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ARGENTINA

TANOIRA CASSAGNE ABOGADOS

Argentina brings in new law and guidelines for competition enforcement

by **Francisco Rondoletti**

On 11 May 2018 a new antitrust law, No. 27.442 was enacted bringing the following changes:

• the creation of a new independent, decentralized and autonomous antitrust agency known as the National Competition Agency (ANC). The agency is still under creation and until it is created, the enforcement will continue to be carried out by the Secretariat of Domestic Trade together with the assistance of the National Commission for the Defense of Competition (CNDC)

• the presumption of illegality for hard-core cartels (price fixing, market allocations)

• increased fines which now take into account the turnover of the company involved in anticompetitive practices

• a leniency program with fine reductions for applicants

• a new pre-merger control regime which will come into force one year after the creation of the ANC

• a notable increase of notification thresholds that now intend to discharge minor transactions

• a de facto fast track procedure for transactions that clearly do not raise antitrust concerns

• the creation of a specialized antitrust division within the Federal Court of Appeals in Civil and Commercial matters for judicial reviews

The competition authority has also been proactive issuing several guidelines, such as:

• guidelines for merger control in Argentina (April 2018), which provide information on, and criteria for merger control reviews (relevant market, HHI, barriers to entry, etc.)

• antitrust guidelines for associations and chambers (December 2018) which provide recommendations for such agents in relation to price fixing, market allocation and other anticompetitive conducts that restrict competition, and the exchange of competitive, sensible information among its members

• draft guidelines for analysis of cases of abuse of dominance (still under public consultation)

• draft guidelines for merger notification (still under public consultation) which aim to clarify which transactions are considered to be mergers that require notification in Argentina, according to the law.

CZECH REPUBLIC

NEDELKA KUBÁČ ADVOKÁTI

Problems persist with the Act on Significant Market Power

by **Jindrich Kadoun**

In late February 2019, the Czech Competition Authority (CCA) fined supermarket chains Penny Market and BILLA as well as their common purchasing company, all of them belonging to the Rewe Group, EUR 6.4m for abuse of market power. The CCA held that by obtaining payments from certain suppliers without providing them adequate consideration, the supermarket chains violated the Act on Significant Market Power (the Act). The affected companies applied for a settlement procedure.

The Act aims to protect food suppliers from unfair practices by large retailers or wholesalers that enjoy significant market power. The rules apply to purchasers with a turnover of more than EUR 194.6m achieved within the last 12 months from the sale of food products.

In terms of the provisions on abuse

of dominance, the Act stands next to the Act on Protection of Competition. The Act constitutes lex specialis in regard to abusive behavior in relations between purchasers and suppliers in the food industry. Unfortunately, the Act raises many issues and has been highly criticized for its opaqueness. The Czech Constitutional Court is currently dealing with a complaint by the members of the Senate seeking an annulment of the Act for its violation of the Constitution. The prevailing public opinion is that the Act does not reflect the realities of the food retail market, damages businesses and mainly serves as an instrument for lobby groups.

Regardless of these issues, however, the CCA has initiated a number of proceedings, some of them resulting in substantial fines. These fines have been criticized as excessive and purpose-built. In 2017, the CCA fined supermarket chain Globus EUR 7.2m for allegedly forcing some of its suppliers to use unwanted accounting services. It is expected that the CCA will continue its activities regarding the Act.

GREECE  BERNITSAS

Decision on the public works cartel case – entities that did not submit to the settlement procedure

by **Tania Patsalia**

Almost a year and a half following the release of the Hellenic Competition Commission's (HCC) settlement decision (No. 642/10.3.2017), whereby the HCC imposed record fines amounting to around EUR 80m on construction companies in the much-publicized case of collusion/bid rigging in public works tenders, the HCC has recently released its decision involving the construction companies that did not opt to settle.

By means of decision No. 647/4.7.2017 (Official Gazette 939/B'/20.3.2019), the HCC found that 17 contracting companies and two contractor associations (SATE and STEAT) violated Articles 1 of Law 703/1977, 3959/2011 and 101 TFEU, by participating in collusive schemes for market-allocation arrangements and bid-rigging.

The HCC found that the companies ALPINE Bau GmbH, FCC CONSTRUCCION SA, ARCHIRODON GROUP NV and IACOVOU BROTHERS (CONSTRUCTIONS) LIMITED participated in a single and continuous infringement that spanned from 2005-2012, consisting in jointly developing an allocation and bid-rigging scheme in public tenders for public infrastructure works, notably Metro rail projects for the period 2005-2006 and infrastructure projects for the period 2011-2012. A fine of approximately EUR 27m was imposed on them.

The HCC found that its power to impose a fine for the single and continuous infringement consisting in jointly developing an allocation and bid-rigging scheme in public infrastructure works tenders for the period 1989-2000 and for the separate infringements consisting in the allocation of public infrastructure works tenders for the periods 1981-1988 and 2001-2002 against certain construction companies, had become time-barred pursuant to the 5-year limitation period under Article 42 of Law 3959/2011.

