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In last year’s edition of *The Dominance and Monopolies Review*, we noted that abuse of dominance rules appeared to be entering a phase of more rapid development. For once, our predictions were not far off the mark. 2017 saw authorities reach decisions imposing record fines based on novel theories of harm applied to rapidly changing markets; overlapping parallel investigations have become the norm, rather than the exception; and ‘hipster antitrust’ – a call to replace the consumer welfare standard with a broader public interest test – has emerged as a serious challenge to contemporary economic orthodoxy. Carl Shapiro recently went so far to claim that ‘antitrust is sexy again’.1

The sixth edition of *The Dominance and Monopolies Review* seeks to navigate these choppy waters. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, provides a review of the regime’s enforcement activity in the past year, and offers a prediction regarding future developments. From the thoughtful contributions of the specialist chapter authors, we identify four trends.

First, we observe growing clamour on both sides of the Atlantic for more competition enforcement. In May 2017, Senator Elizabeth Warren stated: ‘It’s time for us to do what Teddy Roosevelt did – and pick up the antitrust stick again. Sure, that stick has collected some dust, but the laws are still on the books.’ In September, *The Economist* argued that ‘the world needs a healthy dose of competition to keep today’s giants on their toes and to give others in their shadow a chance to grow’. And *The New York Times* has associated declining competition with rising inequality: ‘with competition in tatters, the rip of inequality widens’.

These statements are sometimes accompanied by a plea to abandon consumer welfare as the lodestar of antitrust in favour of a broader, multi-factored public interest test – and even a ‘fairness’ test.2 The underlying concern is that large corporations wield too much influence, collect too much data and undermine traditional industries by siphoning off the large majority of profits. The response, it is argued, should be to break up these companies, which would, according to Scott Galloway, ‘oxygenate’ the economy and ‘prune [the] firms [that have] become invasive, cause premature death and won’t let other firms emerge’.3

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We are concerned that many of these calls seek to address broader societal problems – such as widening wage inequality, declining democratic institutions, and rising global populism and intolerance – rather than a problem in the competitive process. We do not think that a reduction of competition is the cause or effect of these societal issues. Attempting to use antitrust to address problems not directly related to competition would backfire. Antitrust laws are ill-suited for remedying political problems in society, and introducing political objectives into antitrust risks politicising enforcement, reducing legal certainty, and undermining confidence in the foundations of antitrust.

Instead, enforcement should always focus on whether a dominant firm engages in conduct that departs from legitimate competition on the merits and that excludes equally efficient rivals. That is a fact-intensive inquiry that requires balancing procompetitive business justifications with exclusionary conduct. The analysis turns on the specific conduct at issue and its effects in the market, not the size of a firm or its success or reach into other areas, or political issues.

In April 2018, Daniel Crane published a fascinating case study applying modern antitrust principles to the rise of fascism in 1930s Germany. The study is especially germane given today’s calls to broaden the consumer welfare standard to help arrest the decline in contemporary democracy. Crane argues that applying contemporary economically-orientated antitrust principles could have prevented the rise of IG Farben – the chemical cartel that supported the rise of Nazism and the perpetuation of its atrocities. He concludes: ‘If the Farben story can be generalized—an important caveat since this is just the beginning of an inquiry—that would suggest that antitrust law need not be reformulated to safeguard political liberalism, that what is good for consumers is good for democracy.’

Secondly, the past year has seen authorities pursue an increasing number of excessive pricing cases. In the UK, the Competition and Markets Authority (CMA) fined Pfizer and Flynn £85 million for suddenly increasing the prices of an anti-epilepsy drug; the CMA has two other excessive cases against Actavis and Concordia in the pipeline. In China, the National Development and Reform Commission imposed fines on two companies for engaging in excessive pricing in the pharmaceutical sector. In Italy and in Spain, and at the European Commission, excessive pricing cases concerning Aspen’s pricing of cancer drugs are ongoing.

Excessive pricing cases present the familiar paradox that it is not illegal to hold a monopoly; the natural consequence of a monopoly is to price above the competitive level; and finding a price above the competitive level to be illegal treats the monopoly as illegal. The excessive pricing cases observed during the past year traverse this paradox by following specific fact patterns in the pharmaceutical industry. In each case:

- the price rises were sudden and substantial;
- the products concerned were essential or had very high demand inelasticity;

the products had been in the market for a long time; and

the price rise does not appear to be explained by cost or market changes.

It is not obvious that these findings could be transposed to other situations. Hence, in his opinion in AKKA/LAA (the Latvian collecting society case), Advocate General Wahl advised: ‘there is simply no need to apply that provision [excessive pricing] in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.’ Accordingly, in our view, excessive pricing cases will (and should) remain rare and exceptional, other than where there are long-term barriers to entry, as in patents that are essential for standards. We hope that the renewed appetite to bring such cases does not stretch the concept of an exploitative abuse to address policy issues beyond the scope of competition law.

Thirdly, the past year was notable for the European Court of Justice’s long-awaited judgment in the Intel case. Intel had offered customers discounts if they exclusively installed its chipsets in categories of their computers. The European Commission found this to be abusive and imposed a €1 billion penalty. The EU General Court upheld the European Commission’s decision, treating Intel’s arrangements as akin to per se abusive. The Court of Justice has set that judgment aside, making clear that competition rules do not seek to protect less-efficient rivals or prevent them leaving the market. Instead, what matters is an ‘exclusionary effect on competitors considered to be as efficient’ as the dominant firm.

Advocate General Wahl in his Orange Polska opinion and the Court of Justice in its subsequent MEO judgment have reaffirmed the importance of establishing anticompetitive effects as a necessary element of an infringement of Article 102 TFEU, emphasising once more that only the exclusion of equally-efficient competitors is problematic. This mantra now appears to be firmly entrenched in the minds of the EU courts, and it will be interesting to see how the European Commission and national authorities react.

The European Commission, for example, appears to take the view that Intel largely imposes a procedural requirement, with Commissioner Vestager noting that ‘in practical terms, our main conclusion is that you won’t see fundamental change’. The European Commission has also argued that ‘The benefit of ascertaining whether something is, in fact, true, is not necessarily worth the cost’.7 However, an effects analysis can be conducted quickly and efficiently: in last year’s Ice Cream case, for example, the UK CMA opened and closed an investigation in six months, and conducted an effects analysis in a 13-page decision. The European Commission, for its part, frequently conducts detailed economic analyses – under significant time pressures – when assessing mergers. Stricter standards ought to apply when analysing unilateral conduct, because rights of defence are fully engaged.

Fourthly, we could not let this editorial pass without commenting on the divergent global approach to investigating Google’s conduct in search. Over the past few years, courts and authorities in the UK, Germany, Brazil, Canada, the US and Taiwan have held that Google’s search designs are procompetitive. Last year, the Competition Commission of India joined the consensus by rejecting complaints against Google’s search designs and ranking of search results (the CCI identified a narrow concern with the way that Google labels its Flights Commercial Unit, asking for Google to display an enhanced disclaimer). Similarly, in

7 European Commission submission to OECD, Roundtable on Safe Harbours and Legal Presumptions in Competition Law, 5 December 2017, ¶ 15.
December 2017, the Russian Federal Antimonopoly Service authority dismissed complaints against Google’s search designs.

Against this background, the European Commission’s decision to impose on Google a record-breaking fine of €2.42 billion looks increasingly like an outlier, and perhaps a politically inspired one. The European Commission considers that the different way that Google ranks and displays groups of ads for product offers compared to free results for comparison shopping services amounts to unlawful favouring.

Google has appealed the decision to the General Court in Luxembourg. In Google’s view, the product ads at issue are enhanced ad formats that help users find relevant products and are more efficient for advertisers. Showing ads in clearly marked advertising space separate from free results is not favouring; it is how Google monetises the free search service it offers to users. In addition, Google has no obligation to supply rivals with access to its search results pages because it is not an essential facility. Google also points to a thriving product search space, where Amazon (not Google) is the leading player. Finally, while the Court of Justice has espoused the equally efficient competitor benchmark, nowhere does the European Commission’s Shopping decision discuss whether supposedly marginalised comparison shopping services were equally efficient.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this sixth edition of The Dominance and Monopolies Review. We look forward to seeing what the next year holds.

Maurits Dolmans and Henry Mostyn
Cleary Gottlieb Steen & Hamilton LLP
London
May 2018
Chapter 1

ARGENTINA

Camila Corvalán

I INTRODUCTION

Antitrust legislation began in Argentina with the enforcement of Act No. 11,120, which was inspired by the provisions of the United States Antitrust Law. This was replaced by Act No. 12,906, which was itself replaced by Act No. 22,262 in 1980. The enforcement of Act No. 22,262 led to the establishment of the first antitrust agency of Argentina, the National Commission for the Defence of Competition (CNDC).2

The provisions envisaged by Act No. 22,262 were mostly focused on the analysis of anticompetitive conduct; in this law, some anticompetitive conducts could be sanctioned with imprisonment and there was no mergers and acquisitions control. Finally, on 25 August 1999, Act No. 22,262 was abrogated and a new antitrust regulation was enacted: Act No. 25,156 (Antitrust Law).

The Antitrust Law was complemented by Decree No. 89/2011, which was later amended by Decree No. 396/2001. The Antitrust Law and the Decrees were complemented by regulations regarding the procedures established by them.3 Some sections of the Antitrust Law were modified in September 2014 with the sanction of Act No. 26,993. The new regulation abrogated imprisonment and established a mergers and acquisitions control procedure. Further, the Constitution of Argentina promotes effective competition between markets in Argentina.

The above is the complete regulatory plexus that currently controls both anticompetitive conduct and merger and acquisition procedures in Argentina. Notwithstanding the above-mentioned, it is worth mentioning that a bill of the Antitrust Law is being currently analysed by the Argentine Congress.

The relevant authority that enforces the Antitrust Law and its complementary regulations is the Secretary of Trade, led by Mr Miguel Braun, which formally depends on the Minister of Production, Mr Francisco Cabrera, assisted by the CNDC (mainly comprising economists and lawyers). The CNDC is currently led by Mr Esteban Manuel Greco, who assumed the leadership of the agency in February 2016. Under Resolution No. 190/2016, the Secretariat of Trade delegates powers to the CNDC.4

1 Camila Corvalán is an associate at Estudio Beccar Varela.
2 Act No. 22,262, Section 6.
3 Resolution No. 40/2001; Resolution 26/2006; Resolution 164/2001.
4 Section 17, Act No. 25,156, Resolution No. 190/2016.
Further, the CNDC is the agency that investigates both anticompetitive conduct and merger and acquisition procedures by formal requirement of the Secretary of Trade. The Secretary of Trade has full power to investigate and decide on the existence of anticompetitive conduct, either at the request of a party or *ex officio*.\(^5\)

Investigations of anticompetitive conduct or analyses of mergers and acquisitions made by the CNDC end with a non-binding recommendation to the Secretary of Trade. The Secretary of Trade will make the final decision in the case, subject to analysis. The decisions of the Secretary of Trade may be appealed by parties to the judicial courts.

## II YEAR IN REVIEW

In the year in review, according to public sources,\(^6\) the antitrust authorities closed investigations in 48 anticompetitive cases. These 48 cases involved the analysis of claims and investigations of possible anticompetitive conduct (including but not limited to abuse of dominant position). As an exception, *Asociación de clínicas y sanatorios privados de la provincia de Salta* was closed in 2017 with fines amounting to approximately US$1 million for collusion. All the other cases during the period under review were closed without sanctions. As in 2016, mostly the cases were closed because the antitrust authorities accepted the explanations given by the companies under investigation.

Notwithstanding the above, the antitrust authorities opened new investigations. In the year under review, the antitrust authorities, through the CNDC, opened 12 markets studies and initiated three market investigations.

Regarding the PRISMA case (in which the CNDC stated, as a result of an analysis regarding the credit card and electric payments markets, that the company has a dominant position in some sub markets), in 2017 the Secretary of Trade approved the proposal filed by the company.

Likewise, PRISMA is currently owned by Visa International and 14 private banks that operate locally in Argentina. The proposal filed by PRISMA obliges the company to divest 100 per cent of the shares and prohibits more than one bank, that is operating in Argentina, to be shareholder of the company, so as to prevent vertical integration. Further, the proposal states that PRISMA cannot commercialise other brands of credit card until there is in the Argentine market another company that commercialises VISA. According to the Secretary of Trade, this proposal will promote competition in the markets that were involved in the investigation. This is the first time, in the history of the competition authority, that an investigation has resulted in a divestment of assets.

## III MARKET DEFINITION AND MARKET POWER

According to the legislation of and usual practices in Argentina, the analysis of anticompetitive acts, conduct or behaviours follows a procedure in which, as a first issue, the definition of the scope of the relevant product and geographic market involved in the investigation is highlighted. Following this, the antitrust authorities focus mainly on the analysis of market power and market shares of the companies involved in the case. Further to the analysis of the market shares of the companies, the antitrust authorities also focus their attention on barriers

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\(^5\) Section 20, the Antitrust Law.

\(^6\) [https://www.argentina.gob.ar/defensadelacompetencia](https://www.argentina.gob.ar/defensadelacompetencia)
to entry, efficiency gains, technological advantages, chains of commercialisation and market power, among other things.

The relevant market in an investigation will comprise two basic dimensions: the relevant market of the product involved, and the relevant geographical market where the conduct, act or behaviour is taking place. The assessment of the impact of an investigation will be largely determined by the relevant market definition, the market power involved and the market shares of the companies involved in the case.

The relevant market of the product shall comprise all products and services that consumers consider interchangeable or substitutable by reason of their characteristics, price and intended use. More precisely, sets of products or services constitute the same relevant market when said services or products are substitutes from both the demand\(^7\) and supply\(^8\) side.

Having reached the stage of defining the relevant market for a product, the next step is to do the same in geographical terms. Defining a geographic market involves the same considerations mentioned above for the definition of the relevant market for the product, with the difference that the substitution estimate, in this case, is in terms of physical distances or capabilities of displacement, for the users as well as the producers.

The above-mentioned definitions will be followed by the analysis of market power and market shares of the companies involved in the investigation, as well as the analysis of barriers to entry into the market previously defined.

IV ABUSE

i Overview

The Antitrust Law applies to all behaviours that have effects in the Argentine territory. This means that the Antitrust Law is applied not only to acts and behaviours that occur in the Argentine territory, but also to certain acts or behaviours that take place in other countries and that have effects on the Argentine market. The current national government has declared that it intends to modify some of its sections – mostly the ones regarding thresholds for merger and acquisition notification, and including the leniency programme – that are still not enforced in our current legislation.

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\(7\) From the point of view of substitution of demand, which is to say from the perspective of the user or consumer, the analysis will look to determine for each of the products and services offered by the companies involved the degree of substitution that exists between them and goods and services offered by other companies. So that the replacement on the demand side is effective, consumers must evaluate the products as being able to meet the same needs, under similar consumption opportunities. It is worth mentioning that substitutability from the user's point of view depends, then, on the attributes of the product or service and the similarities or differences that are observed from those offered by other vendors. The degree of substitution given in these attributes is usually the result of a qualitative analysis that assesses to what extent consumers or users of a service provided by a supplier ‘replace’ that supplier when it raises its prices close to 10 per cent in a steady manner or non-transitory manner.

\(8\) Once current competitors are determined and identified on the demand side, the CNDC analyses a second aspect in its determination of the relevant market for the product associated with the probability of a new supplier entering the market in the short or medium term. This issue is known technically as ‘supply-side substitutability’. This probability of entrance to the market involves the following factors: that other players exist, possibly at an international level, that potentially have an interest in entering the market, if conditions are checked for this; and most important, the level of barriers to entry to the market.
The Antitrust Law does not prohibit conducts *per se*; conducts must be analysed in all cases by the rule-of-reason criteria, and for sanctioning, the antitrust authorities must prove an actual or potential damage to the general economic interest.

Section 1 of the Antitrust Law establishes:

*The following actions or behaviours are prohibited and shall be penalised according to the rulings of this Act: actions or behaviours, however expressed, relating to the production and exchange of goods or services, the purpose or effect whereof is to limit, restrict, forge or distort competition or access to the market or constituting abuse of dominant position in a market, so that damages may result to the general economic interest. This section comprises, to the extent the conditions of the foregoing paragraph are met, the obtention of significant competitive advantages through the infringement of other rules, as declared by an administrative act or final judgment.*

Section 1 of the Antitrust Law focuses on unilateral actions, as well as bilateral or multilateral actions.

The two basic offences under the Antitrust Law are the limitation, restriction, distortion of competition or accessing to the market, and the abuse of dominant position. To be illegal, the two offences have to be able to cause damage to the ‘general economic interest’; this concept, while included in the Antitrust Law, is not defined in the text of the Antitrust Law, and has been interpreted, on several occasions, by courts and scholars in various ways. Currently, the undefined term ‘general economic interest’ is mostly likened to ‘consumer welfare’, which may be damaged if a conduct, act or behaviour has the potential to cause an increase in price or a reduction of the offer of the relevant product defined within the framework of an investigation.

Section 2 of the Antitrust Law details 14 practices that are, to the extent that they fit in any event described in Section 1, anticompetitive. It is important to state that this list is not exhaustive; any conduct shall be considered anticompetitive when actions of Section 1 are involved.

Chapter 2, Section 4 of the Antitrust Law is exclusively focused on dominant position. The definition of dominant position is stated in the Antitrust Law as follows:

*For the purpose of this Act, one or more persons are understood to have a dominant position when for a certain type of product or service it is the only one to offer or ask in the national market or in one or more parts of the world or, when not being the only one, it is not exposed to a material competition or, when due to the degree of vertical or horizontal integration it is in a position to determine the economic viability of a competitor sharing the market, in detriment of the latter.*

To establish the effective existence of dominant position, Section 5 details a number of circumstances that shall be taken into account at the moment of analysing the position:

a) the extent that the good or service involved can be replaced by other goods or services, either of local or foreign origin, and taking into consideration the conditions of the substitution and the time required to do so;

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9 Section 1 of the Antitrust Law.
10 This concept was confirmed by the Supreme Court of Justice in *re A Gas y Otros c/AGIP Argentina SA y Otros s/ Infracción Ley 22.262*.
11 Section 4 Antitrust Act No. 25,156.
the existence of regulatory restrictions that limit access to products, the offer of products or demand in the markets involved; and

c the extent that the allegedly responsible party may unilaterally have influence in the formation of prices or restrict the supply or demand in the market, and the extent its competitors are able to counterbalance such power.

Dominant position is not forbidden by the Antitrust Law – the prohibition is only focused on the abuse of such dominant position. The abuse of dominant position is a unilateral conduct and, therefore, is not reliant on any kind of contract or agreement with competitors or third parties. According to the antitrust authorities, unilateral conduct ‘stumbles upon the difficulty of determining to what extent such conducts are part of a valid or competitive behaviour or constitute or result manoeuvres whose meaning is simply to create impediments to entry or reside of competitors in a market’.12

ii Exclusionary and exploitative abuse: price discrimination

Practices that imply abuse of a dominant position usually involve those practices that obstruct the entry of potential competitors in the market and those that exclude existing competitors. Strictly, the abuse of a dominant position can be raised by exploitative or exclusionary conduct, acts or behaviours.

Abuse of a dominant position based on exclusionary conduct, acts or behaviours triggers a concern for the antitrust authorities that is based principally on the exclusion of one or more competitors in the market involved. In cases of abuse of dominant position based on exploitative conduct, the concerns of the antitrust authorities include price discrimination, imposition of exploitative prices, and any other conduct that tends to differentiate prices and commercial conditions between competitors in the same market.

The Antitrust Law provides no guidelines on what market shares give rise to the existence of a dominant position on one or several markets.

In general terms, and considering the provisions established in Section 4 of the Antitrust Law, a company is considered to have a dominant position when it is the only supplier of certain goods or services or when, as a consequence of the vertical or horizontal degree of integration, it is able to determine the economic feasibility of a competitor or participant on the market.

In effect, the CNDC has held that a position of dominance is the economic power that a company has to prevent effective competition from being maintained on a relevant market, thus enabling it to act to a great extent independently from its competitors, customers and consumers. It has also stated that a dominant position does not necessarily derive from an absolute dominance that may enable a company to exclude all competition, but it is enough for it to have a strong position that may allow it to act in a highly independent way.

Notwithstanding the above-mentioned as to the lack of a precise criteria in the Argentine legislation, the CNDC frequently adopts foreign criteria and precedents, namely the ones adopted by the EU Competition Commission, when considering the analysis of precedents.

In practice, such criteria may be used as guidelines when determining what shares may enable a company to act independently from its competitors. Following the practical

12 Secretary of Trade, National Commission on Defence of Competition, ‘Clorox Argentina S.A. s/ Infracción Ley 25.156 (C. 1122)’. 

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approach usually adopted by the EU Competition Commission, it is possible to argue that shares lower than 30 per cent do not normally imply a position of dominance, while shares higher than 50 per cent do.

Defining what relevant markets are according to this analysis is no easy task. In most scenarios, the antitrust authorities may deem it necessary to perform a specific economic analysis on the products involved and the geographical areas in which such products are offered.

As previously mentioned, there is no specific prohibition in the Antitrust Law for having a position of dominance, just for the abuse of it. Therefore, companies that have a dominant position should avoid participating in what may be considered as abusive conduct. Such conduct may include, but is not limited to:

\[ \begin{align*}
  a & \text{ refusing to accept orders without objective reasons that justify such refusals;} \\
  b & \text{ selling at prices that are equal to or below cost;} \\
  c & \text{ imposing abusive contractual conditions;} \\
  d & \text{ lowering prices temporarily (predatory pricing);} \\
  e & \text{ applying temporary discounts or better conditions in specific areas with the aim of eliminating actual or potential competitors;} \\
  f & \text{ applying different prices or sales conditions in similar scenarios (price discrimination);} \\
  g & \text{ subordinating the purchase or the sale (or the purchase or sale under certain conditions) to the condition of not using, buying, selling or providing goods or services offered by a third party, or subordinating the purchase of goods or services to the purchase of other goods or services.}
\end{align*} \]

The most important case in Argentine competition history regarding the abuse of a dominant position involved exploitative conduct, specifically, price discrimination, in the 2002 *National Commission for the Defence of Competition v. Yacimientos Petrolíferos Fiscales* case.

Yacimientos Petrolíferos Fiscales (YPF) is one of the largest suppliers of liquefied petroleum gas (LPG) in Argentina, and was also the largest exporter of said product. The issue in this case was the pricing policy of YPF concerning its wholesale of LPG. The CNDC objected that YPF commercialised LPG in the local Argentine market at a higher price than it did in the markets where the company exports the product. In addition, YPF prohibited the foreign companies that buy the product to re-export the product into Argentina.

In this case, the Secretary of Trade took into consideration the recommendation of the CNDC for the fine imposed, which amounted to 109 million pesos. The decision of the Secretary of Trade was questioned by YPF in the courts; the fine was confirmed by the Supreme Court.

**V Remedies and Sanctions**

i **Sanctions**

Infringements of the Antitrust Law regarding the abuse of a dominant position may result in harsh consequences for both the infringing company and its individual employees. Under the current legislation, fines for infringements of the Antitrust Law range from 10,000 pesos to 150 million pesos.
To determine the amount of the fine, the antitrust authorities take into account: the loss suffered by all individuals who were affected by the unlawful activity; the benefit obtained by all the individuals who were involved in such an activity; and the value of the assets involved, and which belonged to said individuals at the time of the infringement.

In the case of a re-offence, the fine could be doubled. Without prejudice to other penalties that may correspond, when verified acts that constitute abuse of a dominant position or where it is noted that a monopolistic or oligopolistic position in violation of the provisions of the Antitrust Law has been achieved, the Secretary of Trade may enforce conditions aimed at neutralising the distorting aspects of competition or ask the judge that the offending companies are dissolved, liquidated, unconcentrated or divided.

Further, companies are liable for the acts of their employees (even those who are not in a managerial position) that are performed on their behalf, for their benefit or with their assistance.

As a consequence of the aforementioned, directors, managers, administrators, receivers or members of a surveillance commission who contribute, encourage or permit an infringement are joint and severally liable regarding the imposition of the fine.

In addition to all the sanctions described above, the individuals or legal entities that are injured by acts and behaviours forbidden by the Antitrust Law may sue for damages in a court of competent jurisdiction in accordance with the laws of Argentina.

Finally, any agreements or terms and conditions that infringe the Antitrust Law may be declared null and void.

ii Behavioural remedies

As mentioned above, the antitrust authorities may enforce conditions aimed at neutralising the distorting aspects of competition or may ask a judge that the offending companies be dissolved, liquidated, unconcentrated or divided.

VI PROCEDURE

Abuses of dominant position cases mostly occur through a filing made by any natural or legal person. Notwithstanding this, an investigation may also be initiated ex officio by the antitrust authorities.

Complaints must be filed before the antitrust authorities, detailing, among the formal requirements, the complaint subject, the facts that ground the complaint and the legal basis considered for filing the claim.

The procedure will be initiated by communicating the investigation to the denounced, who will have the possibility of answering it in relation to the facts or the legal basis investigated by the antitrust authorities.

Once the defence has been filed, the antitrust authorities may consider the explanations satisfactory or conclude that there is no merit in continuing with the investigation. Otherwise, the denounced will be notified to submit its disclaimer and to offer evidence to be produced.

The complainant should cooperate with the investigation, and the antitrust authorities may require information from other competitors in the relevant market. Furthermore, the authority may convene a public audience review at any step of the procedure if the investigation merits it or to obtain more information on the investigation.

The antitrust authorities may enforce precautionary measures, such as ordering the cessation of the injurious conduct while the analysis of the investigation is taking place. This
decision can only be taken when the antitrust authorities judge that the competition regime may be affected (at the complainant’s request or ex officio). This last decision, regarding a precautionary measure, may be appealed by parties.

After the evidence is produced, the antitrust authorities must decide the case in 60 days, ending the administrative claim. Nevertheless, once the resolution is notified and published in the Federal Register, interested parties may appeal it.

Despite this, the Antitrust Law gives the opportunity for the denounced to make an arrangement with the antitrust authorities by which it commits to cease immediately the conduct that affects competition. In this last case, the antitrust authorities will investigate the enforcement of the arrangement for three years.

VII PRIVATE ENFORCEMENT

Section 51 of the Antitrust Law states that individuals and companies that have been affected by anticompetitive conduct have the right to sue in judicial courts and claim for damages.13 At the time of writing, there are few private actions that have been initiated to claim damages.

As occurs in other legislation within the area of antitrust, a private individual or company that sues in the judicial courts must reveal not only the infringement relating to the Antitrust Law, but also demonstrate and quantify the damage suffered as a result of the alleged practice.

There is still much to do and explore in relation to such actions in Argentina. It is expected that new cases will be initiated in the coming years.

VIII FUTURE DEVELOPMENTS

The current national government has declared that it intends to modify some of the sections of the Antitrust Law – mainly those regarding thresholds for merger and acquisition notification. Clemency programmes are also being analysed by the antitrust authorities. The Congress is currently analysing a bill with modifications of the Antitrust Law. This bill was approved last April 19 by the Senate with some changes, and has been sent to the deputies for final approval.

Further, as a first step after taking office as the President of the CNDC, Esteban Greco undertook CNDC internal audits. He has also released the results of internal audits that were performed with regard to anticompetitive conduct. Mr Greco acknowledges that the antitrust authorities in the past have failed to comply with the terms established under the Competition Act as regards conduct and merger control cases. Specifically, regarding anticompetitive cases, he has stated that conduct cases that were initiated with an aim differing from the protection of market competition will be dismissed and closed.

13 Section 51, Antitrust Law.
I INTRODUCTION

In Australia, unilateral market conduct issues are primarily regulated by Section 46 of the national competition statute, the Competition and Consumer Act 2010 (Cth) (CCA or the Act). Section 46 prohibits a corporation with substantial market power engaging in conduct that has the purpose or likely effect of substantially lessening competition in the market in which the corporate has market power or in any other market in which the corporation supplies or acquires the goods or services.

While the prohibition is drafted with reference to competitors, consistent with the approach in Europe in abuse of dominance cases, Australian courts have made clear that the primary concern of the provision is to protect consumers and the competitive process itself, not particular competitors who may be affected by an exercise of market power. It should also be noted that it is not a contravention for a corporation to have, or to merely exercise, its market power: see, for example, the decision of the Privy Council in Commerce Commission v. Carter Holt Harvey Building Products Group in relation to a similar provision under the NZ Commerce Act 1986:

The law does not disable a trader who is in a dominant position in a market from competing with other traders in that or any other market. It is open to the trader to compete on price as well as quality so long as he does not use his dominant position for the purpose of producing an effect which is anti-competitive. More over the trader is entitled, before he enters upon a line of conduct which is designed to affect his competitors, to know with some certainty whether or not what he proposes to do is lawful. The questions is how, in this difficult area, lawful conduct can be distinguished from unlawful conduct.

Predatory pricing will contravene Section 46 if engaged in by a corporation with market power and with the likely effect of substantially lessening competition in any relevant market, or where that is its purpose.

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1 Prudence J Smith is a partner and Matthew J Whitaker is an associate at Jones Day. The authors wish to thank Nicolas J Taylor and Jason A Beer for their generous assistance in preparing previous versions of this chapter.

Previous versions of the provision

On 6 November 2017, an amendment to Section 46 of the CCA came into effect. The amended provision is unchanged to the extent that it requires that it be established that a corporation has a substantial degree of power in a market. From that point on, the provision has changed. Formally, the requirement of Section 46 was that a corporation take advantage of that market power for a prescribed purpose: eliminating or substantially damaging a competitor, or preventing the entry of a person into that or any other market; or deterring or preventing a person from engaging in competitive conduct in that or any market.

Following the amendment, the focus has shifted from the purpose of a conduct to the conduct itself that substantially lessens competition or conduct that has that purpose. Specifically, the CCA prohibits corporations that have a substantial degree of market power from engaging in conduct that has the purpose, or likely effect, of substantially lessening competition in a market in which the corporation has market power; in any other market in which the corporation has market power; or in any other market in which the corporation supplies or acquires goods or services.

The CCA previously contained two provisions prohibiting predatory pricing that provisions were repealed in November 2017. Such conduct is now subject to the general provisions.

Until November 2017, Section 46 provided that corporations with a substantial degree of market power could not use that power, in any market, for the purpose of:

a. substantially damaging or eliminating a competitor;

b. substantially damaging or eliminating competitors generally, a class of competitors or any particular competitor; or

c. preventing or deterring anyone from engaging in competitive conduct in any market.

To make out a contravention, an applicant had to establish that a corporation was using its market power (as opposed to any other power), and that it was doing so for a proscribed purpose. This was established by assessing the way in which the corporation would have acted in a competitive market, or how a profit-maximising firm functioning in a competitive market would have acted.

The provision was focused on the purpose for which the market power was used or was intended to be used, instead of a conduct that had an anticompetitive effect.3

The amendment followed recommendations in which it was proposed to expand the ‘purpose’ element to a ‘purpose, effect or likely effect’ test; remove the ‘take advantage’ element; and shift the legislative focus from damage to a specific competitor to damage to the competitive process itself.4

The proposed Competition and Consumer Amendment (Misuse of Market Power) Act 20175 passed the House of Representatives on 28 March 2017 and came into effect on 6 August 2017. These amendments were in part intended to remedy a significant perception that the Australian Competition and Consumer Commission (ACCC) has not been able to bring enough Section 46 actions under the previous form of the prohibition, and of those

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that it has brought, it has had a relatively low success rate.6 The ACCC itself had been a vocal supporter of changes to Section 46, with Chairman Rod Sims stating that the prohibition was ‘almost unusable’ in addressing misuse of market power by dominant corporations.7

II YEAR IN REVIEW

Understandably, in the past year, the ACCC has been vocal in emphasising the focus of the amended Section 46 provision on the protection of the competitive process. On the same day that the amended law took effect, the ACCC issued interim guidelines as to the ACCC’s interpretation of the provision and its investigations into alleged conduct. In the period since the amendment, the ACCC has yet to bring proceedings under the new provision. Similarly, likely in anticipation of the amendment, the ACCC has not commenced any actions under this provision in the past year. Indicative of the ACCC’s change of focus is its return to its priorities regarding conduct that may contravene the new misuse of market power provisions among the regulator’s priorities for the year ahead.8 The only Section 46 cases currently being considered are the now long-adjourned appeal in ACCC Pfizer Australia Pty Ltd9 and ACCC v. Ramsay.

In May 2017, the ACCC instituted proceedings against Ramsay Health Care Australia, the largest private hospital operator in the country. The ACCC has alleged that, in response to a group of surgeons planning to establish a competing private day surgery facility in a regional town, Ramsay threatened to impose restrictions on surgical consultants who operate in its hospitals in the region if they also conducted procedures at the proposed competing day surgery.10 Further, the ACCC alleges that this conduct resulted in the competing surgeons suspending their plans to establish a day surgery.

Following the filing of an appeal from the ACCC’s 2014 application alleging that Pfizer had misused its market power in its conduct to minimise anticipated loss of shares to generics following the expiration of a patent, the ACCC alleged that Pfizer:

a had substantial market power in the Australian market for the supply of atorvastatin to pharmacies;
b held that market share because the patent prevented any other party from supplying the product; and
c took steps to prohibit the loss of market share to generics, and took advantage of its market power with the substantive purpose of deterring or preventing other suppliers from engaging in competitive conduct.

At first instance, the court found that Pfizer possessed a substantial degree of market power, but it was not persuaded that the steps taken had the purpose of deterring or preventing

8 Rod Sims, ‘Section 46 no defence for uncompetitive firms’ (speech delivered at the RBB Economics Conference, 30 November 2017).
10 *Australian Competition and Consumer Commission v. Ramsay Health Care Australia Pty Limited* (currently before the Federal Court of Australia).
Australia

competitive conduct. Relevantly, the court held that Pfizer’s conduct was pursued for the purposes of ensuring it remained competitive following the expiry of the patent. The court also found that there was a legitimate reason for each of the steps undertaken by Pfizer, rather than for the prescribed purpose in the provision of deterring or preventing competitive conduct.

