VOGEL & GLOBAL COMPETITION NETWORK

# COMPETITION NEWSLETTER

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CROATIA

BABIĆ & PARTNERS LAW FIRM

## Prohibition of unfair trading practices in the food supply chain

The Act on Prohibition of Unfair Trading Practices in the Food Supply Chain (Act) has entered into force on 7 December 2017. The Act is a result of severely impaired commercial relations between traders in the Croatian food supply chain. In order to demonstrate the necessity of regulating this area, producers and other key players in the agro-food industry have been highlighting problems such as difficult access to retail, requests for advanced payments to participate in negotiations, late payments and unilateral and retroactive amendments to agreements imposed by parties with strong bargaining power.

Under the Act, unfair trading practices include all business practices and contractual clauses imposed on the supplier by the buyer, processor or reseller which abuse their strong bargaining power - contrary to the principle of good faith, equality of parties, equal value of contractual performances and good business practice in the agro-food trading industry.

The Act contains several categories of black-listed practices and contractual clauses which are considered unfair and therefore subject to a monetary fine of up to HRK 5,000,000 (approximately EUR 674,500). Furthermore, agreements between suppliers and buyers, processors or resellers that do not contain provisions specifically mandated by the Act are void, as well as contractual provisions which grant buyers, processors and resellers the right to unilaterally terminate the agreement verbally or without cause, or to terminate the agreement with immediate effect, or to unilaterally amend the agreements.

Regulatory powers are vested with the Croatian Competition Agency, specifically its newly formed department responsible for the Act's enforcement. Agreements which are contrary to the provisions of the Act must be amended before 31 March 2018. If not duly amended, these agreements will cease to be effective as of 1 April 2018.

DENMARK

Gorrissen Federspiel

## Danish competition rules become more reflective of EU law

On 1 January 2018, an amendment to the Danish Competition Act entered into force.

The amending act introduced new de minimis rules for the application of the prohibition against anticompetitive agreements. The prohibition does not apply to agreements between competitors with a total market share of under 10 per cent, or to agreements between non-competitors with a market share of under 15 per cent of any of the relevant markets. The de minimis exception does not apply to by-object restrictions. Consortia (preparations for a bid) are no longer exempted from the de minimis rule.

The Danish competition authorities can now 'stop the clock' while waiting for a party to provide information when processing a merger notification. The amending act also clarifies rules on access to documents for someone who is not a party to a case. The rules now only apply to cases where a decision has, or will, be taken.

On 27 December 2016 a new act on damages for competition law infringement entered into force. The act is an implementation of the EU directive 2014/104/EU governing actions for damages for infringements of the competition law provisions of the Member States and the EU.

The new act contains rules on, inter alia, right to full compensation, joint and several liability, passing on overcharges, a presumption that cartel infringements cause losses, the effects of consensual settlements on subsequent actions for dam-ages and limitation periods. There are also new procedural rules on the significance of the competition authorities' and the courts' final decisions in respect of damages.

On 1 July 2017, a new Danish Marketing Practices act entered into force aligning the rules further with EU rules, especially regarding aggressive sales practices.

## INDIA

Kanth & Associates
ATTORNEYS & INTERNATIONAL LEGAL CONSULTANTS

### New target exemption under the Competition Act 2002

The Competition Act, 2002 (Act) mandates notification for any acquisition or merger to the Competition Commission of India (CCI), which triggers above the specified limits under the Act. In 2011 an exception to these rules was introduced by the Ministry of Corporate Affairs (MCA), whereby the acquisition of a target enterprise of an aggregate asset value of INR 2.5bn or less, or the turnover of INR 7.5bn in India (also known as the de minimis exemption) was exempted from providing notification to the CCI (Target Exemption). The Target Exemption was amended in March 2016 and the limits were increased to INR 3.5bn or less of aggregate value of asset, or INR 10bn of turnover.

On 27 March 2017 the MCA (effective from 29 March 2017) came up with a new target exemption applicable for a period of five years. The changes brought under the new target exemption are:

• applicable to mergers and amalgamation, in addition to acquisitions

• where a portion of assets or business is being acquired, taken over or amalgamated, the value of such assets or turnover will be considered to calculate whether the thresholds of the revised target exemption are being breached

• for analyzing the value of assets or turnover of such portion/division/business, the annual report of the enterprise or target company for the preceding financial year will be considered

• in case of non-availability of the annual report, the auditor's report may also be considered

The amendment has removed the irrational disparity and treatment of other transactions vis-a-vis acquisitions. It has also clarified the aspects of the de minimis exemption by expressing the manner and method for calculation, bringing better structure for competition governance.

## MALTA

GANADO
ADVOCATES

### Maltese Competition Authority imposes interim measures on insurance companies

On 18 September 2017, the Office for Competition (OC) imposed interim measures on four insurance companies during the course of an ongoing investigation. The investigation arose after the insurers collectively agreed to establish and operate a Quality Vehicle Repair Scheme (QVR) providing for a list of QVR-certified repairers and a star-rating mechanism showing the level of services provided by the QVR repairers. Where repairs were carried out at a QVR garage, the insurer concerned paid the garage, whilst where repairs were carried out at a non-QVR garage, the policy-holder paid for the service and then awaited for reimbursement from his insurer. The non-QVR garages represented by the Malta Chamber of SMEs claimed that the scheme foreclosed them from the motor vehicle repair market as policyholders were led to opt for QVR garages.

