damages for certain violations, while punitive damages have also been proposed for serious violations of the Product Liability Law. Starting October 2017, the KFTC will have more tools for inducing co-operation with investigations under the Monopoly Regulation and Fair Trade Law (FTL), including the ability to impose a per diem enforcement levy if a company delays responding to an information request approved at the Commission level and criminal sanctions for refusal to cooperate. The Moon administration has also suggested giving prosecutors the authority to independently open investigations into FTL violations (currently, a referral from the KFTC is needed).

The new KFTC Chairman, Mr. Sang-Jo Kim, has an activist background and under his leadership the KFTC is expected to focus on issues such as conglomerate reform and abuses in the franchising and distribution industries.

MEXICO

BASHAM ABOGADOS

Key steps towards a competitive gasoline market in Mexico

For more than 70 years, Mexican energy sectors were controlled by the government through monopolies: state productive companies, price fixing and subsidies.

The only way to allow a third party to commercialize and sell gasoline or diesel in Mexico by a company other than PEMEX – a state productive holding 100% of the market – was through a franchise agreement with PEMEX. This meant that the conditions were imposed and enforced by PEMEX. Additionally, gasoline was a fuel subsidized by the Federal Government, who also fixed the prices of gasoline and diesel sold to the consumer.

As of 2014, thanks to the constitutional reforms, Mexico started to build the legal framework slowly to allow the liberalization of hydrocarbons markets (production, distribution and commercialization of gasoline and diesel). This involved the review of terms and conditions of the franchise agreements under which any third party could commercialize gasoline and diesel to final consumers.

The purpose of reviewing PEMEX franchise agreements was to establish a more competitive structure and to withdraw from PEMEX the powers to impose and enforce restrictive and anticompetitive conditions. As a result, the Regulatory Energy Commission (CRE) requested an opinion of the Federal Economic Competition Commission (COFECE).

COFECE's opinion stated that the CRE should ensure that the franchise agreements comply with the following recommendations:

- acquisition or delivery of gasoline and diesel should be considered without being under the obligation to retain any other service provided by PEMEX
- PEMEX cannot determine the mandatory delivery systems
- the purchase of fuel to PEMEX shall not be subject to any exclusivity and may not restrict the purchases from other suppliers
- not to include any business margin linked to the type of service station, which may cause exclusive advantages to PEMEX franchisees.

NEW ZEALAND

RUSSELL MCVEAGH

New Zealand's high profile media merger decisions

The New Zealand Commerce Commission (Commission) declined a proposed merger between Sky and Vodafone's broadband and mobile services businesses (Sky/Vodafone). The Commission also declined the proposed merger between NZME and Fairfax, two of New Zealand's print and on-line news organizations (NZME/Fairfax).

Both decisions occurred in the context of a rapidly changing media market and turned on the relevant market definitions. In Sky/Vodafone the Commission defined a market for premium live sports content, separate from other types of pay TV content. In NZME/Fairfax, the Commission considered the range of competitors in the market for the provision of on-line news and information, excluding competitors such as Facebook, Google and small competitors for on-line advertising to include only the two major TV broadcasters, the government owned radio provider and the two major print providers (the parties).

Sky and Vodafone challenged the Commission's conclusion that the merged entity could use its market power to create bundles that will drive broadband and mobile competitors out of the relevant markets, but instead elected to implement a number of the proposed joint initiatives through contract. In NZME/Fairfax, the appellants are challenging the Commission's conclusions on market definition, that a substantial lessening of competition will arise and that the detriments of the merger outweigh the benefits. Despite the uncertain future for print media in New Zealand and potential cost savings of $200 million over five years, the Commission concluded that it could take unquantifiable losses in plurality in the on-line news environment into account.

The Commission took an extended time period to consider both applications (approximately 7 months in Sky/Vodafone and 11 months in NZME/Fairfax). The Commission currently has a 100% decline rate for all clearances and authorizations in 2017. We hope the rest of 2017 will play out better for merging parties.

ROMANIA

Nestor Nestor Diculescu Kingston Petersen
ATTORNEYS & COUNSELORS
Legal & Tax

Romanian Competition Authority issues multi-play services sector inquiry report

The Romanian Competition Authority issued in October 2017 its sector inquiry report on multi-play services (TV, fixed Internet and fixed telephony).

The conclusions of the report, which the authority intends to use in its analyses in mergers and anticompetitive practices cases, are the following:

Market structure: The markets of fixed electronic communication services are highly concentrated at national level, four providers holding over 85% of the total TV and fixed Internet market and 95% of the fixed telephony market;

Relationship between multi-play services and multiple individual services: Despite not all providers offering packages of services, they encourage multiple acquisition of services by offering advantages which are not available in the event of acquiring one service only, thus having a similar conduct with multi-play service providers;

Difficulty in terminating the contracts: It is very difficult for customers to terminate the agreements (from contacting the provider to high termination costs).

Other difficulties: Customers are discouraged from renouncing one service only since this triggers losing all services. Also, should there be a technical problem, there is a risk of having more non-functional services, or should one of the services not be paid, there is a risk of disconnecting all services.

Abusive clauses: There are possible abusive clauses in the multi-play services contracts concluded with natural persons (the list of which the competition authority has transmitted to the consumer protection authority), such as high penalties in the event of early termination by the consumer or the obligation to conclude the contract prior to the verification by the provider of its technical capacity to provide the services at the beneficiary's location.

The authority is considering defining in its future cases relevant markets for the grouped services, separate from the relevant markets for the individual services which are part of the group.

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