A private enforcement action relating to Sections 45 and 46 was brought by Safe is Safe Pty Ltd, a supplier of amusement ride safety inspection services, against the Royal National Agricultural and Industrial Association of Queensland (RNA). The RNA had allegedly made known to prospective licensees intending to operate amusement rides at the annual ‘Ekka’ show that it would not accept safety inspection certificates issued by Safe is Safe Pty Ltd. However, the matter was withdrawn before judgment.

i Active competition authority cases

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pharmaceuticals</td>
<td>ACCC</td>
<td>Alleged misuse of market power (through rebates and bundling) and exclusive dealing in relation to Pfizer’s supply of Lipitor to community pharmacies before the expiry of its patent</td>
<td>February 2014</td>
</tr>
<tr>
<td>Healthcare</td>
<td>ACCC</td>
<td>Alleged misuse of market power and exclusive dealing in relation to restrictions alleged to have been imposed by Ramsay Health Care on surgical consultants who proposed working in competing hospitals</td>
<td>May 2017</td>
</tr>
</tbody>
</table>

III MARKET DEFINITION AND MARKET POWER

The prohibition against misuse of market power contained in Section 46 of the CCA applies only to corporations that have a ‘substantial degree of power in a market’. Courts in Australia have tended to consider the analysis of market definition and market power together.

i Market definition

Sections 46(8)(b) and 4E of the CCA provide that, for the purposes Section 46, a reference to ‘market’ is a reference to a market for goods or services, and includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services; and is a market in Australia.

Given the definition of market in the CCA, analyses focus initially on the identification of substitutes. Both the ACCC and the Australian courts often commence an analysis of the borders of a market using the hypothetical monopolist test (HMT). The HMT examines the effect of a small but significant non-transitory increase in price (SSNIP) on a hypothetical monopolist in a market for the good or service in question.

Owing to the input-intensive nature of the HMT analysis, the ACCC limits its inquiry in most cases to examining a list of product and geographic characteristics that tend to satisfy the test. This analysis consists of physical characteristics and portability, respectively, but also economic metrics such as cross-elasticity of demand.

13 ACCC’s Merger Guidelines.
The meaning of ‘in Australia’ has recently been the subject of consideration in a decision of the Full Court of the Federal Court of Australia. A majority of the Court held, in the context of price-fixing enforcements in the airfreight market, that a market that is located both outside and within Australia was a market in Australia for the purposes of the CCA.

ii Market power

Unlike most other jurisdictions, there are no statutory or court-based market-share presumptions. Proof of market power in Australia always needs to proceed on the basis of a full economic analysis. Market shares are helpful in identifying the degree of market power; however, a large market share does not necessarily mean that there is a substantial degree of market power in that corporation. Section 46(7) provides that more than one corporation may have a substantial degree of market power in a market. Australian courts place significant focus on the existence and scale of barriers to entry in determining to what extent an entity possesses market power.\(^\text{14}\) Courts have also placed weight on other evidence of related but distinct indications of market power,\(^\text{15}\) including:

\begin{itemize}
  \item[a] the ability of the firm to raise prices above the supply cost without rivals taking away customers in due time;
  \item[b] the extent to which a corporation’s conduct in the market is constrained by that of competitors or potential competitors;
  \item[c] the market share of the corporation (although not determinative by itself);\(^\text{16}\) and
  \item[d] the existence of vertical integration.
\end{itemize}

In its interim guidelines for market power, the ACCC indicates that market power exists where a firm can only engage in the conduct in question absent competitive constraint. This freedom, the ACCC notes, can be assessed having regard to the factors indicated in Queensland Co-operative Milling Association Limited and Defiance Holdings Limited:

\begin{itemize}
  \item[a] the number and size of distribution of independent sellers, especially the degree of market concentration;
  \item[b] the height of barriers to entry, that is, the ease with which new firms may enter and secure a variable market;
  \item[c] the extent to which the products are characterised by extreme product differentiation and sales promotion;
  \item[d] the character of ‘vertical relationships’ with customers and suppliers, and the extent of vertical integration; and
  \item[e] the nature of any formal, stable and fundamental arrangements between firms that restrict their ability to function as independent entities.
\end{itemize}

\(^{14}\) ACCC v. Boral Ltd [1999] FCA 1318 at [140]-[148]; See also ACCC v. Pfizer Australia Pty Ltd (ACN 008 422 348) [2015] FCA 113; 323 ALR 429.


\(^{16}\) A market share of 30 per cent has been of the referred to as indicative of market power in Boral Besser Masonry Ltd v. ACCC [2003] HCA 5; 215 CLR 374.
An important element of the analysis is determining whether market power is ‘substantial’ in nature. For market power to be substantial, courts have held that it needs to be ‘real and of substance rather than trivial or minimal’,\(^\text{17}\) or put another way, ‘large or weighty’ or ‘considerable, solid or big’.\(^\text{18}\)

Courts have held that merely because a corporation is not profitable does not mean that it lacks market power.\(^\text{19}\) Financial power is also not evidence of market power.\(^\text{20}\)

Since the amendment, the provision no longer explicitly provides that a corporation with a substantial market share is prohibited from supplying, or offering to supply, goods or services for a sustained period at below the relevant cost of supplying goods or services where the corporation’s purpose was to substantially damage or eliminate a competitor, competitors generally, a class of competitors or any particular competitor; or prevent or deter anyone from engaging in competitive conduct in any market. Such conduct will now be subject to the general prohibition.

**IV PURPOSE OR LIKELY EFFECT OF SUBSTANTIALLY LESSONING COMPETITION**

**i Substantial market power**

For the provision to apply, it is necessary to establish that a corporation has substantial market power. Such market power can be described to be ‘considerable’, ‘big’ or ‘not merely nominal’ (see *Tillmanns Butcheries Pty Ltd v. Australasian Meal Industry Employees Union*\(^\text{21}\)).

The explanatory memorandum accompanying the bill introducing the concept in 1986 indicated that substantial was to be regarded as ‘large or weighty’ or ‘considerable, solid or big’ (see also *Eastern Express Pty Ltd v. General Newspaper Pty Ltd*\(^\text{22}\)).

While the introduction of the competition test is recent for the operation of Section 46, the test is well established in the Australian legal landscape in relation to anticompetitive contracts, arrangements or understandings, and mergers or acquisitions, which have all been prohibited where the conduct concerned has been likely to result in a substantial lessening of competition for some time. These authorities will also guide parties as to the likely treatment of the courts in relation to Section 46.

The ACCC, in its Interim Guidelines, has observed that ‘conduct substantially lessens competition when it interferes with the competitive process in a meaningful way by deferring, preventing or limiting competition. This can be done by raising barriers to entry or to entry into a market’.\(^\text{23}\) As noted elsewhere in this chapter, ‘substantial’ must be meaningful

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\(^{17}\) *Mark Lyons Pty Ltd v. Bursill Sportsgear Pty Ltd* (1987) 75 ALR 581.


\(^{21}\) *Tillmanns Butcheries Pty Ltd v. Australasian Meal Industry Employees Union* (1979) 27 ALR 367; (1979) ATPR 40-138.

\(^{22}\) *Eastern Express Pty Ltd v. General Newspaper Pty Ltd* (1992) 106 ALB 297; 35 FCR 43; (1992) ATPR 4-16 at 63 (FCR).

\(^{23}\) ACCC, Interim Guidelines on misuses of market power; 6 November 2017, paragraph 2.22, page 8.
to the competitive process\textsuperscript{24} (see \textit{Stirling Harbour Pty Ltd v. Bunbury Post Authority}\textsuperscript{25}). The ACCC identifies at 2.26 in its Interim Guidelines that lessening competitive means that the field of rivalry is diminished or lessened, or that the competitive process is compromised or impacted. The ACCC notes that the commercial rationale for the conduct will be relevant to the assessment\textsuperscript{26} (paragraph 2.27).

V ABUSE

i Overview

The prohibition in Section 46 requires not only satisfaction of the elements of market power and engaging in conduct with the purpose or likely effect of substantially lessening competition.

Section 46(4) provides the following non-exhaustive list of factors the court may consider to determine whether a corporation has taken advantage of market power:

\begin{itemize}
  \item \textit{a} whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;
  \item \textit{b} whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
  \item \textit{c} whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market; and
  \item \textit{d} whether the conduct is otherwise related to the corporation's substantial degree of power in the market.
\end{itemize}

ii Purpose

The purpose element in Section 46(1) will be established where it can be shown merely that there is an intention to achieve a result,\textsuperscript{27} rather than the fulfilment of that intention.\textsuperscript{28}

While courts have taken a range of approaches to determining purpose, including assessing conduct on a subjective basis,\textsuperscript{29} it appears likely that the position going forward is that while there are subjective elements to assessing purpose, the ultimate test is objective.\textsuperscript{30} In the \textit{Telstra Corporation} case, the Federal Court placed weight on the requirement, which provides that the court may find that a corporation's purpose where that purpose is ascertainable only by inference from the corporation's conduct or the conduct of any other person, or from other relevant circumstances. The Court took the approach that if, upon

\textsuperscript{24} Ibid at paragraph 2.27.
\textsuperscript{25} \textit{Stirling Harbour Pty Ltd v. Bunbury Post Authority} [2000] FCA 38.
\textsuperscript{26} Ibid at paragraph 2.27.
\textsuperscript{27} \textit{Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd} (2001) 205 CLR 1; [2001] HCA 13, [31].
consideration of the nature and substance of the conduct, it can be said that the substantial purpose for that conduct was to substantially lessen competition, or if such a purpose can be inferred, it is not necessary to consider the subjective reasons for the conduct.31

It is important to note that to contravene Section 46(1), the proscribed purpose need not be the sole purpose for the conduct, merely a substantial purpose.32 If the conduct was motivated by both a legitimate purpose and purpose to substantially lessen competition, and both are substantial purposes, the corporation will have contravened Section 46(1).33 However, Section 46(1) will not be contravened where a corporation was motivated entirely by a legitimate purpose, or dual purposes where the purpose of substantially lessening competition was not substantial.34 For example, in Dowling v. Dalgety Australia Ltd, the respondents’ dominant purpose was to use their valuable asset without sharing it with a person who had no proprietary interest in it, and restricting competition was found to be a subsidiary purpose.35

iii Exclusionary abuses

Predatory pricing

Predatory pricing will now be dealt with under the general misuse of market power prohibition in Section 46(1), and will be prohibited if engaged in by a corporation with market power, and the purpose or likely effect of the conduct substantially lessens competition in any relevant market. Conduct will be considered predatory pricing if the corporation has market power and is selling below cost. Typically, the conduct drives competition from the market, following which the offender will increase its price and recover its losses. As per Finkelstein J in ACCC v. Cabcharge Australia Limited,36

Firms engage in predatory pricing ‘to drive rivals out of business and scare off potential entrants’ ...
Then, they raise prices, capturing monopoly oligopoly rents.

Once firms gain monopoly/oligopoly power, it is often extremely difficult to take that power away and firms are likely to be deterred from entering the market because they know that the incumbent has the ability to undercut them and to engage in predatory pricing.

To establish predatory pricing, two questions will arise. First is assessing when will the price be sufficiently low to be regarded as predatory. The record is whether the prospect of recoupment is necessary. In relation to costs, the courts have yet to settle on the appropriate costs measure to establish predatory pricing. In Eastern Express Pty Ltd v. General Newspaper Pty Ltd,37 the court found that no specific category of pricing tends to imply a misuse of market power. Accordingly, it is not a contravention to supply goods or services below the relevant cost where such conduct places the corporation at risk of a contravention occurring when its pricing conduct is for the purpose or likely effect of substantially lessening competition. On the

32 CCA Section 4E.
question of the recoupment, the Australian courts have not yet established that recoupment is necessary to establish a contravention. In *Boral Besser Masonry Ltd*[^38] *v. ACCC* per Gleeson CJ and Callinan JJ, ‘While the possibility of recoupment is not legally essential to a finding of pricing behaviour in contravention of section 46, it may be of factual impertinence’.[^39] Accordingly, the ability to recoup may be an indication of market power, and if it in fact occurs and drives others from the market, it may have the effect of substantially lessening competition.

**Margin squeeze**

While there is no judicial precedent, a possible theory of harm of a ‘price squeeze’ that may fall within Section 46(1) suggests that a vertically integrated firm with substantial market power in the provision of an essential upstream product sets the wholesale price for the upstream product and retail price for the final product in such a way that the margin ‘squeezes’ an efficient downstream rival from the market.

**Exclusive dealing**

The CCA specifically prohibits all corporations from, in trade or commerce, engaging in the practice of exclusive dealing where such conduct has the purpose, or would have the effect or likely effect, of substantially lessening competition.[^40]

A refusal to supply may not substantially lessen competition if it does not alter the market structure by raising barriers to entry or reducing price competition, and is unlikely to substantially lessen competition if it is a refusal to supply one of a number of competing retailers in a generally competitive market.[^41]

Additionally, regardless of whether the purpose or likely effect is to substantially lessen competition, a corporation will contravene the CCA if it:

- supplies, or offers to supply, goods or services at a particular price, or at all, or gives or allows, or offers to give or allow, a discount, allowance, rebate or credit, on the condition that a person to whom a corporation supplies, or offers or proposes to supply, the goods or services (or a related corporation), will acquire goods or services directly or indirectly from another person (not being a related corporation);[^42] or
- refuses to supply goods or services at a particular price, or at all, or to give or allow a discount, allowance, rebate or credit, for the reason that a person (or a related corporation) has not acquired, or has not agreed to acquire, goods or services directly or indirectly from another person (not being a related corporation).[^43]

Exclusive dealing conduct notified to the ACCC may be immunised unless the ACCC is of the opinion that the likely public benefit of the conduct will not outweigh the likely detriment.[^44]

[^38]: Now Boral Masonry Ltd.
[^40]: CCA Section 47(1).
[^42]: CCA Section 47(6).
[^43]: CCA Section 47(7).
[^44]: CCA Section 93.
**Tying and bundling**

A tying scheme may fall within one of the exclusive dealing provisions discussed above if it has the purpose or likely effect of substantially lessening competition. If a corporation with market power grants a discount on condition that a purchaser acquires other goods from it or a third party, such a tying or forcing arrangement may contravene Section 46(1) or Section 47(1) of the CCA.

It will need to be proved that the tying or bundling conduct was exclusionary. For example, in some cases, requiring a customer to obtain consumables from the equipment supplier may be justified as the only way to ensure the safe functioning of the equipment.

**Refusal to deal**

The general position is that there is no obligation to deal with everyone seeking to deal. Operators have the freedom to choose whom they deal with, and under what conditions. This is subject to the prohibition in Section 46. To contravene Section 46(1), there must be a connection between a refusal to deal and market power. A court considers the business rationale for the refusal, and whether a corporation would have refused to deal even if it was subject to competitive constraints in the market. In particular, where there was a cooperative relationship between parties and a party with substantial market power terminates such dealing, a court may require evidence of some change in circumstances justifying the refusal to continue that relationship. The court will also need to be persuaded that the purpose or likely effect of the conduct is to substantially lessen competition in a relevant market.

Some refusals to supply or acquire goods or services for failure to comply with a requirement will contravene the exclusive dealing provisions in Section 47 of the CCA. Refusal to license intellectual property rights can also attract Section 46(1) if the criteria are met.\(^45\)


\(^46\) Repealed by the Competition Policy Reform Act 1995 (Cth) following recommendation of the ‘Hilmer’ Independent Committee of Inquiry, National Competition Policy (AGPS, Canberra, 1993) 79.

**iv  Discrimination**

Price discrimination was specifically prohibited by the former statutory regime if it was likely to have the effect of substantially lessening competition. This provision was repealed in 1995 following a government report concluding that price discrimination generally enhances economic efficiency except in cases otherwise falling within Section 46.\(^46\) Price discrimination will only be prohibited if there is a misuse of market power where the purpose or likely effect of the conduct is the substantial lessening of competition in a relevant market. It will not constitute taking advantage of market power if it is justified by efficiency considerations.

Buyer-induced price discrimination can also constitute a misuse of market power within Section 46(1).

\(^46\) Repealed by the Competition Policy Reform Act 1995 (Cth) following recommendation of the ‘Hilmer’ Independent Committee of Inquiry, National Competition Policy (AGPS, Canberra, 1993) 79.

**v  Exploitative abuses**

Mere exploitation of market power by charging the maximum price the market will bear does not generally fall within Section 46(1), provided it does not take advantage of market
power for a proscribed purpose such as to damage competitors. Different considerations may apply where a monopoly input supplier competes in a downstream market, and the high price charged has an exclusionary purpose and is associated with price discrimination or a price squeeze. For example, BHP was held to have contravened Section 46(1) by offering to supply QWI with Y-bar at an ‘excessively high’ price, which would have made it impossible for QWI to compete with BHP in the downstream rural fencing products market.

V REMEDIES AND SANCTIONS

i Sanctions

Section 76 of the CCA provides that a contravention of a provision of Part IV (‘restrictive trade practices’), including Section 46, can lead to pecuniary penalties of the largest of the following: A$10 million; where the court can determine the value of benefits that have been obtained that are reasonably attributable to the contravening act or omission, three times the total value of the benefits; or where the court cannot determine the value of benefits that have been obtained, 10 per cent of the annual turnover of the offender over the previous 12 months.

For an individual, a penalty of up to A$500,000 may apply.

In addition, a person who suffers loss or damage as a result of a contravention of Section 46 can recover the amount of the loss or damage against the offender.

Important, there is a broad accessorial liability for penalties, damages and other orders for any natural or corporate person who aids, abets, counsels, procures or is ‘knowingly concerned’ in a breach. Companies are prohibited from indemnifying their staff.

ii Behavioural remedies

The CCA also allows for the court to grant an injunction prohibiting a corporation from engaging in contravening conduct, or requiring a corporation to engage in particular conduct, where it is satisfied that the corporation has engaged in, or is proposing to engage in, conduct that constitutes or would constitute a contravention of the restrictive trade practices provisions. In addition to imposing fines and injunctions, the court can also make the following orders:

- a declaration in relation to the operation of Section 46;
- non-punitive orders, being:
  - community service orders;
  - probation orders;
  - orders for disclosure of information; or
  - orders requiring the offender to publish an advertisement on the terms specified in the order;

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47 Pont Data Australia Pty Ltd v. ASX Operations Pty Ltd (1990) 21 FCR 385, 419.
49 CCA Section 76(1A)(b).
50 CCA Section 82.
51 CCA Section 80(1)(a)(i).
52 CCA Section 163A(1)(a).
53 CCA Section 86C.
an adverse publicity order in relation to a person who has been ordered to pay a fine for a contravention of Section 76; and

a disqualification order preventing a person from managing corporations for a period the court considers appropriate.

The court may also make such orders as it thinks appropriate against the offender pursuant to Section 87 of the CCA if the court considers that the orders will compensate the person who made the application, or prevent or reduce the loss suffered, or likely to be suffered, by such a person. These orders may include:

- voiding a contract or certain provisions of a contract;
- varying a contract;
- refusing to enforce any or all of the provisions of a contract; or
- an order directing the person who contravened Section 46 to:
  - refund money;
  - return property;
  - pay the person who suffered loss the amount of the loss or repair; or
  - provide services or parts for goods that had been supplied to the person who suffered the loss.

iii Structural remedies

The CCA does not currently provide any structural remedies for contraventions of Section 46.

VI PROCEDURE

The ACCC is Australia’s peak competition and consumer protection enforcement agency, and is responsible for enforcement of the CCA.

i Investigating and gathering evidence

The CCA contains multiple far-reaching powers that the ACCC can use for investigating and gathering evidence for investigations, including in relation to Section 46. The ACCC both pursues complaints from third parties and investigates on its own initiative.

The ACCC exercises discretion to direct resources to matters that harm the competitive process or result in widespread consumer detriment. Breaches of the prohibition of misuse of market power are regarded as a priority.

ii Power to obtain information, documents and evidence

Section 155 of the CCA is the ACCC’s most widely used mandatory information-gathering power. It gives the ACCC the power to require a person to provide information and documents and give evidence relating to a possible contravention where the ACCC has reason

54 CCA Section 86D.
55 CCA Section 86E.
56 CCA Section 87(1).
57 CCA Section 87(2).
58 CCA Section 81.
to believe that a person is capable of doing so. Failure to comply with a notice is an offence punishable by a fine or imprisonment, and there is no privilege against self-incrimination. Legal professional privilege in respect of documents is preserved.

The ACCC also has the option to seek a warrant to conduct search and seizure operations (i.e., dawn raids).

### iii Enforcement

The ACCC has a range of enforcement remedies under the CCA, with lower order matters often being dealt with administratively, while more serious violations are pursued through the courts.

Recent amendments to this provision provide that a ‘reasonable search’ may provide a defence to compliance with such a notice. While this addition is yet to be subject to judicial consideration, the search need only extend to information in the addressees’ knowledge or control.

### iv Undertakings

An administrative resolution often involves an undertaking from the corporation pursuant to Section 87B of the CCA. An undertaking is not an admission of the ACCC’s allegations. An undertaking is approximately equivalent to a consent injunction. The terms may vary, but most commonly the trader agrees to stop the conduct and compensate those who have suffered a detriment because of it, and to take other measures necessary to ensure that the conduct does not recur.

### v Court proceedings

The ACCC is more likely to proceed to litigation in circumstances where:

- **a** the conduct is particularly egregious;
- **b** there is reason to be concerned about future behaviour;
- **c** a high-profile corporation is involved; or
- **d** the party involved is unwilling to provide a satisfactory resolution.

However, few cases concerning breaches of Section 46 have been fully litigated, as commencement of legal proceedings often encourages parties to resolve a matter by negotiating and settling a statement of agreed facts and consent orders.

### VII PRIVATE ENFORCEMENT

#### i Overview

Notwithstanding that the CCA provides a ready means of enforcement for private litigants, private actions have historically been few in number. Further, while it is increasingly common for high-profile ACCC proceedings to trigger subsequent private damages suits

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59 CCA Section 155(7).

60 See, for example, *Australian Competition and Consumer Commission v. Ticketek Pty Ltd* [2011] FCA 1489.

(in ‘piggy-back’ proceedings), private enforcement remains under-utilised: of the five court decisions handed down in the past year that invoke Section 46, only two have resulted from private actions.

The planned reframing of Section 46 to include an ‘effects test’ is anticipated to increase the efficacy of the provision by broadening the range of conduct captured, which is intended to increase the number of successful ACCC proceedings and encourage private litigants to make greater use of the provision.

ii Availability and remedies

While there are no structural remedies available to private parties (or indeed the ACCC) in respect of Section 46 contraventions, behavioural and other remedies are provided for under the CCA, and are available to private litigants.

Section 82 permits private litigants to seek damages for loss or damage suffered owing to the conduct of another party in contravention of Section 46. Section 80 also permits private litigants to seek an injunction restraining a party from engaging in certain conduct, or compelling a party to do a certain act or thing, so as to prevent or stop a breach of Section 46. Injunctive relief may be appropriate where a litigant wishes to prevent another party from initiating or continuing on a course of conduct, or to compel the other party to engage in some positive action (like in the case of a refusal to deal) in response to conduct that may amount to a misuse of market power.

iii Calculation of damages

Courts are largely guided by general common law principles in assessing damages. To rely upon Section 82, the person must have suffered actual loss or damage (thus, potential damage is not sufficient). Secondly, there is a causal requirement that this loss or damage was sustained by the other party’s contravention. If it is found that such loss or damage has been incurred, then the court must quantify the loss, even if this requires a degree of

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64 CCA Section 82(1). Note that pecuniary penalties are available under Section 76 but are payable to the Commonwealth (so are not a private action remedy as such).
65 CCA Section 80(1).
66 Such as in the recent case of Ocean Dynamics Charter Pty Ltd v. Hamilton Island Enterprises Limited [2015] FCA 460 (www.austlii.edu.au/au/cases/cth/FCA/2015/460.html) in which the Federal Court granted an interlocutory injunction to restrain the respondent from preventing the applicant from using a marina (after the respondent decided not to renew a business licence agreement with the applicant). The applicant had a prima facie case on the basis that the respondent’s refusal to deal constituted taking advantage of market power (the marina services market) for a proscribed purpose (either eliminating or substantially damaging the applicant in the luxury yacht market or deterring them from competitive conduct in that market) (at [8]).
68 Wardley Australia Ltd v. Western Australia (1992) 175 CLR 514, 526.
approximation or conjecture. Finally, in accordance with general principles governing damages, loss or damage under Section 82 encompasses economic or financial loss but may also extend to consequential loss that arises directly from the impugned conduct.69

iv  Availability of collective actions

There are no competition law-specific collective actions, but collective actions to enforce the CCA are available under the general provision for commencement of representative proceedings.70 A collective action may be commenced only if seven or more persons have claims against the same person; the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and all the claims give rise to a substantial common issue of law or fact.

In relation to standing, a person who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a collective action.71 Further, actions are subject to an opt-out regime, so that potential claimants who fall within a class definition will be members of that class unless they opt out, although it should be noted that in some cases, class definitions will be sufficiently narrow that they in effect require claimants to opt in (by defining members as those who have made arrangements with a certain funder or engaged a particular law firm).

Collective actions in respect of damages for anticompetitive conduct are underutilised in Australia.

v  Interaction between government investigations and private enforcement

The public and private enforcement regimes interact in a way that both facilitates and frustrates the bringing of private actions. Under Section 83 of the CCA, findings of fact made by a court in a successful proceeding (in respect of a contravention of Section 46) may be used as prima facie evidence of that fact in a subsequent action. A private litigant may therefore rely upon findings of fact made in a successful ACCC proceeding by producing the relevant documents under seal of the court (rather than needing to adduce its own evidence in support of the finding).

On the other hand, some aspects of the ACCC regime may inhibit successful private actions. For instance, while the ACCC has at its disposal a wide range of investigative (and coercive) powers to enable the gathering of evidence, private litigants have no such means of obtaining evidence (for instance, by compelling production of documents). Thus, they face greater hurdles in obtaining sufficient evidence to support a claim of misuse of market power.

Further, where a party has engaged in an alleged contravention of the CCA, the ACCC has the discretion to accept a formal undertaking from the party under Section 87B of the CCA. Such undertakings are enforceable by a court and subject to monitoring for compliance (as well as being made a matter of public record). However, undertakings do not necessarily require an admission by the party that it has contravened the CCA. Further, undertakings cannot be relied upon in the same way as findings of fact under Section 83. Therefore, where

70  Section 33C of the Federal Court Act 1976 (Cth).
71  Section 33D of the Federal Court Act 1976 (Cth).
the ACCC chooses to settle a matter administratively, rather than initiate proceedings, they may inadvertently discourage (or reduce the likely success of) a later private enforcement action.

VIII FUTURE DEVELOPMENTS

Following significant debate as to whether the former formulation in Section 46 should be amended to better distinguish between competitive and anticompetitive conduct, the government has now introduced legislation that substantially amends the elements of the former offence provided for under Section 46. After negotiations among the various political parties, the amended provision does not include an ability for the courts to consider any pro-competitive effects of competition as a counterweight to competitive detriments.

The amended prohibition is intended to significantly increase the number of Section 46 cases taken on by the ACCC. It is also expected that there will be an increased number of private actions, given the simpler statutory construction of the provision. While there has yet to be a case brought under the new provision, because Section 46 is a stated ACCC enforcement priority for 2018, it is expected that, at the least, the ACCC will seek to test the parameters of the amended provision in the near future.

It is also noteworthy that the ACCC’s Chairman has unequivocally stated his intention to ensure that ‘penalties are sufficiently high to deter large companies from contravening the law’.72 He accepts that this tougher approach may well lead to fewer agreed settlements. All indications are that this new tough approach is likely to apply equally to future Section 46 cases.

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AUSTRIA

Bernt Elsner, Dieter Zandler and Molly Kos

I INTRODUCTION

The Austrian legal regime regulating market dominance is set out in Part II (Sections 4 to 6) of the Austrian Cartel Act (KartG), stipulating the prohibition on abusing a (single or collective) dominant position and retaliation measures imposed by dominant companies against companies initiating cartel court proceedings or lodging a complaint with the Austrian official parties. Furthermore, abusive behaviour of companies having ‘relative’ market power in relation to their suppliers or customers is also prohibited.

In addition to the general provision prohibiting abuse of a dominant position, Section 5 KartG also contains examples of abusive behaviour: the examples in Section 5 Paragraph 1 Nos. 2 to 4 KartG are based on Article 102 Letters b to d TFEU. Section 5 Paragraph 1 No. 1 KartG does not follow the exact wording of Article 102 Letter a TFEU, but prohibits requesting prices or other conditions that differ from those prices or conditions that would exist under a functioning competitive environment.

Another distinct characteristic of Austrian antitrust law are the specific (rebuttable) statutory presumptions of dominance based on market shares (Section 4 KartG), which are stricter than the market dominance presumptions developed by the EU institutions in the case law of Article 102 TFEU.

In addition, even for companies not holding a dominant position, the Austrian Act on Local Supply and Improvement of Competition Conditions (NahversorgungsG) contains specific provisions governing certain types of unilateral behaviour such as dissimilar trading terms.

In Austria, there exists no formal guidance on the application of the statutory rules on abuse of a dominant position in general. However, guidance can be derived from the case law of the cartel court (Higher Regional Court of Vienna (OLG) and the Supreme Court acting as a higher and appellate cartel court (OGH)). Moreover, the Federal Competition Authority

1 Bernt Elsner and Dieter Zandler are partners and Molly Kos is an attorney at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.
(FCA) has published sector specific notices on market dominance in the field of funeral services and motor vehicle distribution, and a very specific notice on media cooperation between concert promoters and radio stations.

No special rules apply to public sector or state-owned enterprises. Thus, Austrian antitrust law also applies to companies entirely or partially, directly or indirectly, owned by the state if these companies carry out an economic activity (functional approach). However, special rules apply to certain regulated industries, such as electricity, gas, telecommunications and post, and railway, which are under the jurisdiction of industry-specific national regulatory authorities (e.g., Telekom-Kontrol Kommission, the Regulatory Authority for Broadcasting and Telecommunications, E-Control). In the course of the amendment of the KartG in 2013, the legislator intended to enact specific rules for energy supply companies in a dominant position. However, the parliament’s judicial committee in the review process rejected this proposal, as its legal implications were considered premature (apparently, the proposal faced heavy opposition from some Austrian federal states owning incumbent local electricity suppliers).

II YEAR IN REVIEW

Compared to the number of proceedings initiated by the FCA in previous years in the field of agreements and concerted practices restricting competition, public enforcement in the area of abuse of dominance has been very limited. This might also stem from the fact that in a number of recent cases the FCA has not been successful in arguing its case before the cartel courts; examples include the Taxi app case relating to exclusivity clauses, and more recently the Liquid gas tank case relating to tying clauses. In both of these cases, the OGH did not follow the FCA’s arguments claiming an abuse of a dominant position.

Therefore, it is no surprise that the most recent published case (already dating back to December 2015) in which the OGH found an abuse of a dominant position stems from a proceeding directly instituted by a competitor rather than ex officio by the FCA: in the Old-packaging recycling case, a competitor requested that another competitor be prohibited from abusing its dominant position by offering unprofitable prices for its services (collection and recycling of packaging). The request was granted by the OLG as regards the collection of certain types of packaging, and the OGH subsequently confirmed the finding of an abuse of a dominant position by predatory pricing.
Another case not directly relating to abuse of a dominant position under the KartG concerns a monopoly undertaking’s obligation to enter into a contract that was published only very recently. In this decision, the OGH sets out the obligation of a subsidiary of a publicly owned company operating an airport with a taxi area (on private ground) to conclude a contract with taxi drivers, who depend on access to this area for providing airport taxi services to their customers. The OGH’s ruling again confirms previous rulings that a monopolist’s refusal to contract or termination of a contract can only be based on justified reasons. The decision also clarifies that this obligation is not limited to publicly owned companies or to companies offering public utilities (i.e., public transport).

Another interesting Austrian case on a possible abuse of a dominant position, which has already kept the courts busy for more than eight years, relates to the newspaper boxes in front of and inside the Viennese subway stations offering the (free) Austrian yellow-press newspaper, Heute. The case was initiated by a competitor publishing another yellow-press newspaper, Österreich, also offered free of charge, which requested that the Viennese subway operator be prohibited from only allowing one (other) competing newspaper publisher to offer its newspaper (Heute) in front of and inside the Viennese subway stations free of charge. The competitor argued that such practice constitutes a violation of Section 5 Paragraph 1 No. 2 KartG (restricting offerings to the detriment of consumers), Section 5 Paragraph 1 No. 3 KartG (applying different conditions to equivalent services) and Article 102 TFEU. The OLG granted the request with regard to three specific subway stations but dismissed the remainder of the claim. Both parties appealed against this decision, and the OGH set aside the ruling and referred the case back to the OLG to further assess the exact market definition in order to assess the alleged dominant position of the Viennese subway station operator. Although this case has been ongoing for several years, so far no final judgment has been published.

Due to the small number of cases related to abuse of a dominant position, the table below lists the most important (fine) decisions in abuse of dominance cases before the Austrian cartel courts in recent years:

<table>
<thead>
<tr>
<th>Year</th>
<th>Sector</th>
<th>Company</th>
<th>Conduct</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007</td>
<td>Financial services</td>
<td>Europay Austria Zahlungsverkehr GmbH</td>
<td>Discriminatory pricing, exclusionary practices</td>
<td>€7 million</td>
</tr>
<tr>
<td>2009</td>
<td>Telecommunication</td>
<td>Telekom Austria TA AG</td>
<td>Abuse of a dominant position (not specified)</td>
<td>€1.5 million</td>
</tr>
<tr>
<td>2011</td>
<td>Award of movie copies</td>
<td>Constantin Filmverleih</td>
<td>Refusal to supply</td>
<td>€150,000 and an obligation to provide copies of films to all requesting cinemas</td>
</tr>
<tr>
<td>2012</td>
<td>Rail freight transport</td>
<td></td>
<td>Alleged discriminatory prices depending on whether the main run was procured together with the pre-carriage and delivery</td>
<td>No infringement found by the cartel court</td>
</tr>
</tbody>
</table>

10 OGH 20 February 2018, 4 Ob 13/18t.
11 OGH 11 June 2015, 16 Ok 8/14h; the most recent decision was delivered in 2017, but does not deal with the issue of dominance and was only limited to the alleged bias of the responsible judge (OGH 28 March 2017, 2 Ob 4/17b).
III MARKET DEFINITION AND MARKET POWER

i Market definition

The assessment of whether a company enjoys a dominant position is closely linked to the definition of the relevant product and geographic market. Before the Austrian courts, the market definition is an issue of fact when it comes to examining the objective delimitation criteria, and a legal question when it comes to choosing the methods to define a market.12

When defining the relevant product market, the FCA and cartel courts follow the demand-side substitution concept, and thus analyse the substitutability of the goods or services from the demand-side perspective.13 However, in cases where the market position of a supplier or manufacturer is to be determined, it is also necessary to include the substitutability of the goods or services from the supply-side perspective (i.e., whether other suppliers or manufacturers are able and willing to adapt their product portfolio or production within a short time and without significant costs) when defining the relevant product market.

