Ieva Andersone
Sorainen, Riga
ieva.andersone@sorainen.com

Latvia

The fight against cartels in Latvia goes on

The Latvian national competition authority (the 'Competition Council') is continuing an active fight against collusions of undertakings. It has already previously been described (*IBA Antitrust Committee Newsletter*, May 2010) that at the end of 2009, the Competition Council adopted three widely discussed decisions on local cartels, one of which applied the largest fine so far. By now, two of these cases have already been reviewed by the courts, and the final judgment has confirmed the decisions of the Competition Council. Meanwhile, the Competition Council has continued investigations and made new cartel discoveries.

Court confirms the decision of the Competition Council in Samsung cartel case

At the end of October 2009, the Competition Council adopted a decision in which it accused the local Samsung subsidiary Samsung Electronics Baltics and four of its largest wholesalers in Latvia of collusion. The case centred on a cartel agreement among the four wholesalers and price fixing between Samsung and its wholesalers. Some of the violations discovered included the enforcement and maintenance of the minimum retail price, market sharing, restrictions on parallel trade, and 'black-listing' of rebelling retailers. The decision was notorious for the amount of the fine, which was the largest one imposed by the Competition Council at the time. The monetary penalty to Samsung's Latvian subsidiary was around €5.85m, and a penalty of more than €3.6m to the four wholesalers was imposed. Moreover, the undertakings were accused of violating not only the Latvian competition law, but also the breach of Article 101 of the Agreement on the Functioning of the European Union.

All of the undertakings appealed the decision to the court. However, two of the litigants agreed to reach a settlement and withdraw their appeal. The Samsung Latvian subsidiary, as well as one of the wholesalers, agreed with the Competition Council that the undertakings had violated the law and that they would pay the penalty, which in the result of this settlement was halved. One of the other wholesalers became insolvent and the proceedings with respect to this company were terminated. However, the remaining two wholesalers continued to pursue their claims. On 6 May 2011, the appeal instance court confirmed the decision of the Competition Council. The court agreed to all the conclusions of the Competition Council, including the challenged definition of the geographical market. The wholesalers argued that it should be the whole European Union, but the court agreed that it should be only the territory of three Baltic states: Estonia, Latvia, and Lithuania. The court also rejected all the doubts regarding the evidence gathered by the Competition Council in several dawn raids and by the examination of the computers and electronic correspondence of the cartel participants. The court was of the opinion that all the evidence unequivocally pointed out that the undertakings had purposefully and systematically colluded with a purpose to fix prices, share markets and restrict free competition. Moreover, the real effect to the competition had been established: the market sharing took place in practice, and the parallel trade was considerably restricted.

The wholesalers appealed the judgment to the revision court instance, the Supreme Court Senate. However, on 4 October 2011 the Senate refused to initiate proceedings, deciding that it was obvious that the judgment complied with the earlier jurisprudence of both national and European courts. The appellate instance court had completely examined the evidence and correctly applied the law. In such cases, there are no grounds to initiate revision proceedings. The decision of the Senate is final and cannot be appealed, which means that accordingly the decision of the Competition Council has entered into full force.

In addition, just recently on 20 October 2011, the Senate confirmed the decision of the Competition Council in the *egg cartel* case,

also described previously (*IBA Antitrust Committee Newsletter*, May 2010). Thus, the court has generally been very supportive of the findings of the Competition Council.

Later important decisions on cartels

The Competition Council continues its vigilant fight against cartels. Last year (2010) evidenced several decisions of local meaning, such as a discovery of a cartel of sworn auditors, internet providers, and mechanical oil trading companies. The year 2011 came with another landmark case with a huge fine imposed as the Competition Council discovered a cartel involving 22 of the Latvian commercial banks. The Competition Council established that the banks had fixed the multilateral interchange fee for accepting payment cards within a lengthy period. The multilateral interchange fee is the fee which the bank that has installed the payment terminal in a certain venue (eg, a shop) pays to other banks for accepting their payment cards in this terminal. The bank, in return, charges a fee from traders who use the payment terminal for accepting bank cards as a means of payment. As a result of the fixing of the interchange fee, the fee collected from the traders was always higher than the fixed fee, notwithstanding the actual costs to the bank. The Competition Council referred to the practice of the European Commission, which had previously assessed the interchange fee between VISA and MasterCard organisations. The Latvian banks had to take this practice into account when agreeing on their fees. However, the fees applied among Latvian banks were usually higher than those applied by the international payment card organisations and without an economic basis.

The Competition Council indicated that the application of the interchange fee as such is not a violation, but the banks were not entitled to agree a fixed fee, which was not reviewed and changed over an eight year period.

In addition, the banks had fixed the fee for withdrawing cash from automatic money tellers, and the fee for withdrawing and the display of the balance was higher than it would be without the collusion. This price fixing had a direct negative effect for consumers, as the price charged for these services involved a profit margin of 253 per cent or 289 per cent.

