VOGEL & GLOBAL Competition Newsletter

No3 July 2016

CROATIA

BABIĆ & PARTNERS LAW FIRM

Dawn raids in Croatia - Fishing for justice by Boris Babic

Croatian Competition Agency ("Agency") launched a number of unannounced inspections ("dawn raids") during the last year.

The essential features of Agency's recent dawn raids as currently tracked include:

• Trigger for investigation can be any type of suspected infringement, including matters that might not attract such action in other jurisdictions (e.g. Resale Price Maintenance);

• The raids are carried based on Court Decision granting wide powers to the officials of the Agency. Decision will contain a start and end date of investigation in the range of four or more days;

• Agency officials will likely come at the opening hours and the team will consist of five or more officials of the Agency accompanied by police officers;

• The officials will: i) present the court decision, ii) present their identification cards; iii) immediately ask that no personnel leave the premises; iv) request termination of all communication. Telephone facilities will likely be blocked;

• A call to the outside counsel will be allowed, but it cannot be expected that the search will be suspended until the arrival of outside counsel;

• The officials will ask to examine books and records of the company and will make copies or extracts from such books and records. IT environment and media that can be subject of search include laptops, desktops, tablets, mobile phones, CD-roms, DVDs, USB keys etc. Inspections officials will make copies using their forensic IT tools.

• Some of the materials will be briefly inspected on the site while certain documents and other data will be taken from the premises;

• A Minutes from the inspection will be prepared and the representatives of the company will be asked to sign these. An objection to the Minutes can be raised within 15 days from the date of signing of the minutes.

However, it appears that the Agency prefers to review copies as a part of continued inspection. In other words, the Agency will; independently view copies of electronic files obtained during the dawn raids and will invite undertaking only once a selection of documents to be used in the proceedings is established.

This is contrary to the practice of the European Commission. If the selection of documents relevant for the investigation is not yet finished at the envisaged end of the on-site inspection at the undertaking's premises, the copy of the data set still to be searched may be collected to continue the inspection at a later time. This copy will be secured by placing it in a sealed envelope. The undertaking may request a duplicate. The Commission will invite the undertaking to be present when the sealed envelope is opened and during the continued inspection process at the Commission's premises. Alternatively, the Commission may decide to return the sealed envelope to the undertaking without opening it. The Commission may also ask the undertaking to keep the sealed envelope in a safe place to allow the Commission to continue the search process at the premises of the undertaking in the course of a further announced visit. (Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003, Section 14).

It is obvious that during this practice the Agency may review the documents that are not relevant for the investigation as well as documents that are protected by legal privilege. In addition, the Agency is in a position to review private documents that are also not related to the investigation.

This exercise of the powers is in contravention of the general principles of EU law (such as the principle of proportionality, respect for the rights of defence and legal certainty), the rules and principles of international law, as well as the observance of fundamental rights, including those enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. Furthermore, this exercise is in contravention of the rules and case law on legal privilege and processing of personal data.

This practice is in contravention with a number of decisions of the ECJ (e.g. Akzo Nobel Chemicals vs Commission C-550/07P; Nexans vs Commission T-135/09) as well as number of decisions of the European Court of Human Rights (e.g. Vinci Construction e.a. vs France).

Obviously there is a need to further amend in many ways highly questionable Croatian Competition Act. In the interim it is for Croatian lawyers to seek the best options for their clients:

• Update and localize your Dawn Raids Manual. Contact details of your in-house and the outside counsel must be accurate and include cell phones;

• Ensure you have educated team locally. Compliance programs are not enough and copy-paste might not be a good solution;

• Think of conducting mock dawn raids. This may also be good in the context of other potential investigations carried out by different authorities;

• Trigger for investigation in Croatia may be current investigation by other competition authorities. Likewise, an investigation in Croatia may be a trigger for investigations in other countries;

• Privilege in Croatia applies only to communication with the outside counsel;

• Careful drafting of documents and communication protocols as regards competition law issues might help;

• Competition law investigation may trigger other investigations ("chain reaction"). Consider preparing carefully designed competition law audits or risk management analysis;

• Coercive measures such as dawn raids can have negative impact on personnel's moral. Key is to have employees duly informed and have the business running as smooth as possible;

• Have on board IT specialists and Communication experts;

• Be polite and cooperative with the investigation officials, but think how to tackle the investigation on both substantive and procedural grounds.