The small but significant and non-transitory increase in price (SSNIP) test is often used when defining the relevant market. However, in accordance with the European Commission,14 the OGH takes the view that in cases of abuse of dominance, this test should be dealt with carefully, as the prices of a company holding a dominant position might already be above market level, with a further small price increase causing the demand-side to switch to a (false) substitute that could result in a too-broad market definition.15

In accordance with EU law, the geographic market comprises the area in which the companies concerned compete, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because of appreciably different competitive conditions.16 Factors for determining the relevant geographic market are thus the characteristics of the product (i.e., durability, limited transport capacity), the existence of market entry barriers or consumer preferences as well as significantly varying market shares of competitors in neighbouring areas. Thus, the geographic market is also defined through a substitutability test.

In practice, in legal proceedings before the cartel court, questions concerning market definition are very often dealt with by court-appointed experts, with the cartel court frequently and to a large extent relying on the expert’s opinion. Thus, challenging an expert’s findings as regards the relevant markets in an appeal (which is limited to questions of law) can be quite difficult.

ii Dominance

While single dominance has a long tradition in the Austrian antitrust rules, specific rules on joint dominance have only been incorporated into the Austrian legal regime with the Cartel Amendment Act 2012, which entered into force on 1 March 2013.

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13 See, for example, OGH 2 December 2013, 16 Ok 6/12.
14 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 19.
15 OGH 25 March 2009, 16 Ok 4/08.
16 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 8.
Single dominance

According to the definition in Section 4 Paragraph 1 KartG, a company has single dominance if it is not subject to any or only insignificant competition, or in comparison to all other competitors holds a ‘superior market position’. Section 4 Paragraph 1 Sentence 2 KartG further substantiates that a company’s financial strength, its links to other companies, its access to the supply and sales markets as well as market barriers for other companies should all be taken into account when determining the existence of single dominance.

In addition to the characteristics of the respective company, it is also necessary to consider the market structure, particularly the number of competitors and their respective market shares.

When calculating market shares, the activities of all companies belonging to the same group active on the relevant market have to be taken into account. As an Austrian company particularity, the turnover of any non-controlling participations of at least 25 per cent may also have to be taken into account when it comes to market share calculation.\(^{17}\)

Overall, the respective market share of a company (including its group companies) is still considered the most important factor in determining market power in case law. The OGH has classified a company having a 95\(^{18}\) and 65\(^{19}\) per cent market share as holding a dominant position. In cases of market shares below 60 per cent, particular consideration is given to the market position of the other competitors: that is, whether they have similar market shares, or whether one company is the only ‘major’ player with its competitors playing just a minor role on the market. In its assessment, the authorities and courts also take into account how market shares have developed to date and what is to be expected in the near future.

In addition to the market share of a company and under the criteria set out in Section 4 Paragraph 1 Sentence 1 KartG, the authorities and courts also take into account possible technical leadership or commercial know-how, outstanding innovation capability, access to public funding or vertical integration of the company when determining single dominance.

In addition to the general clause of Section 4 Paragraph 1 KartG, Austrian antitrust law foresees (rebuttable) market dominance presumption thresholds in Section 4 Paragraph 2 KartG in the case of a company holding a market share of:

\[a\] at least 30 per cent;

\[b\] more than 5 per cent, with only two other competitors being active on the same market; or

\[c\] more than 5 per cent, with the company belonging to the four biggest companies on the market, which together hold a combined market share of at least 80 per cent.

In these cases, the onus is on the company to prove that it does not have a market dominant position as stipulated in Section 4 Paragraph 1 KartG. To rebut the above presumptions of market dominance, companies generally base their arguments on the presence of strong competitors, low market entry barriers, a strong countervailing market side and overall significant competition on the market.

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\(^{17}\) However, indirect participations of at least 25 per cent normally will only be considered if there is also a controlling influence at the preceding level (cf OGH 17 December 2001, 16 Ok 9/01).

\(^{18}\) OGH 11 October 2004, 16 Ok 11/04.

\(^{19}\) OGH 22 June 1999, 4 Ob 90/99k.
In practice the threshold of a 30 per cent market share receives a great deal of attention in particular in merger control proceedings, while the other two presumptions so far have not gained any major practical importance, especially since the entry into force of the new presumptions for collective dominance (Section 4 Paragraph 2a KartG).

**Collective dominance**

Section 4 Paragraph 1a KartG was incorporated into the Cartel Amendment Act 2012 and defines collective dominance under Austrian antitrust law. According to this provision, two or more companies hold a collective market dominant position if there is no significant competition between them, and they are not subject to any or only insignificant competition or together hold a ‘superior market position’ in comparison to all other competitors.

When determining whether two or more companies collectively hold a dominant position, the same principles relevant for the assessment of single dominance are used (see in detail above). However, so far, we are not aware of any published Austrian case law where collective dominance was established.

As for single dominance, a (rebuttable) presumption for collective market dominance exists if three or less companies hold a combined market share of at least 50 per cent, or five or less companies hold a combined market share of at least two-thirds.

In these cases, the onus is on these companies to prove that they do not hold a collectively dominant market position as stipulated in Section 4 Paragraph 1a in connection with Section 4 Paragraph 1 KartG. Thus, for a rebuttal of the presumption of collective dominance, companies have to either show that there is significant competition between them or that they do not collectively fulfil the dominance criteria set out in Section 4 Paragraph 1 KartG.

**‘Relative’ dominance**

A company is also considered dominant if it has a paramount market position relative to its customers or suppliers; in particular, such ‘relative’ market dominance exists when customers or suppliers are dependent on continuing their business relationship with a company if they do not want to suffer severe economic disadvantages.

‘Relative’ market dominance exists if the respective business partner depends on a specific good or service (only) offered by a company taking into account possible alternative sources of supply or demand.\(^{20}\) So far, the Austrian courts have established ‘relative’ market dominance in cases of a (vertically integrated) film distributor in relation to its customers (i.e., independent movie theatres).\(^{21}\)

**Prohibition on granting dissimilar trading conditions for non-dominant companies**

As already outlined above, the cartel courts are also competent to enforce the NahversorgungsG, which is not limited to companies holding a dominant market position. In particular, Section 2 NahversorgungsG allows an injunction against a supplier on the wholesale level (or a dealer on the retail level) requesting or granting dissimilar conditions to retailers (or wholesalers, respectively) without an objective justification. Claimants often try to use the provisions of the NahversorgungsG in the event that they have difficulty establishing the dominant market position of a defendant.

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\(^{20}\) OGH 1 July 2002, 16 Ok 5/02.

\(^{21}\) OGH 1 July 2002, 16 Ok 5/02; OGH 16 July 2008 16 Ok 6/08.
Note that while the title of the NahversorgungsG might suggest that it only applies to sectors relevant for local (food) supply (e.g., food retailers, supermarkets), the OGH has also applied its provisions to other economic sectors such as round timber and running shoes.

IV  ABUSE

i  Overview

Section 5 Paragraph 1 KartG contains a general prohibition on abusing a dominant market position, and also sets out a non-exhaustive list of specific types of abusive conduct (Section 5 Paragraph 1 Nos. 1 to 5 KartG). In general, the concept of abuse of a dominant market position under Section 5 KartG largely corresponds to the provision in Article 102 TFEU. Therefore, the case law of the European Commission as well as the EU courts in the field of dominance is also relevant to domestic Austrian cases.

ii  Exclusionary abuses

Section 5 KartG prohibits exclusionary conduct ranging from predatory pricing to margin squeeze, loyalty rebates, (long-term) exclusivity clauses in vertical agreements as well as tying and bundling, price tying, and refusal to deal or supply.

With regard to predatory pricing, the Austrian Supreme Court followed the ECJ rulings in AKZO, Tetra Pak II and Post Danmark, according to which prices below the average variable costs are considered an indication of exclusionary conduct. It further held that in cases where prices are set above the average variable costs, but still below the overall costs, they are only considered abusive if it can be demonstrated that they are used to exclude competitors.

By reference to the Post Danmark judgment, the Supreme Court confirmed the long run incremental cost method used in a case by a court-appointed expert to establish the existence of predatory pricing.

Furthermore, Section 5 Paragraph 1 No. 5 KartG (as Article 102 TFEU) specifically stipulates the abusive character of selling goods below cost. Based on the case law of the Austrian cartel courts, this provision only applies to the selling of goods below cost for a certain period and not to selling services. Moreover, Section 5 Paragraph 2 KartG stipulates that the dominant company may rebut an appearance of sales below cost or provide an objective justification (e.g., because the expiry date of the products is approaching).

To date, the OGH has not had to issue a material decision on a margin squeeze case. However, the OLG held in an obiter dictum in 2002 that a company with a dominant position is not obliged to set its prices at a level to guarantee its competitors commercial success. According to the OLG, this is also true for cases where competitors purchase an

23 OGH 26 June 2014, 16 Ok 12/13.
26 ECJ, 27 March 2012, case C-209/10, Post Danmark.
27 OGH 9 October 2000, 16 Ok 6/00.
28 OGH 8 October 2015, 16 Ok 9/15g.
29 OGH 16 December 2002, 16 Ok 10/02.
intermediate product from the dominant company.\textsuperscript{30} Once a question of material law related to margin squeeze conduct has reached the OGH, it will be seen whether it will uphold this rather sceptical approach by the OLG or will follow the ECJ’s case law.\textsuperscript{31}

With regard to rebates, the OGH follows the ECJ’s distinction between generally admissible quantity rebates and generally inadmissible target and loyalty rebates.\textsuperscript{32} However, case law on exclusionary conduct stemming from inadmissible rebates is rather limited in Austria.

The OGH has dealt with a number of cases relating to the obligation to contract by dominant companies.\textsuperscript{33} For example, the OGH recently affirmed the obligation of the Austrian Federal Railways to allow its only private competitor, Westbahn, to participate in the Austrian Federal Railways electronic timetable information system.\textsuperscript{34}

### iii Discrimination (including discriminatory pricing)

Section 5 Paragraph 1 No. 3 KartG prohibits discrimination of contract partners by the application of dissimilar conditions to equivalent transactions, thereby placing them at a competitive disadvantage. A similar prohibition of discrimination for wholesalers and retailers (even if not in a dominant position) is contained in Section 2 Paragraph 1 NahversorgungsG (see above; a violation against this prohibition allows the contracting party to claim for injunctive relieve but does not lead to any fines). Under both provisions, the most common discriminatory behaviour is discriminatory pricing.

A transaction is considered to be equivalent and requires equal treatment where the various contract partners are in the same position towards the supplier.\textsuperscript{35} With regard to possible objective justifications, the OGH takes the view that, \textit{inter alia}, different delivery terms, transportation costs or statutory frameworks in different countries can provide objective justifications for applying different conditions to equivalent transactions.\textsuperscript{36}

### iv Exploitative abuses (including excessive pricing)

The main statutory provision prohibiting exploitative abuses, including (but not only) excessive pricing is Section 5 Paragraph 1 No. 1 KartG. This provision was amended with the Cartel Amendment Act 2012, and changed from a wording that corresponded to Article 102 Letter a TFEU to an almost identical wording as Section 19 Paragraph 2 No. 2 of the German Act against Restraints of Competition. However, the case law relating to the former Section 5 Paragraph 1 No. 1 KartG may still be used for interpretation purposes.\textsuperscript{37}

So far, there has been only one case before the OGH based on this amended provision. Therein the OGH, by referring to German case law,\textsuperscript{38} held that requesting excessive prices or other exploitative conditions from a contract partner is not limited to contract negotiations,

\textsuperscript{30} OLG 14 May 2002, 29 Kr 554, 555/00.
\textsuperscript{31} ECJ, 14 October 2010, case C-280/08P, \textit{Deutsche Telekom/Commission}; 17 February 2011, case C-52/09, \textit{TeliaSonera}.
\textsuperscript{32} OGH 22 June 1999, 4 OB 90/99k; 11 October 2004, 16 Ok 9/04.
\textsuperscript{33} OGH 20 December 2005, 16 Ok 23/04; 4 April 2004, 16 Ok 20/04; 16 July 2008, 16 Ok 6/08.
\textsuperscript{34} OGH 11 October 2012, 16 Ok 1/12.
\textsuperscript{35} OGH 10 March 2003, 16 Ok 1/03.
\textsuperscript{36} OGH 9 June 2010, 16 Ok 1/10.
\textsuperscript{37} OGH 12 September 2007, 16 Ok 4/07.
\textsuperscript{38} BGH KVR 13/83, WuW/E BGH 2103.

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but is also applicable to an ongoing contractual relationship when refusing to lower prices or allow changes to the contract. Moreover, it stipulated that only a significant price excess compared to the price that would have to be paid in a competitive environment falls under Section 5 Paragraph 1 Nr 1 KartG.

V REMEDIES AND SANCTIONS

i Sanctions

The legal nature of fines imposed for antitrust violations under Austrian law is not clear. Austrian antitrust fines share some of the characteristics of criminal sanctions as well as of the sanctions under administrative criminal law, but are imposed by the cartel courts as civil courts, and not by the criminal courts or an administrative authority. The OGH considers them to have a hybrid nature having some similarities with criminal sanctions.

According to Section 29 KartG, a fine requires an intentional or negligent violation of the antitrust law. Thus, when imposing a fine upon a company for abusing a dominant position, it is necessary to identify one or more individuals who have committed the infringement intently or negligently, and whose acts or omissions can be attributed to the company. However, similar as found under EU competition law, the standard for proving an intentional or negligent infringement is not very high. In an abuse of dominance case, the FCA can request a cartel court to impose a fine of up to 10 per cent of the overall group turnover of the last business year.

Section 30 Paragraph 1 KartG stipulates that the amount of a fine shall be based on the gravity and duration of the infringement, the illicit gain from the infringement, the degree of liability and the economic strength of the perpetrator. Since 1 March 2013, Section 30 Paragraph 2 and 3 KartG sets out aggravating (e.g., repeat offender) and mitigating (e.g., own termination of infringement, cooperation, damage payments) factors.

Fines are imposed on the undertaking normally being the company that committed the abuse. However, as under EU law, fines may also be imposed on a parent company in cases where a subsidiary did not act autonomously on the market but followed the instructions of the parent company (single-economic entity doctrine). In a vertical price-fixing case, the OGH already has used the EU law concept of parental liability to fine the company committing an infringement as well as its four direct and indirect controlling shareholders. Thus, it can be assumed that the Austrian cartel courts will follow the single-economic entity doctrine for calculating fines and attributing liability also in cases of fines for abuse of a dominant market position.

ii Behavioural remedies (including interim measures)

Section 26 Sentence 1 and 2 KartG allows the OLG to issue (proportionate) restraining orders to end an abusive behaviour. These orders require a prior request by the official parties.

39 OGH 16 September 2014, 16 Ok 13/13.
40 OGH 26 June 2006, 16 Ok 3/06; 12 September, 16 Ok 4/07.
41 OGH 5 December 2011, 16 Ok 2/11.
42 ECJ, 10 September 2009, case C-97/08P, Akzo Nobel ao/Commission.
43 OGH 8 October 2015, 16 Ok 2/15b (16 Ok8/15k).
to the cartel proceedings, that is, the FCA or the Federal Cartel Prosecutor (FCP), or by an interested company. Often such requests to end an abusive behaviour are combined with a request for an interim injunction according to Section 48 Paragraph 1 KartG.

As an alternative to ordering a company to cease an infringement, the OLG may issue binding commitments if it can be expected that these preclude an abusive behaviour in the future (Section 27 Paragraph 1 KartG). In contrast to commitment decisions of the European Commission, such decisions can only be passed on the basis of the (tacit) assumption that there was an infringement. In cases of commitments, the OLG has to reopen a case if the facts have changed significantly, the company in question does not comply with its commitment, or if the decision was based on incomplete, incorrect or misleading information.

iii  Structural remedies

In a proceeding requesting the ending of an abuse of dominance, the OLG may also order structural remedies (i.e., a change in the company structure). However, such structural measures may only be imposed if no other effective remedies are available, or if these alternatively effective remedies would result in a greater burden for the company (Section 26 Sentence 3 KartG). The OGH explicitly held that such structural remedies may only be imposed in particularly severe cases of an abuse of dominance, and are in any case subsidiary compared to all other available measures.44

VI  PROCEDURE

Abuse of dominance cases are either investigated by the FCA (ex officio or on the basis of complaints), or are commenced directly by parties claiming harm from an alleged abusive behaviour initiating proceedings in front of the cartel court.

i  Commencement of proceedings

Proceedings may be commenced by the official parties (i.e., the FCA or the FCP), in particular based on market investigations or more often on third-party complaints (i.e., consumer associations, competitors, customers or suppliers). The FCA may send formal or informal information requests and questionnaires to the investigated undertaking and to third parties, or (subject to a court order) may also conduct surprise inspections or dawn raids to gain further evidence in connection with an alleged abusive conduct to copy or seize documents and electronic files.

Alternatively, parties claiming harm from an alleged abusive behaviour can directly commence proceedings in the cartel court (requesting that a certain behaviour is stopped or that it is determined that past behaviour was an abuse of dominance). In addition, in some cases parties may also claim that a certain behaviour was an illegal abuse of a dominant market position in a civil law proceeding before the ordinary courts.

ii  Right to be heard

During the proceedings of the cartel court, based on the fundamental right to a fair trial, every party has the right to be heard during all stages of the proceedings, and is entitled to be represented by an attorney-at-law at all times.

44 OGH 19 January 2009, 16 Ok 13/08.
In the event that the FCA plans to initiate proceedings before the cartel court following an investigation, it has to inform the (prospective) defendant about the results of its investigation and give the defendant the possibility to comment on them.\(^{45}\) In case the event that the FCA’s investigation does not give a reason for the commencement of proceedings before the cartel court, the defendant also has to be informed within a reasonable period.\(^{46}\)

### iii Settlements

Informal settlements between the FCA and the (alleged) perpetrator before the commencement of proceedings before the cartel court make up the majority of antitrust fine cases in Austria. The FCA published a guidance paper on settlements in 2014.\(^{47}\) After the decision in a vertical price-fixing case in the retail sector that did not involve a settlement,\(^{48}\) where the OGH multiplied the fine initially imposed by the OLG by 10, the incentive for companies to settle fine cases has even increased further (at least in cases were it is likely that an infringement ultimately can be proved by the official parties).

In dominance cases, those types of settlements so far are not that common. At the same time, in the case of proceedings initiated by private claimants, sometimes the parties agree on a settlement in the cartel court proceedings or out of court (by means of a settlement agreement).

### iv Appeal proceedings

Decisions of the OLG may be appealed with the OGH. The OGH may only review decisions on questions of law, and therefore typically cannot review decisions as regards questions of fact. Thus, the review is rather limited, and in particular does not encompass the consideration and assessment of the evidence made by the OLG.

### VII PRIVATE ENFORCEMENT

Private antitrust litigation in Austria has substantially increased in recent years. To a large extent, such growth can be attributed to an increase of cartel court decisions imposing fines against cartel members based on intensified enforcement activity of the FCA and the FCP. The OGH in several cases has affirmed the possibility of claims for damages for directly damaged parties\(^{49}\) as well as for indirectly damaged parties,\(^{50}\) including cases where damages were allegedly caused by cartel outsiders (umbrella pricing).\(^{51}\)

\(^{45}\) Sec 13 Paragraph 1 of the Act on the foundation of the Federal Competition Authority (Wettbewerbsgesetz).

\(^{46}\) Sec 13 Paragraph 2 Wettbewerbsgesetz.


\(^{48}\) OGH 8 October 2015, 16 Ok 2/15b, 8/15k.

\(^{49}\) OGH 26 May 2014, 8 Ob 81/13i.

\(^{50}\) OGH 2 August 2012, 4 Ob 46/12m.

\(^{51}\) OGH 29 October 2014, 7 Ob 121/14s.
i Private right of action

With the Austrian Cartel and Competition Law Amendment Act 2017 implementing the EU Damages Directive, the Austrian private enforcement regime changed significantly. The provisions on the compensation of harm caused by infringements of the antitrust law (Sections 37a to 37m KartG) entered into force retroactively as of 27 December 2016 (apart from the provision in Section 37m concerning the imposition of fines). Thus, the substantive provisions apply to harm incurred after 26 December 2016; for all damages arising before this date, the old regime has to be applied.

ii Collective actions

Austrian law does not provide for class actions as found in Anglo-American legal systems (neither on an opt-in nor an opt-out basis). Recently, Austrian-style ‘class actions’ have been brought before courts mainly by the Association for Consumer Protection (VKI) through individual consumers assigning their claims to the VKI, which then tries to combine these claims in a single court proceeding. However, courts have differed in their treatment by either treating them as separate single proceedings, by joinder of claimants, or by having one ‘test proceeding’ (while staying the other proceedings) that then serves a similar function to a ‘precedent’ for the other claims.

iii Calculating damages

Under Austrian law, antitrust damages are limited to the actual loss suffered, which also includes lost profits plus statutory default interest calculated from the date when the harm occurred. Thus, Austrian law does not allow claims for punitive or treble damages, and also does not take into account possible fines imposed by competition authorities.

According to Austrian case law, antitrust damages are calculated by comparing the actual financial situation of the injured party after the infringement with the counterfactual hypothetical scenario without the damaging infringement.

Furthermore Austrian law allows the courts to estimate the quantum of the damages if the liability has already been established and the injured party was able to establish that it has suffered damages due to an antitrust infringement (i.e., the injured party has to prove the ‘first euro’ of its damages).

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55 The applicable statutory default interest is 4 per cent (Section 1000 (1) General Civil Code (ABGB)), except for claims from contractual relationships between businesses, which is 9.2 per cent +/- base interest (Section 456 Austrian Business Code (UGB)).
56 OGH 15 May 2012, 3 Ob 1/12m.
57 In one case, the allegedly injured party was not able to establish that it had suffered damages in follow-on litigation from the Escalator cartel as the claimant (due to lack of contractual documentation) was only able to make estimates of the prices paid to the cartel members rather than the actual prices paid (cf OGH 3 Ob 1/12m).
Austria

iv  Interplay between government investigations and private litigation

Section 37i (2) KartG stipulates that decisions of the cartel court, the European Commission or the national competition authorities of other EU Member States establishing an infringement have a binding effect for the Austrian civil courts as regards illegality and culpability. Therefore, in a follow-on scenario, claimants ‘only’ have to establish the damage incurred and a causal link between the infringement and such damage.

VIII  FUTURE DEVELOPMENTS

Based on the limited activity of the FCA in dominance cases in the past, we do not consider it very likely that the FCA will suddenly change its approach towards being more active in this area in the near future. Rather, we would expect that the public enforcement focus will remain on agreements and concerted practices restricting competition (in particular vertical agreements) and merger control. Therefore, enforcement activity in the field of dominance to a large extent will depend on private parties pursuing their claims directly (on a stand-alone basis and not as a follow-on action).
Chapter 4

BELGIUM

Robbert Snelders, Thomas Woolfson and Athina Van Melkebeke

I INTRODUCTION

Abuses of dominance are prohibited under Belgian law pursuant to Article IV.2 of the Code of Economic Law (CEL). Article IV.2 of the CEL is the domestic equivalent of Article 102 of the Treaty on the Functioning of the European Union (TFEU), and its wording is almost identical to the EU provision. As expressly acknowledged by the Belgian legislature, Article IV.2 of the CEL is intended to be a ‘carbon copy’ of Article 102 of the TFEU to align the interpretation of the Belgian and EU rules on dominance. In effect, such a legal transplant allows companies to rely on EU precedents before the Belgian Competition Authority (BCA) and the Belgian courts, that is, on the European Commission’s decisional practice and the case law of the EU General Court and the European Court of Justice.

In the same spirit, Article I.6 of the CEL defines the notion of dominant position in the same way as the European Court of Justice did in Hoffmann-La Roche, namely as a position enabling an undertaking to ‘prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers’. Again, that transplant was expressly intended by the Belgian legislature to ensure consistency with EU precedents in the application of dominance rules and, therefore, to bring as much legal certainty as possible in an area of competition law that is notoriously unstable. References to EU case law are therefore very common before the BCA and the Belgian courts, which rely heavily on EU precedents in their decisions and judgments irrespective of whether Articles IV.2 of the CEL and 102 of the TFEU are applied jointly or not. In the absence of Belgium-specific guidelines or policy statements on the application of Article IV.2 of the CEL, the Commission Guidance Paper can also be used as a source of authority in the Belgian context, at least as much as it can be relied upon in the EU context.

1 Robbert Snelders is a partner and Thomas Woolfson and Athina Van Melkebeke are associates at Cleary Gottlieb Steen & Hamilton LLP. The authors wish to thank Damien MB Gerard, case handler at DG COMP, who drafted this chapter in recent years. The authors also wish to thank François-Guillaume de Lichtervelde and Thomas Verheyden, stagiaires with Cleary Gottlieb Steen & Hamilton LLP, for providing input and assistance for the 2018 edition of this chapter.

2 Ibid., page 10.


5 Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009]
Moreover, Belgium has so far refrained from taking advantage of the flexibility afforded by Article 3(2) of Regulation 1/2003, that is, from ‘adopting and applying on [its] territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings’. In particular, Belgian law does not know notions such as abuse of economic dependency, and does not contain specific provisions on unilateral practices applying to specific sectors of the economy, such as the energy or telecommunications sectors. However, as is the case at the EU level, competition rules apply to state-owned enterprises and undertakings benefiting from special rights ‘in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them’. According to the theory known as the ‘reflex effect’ of competition law on the law of unfair trade practices (now included in Book VI of the CEL), a commercial practice implemented by a dominant company that is considered permissible under Article IV.2 of the CEL (and Article 102 of the TFEU) cannot constitute an unfair trade practice insofar as the essence of the plaintiff’s claim relates to an impediment to the functioning of the free market resulting from that practice (save for a case of abuse of right). In other words, the law on unfair trade practices is not supposed to catch unilateral practices that are not caught by or are compliant with Article IV.2 of the CEL.

In theory, Belgian and EU rules on dominance are therefore perfectly aligned. However, in practice, Belgian law is characterised by the same tensions that have long affected the enforcement of dominance rules at EU level, notably between a more formal and a more effects-based approach to the assessment of abusive practices. In particular, Belgian courts sometimes rely on somewhat formalistic reasoning and tend to interpret Article IV.2 of the CEL in the light of perceived ‘fairness’ requirements (i.e., without assessing the existence of (likely) anticompetitive effects or the actual incentives of dominant undertakings to engage in foreclosure strategies).

II YEAR IN REVIEW

Throughout the 2008 to 2017 period, the BCA adopted approximately one-third of its decisions on the basis of Articles IV.2 of the CEL and 102 of the TFEU. This high average conceals a drop over the past couple of years, which suggests convergence between the BCA and competition authorities in neighbouring jurisdictions and at the EU level (independent

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OJC 45/7 (Commission Guidance Paper).
7 As is the case at EU level, compliance with the applicable regulatory framework does not shelter dominant undertakings from the application of competition – including dominance – rules (see, for example, Competition Council, case 2012-P/K-32, Publimail, Link2Biz International and G3 Worldwide Belgium/ bpost, 10 December 2012, paragraph 281). See also the presumption of discriminatory abuse of dominance provided for at Article 23 ter of the 1999 Electricity Act (Official Gazette, 11 May 1999, page 16,264).
8 Article IV.12 of the CEL.
9 That theory was upheld by the Belgian Supreme Court in 2000 (see Cass., 7 January 2000, Multipharma/ Louis Widmer, RCJB, 2001, page 255).
10 Some restrictions still apply to consumer sales in relation to, for example, product bundling.
11 For a more recent restatement, see Court of Appeal of Brussels, 27 February 2014, Bureau d’Assurances Desert/AXA, (case 2013/AR/1783), paragraph 6, as published in TBM/RGB, page 353.
of commitment decisions). In 2017 there was slightly more activity by the BCA, which issued one abuse of dominance decision on the merits, and found *prima facie* evidence of abuses of dominance in two interim measures decisions.

### BCA

In 2017, the BCA found for the first time that ‘denigrating practices’ could constitute an abuse of dominance in its *Algist Bruggemans* (*AB*) decision. In addition, the BCA adopted two noteworthy interim measures decisions.

On 22 March 2017, the BCA adopted a decision finding that Belgium’s leading supplier of baking yeast products, *AB*, had engaged in anticompetitive vertical restraints and abusive exclusionary practices in the market for fresh yeast between January 2008 and June 2013.12 *AB* supplies large and industrial bakeries directly, and also relies on a network of distributors to supply smaller and artisan bakeries. In addition to various breaches of Articles 101 TFEU and IV.1 of the CEL, the Auditorate found that *AB* had breached Articles 102 TFEU and IV.2 of the CEL by implementing various measures to impede sales of yeast products by cheaper competitors, namely by offering loyalty enhancing rebates, by entering into long-term exclusive supply agreements and by undermining competing products’ reputation. First, *AB* granted various rebates:

- *a* it offered rebates to distributors, as well as indirect compensations such as free yeast supplies or withholding the passing-on of price increases if they excluded (lower-priced) competitors;
- *b* it offered (retroactive) rebates to certain large distributors for purchasing (quasi) 100 per cent of their volume of the previous year from *AB*; and
- *c* it offered selective rebates (or supplies of free yeast) to certain bakers that had purchased competing yeast brands, or considered doing so, in exchange for loyalty to *Algist* products.

The Auditorate found that these measures were aimed at foreclosing suppliers of lower-priced yeast.

Secondly, the Auditorate found that *AB* had abusively tied the supply of liquid yeast to the acquisition of a dosing installation, for which it unilaterally set a (long) depreciation period factored into the price of the yeast, and which it linked to non-compete clauses for bakers’ yeast purchases.

Thirdly, *AB* had engaged in abusive denigrating practices against Basic Bakery, a competitor that had entered the market in 2008. Notably, *AB* circulated biased internal reports about this competitor’s product (called Enzym) unsupported by findings of official bodies.

The Auditorate found that these practices aimed to create uncertainty about the microbiological aspects and quality of the competing yeast, and to discourage distributors or bakeries from supplying or using the product. After its investigation, the Auditorate entered into settlement discussions with *AB*, which resulted in a decision in which *AB* acknowledged the infringements, and the Auditorate fined the company €5.5 million.

On 19 June 2017, the BCA decided not to order interim measures requested by Medicare-Market (MM) against the Order of Pharmacists (OP), Belgium’s national official...

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association of pharmacists, in a case dealing with the application of dominance rules to a regulated profession benefiting from a legal monopoly.\textsuperscript{13} MM runs a number of pharmacies and para-pharmacies (i.e., shops selling health and well-being products other than regulated medication) in separate but often adjacent locations. MM alleged that the OP had engaged in various practices breaching Articles 101 TFEU and IV.1 of the CEL, and Articles 102 TFEU and IV.2 of the CEL, and applied for interim measures essentially prohibiting the OP from imposing disciplinary sanctions on pharmacists working with MM.

The College (the decisional body in the BCA's two-tier structure) applied the two-pronged test for interim measures: \textit{prima facie} evidence of anticompetitive practices, and an urgent need to avoid a situation likely to cause a serious an imminent prejudice that would be difficult to remedy or to prevent harm to the general economic interest. It found that various practices could \textit{prima facie} constitute breaches of Articles 102 TFEU and IV.2 of the CEL. In particular, it found that the OP’s press campaign about MM’s potential harm to the profession of pharmacists and to patients, and its reproaches against pharmacists working with MM, could constitute attempts to broaden the scope of a legal monopoly beyond the limits set by the legislator to cover para-pharmaceutical products. However, the College found that there was insufficient evidence of a serious, imminent and difficult-to-remedy prejudice, or of a harm to the general economic interest, even though a few pharmacists had resigned from MM pharmacies. The case on the merits is ongoing.

By contrast, on 20 December 2017, the BCA imposed interim measures on the Fédération Equestre Internationale (FEI), the Global Champions League (GCL) and Tops Trading Belgium (TTB) requested by a Belgian equestrian team and a horse rider.\textsuperscript{14} The FEI is the governing body for equestrian sports, and GCL and TTB are organisers of the Global Champions Tour (GCT), an equestrian competition accredited by the FEI. In 2017, the defendants concluded a memorandum of understanding (MoU) regarding the organisation of equestrian competitions and recognition by the FEI, which the complainant alleged breached Articles 102 TFEU and IV.2 of the CEL, notably because it significantly reduced the share of participants selected based on their ranking rather than non-sport related criteria (such as membership in a paying team).

The College considered that the FEI was dominant in the EU market for the organisation and promotion of show-jumping competitions in light of its role as regulator for equestrian sports, as only FEI-accredited events are taken into account for ranking purposes (and, \textit{in fine}, for participation in the Olympic Games). The College considered that the reduction, for GCT events, from 60 to 30 per cent of invitations based on the riders’ official ranking created a difference in treatment between GCT events and other FEI-accredited competitions that was not justified by the specificities of the sport sector. Therefore, it was not unreasonable to conclude that the defendants’ practices might be abusive. The College further found that the harm suffered by riders and teams was sufficiently serious and imminent, and its impact on their image and future activities was difficult to quantify and adequately compensate \textit{ex post}. Consequently, the BCA suspended the MoU insofar as it reduced the share of participants selected based on their ranking below 60 per cent until the adoption of the decision on the merits. The case on the merits is ongoing.