As a result of these violations, the Competition Council applied a monetary penalty in the amount of more than €7.8m. The largest penalty, of more than €3.9m, was imposed on AS Swedbank, which is one of the largest and oldest commercial banks in Latvia, currently a subsidiary of a large Swedish bank. The decision has been appealed to the court.

Another interesting case in 2011 has been a discovery of a prohibited vertical agreement between a supermarket chain and a landlord of several supermarket premises. The Competition Council established that the supermarket and the landlord had agreed that the landlord would not conclude lease agreements under the same roof with other smaller retailers (such as specialised dairy or bread retailers). The lease agreement with such retailers could be concluded only subject to the permission of the supermarket, who was the largest lessee. The Competition Council decided that such an agreement hinders market access and free competition, and imposed a fine on the supermarket of more than €200,000. The case is peculiar due to the fact that the landlord did not receive any fine: the Competition Council explained that the prohibited agreement was advantageous only to the supermarket.

Application of the new rule on dominant position in the retail sector

The end of 2010 and the start of 2011 has seen the appearance of first decisions by the Competition Council, applying the new rule of the abuse of dominant position in retail sector. The Latvian Competition Law was supplemented by this rule in 2008, providing that a market participant is in a dominant position in retail trade if, considering their buying power for a sufficient period of time and the suppliers' dependency, it has the capacity of applying unfair and unjustified provisions, conditions or payments upon suppliers and may distort competition in any relevant market in the territory of Latvia.

The new rule was firstly applied in November 2010 when the Competition Council recognised that one of the largest supermarket chains had imposed unfair discounts to a large dairy producer. The supermarket had to pay a fine of more than €88,000. Afterwards, the Competition Council applied the rule once again against another large supermarket for an imposition of too slow a payment period in its payments to the supplier. In several other cases initiated after the complaints of suppliers the Competition Council has decided that the rule was not broken.

The rule has been criticised by legal professionals for being too casuistic and for trying in vain to protect local food producers against the influence of large supermarket chains. The rule, indeed, is very fact-specific, as it lists several actions by the dominant retailer which would be qualified as abuse, such as application of unfair provisions concerning return of products, unless the returned product is of poor quality or is a product, including a new product, unknown to the consumer. Also, one of the potentially abusive actions is 'application or imposition of unfair and unjustifiably lengthy settlement periods for the delivered products. The settlement period for the delivered food products, the term of validity of which is not longer than 20 days, shall be unfair and unjustifiably lengthy, if it exceeds 30 days from the day of delivery of products.'

In February 2011, the Latvian Parliament even considered amending the rule so that the settlement period for any of the delivered food products shall not exceed 30 days in order not to be considered as abusive. However, this amendment was not adopted, and now there are some grounds to believe that the new rule might be taken out of the competition law altogether. According to unofficial information received from the Competition Council, the adoption of a new trade law is being considered, which would regulate also the relationship between large retailers and producers. Although it can be agreed that the regulation of dominant retailers is out of place in the competition law, just a mere movement of the rule to another law may pose even new questions and problems. It remains to be seen how the legislator will proceed in this area, and hopefully a better solution will be found.

Anand Raj
Shearn Delamore & Co, Kuala Lumpur
anand@shearndelamore.com

Penny Wong
Shearn Delamore & Co

Malaysia

An Overview of the Malaysian Competition Act 2010 ('MCA')

MCA scope

After a long gestation period, the MCA was enacted in June 2010. This article is written to reflect the changes to Malaysian law that the MCA will introduce with effect from 1 January 2012.[1] The MCA covers commercial activity[2] transacted within or outside Malaysia, which has an effect on competition in any market[3] in Malaysia.

The MCA, however, does not apply to commercial activities regulated under the Communications and Multimedia Act 1998 and the Energy Commission Act 2001.[4]

Part II MCA contains two key sections prohibiting enterprises[5] from entering into anti-competitive horizontal and vertical agreements and from conduct which constitutes an abuse of a dominant position. There are no merger control provisions in the MCA.

Sections 4 and 10 MCA are modelled upon Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Accordingly, cases, materials and authorities from European and other relevant jurisdictions should provide some guidance on the interpretation of the MCA prohibitions.

Anti-competitive vertical and horizontal agreements[6]

The language of section 4(1) MCA prohibiting anti-competitive agreements borrows heavily from Article 101 TFEU. Horizontal and vertical agreements[7] are prohibited if any such agreement 'has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services'.

Accordingly, the MCA prohibits horizontal or vertical agreements which are 'significantly', and not just 'appreciably', anti-competitive – this is the general prohibition. Section 4(2) MCA further provides that any horizontal agreement which is subject to any of the following is deemed to be anti-competitive: