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We are pleased to present a new issue of the International Antitrust Bulletin, 2015 Vol. 4. We feature in this issue articles from Peter Willis in England, Mattan Meridor and Moran Aumann in Israel, Stephen Wu and Yvonne Hsieh in Taiwan and Lisa Totino the U.S. As always, the issue includes What In The World Did I Miss? updates from our diligent regional reporters. We welcome your comments and suggestions and invite your proposals for future articles.

Thomas J. Collin
Editor-in-Chief

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Africa

South Africa

Construction Investigation Officially Concluded, Oct. 26, 2015 — The South African Competition Commission (Commission) officially concluded the last case in the construction cartel under its “fast track” settlement process, marking the end of an investigation which uncovered and exposed the most notorious cartel in South Africa. The investigation, which has resulted in over 17 construction firms paying R1.4 billion in administrative penalties, related to anticompetitive conduct which took place during 2006-11, including collusive tendering for, inter alia, stadiums constructed for the 2010 soccer world cup in South Africa. There are a number of firms which have not concluded consent orders with the Commission, and these cases are still to be heard before the Competition Tribunal.

The Supreme Court of Appeal upholds Premier Foods’ “Section 65 Certificate” Appeal, Nov. 4, 2015 — The Supreme Court of Appeal held that the Competition Tribunal did not have jurisdiction to issue what is commonly referred to as a “section 65 certificate” against a respondent that was not cited as a party before the Tribunal in a complaint referral. A section 65 certificate is a necessary procedural step, which allows a civil litigant to institute a civil claim for damages. The certificate constitutes prima facie proof of wrongful conduct, and a civil litigant then needs to prove the quantum of damages sought and the necessary element of causation that the damages in question were caused by the anticompetitive conduct in question. The Supreme Court of Appeal held that Premier, as the leniency applicant, was not a cited respondent and the Competition Commission had elected to exercise its discretion by neither citing Premier nor seeking relief against Premier for its involvement in the anticompetitive conduct before the Tribunal. Therefore, it was not appropriate for the Tribunal to make a finding against Premier (i.e., that Premier had engaged in prohibited conduct), which is a prerequisite to the issuing of a section 65 certificate. Importantly, the Supreme Court of Appeal stated that a civil litigant’s right to a claim for damages (as a result of a contravention of the Competition Act) arises once the Tribunal has made a finding against a named respondent. Unless there has been a finding, no right arises to request a certificate from the Competition Tribunal.  

Constitutional Court Dismisses Competition Commission’s Excessive Pricing Case Against Sasol, Nov. 17, 2015 — The Constitutional Court of South Africa (Constitutional Court) dismissed an application for leave to appeal brought by the Commission. The Commission’s appeal followed a decision in June 2015 by the Competition Appeal Court (CAC) setting aside the decision (along with a ZAR534 million administrative penalty) of the South African Competition Tribunal against Sasol Chemical Industries Limited. Central to the dispute were two fundamental aspects to the definition of excessive pricing – the first being the proper interpretation of “economic value” and the second being how the “reasonableness” of the price vis-à-vis the “economic value” is to be assessed. The CAC held that even if the price were 14% more than its economic value, this on its own would not justify an inference that the price bears no reasonable relation to the economic value of the good or service. Most importantly, it was confirmed that the CAC would follow European jurisprudence to the extent that a price must be substantially higher than the defined economic value before an adverse finding can be made against the dominant firm. The Constitutional Court ultimately dismissed leave to appeal the CAC’s decisions on the basis that the application had “no reasonable prospects of success.”  

Zambia

Dawn Raids, Nov. 3, 2015 — On Oct. 30, 2015, the Zambian Competition and Consumer Protection Commission (CCPC) conducted dawn raids on three milling companies, namely National Milling Corporation, Superior Milling Company and Simba Milling Company, as well as the Miller’s Association of Zambia. The raid followed the CCPC’s investigation into the alleged fixing of maize and flour prices in contravention of the Competition and Consumer Protection Act, 24 of 2010 (Act). Importantly, in terms of the Act, a person who engaged in price fixing (as well as other traditional types of cartel conduct such as market allocation and collusive tendering) may be subjected not only to a fine, but imprisonment to a maximum of five years. Furthermore, price fixing is prohibited per se, and consequently there is no rule of reason or justification defense available to a respondent that has been found to have directly or indirectly fixed prices. The raids carried out in the milling industry are the first to be conducted by the CCPC since 2013, when raids were carried out in relation to the fertilizer industry.
What In The World Did I Miss?

Africa

Memorandums of Understanding

COMESA and Malawi, Sept. 9, 2015 — The COMESA Competition Commission and the Competition and Fair Trade Commission of Malawi signed a memorandum of understanding (MoU) in order to facilitate greater cooperation between the two agencies when dealing with related matters. This is the first MoU between the COMESA Competition Commission and a COMESA member state. www.comesacompetition.org/?p=1020

Namibia and South Africa, Nov. 11, 2015 — The competition agencies of South Africa and Namibia respectively signed a MoU which aims to promote cooperation between the two countries in so far as competition law policy and enforcement are concerned. The MoU will come into effect shortly and remain in effect for a period of three years. www.compcom.co.za/wp-content/uploads/2015/01/Competition-Commission-of-South-Africa-Signs-Landmark-MoU-with-the-Namibian-Competition.pdf

South Africa and China, Dec. 4, 2015 — The Department of Economic Development, which oversees the South African competition authorities, has signed a MoU with the Ministry of Commerce of the People's Republic of China in order to promote “exchanging information regarding developments in their respective competition legislation, enforcement and policy; providing comments on drafts of each other’s competition law, regulations and other legal or guidance documents; exchanging information on issues including, but not limited to, definition of relevant markets, theories of harm, the competitive impact assessment and the design of remedies; sharing competition law enforcement experience; sharing practice and experience with respect to law enforcement capacity building; and exchanging views on issues relating to international co-operation on competition law and policy.” www.southafrica.info/business/Chinese-South-Africa-trade-041215.htm#.Vm6thNIrIdU

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What In The World Did I Miss?

Asia

China

*It's All in the Eye of the Beholder or the Regulator*, Oct. 15, 2015 — A National Development and Reform Commission (NDRC) official reportedly stated at the Global General Counsels and Business Leaders Forum in Beijing in October that the NDRC’s enforcement follows procedural rules that are as rigorous as any other country’s procedural rules. The same official also stated that the NDRC’s administrative penalty decisions will be made in a more open and transparent manner, and the NDRC has issued uniform evidence rules for different agencies. One feature of its rules is that once the NDRC has made a preliminary decision of its investigation of a particular company, the target company will be “kindly” notified that it has the right to rebut within three days. Most respondents/defendants may expect that they would have more than three days in which to respond to such a decision. [http://app.parr-global.com/intelligence/view/1315348?src_alert_id=8369](http://app.parr-global.com/intelligence/view/1315348?src_alert_id=8369) (subscription required)

India

*India Also Has Uber and App-based Taxi Service on Mind*, Oct. 6, 2015 — Numerous companies (presumably traditional taxi service providers) are complaining to the Competition Commission of India (CCI) about Uber and the like, including Olacabs, Japan’s Softbank-backed local answer to Uber, alleging abuse of dominance and predatory pricing. Just as in many other cities, these two high-profile taxi app firms are entangled in a dispute with transportation authorities in Delhi. Olacabs’ and Uber’s market shares are reportedly 60% and 5%, respectively, with Uber set to invest an additional $1 billion in India over the next several months. Transportation authorities are taking the position that ride-sharing or app-based taxi firms must comply with the same rules as conventional taxi companies. [http://app.parr-global.com/intelligence/view/1311370?src_alert_id=8369](http://app.parr-global.com/intelligence/view/1311370?src_alert_id=8369) (subscription required)