Finally, the HCC found that infringements in the context of, inter alia, concession projects for road construction were not substantiated.

POLAND  SK&S SOŁTYSIŃSKI KAWECKI SZLĘZAK

The Polish Competition Authority gains new powers to impose fines on managers

by **Krzysztof Kanton**

The recent amendments to the Polish Act on Competition and Consumer Protection (the Act) introduced personal liability and sanctions for managers of undertakings guilty of infringing consumer interests.

The change in law allows the Polish Competition Authority (PCA) to fine a manager who – when exercising duties when the infringement was put in place – intentionally allowed (by action or omission) the undertaking to infringe the collective interests of consumers or to apply abusive clauses in contracts with consumers. Infringements of collective interests under the Act include providing consumers with misleading information, unfair commercial prac-

tices and mis-selling of financial products.

The maximum amount of fine for a manager is generally capped at PLN 2m but a person holding a managerial position in an undertaking active in the financial sector can be fined up to PLN 5m.

Recent statements made by the President of the PCA suggest that the authorities intend to make use of the new powers awarded to them: "We will make use of the new tools because our experience shows that the decisions and supervision of managers have a huge impact on a company's practices that violate consumer rights. This could be, for example, putting pressure on sales staff to gain as many customers as possible, even at the cost of misleading them."

Prior to the entry into force of recent amendments, the PCA was entitled to impose a fine (up to PLN 2m) on a manager who intentionally allowed the undertaking to enter into an anticompetitive agreement. There are currently two pending proceedings in which managers have been charged but so far no fines have been imposed.

UNITED KINGDOM

SHEPHERD+WEDDERBURN

The CMA targets the UK construction industry

by **Tripti Malhotra**

The Competition and Markets Authority (CMA) has been on a hunt for more cartels in the construction industry. The ICM's 2018 Competition Law report (commissioned by the CMA) reflects the construction industry's lack of competition law awareness, which has only encouraged greater scrutiny. The statistics reflect that only 19% of the industry was aware about competition law, with very few knowing that it was illegal to fix prices or divide markets.

The sector is known to have engaged in practices including bid-rigging and exchange of competitively sensitive information, with the Office of Fair Trading imposing a hefty £129.2m fine on construction firms for rigging 199 tender bids between 2000 and 2006.

Worth noting are two of the CMA's infringement decisions with respect to the supply of galvanised steel tanks. In one, four suppliers were found to have engaged in price-fixing, bid-rigging and market sharing. In the second, three out of four main cartelists, along with Balmore Group Holdings exchanged commercially sensitive information. Interestingly, Balmore was not one of the main cartelists and happened to attend only one meeting in which commercially sensitive information was exchanged. This was considered enough to invoke liability. This meeting was secretly recorded by the CMA.

Since then, various other investigations have been initiated by the CMA:

- roofing materials – initiated in 2017, statement of objections have been issued,
- design, construction and fit-out services – launched in 2017, five companies agreed to pay fines totalling over £7m,
- precast concrete drainage products – initiated in 2016, two of three defendants (SBC and CPM Group) admitted to the infringement. The civil investigation also prompted a criminal investigation, which led to SBC's chief executive to plead guilty, followed by a two-year imprisonment sentence and seven years' disqualification as a company director.

Given the uncertainties around Brexit, the CMA has been more vigilant than ever and is eager to take up fresh cases, specifically targeting certain sectors, with construction appearing high on its list.

Ukrainian Competition Authority explains vertical exemption in pharma

by **Tetiana Vovk**

The Antimonopoly Committee of Ukraine (the AMC) recently issued recommendatory guidelines explaining how it intends to apply the earlier adopted Vertical Block Exemption Regulation (VBER) to relations regarding supply and promotion of medicines (the guidelines).

Under the VBER, vertical restraints are generally exempted if the supplier's and buyer's market share do not exceed 30%, except for certain hardcore practices. Practices that do not fall within the safe harbor may still be individually authorized by the AMC. The guidelines aim, inter alia, to clarify the authority's approach to assessing borderline cases.

The document summarizes the AMC practice accumulated over five years of investigations into various practices, the major concerns being the allegedly excessive prices in tenders and market foreclosure for generics.

In particular, the following practices may be viewed as anticompetitive:

- establishing different terms of supply to individual distributors without proper justification (eg. by volumes of supply),
- applying non-transparent price-setting mechanisms – discounts, bonuses, credit notes (in particular, the AMC recommends that suppliers carefully design discount models with respect to medicines where they may have significant market power),
- fixing purchase or sales volumes (plans) in value rather than in volume,
- setting stock maintenance requirements at an unjustified level.

According to the AMC, agreements between the medicines manufacturer/supplier and the distributor regarding the above will likely aim or result in restriction, elimination or prevention of competition by foreclosing generic drugs manufacturers from the market. They could also lead to market sharing and excessive pricing.

The AMC also explains that for the purposes of the market definition regarding pharmaceuticals, it will take into account a combination of the following factors:

- active ingredient,
- dosage form,
- means of administration,
- safety, quality and efficiency indicators,
- bioavailability.

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