\textsuperscript{13} College, 19 June 2017, decision No. ABC-2017-V/M-24, \textit{Interim measures against Order of Pharmacists} (case CONC-V/M-17/0017).

\textsuperscript{14} College, 20 December 2017, decision No. ABC-2017-V/M-38, \textit{Interim measures against FEI, GCL, and TTB} (case CONC-V/M-17/0037).
Courts

On 23 March 2017, the Commercial Court of Ghent awarded damages to parallel importers of Honda motorcycles, ending judicial proceedings against Honda that had lasted over 10 years. The BCA had previously investigated Honda’s conduct and, in 1999, fined the company for abusing its dominant position on the market for the issuance of Honda motorcycles conformity certificates in Belgium. This decision became final only in 2011 after multiple appeals. In 2006, several parallel importers of Honda motorcycles filed an action for damages against Honda. Honda argued that the plaintiffs’ claims were time-barred pursuant to Article 2262bis of the Belgian Civil Code, which provides for a five-year limitation period for tort-based damages claims, in light of the 1999 BCA decision. The Commercial Court referred a request for a preliminary ruling to the Constitutional Court regarding the starting point of the limitation period for damages claims arising from breaches of competition law. In 2016, the Constitutional Court ruled that limitation periods of antitrust damages claims cannot expire before a final decision of the competition authority (or the end of the investigation by other means). In its judgment, the Commercial Court of Ghent applied this principle, and held that the parallel importers’ damages claims were not time-barred because they were filed while the appeal against the BCA decision was still pending. The Court, however, held that the harm, which stemmed from events dating as far back as 25 years, was practically impossible to quantify, and as a consequence assessed it ex aequo et bono and granted each plaintiff €20,000 (plus interest from 1997).

On 28 June 2017, the Brussels Court of Appeal confirmed the BCA’s 2016 interim measure decision rejecting Alken-Maes NV’s (AM) request to suspend the acquisition of Brouwerij Bosteels NV (BB), a smaller Belgian brewer, by Anheuser-Busch InBev NV (ABI). In September 2016, AM, one of ABI’s competitors complained to the BCA regarding the latter’s planned acquisition of BB. AM argued that, even though the transaction did not meet the thresholds for merger control notification, the acquisition should nevertheless be halted, as it would amount to an abuse of dominance by ABI. According to AM, ABI’s acquisition of BB, including its ‘Karmeliet’ brand, would reinforce ABI’s dominant position and thereby constitute an abuse of this dominant position. AM also filed for interim measures with the BCA requesting the suspension of the acquisition until the decision on the merits of its complaint. At the EU level, concentrations are only reviewed under merger control rules and excluded from procedures for restrictive practices, pursuant to Article 21(1) of the Merger Regulation.

In the BCA decision on the interim measures, the College decided that Article IV.2 of the CEL may still be applied to concentrations that do not meet the merger control thresholds. Interim measures could be imposed only in cases of ‘strong indications’ of an abuse of dominance, which require prima facie adverse effects on competition distinct from

16 Constitutional Court, 10 March 2016, Honda (case 38/2016).
17 Brussels Court of Appeal, 28 June 2017, Alken Maes NV/Belgian Competition Authority (case 2016/MR/2).
the mere effect of the concentration and _prima facie_ evidence that these adverse effects may be qualified as an abuse of dominance. In the case at hand, there was insufficient evidence of restrictions on competition in the case at hand.19

The Brussels Court of Appeal confirmed the BCA’s decision. It held that an acquisition creating a concentration not covered by merger control rules does not as such amount to an abuse of dominance, as other conduct must accompany the concentration. This other conduct must have restrictive effects on competition that are distinguishable from the effects of the concentration itself, and must qualify as a _prima facie_ abuse of dominance (rather than being potentially abusive). The Brussels Court of Appeal further rejected AM’s objections that the BCA’s test was more stringent than the test typically used to assess an abuse of dominance under Articles 102 TFEU and IV.2 of the CEL.

On 13 December 2017, the Brussels Court of Appeal dismissed an appeal by Distripaints NV (Distripaints) and Novelta NV (Novelta) regarding the use of documents seized by the BCA at their premises during dawn raids conducted in 2011 in the context of an investigation into an alleged abuse of dominance and collusion involving chemical producer AkzoNobel NV (Akzo).20 During the BCA’s dawn raids, Akzo distributors Distripaints and Novelta had contested the relevance of documents collected by the BCA, which had therefore been sealed for subsequent review. In 2013, the Auditorate lifted the seal and considered certain documents as within the scope of the investigation (‘in scope’), and the two companies appealed this decision before the Brussels Court of Appeal.

The Court rejected some of their claims in an interim judgment in 2014, but accepted their claim regarding the insufficient statement of reasons provided by the BCA to justify the ‘in-scope’ character of the documents, and ordered the BCA to provide an expanded statement of reasons and the BCA and claimants to discuss whether the documents were ‘in-scope’ or not.21 The BCA provided an expanded statement of reasons, but could not agree with the claimants regarding the ‘in-scope’ character of the documents, so that the Court had to rule on this point. _Inter alia_, the claimants argued that their rights of defence were breached in light of contradictions in the original mission order, in which they were described both as victims of and participants in the various anticompetitive practices, including an abuse of dominance.

In its December 2017 judgment, the Brussels Court of Appeal referred to principles established by the EU courts, and held that its review was marginal and aimed at protecting against arbitrary and disproportionate interventions and to preserve the rights of defence. On this basis, the Court considered that the BCA had appropriately supplemented its statement of reasons for considering documents as ‘in-scope’, with an individual reasoning for each document that was not _prima facie_ unacceptable, unreasonable or illegal. Therefore, the BCA’s ‘in-scope’ documents could remain in the case file.

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19 College, 21 November 2016, decision No. ABC-2016-V/M-36, Alken Maes NV/Anheuser-Busch InBev NV (case CONC-V/M-16/0029).
20 Brussels Court of Appeal, 13 December 2017, Distripaints & Novelta/Belgian Competition Authority (case 2013/MR/9).
III  MARKET DEFINITION AND MARKET POWER

When it comes to market definition and the assessment of dominance, the BCA and the Belgian courts can be generally expected to use the same criteria as the European Commission, the General Court and the European Court of Justice. As noted above, the definition of ‘dominance’ provided by Article I.6 of the CEL is directly derived from the well-known formula expressed by the European Court of Justice in *Hoffmann-La Roche*. Likewise, as under EU law, it is essential under Belgian law to first define the relevant markets before assessing whether an undertaking holds a dominant position.

Unsurprisingly, the main criterion used to define the relevant product and geographic markets is that of ‘substitutability’, which is first of all assessed on the demand side. Products and services are considered part of the same market if they are regarded as substitutable for users or consumers, by reason of their characteristics, prices and intended use. The assessment of substitutability should also reflect any sources of potential competition (new products, potential entry of a new competitor on the geographical market, etc.), and any relevant constraint that may affect the demand structure, such as the existence of a specific regulatory framework. In addition, the substitutability does not need to be perfect if it is effective for a part of the goods or services at issue that is significant enough to materially affect factors driving competition, in particular prices.

Practically, decisions by the BCA and judgments by the Belgian courts typically describe, first of all, the contentious commercial practice, to ascertain the competitive environment affecting the supply and demand of the affected products or services. Then market definitions previously adopted at the European or Belgian level (but also by the competition authorities of neighbouring countries) are generally considered a useful, if not decisive, starting point.22

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22 See, for example, decision No. 2010-P/K-42-AUD, *Freedom CVBA/InBev Belgium NV*, paragraph 75.
Potentially converging arguments of the parties involved are further likely to influence the market definition.\textsuperscript{23} It is also common to consider several possible definitions and to test whether the defendant can be deemed to hold a dominant position under any of them. If this is not the case, or is not such as to affect the outcome of the competitive analysis, it is also common practice to leave open the question of the exact definition of the relevant markets. Generally, even though somewhat dated, the Commission’s guidance on the definition of relevant markets is frequently relied upon before both the BCA and the Belgian courts, so that arguments relying on such guidance will often carry particular weight.\textsuperscript{24}

In line with practices at the EU level, the assessment of dominance requires consideration of various factors that, taken separately, are not necessarily determinative.\textsuperscript{25} Among these factors, considerable importance is given to market shares. Although the CEL does not provide for a market-share threshold above which an undertaking would be deemed dominant, the BCA has considered in the past that a market share exceeding 50 per cent entailed a presumption of dominance.\textsuperscript{26} Likewise, a market share exceeding 40 per cent, while not decisive in itself, has been viewed as a very important indication of the existence of a dominant position.\textsuperscript{27} Conversely, the BCA has also proved that it is open to more sophisticated approaches whereby ‘a considerable market share is not automatically considered as equivalent to a dominant position’.\textsuperscript{28} Overall, Belgian practice recognises the need to assess the position of an allegedly dominant company in comparison with the position of its competitors and to consider in particular, as a proxy for the ability to circumvent competitive constraints and as evidence of a possibility to behave independently of competition: the differences in market shares;\textsuperscript{30} the evolution in time of market shares; the concentration index of the relevant

\textsuperscript{23} For example, in Base/Belgacom Mobile, the Council found that, with regard to the geographical scope, all parties seemed to agree that the relevant market was the Belgian territory, and the Council subsequently adopted such a decision (decision No. 2009-P/K-10, Base/BMB, paragraph 130).

\textsuperscript{24} Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJC 372/5.

\textsuperscript{25} Decision No. 2008-P/K-10-AUD, FEGE/Idelux, page 6; decision No. 2009-P/K-10, Base/BMB, paragraph 139.

\textsuperscript{26} For a recent case, see decision ABC-2015-P/K-09-AUD of the Auditorate of 26 March 2015 in case CONC-P/K-09/0002, Lampiris/Electrabel, paragraphs 101–118.

\textsuperscript{27} In Unie der Belgische Ambulancediensten/Belgische Rode Krois (decision No. 2001-V/M-22), the BCA considered that a market share of above 40 per cent gives a ‘strong indication’ of dominance, whereas a market share below 30 per cent, in the absence of additional factors, is ‘not indicative’ of dominance. For a discussion relying on the Commission Dominance Paper, see also decision No. BMA-2014-P/K-23-AUD of the Auditorate of 2 December 2014 in case MEDE-P/K-11/0027, NV Handling CO/Sony Pictures, The Walt Disney Company (Benelux), Universal Pictures International Belgium, Twentieth Century Fox Film Belge and Warner Bros Studios Leuven in Lim. For a discussion by a Belgian court, see, e.g., Court of Appeal of Brussels, Bureau d’Assurances Desert/AXA Belgium, 27 February 2014 (case 2013/AR/1783), TBM/RCB, 2014/4, page 352.

\textsuperscript{28} Decision No. 2009-P/K-10, Base/BMB, paragraphs 150 and 154.


\textsuperscript{30} For example, the BCA has considered that a difference of 40 per cent between the market share of a dominant undertaking and its largest competitor constitutes in itself an indication of dominance (see decision No. 2007-V/M-25-AUD, Merck Generics Belgium BVBA, Generics UK/Merck Sharp & Dohme BV and MSD Overseas Manufacturing Company, paragraph 21).
markets; the existence of barriers to entry; the significance of potential competition; the existence of network effects; the vertically integrated structure of competing firms; competing firms’ respective economic and financial power; and the nature of the contentious practices.

The BCA has also relied on earlier findings of dominance in its own decisions.31

Finally, there are only a couple of precedents in which the BCA has had recourse to the concept of collective dominance. The main one to date is the 2014 decision dismissing a complaint brought against various film studios.32 The complaint against the studios involved digital screening fees paid by major record companies (the majors) to certain theatre owners and ‘incubators’, but not to the complainant. The Auditorate summarily referred to the Sony/ BMG criteria. Finding that they were inapplicable to the case at hand, it thus rejected the allegation of collective dominance on the part of the majors. Moreover, it noted that the European Commission had already investigated the substance of the companies’ contracts involving digital screening fees and had closed its investigation after the contracts in question were amended.

IV ABUSE

Although the assessment of the abusive character of a specific commercial practice is inherently fact-specific, the BCA and the Belgian courts can generally be expected to use criteria or tests similar to those developed to that effect by the European Commission and the European Court of Justice, even though courts are more unpredictable in this respect. As noted, Article IV.2 of the CEL was modelled after Article 102 of the TFEU, and accordingly contains a non-exhaustive list of practices that may be considered abusive depending on the circumstances. Moreover, as at the EU level, the BCA and courts take as a starting point that holding a dominant position is not problematic per se,33 and that ‘the existence of a dominant position does not deprive an undertaking in this position from the right to protect its own interests when they are jeopardised’,34 but that it may not abuse its position to exploit consumers or foreclose competition. With respect to exclusionary conduct, the ‘as-efficient competitor test’ is also used as a baseline.35

31 In its decision of 26 March 2015 in case CONC-P/K-09/0002, Lampiris/Electrabel, paragraph 106, the Auditorate relied on a decision of the College of 18 July 2014, which had found Electrabel to be dominant on the wholesale electricity market, in case CONC-1/O-09-0015, Electrabel/Wholesale Electricity Market (decision No. ABC-2014-I/O-15).
32 Auditorate, 2 December 2014, decision No. BMA-2014-P/K-23-AUD, NV Handling CO/Sony Pictures, The Walt Disney Company (Benelux), Universal Pictures International Belgium, Twentieth Century Fox Film Belge and Warner Bros Studios Leavesden Limited (case MEDE-P/K-11/0027). In a recent case, the BCA closed an investigation into potential collective dominance by cargo handling companies at Brussels airport: see Auditorate 17 February 2015, decision No. BMA-2015-I/O-02-AUD, Cargo handling at Brussels National Airport (case MEDE-I/O-10/0009). For a case mixing concerted practices and collective dominance considerations, see judgment of the Court of Appeal of Liège of 5 February 2009 in case AGIM/Oxycure, TBM/RCB, 2009, page 60.
33 Court of Appeal of Ghent, 1 October 2014, Ducati/DDBikes (case 2010/AR/3351).
34 See, for example, Court of Appeal of Brussels, 3 November 2005, SABAM v. Productions & Marketing, TBM/RCB, 2006, No. 4, p. 320.
35 See, for example, decision No. 2009-P/K-10, Base/BMB, paragraphs 190 and 275 et seq.
Overview

Generally, the abusive character of a commercial practice implemented by a dominant company depends on its actual or likely effects on competition. To assess the materiality or likelihood of such effects, the BCA and courts typically rely on specific tests designed for certain categories of practices, which are then applied to the facts of each case. These tests tend to create presumptions that are rebuttable in view of the circumstances prevailing on the relevant markets and the actual effects observed (or lack thereof). Similarly, a practice is only regarded as abusive after consideration has been given to possible objective justifications, if any, put forward by the dominant company. Unfortunately, Belgian courts sometimes tend to adopt a formalistic approach to the notion of abuse, occasionally driven by underlying ‘fairness’ considerations.

Exclusionary abuses

Exclusionary pricing

The leading precedent on predation is Electrabel. The case involved allegations of predatory pricing on the part of the incumbent gas operator, Electrabel, at the time of the liberalisation of the sector. The allegations were dismissed for two main reasons: the short duration of the alleged predation (six months), which was considered too short to implement a credible predatory strategy; and the fact that no alternative operator had exited the market during that period.

This case is interesting in three respects:

a it seems to require evidence of actual foreclosure effects, whereas the Commission does not consider that ‘it is necessary to show that competitors have exited the market to show that there has been anticompetitive foreclosure’;

b much like under the US antitrust framework, it suggests that predation implies the possibility to recoup losses at a later stage, whereas the Commission and the European Court of Justice recently reiterated that the prospect of such a recoupment was not a prerequisite for the establishment of an exclusionary strategy; and

c the BCA did not perform a cost analysis in this case, but focused on the materiality of the foreclosure effects. Otherwise, it is generally acknowledged under Belgian law that temporary below-cost prices associated with the launch of a new product or the liquidation of stocks is not abusive.

With regard to margin squeeze, the BCA’s practice is generally in line with EU case law. In the Lampiris/Electrabel case discussed in last year’s edition of this chapter, the BCA dismissed a margin squeeze allegation among other claims of price-related abuses of dominance by Electrabel. The BCA found no margin squeeze. Applying the ‘as-efficient competitor test’ on the basis of Electrabel’s long-run average incremental costs, the BCA found that Electrabel’s margins would have remained positive on the retail market even when paying the prices charged to customers on the wholesale market. The BCA further noted that

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36 Decision No. 2008-I/0-41-AUD, Electrabel NV.
37 Commission Guidance Paper, paragraph 69.
38 See, for example, Commercial Court of Brussels, 20 November 2006, Docpharma/Eli Lilly Benelux, TBM/RCB, 20007, No. 1, page 90.
during the relevant period, Lampiris’ prices had been equal to or lower than Electrabel’s prices, with positive margins, and that Lampiris had grown its market share. Otherwise, the leading precedent is *Base/Belgacom Mobile* (BMB), in which the BCA established a margin squeeze on the basis of a comparison between the wholesale prices charged by BMB on the upstream market for call terminations on its network (as charged to competitors) and the retail prices charged by BMB on the downstream market for mobile telephony services to business customers.\(^40\) Considering that BMB is ‘a vertically integrated undertaking offering offering termination services on the upstream market and telephony services on the downstream market’ and that ‘termination services are an essential input for BMB’s competitors’, the BCA endeavoured to ‘verify whether BMB would be able to make a normal profit on its on-net calls if it had to bear the termination cost charged to its competitors’. Having found that this was not the case during the relevant period, it subsequently referred to EU case law to support the conclusion that: ‘[a] margin squeeze may, by its very nature, restrict competition.’\(^41\)

**Exclusive dealing**

The offering of rebates characterised as exclusive tends to be treated somewhat strictly by the BCA and courts. Thus, on 27 September 2013, the Brussels Court of Appeal upheld the BCA’s decision of 30 July 2012 imposing a €245,530 fine on Presstalis,\(^42\) a French media distributor, for providing French publishers an extra 2.5 per cent discount (BSC) on top of other volume-based discounts in exchange for the exclusive right to export their magazines to the Belgian, Swiss and Canadian markets for a period of 12 months.\(^43\) The BCA found that the BSC discount had had a ‘strong fidelity effect’, and enabled Presstalis to foreclose competitors both on the market for the export of French magazines and, through its privileged relationship with Belgian distributor AMP, on the market for the distribution of those magazines in Belgium. While confirming that the proof of likely (and not actual) foreclosure effects on competitors that are at least as efficient as the dominant company was sufficient to establish an abuse, the Court adopted a strict view holding that loyalty discounts provided in exchange for exclusivity are as such in violation of Article 102 of the TFEU. The Court concluded that the BCA correctly qualified the BSC discount as a loyalty discount, and ruled that it was sufficient that the BSC discount placed competitors in a less favourable economic position than Presstalis.

With regard to loyalty rebates (not tied to an exclusivity requirement), the BCA adopted an effects-based approach in *Base/BMB*, which also involved individualised conditional rebates in the form of free subscriptions, reimbursements proportionate to spending, a reduction on certain types of calls, or free calls and text messages. The BCA dismissed the existence of an abuse on the grounds that it was unclear how said rebates were ‘likely to have a real influence on the customer’s choice’; and how ‘the offers from the dominant undertaking on the one hand, and the competitors on the other hand’ compared with each other.\(^44\) In *Algist Bruggeman* (discussed in Section II), however, the BCA reviewed various

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\(^42\) Competition Council, 30 July 2012, decision No. 2012-P/K-20, *Tondeur Diffusion/AMP & Presstalis*.

\(^43\) Court of Appeal of Brussels, 27 September 2013, *Presstalis SAS*.

\(^44\) Ibid., paragraphs 192–199.
loyalty-enhancing rebates and found that, because these rebates were aimed at enhancing the loyalty of distributors and bakers to exclude lower-priced competitors, and had no objective justification, they breached Articles 102 TFEU and IV.2 of the CEL. Otherwise, volume rebates are generally unproblematic under Belgian law. The Brussels Court of Appeal has considered, for instance, that:

> the existence of a dominant position does not deprive such an undertaking of its right to grant volume-based rebates to its customers depending on the customer's volume of purchases, if there are objective reasons to believe that the conferral of a financial benefit to certain customers is justified by the business volume realised by these customers and the economies of scale to which they give rise.\(^\text{45}\)

**Leveraging**

Leveraging allegations have occasionally been made in Belgium. In *National Lottery*, the National Lottery acknowledged forms of leveraging in a BCA settlement decision in 2015.\(^\text{46}\) Following complaints, the Auditorate had investigated the National Lottery’s conduct at the time of its launch of Scooore!, a new sports betting product. The Auditorate found that the National Lottery had abused its dominant position through a one-off use of customers’ contact details to promote Scooore!. The contact details had been collected through its legal monopoly, where competitors were unable to collect data of a similar scope and nature at reasonable costs and within a reasonable period of time. In addition, the National Lottery had obtained commercially sensitive information about competitors, both before and after the launch of Scooore!, from some of its retailers, for which the sale of lottery products represented a significant share of their turnover.

In *Medicare-Market* (discussed in Section II), the BCA’s decision rejecting interim measures did not explicitly refer to leveraging but found that the abusive practices at hand could constitute an attempt to broaden the scope of pharmacists’ legal monopoly beyond the limits set by the legislator (i.e. beyond pharmaceutical products to cover para-pharmaceutical products).\(^\text{47}\)

Otherwise, Belgian case law does not contain other recent discussions of the principles applicable to tying and bundling practices so that reference can be made to those developed at EU level.\(^\text{48}\)

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\(^{48}\) In the *Cargo handling* case, the Auditorate closed an investigation (for lack of evidence) into practices that would have entailed a review of potential bundling practices by Aviapartner and Flightcare on the reserved market for airside freight handling and the downstream non-reserved market for landside freight handling services, see decision No. BMA-2015-I/O-02-AUD of 17 February 2015, *Cargo handling at Brussels National Airport* (case MEDE-I/O-10/0009).
Refusal to deal

The Bofar case, involving a company specialised in the export of pharmaceutical products, enabled the BCA to provide some guidance regarding refusal to deal practices. As is the case at the EU level, the starting point of the analysis is the basic free trade principle according to which ‘each undertaking, irrespective of whether or not it holds a dominant position, should have the right to choose its business partners’.49 Subsequently, the BCA appears to condition a finding of abuse on evidence of a clear intent to foreclose actual or potential competition; the strengthening of the company’s dominant position; and the absence of objective justification. In this case, the BCA dismissed the existence of an abusive refusal to deal, relied heavily on the Commission Guidance Paper and modelled its decision on the GlaxoSmithKline case law of the European Court of Justice.50

While the principle according to which dominant players should remain free to choose their trading partners is well understood by the Belgian courts, exceptions to this principle are sometimes found on the basis of ad hoc tests that are applied quite flexibly. This is well illustrated by Ducati/DD Bikes, in which the Ghent Court of Appeal upheld a lower court judgment finding Ducati guilty of abusive refusal to supply spare parts and other repair equipment to a former dealer-repairer following the (otherwise lawful) termination of the dealership agreement.51 After finding that Ducati, through its official dealers, was dominant on a Ducati brand-specific market for maintenance and repair, it laid down its own test to appreciate the abusive character of the refusal to supply without any reference to EU or other precedent (very uncommon in Belgian case law) and dismissed, for example, free-riding arguments or the relevance of the fact that the repairer sold and serviced other brands of motorbikes. In addition to holding Ducati’s refusal to supply abusive, the Court imposed on it a number of obligations aimed at ensuring that DD Bikes could effectively offer after-sales services for Ducati motorbikes in the future. This case should be understood in the context of long-term dealership agreements in Belgium, and testifies to a historical tendency on the part of Belgian courts to protect the interests of dealership holders.

Other practices

In Algist Bruggeman (discussed in Section II), the BCA found an abuse of dominance in denigrating practices against a competitor. The Auditorate found that Algist Bruggeman’s circulation of biased internal reports about a competitor’s product, aimed to create uncertainty about the microbiological aspects and quality of its competing yeast, and to discourage distributors or bakeries from supplying or using the product.52

While in the context of its decision rejecting interim measures requested by Medicare-Market, the College found that the Order of Pharmacists’ denigrating press campaign about Medicare-Market’s potential harm to the profession of pharmacists and to patients could prima facie constitute an abusive practice.53

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49 Decision No. 2009-V/M-04, Bofar NV, paragraph 103.
50 Joined cases C-468 to 478/06, GlaxoSmithKline AEVE [2008] I-7139.
51 Ghent Court of Appeal, 1 October 2014, Ducati/DD Bikes (case 2010/AR/3351).
53 College, 19 June 2017, decision No. ABC-2017-V/M-24, Interim measures against Order of Pharmacists (case CONC-V/M-17/0017).
iii Discrimination

Price discrimination under Article IV.2(2)(3) of the CEL is generally considered to require evidence of a difference in treatment applied to equivalent transactions with the effect of causing a material competitive disadvantage. In Lampiris/Electrabel, the BCA considered that the services offered on the electricity wholesale market and on the retail market were not equivalent, and hence dismissed the discriminatory pricing claims.54 In InBev, the on-trade (catering) and off-trade (wholesalers and retailers) segments for the distribution of beers and beverages were considered as separate markets, thereby justifying differences in pricing.55 In bpost, however, the BCA referred to a breach of equal treatment in relation to the grant of rebates without reaching a formal finding of discrimination, thereby creating uncertainty as to the applicable standards. The Brussels Court of Appeal annulled this decision on ne bis in idem grounds, and therefore did not review the finding of breach of equal treatment.57

Likewise, Belgian courts sometimes fail to inquire into the existence of an actual competitive disadvantage resulting from an allegedly discriminatory practice, in contradiction with the principles prevailing at the EU level since Post Danmark.58 In SABAM, for example, the Brussels Court of Appeal found that services offered to ‘major customers’ were equivalent to those offered to other customers, and that the application of different prices was therefore discriminatory, without inquiring into the actual existence of a competitive disadvantage resulting from that difference of treatment on the downstream market.59

iv Exploitative abuses

It is well known that there is no clear standard to assess what is or makes a price ‘excessive’, and the comparative test proposed in some EU precedents leaves room for a significant margin of discretion. Excessive pricing claims are relatively frequent in Belgium but seldom established, with the notable – although quite specific – exception of the 2014 Electrabel electricity wholesale market case. In the 2014 Electrabel case, the BCA found the former incumbent electricity producer and supplier guilty of an abuse of dominance revolving

54 Auditorate, 26 March 2015, decision No. ABC-2015-P/K-09-AUD, Lampiris/Electrabel (case CONC-P/K-09/0002), paragraph 142.
57 Brussels Court of Appeal, 10 November 2016, bpost/Spring, LINK2BIZ International, Publimail, in the presence of the BCA (case 2013/MR/2). Bpost had applied a per-sender rebate model, whereby quantity rebates are based on the volume of mail supplied by senders. This model did not consider consolidators, which provide collection and sorting services to senders before forwarding the mail to bpost for distribution, as single senders. In 2011, the Belgian Institute for Postal services and Telecommunications (BIPT), the sectoral regulator, found the rebate scheme to be discriminatory and fined bpost. In a separate decision in 2012, the BCA found the rebate scheme to be abusive because of its loyalty-inducing effect and fined bpost (but deducted the BIPT fine from the initial fine amount). On 10 March 2016, the BIPT decision was annulled by the Brussels Court of Appeal. Then, on 10 November 2016, the Brussels Court of Appeal annulled the Competition Council’s decision for breach of the ne bis in idem principle. The Court considered that the facts underlying the Competition Council’s decision had already been subject to scrutiny by the BIPT and the sanctions that both authorities could impose were of a criminal nature under the European Convention of Human Rights, so that the conditions for ne bis in idem were met even though the two authorities operate under different legal regimes.
around Electrabel’s tertiary production reserve policy, which was presented as an unjustified limitation of production. Relying on EU precedents, the BCA defined the relevant markets as the production and wholesale trade of electricity in Belgium, on the one hand, and the supply of the tertiary reserve in Belgium, on the other, and found that Electrabel held a dominant position on both. The BCA then narrowed the scope of the abuse to Electrabel’s marketing of reserve capacities by means of the application of an excessive margin scale (qualified as a form of ‘economic withholding’). Electrabel’s scale governing the release of reserve capacity implied the realisation of margins of 50 to 200 per cent above the average wholesale price per MWh achieved on the Beplex trading platform in 2008, which was found ‘excessively disproportionate compared to the marginal cost of production’.

Other cases involving Electrabel were dismissed. In Lampiris/Electrabel and NMBS/Electrabel, the BCA and the Brussels Court of Appeal both dismissed similar excessive pricing claims. Both found that Electrabel’s incorporation into its wholesale prices of the value of emission allowances obtained for free was economically justifiable, since the allowances could otherwise be traded. Beforehand, the leading precedent involved the allegedly excessive character of an increase in Electrabel’s natural gas prices. After comparing Electrabel’s prices with a number of competitive price benchmarks – for example, prices of alternative operators, regulated prices and prices applied in other EU Member States – the BCA was not able to reach a finding of infringement.

Loose findings of excessive prices are sometimes encountered in judgments of Belgian courts, however. This was the case in the AMP judgment, where the Brussels Court of Appeal considered excessive an increase in AMP’s minimum distribution fee because of its lack of costs-based justification, as established by an expert report. Likewise, the Commercial Court of Antwerp is reported to have held Belgacom guilty of charging excessive prices, as it failed to pass on to consumers a reduction in the mobile termination charges of competing operator Base, as mandated by the telecommunications regulator. By holding that prices ‘were higher than those that should normally be applied’, the Court essentially sanctioned Belgacom’s failure to comply with a regulatory decision and gave the concept of excessive pricing an interpretation driven by fairness considerations.

In addition, it should be noted that the CEL grants the BCA the power to issue interim orders in cases of ‘price or margin problems’, ‘abnormal evolution in prices’ or ‘structural market failures’ established by a report of the Price Observatory, with the aim of preventing

60 The management of reserve capacities on the Belpex electricity exchange, for the electricity wholesale market.
61 College, 18 July 2014, decision No. ABC-2014-I/O-15, Electrabel/Wholesale Electricity Market (case CONC-I/O-09-0015). As part of its reasoning, the College also repeated that, as a matter of principle, competition law is applicable to practices otherwise regulated by sector-specific rules.
64 Decision No. 2008-I/O-41-AUD, Electrabel NV.
65 Court of Appeal of Brussels, 29 May 2012, Standaard Boekhandel, Prodisprese, VFP and Buurtsuper v. AMP.
serious, actual and irreparable harm to companies, consumers or the general economic interest. These orders, which can last for a maximum of six months, are adopted pursuant to summary proceedings during which parties are only heard orally and benefit from a mere five-day period for reviewing any submissions and supporting evidence. Orders are then notified to the Minister for Economic Affairs, who shall submit a plan to the government within six months proposing a ‘structural modification of the functioning of the market concerned’. No such reports or orders have yet been issued. Thus, the scope of the causes of action, as well as the possible reach of these orders, remain largely unclear, and therefore are a source of concern for the business community. This peculiar regime finds its origin in a frustration of political actors with the perceived limitations of dominance principles (notably with notions such as ‘excessive prices’) and of available remedies.

V REMEDIES AND SANCTIONS

Article IV.48(1) of the CEL entitles the BCA to find an infringement of the rules on dominance and to order the termination of the commercial practice in question. In turn, Article IV.70(1) of the CEL provides for the possibility of imposing a fine to sanction the abusive character thereof. As at the EU level, it was in a dominance case that the BCA imposed its highest individual penalty ever, of an amount of €66.3 million levied against Belgacom (now Proximus) in a margin-squeeze decision dated 26 May 2009.

Belgian remedial practice differs from that observed at the EU level in two notable respects. First, whereas the Commission relies heavily on commitment procedures to deal with dominance cases, the BCA has adopted very few commitment decisions to date. Even though not formally a commitment decision but a dismissal, the Immoweb case set a precedent in Belgium for de facto commitment decisions at the level of the Auditorate. In 2015, the Auditorate opened an investigation into Immoweb’s use of ‘most favoured nation’ (MFN) clauses in its contracts concluded with software developers for real estate agencies. After a preliminary analysis, the Auditorate concluded that Immoweb, the operator behind Belgium’s most frequented real estate website, was dominant on a national market for web portals dealing primarily in real estate, and that the MFN clauses prevented Immoweb’s competitors from negotiating more commercially favourable terms with software developers, which increased the barriers to entry. Immoweb committed unilaterally to terminate the clauses at issue and not to include such MFN clauses in contracts concluded in the next five years. On this basis, the Auditorate decided to close its investigation, essentially dismissing the case without coming to a final determination about any abuse of dominance under Article

67 Articles V.3–V.4 of the CEL.
68 Article V.6 of the CEL.
69 In a decision closing an investigation into alleged unfair prices (in light of available resources and priorities), the Auditorate mentioned that the Price Observatory may be better placed to investigate the price evolution identified by the complainant; see decision No. BMA-2015-P/K-10-AUD of 31 March 2015, [x]/Omega Pharma (case MEDE-P/K-02/0073), paragraph 53.
70 Articles V.3–V.4 of the CEL.
71 See the €1.06 billion fine imposed in case COMP/C-3/37.990, Intel (13 May 2009).
72 Decision No. 2009-P/K-10, BASE/Belgacom & Belgacom Mobile.
73 The BCA has adopted commitment decisions in only two instances so far: see decision No. 2005-I/O-52, NV Distri-One/BVBA Coca-Cola Enterprises Belgium and decision No. 2006-I/O-12, Banksys SA/FNUCM / Banksys SA; UNIZO/Banksys). Both decisions ended seven-year investigations into alleged abusive conducts.
IV.2 of the CEL and Article 102 of the TFEU, and without issuing a formal commitment decision under Article IV.47 of the CEL. As illustrated by National Lottery and Algist Bruggeman, the BCA may also adopt settlement decisions in dominance cases. In addition, whereas this is extremely rare at the EU level, the BCA commonly adopts interim measures in the course of dominance proceedings.

i Sanctions

Fines are capped at 10 per cent of the turnover realised on the Belgian market (including the sale of goods for export) in the last full year preceding the adoption of a decision. Below that limit, fines are calculated according to Fining Guidelines issued in 2014. These Guidelines provide that the BCA applies the same methodology as the European Commission, with a limited number of exceptions. Most importantly, the starting amount of the fine is based on Belgian sales (i.e., sales realised on the Belgian territory and for exports). Moreover, the Guidelines provide for specific rules for the assessment of the aggravating factor of repeated infringement. The CEL also foresees the possibility of the BCA imposing administrative fines on individuals, but that provision is not applicable to dominance cases (only to specific types of horizontal infringements).

ii Behavioural remedies

As previously noted, the BCA (and the Belgian courts) typically issues a cease-and-desist order when finding an abuse of dominance. In contrast, behavioural remedies are uncommon, notably because commitment procedures have only been rarely used to date. Over the years, however, the BCA has developed an important practice of imposing positive obligations on an interim basis pending the completion of investigations into alleged abuses of dominance. That practice is rooted in Article IV.64(1) of the CEL, whereby the College may ‘adopt interim measures intended to suspend the anticompetitive practices under investigation, if there is an urgent need to avoid a situation likely to cause serious, imminent harm that would be difficult to remedy [ex post].’

The powers of the BCA to impose interim measures in pending proceedings have been strengthened since the entry into force of the CEL. First, establishing a risk of ‘irreparable harm’ is no longer required. Secondly, and importantly, interim proceedings are subject to strict deadlines. In particular, the CEL provides that an oral hearing preceded by the

74 Auditorate, 7 November 2016, decision No. ABC-2016-I/O-31-AUD, Immoweb (case CONC-I/O-15/0002).
79 Article IV.70(2) of the CEL.
80 Article IV.64(1) of the CEL.
submission of written briefs will be held within one month of the filing of a request for interim measures. Subsequently, the BCA will have to render its decision within one month of the oral hearing, with failure to do so amounting to a rejection of the request.

The BCA’s willingness to make use of interim measures was sustained by the Brussels Court of Appeal. In the 2016 FEI case, the BCA ordered the suspension of the FEI’s exclusivity clause, prohibited the FEI from suspending or otherwise sanctioning athletes or horses for participating in GCL competitions, and requested that the FEI inform its members (national federations), athletes, officials and organisers of these measures by 31 August 2015. After finding that the FEI had not properly communicated the measures, the BCA determined the content of the messages to be published on the FEI’s website, and to be sent to national federations and other associations by 30 November 2015, subject to penalty payments.

In the more recent 2017 FEI case, discussed in Section II, the BCA ordered the FEI and equestrian competition organisers to suspend their MoU insofar as it reduced the share of invitations based on the official ranking below 60 per cent until the adoption of a decision on the merit, and prohibited any points for the official FEI ranking from being granted as a result of GCT competitions so long as invitations for these events did not comply with the requested share.

In the Telenet case, the BCAs interim measures ordered Telenet and VV to either suspend the exclusivity clause in their agreement and offer the broadcasting rights to interested parties on reasonable and non-discriminatory terms and conditions, or to suspend the full exclusive agreement from the end of season 2015–2016 and reallocate the VV broadcasting rights, whether on an exclusive basis or not, under a transparent and non-discriminatory tender procedure.

iii Structural remedies

There has been no recent reported case of structural measures (such as split-ups or divestitures) imposed or ordered at the Belgian level to remedy an abuse of dominance.

VI PROCEDURE

The structure of the BCA, and the procedure applicable to dominance cases, was entirely redesigned upon the entry into force of the CEL in 2013.

81 Article IV.64(3) of the CEL.
82 Article IV.64(6) of the CEL.
84 College, 24 November 2015, decision No. ABC-2015-V/M-68, Interim measures against FEI (case CONC-V/M-15/0016), pages 29–31, upheld by the Brussels Court of Appeal, 28 April 2016 (case 2015/ MHR/1).
85 College, 20 December 2017, decision No. ABC-2017-V/M-38, Interim measures against FEI, GCL, and TTB (case CONC-V/M-17/0037).
In a nutshell, a single BCA composed of two functionally distinct entities, namely the College in charge of deciding cases and the Auditorate in charge of investigations, replaced the dual structure previously in place. The Auditorate carries out investigations either on an *ex officio* basis, upon a complaint, or at the request or injunction of the competent minister. Upon completion of its investigation, the Auditorate has a choice between closing a case and issuing a formal statement of objections to which parties are entitled to reply prior to the transmission of the case to the College for decision.\(^{87}\) That transmission occurs by means of the issuance of a non-binding draft decision reflecting the replies to the statement of objections.\(^{88}\) The College then hears the parties both in writing and orally before rendering its decision,\(^{89}\) which can then be appealed before the Brussels Court of Appeal. The procedure is controversial, however, primarily because it prevents parties from submitting new factual evidence before the College (unless the draft decision raises points that were not addressed in the statement of objections). Moreover, the CEL sets strict time limits for the submission of written briefs by the parties, namely one month to reply to the statement of objections, and two months to comment on the draft decision and review the case file.\(^{90}\)

Complainants are entitled to appeal to the College any decision by the Auditorate dismissing their complaint and to review the evidence referred to in the Auditorate’s decision. If the Auditorate acts upon their complaint, they may have access to a non-confidential version of the draft decision ‘if the College deems it necessary’.\(^{91}\) As a rule, they do not have access to the case file unless the President of the BCA decides otherwise, and then only to a reduced version of the file containing only the evidence referred to in the draft decision (i.e., not the entire case file).\(^{92}\) Upon request, complainants can be heard orally by the College.\(^{93}\)

The CEL provides for the possibility of closing cases by means of a commitment decision adopted by the College.\(^{94}\) In addition, it contains formal and informal settlement procedures that are also applicable in dominance cases (i.e., not only in collusive cases). The formal settlement procedure can be initiated at any time prior to the issuance of a draft decision.\(^{95}\) If an allegedly dominant company indicates its willingness to engage in formal settlement discussions, the Auditorate will provide it with a summary of the objections and of the relevant pieces of evidence, as well as a range of possible fines. The company in question is then required to recognise its liability and to accept the fine estimate. On that basis, the Auditorate will then issue a draft settlement decision proposing a fine, on which it ‘may’ (in practice, ‘does’) apply a 10 per cent reduction. Similarly, it ‘may’ reflect in the proposed fine commitments to compensate third parties for any harm suffered. Upon acceptance of the proposed fine, the Auditorate then issues a final settlement decision, which cannot be

\(^{87}\) Article IV.42(4) of the CEL.
\(^{88}\) Article IV.42(5) of the CEL.
\(^{89}\) Article IV.45(5) of the CEL.
\(^{90}\) These time limits can be extended if the President of the BCA ‘deems it necessary’. The CEL also provides for various deadlines applicable to the Auditorate and the College, but these are considered indicative. For example, the College is supposed to hold an oral hearing at the latest two months after the filing by the parties of their written comments on the draft decision, and to issue its decision within one month of the oral hearing (see Article IV.42(5) and Articles IV.45(3),(4) and (6) of the CEL).
\(^{91}\) Article IV.45(1) of the CEL.
\(^{92}\) Article IV.45(2) of the CEL.
\(^{93}\) Article IV.45(5) of the CEL.
\(^{94}\) Article IV.49 of the CEL.
\(^{95}\) Articles IV.51–IV.57 of the CEL.
appealed. As is the case at the EU level, settlement discussions can be interrupted at any time. Settlement discussions between the Auditorate and the relevant company are considered confidential. Uncertainty remains as to the rights of complainants and other interested parties in commitment and settlement procedures. The National Lottery case represents the first settlement decision adopted in a dominance case. The Auditorate applied the 10 per cent reduction after having already reduced the fine for mitigating circumstances based on the absence of a proven anticompetitive effect of the practices in question and the National Lottery’s full cooperation.96

The President of the BCA can also make use of an informal settlement procedure to resolve questions and disputes.97 The informal settlement procedure does not entail the imposition of sanctions or binding conditions. In general, the President will only engage in an informal settlement procedure when the practice in question has not yet been implemented and raises a novel question, and when it is clear that the Auditorate does not have the intention to open a formal investigation.98

Generally, legal advice (and associated correspondence), as rendered by in-house counsel who are members of the Belgian Institute for Company Lawyers, benefits from a protection equivalent to legal privilege, and therefore cannot be seized by the BCA during inspections (or by any other public authority).99 However, a provision of the CEL unduly limits the effectiveness of that protection, for it allows parties to bring an appeal against the seizure of documents during inspections only after the issuance by the Auditorate of the statement of objections, and ‘only to the extent that the documents in question are invoked in support of the said objections’.100

Decisions of the BCA may be appealed before the Brussels Court of Appeal. The Court has shown willingness to rule against the BCA, in particular with respect to companies’ rights in the context of inspections (even the Court’s recent Distripaints/Novelta judgment, which confirmed the BCA’s determination of ‘in-scope’ documents only after the BCA provided an expanded statement of reasons). Recent developments show that the Court is ready to endorse the BCA’s practice as regards interim measures decisions. It should be noted that settlement decisions may not be appealed by the settling parties under Belgian law.

Finally, the CEL contains an antitrust blocking statute, subject to exceptions to be set forth by Royal Decree.101 The principle of the primacy of EU law makes that provision unenforceable against requests from the Commission or from the competition authorities of other EU Member States addressed pursuant to Regulation 1/2003.

96 Decision No. BMA-2015-P/K-27-AUD of 22 September 2015; the Auditorate adopted a second decision on the same day, dismissing the complainants’ other allegations, see decision No. BMA-2015-P/K-28-AUD, Stanleybet Belgium NV/Stanley International Betting Ltd and Sagessas SA/World Football Association SPRL/ Samenwerkende Nevenmaatschappij Belgische PMU (cases MEDE-P/K-13/0012 and CONC-P/K-13/0013).
97 Article IV.20(2) of the CEL.
98 The applicable procedure has been spelled out in a BCA communication of 27 January 2015.
100 Article IV.79(1) of the CEL. The compliance of that provision with the Belgian Constitution was confirmed by the Belgian Constitutional Court, subject to conditions, by a judgment of 10 December 2014 (joined cases 5733 and 5740).
101 Article IV.13 of the CEL.
VII PRIVATE ENFORCEMENT

As previously noted, claims for abuse of dominance are also brought before Belgian courts. One avenue for such claims involves reliance on the rules on Unfair Trade Practices. It is settled case law that claimants alleging breaches of Article IV.2 of the CEL can also obtain redress pursuant to the CEL's Unfair Trade Practices provisions (replacing the previous Belgian Act on Unfair Trade Practices).\(^\text{102}\) The CEL, in particular, provides for a special and particularly effective procedure to obtain a cease-and-desist order at short notice from the president of the competent commercial court.\(^\text{103}\) The procedure constitutes a credible alternative to proceedings before the BCA in those cases where plaintiffs have sufficient elements at their disposal to discharge the applicable burden of proof (or can readily identify the relevant pieces of evidence and request their production in court). However, at present the Belgian Code of Civil Procedure does not contain discovery rules comparable to those existing in the United States or the United Kingdom. In BIT Marketing/SEB and Bierhalle Demeyer NV/Duvel Moortgat, the claimants appealed judgments denying cease-and-desist orders. Their appeals were dismissed because the claimants had not provided sufficient evidence to find that either SEB and DM were dominant in their respective markets.\(^\text{104}\)

Damage claims can also be filed to obtain compensation for harm suffered as a result of an (alleged) abuse of dominant position, either on a stand-alone basis or as a follow-on action. As the law currently stands, the CEL does not include a specific statutory basis for that purpose, so that general tort law principles apply and require plaintiffs to establish a fault imputable to the defendant, an injury suffered by the plaintiff, and a causal link between the fault and the injury.\(^\text{105}\) In 2017, the Belgian legislator implemented the EU Damages Directive, and thereby provided a specific regime for damage claims based on Articles IV.1 and IV.2 of the CEL or Articles 101 and 102 of the TFEU, or on both. Whereas the Damages Directive provides for a presumption that cartels cause harm, it does not include such presumption for abuses of dominance. Under Belgian tort law, damages are awarded according to the *restitutio in integrum* principle, whereby the victim must be compensated for the entire harm suffered (i.e., to restore the status quo ante) but only the actual harm suffered. Hence, Belgian law allows for the recovery of any direct losses and profits forgone (including losses of business opportunities), but does not recognise treble or punitive damages. In spite of the lack of clear precedent in the antitrust field, commentators have commonly admitted that the passing-on defence can be invoked by defendants, a position that should be formalised in the implementation of the Damages Directive. Upon request, damage awards can also include (simple, not compound) interest from the date the injury occurred, and be complemented by a fixed (and relatively modest) indemnity of procedure supposed to cover attorneys’ fees and other costs and disbursements.

\(^{102}\) Further, infringements of Chapter IV of the CEL are considered to fall within the scope of the notion of ‘unfair trade practices’ pursuant to Article VI.104 of the CEL.

\(^{103}\) Article XVII.10 et seq. of the CEL. That procedure is dealt with according to the rules applicable to interim proceedings but is not subject to the requirement of urgency.


\(^{105}\) These principles are rooted in Article 1382 of the Belgian Civil Code. In theory, contractual liability can also be invoked to obtain damages or even the nullity of a contract, depending on the terms of the contract in question and the circumstances of the case.
The Belgacom/Base & Mobistar case, discussed in the 2016 edition of this chapter, addressed the question of an undertaking’s fault in cases of abuse of dominance. The former incumbent telecommunications operator, Belgacom, and mobile competitors Mobistar and Base had been involved in a long-running damages litigation for alleged pricing abuses. The abuses revolved around the different mobile termination rates charged by Belgacom depending on whether calls were initiated and terminated on its network (on-net) or initiated from other networks and terminated on its network (off-net). While the parties settled the litigation in October 2016, the Brussels Court of Appeal held before that Belgacom should have known, in light of established EU precedents, that its alleged practices would constitute breaches of Article 102 TFEU and therefore faults on its part (if they were confirmed by experts). With respect to the network effects in particular, the Court noted that the fact that the EU courts had not yet expressly decided on such practices did not mean that these could not amount to anticompetitive conduct. In particular, the Court held that the language of Article 102(a) TFEU, existing EU case law and decisions, and Commission guidance, made it reasonably predictable that an unjustified difference between the costs of on-net and off-net calls would not be defensible in courts.

Honda, discussed in Section II, addressed the question of statute of limitations. As a result of the Constitutional Court’s ruling, applied by the Commercial Court of Ghent, damages actions should not be time-barred where a decision of the BCA is not yet final (i.e., when a decision or judgment cannot be appealed).

In fact, but for a couple of unsuccessful cases, recent practice appears extremely limited, as only two cases have been reported since 2004 of damages awarded based on a finding of abuse of dominance. The first case was peculiar, for the abuse was found to arise from meritless actions brought by Kinepolis, an (allegedly dominant) operator of film theatres, to stop or delay the anticipated construction of a new theatre complex in the Liège region by rival UGC, as well as from the pre-emptive purchase of land constraining the development of such project. By a judgment of 17 June 2010, the Brussels Commercial Court awarded damages compensating UGC for the legal fees incurred as a result of Kinepolis’ abusive practices, as well as for the consultancy fees and costs associated with a bank guarantee contracted by UGC in association with its project. In contrast, the Court refused to consider the loss of operating income that would have resulted from the construction of the complex for it was deemed too speculative. Interestingly, the Court also clarified that damages claims can proceed (and do not have to be stayed) in spite of parallel proceedings pending before the BCA.

The second case to date is Honda. In its 1999 decision (which became final in 2011, after multiple appeals), the BCA (then the Competition Council) found that Honda

106 Court of Appeal of Brussels, 26 February 2015, Belgacom/Base & Mobistar (case 2012/AR/1).
107 Prohibiting ‘directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions’.
108 Constitutional Court, 10 March 2016, Honda (case 38/2016), and Ghent Commercial Court, 23 March 2017, NV Honda Motor Europe Logistics/NV Herman Verboven et al (case A/12/02970).
111 Constitutional Court, 10 March 2016, Honda (case 38/2016), and Ghent Commercial Court, 23 March 2017, NV Honda Motor Europe Logistics/NV Herman Verboven et al (case A/12/02970).
had abusively imposed overly burdensome conditions on parallel importers for obtaining conformity certifications; the parallel importers competed with Honda’s official authorised distributors. The Commercial Court of Ghent found a fault, a damage and a causal link as required under Article 1382 of the Belgian Civil Code. The Court held that the harm, which stemmed from events dating back as far as 25 years, was practically impossible to quantify. The Court agreed with Honda that the plaintiffs could not bring forward sufficient evidence of the harm, but considered that not granting damages would be contrary to the objectives pursued by the rules on the private enforcement of competition law, and therefore assessed the harm ex aequo et bono and granted each plaintiff €20,000 in damages, plus interest accrued since 1997.

Finally, Belgian law permits plaintiffs to seek collective redress. Interestingly, the Collective Actions Act provides that only consumers and other organisations satisfying certain legal conditions, as well as the Federal Ombudsman for Consumers, are entitled to file a claim on behalf of a group for collective recovery, and that they may do so only before the Brussels courts. It is up to the court to decide whether to apply an opt-in or opt-out system. Likewise, the court must systematically require the parties to first explore the possibility of negotiating a settlement. It is only in the case of failure of such settlement that the court may hear and decide on the merits of the damages claim.

**VIII FUTURE DEVELOPMENTS**

In its priority policy statement for 2018, the BCA identified, among the priority areas for enforcement, the telecommunications, pharmaceutical products and logistics (ports, and road, rail and water networks) sectors.

The government is expected to table a draft law and the parliament is considering a proposal on a prohibition of abuses of ‘significant market power’ that would allow enforcement against non-dominant undertakings similar to the existing regulation in France. While the BCA has indicated its support for measures to fight against abuses of market power beyond Articles 102 of the TFEU and IV.2 of the CEL, the BCA President has stated that the enforcement of such new provisions would require additional staff if adopted.

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112 Articles XVII.35–XVII.69 of the CEL.
113 BCA, Priority Policy for 2018, 6 April 2018.
Chapter 5

BRAZIL

Ana Paula Martinez

I INTRODUCTION

At the administrative level, antitrust law and practice in Brazil is governed by Law No. 12,529/11 (Competition Law), which entered into force on 29 May 2012 and replaced Law No. 8,884/94. The Competition Law has consolidated the investigative, prosecutorial and adjudicative functions into one independent agency: the Administrative Council for Economic Defence (CADE). CADE’s structure includes an Administrative Tribunal for Economic Defence (Tribunal) composed of six commissioners and a president, a Directorate-General for Competition (DG) and a Department of Economic Studies. The DG is the chief investigative body in matters related to anticompetitive practices. The Tribunal is responsible for adjudicating cases investigated by the DG: all decisions are subject to judicial review. There are also two independent offices within CADE: CADE’s Attorney General’s Office, which represents CADE in court and may render opinions in all cases pending before CADE; and the Federal Public Prosecutor’s Office, which may also render legal opinions in connection with all cases pending before CADE.

The first Brazilian competition law dates back to 1962, but it was only in the mid-1990s that the modern era of antitrust began in Brazil. Among other reforms, in 1994 Congress enacted Law No. 8,884, which governed Brazil’s administrative antitrust law and policy until 2011. From 1994 to 2003, the Brazilian antitrust authorities focused primarily on merger review, and substantial resources were devoted to the review of competitively innocuous mergers. In 2003, the Brazilian antitrust authorities promoted a hierarchy of antitrust enforcement and ranked hard-core cartel prosecution as the top priority, making use of investigation tools such as dawn raids and leniency applications. A more recent development in Brazil’s competition law enforcement is related to the increasing number of abuse of dominance cases, which is first and foremost a symptom of a system that is no longer in its infancy.

1 Ana Paula Martinez is a partner at Levy & Salomão Advogados. The author would like to thank Lucas Griebeler da Motta for conducting the research needed to update this chapter.

2 Brazil’s antitrust system features both administrative and criminal enforcement. The administrative and criminal authorities have independent roles and powers, and may cooperate on a case-by-case basis. Private enforcement actions may also be initiated through the judicial courts by aggrieved competitors or damaged parties. At the criminal level, antitrust law and practice is governed mainly by Law No. 8,137/1990 (Economic Crimes Law), as amended by Law No. 12,529/11, and Law No. 8,666/1993 (Public Procurement Law).

3 On average, judicial courts confirm over 70 per cent of CADE’s decisions.
The basic framework for abuse of dominance in Brazil is set out in Article 36 of the Competition Law. CADE has not yet issued a regulation under the new Competition Law covering unilateral conduct, and has been resorting to legislation issued under the previous regime and precedents. The Anglo-American concept of binding judicial precedent (i.e., *stare decisis*) is virtually non-existent in Brazil, which means that CADE’s commissioners are under no obligation to follow past decisions in future cases. Under CADE’s Internal Regulations, legal certainty is only achieved if CADE rules in the same way at least 10 times, after which a given statement is codified via the issuance of a binding statement. To date, CADE has issued nine binding statements, all related to merger review except one (Binding Statement No. 7), which provides that it is an antitrust infringement for a physicians’ cooperative holding a dominant position to prevent its affiliated physicians from being affiliated with other physicians’ cooperatives and health plans.

Although abuse of dominance could also be considered a criminal violation under Article 4 of Law No. 8,137/90, punishable in the case of individuals but not corporations by a criminal fine and two to five years’ imprisonment, no criminal sanction has to date been imposed on individuals for abuse of dominance practices.

**II YEAR IN REVIEW**

In 2017, CADE adjudicated 13 administrative proceedings. Out of these four were dismissed, while in nine cases CADE found an infringement in relation to at least one defendant. This represents a significant drop if compared to 2016, when 31 cases were adjudicated in total, out of which 19 resulted in a conviction (and an even more significant drop if we take 2015 figures into account, when 52 cases were adjudicated, resulting in 39 convictions). On the other hand, there has been an increasing number of settlements reached between defendants and CADE, totalling 70 settlements executed in 2017 (out of 75 settlement proposals). As a result, imposed fines have decreased from 196 million reais in 2016 to 95 million reais in 2017, while settlement sums agreed to be paid with CADE achieved a record 845 million reais in 2017, against 798 million reais in 2016. The increasing number of settlements and amounts collected may be explained by the fact that the authority has established a more predictable procedure for settling cases, and is devoting more resources to the prosecution of anticompetitive practices.

In 2017, cartels remained a priority for CADE, accounting for most of the investigations and infringements found. All cases in which CADE found an infringement referred to cartel investigations. There was only one investigation involving concerted practices in connection with the pricing of advertising agencies and marketing services, but CADE dismissed such case due to lack of evidence of harmful effects on competition. Other CADE decisions – whether to open, settle or dismiss a case, or recommend the conviction of defendants – included exclusionary practices, namely refusal to deal, price discrimination and the creation of difficulties for market players. Listed below is a comprehensive list of 2017’s abuse of dominance cases.

### Regulated industries

In 2017, CADE continued to be active in the review of alleged abuse of dominance practices in regulated industries, with a special focus on financial services, port services and natural gas.
Financial services

In March 2016, CADE launched administrative inquiries to investigate whether large-scale financial institutions, card issuers and payment acquirers limited competition through exclusivity arrangements and refusal to deal with competitors. The agreements were thought to reinforce the dominant position of credit card providers Cielo and Rede to the benefit of their controlling banks.

The first inquiry is looking into whether credit card networks Elo, Alelo, American Express (Amex), Hipercard and Ticket had exclusive relationships with payment acquirers Rede, Cielo or with issuers Banco do Brasil, Bradesco and Itaú. The second concerns only banks Banco do Brasil, Bradesco and Itaú-Unibanco, which were accused of refusing to process the receivable amounts schedule from competitors of Rede and Cielo, their controlled entities. Finally, CADE is investigating whether Rede and Cielo discriminated against competitors by employing encryption technology in their pinpad equipment, preventing access from smaller competing payment acquirers.

On 5 April 2017, CADE settled two of these investigations: a) Itaú-Unibanco and Hipercard settled the first inquiry, agreeing to allow access to new payment acquirers and to meet certain targets during a two-year period; and b) Rede settled the last inquiry by undertaking to allow competitors to access its pinpads, on a non-discriminatory basis, as long as Rede was given reciprocal treatment. On 28 June 2017, Cielo and Elo also settled the cases, on similar conditions.

In July 2017, CADE dismissed the investigation against Alelo, Amex and Ticket once the authority found that all of those credit card networks by themselves had succeeded in opening their processing networks to other acquirers, voluntarily ceasing all contractual and de facto exclusive arrangements with acquirers.

The investigation had been closed before CADE and the Brazilian Central Bank signed a memorandum of understanding setting out a cooperation framework for both institutions, ending a long-term dispute regarding antitrust enforcement and competitive analysis in the market for financial services.

On 21 March 2018, CADE made public a complaint filed by Nubank, a Brazilian fintech and card issuer, against the five major banks in Brazil: Banco do Brasil, Bradesco, Caixa Econômica Federal – CEF, Itaú-Unibanco and Santander. According to the allegations presented by Nubank, the banks have been creating barriers and refusing to provide Nubank with the services needed for its regular development. Moreover, Nubank argued that the banks have been jointly lobbying for banking and financial policies against fintechs. The investigation is ongoing.

Telecom and internet-related services

On 9 June 2016, the Federal Public Prosecutor’s Office filed a complaint against the four major internet service providers in Brazil (Claro, Oi, Telefônica/Viv, and TIM) due to alleged negative effects that had arisen from the practice of zero-rating – when an internet service

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5 Administrative inquiry No. 08700.001860/2016-51.
6 Administrative inquiry No. 08700.001861/2016-03.
7 Administrative inquiry No. 08700.003187/2017-74.
8 Administrative inquiry No. 08700.004314/2016-71.
provider applies a zero price to the data traffic associated with a particular application or websites, or class of applications or websites, and the data does not count towards any data cap in place on the internet access service (very common in social media and music streaming applications).

According to the complaint, zero-rating practices would have the ability to distort competition among application and content providers, in the sense that all major internet service providers in Brazil only offer zero-rating for very popular applications, such as Facebook, Instagram, WhatsApp and Twitter: that is, by exempting consumers from the utilisation of some data packages, there would be incentives for the strengthening of the dominant position held by major content providers, to the detriment of small players and entrants, once consumers would be more inclined towards using apps and content on their mobile phones without any charge.

On 31 August 2017, CADE dismissed the case as it found that there was no casual nexus between zero-rating and the success of the major applications and content providers: for example, the increase in the number of users and accesses to Facebook, Instagram, WhatsApp and Twitter was not dependent on zero-rating offers. Even if the investigated telecom companies ceased all offers involving zero-rating, consumers would use the aforementioned social media apps at the same intensity. Additionally, by exempting the data traffic of the most-used applications, there would be more free data packages for consumers to try and enhance their experience with new and innovative applications.

Another relevant case was initiated by a complaint filed by British Telecom in December 2015, against Claro, Oi and Telefônica, which collectively own most of the telecom infrastructure in Brazil.9 In accordance with British Telecom’s allegations, the defendants refused to deal with British Telecom and, therefore, the complainant was deprived from competing on the merits in the context of a public bidding launched by the Brazilian Postal Services, Correios, with the aim of improving the networks and the interconnection among all local agencies of Correios. British Telecom also alleged that Claro, Oi and Telefônica foreclosed the market and impeded competition because they formed a consortium, and through this collectively abused their market power. CADE has been collecting evidence on the case since August 2017, when the investigation was made public.

Natural gas

Under CADE’s scrutiny are Petrobras’ alleged preferential discounts for natural gas, under which distributors that solely traded Bolivian gas would not be granted discounts. As a result, Petrobras’ integrated natural gas distributors were given beneficial treatment, harming competing gas distributors such as Comgás, which filed the claim.10 In August 2016, the DG concluded the existence of a violation and sent the case for final judgment to CADE’s Tribunal. Judgment was still pending as of 4 April 2018.

Finally, on 29 March 2018, CADE’s DG dismissed a claim presented by Âmbar Energia, an operator of thermopower plants, against Petrobras, the supplier of most of the natural gas needed for the operation of a plant located near the border region of Brazil and Bolivia.11 Following a frustrated private negotiation between Âmbar and Petrobras, Âmbar presented a claim before CADE against Petrobras, requesting the opening of an antitrust

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9 Administrative inquiry No. 08700.011835/2015-02.
11 Administrative inquiry No. 08700.009007/2015-04.
investigation. At the beginning of the case, Âmbar alleged price discrimination against it by Petrobras, which supposedly supplied thermopower plants owned by Petrobras under more favourable commercial conditions. After signing a transitory natural gas supply agreement, Petrobras terminated such agreement due to the fact that the shareholders of Âmbar executed a plea bargain with the Brazilian Federal Prosecution Service, admitting corrupt practices in connection with the negotiation of the terms and conditions of the mentioned agreement, which prompted new allegations by Âmbar of a refusal to deal. CADE’s DG dismissed the case due to lack of evidence. Additionally, the DG acknowledged that Petrobras has the discretion to terminate agreements in cases of noncompliance with anticorruption policies.

ii Price comparison websites: most favoured nation and price parity clauses

On 27 June 2016, the Forum of Brazilian Hotel Operators (FOHB) filed a complaint before CADE against Expedia, Decolar.com and Booking covering most-favoured nation (MFN) and price parity clauses.

According to FOHB, MFN clauses prevent hotel operators from granting lower prices to direct customers and clients, so that Expedia, Decolar.com and Booking, as the dominant price comparison websites, would always be able to provide clients with more attractive commercial conditions and room availability on internet sales platforms.

On 29 March 2018, Expedia, Decolar.com and Booking settled the case with CADE and agreed to cease the use of a broad parity clause with hotel operators, preventing the price comparison websites from blocking hotel operators from granting better offers to their clients in offline and online sales channels. However, to reduce incentives for free-riding, in the event that a hotel operator is found through an online platform (such as Expedia, Decolar.com or Booking), such online platform may require hotel operators to ensure price parity to mitigate the chances of sellers and buyers connecting through online platforms but finalising transactions through other channels, with lower prices, in typical free-rider behaviour.

iii Other

There were important developments regarding two of the four antitrust probes against Google. On 14 May 2018, the DG issued a report recommending that CADE’s Tribunal dismiss the complaint filed by E-Commerce (owner of the Buscapé and Bondfaro platforms) on content scraping for the following reasons: no evidence of harm to Brazilian customers was found; other competitors did not report similar conduct by Google; and the conduct was limited to a very limited number of cases, due to a computer bug. The other complaint that the DG recommended be dismissed was initially based on Microsoft’s views that Google created barriers to the portability of online search advertising campaigns from Google’s AdWords to the platforms of competitors such as Bing. According to the DG, there was no evidence of anticompetitive conduct, and other competitors and clients were not adversely affected by Google. The two cases will now need to be reviewed by CADE’s Tribunal for final adjudication. There are two other investigations against Google still pending before CADE’s

12 Case No. 08700.005694/2013-19.
13 Case No. 08700.009082/2013-03.
DG. One relates to Google’s allegedly abusive behaviour in sidestepping the logic of Yelp’s own algorithm to divert traffic away from rival services, and the other refers to Google allegedly giving unfair prominence to its own e-commerce service, Google Shopping.

Finally, on 14 March 2018, CADE’s Tribunal issued one of CADE’s most anticipated rulings involving an investigation into carmakers Fiat Chrysler, Ford and Volkswagen, which have been accused of abusing their intellectual property (IP) rights in the spare parts aftermarket by blocking independent makers from producing and selling certain spare parts. Even though in June 2016, CADE’s DG found that the conduct was illegal, recommending the imposition of a sanction, the majority of CADE’s Tribunal concluded that there was no abuse of IP rights, but only the exercise of exclusive rights granted by the Brazilian IP Law.

### III MARKET DEFINITION AND MARKET POWER

Brazil’s Competition Law provides that a dominant position is presumed when ‘a company or group of companies’ controls 20 per cent of a relevant market. Article 36 further provides that CADE may change the 20 per cent threshold ‘for specific sectors of the economy’, although the agency has not formally done so to date. The 20 per cent threshold is relatively low compared with that in other jurisdictions, especially the United States and the EU. CADE has traditionally interpreted the expression ‘group of companies’ to encompass companies belonging to different economic groups that could jointly abuse power in a given market, even if no single member of the group holds market power on its own.

The new CADE is yet to issue secondary legislation setting formal criteria for the analysis of alleged anticompetitive conduct, and the agency has been relying on regulations issued under the previous law, primarily CADE Resolution No. 20/1999.

Annex II of CADE Resolution No. 20/99 sets criteria for the definition of the relevant market in terms of both product and geographic dimensions. The methodology is mostly based on substitution by consumers in response to hypothetical changes in price. The resolution incorporates the ‘SSNIP test’, aiming to identify the smallest market within which a hypothetical monopolist could impose a small and significant non-transitory increase in price – usually taken as a price increase of 5 to 10 per cent for at least 12 months. Supply-side substitutability is also sometimes considered for market definition purposes. As for measures of concentration, reference is made to both the CRX index and the Herfindahl-Hirschman Index.

### IV ABUSE

#### i Overview

Article 36 of the new Competition Law deals with all types of anticompetitive conduct other than mergers. The statute did not change the definition or the types of anticompetitive conduct that could be prosecuted in Brazil under the previous law. The Competition Law prohibits acts ‘that have as [their] object or effect’:

- a limitation or restraint on, or, in any way, harm to, open competition or free enterprise;
- control over a relevant market of a certain good or service;

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14 Case No. 08700.003211/2016-94.
Article 36 specifically excludes from potential violations, however, the achievement of market control by means of ‘competitive efficiency’.

Under Article 2 of the Competition Law, practices that take place outside the territory of Brazil are subject to CADE’s jurisdiction, provided that they produce actual or potential effects in Brazil.

Article 36, Section 3o, contains a lengthy but not exclusive list of acts that may be considered antitrust violations provided they have as their object or effect the aforementioned acts. The listed practices include various types of horizontal and vertical agreements and unilateral abuses of market power. Enumerated vertical practices (they could be abusive if imposed unilaterally) include resale price maintenance (RPM) and other restrictions affecting sales to third parties, price discrimination and tying. Listed unilateral practices encompass both exploitative and exclusionary practices, including refusals to deal and limitations on access to inputs or distribution channels, and predatory pricing.