Japan

*Japan Also Revises Investigation Guidelines*, Dec. 17, 2015 — The third quarter of 2015 turned out to be a busy month for Asian antitrust enforcement authorities to talk about and/or reform their investigative procedures. Taking recommendations from three industry groups, including Japan’s business associations as well as the federal bar association, the Japan Fair Trade Commission (JFTC) reportedly submitted its final version of revised administrative guidelines to the ruling party’s competition policy committee. Of particular interest, the proposed revised guidelines would permit note-taking in some situations and also would allow lawyers to attend JFTC depositions in some situations. The JFTC also stated that it will review other important issues such as attorney-client privilege and interrogation records creation process in two years when it reviews and reassesses the guidelines for possible revision. A commentator reportedly observed that in the context of the newly christened Trans-Pacific Partnership trade agreement, the attorney-client privilege issue should be discussed now rather than two years from now. It remains to be seen which of the three Northeastern Asian countries (China, Japan and Korea) will be the first to formally embrace the attorney-client privilege. [http://app.parr-global.com/intelligence/view/1341764](http://app.parr-global.com/intelligence/view/1341764) (subscription required)

Korea

*KFTC Promises a Major Overhaul of Its Enforcement Procedures To Improve Due Process, but Also to Boost Its Court Room Win Rate*, Oct. 21, 2015 — The Korea Fair Trade Commission (KFTC) embarked on the first major overhaul of its investigative procedures in 30 years and aptly dubbed it (in more suitable translation rather than literal translation) “Enforcement Process 3.0” as an initiative befitting the digital age. According to the KFTC, the overhaul is not just to improve due process but also to answer its recent string of major courtroom losses that were at least partially caused by ambiguous enforcement procedures and practices, and resulting evidentiary weaknesses and technical deficiencies. The KFTC will now allow a defense lawyer to be present during dawn raids and witness examinations under most circumstances, whereas in the past it often depended on how reasonable the chief KFTC investigator was during the dawn raid or how tenaciously a defense lawyer insisted on being present. The KFTC also announced that it would revise its case management process rules to strengthen internal control of management processes and investigative records. As part of the reform, the KFTC announced that it would revise leniency program rules by requiring a separate Commission hearing to examine the leniency applicant and verify the credibility and content of leniency applications. It has abolished the Secretary General’s power to grant “provisional” leniency markers, sometimes well ahead of the Commission’s deliberation of a case on the merits, and instead will now require the Commission to grant “permanent” markers only after separate leniency status hearings. The KFTC appears to have taken important steps in the right direction to further modernize procedural aspects of its enforcement program. [www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6419&enthu_type_cd=&report_data_div_cd=&curpage=8&searchKey=&searchVal=&stdate=&enddate=](http://www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6419&enthu_type_cd=&report_data_div_cd=&curpage=8&searchKey=&searchVal=&stdate=&enddate=) (in Korean)
What In The World Did I Miss?

Asia

And Here Come KFTC’s Revised Investigative Procedures With Slight Twists, Nov. 24, 2015 — Further to the KFTC’s Oct. 21, 2015 reform initiative announcement discussed above, the KFTC unveiled its proposed revised investigative procedures on Nov. 24, 2015. While the revised procedures largely followed what the KFTC announced was going to be included in the revised rules, two items were quietly excluded or at least not specifically included in the proposed revised rules at this time. For example, the Oct. 21, 2015 announcement mentioned the subject of a dawn raid’s right to review and confirm investigators’ detailed reports of the on-site investigation. However, it does not appear that this particular feature has been included in the revised rules of Nov. 24. Moreover, the Oct. 21 announcement also included a provision that KFTC investigators who violate the Investigative Procedural Rules will be penalized for violations, such as failing to make investigation reports or employing unfair or overbearing investigative techniques. This feature also appears to have been excluded or minimized in the Nov. 24 notice of proposed rules. One might reasonably characterize the Oct. 21 announcement as a non-binding overview or preview of what may be included in the actual proposed rules. These two particular features in the Oct. 21 reform announcement were unexpected such that one had to wonder if they were actually going to be included in the draft proposed rules. http://app.parr.global.com/intelligence/view/1331208 (subscription required); www.ftc.go.kr/news/ftc/reportboView.jsp?report_data_no=6464&tribu_type_cd=&report_data_div_cd=&currpage=4&searchKey=&searchVal=&startdate=&enddate= (in Korean)

A Perfect Christmas Present For Korea’s Largest Ramen Maker – No Ramen Cartel; and Information Exchange Alone Does Not Establish Price Fixing Agreement, Dec. 24, 2015 — Korea’s largest instant noodle, or ramen, maker, Nong-Shim, received a Christmas present, courtesy of the Korean Supreme Court, when it overturned the Seoul High Court decision that had previously affirmed the KFTC’s liability and fine imposition decision on alleged ramen collusion, which also triggered private damage lawsuits in the U.S. Among other things, the Korean Supreme Court questioned the credibility and weight of the vague leniency application which relied on a deceased employee’s statement with no corroborating written records. In addition to this serious hearsay problem, the Court also noted that, consistent with its 2014 holding in the so-called “16 Life Insurance Company Cartel” case, information exchange, without more, is insufficient to establish an illegal price-fixing cartel agreement. Two other alleged co-conspirators’ appeals are pending before different departments or panels within the Korean Supreme Court while the leniency applicant that was exempt from the KFTC’s fine and criminal referral did not seek judicial review. http://app.yonhapnews.co.kr/YNA/Basic/SNS/r.aspx?c=AKR2015122420461551004&did=1195m (in Korean)

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What In The World Did I Miss?

Australasia

**Australia**


*High Court Orders That Parties May Make Submissions on an Agreed and Quantified Civil Penalty*, Dec. 9, 2015 — The High Court unanimously held that, in civil penalty proceedings, courts are not precluded from considering and, if appropriate, imposing penalties that are agreed between the parties. In doing so, the Court reinstated in excess of twenty years of authorities relating to the ability of regulators (such as the Australian Competition and Consumer Commission, Australian Tax Office and the Australian Securities and Investment Commission) along with those subject to civil prosecutions to make joint submissions to a court about the appropriate pecuniary penalty or range of penalties. The Court held that the task of a court is to determine whether, in all the circumstances, the agreed penalty is an appropriate penalty. A court is not bound to accept the agreed penalty if it does not consider it appropriate. The High Court set aside the Full Court’s adjournment order and remitted the proceedings to the Federal Court. Going forward, given that “certainty” about the likely monetary penalties is often a very significant part of parties’ analysis of its position, this decision is likely to give parties greater incentive to negotiate settlements and therefore avoid lengthy and costly litigation. [www.hcourt.gov.au/assets/publications/judgment-summaries/2015/hca-46-2015-12-09.pdf](http://www.hcourt.gov.au/assets/publications/judgment-summaries/2015/hca-46-2015-12-09.pdf)

**Burma (Myanmar)**


**Indonesia**

Oct. 28, 2015 — Indonesia’s Commission for the Supervision of Business Competition (KPPU) asked Parliament not to criminalize cartel conduct and other anticompetitive conduct. The KPPU Commissioner, Nawir Messi, said that criminalization may not be effective, as small and medium businesses are still quite unfamiliar with competition law. [www.lexology.com/library/detail.aspx?g=6dbb3aab-61a1-459d-8492-caf74d06fc38](http://www.lexology.com/library/detail.aspx?g=6dbb3aab-61a1-459d-8492-caf74d06fc38)