GREECE

M&P BERNITSAS
LAW OFFICES

Recent legislative developments regarding sales and promotions by Augustine Almyroudi & Tania Ptasalia

The legislation governing sales, promotions, promotional activities, stock and outlets has been amended and remodeled in recent years.

Sales are allowed four times annually (while, before, sales were possible only twice per year). Regular sales last from the second Monday of January until the end of February and from the second Monday of July until the end of August of each year; interim sales take place during the first ten days of May and of November, respectively.

By way of a legislative amendment of 2015, stores may additionally offer goods or services at reduced prices throughout the year, without obligation of prior notification.

Promotions (the sale of specific products or product categories at reduced prices) can be effected throughout the year, except during the sales periods, and may not cover more than 50% of the total goods sold.

Promotional activities (special offers available for a limited duration only, involving customer rewards in the form of money, goods or services) are also allowed.

Stock and Outlets, where products (usually old stock) are sold at lower prices, may also do sales four times per year and offer promotions to customers.

Liberalizing sales promotion activity, such as sales or money-off promotions, has facilitated consumers and traders who, in the adverse economic conditions prevailing in the Greek market for over five years now, would have otherwise seen their businesses shrink even further. The possibility to offer sales at shorter intervals and the extension of promotional periods has enabled businesses to attract customers when commerce in Greece is otherwise suffering. That being said, the legislation ensures that sales, promotions and promotional activities alike comply with specific rules, in order to ensure the price reduction or other type of reward offered (e.g. two for the price of one etc.) is clear to customers and customers are not misguided

HUNGARY

oppenheim

Hungarian Competition Authority savages information exchange schemes by Balázs Csépai

The HCA took a surprisingly hostile stance towards information exchange schemes in two recent cases. The first hit fell on the scheme of contact lens suppliers, while the second bore down a massive scheme of banks. Though none of the schemes looked nice from an antitrust point of view, from suspicion to certainty one has to go through the Burden of Proof, a journey the HCA spared.

The HCA could find no anticompetitive object as lens suppliers exchanged past average price/volume information on product categories, and banks exchanged an amount of data, none however on future behaviour. The HCA could not prove effects either, establishing that market developments "could be the result of competition conform or anticompetitive behaviour as well". The HCA thus opted to establish infringements of potential anticompetitive effect.

Could decade long schemes be labelled potentially anticompetitive? While certainly not elegant, one would accept the argument when it is shown that the scheme was apt to restrict competition. For that it is however unavoidable to show how the scheme would have led to anticompetitive effects or to make a counterfactual assessment under the Horizontal Guidelines.

The HCA though did go through the assessment suggested by the Guidelines in identifying the nature of the market and the information exchanged but did not "compare the likely effects of the information exchange with the competitive situation that would prevail in the absence of the information exchange" (no assessment in the lens case and only a simulacra in the banks case). It did not explain at all, how the exchanged data could lead to restriction.

Now the standard is that exchanges of information labelled strategic (be it past average price) on markets labelled oligopoly (be there 40 participants) can be found potentially anticompetitive. It has become a risky thing to exchange information in Hungary.

ICELAND

ADVEL ATTORNEYS

Preliminary findings published on the market investigation of the fuel market in Iceland

by Telma Halldorsottir

The Icelandic Competition Authority (ICA) has published its preliminary findings on the fuel market in Iceland. The ICA has been conducting a market investigation since summer 2014. The market investigation is the first of its kind based on a new authorisation in the Icelandic Competition Act no. 44/2005. The authorisation allows the ICA to investigate markets and propose changes in markets such as structural changes even if the Icelandic Competition Act has not been violated. The authorisation has been highly debated and questioned whether it violates the ownership rights secured in the Icelandic Constitution, as the ICA can demand structural changes, including the selling of a company, on their finding that a market is anti-competitive despite companies not having violated any laws. The ICA has now published its preliminary findings where it maintains that circumstances and conduct in the market are considered to impede competition, to the detriment of the public. The report discusses what actions may be taken to counteract the circumstances or conduct that harms competition. Stakeholders are in the process of giving their views on the preliminary findings and a final report is expected in spring/summer 2016. In the final report the ICA will decide whether it considers it necessary to take actions against the circumstances or conduct that it believes to disrupt competition to the detriment of public interests.