Annex II of CADE Resolution No. 20/99 generally provides for the review of unilateral conduct under the rule of reason, as it might have pro-competitive effects. Authorities should consider efficiencies alleged by the parties and balance them against the potential harm to consumers.

ii Exclusionary abuses

Exclusionary pricing

Annex I of CADE Resolution No. 20/99 defines predatory pricing as the ‘deliberate practice of prices below average variable cost, seeking to eliminate competitors and then charge prices and yield profits that are closer to monopolistic levels’. This definition specifically sets as a condition for the finding of predatory pricing and the possibility or likelihood of recoupment of the losses. Given such stringent standards, CADE has never found any conduct to be an abuse of dominance on the basis of predatory pricing. Margin squeeze may be a stand-alone abusive behaviour, and generally requires a differential between wholesale and retail prices that impedes the ability of a vertically integrated firm’s wholesale customers to compete with it at the retail level. CADE has been particularly concerned with alleged margin-squeeze practices in the telecommunications sector.

Exclusive dealing

In recent years, CADE has investigated and imposed sanctions against numerous exclusive arrangements. Exclusive dealings and other contractual provisions can constitute violations of Article 36 of the Competition Law if they lead to the foreclosing of competitors from accessing the market. Most of the cases have involved Unimed, a physicians’ cooperative with operations in 75 per cent of the country. Unimed affiliates contract with local physicians and hospitals for the provision of healthcare services, and often such providers are prohibited from affiliating with any other health plan. CADE prohibited such exclusivity arrangements and imposed sanctions against Unimed in all cases where it held a high market share (usually around 50 per cent). CADE has sanctioned more than 70 of these cases – including a fine of 2.9 million reais imposed in 2013 against a Unimed cooperative in the south of Brazil,
doubled for recidivism – and recently settled another 39 investigations on condition that Unimed terminated the exclusivity clauses. The most recent conviction concerned Unimed in the Missões region, in southern Brazil, where it was also imposing exclusivity arrangements.

In February 2016, CADE also reached a settlement with Unimed Catanduva, which would only accredit companies as its service providers if they were controlled by physicians linked to the Unimed system, closing the investigation.

CADE’s most important exclusive dealing decision was issued in 2009. The investigation, initiated in 2004, concerned a loyalty programme (Tô Contigo) instituted by AmBev, Brazil’s largest beer producer, which accounts for 70 per cent of the beer market in Brazil. The programme awarded points to retailers for purchases of AmBev products, which could be then exchanged for gifts. CADE concluded that the programme was implemented in a way that created incentives for exclusive dealing, preventing competitors from accessing the market; there was no extensive discussion of the distinction between fidelity and volume rebates. CADE imposed what is still the record fine in connection with an abuse of dominance case: 352 million reais. AmBev challenged CADE’s decision before the judicial courts and, in July 2015, reached an agreement with CADE through which it agreed to pay 229.1 million reais and terminate the conduct.

**Tying and other leveraging practices**

Annex I of CADE Resolution No. 20/99 defines tying as the practice of selling one product or service as a mandatory addition to the purchase of a different product or service. Similarly to the European Commission’s approach, CADE generally requires four conditions to find an infringement for tying:

a. dominance in the tying market;

b. the tying and the tied goods are two distinct products;

c. the tying practice is likely to have a market-distorting foreclosure effect; and

d. the tying practice does not generate overriding efficiencies.

In recent years, CADE dismissed two probes related to allegations of tying arrangements in World Cup events due to lack of evidence. In December 2014, the DG closed an inquiry aimed at investigating whether Match Services – a Swiss company chosen by FIFA to provide ‘hospitality’ services in the 2014 World Cup – tied the sale of rooms to game tickets and

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17 Administrative proceeding No. 08012.010576/2009-02.
18 Administrative proceeding No. 08700.009890/2014-43.
20 Administrative proceeding No. 08012003805/2004-10; defendant: Companhia de Bebidas das Américas – Ambev; adjudication date: 22 July 2009. The amount of the fine was equivalent to 2 per cent of the total turnover of the defendant in the year preceding the initiation of the investigations.
21 Another alleged exclusionary case involving AmBev concerned an alleged practice to raise rivals’ costs by introducing a proprietary reusable bottle in the market. Much of the beer sold in Brazil is packaged in reusable bottles. The bottles have a standard size (600ml), allowing all market players to coordinate their recycling (for reuse) programmes. AmBev introduced a 630ml proprietary bottle, which was physically very similar to the 600ml bottle, allegedly causing confusion in the recycling programme of rivals and raising costs for points of sale that also offered AmBev’s competitors’ products. In November 2010, AmBev agreed to stop commercialising the 630ml bottle through a consent decree with CADE (administrative proceeding No. 08012.001238/2010-57).
inflated the price of accommodation. In March 2015, the DG closed an inquiry into whether the Brazilian Soccer Confederacy and a tour operator tied the sales of tickets to packaged tours for the 2006 World Cup in Germany.

**Refusal to deal**

Annex I of CADE Resolution No. 20/99 includes refusal to deal as an example of anticompetitive practices. Brazil’s antitrust agency acknowledges that, as a general rule, even monopolists may choose their business partners. Under certain circumstances, however, there may be limits on this freedom for dominant firms to deal with rivals, particularly including refusal to license IP rights. CADE Resolution No. 20/99 considers denial of access to an essential facility as a particular type of refusal to deal. Under CADE case law, for an infringement to be found, access to the facility must be essential to reach customers, and replication or duplication of the facility must be impossible or not reasonably feasible.

In October 2016, CADE dismissed a refusal to deal involving cement makers. Although CADE concluded that violations did occur, it also found that all these conducts were part of cartel practices in the cement industry – a case adjudicated by CADE in early 2014 – and that some of the defendants had already been punished for it. The remaining defendants were acquitted owing to lack of evidence.

**Resale price maintenance**

Annex I of CADE Resolution No. 20/99 establishes RPM as a potentially illegal conduct when it refers to either minimum or maximum prices. According to CADE, RPM may increase the risk of collusion in the upstream market and also a manufacturer’s unilateral market power.

In January 2013, in a landmark abuse of dominance case, CADE sanctioned automobile parts manufacturer SKF for setting a minimum sales price. Pursuant to the decision, RPM will be deemed illegal unless defendants are able to prove efficiencies. An infringement will be found regardless of the duration of the practice (in this case, distributors followed orders for only seven months) and whether the distributors followed the minimum sales prices, as CADE considered such conduct to be *per se* illegal. Elaborating further, the reporting commissioner, Vinícius Marques de Carvalho, who later became CADE’s President, explicitly stated that a company having a low market share is not in itself sufficient reason for the authority to conclude that such conduct is legal. In its decision, the authority also notably disregarded the efficiency defence: in fact, there is no instance in CADE’s case law clearing an anticompetitive merger or dismissing an anticompetitive practice on the basis of efficiency arguments. CADE imposed a fine equivalent to 1 per cent of SKF’s total turnover in the year preceding the initiation of the investigation. This position, taken by the majority of

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26 Administrative proceeding No. 08012.001271/2001-44; defendant: SKF do Brasil Ltda; adjudication date: 30 January 2013.
the commissioners, departs from previous decisions issued by Brazilian authorities on RPM, and makes it very hard for companies holding a stake of at least 20 per cent of the market to justify the setting of minimum sales prices.

iii Discrimination

Annex I of CADE Resolution No. 20/99 makes reference exclusively to price discrimination, even though non-price discrimination practices could also be subject to Brazil’s Competition Law provided they unreasonably distort competition. The imposition of dissimilar conditions to equivalent transactions would be deemed an antitrust violation to the extent that it is predatory or otherwise excludes competitors from the relevant market.

In November 2013, the DG launched a probe into Brazil’s national postal service provider ECT for alleged abuse of dominance practices through discrimination in the market for express parcels.27 CADE’s DG recommended the imposition of fines in April 2017, but a final decision is pending.

There is also an ongoing proceeding into an alleged abuse of dominance in the fuel retail market in Brazil’s Federal District.28 Petrobras Distribuidora is believed to be ensuring favourable contractual terms to petrol stations affiliated with a specific chain. CADE is still collecting evidence on this case.

iv Exploitative abuses

Unfair trading practices may, in theory, be punished under Brazil’s Competition Law. The previous Law provided as an example of anticompetitive practice the charge of ‘abusive prices, or the unreasonable price increase of a product or service’. This example was excluded from the current Competition Law because CADE has traditionally taken the view that excessive pricing would only be considered an antitrust infringement if it had exclusionary purposes.

In recent years, CADE has reviewed more than 60 cases dealing with alleged abusive pricing, most of them related to pharmaceuticals, and has dismissed all of the complaints.

V REMEDIES AND SANCTIONS

i Sanctions

Brazil’s Competition Law applies to corporations, associations of corporations and individuals. For corporations, fines range between 0.1 and 20 per cent of the company’s or ‘group of companies’29 pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of an investigation. CADE Resolution No. 3/2012 broadly defines 144 ‘sectors of activity’ to be considered for the purposes of calculating the fine under Law No. 12,529/2011. In November 2016, CADE issued Resolution No. 18/2016, under which such ‘fields of activities’ may be further limited to ensure that a sanction will be proportionate to the specificities of the conduct. CADE may resort to the total turnover, 27 Administrative inquiry No. 08700.009588/2013-04; defendant: Empresa Brasileira de Correios e Telégrafos – ECT.
28 Administrative proceeding No. 08012.005799/2003-54.
29 The wording of the new provision lacks clarity and creates legal uncertainty regarding the scope of its application. CADE was expected to issue a regulation defining the criteria that would be applied to distinguish when fines would be imposed against a company, a group of companies or a conglomerate, but has not yet done so.
whenever information on revenue derived from the relevant ‘sector of activity’ is unavailable. Moreover, the fine may be no less than the amount of harm resulting from the conduct. Fines imposed for recurring violations must be doubled. In practice, CADE has been imposing fines of up to 10 per cent of a company’s turnover in connection with abuse of dominance violations. On rare occasions (all related to cartel investigations), CADE has proceeded to calculate the harm resulting from the conduct.

The Competition Law further provides that directors and other executives found liable for anticompetitive behaviour may face sanctions of 1 to 20 per cent of the fine imposed against the company. Under the new Competition Law, individual liability for executives is dependent on proof of guilt or negligence, which makes it hard for CADE to find a violation on the part of a company’s executives. Historically, while CADE has investigated the involvement of individuals in cartel cases, it has rarely done so in abuse of dominance cases. In July 2014, CADE settled an investigation with six individuals who allegedly participated in the development and implementation of the aforementioned Tô Contigo loyalty programme, created by AmBev, sanctioned by CADE in 2010. The joint settlement fine amounted to 2 million reais.30

Other individuals and legal entities that do not directly conduct economic activities are subject to fines ranging from 50,000 reais to 2 million reais.

Individuals and companies may also be fined for refusing or delaying the provision of information, or for providing misleading information; obstructing an on-site inspection; or failing to appear or failing to cooperate when summoned to provide oral clarification.

ii Behavioural remedies

At any stage of an investigation, CADE may adopt an interim order to preserve market conditions while a final decision on a case is pending.31 An interim order may be adopted only if the facts and applicable law establish a prima facie likelihood that an infringement will be found (fumus boni iuris); and that, in the absence of the order, irreparable damage may be caused to the market (periculum in mora). CADE has been adopting interim orders in connection with a significant number of solid abuse of dominance cases. The most recent was the interim measure ordered by CADE in April 2015 against the Gemini consortium, which was ordered to disclose the price of gas that it was supplied with.

Apart from fines, CADE may also:

a order publication of the decision in a major newspaper at the wrongdoer’s expense;
b prohibit the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years;32
c include the wrongdoer’s name in the Brazilian Consumer Protection List;
d recommend that the tax authorities block the wrongdoer from obtaining tax benefits;
e recommend that the IP authorities grant compulsory licences of patents held by the wrongdoer; and

30 Administrative proceeding No. 08012.010028/2009-74; defendants: Felipe Szpigel, Bernardo Pinto, Paiva, Rodolfo Chung, Ricardo Tadeu, Marcelo Miranda and Marcelo Costa.
31 Article 87 of the Competition Law.
32 In 2012, CADE, for the first time, imposed this sanction in connection with an abuse of dominance case (see administrative proceeding No. 08012.001099/1999-71; defendants: Comepla Indústria e Comércio et al; adjudication date: 23 May 2012).
prohibit an individual from exercising market activities on its behalf or representing companies for five years.\textsuperscript{33}

The new Competition Law also includes a broad provision allowing CADE to impose any ‘sanctions necessary to terminate harmful anticompetitive effects’, which allows CADE to prohibit or require a specific conduct from the undertaking at issue. Given the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE’s wide-ranging enforcement of such provision may prompt judicial appeals.

\textbf{iii} Structural remedies

Under the Competition Law, CADE may order a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to cease the detrimental effects associated with a wrongful conduct. CADE has never resorted to structural remedies in connection with abuse of dominance cases.

\textbf{VI} PROCEDURE

The first step of a formal investigation is taken by the DG, which may decide, spontaneously (\textit{ex officio}) or upon a written and substantiated request or complaint of any interested party, to initiate a preliminary inquiry or to open an administrative proceeding against companies or individuals, or both, which may result in the imposition of sanctions.

After an administrative investigation is initiated, the DG will analyse the defence arguments and continue with its own investigations, which may include requests for clarification, issuance of questionnaires to third parties, hearing of witnesses and even the conducting of inspections and dawn raids. Inspections do not depend upon court approval and are not generally used by the DG. As for dawn raids, as a rule, the courts allow the DG to seize both electronic and paper data. In 2009, a computer forensics unit was created by the Brazilian agencies for the purpose of analysing electronic information obtained in dawn raids and by other means. Over the past few years, the Brazilian authorities have served more than 300 search warrants (including for residential premises), mostly in connection with cartel investigations.

Once the DG has concluded its investigation in the administrative proceeding, the defendants may present final arguments, after which the DG will send the files for CADE for final ruling with a recommendation to impose sanctions against the defendants or to dismiss the case.

At the Tribunal, the case is assigned to a reporting commissioner. While the reporting commissioner reviews the case, CADE’s Attorney General may issue an opinion on it. The reporting commissioner may also request data, clarifications or documents from the defendant, any individuals or companies, public entities or agencies prior to issuing its opinion. After doing so, the case is brought to judgment before CADE’s full panel at a public hearing, where decisions will be reached by a majority vote. CADE may decide to dismiss

\textsuperscript{33} The idea behind this provision was to deal with situations in which CADE prohibited the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years. To avoid this penalty, the parties simply set up a new company and resumed activities in the same sector without being subject to the restrictions imposed by CADE’s decision.
the case if it finds no clear evidence of an antitrust violation, or impose fines or order the defendants to cease the conduct under investigation, or both. CADE decisions are subject to judicial enforcement if they are not complied with voluntarily.

At any phase of the proceeding, CADE may enter into a cease-and-desist commitment (TCC) with the defendant whereby the defendant undertakes to cease the conduct under investigation. Should a defendant enter into a TCC, it will not necessarily result in an admission of guilt as to the practice under investigation, nor necessarily require the payment of a settlement sum. The case is put on hold if and to the extent that the TCC is complied with, and sent to CADE’s archives after a predetermined time if the conditions set out in the TCC are fully met.

Finally, Brazil has been increasing its cooperation with foreign antitrust agencies. In February 2009, SDE, Brazil’s former administrative antitrust investigative agency, and Brazil’s federal police launched the first simultaneous dawn raid in connection with an international cartel investigation together with the US Department of Justice and the European Commission. Brazil’s antitrust authorities have executed cooperation agreements with the US Department of Justice, the European Commission, Argentina, Canada, Chile, China, Colombia, Ecuador, France, Japan, Peru, Portugal, Russia and South Korea, among others. CADE has in a number of instances requested the assistance of foreign authorities to conduct an investigation and, more recently, with the increasing number of dawn raids, foreign authorities have become interested in evidence seized in Brazil. However, in most of the cases, cooperation takes place in relation to cartel investigations rather than in abuse of dominance cases. CADE has also entered into cooperation agreements with the World Bank Group, and the Inter-American Development Bank, allowing for the exchange of information and for consultations on matters of common interest.

VII PRIVATE ENFORCEMENT

Private antitrust enforcement in Brazil has been on the rise over the past five years. This may be due to reasons such as the global trend of antitrust authorities encouraging damage litigation by potential injured parties, the growing number of infringement decisions issued by Brazil’s antitrust agency, CADE and the increasing general awareness of competition law in Brazil.

Pursuant to Article 47 of Brazil’s Competition Law, victims of anticompetitive conduct may recover the losses they sustained as a result of a violation, apart from an order to cease the illegal conduct. A general provision in the Brazilian Civil Code also establishes that any party that causes losses to third parties shall indemnify those that suffer injuries (Article 927). Plaintiffs may seek compensation in the form of pecuniary damages (for actual damage and lost earnings) and moral damages. Under recent case law, companies are also entitled to compensation for moral damage, usually derived from losses related to their reputation in the market.


35 Punitive damages are not expressly provided for in the Competition Law, but some plaintiffs have been awarded those as well.
Apart from complaints based on contracts, a significant percentage of private actions are based on horizontal conduct in Brazil. As in other jurisdictions, both corporations and individuals may be sued individually (e.g., by competitors, suppliers, or direct or indirect purchasers) or collectively for antitrust violations, but the greatest majority of pending cases are against corporations. The pass-on defence is not applicable to misconduct against consumers; for other cases, there are no statutory provisions or case law issued to date.

Individual lawsuits are governed by the general rules set forth in the Brazilian Civil Procedure Code. Collective actions are regulated by different statutes that comprise the country’s collective redress system. Standing to file suits aiming at the protection of collective rights is relatively restricted, and only governmental and publicly held entities are allowed to file. State and federal prosecutors’ offices have been responsible for the majority of civil suits seeking collective redress, most of which have been related to consumers’ rights complaints.

In December 2016, CADE put to public consultation a Draft Resolution on third-party access to documents and information deriving from leniency agreements, settlement agreements, and search and seizures, as well as its draft proposals (Proposed Legislation) for modifying Article 47 of Law 12,529/11 related to private antitrust litigation. The explanatory note issued by CADE sets forth that its aim is to ‘coordinate the antitrust public and private enforcement’. As CADE states: ‘On the one hand, rules that over-encourage private enforcement can damage public enforcement. On the other, rules too restrictive could jeopardise compensation of the injured party by the offence to the economic order and limit antitrust enforcement.’

The drafts are generally in line with international best practices, and reflect CADE’s efforts to strike a balance between the two goals. However, there is room for improvement regarding some aspects of the Draft Resolution and of the Proposed Legislation, and in particular on the need for CADE to change the approach adopted in the Proposed Legislation regarding the triggering event for the statute of limitation for damage claims.

**VIII  FUTURE DEVELOPMENTS**

There are two major, and conflicting, trends currently contributing to defining CADE’s stance in abuse of dominance cases. The first is the increasing availability of apparatus that enables the competition authority to employ economic analysis and evidence. The use of economics in Brazil has grown dramatically in competition matters over recent years, and is expected to play a major part in every important abuse of dominance case. The creation of the Department of Economic Studies within CADE by the 2011 Competition Law is certainly a watershed event in that respect.

Nonetheless, some recent cases seem to point to a second trend that is apparently at odds with the ever-growing sophistication of competition analysis. That trend could be defined as an enhanced scepticism or outright disregard for the role of efficiencies in vertical practices. The reason the latter trend is counterintuitive and somewhat paradoxical in light of the larger role currently played by economics in antitrust analysis is obvious: standard economic analysis would recommend caution against ‘over-enforcement’ regarding unilateral conduct. Still, it seems CADE has not been (and will continue not to be) shy about intervening.

It will be very interesting to follow future developments and see the interplay of those two undercurrents: it can be hoped that in the end they will balance out and we will have a

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36 See Brazil’s Consumer Protection Code, Article 25.
CADE that is more proactive but still selective in the abuse of dominance arena. Guidelines on vertical restraints and recommended commercial practices for dominant firms would ensure legal certainty and allow more predictability for market players when designing their commercial practices.

Furthermore, the intervention of rivals and customers as third parties in cases pending before CADE with more aggressive approaches, the issuance of injunctions for ceasing potentially harmful practices before a final decision is issued by the agency, as well as the imposition of behavioural remedies in the context of vertical mergers to reduce the incentives for future market abuses, are expected to increase in the coming years.
Chapter 6

CANADA

Arlan Gates and Eva Warden

I \hspace{1em} INTRODUCTION

Abuse of dominance is one of the foundational provisions of Canadian competition law under the Competition Act (Act), alongside cartels, mergers, vertical distribution practices and misleading advertising. Originally a criminal provision, abuse of dominance has been an administratively reviewable civil matter since 1986. However, it was significantly strengthened by 2009 amendments that introduced the potential for large administrative monetary penalties (AMPs). Combined with increased enforcement by the Canadian Competition Bureau (Bureau), abuse of dominance has taken on a higher level of practical importance and potential risk for firms active in the Canadian marketplace.

The abuse of dominance provisions are set out in Sections 78 and 79 of the Act. In basic terms, an abuse of dominance in Canada requires a finding by the Canadian Competition Tribunal (Tribunal) that one or more persons who substantially or completely control a class or species of business in Canada have engaged or are engaging in a practice of anticompetitive acts, with the actual or likely effect of substantially lessening or preventing competition in a market. Where an abuse of dominance is established, the Tribunal can prohibit the practice, require another action to be taken or impose AMPs.

The requisite elements of an abuse of dominance have received extensive judicial consideration, and the assessment of whether a firm is dominant and whether the required elements of an abuse have been met is far from straightforward.

To provide guidance in this area, the Bureau has issued Enforcement Guidelines (Guidelines) describing its approach to the interpretation of the statutory provisions in light of case law. The Guidelines were issued in September 2012 and explicitly supersede

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1 Arlan Gates is a partner and Eva Warden is an associate at Baker McKenzie LLP. The authors thank Yana Ermak, a senior associate at Baker McKenzie LLP, for valuable contributions to the 2018 update of this chapter.


policy statements and several earlier guidelines, including the prior 2001 Guidelines, as well as detailed enforcement guidelines on predatory pricing, guidelines specific to the telecommunications and grocery sectors, and draft guidelines specific to the airline industry.

The Guidelines do not have the force of law and are not binding on the Tribunal, Canadian courts or even the Bureau. The Guidelines also emphasise that the Bureau’s enforcement approach will ‘depend on the particular circumstances of each case’, and on the discretion of the Tribunal and Canadian courts in contested cases. In practice, abuse of dominance in Canada turns significantly on fact-specific analysis and risk assessment. Firms that are likely to be, or to become, dominant may be subject to a higher level of potential scrutiny and exposure of their business activities if they do not adapt accordingly.

II YEAR IN REVIEW

The Bureau’s evolving and increasingly active approach to enforcement of the abuse of dominance provisions is reflected in a number of recent developments.

On 1 December 2017, the Federal Court of Appeal upheld the Tribunal’s decision upon the rehearing of a long-running case involving the Toronto Real Estate Board (TREB) that concerned one of the prevailing tests for finding that an abuse of dominance has occurred. The Tribunal had ruled that an abuse of dominance had in fact been established and subsequently issued an order that TREB remove restrictions on its members’ use of certain listing data. The Court of Appeal’s decision is now subject to further appeal by TREB to the Supreme Court of Canada.

Another ongoing case also involves a respondent that technically does not compete directly in the market, the Vancouver Airport Authority (VAA). Despite a procedural setback in January 2018, the Bureau stated that it expects to continue to pursue its abuse of dominance case against the VAA, challenging restrictions that are alleged to decrease competition among in-flight catering companies.

On 17 January 2018, the Bureau entered into a settlement agreement with a software development company in the travel industry, Softvoyage Inc, pursuant to which the company

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4 The former predatory pricing guidelines also addressed the Bureau’s approach to predatory pricing under Section 50 of the Act, which was repealed in 2009 together with the Act’s former criminal prohibition against price discrimination.

5 Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) (July 2001); Predatory Pricing Enforcement Guidelines (July 2008); Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry (June 2008); the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Grocery Sector (November 2002); and Draft Enforcement Guidelines on Abuse of Dominance in the Airline Industry (February 2001).

6 A binding written opinion on the applicability of Section 79 may be requested from the Bureau for a fee pursuant to Section 124.1 of the Act, but in practice this is infrequently used.

7 Guidelines, Preface.

8 The Bureau does not currently publish up-to-date statistics on the number of abuse of dominance investigations commenced or discontinued. While several prominent cases were decided in the first two decades after 1986, more than one-third of all cases ever to come before the Tribunal for decision or registration of a consent agreement have been since 2009.
has committed to ending certain restrictive business practices that the Bureau considered to have lessened or prevented competition in markets relating to the supply of ‘all-inclusive travel packages’.

In November 2017, the Bureau announced the discontinuation of its high-profile three-year investigation into the practices of the largest grocery retailer in Canada. Other recently concluded investigations focused on online search and search advertising practices, a smartphone manufacturer’s agreements with Canadian wireless carriers, and the effect of restrictive clauses in contracts between TMX Group Limited and investment dealers on competition in the provision of products delivering consolidated securities market data. These cases and investigations reflect a trend towards an intensified focus on compliance and enforcement since the late 2000s, which in recent years has also included such high-profile developments as the imposition of landmark AMPs in the water heater rental industry.9 Enforcement trends also suggest a focus on the digital economy and, more broadly, innovation. In this regard, the release of updated guidance on the interface of intellectual property (IP) and competition law also underlines the Bureau’s growing attention on the innovative and expanding pharmaceutical industry in particular.

Finally, in March 2018 the Bureau published draft updates to its Guidelines for public comment. Once finalised, the updated guidance will replace the 2012 Guidelines.

### TREB decision

On 1 December 2017, the Federal Court of Appeal upheld a 2016 decision of the Tribunal in favour of the Commissioner against TREB, in a long-running case involving the Canadian real estate industry.10

The Bureau had sought to prohibit restrictions on TREB members’ provision of direct access to multiple listing service (MLS) information such as sales inventory, selling price and broker compensation, arguing that they prevented the introduction of internet-based services such as ‘virtual office websites’ through which such information could be made available at low cost.11 In an unusually short decision in April 2013, the Tribunal had initially determined that the Bureau’s application did not meet the requirements of Section 79(1)(b) of the Act,12

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11. The Tribunal determined that based on its finding under Section 79(1)(b), the application would necessarily also fail the other statutory tests under Sections 79(1)(a) and 79(1)(c). The Tribunal noted in obiter that a case could potentially be brought instead under the civil horizontal agreement provisions in Section 90.1 of the Act.
as interpreted in prior case law. The Court of Appeal allowed the Bureau’s appeal in a decision of February 2014, in which it held that the circumstances of the relationship between TREB and its members did not preclude the application of the abuse of dominance provisions of the Act, and referred the matter back to the Tribunal for reconsideration.\(^{13}\)

The Tribunal heard the case again throughout the remainder of 2015. In the new proceedings, the Commissioner maintained that the ‘foundations’ of the case remained the same as in 2012, but submitted updated evidence and market developments since the initial hearing.\(^{14}\) On 27 April 2016, the Tribunal ruled in favour of the Commissioner, having determined that the three elements of Section 79 had been established on a balance of probabilities,\(^{15}\) and in June ordered TREB to remove the restrictions on its member agents’ access to the data for display online through virtual office websites.\(^{16}\) Following the Federal Court of Appeal’s dismissal of TREB’s appeal of that decision in December 2017, TREB indicated that it would appeal to the Supreme Court of Canada.\(^{17}\)

As discussed in Section IV, Section 79(1)(b) requires that a dominant firm or firms have engaged in ‘a practice of anticompetitive acts’, but in the leading case interpreting this requirement, \textit{Canada Pipe},\(^{18}\) the Court of Appeal appeared to hold that the dominant firm must be a competitor of the firm or firms targeted by the practice. In its original decision, the Tribunal found on the facts that TREB does not compete with its members, and therefore could not satisfy this test.\(^{19}\) However, on appeal in 2014, the Court of Appeal held that the abuse of dominance provisions could apply on the basis that TREB controls the market for residential real estate services in the Toronto metropolitan area, even though it is not technically a competitor in that market. More particularly, according to the Court of Appeal in its 2014 \textit{TREB} decision, \textit{Canada Pipe} does not mean that ‘a person who does not compete

\(^{13}\) 2014 FCA 29. On 24 July 2014, the Supreme Court of Canada denied TREB’s application for leave to appeal the Court of Appeal’s decision.

\(^{14}\) See Closing Arguments of the Commissioner of Competition (12 November 2015). Among other updates, the Commissioner’s case in 2015 included evidence that TREB continued to actively enforce prohibitions on members’ sharing of historical MLS data, and that already high real estate prices in the Greater Toronto Area had continued to rise since 2012.

\(^{15}\) See Reasons for Order and Order (27 April 2016); Summary of Decision (published 28 April 2016) and Competition Bureau, Announcement (28 April 2016): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04071.html.


\(^{17}\) 2017 FCA 236.

\(^{18}\) \textit{Canada (Commissioner of Competition) v. Canada Pipe Co}, 2006 FCA 233 (Federal Court of Appeal). As leave to appeal the Court of Appeal’s decision to the Supreme Court of Canada was denied, the Court of Appeal decision is a binding precedent.

\(^{19}\) In the initial decision, the Tribunal pointed in part to the Court of Appeal’s observation in \textit{Canada Pipe} that eight of the nine examples of anticompetitive acts enumerated in Section 78 of the Act describe harms against competitors, and harm to a competitor could be implied in the ninth example. It also noted that a proviso in Section 79(4) implies that the dominant firm must compete in the market. These provisos are further discussed in Section IV.
in a particular market can never be found to have committed an anticompetitive act against competitors in that market, or that [an] order can never be made against a person who controls a market other than as a competitor.20

In its initial decision in 2013, the Tribunal had also disagreed with the Bureau’s argument that certain acts could be seen to have an anticompetitive purpose even if not directed at a specific competitor, as the test in Canada Pipe arguably required. The Court of Appeal in TREB differed, holding that neither Parliament in enacting the provision nor the Court of Appeal in Canada Pipe intended to narrow the scope of Section 79(1) solely to acts targeted against one’s own competitor. The Court of Appeal in Canada Pipe had itself acknowledged that while most of the listed anticompetitive acts that may constitute an abuse of dominance under Section 78 of the Act have in common that they are targeted at one’s own competitor, one of the listed acts is not necessarily one that would be taken against a competitor.21 On this basis, and in the absence of any law specifically foreclosing this possibility, the Court of Appeal in TREB concluded that an abuse of dominance could occur through acts of a non-competitor.

In its subsequent ruling (upon reconsideration) in April 2016, the Tribunal followed the Court of Appeal’s 2014 decision in TREB, stating that TREB was found to substantially or completely control the supply of MLS-based residential real estate brokerage services in the Toronto metropolitan area, owing to its control over the MLS, a key input for competitors in the market. The Tribunal also held that TREB had engaged in (and continued to engage in) a practice of anticompetitive acts for the purpose of Section 79, and that the restrictions imposed by TREB had and would continue to substantially prevent competition in the supply of residential real estate brokerage services.22 This reduction in non-price competition, according to the Tribunal, included ‘a considerable adverse impact on innovation, quality and the range of residential real estate brokerage services that likely would be offered’ in the area absent such restrictions.

While the Tribunal’s latest ruling, and the Court of Appeal’s subsequent dismissal of TREB’s appeal, provide some closure to the TREB matter, the case has raised certain questions regarding the scope of Section 79. For example, the Tribunal’s initial decision had been subject to some criticism that it relied on an artificial distinction between trade associations and their members, since association members who may be responsible for the rules and policies of the association do compete with other members, and with non-members. However, the subsequent decisions of the Court of Appeal and of the Tribunal (upon reconsideration) have created some uncertainty concerning the scope of Section 79(1) and whether its application will be limited to cases involving trade associations and similar bodies, or whether it may have implications for a wider range of parties that are not competitors in the relevant market. An ongoing case involving the VAA, discussed below, suggests the latter.

20 At paragraph 14. While the Tribunal in its original decision held that its finding with respect to Section 79(1)(b) (based on the fact that TREB does not compete with its members) alone was ‘fatal’ to the application, the Court of Appeal’s decision first considered Section 79(1)(a), which requires that one or more persons substantially or completely control a class or species of business.

21 At paragraph 19. Specifically, Section 78(1)(f) refers to ‘buying up of products to prevent the erosion of existing price levels’, which the Court of Appeal in Canada Pipe noted need not be conduct directed against a competitor.

22 Among other considerations, the Tribunal in its April 2016 decision found that the restrictions substantially reduced the degree of non-price competition in the supply of MLS-based residential real estate brokerage services, relative to the degree that otherwise would likely exist.
The TREB case has also renewed debate regarding the role of the Guidelines in interpreting the Act. Arguably, the Guidelines offer some support to the reasoning of the Court of Appeal and Tribunal (upon reconsideration) in TREB in suggesting that at least some acts not directed at competitors may still be considered to have an anticompetitive purpose. However, the Court of Appeal’s overt conclusion in its 2014 decision was that the Guidelines ‘provide no useful guidance’ on interpreting Section 79(1) in the case. This conclusion is consistent with the high-level, non-binding nature of the Guidelines, which in their current version (released in 2012) are markedly shorter and less instructive than prior guidance, and suggest a desire for enforcement flexibility at the expense of predictability.

While TREB may eventually be seen as a landmark in Canadian abuse of dominance analysis, its unusual facts make it an outlier in its approach to who is considered a competitor, and suggest that further guidance and case law (including, in the near term, the outcome of the VAA case) will be required to understand its full implications as the law continues to evolve.

ii VAA

On 29 September 2016, the Bureau filed a notice of application against the VAA, which is responsible for the management and operation of Vancouver International Airport, including granting physical access to the airport. The case involves restrictions imposed by the VAA that, according to the Bureau, decrease competition at the airport among in-flight catering companies that prepare meals for flight passengers and crew, and also provide related galley-handling services.