Dec. 7, 2015 — The KPPU has commenced an investigation into price fixing between the country’s five largest rice wholesalers. The investigation began due to increase in rice prices while evidence has shown that there have been no shortages in the rice fields. The KPPU suspects that wholesalers have been withholding their supply of rice to lead to an apparent rice scarcity which allows them to increase their prices. This case has sparked significant political debate concerning regulation of the rice market. [http://globalcompetitionreview.com/news/article/40015/rice-cartel-suspected-indonesia](http://globalcompetitionreview.com/news/article/40015/rice-cartel-suspected-indonesia)

**Malaysia**


Nov. 5, 2015 — The Ministry of International Trade and Industry released the final text of the Trans-Pacific Partnership Agreement, which Malaysia and 11 other nations (including Australia, Canada, Japan, Mexico, New Zealand, Singapore, and the United States) have signed. The agreement, classified as a “free trade agreement” among the participating countries, provides that the signatories adopt or maintain national competition laws that proscribe anticompetitive business conduct and contains a commitment from the parties that they will endeavor to apply these laws to all commercial activities in their territories through maintaining regulatory authorities. [http://mltc.my/competition/news/tpp-parties-to-ensure-framework-of-fair-competition-in-region-MY14174.html](http://mltc.my/competition/news/tpp-parties-to-ensure-framework-of-fair-competition-in-region-MY14174.html)
What In The World Did I Miss?

Australasia

New Zealand

Oct. 2, 2015 — The Commerce Commission gave clearance to FedEx to acquire TNT. Both companies are global companies that supply air delivery services for small packages. The Commission considered that the merger will not be likely to have the effect of substantially lessening competition as there are also other strong competitors including DHL, Express and UPS. This global merger is currently being considered by other competition authorities including the European Commission. https://www.comcom.govt.nz/business-competition/business-competition-media-releases/detail/2015/commerce-commission-clears-fedex-to-acquire-tnt

Dec. 4, 2015 — The Commission cleared the merger of Vocus and M2. Both companies are Australian-based telecommunication companies which operate in New Zealand. The Commission was satisfied that the merger would not or would be unlikely to have the effect of substantially lessening competition as the two companies are not close competitors and Spark, Vodafone and Chorus continue to be active competitors in the market. https://www.comcom.govt.nz/business-competition/business-competition-media-releases/detail/2015/commerce-commission-clears-merger-of-vocus-and-m2

Dec. 8, 2015 — The New Zealand Government announced that cartel conduct will not be criminalized under the Commerce (Cartels and Other Matters) Amendment Bill. This amendment has been under consideration for several years. The Minister of Commerce and Consumer Affairs, Paul Goldsmith, stated that criminalizing cartel conduct would chill competition. The Bill will make other changes including making price fixing, output restrictions and market allocation all automatically classified as cartel conduct (whereas currently only price fixing is automatically cartel conduct). There will also be an exemption for cartel conduct for “collaborative activity.” The Bill is set to come into force in 2016. http://globalcompliancenews.com/new-zealand-cartel-criminalisation-cancelled-20151212/

Singapore

Proposed Reforms to CCS Guidelines, Sept. 25, 2015 — The Competition Commission of Singapore (CCS) issued for public consultation its proposed amendments to the existing CCS Guidelines. The CCS Guidelines outline how CCS will administer and enforce the provisions of the Competition Act and provide important guidance for businesses and practitioners. Public consultation closed on Nov. 27, 2015. The amendments aim to provide greater clarity and detail on CCS’s enforcement approach, as well as streamline various processes. The proposed amendments include changes to the eligibility and conditions for leniency applications, a new fast-track procedure to expedite the investigative process for infringements under section 34 (anti-competitive agreements) and section 47 (abuse of dominance), and clarifications regarding CCS’s approach in the substantive assessment of mergers. In 2016, there will be public consultation on the proposed amendments. The consultation materials which set out CCS’s proposed amendments are available on the CCS website. https://www.ccs.gov.sg/public-register-and-consultation/public-consultation-items/public-consultation-on-proposed-changes-to-ccs-guidelines?type=public_consultation

CCS Study on E-Commerce, Dec. 2, 2015 — A study commissioned by the CCS and presented at an e-Commerce Seminar on the 2 December 2015 found that Singapore’s competition law and analytical frameworks are “generally well suited to address e-commerce-related competition issues.” Further, the CCS has recognized the importance of a level e-playing field to encourage and facilitate companies to join e-commerce. The study noted that Singapore’s online retail market is expected to reach S$4.4 billion in 2015, four times that in 2010. According to the CCS, the rise of e-commerce in Singapore has generated dynamic market developments and created both opportunities and challenges for businesses, and anticompetitive practices could potentially stifle innovation and the expansion of businesses. The CCS will embark on a further study in 2016 to examine the impact of e-commerce on the postal and logistics market. https://www.ccs.gov.sg/media-and-publications/media-releases/ccs-study-on-e-commerce-opportunities-and-challenges-for-a-level-playing-field

Vietnam

Nov. 5, 2015 — The full text of the Trans-Pacific Partnership Agreement (TPP Agreement), to which Vietnam and 11 other nations are party, was released. Of relevance to Vietnam, the TPP Agreement participating countries have agreed that State Owned Enterprises (SOEs) must enter into commercial transactions on the basis of commercial considerations and no longer enjoy preferential treatment or assistance from state governments in the production or sale of goods and services. The agreement may require Vietnam to make changes to its competition law by removing exemptions currently given to state-owned enterprises. Some reports suggest that, currently, SOEs account for around one-third of Vietnam’s gross domestic product, and the TPP Agreement will require a significant change. https://www.lexology.com/library/detail.aspx?g=88ce6c68-6001-4721-a8ba-b4e3ba6402a1

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What In The World Did I Miss?

Europe

Austria

New Cartel Investigation Opened into Rail Passenger Transport Sector in Austria, Dec. 2, 2015 — The European Commission confirmed that it had carried out unannounced inspections of several passenger rail transportation companies in Austria on November 24, in cooperation with the Austrian competition authority. Initial indications suggest that the Commission is looking into both potential cartel-related infringements and abuse of dominance.  http://europa.eu/rapid/press-release_STATEMENT-15-6222_en.htm

European Union

EU Consultation on Role of National Competition Authorities, Nov. 20, 2015 — The EU Competition Commissioner, Margrethe Vestager, gave a speech at the London School of Economics setting out a summary of the major achievements of the European Competition Network. Aside from lauding the ECN for its achievements to date, Vestager outlined challenges that the ECN faces, in particular the challenge of achieving more effective enforcement of EU competition law at the national level. The Commissioner spoke about the launch of a consultation as to whether or not the European Commission should introduce legislation aimed at shaking up the enforcement framework, pushing further enforcement responsibilities down to Member States.  http://ec.europa.eu/commission/2014-2019/vestager/announcements/perspectives-europe_en

Ireland

Irish Competition Authority Accepts Commitments From Booking.com, Oct. 6, 2015 — The Irish competition authority (the Competition and Consumer Protection Commission (CCPC)) published details of commitments secured from the online booking platform Booking.com. The commitments are designed to deal with concerns that the CCPC had over Booking.com’s use of “price parity” clauses in agreements with participating hotels, essentially requiring the members to guarantee that they did not offer a lower price for accommodation via any competing platform, thus allowing Booking.com to sustain its own best-price guarantee. This case will be of interest across the EU more generally, since some of the issues touched on in Ireland are relevant to other hotel-related cases having been investigated by competition authorities in other Member States.  www.ccpc.ie/sites/default/files/Booking%20comSignedCommitmentsSeptember2015.pdf

United Kingdom


UK Merger Jurisdiction Clarified in Supreme Court Judgment, Dec. 16, 2015 — The UK Supreme Court handed down a judgment in favor of the UK Competition and Markets Authority, finding that it had taken the correct approach in concluding that Eurotunnel’s acquisition of three ferries formerly owned by SeaFrance should be treated as a merger under UK rules. The judgment at the end of this long-running case provides guidance on a significant point of law, namely what types of acquisitions might be considered to be potentially subject to the UK merger regime.  www.supremecourt.uk/cases/uksc-2015-0127.html

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What In The World Did I Miss?

