VOGEL & GLOBAL COMPETITION NEWSLETTER

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AUSTRALIA

CLAYTON UTZ

New prohibition against concerted practices

by **Michael Corrigan and Melissa de Jongh**

Reforms in November 2017 introduced a new prohibition against concerted practices. Section 45(1)(c) of the Competition and Consumer Act 2010 now provides that a corporation must not engage in a concerted practice with one or more persons if it has, or is likely to have, the effect of substantially lessening competition in an Australian market.

Guidelines released by the Australian Competition and Consumer Commission (ACCC) address a range of scenarios that run the risk of the new law including industry association meetings, online chat rooms and price signalling. The ACCC notes that a concerted practice "does not require all of the elements of an understanding [or agreement] but involves more than a person independently responding to market conditions".

The new prohibition introduces an additional risk for companies doing business in Australia, requiring updates to internal competition compliance programs and guidelines on communications with competitors. Penalties are available up to 10% of Australian turnover or A$10 m per contravention.

Tougher maximum penalties for breaches of Australian Consumer Law have been introduced.

Tough laws on deceptive marketing, product safety and mandatory product guarantees for consumer goods and services will be applied. Companies which contravene certain provisions of the Australian Consumer Law (ACL) will soon face penalties of up to A$10 m per contravention (increased from A$1.1 m), three times the value of the benefit obtained from the breach or 10% of the company's annual turnover.

Higher penalties apply to conduct including false or misleading advertising, unconscionable conduct, unfair practices and breaches of the ACL provisions governing product safety and warranties.

For cartel conduct, Australia now has criminal sanctions including jail terms for individuals. In June 2018, criminal cartel charges were laid against Citigroup Global Markets Australia Pty Limited, Deutsche Bank Aktiengesellschaft and the Australian and New Zealand Banking Group Ltd (ANZ), as well as several senior executives of the banks. The banks were charged with making cartel arrangements relating to trading in ANZ shares in the context of dealing with unsold shares following an unsuccessful A$2.5 bn capital raising for ANZ in 2015. Five criminal cartel cases have been launched in the past 2 years.

DENMARK

Gorrissen Federspiel

The Danish Competition Council's decision on industry standard setting

by **Martin André Dittmer**

In 2017 the Danish Competition Council (DCC) issued a decision on standard-setting. Two roofing felt manufacturers had allegedly infringed competition law in relation to their involvement in the quality standard of Tagpapbranchens Oplysningsråd (TOR). According to the DCC, it met the "by object" test on whether the agreement, by its very nature, has the potential of restricting competition.

Five types of conduct constituted a "broader restrictive agreement" according to the DCC, including foreclosure of competitors in the form of coordination in relation to the standard.

The decision was appealed to the Danish Competition Appeals Tribunal (DCAT). The DCAT issued its decision on 12 September 2018, remitting the case to the DCC for renewed assessment because of an insufficient "by object" assessment.

The DCAT noted that generally, the adoption of industry standards is considered to have a positive effect on competition and does not, as a starting point, restrict competition. The DCC had regarded the conduct of the parties as agreements that, by their nature, restrict competition and compared them to market sharing. Thus the DCC had only conducted a limited assessment of the economic and legal context.

The DCAT noted that the standards aimed at promoting products of a certain quality and did not amount to an actual market sharing arrangement. The DCC had not presented sufficient evidence to conclude that the controlling interest behind the standards was to restrict competition.

Thus, the limited analysis of the economic and legal context of the standardisation agreements, which the DCC adopted, was insufficient. The DCAT clarified the "by object" test which was much needed – the competition authorities have generally interpreted "by object" very broadly.

The DCC will either reassess the case or decide that it cannot prove an infringement with this heavier burden of proof.

ESTONIA

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The Estonian Competition Authority – a shift towards stricter merger control?

by **Piibe Lehtsaar and Kaupo Lepasepp**

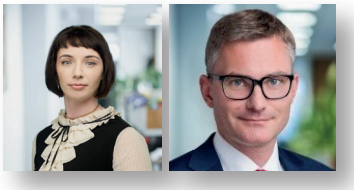
The Estonian Competition Authority has initiated a record number of phase II proceedings in 2018. This might signal a shift towards stricter merger control. The previous record of phase II proceedings in a year was four. By the end of September the authority had already initiated six phase II proceedings which is approximately 16.7% of the total number of merger proceedings initiated in 2018.

In addition to the record number of phase II proceedings, this year has also given us a prohibition decision. Prohibition decisions are extremely rare in Estonia. It is the third decision prohibiting a merger since the beginning of merger control as we know it today in Estonia in 2001. The authority previously prohibited a merger in the postal services sector in 2011 and in the pharmaceuticals sector in 2007. The lonely pair of prohibition decisions turned into a group of three in September 2018 when the authority denied a merger clearance to a transaction in the waste collection sector. The remaining five phase II proceedings are still ongoing.