Specifically, following an investigation the Bureau concluded that while airlines that operate at the airport want greater choice of suppliers and that there are new suppliers willing to meet this demand, the VAA denies new suppliers access to the airport. The Bureau’s notice of application alleges that the VAA has abused its dominant position ‘by excluding and denying the benefits of competition’ to the in-flight catering marketplace at the airport and has ‘no legitimate explanation to justify the substantial prevention or lessening of competition that has resulted in higher prices, dampened innovation and lower service quality’.

Similar to TREB, the case against the VAA involves alleged abuse of dominance in a market in which the VAA technically is not a direct competitor. For the purpose of the dominance test, the Bureau’s case is premised on an argument that the VAA substantially or completely controls both the market for airport access for the supply of galley handling and, by extension, the market for the actual supply of galley handling at the airport. In its response to the Bureau’s application, the VAA submitted that it does not itself provide galley handling or have a commercial interest in any entity that provides galley handling at the airport, and that it does not substantially or completely control that market. According to

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23 Guidelines, Section 3.2.
24 At paragraph 21. According to the Court of Appeal, the Guidelines ‘indicate at most that the understanding of the scope of subsection 79(1) has changed over time’. The earlier decision of the Tribunal had noted that the Guidelines seem to reflect that the Commissioner ‘is not happy with the decision in Canada Pipe to the extent that it limits anticompetitive acts to those intended to harm a competitor’ (at paragraph 19), but that in any event they do ‘not clearly state that the dominant party need not compete in the market’.
the VAA, moreover, it does not represent entities involved in the provision of such services at the airport and does not have any competitive interest in that market. On this basis, the VAA argues that the case represents an attempt to ‘extend the reach of section 79 well beyond what was articulated’ in the *TREB* case.

Supplemental submissions made by the VAA in late March 2017, which primarily related to the respondent’s position on ‘litigation privilege’, also indicated that the Bureau has made extensive use of ‘Section 11’ orders (see Section VI) to compel information in this case. In February 2018, the Federal Court of Appeal held that the Bureau can no longer invoke ‘public interest’ privilege on a class-wide basis.26 Following an adjournment in January 2018, hearings on the merits of the case have been delayed, and have since been rescheduled for late 2018.

### Softvoyage Inc

On 17 January 2018, the Commissioner and Softvoyage Inc (Softvoyage) registered a consent agreement to settle a matter relating to the Bureau’s concerns over Softvoyage’s restrictive trade practices in the travel industry.

The settlement follows a Bureau investigation into alleged abuse of dominance by Softvoyage, which is engaged in the development of software targeted at the travel industry, through certain restrictive trade practices relating to the supply of ‘all-inclusive’ travel packages. According to the Bureau, the company is dominant in two markets relating to supply in this area, namely ‘content management’ (for software used by tour operators to create holiday packages and manage their inventories or ‘content’) and ‘online distribution’ software (which enables the sale of packages to Canadian consumers, either via tour operators or travel agencies). Based on information gathered in the investigation, the Bureau found that the company’s practices created barriers to entry and impacted the level of innovation in the relevant markets. Specifically, it was alleged that after a majority of tour operators adopted Softvoyage’s content management software, the company used exclusivity clauses in its contracts requiring those tour operators to only use Softvoyage’s distribution software. According to the Bureau’s position statement, Softvoyage also prohibited tour operators from ‘extracting or using their own data managed in Softvoyage’s content management software’.27

Under the consent agreement, Softvoyage entered into seven-year commitments to refrain from enforcing restrictive clauses considered likely to limit operators’ choice of distribution software and those likely to limit their ability to use their own content. Softvoyage also committed to collaborate in good faith with tour operators wishing to use competing distribution channels (where their content is managed using Softvoyage’s content management software) and competing content management software (where Softvoyage’s distribution software is used), and to implement a corporate compliance programme.

The case reflects the growing relevance of innovative industries to abuse of dominance considerations in Canada, particularly in the increasingly complex and layered digital

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26 2018 FCA 24. The decision marks a significant shift from long-running practice relating to privilege. Whereas the Bureau previously had been able to assert public interest privilege on a class-wide basis, going forward it will only be able to invoke privilege on a document-by-document basis. The Bureau has indicated that it will not appeal the Court of Appeal’s decision, but intends to continue to pursue its case against the VAA despite the decision.

economy that ultimately serves various end-consumer needs.\textsuperscript{28} It also reflects the Bureau's attentiveness to the possibility that a firm may be able to leverage its market power in multiple markets: not only did Softvoyage allegedly implement exclusivity clauses to create barriers in the market for distribution software,\textsuperscript{29} but its control over the online distribution software market had ‘facilitated’ its control over the content management software market.\textsuperscript{30} Finally, it is an example of circumstances where the Bureau gathered information from multiple sources to aid its investigation, in this case including tour operators, travel agencies, industry associations, past and potential competitors, and ‘businesses offering similar products and services in foreign markets’.

\textbf{iv Loblaw and other recent and ongoing investigations}

The Bureau announced in November 2017 the discontinuation of its investigation of Loblaw Companies Limited (Loblaw), a decision it reached following a change in Loblaw’s practices as well as the Bureau’s determination that it had insufficient evidence to proceed.

The investigation targeted the grocery retailer’s pricing strategies and programmes in the context of its relationship with its suppliers,\textsuperscript{31} reflecting the Bureau’s focus on vertical agreements and arrangements that reference competitors, such as ‘meet-or-release’ and ‘most favoured nation’ clauses.\textsuperscript{32} The Bureau has alluded to the potential anticompetitive effects of Loblaw’s exercise of market power, and it had been expected that any enforcement action arising from the investigation would have been based primarily on abuse of dominance grounds.

In a position statement, the Bureau indicated that before deciding to close the investigation, it had concluded that Loblaw no longer enforced certain policies (further to an earlier communication by Loblaw to its suppliers that it would cease to do so effective January 2016). The Bureau also determined that, on balance, there was insufficient evidence to conclude that the policies had lessened or prevented competition substantially.\textsuperscript{33}

In the course of the investigation, the Bureau obtained 12 ‘Section 11’ orders (see Section VI) to compel the production of records and other information from major grocery suppliers in December 2014, and reportedly sought another four in October 2016 to further its investigation.

\textsuperscript{28} The Bureau has commented, in its position statement, that while both of the relevant markets in this case (software for content management and distribution of holiday packages) may seem ‘ancillary’ to the end consumer, such software is ‘very important to the variety of product offerings that are ultimately made available to consumers’, particularly as ‘enhanced innovation on the software side translates into a more personalised experience that will better serve the consumer’s particular interests, preferences or needs’.

\textsuperscript{29} According to the Bureau’s position statement, the restrictive clauses ‘had the effect of creating an artificial link between Softvoyage’s content management software and its distribution software by rendering the tour operators’ content inaccessible to any of Softvoyage’s competitors in the market for distribution software’.

\textsuperscript{30} That is, because the ‘optimal distribution’ available through Softvoyage’s distribution software had helped to prompt tour operators to migrate towards the company’s content management software.


\textsuperscript{32} In the case of the \textit{Loblaw} investigation, the Bureau has indicated that it considered in particular Loblaw’s programmes and policies with suppliers that reference rivals’ prices.


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In April 2016, the Bureau announced that it was closing its investigation into alleged anticompetitive conduct in relation to a company’s online search, search advertising and display advertising services in Canada. While the Bureau found evidence to support an allegation that the online search engine and advertiser used anticompetitive clauses in certain types of contracts that negatively affected advertisers with an intent to exclude its competitors, this concern was addressed when the company changed the relevant terms in response to similar concerns raised by the US Federal Trade Commission and through an agreement (in response to the Bureau) not to reintroduce such clauses in Canada. In a position statement regarding the investigation, the Bureau indicated that the complaint-driven inquiry, opened in 2013, involved extensive consultations with industry and economic experts, and interviews with a range of market participants, as well as a Section 11 order compelling the target of the investigation to provide documents and information.34

The online search and advertising investigation reflects the Bureau’s intensifying focus on the digital economy, an area of interest that also prompted, for example, the release by the Bureau of a policy report titled ‘Big data and innovation: key themes for competition policy in Canada’,35 and its stated interest in strengthening cooperative ties with its international counterparts. In addition to consulting with the US Federal Trade Commission and European Commission, the Bureau indicated in its position statement that it would continue to closely follow the international investigations and other developments with respect to the company’s conduct, as well as monitor the digital marketplace more generally.

In January 2017, the Bureau also announced that it was closing its investigation into alleged anticompetitive conduct under the abuse of dominance provisions by a smartphone manufacturer in relation to agreements with wireless carriers for the sale and marketing of smartphones in Canada. The Bureau ultimately concluded that the evidence was insufficient to suggest that the terms ‘resulted in a significant effect on competition’, according to the position statement.36

This latest inquiry is consistent with a number of increasingly prominent themes in the Bureau’s investigative focus and approach. Like the Loblaw investigation, the Bureau considered contractual terms that reference rivals (in this case, other original equipment manufacturers), as well as other restrictive terms imposed in vertical agreements with wireless carriers. Similar to other recent investigations, the smartphone inquiry also featured the use of formal powers to compel the production of information from the subject of the inquiry and third parties (in this case, wireless carriers), as well as communication between the Bureau and its foreign counterparts and monitoring of investigations into similar conduct in other jurisdictions. Moreover, the Bureau indicated its ongoing consideration of innovation and technology in competition matters. In this case, it noted in its position statement that the relevant industry is dynamic and innovative, but also that the fact that there were a number of advancements in smartphone-related technology, and that the entry and exit of various competitors over the course of its investigation ‘does not necessarily preclude a finding that conduct has reduced competition’.

In November 2016, the Commissioner also announced that it was closing its investigation into TMX Group Ltd regarding allegedly restrictive trade practices, including potential abuse of dominance. The Bureau had started the investigation following receipt of a complaint that, through the imposition of restrictive clauses in its contracts with investment dealers, TMX Group was hindering another company’s ability to develop a consolidated securities market data product. The Commissioner’s position statement regarding the inquiry indicates that the investigation focused on the third part of the abuse of dominance test, specifically whether the contractual terms in question were likely to ‘prevent’ competition in a market. Ultimately the Bureau concluded that, based on the available evidence, even absent the contractual agreements between TMX Group and investment dealers, it was unlikely that the complainant would have been able to obtain a sufficient volume of private market data from investment dealers to develop a competitive product.37

v Intellectual Property Enforcement Guidelines

On 31 March 2016, the Bureau released its final updated Intellectual Property Enforcement Guidelines (IPEGs).38 The guidance, which outlines the interface between IP law and competition law in Canada and the Bureau’s approach to dealing with competition issues involving IP, reflects the Bureau’s intensifying focus on pharmaceuticals, with specific commentary on potential abuse of dominance through industry-specific conduct such as ‘product switching’ (or ‘product hopping’) and patent litigation settlements.

The updated IPEGs follow the Bureau’s announcement, in May 2014, that it had ended its investigation of a pharmaceutical company that allegedly held a dominant position in the supply of certain prescription drugs and had allegedly ‘disrupted’ the supply of a drug soon to be off-patent in favour of a successor drug for which there was no generic substitute (i.e., product switching).39 In September 2014, the Bureau also released a white paper discussing patent-related settlement agreements and the potential concerns associated with arrangements such as ‘pay-for-delay’ settlements under various provisions of the Act, including abuse of dominance.40 In clarifying the Bureau’s approach to the interface between IP and competition law, the updated IPEGs crystallise these recent developments towards a sharper focus on potential concerns associated with market power, in the pharmaceutical industry in particular, while setting the stage for the possibility of increased enforcement in that industry going forward.41

39 An application by the Bureau for an ex parte order to compel document production and written responses was filed with the Federal Court on 13 December 2012. According to the Bureau, the firm had ceased the conduct that raised concerns shortly after the Bureau began its investigation, causing competitive market dynamics to be restored.
41 The Bureau also announced in March 2015 that it had reached an agreement with Canada’s largest supplier of insulin pumps for diabetic patients, Medtronic of Canada Ltd, after the Bureau raised concerns about the company’s warranty terms further to an investigation. Competition Bureau, Announcement (13 March 2015): www.competitionbureau.gc.ca/eic/site/ch-bc.nsf/eng/03887.html.
More recently, in public statements the Commissioner has continued to emphasise this area in the context of the intersection between IP and competition law. This focus dovetails with the Bureau’s stated interest in supporting the development of both competition and innovation.

**vi Update of Enforcement Guidelines on the Abuse of Dominance Provisions**

On 14 March 2018, the Bureau announced the publication of draft updates to the Guidelines for public comment. Proposed changes in the Bureau’s revised draft include:

- updates to the definition of market power based on recent case law concerning the concept of ‘substantially or completely control’;
- revised guidance on the level of market share that generally will or will not prompt further examination, reflecting the Bureau’s current practice;
- enhanced guidance on the assessment of certain types of anticompetitive conduct, notably predatory, exclusionary and disciplinary conduct, as well as competitive effects; and
- the addition of several hypothetical, illustrative examples.

Subject to the outcome of the public consultation, once finalised, the updated Guidelines will replace the version previously released in 2012.

**vii Summary of recent developments**

The following table summarises significant recent decisions and developments.

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43 See for example the Bureau’s 2017–2018 Annual Plan, the focus of which is ‘Competition is key – Creating the conditions for innovation’ (18 May 2017): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04241.html, as well as the digital economy enforcement trends and ‘big data’ report noted above.
<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
<th>Status</th>
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<tbody>
<tr>
<td>Real estate services</td>
<td>Bureau</td>
<td>Restriction by TREB of members’ access to multiple listing service information (sales inventory, selling price, broker compensation, etc.)</td>
<td>Initial application filed with the Tribunal in May 2011</td>
<td>Rehearing held in 2015. The Tribunal’s April 2016 ruling that abuse of dominance was established (followed by issuance of an order in June) upheld by the Federal Court of Appeal on 1 December 2017, subject to further appeal to the Supreme Court of Canada.</td>
</tr>
<tr>
<td>Residential water heaters</td>
<td>Bureau</td>
<td>Alleged ‘aggressive retention tactics’ during customer calls by Reliance Comfort Limited Partnership and Direct Energy Marketing Limited, as well as other policies and procedures aimed at hindering switching to competitors</td>
<td>Initial applications filed with the Tribunal in December 2012</td>
<td>Consent agreement with Reliance Comfort Limited Partnership registered November 2014, including C$5 million penalty and C$500,000 investigation costs. Consent agreement with Direct Energy Marketing Limited registered October 2015, including a C$1 million penalty and commitment to implement a corporate compliance programme in the event of re-entry into the market. Commitments by EnerCare Inc not to continue Direct Energy’s alleged anticompetitive policies and practices obtained by the Bureau in November 2014 following the acquisition of Direct Energy by EnerCare.</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>Bureau</td>
<td>Alleged ‘product hopping’ by Alcon through intentional disruption of the supply of a branded prescription anti-allergy drug in order to limit or prevent meaningful competition from generic drug companies</td>
<td>Investigation commenced in November 2012</td>
<td>Closure of investigation announced in May 2014 following cessation of the alleged conduct.</td>
</tr>
<tr>
<td>Insulin pumps for diabetic patients</td>
<td>Bureau</td>
<td>Imposition of warranty terms relating to use of Medtronic insulin pumps with non-Medtronic equipment, which allegedly limited competition and restricted consumer choice</td>
<td>Date investigation commenced not publicly disclosed but appeared to follow the acquisition by Medtronic Holdings Limited of Covidien plc, which was subject to a consent agreement registered on 26 November 2014</td>
<td>Agreement with Bureau to revise warranty terms announced March 2015.</td>
</tr>
<tr>
<td>Digital economy – online search and search advertising</td>
<td>Bureau</td>
<td>Alleged conduct by an online search engine and advertiser intended to exclude or disadvantage competitors, including through imposition of conditions and demands on customers preventing rivals from competing</td>
<td>Investigation commenced in 2013</td>
<td>Subject to ongoing monitoring.</td>
</tr>
<tr>
<td>Smartphones</td>
<td>Bureau</td>
<td>Imposition of potentially anticompetitive obligations and restrictions regarding the sale and marketing of smartphones in agreements with Canadian wireless carriers</td>
<td>Investigation commenced after Bureau’s receipt of information on the matter in 2014</td>
<td>Closure of investigation announced in January 2017.</td>
</tr>
</tbody>
</table>
The Bureau does not currently publish up-to-date statistics on the number of ongoing abuse of dominance investigations, although it is estimated that currently there are between 20 and 30 ongoing investigations and that the Bureau receives some 400 complaints yearly.

### III  MARKET DEFINITION AND MARKET POWER

Determining that a firm is dominant is the first of three statutory conditions that must be independently met for the abuse of dominance provisions to apply.

The statutory criteria for dominance are set out in Section 79(1)(a) of the Act, which requires a finding that ‘one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business’. Whether this statutory test is met turns on the definition of the relevant market and an assessment of the exercise of market power.

#### i  Market definition

A ‘class or species of business’ and the words ‘Canada or any area thereof’ have been interpreted by the Tribunal to refer to the relevant product and geographical market or markets. A market definition focuses conceptually on the existence of substitutes for the product and geographical territory in question. It is usually determined on the basis of a ‘hypothetical monopolist’ test that looks at the smallest market in which a ‘small but significant and non-transitory increase

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44 *Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co* (1990), 32 CPR (3d) 1 at 9 and 20.
in price’ could be profitably imposed, beginning with the product of the firm in question and the area in which it operates, and expanding the relevant market to include other products or supplier locations likely to be substituted.45

This is generally consistent with the approach taken by the Bureau in defining markets for purposes of merger analysis.46 As in the case of mergers, market definition may depend significantly on the particular features of the product and geographical markets in question. A market need not be conclusively defined to find that a firm or firms exercise market power.47

In addition to considering actual price and supply data where available, the Bureau may take into account a range of other factors in its assessment of market definition, including:

a consumer behaviour;
b past product or location substitution;
c product functional interchangeability;
d unique product characteristics;
e transportation costs and shipping patterns;
f switching costs;
g the role of distant sellers and foreign competition; and
h past price correlation among substitute products.48

ii Market power

The words ‘substantially or completely control’ in the context of the abuse of dominance provisions have been held by the Tribunal to be synonymous with market power.49 The focus of the Bureau’s concern is the ‘creation, enhancement or preservation of market power’ resulting from a practice of anticompetitive acts. The Bureau’s approach to assessing market power therefore takes into account both pre-existing market power and market power derived from practices alleged to be anticompetitive.50

The Guidelines note that while market power can be measured through direct factors such as high profit margins or ‘supracompetitive pricing’, these factors can present analytical issues and may be inconclusive. The more common analysis will therefore use indirect indicia of market power that suggest the extent to which a firm or firms will be constrained from implementing anticompetitive price increases, either due to existing competition or

45 The benchmark for ‘significant’ and ‘non-transitory’ is a 5 per cent increase in price, sustained over a one-year period. The relevant price is that which would exist in the absence of the anticompetitive acts (often not the current price). The ‘price’ can include not only the nominal price, but also qualitative factors such as product quality, choice, service, support or innovation.


47 One distinction between the two approaches is the Bureau’s acknowledgment, in the abuse of dominance analysis, of a potential ‘overly broad product market definition’ if current prices – that is, price levels where market power has already been exercised – are taken into account (the ‘cellophane fallacy’). See Guidelines, Section 2.1.

48 Guidelines, Sections 2.1 and 2.2.

49 NutraSweet at 28.

50 Market power is most often associated with sellers that possess the ability to maintain prices or impose restrictions on non-price aspects of competition without effective discipline from competitors in the market, but can also arise among a buyer or buyers that exercise market power in lowering the price paid to a seller below a competitive level.
likely competitive entry. Indirect indicia considered by the Bureau include market shares and barriers to entry, as well as countervailing power from customers or suppliers, and the competitive impact of technological change.

iii Market share

There is no statutory threshold for market share that will necessarily give rise to market power, nor a statutory safe harbour below which a firm will not be considered dominant. However, market share is ‘usually a necessary, but not sufficient’\textsuperscript{51} condition of finding market power, and will ordinarily be considered together with other factors. Market share may be measured on the basis of revenues, unit sales, sales or production capacity or natural resource reserves, depending on which ‘best reflects the future competitive significance of competitors’.\textsuperscript{52} In addition to the actual share, the Bureau will consider the distribution of market share among a firm’s competitors, as well as market share fluctuations.

The Bureau has historically taken the position that only a single firm market share below 35 per cent will be considered unlikely to give rise to a finding of market power. The revised (2012) Guidelines maintain this safe harbour, but now go further to say that a market share of up to 50 per cent will ‘generally’ not lead to further examination by the Bureau unless it is believed that the anticompetitive conduct is likely to result in increased market share in a reasonable period. This change is now consistent with the long-standing finding of the Tribunal in the Laidlaw case that a market share below 50 per cent would not lead to a \textit{prima facie} finding of dominance.\textsuperscript{53}

On the other hand, the Guidelines go further than the Tribunal in stating the corollary that a single firm market share above 50 per cent (or a combined share above 65 per cent, in the case of joint dominance) will ‘generally prompt further examination’. In the Télé-Direct case, the Tribunal held that where market share is 80 per cent or greater, it will look for ‘extenuating circumstances’ and ‘generally, ease of entry’ to outweigh a \textit{prima facie} finding of market power.\textsuperscript{54} In practice, contested abuse of dominance cases both before and after Télé-Direct have involved market shares of 80 to 100 per cent, usually in highly concentrated markets.

The Bureau’s draft updates to the Guidelines, published for public comment in March 2018, propose removing the reference to the 35 per cent threshold entirely, and instead referring to the 50 and 65 per cent thresholds.

iv Barriers to entry; other factors

As market share is not determinative of market power, the Bureau will also consider the barriers to entry that may be present in the market, including:

\begin{itemize}
  \item \textit{a} sunk investments (e.g., in equipment, infrastructure or research and development);
  \item \textit{b} government approval requirements;
  \item \textit{c} whether the market is mature or depends on economies of scale or scope;
\end{itemize}

\textsuperscript{51} Guidelines, Section 2.3.1.
\textsuperscript{52} Guidelines, Section 2.3.1.
\textsuperscript{53} \textit{Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd} (1992), 40 CPR (3d) 289.
\textsuperscript{54} \textit{Canada (Director of Investigation and Research) v. Télé-Direct (Publications) Inc} (1997), 73 CPR (3d) 1.

Separately, in a case involving a sole supplier, the Tribunal presumed market power in the absence of ‘evidence that there [were] no barriers to entry’; \textit{Director of Investigation and Research v. D\&B Companies of Canada Ltd} (1995), 64 CPR (3d) 216.

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Market entry despite barriers to entry must be likely, timely and sufficient to prevent or discourage the exercise of market power.

The Guidelines recognise that, in some instances, customers will constrain market power, for example, through vertical integration or by encouraging entry or expansion of competitors. Markets that undergo rapid technological change or innovation, or some other material form of change, may warrant different consideration if this permits new or existing competitors to overcome the exercise of market power.

v Joint dominance

The words ‘one or more persons’ in Section 79(1)(a) explicitly recognise that two or more firms may have joint dominance. As explained in the Guidelines, the Bureau’s approach to joint dominance is essentially similar to that for single firm dominance except that it is also necessary to find that control of the market is exercised jointly.

For purposes of the criminal conspiracy provisions of the Act, ‘conscious parallelism’, in itself, does not constitute an agreement, and the Bureau adopted this position in the prior (2001) Abuse of Dominance Enforcement Guidelines, which also described factors that could be used to infer joint action in the civil context. The revised Guidelines simply state that ‘[s]imilar or parallel conduct by firms is insufficient’ to establish joint dominance, and offer no further insight into the extent of joint conduct – or maximum level of intra-group competition – required to find joint control of the market. The threshold test for joint dominance has never been considered by the Tribunal as, although the Bureau has commenced three significant joint dominance cases, all have settled prior to a contested hearing.55

In addition to the application of the abuse of dominance provisions to joint dominance, since 2010 it has been possible to address coordinated conduct under Section 90.1, a civil provision that applies to agreements between competitors that substantially lessen or prevent competition.56

55 Canada (Director of Investigation & Research) v. Bank of Montreal (1996), 68 CPR (3d) 527; Canada (Director of Investigation & Research) v. AGT Directory Ltd [1994] CCTD No. 24; Canada (Commissioner of Competition) v. Waste Services (CA) Inc and Waste Management of Canada Corporation, Consent Agreement, CT-2009-003. However, in the 2009 Waste Services case, the Bureau’s allegations against two commercial waste firms appear to have been based on parallel conduct combined with high combined market share of greater than 80 per cent. The firms in question both used long-term contracts that imposed highly restrictive terms on customers, such as automatic renewal clauses and severe penalties for early termination; the Bureau did not suggest that the challenged conduct involved any coordination or agreement.

Some commentators foresee a complementary role for the provisions, with Section 79 targeting conduct that reduces competition outside the oligopoly, and Section 90.1 targeting competition between the oligopoly members. See M Aitken and E Davis, ‘The Changing Regulation of Canadian Oligopolies: Complementary Enforcement Roles for Section 90.1 and Joint Dominance’, Conference Paper, American Bar Association Section of Antitrust Law Spring Meeting, 12 April 2013. Moreover, as noted in Section II, following the Bureau’s restructuring, the responsibilities of the ‘Monopolistic Practices Directorate’ cover both abuse of dominance and certain types of anticompetitive agreements or arrangements.

56
vi Attempted monopolisation

In contrast to the US Sherman Act, attempted monopolisation is not caught by the abuse of dominance provisions in Canada. The existence of market power at the time anticompetitive conduct is engaged in is implicit in the formulation of the statutory test, and would prohibit an application to the Tribunal on the basis of anticipated market power. The revised Guidelines nonetheless suggest that the Bureau may investigate the conduct of a firm that does not currently hold market power, but that is expected to acquire it as a result of the allegedly anticompetitive conduct ‘within a reasonable period of time’.

IV ABUSE

i Overview

Dominance itself is not proscribed in Canada. For an abuse of dominance to be found, two other statutory conditions in addition to market power must be met. The first of these requires that the dominant firm or firms have engaged or are engaging in a ‘practice of anticompetitive acts’, as set out in Section 79(1)(b). The second is an effects analysis of whether the practice has had, is having or is likely to have the effect of preventing or substantially lessening competition in a market, as set out in Section 79(1)(c). While apparently similar and often assessed on the basis of the same evidence, these are conceptually distinct tests.

Practice of anticompetitive acts

Although an illustrative list of ‘anticompetitive acts’ is provided in Section 78 of the Act, the list is not exhaustive, and in practice, the abuse of dominance provisions can apply to a wide range of anticompetitive conduct.

Whether an act will be considered ‘anticompetitive’ depends on the limiting principle of whether it has an intended negative effect on a competitor that is ‘predatory, exclusionary or disciplinary’. This does not necessarily require subjective intent, and the Tribunal has held that intent can be inferred from the reasonably foreseeable consequences of the conduct or the circumstances in which it is undertaken.

The requirement that an anticompetitive act be intended to harm a competitor, not competition in general, which is assessed under the separate test in Section 79(1)(c) of the Act, was an essential part of the test in Canada Pipe. The revised Guidelines, however, take the position that ‘certain acts not specifically directed at competitors could still be considered to have an anticompetitive purpose’. This broader interpretation – which would encompass ‘facilitating practices’ that do not themselves harm a competitor but permit coordination – was arguably foreclosed by the Tribunal’s initial decision in the TREB case. However, as discussed above, the subsequent decision of the Court of Appeal and the Tribunal’s ruling upon reconsideration leave open the possibility that a range of acts not specifically directed at a competitor (or at least not one’s own competitor) may qualify as ‘anticompetitive acts’ for the purpose of these provisions, an approach that appears also to be reflected in the more recent proceedings against the VAA.

57 Guidelines, Section 2.3.
58 Canada Pipe at paragraph 66.
59 NutraSweet at 35.
60 Guidelines, Section 3.2.
Where anticompetitive intent has been inferred, it is possible to rebut a presumption that the purpose of conduct is anticompetitive by establishing that the conduct had a valid business purpose or justification. In Canada Pipe, it was held that a business justification must have a ‘credible efficiency or pro-competitive rationale’ and be one that ‘relates to and counterbalances the anticompetitive effects or subjective intent of the acts’. However, the Guidelines take a broader view that a business justification, while not a defence, could be anything that provides an ‘alternative explanation for the overriding purpose of the conduct’.

A ‘practice’ of anticompetitive acts under the abuse provisions generally requires more than a single act, but could be met by a single act that has an ongoing or systemic effect or a ‘lasting impact’ in a market. A practice may also consist of different forms of anticompetitive conduct, not only repeated use of the same conduct, and can therefore in theory include otherwise innocuous conduct, if used in an anticompetitive manner in combination with other anticompetitive practices.

**Substantial lessening or prevention of competition**

An abuse of dominance will be subject to a remedy under the Act only if there is an actual or likely substantial lessening or prevention of competition.

The prevailing test was formulated in Canada Pipe, and recently affirmed in the context of the evaluation of mergers under the Act. It is a ‘but for’ test that seeks to determine if it is likely that there would be substantially greater competition (past, present or future) in the absence of the impugned conduct.

As was the case prior to Canada Pipe, the test considers whether a practice contributes to the creation, preservation or enhancement of market power, which will be assessed in terms of whether there is substantial effect on market entry or expansion by new or existing competitors. However, in contrast to the test prior to Canada Pipe, it is a comparative, relative assessment, rather than a consideration of whether the absolute level of competition is substantial or sufficient. The Guidelines indicate that the Bureau will also consider factors such as whether, but for the practice, there would likely be substantially lower consumer prices, substantially greater product selection, quality or innovation, or substantially more frequent switching.

In contrast to the test for anticompetitive acts under Section 79(1)(b), the above test concerns competition rather than individual competitors. The Act requires, however, that the

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61 Canada Pipe at paragraph 73.
62 Guidelines, Section 3.2.
63 Guidelines, Section 3.1.
64 NutraSweet at 59.
65 Tervita Corporation v. Canada (Commissioner of Competition), 2015 SCC 3. In its decision of 22 January 2015, the Supreme Court of Canada considered whether, but for the merger, the acquired party would likely have entered the relevant market as a competitor.
66 The Court of Appeal held that the Tribunal had erred in considering whether there continued to be a substantial level of competition in the market.
67 Guidelines, Section 4.
68 Confusion around the application of the test following the Canada Pipe decision has, however, arguably led to imperfect application of the principle of relative competitiveness in practice.
analysis take into account whether an impugned practice results from a market participant's 'superior competitive performance', which could be a legitimate cause of a relative decrease in competition.\textsuperscript{69}

\textbf{ii Exclusionary abuses}

The Act enumerates several practices in Section 78 that relate to the exclusion of a competitor, including:

- margin squeezing by a vertically integrated supplier;
- acquisition by a supplier of a customer;
- pre-emption of scarce facilities or resources;
- adoption of non-compatible product specifications; and
- exclusive dealing.\textsuperscript{70}

The Guidelines also reference tying and bundling, activities that increase customer switching costs or, in general, activities that increase a rival's costs.\textsuperscript{71}

The Tribunal and Canadian courts have also recognised numerous other exclusivity abuses in case law, including:

- meet-or-release and most-favoured nation clauses;\textsuperscript{72}
- rights of first refusal;\textsuperscript{73}
- automatic price increases;\textsuperscript{74}
- long-term contracts;\textsuperscript{75}
- negative option automatic renewal provisions;\textsuperscript{76}
- costs or penalties, such as liquidated damages or excessive fees to switch suppliers, return goods or otherwise terminate contracts early;\textsuperscript{77}
- the acquisition of competitors and inclusion of non-compete clauses in the acquisition agreements;\textsuperscript{78}
- various kinds of loyalty or fidelity rebates,\textsuperscript{79} including discounts and allowances in exchange for the use of the supplier's logo and name;\textsuperscript{80}
- exclusive networks;\textsuperscript{81}
- market allocation;\textsuperscript{82} and
- in the real estate services cases, the use of a database in a way that could be exclusionary.\textsuperscript{83}

\textsuperscript{69} Act, Section 79(4).
\textsuperscript{70} Sections 78(a), (b), (e), (j), and (h).
\textsuperscript{71} Guidelines, Section 3.2.1.
\textsuperscript{72} \textit{NutraSweet}; \textit{D&B} regarding most favoured nation clauses.
\textsuperscript{73} \textit{Laidlaw}.
\textsuperscript{74} Id.
\textsuperscript{75} \textit{D&B}.
\textsuperscript{76} \textit{Laidlaw}.
\textsuperscript{77} \textit{Direct Energy and Reliance}; \textit{Laidlaw}; \textit{D&B}; \textit{Waste Services}.
\textsuperscript{78} \textit{Canada Pipe}; \textit{Laidlaw}.
\textsuperscript{79} \textit{Canada Pipe}; \textit{NutraSweet}.
\textsuperscript{80} \textit{NutraSweet}.
\textsuperscript{81} \textit{Bank of Montreal}.
\textsuperscript{82} \textit{AGT} regarding allocation of national advertisers.
\textsuperscript{83} \textit{CREA}; \textit{TREB}.
iii Discrimination

The Act formerly contained *per se* criminal prohibitions against price discrimination and predatory pricing. When price maintenance was decriminalised with the repeal of those provisions in 2009, it was acknowledged that this conduct would remain subject to review under the abuse of dominance provisions where the conditions of Section 79 were met.  

The Act enumerates several examples of discriminatory or predatory conduct, including freight equalisation, introducing fighting brands selectively and temporarily, buying up product to prevent price erosion, and selling articles below acquisition cost. Prior cases have also considered the intimidation of competitors and customers through spurious or threatened litigation, cross-subsidisation and predatory pricing generally.

The Guidelines provide that in the context of predatory pricing conduct, the Bureau will assess whether the predatory price is sufficient to cover the average avoidable (i.e., variable) costs of providing a good or service, taking into account whether competitors could match the price without incurring a loss, and whether an allegedly predatory price is being offered to meet competition.

iv Exploitative abuses

The Act does not prohibit excessive pricing or similar exploitative abuses, except to the extent that they have an exclusionary, disciplinary or predatory purpose and likely effect. The revised Guidelines explicitly state that higher prices or lower levels of service than would be expected in a market characterised by greater competition will not, in themselves, constitute an abuse of dominance.