North America

Canada

Oct. 30, 2015 — The Canadian Competition Bureau reached an agreement with Direct Energy Marketing Limited to resolve concerns that Direct Energy restricted competition in Ontario’s residential water heater industry. The Bureau had alleged that Direct Energy implemented anticompetitive water heater return policies and procedures aimed at preventing consumers from switching to competitors. Under the terms of the consent agreement, Direct Energy agreed to pay a CN$1 million administrative penalty and to establish and maintain a corporate compliance program in the event it re-enters the residential water heater market in Ontario in the next ten years. While Direct Energy exited the market for water heater rentals in Ontario in 2014, the Bureau continued to pursue a resolution that addresses its past conduct. www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03997.html

Dec. 9, 2015 — Toyo Tire & Rubber Co., Ltd., a Japanese manufacturer of automobile and truck tires and other rubber components, pleaded guilty to three counts of bid rigging and was fined $1.7 million for participating in a conspiracy related to the supply of anti-vibration components to Toyota Motor Corp., Ltd. To date, the Bureau’s investigation involving motor vehicle components has resulted in eight guilty pleas and over $58 million in fines imposed by the courts since April 2013. www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04013.html

Mexico

Oct. 8, 2015 — Mexico’s Federal Economic Competition Commission (FECC) issued a resolution authorizing the merger between two supermarket chains (Soriana and Comercial Mexicana) on the condition that Soriana not acquire Comercial Mexicana’s stores in 27 relevant local markets in Mexico. In those 27 markets, the FECC concluded that the transaction would significantly reduce competition and strengthen entry barriers for new competitors. www.cofece.mx/cofece/index.php/prensa/historico-de-noticias/condiciona-cofece-concentracion-entre-soriana-y-comercial-mexicana

Nov. 2, 2015 — The FECC fined Alsea, S.A.B.de C.V. (Alsea) and Axo Group, S.A.P.I. de C.V. (Axo) 25.694 million pesos (~ $1.5 million) and 2.982 million pesos (~ $180,000), respectively, for failing to notify the FECC before closing Alsea’s acquisition of Axo’s stock. This is the first time that the FECC (including the former Mexican Federal Competition Commission) has imposed a high fine for the failure to make a required pre-closing notification. www.cofece.mx/cofece/index.php/prensa/historico-de-noticias/sanciona-cofece-a-alsea-y-grupo-axo-por-omitir-notificacion-de-concentracion

Dec. 7, 2015 — The FECC issued a summons to a group of sugar producers and marketers after an investigation yielded evidence that the producers likely conspired to fix prices and create a monopoly. The issuance of the summons commences a trial phase, during which the sugar producers can defend against the charges. Following the trial phase, the FECC will make a determination regarding the matter. www.cofece.mx/cofece/index.php/prensa/historico-de-noticias/emplaza-cofece-a-agentes-economicos-por-la-posible-comision-de-practicas-monopolicas-absolutas-en-el-mercado-del-azucar

United States

Oct. 27, 2015 — Step N Grip, LLC, a company that sells rug accessories designed to keep rugs from curling at the corners, has agreed to settle FTC charges that it illegally invited its closest competitor to coordinate prices. According to the FTC, Step N Grip’s invitation to collude was an unfair method of competition that violated Section 5 of the Federal Trade Commission Act. www.ftc.gov/news-events/press-releases/2015/10/marketer-rug-accessory-settles-ftc-charges-invitation-collude

Nov. 5, 2015 — Following a four-week trial in New York, a federal jury convicted two former Rabobank derivative traders for manipulating the London InterBank Offered Rates (LIBOR) for the U.S. Dollar and the Yen, benchmark interest rates to which trillions of dollars in interest rate contracts were tied. The jury concluded that the defendants conspired to manipulate the interest rate estimates submitted as part of the LIBOR process to benefit the traders’ or banks’ trading positions and found them guilty of bank fraud, wire fraud and conspiracy to commit wire fraud. www.justice.gov/opa/pr/two-former-rabobank-traders-convicted-manipulating-us-dollar-yen-libor-interest-rates

Nov. 10, 2015 — The Justice Department filed a civil antitrust lawsuit seeking to block a proposed transaction between United and Delta Air Lines in order to preserve competition at Newark Liberty International Airport. The complaint alleges that United’s planned acquisition of 24 takeoff and landing slots at Newark would increase United’s already dominant position at the airport, strengthen a barrier that diminishes the ability of other airlines to challenge United at the airport and result in higher fares and fewer choices for passengers. www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-block-uniteds-monopolization-takeoff-and-landing
What In The World Did I Miss?

North America

Nov. 12, 2015 — A federal judge in Oklahoma overturned a $6.31 million jury verdict against Cox Communications. The jury had found that Cox violated the antitrust laws by tying the sale of set-top box rentals to its premium cable TV services to restrain trade in the market for set-top boxes. The district court judge however, ruled that the plaintiffs had not provided any evidence that Cox’s actions had foreclosed competition, as no evidence was presented that competitors were prevented or blocked from selling set-top boxes at retail.  http://assets.law360news.com/0726000/726235/cox%20dv.pdf

Dec. 7, 2015 — Following a four-week trial in Washington, DC, Electrolux and General Electric Company announced the termination of the agreement under which Electrolux was to purchase General Electric’s appliance business. The Justice Department had challenged the $3.3 billion acquisition and alleged it would combine two of the leading manufacturers of ranges, cooktops and wall ovens sold in the United States.  www.justice.gov/opa/pr/electrolux-and-general-electric-abandon-anticompetitive-appliance-transaction-after-four-week

Dec. 7, 2015 — The Federal Trade Commission filed an administrative complaint charging that Staples, Inc.’s proposed $6.3 billion acquisition of Office Depot, Inc. would violate the antitrust laws by significantly reducing competition nationwide in the market for “consumable” office supplies sold to large business customers for their own use. The Canadian Competition Bureau has also filed an application with the Competition Tribunal to challenge the transaction.  www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-staples-inc-office-depot-inc ; www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04012.html

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What In The World Did I Miss?