The OC found that the insurers prima facie infringed the Competition Act by participating in an anticompetitive horizontal agreement.

The OC ordered the insurers:

• to cease and desist from making a distinction on the method of payment of repair bills between claimants who choose a QVR repairer and claimants who choose a non-QVR repairer;

• to stop circulating any leaflets or adverts which disparage the non-QVR garages;

• to send a letter to those policy-holders who submitted a claim since February 2017 informing them that no distinction in payment shall be made between claimants; and

• to publish a clearly visible notice on their respective websites stating that no distinction in payment shall be made between claimants.

The OC considered that the interim measures aimed at ensuring that the non-QVR garages remained in the market and were not put out of business pending the final outcome of the administrative procedure.

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ATTORNEYS & COUNSELORS
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## ROMANIA

### Exchange of sensitive information in merger cases – Romanian Competition Council assessment

Exchange of sensitive information has been one of the growing concerns of the Romanian Competition Council. While this was usually the case in the regular course of business (and especially via professional associations or market research companies), the authority's focus has also extended to horizontal mergers, in the context of the wider competition compliance goals.

Upon issuance in December 2017 of the Guide on Competition Compliance, the competition authority has indicated certain benchmarks that companies should take into account in merger cases:

- limiting the exchange of sensitive information prior to merger clearance
- not sharing the information to people with commercial roles
- conclusion of a confidentiality agreement in order to limit the use of the information to what is strictly necessary, in order to assess the feasibility of the merger, while prohibiting its use for commercial purposes
- using clean teams in order to guarantee confidentiality of data and diluting their sensitive nature by, for example, preparing aggregate reports

The above benchmarks are those that one can reasonably expect a competition authority to take into account in its analysis. However, it is for the first time that the Romanian Competition Council expressly indicates them, even if it is by way of a non-binding guide on competition compliance.

CDH
CLIFFE DEKKER HOFMEYR

## SOUTH AFRICA

### The South African Competition Amendment Bill – will it be business as usual in South Africa?

The South African Competition Amendment Bill was recently published for public comment, which represents the next stage in the process after a closed panel prepared a Bill that is, in many ways, explosive.

The Bill seeks to address the dual structural challenges of concentration and the racially-skewed spread of ownership of firms in the economy.

The Bill's key changes include:

- provisions on abuse of dominance and price discrimination reveal an aggressive stance against large firm conduct. The Bill's preoccupation with buyer-power could stifle larger customers' incentives to drive down the cost of inputs from small suppliers for fear of sanction. Removing the 'yellow-card' approach to the rule of reason offences in the Act means that every proven contravention is susceptible to a fine on a first offence. This may chill conduct which is efficient albeit disadvantageous to suppliers
- merger control will require pointed analysis of the potential impact of cross-shareholdings and 'creeping concentrations'. The proposed provisions will lead to uncertainty about the tenure of transactions as far back as three years
- wording is introduced to require the regulator to specifically consider the interests of small and black-owned businesses in many of its assessments
- market inquiries are elevated as an alternative to enforcement in tackling structural deficiencies in markets.

Concerns have been raised that the Bill goes too far in protecting small business at the ex-ense of a globally competitive economy, and on whether the Commission should become an economic panel-beater rather than impartial assessor. Others question the wisdom of allowing the Commission to determine its own enforcement paradigm. Either way, it won't be business as usual in South Africa if the Bill is passed in its current form.

UNITED KINGDOM  SHEPHERD+ WEDDERBURN

## UK competition law following Brexit - update

Important guidance on the potential future direction of UK competition law and policy following Brexit has recently been published by a key UK Parliament committee. Various topics investigated include:

- opportunities and challenges in re-shaping UK competition policy
- UK authorities' capacity and resources to cope with additional responsibilities and caseload
- potential state aid obligations in any UK-EU free trade agreement (FTA)
- future co-operation between UK and the EU on investigations and enforcement

As regards antitrust and merger control, the committee recognizes that, post-Brexit, the UK will have the freedom to take a more innovative and responsive approach, including in relation to fast-moving digital markets and dominant online platforms. The report also notes pressure for wider public interest criteria to be considered in merger cases (particularly in relation to foreign takeovers) and loss of the 'one stop shop' in merger control (with parallel reviews in Brussels and London).

Looking at future cooperation, the committee recommends that the UK and EU negotiate a formal co-operation agreement, covering antitrust and merger cases, enabling reciprocal sharing of confidential information.

On state aid, the committee notes that any comprehensive UK-EU FTA will include state aid provisions (although the view is that, even in the absence of such rules, it is highly likely that there will be a new UK-specific state aid/subsidy regime and, moreover, it is questionable whether Brexit would change levels of state support in the UK).

Finally, on the post-Brexit institutional framework, the committee noted that the Competition and Markets Authority (CMA) will assume responsibility for a greater number of large and complex cases, and is likely to require more funding and staff to meet this additional demand. It is anticipated that the CMA will receive these further resources and be a more active competition authority post-Brexit.

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