Between 2015-2017, 80% of the phase II proceedings ended with unconditional merger clearances. The only exceptions were two horizontal mergers in the retail sale of motor fuel in 2017. In those two cases, the acquiring party committed to selling a couple of gas stations located in highly concentrated local areas to a third party buyer. Thus, despite the increasing number of phase II proceedings, the proceedings tend to end on a positive note. At least for the notifying parties.

Only time will tell whether these developments mean a lasting shift towards stricter merger control. One alternative explanation is the authority's struggle to process the higher number of merger notifications speedily without any additions to its staff.

LITHUANIA



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Improving merger control in Lithuania

by **Ana Novosad and Dr. Daivis Švirinas**

Major changes were made to Lithuanian law on competition in December 2017 which came into force on 1 January 2018. These were mainly related to merger control issues.

Turnover thresholds for merger filings were increased. Previously, merger parties were required to notify a merger to the Lithuanian Competition Council (LCC) if the combined aggregate income of the undertakings concerned in the business year preceding the merger was more than EUR 14,500,000, and the aggregate income of each of at least two undertakings concerned was more than EUR 1,450,000. After the amendments, the thresholds increased to EUR 20m and EUR 2m, respectively.

The definition of an undertaking associated with a party to a merger changed. The change is important when calculating the aggregate turnovers and market shares of undertakings for merger control purposes. After the amendment, unless proved otherwise, the undertaking concerned should have at least half of the shares or authorised capital, or half or more of all the voting rights, in another undertaking to be considered associated with that undertaking and be treated as the same group. Previously, Lithuanian legislation considered undertakings to be associated to the same group of undertakings if a company held 1/3 or more of the shares, authorised capital or voting rights.

Finally, the amendment introduced a new right for the LCC. In the case that a party to a merger does not provide the requested information, the LCC is entitled to suspend the examination of a merger (to "stop the clock"), until all the necessary information is provided.

Currently, new legislative proposals on expansion of the LCC's competencies and new requirements for the merger notification filing are under legislative review.

POLYNESIA

Selarl Jurispol

French Polynesia establishes competition framework

by **Mikael Canevet**

French Polynesia has established its right to a competition framework through the country's bill, n° 2015-4, dating from 23 February 2015. This came into effect on 1 January 2016. Broadly inspired from the French law on competition, the French Polynesian Code of Competition hinges around four major axes, namely:

- anticompetitive practices (such as anticompetitive agreements and abuse of dominant position)
- restrictive practices
- concentrations; and
- the acquisition of control over commercial areas.

The implementation of rules relating to restrictive practices falls within the jurisdiction of the Commercial Court. The three other fields fall exclusively within the competence of the Polynesian Authority on Competition. To this day, no decision relating to anticompetitive practices has yet been delivered. Concerning the field of concentration, the Polynesian Authority on Competition has essentially been called upon to intervene in takeovers in the hotel trade carried out by foreign companies. All of these concentrations, which brought about no anticompetitive effect, have been unconditionally authorised.

A takeover in the field of inter-island marine transport of freight and passengers by a group of companies already operating in this sector, but detaining substantial shares in the upstream market, was the object of a more in-depth investigation. The takeover resulted in a monopoly in certain parts of the transportation sector. The notifying party pointed out the relevant transport market's tendency towards a natural monopoly, namely given its limited dimension, and thus offered to draw up a chart of fair practices. Having conducted an essentially structural analysis, the Polynesian Authority on Competition authorized the operation under injunction to sell two of the four ships (decision 2017-CC-01 SCP EMAR/CFMT). The buyer, as he considered that the operation was not viable under such conditions, finally preferred to forgo the project.

ROMANIA

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Romanian Competition Council sanctions private medical hospitals and stem cells banks for anticompetitive agreements

by **Georgeta Dinu**

Following a Romanian Competition Council investigation into the anticompetitive behaviour of five private medical hospitals (active in the maternity services market) and two stem cells banks (active in the market of collecting, processing and storing stem cells), the competition authority imposed sanctions on these entities for anticompetitive agreements.

Each maternity had an exclusive partnership relationship with a particular stem cells bank to which it was directing the patients. If the patients were opting for the recommended bank, the services of collecting, processing and storing of stem cells were free. However, if they opted for another stem cells bank, they had to pay a fixed fee, which was agreed by the maternity and the stem cells bank (with which the partnership agreement was concluded).

Thus, the breach of competition rules resulted from the anticompetitive agreements between private maternities and stem cells banks and concerned the tariff charged for the collection of blood and/or tissue from umbilical cords should patients wish to work with the non-partner stem cells banks.

The investigated companies have admitted their breach of competition law and benefited from fine reductions.

The Romanian Competition Council made the following recommendations to both private maternities and stem cells banks:

- maternities should establish a direct relationship with their patients concerning blood/tissue harvesting without any interference from a stem cells bank
- stem cells banks should have a direct relationship with their patients regarding the collecting, processing and storing of stem cells
- the choice of the stem cells bank for storage of the biological samples should be left to the patient's discretion and not influenced by the maternity.

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