South America

Brazil

Oct. 5, 2015 — The Federal Public Prosecutor’s Office of the State of São Paulo filed a lawsuit with the Brazilian courts against 11 individuals involved in an alleged cartel in the market of ceramic ovenproof rolls. The individuals and their respective companies are targets of an investigation launched by CADE’s General Superintendence (GS) in July 2015. Both entities supported their claims against the defendants on alleged evidence that they have been operating a collusive agreement to allocate clients, to establish shares for each cartel member, to fix prices and to exchange sensitive information. www.cade.gov.br/Default.aspx?81b445d42ce136fd0835065aef53

Nov. 11, 2015 — CADE released for public consultation proposed guidelines for leniency agreements (Guidelines). The Guidelines aim to provide guidance on how to negotiate leniency agreements with CADE. The Guidelines were drafted in a Q&A format, encompassing an overview of CADE’s Leniency Program and outlining the main steps for the negotiation and execution of an agreement with CADE. On the same day, CADE released for public consultation proposed amendments to CADE’s Internal Rules related to the Leniency Program. The main proposed amendments are the following: (i) new provisions to govern the execution of Leniency Plus (full immunity in a new investigation and 1/3 reduction in an ongoing investigation); (2) new provisions to govern the line for submission of a leniency application; and (3) new deadlines to negotiate a leniency agreement. Comments and contributions from interested parties may be sent to CADE by January 10, 2016. www.cade.gov.br/Default.aspx?300313e63ed328eb3e0b5cf44ff2

Nov. 19, 2015 — The GS opened an administrative proceeding to investigate an alleged cartel in connection with a tender process launched by Eletrobras Nuclear S.A. The investigation was opened after the execution of a leniency agreement between CADE, the Federal Public Prosecutor’s Office of the State of Paraná and Construções e Comércio Camargo Correa S.A. (CCCC). The defendants are the following: Construtora Andrade Gutierrez S.A., Construtora Noberto Odebrecht S.A., Construtora Queiroz Galvão S.A., CCCC, EBE – Empresa Brasileira de Engenharia S.A., Technit Engenharia e Construções S.A., UTC Engenharia S.A. and 21 individuals. According to the GS, there is evidence showing that the defendants were involved in price fixing and allocation agreements to prevent competition in the tender process. www.cade.gov.br/Default.aspx?89bc4ddc34e93ec550fd51ef4305

Nov. 20, 2015 — The GS launched an investigation against taxi drivers and taxi class associations for alleged involvement in sham litigation. They have filed three lawsuits against Uber with three different Brazilian courts, all with the same object, and, by doing so, have impaired Uber’s ability to defend. In addition, according to the GS, there is evidence that taxi drivers have been threatening Uber drivers in order to block their entry into the market of individual passenger transportation. On the same day, the GS launched an investigation against Uber based on a complaint filed by the House of Representatives. According to the complaint, Uber has been engaging in unlawful conduct, attempting to dominate the market for individual passenger transportation. www.cade.gov.br/Default.aspx?89bc4ddc34e93ec550fd51ef4307

Dec. 9, 2015 — The GS issued an opinion concluding that the closing of the acquisition by Technicolor S.A. of Cisco Systems Inc.’s connected-devices business outside Brazil could not have been implemented before CADE’s final approval, and, consequently, the parties shall be subject to the applicable penalties for gun jumping in Brazil, despite a Carve-Out Agreement that Technicolor and Cisco had in place. According to the GS, the main reasons behind its decision to issue the opinion were the following: (i) the fact that the notified transaction would have very limited effects in Brazil does not dispense with the need for getting prior antitrust approval in Brazil; (ii) if closing the transaction was urgent, the parties should have tried to make use of the derogation mechanism set forth CADE’s Internal Rules, under which CADE may authorize the parties to close a notified transaction before clearance; (iii) the mechanisms put in place by the parties under the Carve-Out Agreement would not be sufficient to isolate the Brazilian market from the effects of closing the transaction outside Brazil; and (iv) if the market is global in scope and the offering of products and services to Brazilian customers is done through exports into Brazil, closing of the transaction in other jurisdictions would have effects in Brazil. The matter has been passed on to CADE’s Tribunal for final decision on the question of whether the closing of the notified transaction outside Brazil before CADE’s clearance shall be viewed as gun jumping under Brazilian law. According to the GS’ opinion, the GS will only issue a decision on the merits of the merger filing after the Tribunal takes a final decision on the gun jumping question, thereby delaying the review of the notified transaction in Brazil.
What In The World Did I Miss?

South America

Chile
Oct. 20, 2015 — The Fiscalía Nacional Económica (FNE) released for public consultation a second draft of proposed guidelines for leniency agreements (Guidelines), which incorporate comments and suggestions from public and private entities. Comments from interested parties should be sent to FNE by November 15, 2015. The final version of the Guidelines will replace the current guidelines on exemption benefits and reduction of applicable fines in cases of collusion, which was published in October 2009. www.fne.gob.cl/2015/10/20/fne-pone-en-consulta-publica-segundo-borrador-de-la-nueva-guia-de-delacion-compensada/#more-73499

Oct. 29, 2015 — Chile’s Supreme Court confirmed fines (US$ 58 million) imposed by the Tribunal for the Defense of Free Competition (TDLC) on Agrosuper, Arizía and Dollo Pollo in September 2014. TDLC found the three major poultry producers involved in a collusive agreement, which was coordinated by Asociación de Productores Avícolas (APA), the Chilean poultry producer association. Chile’s Supreme Court also confirmed the TDLC’s order to fine and dissolve APA. This was the first time that the maximum fine applicable to a cartel infringement and an order to fine and dissolve a trade association were imposed in the context of a cartel investigation. www.fne.gob.cl/2015/10/29/corte-suprema-confirma-multas-por-colusion-contra-agrosuper-ariztia-y-don-pollo-y-endurece-sancion-contra-el-gremio-que-las-reune/#more-73576

Colombia
Oct. 7, 2015 — The Superintendence of Industry and Commerce (SIC) considered ASOCANA, 14 companies active in the sugar sector and their respective representatives to be involved in a collusive practice to avoid imports of sugar into Colombia from other countries, such as Bolivia, Guatemala, El Salvador and Costa Rica. According to SIC, the fines imposed on some defendants were increased given that they had previously been found to have been involved in a cartel infringement in connection with the purchase of sugar cane in 2010. www.sic.gov.co/drupal/noticias/por-cartelizacion-empresarial-para-obstruir-importaciones-superindustria-sanciona-a-ASOCANA-ya-14-empresas-del-sector-azucarero

Ecuador
Nov. 19, 2015 — The Superintendence for the Control of Market Power (SCMP) passed a new resolution to govern the execution of settlement agreements. The resolution will enter into force on January 1, 2016, establishing new provisions for calculation of fines to be paid in the context of a settlement agreement with SCMP. Pursuant to the new resolution, settlement proponents will be entitled to a reduction on the applicable fine subject to the following criteria: (a) a reduction of 50% for the first settlement proposal; (b) a reduction of 15% for the second settlement proposal; and (c) a reduction of 5% for the third settlement proposal. A reduction of 20% will be granted to a settlement proponent that either ceases its involvement in the infringement or promotes competition. www.scpm.gob.ec/la-superintendencia-de-control-del-poder-de-mercado-emite-instructivo-para-gestion-y-ejecucion-de-compromisos-de-cese/

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Hong Kong’s New General, Cross-Sector Competition Ordinance

Lisa Totino
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On July 15, 2015, Hong Kong finalized rules for the new Competition Ordinance (Chapter 619 of the Laws of Hong Kong) (“Ordinance”), its first general and cross-sector competition law, and aligned itself with the international practice of over 100 jurisdictions that already have a general competition law. The primary purpose of the Ordinance is to prohibit conduct that prevents, restricts or distorts competition in Hong Kong. The Ordinance became effective December 14, 2015.

Prior to enactment of the Ordinance, Hong Kong’s competition laws only applied to the telecommunications and broadcasting sectors under the Telecommunications Ordinance and the Broadcasting Ordinance, which the Hong Kong Communications Authority (“CA”) had the authority to enforce. The Ordinance effectively repealed and replaced these provisions, among other modifications, and adopted a two-tiered adjudicative enforcement model. This two-tiered model created an independent statutory body, the Competition Commission (“Commission”), to enforce the Ordinance and a specialist court, the Competition Tribunal, to adjudicate alleged violations.

Three rules have been imposed under the Ordinance to prevent specific types of anti-competitive conduct:

1) The First Conduct Rule prohibits agreements between undertakings that have the object or effect of preventing, restricting or distorting competition in Hong Kong;

2) The Second Conduct Rule prohibits undertakings with a substantial degree of market power from abusing it to engage in conduct which has the object or effect of preventing, restricting or distorting competition in Hong Kong;

3) The Merger Rule prohibits mergers that have or are likely to have the effect of substantially reducing competition in Hong Kong. (Presently, this rule only applies to the telecommunications sector. However, it is anticipated that the Commission will eventually implement a cross-sector merger control regime).

A significant aspect of the Ordinance is its extra-territorial application, as it reaches any agreement or conduct that takes place outside Hong Kong that has the object or effect of preventing, restricting or distorting competition in Hong Kong. The Ordinance has a number of exemptions and exclusions. One is a general efficiency exclusion to the First Conduct Rule for any agreement which, in the Commission’s determination, enhances overall economic efficiency in Hong Kong.

In addition to the foregoing rules, the Commission also issued six guidelines on how it plans to interpret and apply provisions of the Ordinance. The first three guidelines (“Guideline on the First Conduct Rule,” “Guideline on the Second Conduct Rule,” “Guideline on the Merger Rule”) provide detailed explanations on the key concepts and the economic rationale of the First Conduct Rule, Second Conduct Rule and Merger Rule, respectively. The guidelines also include hypothetical examples that reflect anticipated market situations to help businesses and advisers understand application of such rules to real-life scenarios. The final three guidelines (“Guideline on Complaints,” “Guideline on Investigations,” “Guideline on Applications for a Decision under Sections 9 and 24 Exclusions and Exemptions and Section 15 Block Exemption Orders”) provide procedural guidance on the Commission’s process for handling complaints, conducting investigations, and reviewing applications for exemptions and exclusions.

Penalties for violations of the rules can be imposed on companies and individuals and may include pecuniary penalties, behavioral and structural remedies, and other sanctions (such as director disqualification orders for up to five years). Appeals of such orders will be referred to the Court of Final Appeal.

The final rules, coming into effect nearly three years after the enactment of the Ordinance, were part of a phased-in implementation plan to afford businesses sufficient time to familiarize themselves with the law and make necessary adjustments in commercial practices. During this time, the Commission has been actively engaged in public outreach, including advocacy and education programs, to help businesses come into compliance with the law. Currently, the Commission is publishing policy documents in relation to leniency and enforcement priorities, preparing a Memorandum of Understanding on how to enforce concurrent jurisdiction with the CA, and issuing educational materials (such as compliance toolkits, SME-focused and sector-specific brochures and booklets) to further assist in compliance.

In a recent journal article, Commission Chair, Anna Wu Hung-yuk, noted that Hong Kong has been able to learn from the experience of other competition regimes: “Being the latecomer means we have the benefit of hindsight; we are well placed to learn from international best practice while remaining alive to local commercial realities.”

The CA and the Commission share concurrent jurisdiction in relation to competition matters in the telecommunications and broadcasting sectors. They are currently developing a Memorandum of Understanding that describe how the two bodies will cooperate and pursue such enforcement actions with overlapping jurisdiction. Furthermore, the Commission envisions further cross-agency and international cooperation efforts. See Anna Wu Hung-yuk, Hong Kong: Competition Commission, THE ASIA-PACIFIC ANTITRUST REVIEW 2015, available at http://globalcompetitionreview.com/reviews/69/sections/235/chapters/2743/hong-kong-competition-commission/.

Chairperson Anna Wu Hung-yuk states, “after acquiring a number of years’ enforcement experience, the government will review the Ordinance’s efficacy and reconsider whether a cross-sector merger control regime may be suitable for Hong Kong.” See Hung-yuk, supra note 2.


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Amendments to the Taiwan Fair Trade Act

Stephen Wu & Yvonne Hsieh
Lee and Li, Taiwan

The Taiwan Fair Trade Act (“TFTA”) was amended in February 2015, and the amendments are seen as the most sweeping reform of the TFTA since it came into effect in 1992. In July 2015, the Taiwan Fair Trade Commission (“TFTC”) announced amendments to the Enforcement Rules of the Taiwan Fair Trade Act (“Enforcement Rules”). A wide range of legal provisions under the TFTA are covered by the amendments, such as merger control, cartel enforcement, restrictive competition, and unfair competition, and they will have significant impact on companies’ business operations as well as their compliance guidelines.

The key features of the TFTA amendments are as follows.

Merger Control

1. When assessing whether a transaction constitutes a combination and whether any filing threshold is met, the new law prescribes that in addition to the turnovers and shareholding of the party’s parent or subsidiary companies, those of affiliated companies (including brother/sister companies under common control) should also be taken into consideration.

2. In addition to holding shares through corporate entities, it is not uncommon that an enterprise’s business operations or management is controlled by certain individuals. It is also common for an enterprise to hold shares in another enterprise through natural persons or non-corporate entities. As the transactions of such shareholding structures may have the same effect as a combination under the TFTA, the new law provides that natural persons or non-corporate entities with control over a company through share ownership should also be subject to the merger control rules.

3. The review period for a merger filing has been revised from 30 days with a possible 30-day extension to a possible extension of 60 days, as the original period may not be sufficient for the agency to thoroughly analyze a case which may have potential anticompetitive effect.

4. In the past, many filing parties were unable to collect the information from all related parties due to a party being an international conglomerate, the transaction being a hostile takeover, or estate disputes among family enterprises, so that the filing could not be completed. Since the new TFTA expanded the scope of merger control to include affiliated enterprises and persons/groups having controlling interests, it is even more likely that filing parties may face difficulty in collecting complete information and all relevant documents. As a compromise in this situation, the new additions to the Enforcement Rules stipulate that in case there is a justification for the failure to provide required documents, the justification should be explained in the merger filing.

5. The TFTC’s proposal for removing market share filing thresholds did not pass the Legislative Yuan’s final review, and, thus, the amended TFTA still uses a dual filing threshold system.

Cartel Regulations

1. To enhance enforcement effectiveness, the amended TFTA permits the TFTC to presume the existence of an agreement on the basis of circumstantial evidence, such as market conditions, characteristics of the products or services involved and profit and cost considerations. It is anticipated that the amended TFTA can help the TFTC overcome the difficulty in securing direct evidence to prove the existence of a cartel, because it shifts the burden of proof regarding the existence of an agreement among competitors from the TFTC to the enterprises that are investigated or penalized.

2. The fine for any violation of the cartel regulations as well as other anticompetitive practices has been doubled. Under the amended TFTA, the fine for a first-time violation ranges from NTD 100,000 to NTD 50 million and for repeated violations from NTD 200,000 to NTD 100 million. The maximum fine for a material violation of the cartel regulations remains unchanged and is still capped at 10% of the violating enterprises’ sales revenue in the last fiscal year.

3. By following the Administrative Penalty Act, the amended TFTA empowers the TFTC to seize anything found during investigation that may serve as evidence. The TFTC’s proposal for introducing the right to search and seize (i.e., the dawn-raid) did not pass the Legislative Yuan’s final review due to the concerns that such dawn-raid power may be unconstitutional.

4. In most cases, the facts associated with an anticompetition investigation are complicated, and considerable time is needed for the TFTC to investigate the facts of potential violations. Moreover, the TFTC requires time for economic study and analysis of the facts. The statute of limitations on administrative sanctions for an anti-competition case has therefore been extended from 3 years to 5 years.

5. A whistle-blower reward scheme is incorporated into Article 47-1 of the TFTA. The sources of funding for this reward, described as “antitrust fund” under the TFTA, come from 30% of the penalty that the TFTC collects and from the
budget allocated to the TFTC. This reward scheme aims to encourage individuals to report illegal activities carried out by their employers. By obtaining such internal information from whistle-blowers, the TFTC’s chances of detecting and proving a cartel may be heightened. Detailed enforcement rules on the reward scheme are still under discussion and will be announced later.

**Resale Price Maintenance**

1. Resale price maintenance is no longer per se illegal but is evaluated under the rule of reason. The amended TFTA may offer greater flexibility for pricing arrangements between upstream manufacturers and downstream distributors.

2. As to the “justification” for a resale price maintenance, the TFTC, after referring to international trends, identified certain factors in the Enforcement Rules that may provide justification, which include encouraging downstream enterprises to escalate the efficiency and quality of pre-sale service, preventing free riding, boosting the entrance of new enterprises or brands, promoting interbrand competition or other economically reasonable matters related to competition concerns.

**Amendments to Structure and Procedure**

1. The TFTC is allowed to suspend an investigation to save administrative cost, if a business ceases its illegal conduct and undertakes corrective measures. The TFTC on July 2015 published Guidelines on Handling Suspension of Investigation detailing how such a suspension measure may be carried out.

2. As the TFTC is an independent agency, the amended TFTA provides that a penalized party can directly file a lawsuit with the administrative court to seek a remedy, without going through the administrative appeal process.

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In a Dramatic Decision, the Supreme Court Introduces a U.S. Style Rule of Reason to the Israeli Competition Laws

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On August 2015, the Supreme Court of Israel upheld a decision of the Jerusalem District Court, which imposed a jail sentence, community service, and a fine of 450,000 NIS (~$115,000) on Efi Rosenhaus, the former CEO of Shufersal, Israel’s largest food retail chain (“Shufersal”).¹ Mr. Rosenhaus was also barred from being a company director for three years.

The District Court decision also sentenced Eli Gidor, Shufersal’s former Vice-President for marketing, to 3 months of community service and a fine of 250,000 NIS (~$65,000). Shufersal itself was fined 3 million NIS (~$760,000).

This decision broke new ground in many respects. This was the first instance where a person was sentenced to jail for a failed attempt to reach (what the court found to be) a vertical agreement in violation of a merger condition – thus increasing the potential severity of sentencing for antitrust offenses in Israel. In addition, the decision will have a broad effect on the potential severity of sentencing for antitrust offenses in Israel. As a consequence, most vertical arrangements (RPM, MFN, territorial exclusivity, etc.) were regarded as illegal arrangements under § 2(b).

Although it seems that in recent years the IAA’s policy and the courts in Israel tried to minimize the interpretation of Tirol, there was no amendment to the RTPL or clear declaration by the IAA or courts in Israel that excluded vertical arrangements from § 2(b).

In 2013, the IAA introduced a ground-breaking block exemption “for non-horizontal agreements that do not concern certain limitations on price.” Despite its complicated name, this block exemption exempted agreements between non-competitors as long as they do not include minimum or fixed price maintenance, and did not harm or intend to harm competition. This block exemption, which minimizes the per se application of § 2(b) to many vertical agreements, still is not a clean and complete solution to the problem. The definitions of “competitors” and “horizontal arrangements” in the block exemption are very broad.

The Shufersal Case

The District Court’s decision in the Shufersal case found that Shufersal’s CEO Efi Rosenhaus and Vice-President Eli Gidor had breached merger conditions and attempted to create a cartel, by trying to make suppliers cease granting discounts to Mega, a competing food chain, during a Hannukah campaign.³ They tried to do so by contacting suppliers whose products were included in the campaigns of both supermarket chains to convince them to stop their campaign with Mega (which included lower prices than in the Shufersal campaign).

The defendants were charged with four attempts to engage in a vertical restrictive arrangement under §2(a) and with violation of 3 merger conditions that were attached to the IAA’s approval of a merger between Shufersal and the failing competing food chain Clubmarket in 2005.

Although §2(b) wasn’t mentioned in the indictment, the District Court ruled that the four attempts are subject to §2(b) (which constitutes market allocation) was a per se illegal restrictive arrangement.

The Supreme Court initially enforced a per se approach to all §2(b) restrictions – vertical as well as horizontal. In the case of Tirol v Chef Hayam (Additional Civil Appeal 4465/98, henceforth: Tirol), the Supreme Court ruled that §2(b) should not differentiate between horizontal and vertical arrangements, rendering both per se illegal. The court applied a formal test which asked whether the arrangement fell under the general presumptions of harm to competition. As a consequence, most vertical arrangements (RPM, MFN, territorial exclusivity, etc.) were regarded as illegal arrangements under §2(b).

The Shufersal decision broke new ground in many respects. This was the first instance where a person was sentenced to jail for a failed attempt to reach (what the court found to be) a vertical agreement in violation of a merger condition – thus increasing the potential severity of sentencing for antitrust offenses in Israel. In addition, the decision will have a broad effect on the potential severity of sentencing for antitrust offenses in Israel. As a consequence, most vertical arrangements (RPM, MFN, territorial exclusivity, etc.) were regarded as illegal arrangements under §2(b).

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Although §2(b) wasn’t mentioned in the indictment, the District Court ruled that the four attempts are subject to §2(b)
since the arrangements relate to prices. Finally, the District Court ruled that all the conditions of § 2(a) are met so there is no need to use § 2(b).

On August 10, 2015, the Supreme Court issued its decision, upholding the District Court’s conviction of Shufersal, Rosenhaus and Gidor.4 They were convicted of breach of 2 merger conditions and attempting to engage in 4 restrictive arrangements (they were acquitted on one of the merger condition charges).

The Supreme Court decision marks a new era in antitrust enforcement and a new legal approach toward vertical agreements, overturning the Tirol case. Under the Supreme Court’s interpretation in Shufersal, vertical arrangements will no longer be automatically condemned as restrictive arrangements under § 2(b), but will be examined under § 2(a) to determine whether they have a probability of harming competition.

But the ruling is still unclear on one issue. The Justices were undecided whether there are exceptions to the new rule – in other words, whether there are vertical arrangements that the § 2(b) per se prohibitions still apply to.

Justice Rubinstein (the senior of the three Judges that sat in the case) ruled that § 2(b) shall not apply to vertical agreements. However, he wrote that § 2(b) will be applied to vertical agreements in exceptional cases in which there is a “naked” restriction the sole purpose of which was to harm competition.

In his opinion, Justice Hendel agreed with Justice Rubinstein in principle, but decided that § 2(b) shall not apply to vertical arrangements at all.

The decision relies heavily on U.S. case law. According to Justice Rubinstein, there usually is a distinction between horizontal arrangements (naked arrangements) that are prohibited per se, and vertical arrangements that have pro-competitive benefits and are subject to the Rule of Reason. Justice Rubinstein then found that there are vertical arrangements that are subject to the per se rule under the U.S. law. Moreover, Justice Rubinstein explained that since the RTPL allows parties to obtain a prior authorization from the Antitrust Tribunal or the IAA, this justified a tougher classification under § 2(b).

Justice Hendel also turned to U.S. case law. According to Justice Hendel, in practice, vertical arrangements are subject to the Rule of Reason analysis. The fact that breaching § 2 is a criminal offence justifies making a clear ruling to exclude all vertical agreements from § 2(b).

It is important to note that the question of the applicability of § 2(b) was a theoretical question because, as the District Court ruled, in the present case all the conditions of § 2(a) were met.

The unresolved argument in the decision of the Supreme Court stems from the approach the IAA took in the indictment, and which the District Court did not correct. The IAA chose to indict Rosenhaus and Gidor in an attempt to reach a vertical agreement: Rosenhaus and Gidor approached their suppliers and tried to convince them to influence Mega (Shufersal’s competitor) to change its discount strategy. In other words, Shufersal, tried to influence Mega’s prices (via their mutual suppliers). That is an attempt to form horizontal cartel. The District Court did not correct (or see) that mistake and based its entire analysis on the vertical aspects of Shufersal and its suppliers’ conduct.

We believe that this is why Justice Rubinstein was reluctant to have a clear-cut rule exempting all vertical agreements from the per se prohibition of § 2(b). Instead, he opined that vertical agreements similar to the one in the Shufersal case should not be exempt from § 2(b). Or as he explained in the decision: where there are arrangements in which the retailer is trying to stop (or influence) the communication between a supplier and a competitor retailer, these arrangements will be a subject to § 2(b).

According to our analysis, what Shufersal tried to do is to engage in a horizontal arrangement with Mega. This kind of arrangement can absolutely be subjected to § 2(b) with no need for exceptions and with no need to prove all § 2(a) conditions.

Regardless of this minor issue in the decision, the Shufersal decision opens a new era in Israeli antitrust enforcement, which mirrors the U.S. distinction between Per Se and Rule of Reason violations of the law.

It remains to be seen, if the IAA and Israeli Courts will feel comfortable applying an analysis based on U.S. case law in their decisions, or whether Israel will develop its own interpretation of the Per Se/Rule of Reason dichotomy.

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1 The authors represented Efi Rosenhaus and Shufersal Ltd. in the legal process.

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Access to Evidence From the Files of EU Antitrust Authorities

Peter Willis
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Introduction

According to the European Commission, one of the main obstacles to claimants securing compensation effectively in antitrust damages cases in the EU is “difficult access to the evidence that is necessary for proving a case.” Obtaining access to evidence to support their claims is therefore a priority for claimants. The published “non-confidential” version of the Commission’s decision is commonly a first step in the process. However, it can take several years for the Commission to resolve the various parties’ confidentiality claims and publish the decision. The files of evidence compiled by the European Commission during its investigations, in the hands of the authorities or parties, are also an obvious and often even more valuable target for claimants. However, in many Member States, there is little or no provision for or history of disclosure of evidence between the parties of the kind covered by the obligations of confidentiality in relation to information “of the kind covered by the obligation of professional secrecy,” i.e. confidential information, leniency material and business secrets, imposed on it by both Article 339 of the Treaty on the Functioning of the EU and Article 28 of Regulation 1/2003, the Commission’s main procedural Regulation.

A number of recent developments in the EU and national courts have addressed the tensions resulting from these apparently conflicting priorities.

Publication of the Decision

In September 2013, the Court of Justice of the EU ruled on an interim basis that the Commission was not entitled to publish a version of its Carglass cartel decision until the Court had resolved Pilkington’s claims for confidentiality. In July 2015, the General Court rejected most of those claims. It held that while customer details, and details of prices and quotas, are usually confidential, in this case the members of the cartel had lost that protection by exchanging the details with each other. The information was also historical, being more than five years old, and in any event the Commission was entitled to consider the interests of victims of the infringement to seek compensation. Nevertheless, this did not affect the principle that a party can hold up publication pending its confidentiality challenge, so continued delays in publication appear likely.

This Pilkington delay was one of the factors that held up publication of the Commission’s decision on the Air freight cartel for more than four years. To break the logjam, a frustrated Mr Justice Peter Smith in the Emerald v. BA proceedings in the High Court in London in July, August and October 2014 ordered the airlines to prepare their own redacted version of the decision, and to provide it to the claimants. In doing so, however, he rejected arguments that references to airlines not found to have infringed Article 101 (for example as a result of limitation periods), and to findings falling outside the scope of the core infringement finding of the decision, should be redacted. In October 2015, the Court of Appeal upheld the airlines’ appeal against this order, on the basis of the judgment of the EU General Court in the Pergan case. It held that because the airlines that were not addressees of the decision had not been able to challenge the findings against them in the decision, and the addressees had not been able to challenge those findings that fell outside the scope of the infringement decision, they were entitled to the presumption of innocence and the findings should be redacted from the version of the decision provided to the claimants.

Interestingly, at the same time as the High Court in London ordered disclosure of the decision, a Dutch court also hearing a damages claim relating to Air freight came to the opposite conclusion, ruling that the claimants should await publication of the decision by the Commission, to avoid possible inconsistency between versions created by the Commission and the parties.

Disclosure of the File

In many cases, information that is even more useful to the claimants than the decision is found in the Commission’s file. The EU Antitrust Damages Directive provides for disclosure by the parties of evidence from the Commission’s file, with the exception of corporate leniency and settlement statements. In a number of Member States, these rules introduce (limited) disclosure requirements in civil litigation for the first time.

Much of the material in the Commission file remains confidential, either to the parties, or to third parties such as claimants, however, and the Commission has expressed concerns about its disclosure in the context of national damages proceedings.

In the English courts, these concerns are generally addressed by means of confidentiality rings. The European Commission has issued opinions on the confidentiality rings put in place in two sets of proceedings before the English courts, providing useful guidance.
In *Morrison v. MasterCard*, a claim by retailers relating to credit card multilateral interchange fees, the claimants requested disclosure by MasterCard of documents from the Commission’s file. The Commission wrote to the English court and confirmed that it had no objection to the disclosure of certain material provided to the Commission by MasterCard. It also expressed the view that the interests of third parties in the confidentiality of material that they had provided to the Commission, and of the parties in confidential information that they had provided, could be protected through appropriate safeguards, such as a confidentiality ring, or further redactions.6

Similarly, in *Secretary of State for Health v. Servier*,7 the Commission indicated that in principle it had no objection to disclosure into a confidentiality ring of a version of its decision. Its only concern was in relation to the treatment of information provided by third parties. It therefore sought to restrict the confidentiality ring to a narrower class of individuals than that originally proposed by the parties. It should be noted, however, that there are still some categories of information for which a confidentiality ring does not provide sufficient protection – for example, the Court of Appeal in *Emerald v. BA* held that this was the case for the *Pergan* material in those proceedings.

While the experience of the English courts in the use of confidentiality rings provides some assistance to those jurisdictions where such tools are unknown, it is clear that a number of practical issues remain to be worked out before they can be made to work effectively, and before disclosure of file materials can become commonplace. For example, not all national bar rules permit their members to withhold information from their clients, as is required for a confidentiality ring to work effectively. Further national judgments and opinions of the European Commission will be needed in order to clarify these issues.

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