Given the constant collusion behaviour Cofece has found over public procurement procedures (and not only within the public health sector), Cofece recently issued a series of recommendations to promote competition within public procurement procedures, which will work as non-binding guidelines.[13]

These recommendations contain practical guidelines that aim to incorporate and spread competition rules when designing and implementing procedures for public procurements and are an effort to consolidate best practices worldwide and Cofeco's experience in these matters. Besides, these recommendations can be considered part of a preventive tool to fight and detect cartel behaviour early in the future.

The United Nations has recognised that the pharmaceutical industry 'plays an important role in improving global health care' and that competition becomes of great relevance as it 'compels industry to provide higher quality goods and services at lower prices'.[14] The need to eradicate corruptive practices and specifically the need to eradicate cartel behaviour in public procurement is vital as the existence of both correlated factors not just affects government bodies, but also consumer welfare and consumers health opportunities.

Notes

* **Luis Omar Guerrero-Rodríguez** is a senior partner and **Martín Michaus-Fernández** is an associate, both at Hogan Lovells BSTL SC (México). We want to thank our summer associate Matthew Gluschankoff for reviewing of this written piece.

1 Organisation for Economic Co-operation and Development: 'Policy Roundtables, Collusion and Corruption in Public Procurement', (2010) available at: www.oecd.org/competition/cartels/46235884.pdf.

2 Organisation for Economic Co-operation and Development: 'OECD Principals for Integrity in Public Procurement', (2009), available at: www.oecd.org/gov/ethics/48994520.pdf.

3 Cofece, 'Recomendaciones para promover la competencia y libre concurrencia en la contratación pública' (2016); available at: www.cofece.mx.

4 Lizbeth Pasillas and Zacarías Ramírez, 'La verdadera enfermedad del sistema de salud mexicano' *Forbes* (11 August 2014) available at: www.forbes.com.mx/la-verdadera-enfermedad-del-sistema-de-salud-mexicano/.

5 International Competition Network, 'Anti-Cartel Enforcement Manual, Relationships between Competition Agencies and Public Procurement Bodies', (April 2015). Available at: http://internationalcompetitionnetwork.org/uploads/library/doc1036.pdf.

6 Formally known as Instituto Mexicano del Seguro Social.

7 Identified as PR 028/2016, available at: www.imss.gob.mx/prensa/archivo/201603/028.

8 Cofece's announcement is available at: www.dof.gob.mx/nota_detalle.php?codigo=5432958&fecha=13/04/2016.

9 Public version of the decision is available at: www.cofece.mx:8080/cfcresoluciones/docs/Concentraciones/V1215/0/2151317.pdf.

10 Public information related to the investigation is available at: www.cofece.mx/cofece/index.php/lista-de-notificaciones.

11 In fact, some of the individuals related to this new investigation have filed motions before the judiciary claiming several unknown aspects related to the investigation. This information can be identified under dockets SV-026-2016 and SV-025-2016 processed by Cofece. Public information related to the investigation is available at: www.cofece.mx/cofece/index.php/lista-de-notificaciones.

12 See: Law for Acquisitions, Leasing and Services of the Public Sector (*Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público*), Art 60, s IV and Federal Anti-corruption Law for Public Contracting (*Ley Federal Anticorrupción en Contrataciones Públicas*), Art 8, s II and Art 27, s I.b.

13 Cofece's recommendations are available at: www.cofece.mx.

14 United Nations, UNCTAD, 'The role of competition in the pharmaceutical sector and its benefits to consumers'. UN Conference on Trade and Development. April 2015. Available at: http://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d3_en.pdf.

NEW ZEALAND

Developments in NZ Competition Law: merger fever in the media sector, domestic price-fixing penalties and review of monopolisation laws

Gus Stewart
Matthews Law, Auckland
gus.stewart@matthewslaw.co.nz

Merger fever in the media sector

Two high profile mergers have been announced in the last few months, representing further consolidation in the media, telecommunications and content space in New Zealand. Both mergers are

conditional on Commerce Commission ('Commission') approval.

On 27 May 2016, the Commission registered a joint application from Wilson & Horton ('NZME') and Fairfax seeking authorisation to merge their media operations in New Zealand ('NZME/Fairfax'). The merger would essentially be a 'two to one' in newspaper supply (national dailies), with overlap in community publications, magazine supply and (news) websites. The merger is in 'response to the dramatically transforming media landscape [where] print readership and revenue [are] in decline and revenue from online news/information provision [is] becoming highly competitive.'

The parties have sought authorisation, which means that clearance can still be granted if there is no substantial lessening of competition, but if there is a substantial lessening of competition the transaction could be 'authorised' by the Commission if the public benefits (essentially economic efficiencies) exceed anti-competitive detriments. Those benefits must be quantified, although the Commission can account for qualitative factors.

On 14 June 2016 the Commission issued its statement of preliminary issues, noting that it will be 'focusing on the unilateral and vertical effects that might result from this merger.' (Unlike some other jurisdictions, the Commission generally issues a statement of preliminary issues before it has conducted a substantive competition analysis. If the Commission has concerns about potential competition concerns it may issue a letter of issues (and potentially a letter of unresolved issues) to the parties, although those are usually private as between the parties.) The applicants have emphasised the growing trend towards increasing competition across different media such that all media may be in the same market for both the advertiser and reader sides of the platform. They submitted that it is no longer appropriate to draw distinctions between online and print advertising, and print and online news/information services, and have invited the Commission to 'revisit historic approaches to [narrow] market definition as they do not reflect the reality of a converged market'. The notion of convergence is increasingly being taken into account by antitrust regulators overseas.