POLAND

SK&S SOŁTYSIŃSKI KAWECKI SZLĘZAK

Polish Constitutional Tribunal to review rules on antitrust fines by Krzysztof Kanton

In March 2016, the Court of Appeals in Warsaw requested the Constitutional Tribunal to verify whether the statutory rules on imposition of fines for antitrust infringements comply with the Polish Constitution.

The request was made during the appeal proceedings against the decision of the Polish Competition Authority (PCA) which fined Polish cement manufacturers for anticompetitive conduct. The 2009 decision imposed fines which amounted in total to PLN 411 Million and were determined in accordance with the applicable statutory rules. These rules stipulate that a fine should be calculated on the basis of turnover generated in the year which preceded the year in which the PCA's decision on infringement was issued.

The Court of Appeals concluded that the pertinent principles to determine the amount of fine pose substantial doubts on the constitutional grounds. The Court referred to a previous ruling of the Constitutional Tribunal which determined that a similar regulation in the act governing liability of business undertakings for criminal offenses breached the basic rules of a democratic state ruled by law. The Tribunal also noted that the proper benchmark for any fine should be correlated to a particular situation of an entity at the time when infringement has occurred. Otherwise, there is no meaningful connection between infringement and the amount of fine (especially in situations where infringement is discontinued but the related antitrust proceedings continue for considerable time afterwards).

If the Tribunal confirms incompatibility of rules on imposition of antitrust fines with the Constitution, the pertinent principles will need to be amended by the Polish Parliament. However, it seems that the PCA has already modified its approach in practice: the recent Guidelines of PCA, issued in December 2015, stipulate that the fine should be calculated on the basis of the turnover generated in the last of the years in which infringement has occurred.

MONACO 

The notion of "consumer" under Monegasque law by Mireille Chauvet

Monaco does not have a dedicated consumer laws, however, law n°1.383 of August 2nd, 2011 ("Law n°1.383") relating to digital economy introduced the notion of "consumer" under Monegasque law. Provisions of Law 1.383 are primarily applicable to:

sales of goods or services to consumers by the implementation of one or several techniques of remote communication using electronic means;

services such as those consisting in providing on-line information, commercial communications and tools for research, access and recovery of data, access to a communication network or hosting of information.

Law 1.383 protects the consumer against several techniques of electronic communication such as direct prospecting or "spamming". In the same way, the consumer is protected against the risks of excessive use of his personal data collected by the supplier. Indeed, the supplier must inform the consumer of his right of opposition to the exploitation of such data.

Any advertising, in any form, accessible by a service of remote communication using electronic means, must be clearly identifiable as such, and make clearly identifiable the individual or legal entity from which it is sent.

Law n°1.383 also prohibits the sale of goods or services without a prior order of the consumer (forced sale), using electronic means. The supplier would have to refund the consumer in such case.

Pursuant to Law n°1.383, any writing in electronic form is admissible as evidence in the same manner and with the same probative value as paper-based writing, provided that the person from whom it proceeds can be duly identified and that it be established and stored in conditions designed to secure its integrity.

Law n°1.383 defines the electronic signature as a signature which consists in a reliable process of identification. The process would be presumed reliable, until proof to the contrary, when it secures the identity of the signatory and the integrity of the deed in the conditions which will be defined by Sovereign Order.

VOGEL & VOGEL GLOBAL

30 avenue d'Iéna, 75116 Paris
Tél. +33 (0)1 53 67 76 20 Fax +33 (0)1 53 67 76 25
vogel-global@vogel-vogel.com www.vogel-vogel.com