Following widespread market rumors, SKY TV and Vodafone NZ confirmed in early June 2016 that they are considering a merger of their respective businesses, whereby Vodafone Group plc would directly or indirectly own 51 per cent of the shares in SKY, and SKY would own 100 per cent of Vodafone NZ ('SKY/Vodafone'). Following that confirmation, the Commission received and subsequently registered two applications for clearance in relation to the merger on 29 June 2016. According to the parties, the SKY/Vodafone merger would create 'a leading integrated telecommunications and media group in New Zealand [with] the ability to offer New Zealand's best entertainment content across all platforms and devices in a rapidly evolving media and telecommunications market.' This is likely seen as an important strategy given the recent growth in prevalence and popularity of 'over the top' premium content providers.

The parties are both well known to the Commission. Vodafone NZ claims that it is New Zealand's leading mobile and 'number two' broadband provider, with over 2.35 million mobile connections and 500,000 fixed line connections as at 31 March 2016. SKY is New Zealand's leading pay TV provider with over 830,000 subscribers of its premium content. While some market analysts have struggled to see the value in a SKY/Vodafone match up, the parties see a raft of benefits for their shareholders and customers (including greater innovation, accelerated data growth, and greater utilisation of New Zealand's ultra-fast broadband infrastructure), and the combined entity is expected to be one of the largest companies listed on the New Zealand Stock Exchange's main board.

As noted in the application, 'the parties currently enjoy a successful and complementary strategic relationship, under which Vodafone resells SKY's pay television services, and SKY promotes Vodafone's broadband products and refers customers to Vodafone.' Questions have been raised about whether the merger would allow the parties to bundle their services in an anti-competitive way. However, the parties have pre-empted such arguments, noting that the combined group 'would not have the ability or incentive to engage in any foreclosure strategy' and 'will continue to make inputs available on a wholesale basis [and] offer SKY services and Vodafone telecommunication services separately.'

Interestingly, the Commission has noted the expected date for a decision as 'TBA' on its website.[1] We would expect the Commission to conduct a comprehensive investigation

in relation to the merger - especially given the relatively complex deal structure and concurrent applications – and it is likely to run on for a number of months. Given the track record of recent complex applications which have taken upwards of six months (and in some cases almost 12 months), it is not unrealistic that a decision is not reached until early 2017.

Increase in number of domestic price-fixing penalty cases

After a relatively quiet period on the penalties front, we have seen a marked increase in the number of domestic price- fixing penalty cases work their way through the New Zealand courts. Since November 2015, the Commission has collected just shy of NZ$8m in price fixing penalties from national businesses in the real estate, livestock and waste oil sectors. Over that same time period, there have been no penalty decisions in New Zealand relating to multijurisdictional cartels.

Government invites cross-submissions on monopolisation laws

In the April 2016 newsletter we reported on the Ministry of Business, Innovation and Employment's ('MBIE') publication of its Targeted Review of the Commerce Act 1986 – Issues Paper ('Issues Paper'), which focused on whether New Zealand's misuse of market power (monopolisation/unilateral conduct) test in section 36 of the Commerce Act and alternative enforcement mechanisms work, and whether New Zealand needs formal powers specifically aimed at analysing competition across markets. MBIE received 39 submissions on the Issues Paper, and has now invited interested parties to make cross-submissions. While some of the submissions were 'pro-reform' (or at least encouraged further consideration of the issues), the majority – perhaps unsurprisingly from large businesses and the law firms who advise them – were not supportive of reform.

The cross-submission process appears to have been at least partly influenced by a letter sent from the Chair of the Commission, Dr Mark Berry, to the Minister of Commerce, Hon Paul Goldsmith on 2 June 2016. The letter confirmed the Commission's position that 'reform of section 36 is necessary', and that 'an effective unilateral conduct provision is especially important for a small economy with concentrated markets'. Dr Berry has been a strong proponent for reform of section 36, and in his letter to Hon Goldsmith, referred to the test as 'not currently effective in promoting competition in New Zealand domestic markets.' Cross-submissions were due on 21 July 2016.

Note

1 As at 1 July 2016.

Updates from Peru

PERU

Eduardo Quintana

Bullard Falla Ezcurra +, Lima

equintana@bullardabogados.pe

Agustín Valencia-Dongo

Bullard Falla Ezcurra +, Lima

avalencia@bullardabogados.pe

In Peru, the National Institute for the Defence of Competition and Intellectual Property (INDECOPI) – is the administrative entity in charge of implementing competition law, consumer protection law and matters related to intellectual property, among other things. INDECOPI's Antitrust Commission is the administrative body in charge of implementing competition law and authorising acts of concentration in the electricity sector under Law No 26876. The Antitrust Commission's Technical Secretariat is the instructive body, in charge of conducting dawn raids and initiating exofficio investigations, among other functions.

The organism in charge of supervising the private investment in Telecommunication (OSIPTEL) is the administrative entity in charge of implementing competition law in matters related to the telecommunications sector.

In the first semester of 2016, the Antitrust Commission's Technical Secretariat (hereinafter, 'Technical Secretariat') initiated a punitive administrative proceeding against 17 container shipping companies for price-fixing. Also, the Antitrust Commission sanctioned 34 hemodialysis centres for price-fixing in public selecting processes. Moreover, INDECOPI issued a Draft of the Leniency Programme Guidelines. Finally, INDECOPI's Tribunal confirmed a first instance resolution which declared a complaint for abuse of dominant position unfounded.

Below we present details on these current developments.