V REMEDIES AND SANCTIONS

i Sanctions

Since 2009, the Tribunal has had the discretion, in addition to ordering behavioural or structural remedies, to impose AMPs of up to C$10 million in the first instance or C$15 million for a ‘subsequent order’.

Pursuant to the Act, the Tribunal is required to consider various factors in determining the amount of an AMP, including the affected sales, actual or anticipated profits, the dominant firm’s financial position, its history of compliance and ‘any other relevant factor’. An unpaid AMP is a debt owed to the Crown and recoverable in any court of competent jurisdiction.

Although the stated purpose of AMPs in the Act is compliance and not punishment, the constitutionality of AMPs has been challenged in other contexts on the basis that they

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84 For example, see Competition Policy Review Panel, Compete to Win (27 June 2008) at 58: www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.
85 Sections 78(c), (d), (f), and (i).
86 Laidlaw.
87 NutraSweet; Tele-Direct.
88 Commissioner of Competition v. Air Canada, 2003 Comp Trib 13; Tele-Direct.
89 Guidelines, Section 1.
90 AMPs had previously been available in the domestic airline industry only.
91 Act, Section 79(3.2).
92 Act, Section 79(3.3).
are punitive and therefore warrant the same procedural protections as criminal penalties. To date, the Reliance and Direct Energy cases discussed in Section II are the only cases in which AMPs have been sought by the Bureau and ultimately imposed.

ii Behavioural remedies

The most basic remedy under Section 79 is an order prohibiting the continuation of a practice of anticompetitive acts. In addition or as an alternative, the Tribunal has broad discretion to make any other order required to restore competition, where a prohibition order alone is not likely to be sufficient to restore competition in the market. Both consent agreements and prohibition orders can theoretically be imposed for an indefinite period.

An interim order may be issued, on application by the Bureau on an *ex parte* basis, where the Tribunal finds that injury to competition cannot be adequately remedied by a later order, or in certain other specific circumstances, is likely to occur in the absence of the order.

iii Structural remedies

The Tribunal’s authority to make a restorative order explicitly extends to an order to divest assets or shares, if reasonable and necessary to overcome an abuse of dominance, although to date divestiture has never been ordered under Section 79.

VI PROCEDURE

The Monopolistic Practices Directorate of the Bureau’s Mergers and Monopolistic Practices Branch investigates potentially anticompetitive business practices, such as abuse of dominance and restrictive vertical trade practices, as well as certain types of anticompetitive agreements or arrangements.

Obtaining an order for a remedy under the abuse of dominance provisions in principle requires an application by the Commissioner of Competition to the Tribunal, a specialised competition court with judicial and lay members that hears and decides non-criminal matters.

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93 Constitutional arguments challenging AMPs under the civil misleading advertising provisions of the Act, for which the same level of AMPs is available as for abuse of dominance, were made but effectively rejected in *Canada (Competition Bureau) v. Chatr Wireless Inc*, 2013 ONSC 5315 (Ont. Sup. Ct.): http://canlii.ca/t/g04cv.

94 As explained in Section II, *Reliance* was not a fully contested case. The C$5 million penalty obtained by the Bureau was the result of a consent agreement.

95 Act, Section 79(2).

96 In contrast, criminal prohibition orders and orders regarding civil deceptive marketing practices are subject to a statutory maximum limitation period of 10 years.

97 Act, Section 103.3. Interim orders are issued for an initial term of 10 days but may be extended up to twice for 35 days each.

98 Following the internal restructuring within the Bureau that became formally effective on 1 April 2015, the Mergers and Monopolistic Practices Branch now combines the Mergers Directorate, responsible for merger review, and the Monopolistic Practices Directorate. The Mergers Directorate and Monopolistic Practices Directorate were formerly known as the Mergers Branch and Civil Matters Branch respectively. Competition Bureau, ‘Competition Bureau restructures to maximise its contribution to a more effective marketplace’ (Announcement, 25 March 2015): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03897.html.
under the Act. Cases before the Tribunal are subject to rules of procedural practice, which, *inter alia*, provide for documentary, written and oral discovery on a relevance standard. Decisions of the Tribunal may be appealed to the Federal Court of Appeal, and ultimately to the Supreme Court of Canada. Courts may refer matters back to the Tribunal for redetermination.

However, it is increasingly common for alleged abuses of dominance to be investigated and initially challenged outside the formal Tribunal process with a view to seeking a negotiated resolution. Negotiated settlements are then recorded in a ‘consent agreement’, which is registered with the Tribunal and, once registered, carries the legal force of an order of the Tribunal. Firms that volunteer to make changes in their businesses practices are generally required to formalise these commitments in a consent agreement.

Consent agreements must be ‘based on terms that could be the subject of an order of the Tribunal’, but consent agreements filed with the Tribunal are not subject to its substantive oversight; nor are full details of the conduct leading to the agreement made public. Given the availability of consent agreements, abuse of dominance investigations often settle before reaching the contested hearing stage. On the other hand, this framework has been observed to be one in which respondents may “dig in”, or at least protract settlement discussions, to avoid a restrictive consent agreement.

The Act provides the Bureau with numerous tools to investigate alleged abuses of dominance, including the ability to obtain a judicial order under Section 11 of the Act to compel oral examination, document production or a written response to questions, where the Bureau believes grounds may exist for an order. The Bureau has increasingly made use of this tool to compel production in recent activity such as the Loblaw investigation. The Bureau can also obtain a warrant to enter and search premises and seize documents, or, in ‘exigent’ circumstances, exercise these rights without a warrant. Section 11 orders can extend to affiliates outside Canada of a Canadian corporation that is subject to the order, and can also be used to obtain information from third-party customers, suppliers and competitors.

Various procedural limitations are set forth in statute. Applications for remedies must be brought to the Tribunal no later than three years after a practice has ceased. The Commissioner may not bring an application under both the abuse of dominance provisions and either the criminal conspiracy provisions or the civil price maintenance, competitor collaboration or substantive merger provisions. However, the Bureau may, and often does, bring applications under both the abuse of dominance provisions and provisions relating to other vertical trade practices, as discussed in Section VII.

99 See www.ct-tc.gc.ca.
101 Act, Section 105.
102 Guidelines, Section 1.
104 Act, Section 15.
105 Act, Section 79(6).
106 Act, Sections 45 or 49, 76, 90.1 or 92 respectively.
VII PRIVATE ENFORCEMENT

There is no private right of action to obtain remedies for abuse of dominance in Canada. Only the Commissioner may bring applications or register consent agreements with the Tribunal.

There is also no statutory right to obtain damages as a result of a finding of an abuse of dominance, although under Section 36 of the Act a private right of action is available where an order of the Tribunal has been violated.107

Attempts by private litigants to bring cases on the basis of civil conspiracy or torts alleging an abuse of dominant position have not been recognised for the reason that, unlike the criminal provisions, the civil provisions of the Act are presumptively lawful unless and until an order has been granted by the Tribunal.108

However, Section 103.1 of the Act does allow private parties to apply for leave to bring applications before the Tribunal under the refusal to deal (Section 75), price maintenance (Section 76), and exclusive dealing, tied selling and market restriction (Section 77) provisions of the Act, where the underlying requirements of those sections are met. While the remedies available under those provisions do not include AMPs or damages, and while actions are costly to bring, private litigants could in theory use Section 103.1 to prohibit certain conduct that might otherwise be pursued as an abuse of dominance, or to draw attention to related abuse of dominance concerns, providing private parties with a ‘back door’ method of privately challenging abuse of dominance.109

Private parties are also entitled to file a complaint with the Bureau with regard to the abuse of dominance provisions. Consumer and competitor complaints are a primary source of leads for Bureau investigations.

VIII FUTURE DEVELOPMENTS

It is likely that considerable attention will continue to be focused on abuse of dominance in Canada in the coming year, with the following expected developments being of particular relevance:

a finalisation of the updated Abuse of Dominance Guidelines following public consultation;
b commencement of an appeal by TREB to the Supreme Court of Canada following the Federal Court of Appeal’s upholding of the Tribunal’s 2016 ruling;
c the continuation of the Bureau’s proceedings against the VAA;

107 Section 36 of the Act applies to breaches of the criminal provisions of the Act; a breach of an order of the Tribunal is a criminal offence.
108 For example, Chadha v. Bayer Inc (1998), 82 CPR (3d) 202 (Ont. Gen. Div.). However, in an action against TREB, CREA and their directors and officers alleging in part that they had breached the terms of CREA’s consent agreement, the Court of Appeal in refusing a motion to strike the statement of claim found that a reasonable cause of action was disclosed (Dale v. Toronto Real Estate Board, 2012 ONSC 512).
109 In several past refusal to deal leave applications, the plaintiffs alleged (or implied) that the defendant suppliers were dominant. See for example Barcode Systems Inc v. Symbol Technologies Canada ULC, Allan Morgan and Son Ltd v. La-Z-Boy, Mrs O’s Pharmacy v. Pfizer, Paradise Pharmacy Inc v. Novartis and Broadview Pharmacy v. Wyeth, Nadeau Ferme Avicole Limitée/Nadeau Poultry Farm Limited v. Groupe Westco Inc and Groupe Dynaco, Cooperative Agroalimentaire et Volailles Acadia SEC and Volailles Acadia Inc/Acadia Poultry Inc, Canadian Standard Travel Agent Registry v. International Air Transport Association, and Swenson Inc v. Trader Corporation.
a continued focus on agreements that reference rivals in general in light of the recently
discontinued investigation into Loblaw’s pricing strategies and similar considerations
in a recent investigation in the market for smartphones;

increased focus on the digital economy as well as innovative markets generally as
they relate to dominance, further to recent enforcement trends, the Bureau’s stated
commitment in its 2017–2018 Annual Plan to ‘creating the conditions for innovation’,
and a policy report on ‘big data and innovation’ released in February 2018; and

continued attention on the pharmaceutical industry in particular, following the release
of the updated IPEGs and in light of a growing number of pharmaceutical transactions
subject to merger review under the Act.
I INTRODUCTION

Article 17 of the Chinese Anti-Monopoly Law (AML) prohibits undertakings with a dominant position in the relevant market from abusing their market dominance. According to Article 17, and subject to the rule of reason, such undertakings are banned from conducting the following seven kinds of abusive activities:

\[\begin{align*}
& a \text{ selling commodities at unfairly high prices or buying commodities at unfairly low prices;} \\
& b \text{ without justifiable reasons, selling commodities at prices below cost;} \\
& c \text{ without justifiable reasons, refusing to enter into transactions with their trading counterparties;} \\
& d \text{ without justifiable reasons, requiring trading counterparties to make transactions exclusively with themselves or with the undertakings designated by them;} \\
& e \text{ without justifiable reasons, conducting tie-in sales of commodities or imposing other unreasonable trading conditions on transactions;} \\
& f \text{ without justifiable reasons, applying differential prices and other transaction terms among trading counterparties on an equal footing; or} \\
& g \text{ other acts of abuse of dominant market positions confirmed as such by the AML enforcement authorities under the State Council.}
\end{align*}\]

Public enforcement of the AML is carried out by three authorities: the Ministry of Commerce (MOFCOM), which is in charge of merger review; the National Development and Reform Commission (NDRC), which is responsible for combating price-related anticompetitive activities; and the State Administration for Industry and Commerce (SAIC), which regulates non-price-related anticompetitive activities.

In accordance with Article 17 of the AML, abusive activities include both price and non-price-related anticompetitive activities. For example, ‘selling commodities at unfairly high prices’ is price-related, while ‘refusing to enter into transactions with their trading counterparties’ is deemed non-price-related. The NDRC and the SAIC (and their local branches) are the two agencies in charge of antitrust enforcement against abuse of market dominance.

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1 Zhan Hao is the managing partner and Song Ying and Stephanie Wu are partners with AnJie Law Firm.
The NDRC, the SAIC and the Anti-Monopoly Commission of the State Council (AMC)\(^2\) have released a series of regulations and guidelines in relation to enforcing Article 17 of the AML. Since December 2015, the NDRC, the SAIC and the AMC have continued putting their efforts into drafting the AML guidelines, aiming to improve the transparency and predictability of enforcement activities regarding abuse of market dominance. In this respect, the NDRC has released the following for public opinion:

\(\text{a} \) Guidelines for the Abuse of Intellectual Property Rights;\(^3\)
\(\text{b} \) Guidelines for Business Operators’ Commitments in Anti-monopoly Cases (Guidelines for Commitments);\(^4\)
\(\text{c} \) Anti-monopoly Guidelines for Automobile Industry;\(^5\)
\(\text{d} \) Guidelines on the General Conditions and Procedures for Monopoly Agreement Exemptions;\(^6\) and
\(\text{e} \) Guidelines on Recognising the Illegal Gains Obtained by Business Operators from Monopolistic Acts and Determining the Amount of Fines.\(^7\)

The SAIC has also released its version of Guidelines for the Abuse of Intellectual Property Rights for public opinion,\(^8\) and the AMC released Guidelines for Abuse of Intellectual Property Rights for public opinion on 23 March 2017 by combining opinions of both the NDRC and the SAIC.\(^9\)

On 17 March 2018, the Chinese National People’s Congress passed a resolution to restructure many of China’s regulatory ministries. The State Administration for Market Supervision (SAMS) will be formed in the next few months, and will take over the responsibility of ensuring the enforcement of the AML from the three existing agencies, as well as numerous other market supervision responsibilities, including those of the China Food and Drug Administration, quality control and many other SAIC functions. Although details have not been published, we hold that these arrangements will strongly affect both related laws and antitrust practices in the future.

II YEAR IN REVIEW

Like 2016, 2017 witnessed a lot of cases related to abuse of market dominance, especially in relation to public utility sectors.

\(\text{2} \) In accordance with Article 9 of the AML, the State Council shall establish an antimonopoly commission in charge of organising, coordinating and guiding antimonopoly work and performing the following duties: (1) studying and drafting policies on competition; (2) organising studies and assessments of competition in the market as a whole and publishing assessment reports; (3) formulating and releasing antimonopoly guidelines; (4) coordinating administrative enforcement of the AML; and (5) other duties as prescribed by the State Council.

\(\text{3} \) http://jjs.ndrc.gov.cn/fjgld/201512/t20151231_770233.html.
\(\text{4} \) http://jjs.ndrc.gov.cn/fjgld/201602/t20160203_774286.html.
\(\text{5} \) http://jjs.ndrc.gov.cn/gzdt/201603/t20160323_798376.html.
\(\text{6} \) http://jjs.ndrc.gov.cn/fjgld/201605/t20160512_801559.html.
\(\text{7} \) http://jjs.ndrc.gov.cn/fjgld/201606/t20160617_807541.html.
\(\text{8} \) www.saic.gov.cn/fldybzjz/gzdt/201602/t20160204_205344.html.
\(\text{9} \) http://fldj.mofcom.gov.cn/article/zcfb/201703/20170302539418.shtml.
Public enforcement

Cases pursued by the NDRC and its provincial branches

Last year, the NDRC’s priorities related to fair competition review, while the NDRC continued to focus on enforcement in the pharmaceutical and public utility sectors. For example, the NDRC initiated investigations into port enterprises, and required these enterprises to act consistently with the AML.10

Investigation against Zhejiang Second Pharma and Tianjin Handewei Pharmaceutical (completed)

On 28 July 2017, the NDRC imposed 443,900 yuan in cumulative fines on Zhejiang Second Pharma and Tianjin Handewei Pharmaceutical for alleged abuse of dominance in relation to isoniazid active pharmaceutical ingredients (APIs). The two companies allegedly sold isoniazid APIs at excessive prices and engaged in unjustifiable refusal to trade. The NDRC imposed a fine of 289,516 yuan, equivalent to 2 per cent of the company’s sales value in the relevant market in 2016, on Zhejiang Second Pharma, and ordered it to stop the anticompetitive practices. The NDRC imposed a fine of 154,400 yuan, equivalent to 2 per cent of the company’s sales value in the relevant market in 2016, on Tianjin Handewei Pharmaceutical, and ordered it to stop the anticompetitive practices.

Cases pursued by the SAIC and its provincial branches

Investigation against Hubei Yinxingtuo Port (completed)11

On 9 January 2018, the Hubei Administration for Industry and Commerce (AIC) imposed a penalty on Hubei Yinxingtuo Port of 977,400 yuan, equivalent to 6 per cent of the company’s sales value in 2016, for discriminating against roll-on/roll-off (RORO) shipping transport companies by favouring its connected entity, Yichang H Transport.

Investigation against the Inner Mongolia Branch of the Agricultural Bank of China’s tying practice (suspended)12

The Agricultural Bank of China’s Inner Mongolia Branch made it mandatory for all farm households seeking to take out a loan to also purchase accident insurance from it, which may violate Article 17 of the AML. The Inner Mongolia AIC launched a probe into the ABC’s Inner Mongolia Branch on 28 July 2016 after receiving SAIC authorisation. Through this investigation, the Inner Mongolia AIC found that between 7 November 2013 and 31 December 2015, the Branch was the only financial institution that provided loans to parties under the ‘Financial Poverty Alleviation and Wealth Boosting’ project in Inner Mongolia, and hence held a dominant position. In light of the commitments offered, in January 2018, the Inner Mongolia AIC decided to suspend its investigation against the ABC’s Inner Mongolia Branch in accordance with Article 45 of the AML.

Investigation against China Mobile Group Inner Mongolia Company (completed)\(^1\)

In December 2017, the Inner Mongolia AIC decided to terminate an investigation into China Mobile Group Inner Mongolia Company that was based on suspicions of the imposition of unreasonable trade conditions without justified reasons. This was done in accordance with Article 45 of the AML, since China Mobile had adhered to their commitments during the preceding suspension period.

Investigation against Sichuan Jiuyuan Yinhai Software (completed)\(^2\)

On 3 August 2017, the Sichuan AIC imposed 209,601 yuan, which is equivalent to 7 per cent of the company’s sales value in 2015 of the relevant software products in fines and 394,730 yuan in disgorgement, on Sichuan Jiuyuan Yinhai Software (Yinhai). The Sichuan AIC found that Yinhai provided medical insurance payment software installation services on the condition that designated agencies buy encrypted keyboards and card readers supplied by it.

Investigation against State Grid Shandong Power Company and Yantai City Muping District Power Supply Company (completed)\(^3\)

In December 2016, Shandong AIC suspended an investigation against State Grid Shandong Power Company and Yantai City Muping District Power Supply Company. The companies were suspected of abusing their market dominance by appointing their affiliates as construction service companies. During the investigation, the companies admitted the illegal conduct and promised to promptly undertake internal rectification measures; Shandong AIC therefore made a suspension decision. On 30 June 2017, Shandong AIC decided to terminate the investigation in accordance with Article 45 of the AML.

Investigation against Microsoft (pending)

An investigation against Microsoft commenced in June 2014. In July 2014, the SAIC conducted large-scale dawn raids at four of Microsoft’s offices in Beijing, Shanghai, Guangzhou and Chengdu at the same time, with the cooperation of nearly 100 enforcement officers from nine SAIC branches. To date, the SAIC has publicised only limited details about the case, which is ongoing.

The major cases handled by the SAIC and its provincial branches in 2017 are summarised below:

<table>
<thead>
<tr>
<th>Investigated party</th>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hubei Yinxingtuo Port Transportation facility</td>
<td>SAIC (Hubei AIC)</td>
<td>Differential treatment</td>
<td>2017</td>
<td>Completed</td>
<td></td>
</tr>
<tr>
<td>Inner Mongolia Branch of the Agricultural Bank of China Bank</td>
<td>SAIC (Inner Mongolia AIC)</td>
<td>Tying and imposing unreasonable trading conditions</td>
<td>2016</td>
<td>Suspended</td>
<td></td>
</tr>
<tr>
<td>China Mobile Group Inner Mongolia Company Telecoms</td>
<td>SAIC (Inner Mongolia AIC)</td>
<td>Imposing unreasonable trading conditions</td>
<td>2014</td>
<td>Completed</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Investigated party</th>
<th>Sector</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Sichuan Jiuyuan Yinhai Software</td>
<td>Software</td>
<td>SAIC (Sichuan AIC)</td>
<td>Tying</td>
<td>2016</td>
<td>Completed</td>
</tr>
<tr>
<td>State Grid Shandong Power Company and Yantai City Muping District Power Supply Company</td>
<td>Power supply</td>
<td>SAIC (Shandong AIC)</td>
<td>Requiring trading counterparties to make transactions exclusively with the undertakings designated by them</td>
<td>2014</td>
<td>Completed</td>
</tr>
<tr>
<td>Microsoft</td>
<td>Software</td>
<td>SAIC (Guangdong AIC)</td>
<td>Bundling</td>
<td>2014</td>
<td>Pending</td>
</tr>
</tbody>
</table>

ii  Private enforcement

**Wu Xiaojin (individual) v. Shaanxi Broadcast and TV Network Intermediate (Group) (completed)**¹⁶

In 2012, Wu Xiaojin, a cable TV user of Shaanxi Broadcast & TV Network Intermediate (Group) (Shaanxi Broadcast), brought a lawsuit to Xi’an Intermediate People’s Court, claiming that the company bundled chargeable cable TV programmes with basic TV services.

The Xi’an Intermediate Court supported Wu Xiaojin’s claim that Shaanxi Broadcast abused its dominance in the local cable TV service market by tying the sale of basic services with paid services. Shaanxi Broadcast appealed, and the High People’s Court of Shaanxi Province overturned the judgment of the lower Xi’an court in September 2013.

Wu Xiaojin filed a petition for legal review with the Supreme People’s Court, and in May 2016 the Supreme People’s Court overturned the second instance judgment of Shaanxi High People’s Court. This was the first time that an individual plaintiff won in a civil antitrust case, and the case has been announced as a guiding case by the Supreme People’s Court.

**Yunnan Yingding v. Sinopec**¹⁷

Sinopec and the Yunnan branch of Sinopec’s trading company were alleged to have abused their market-dominant position by refusing to incorporate biodiesel produced from waste cooking oil by Yingding, a bio-energy manufacturer, into Sinopec’s distribution system without justifiable reasons. The lawsuit was filed with the Kunming Intermediate People’s Court (Kunming Court) in Yunnan Province in January 2014.

The Kunming Court ruled against Sinopec despite not clearly addressing some issues, such as the definition of the relevant market, whether the conduct constituted refusal to deal in the sense of the AML and whether any justifiable reason existed. Sinopec was ordered to incorporate Yingding’s biodiesel within 30 days of the ruling dated 8 December 2014 in accordance with the Renewable Energy Law and the AML. Yingding and Sinopec have both appealed to the High People’s Court of Yunnan Province.

With regard to the foregoing issues, the lawyer representing Sinopec, in the second instance, pointed out that the distribution channels for biodiesel were not the same as those for petroleum products, and oil sales were not the sole channels to which biodiesel manufacturers could resort. Thus, the relevant product market in this case should be defined as the market for fatty acid methyl ester. Specifically, Sinopec itself did not produce biodiesel and therefore

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¹⁶  [http://wenshu.court.gov.cn/content/content?DocID=2a673a72-5b62-4857-ac42-c8b835b0c096 &KeyWord=%E5%8F%8D%E5%9E%84%E6%96%AD%E6%B3%95](http://wenshu.court.gov.cn/content/content?DocID=2a673a72-5b62-4857-ac42-c8b835b0c096 &KeyWord=%E5%8F%8D%E5%9E%84%E6%96%AD%E6%B3%95).


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was not Yingding’s competitor. From this perspective, it was also hard to gauge whether the purpose of Sinopec’s refusal to purchase Yingding’s biodiesel constituted elimination or restriction of competition in the relevant market. In addition, apparent problems with the quality of the biodiesel produced by Yingding also formed a significant argument for justifiable reasons for Sinopec.

This antimonopoly lawsuit, which was the first filed against a state-owned oil company in China, attracted the attention of the whole industry. The drafter of the national standard for biodiesel blend stock for diesel engine fuels and an expert in economics were also brought in as expert witnesses to assist in clarifying the facts before the court.

On 13 August 2015, Yunnan High People’s Court reversed the first instance ruling and remanded the case on account of unclear facts and procedural errors, and the case was sent back to the Kunming Court for retrial.

The Kunming Intermediate Court held a retrial of the lawsuit in June 2016, and found that the pilot programme of switching gutter oil to biofuel had encountered challenges from an enterprise development and commercial angle. Therefore, the Court determined that the two defendants’ refusal-to-deal practice was justifiable because it was in line with their own economic benefits and the interests of consumers without bringing about any monopolistic benefits. Yunnan Yingding appealed on the grounds that fact-finding mistakes, erroneous application of the law and incorrect procedures were evident in the case.

The second instance hearing for the retrial was held on 28 April 2017. On 11 September 2017, the Yunnan High People’s Court finally issued a judgment dismissing the appeal. More specifically, the Court first clarified that, from an economic law perspective, the legal relationship between the parties was a type of private legal relationship rather than a regulated relationship. Secondly, the Court confirmed that there was in fact no lawful and effective contract between Yingding and Sinopec, since the lawyer’s letter sent by Yingding was to be merely regarded as an invitation to offer without setting out the specific and indispensable clauses and trading terms of a legal contract. In addition, the quality of the biodiesel produced by Yingding from waste oil was not certified and could not be held as meeting the relevant national standard in this area. In line with this, Sinopec therefore had no obligation to observe the rules of the Renewable Energy Law. In other words, Sinopec’s refusal to purchase the biodiesel was held not to be related to the alleged AML violation sued for in this case. Therefore, the Court supported the allegations of Sinopec by confirming that the facts of the case were clear, the law was applied correctly and no procedural errors occurred during the remanded proceedings in the court of first instance.

After receiving the final judgment, Yingding applied to the Supreme Court for a retrial. From this perspective, if Yingding succeeds, the curtain on this case will once again be lifted, but this time at a higher-level court in respect of the follow-up antimonopoly law issues remaining.

Four Chinese rare earth companies v. Hitachi Metals (pending)\(^\text{18}\)


with the Ningbo Intermediate People’s Court (Ningbo Court) in Zhejiang province. The rare earth companies claimed Hitachi Metals abused its market dominance and harmed industry competition by refusing to license patents to them. The patents in this case are not standard essential patents (SEPs), and are used in the manufacturing of sintered neodymium iron boron (NdFeB) magnets, a rare-earth magnet alloy widely used in parts for aeroplanes, automobiles and other products. The cases were heard in the middle of December 2015 and early in March 2017 before the Ningbo Court, and the second hearing was held on 10 March 2016 with experts of both parties being cross-examined. The final decision is pending.

It should be noted that there is no precedent holding a non-SEP to constitute an essential facility to date. This case will go down in history if the Chinese court decides that a non-SEP can be deemed an ‘essential facility’.

**Qualcomm v. Meizu (completed)**

Qualcomm Inc filed a lawsuit against Meizu in the Beijing Intellectual Property Court in June 2016. The claims request rulings that the terms of a patent licence offered by Qualcomm to Meizu comply with the AML, and Qualcomm’s fair, reasonable and non-discriminatory licensing obligations. The claims also seek a ruling that the offered patent licence terms should form the basis for a patent licence with Meizu for Qualcomm’s fundamental technologies patented in China for use in mobile devices, including those relating to 3G (WCDMA and CDMA2000) and 4G (LTE) wireless communications standards. Although this lawsuit has attracted the interest of various groups and touches on leading issues in China’s antitrust enforcement history, the two parties reached a settlement at the end of December 2016.

**Apple v. Qualcomm**

Apple Inc's China subsidiary has filed two lawsuits against Qualcomm Inc in China, according to the Beijing Intellectual Property Court’s Chinese-language WeChat account. On 25 January 2017, Apple Electronics Products Commerce (Beijing) Co, Ltd filed a lawsuit alleging that Qualcomm abused its dominance in the sale of baseband processor chipsets. The Apple subsidiary is seeking 1 billion yuan in damages. Apple Electronics has also filed a second lawsuit, alleging Qualcomm refused to license its SEPs to Apple on fair, reasonable and non-discriminatory (FRAND) terms.

In summary, the most high-profile litigations of 2016 to 2018 are listed below:

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### III RELEVANT MARKET DEFINITION AND MARKET POWER

The approaches for defining the relevant market and assessing market power presented in the black letter law of China are consistent with other major antitrust regimes.

#### Relevant market definition

The basic principles related to abuse of dominance in the AML are similar to those of Article 102 of the Treaty on the Functioning of the European Union and Section 2 of the Sherman Act. The specification of market definition is stipulated in the Guidelines on the Definition of Relevant Market (Guidelines). In accordance with the Guidelines, the basic approaches for defining the relevant market are analysis of demand-side substitutability and supply-side substitutability.

Article 8 of the Guidelines provides that the following factors may be considered when defining the relevant market from the demand side:

- **a** evidence of turning to other products when the price or other factors of the product concerned are changed;
- **b** the appearance, characteristics, quality, technical features and functionality of the product;
- **c** price variance between products;
- **d** the distribution channel; and
- **e** other factors.
Article 9 of the Guidelines provides the following factors to be considered when defining the relevant geographical market from the demand side:

- **Evidence of turning to other regional products when the price or other factors of the product concerned are changed**;
- **Transportation cost and the characteristics of transportation**;
- **The region in which the majority of the demanders purchase the product in practice, and the regional distribution of major business operators’ products**;
- **Trade barriers such as tariffs, regulations, and environmental and technical factors; and**
- **Other factors**.

The Guidelines also mention the ‘small but significant and non-transitory increase in price’ method (the SSNIP test, or hypothetical monopolist test), a tool frequently used by both EU and US antitrust regulators.

### ii  Market dominance

Market dominance under the Chinese antitrust regime is defined in Article 17 of the AML and further clarified by the implementing rules. It refers to a market dominant position held by one or more undertakings that enable the undertakings to:

- **Control the price, volume or other trading terms** in the relevant market; and
- **Block or affect the ability of other undertakings to enter the relevant market by impeding or delaying other undertakings’ entry into the market, or substantially increasing other undertakings’ entry costs, so that the competitors cannot compete effectively post-entry**.

### iii  Market share presumption

As illustrated in the table below, Article 19 of the AML specifies the market-share thresholds that are regarded as preliminary evidence of market dominance:

<table>
<thead>
<tr>
<th>Number of undertakings</th>
<th>Aggregated market share in the relevant market</th>
</tr>
</thead>
<tbody>
<tr>
<td>One</td>
<td>One-half</td>
</tr>
<tr>
<td>Two</td>
<td>Two-thirds</td>
</tr>
<tr>
<td>Three</td>
<td>Three-quarters</td>
</tr>
</tbody>
</table>

The preliminary evidence of market dominance can be rebutted by proof showing lack of sufficient market power despite high market share. In addition, under the preliminary evidence, if any of the undertakings has a market share of less than 10 per cent, this undertaking shall not be deemed to have a dominant position.

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21 According to Article 17 of the Provisions of Anti-Price Monopoly, ‘other trading terms’ include the factors that can have substantial impact on a market, such as grade of commodity, payment terms, method of delivery, aftersales service, trading options or technical constraints.

22 See Article 19 of the AML.

23 Ibid.
Factors for assessment of dominance

The AML has further elaborated the factors by which market dominance should be assessed in Article 18, including:

a. market share in the relevant market;
b. the competition situation in the relevant market;
c. the ability to control sales markets or raw material purchasing markets;
d. the financial status and technical conditions of undertakings;
e. the degree of dependence of other undertakings;
f. entry to relevant market by other undertakings; and
g. other factors related to finding a dominant market position.

ABUSE

Overview

Article 17 of the AML sets out a non-exhaustive list of seven types of behaviour that may be regarded as abuse of market dominance:

a. excessive pricing, or selling at an unfairly low price;
b. selling below cost;
c. refusal to deal;
d. requiring a party to trade exclusively with the undertaking or other designated undertakings;
e. tie-ins or the imposition of other unreasonable trading terms;
f. price discrimination or the imposition of other discriminatory trading terms; and
g. other behaviours defined as abuse of dominance by the antitrust regulators.

As early as 2015, the enforcement priority of the SAIC gradually shifted from monopoly agreements to abuse of dominance. In particular, practices including excessive pricing, tying and discriminatory treatment by public utility companies have frequently come under antitrust scrutiny. In 2017, the enforcement agencies continue to focus on the pharmaceutical and public utility sectors: for example, the NDRC initiated investigations into port enterprises, and required these enterprises to act consistently with the provisions of the AML.24

Exclusionary abuses

‘Exclusionary abuses’ means the dominant undertaking abuses its market dominance by excluding its competitors, for example, by selling below cost, refusing to deal, or tying or bundling.

Concluded cases suggest that both the SAIC and the NDRC have an interest in exclusionary abuses. Exclusionary abuses are included in the NDRC’s investigations into the port enterprises. Such abuses include restricting logistics firms from using tugboat, tally and shipping agency services from any party other than the subsidiaries of the operators, charging excessive international transhipment container handling fees and imposing unfair terms on transaction counterparts, such as terms related to no competition, unpacking tally and customer loyalty.

China

Inner Mongolia AIC's investigations into the Inner Mongolia Branch of the Agricultural Bank of China and China Mobile Group Inner Mongolia Company focus on abuses of tying and imposing unreasonable conditions. In Sichuan AIC's investigation into Sichuan Jiuyuan Yinhai Software, the company conducted tying behaviour. In Shandong AIC's investigation on State Grid Shandong Power Company and Yantai City Muping District Power Supply Company, the companies required trading counterparties to make transactions exclusively with the undertakings designated by them.

iii Discrimination (including discriminatory pricing)

The Hubei AIC's investigation into Hubei Yinxingtuo Port focuses on discriminatory treatment. On 9 January 2018, the Hubei AIC imposed a penalty on Hubei Yinxingtuo Port of 977,400 yuan, equivalent to 6 per cent of the company's sales value in 2016, for discriminating against RORO shipping transport companies by favouring its connected entity, Yichang H Transport.

iv Exploitative abuses (including excessive pricing)

'Exploitative abuses' means that a dominant undertaking abuses its position by exploiting its customers or suppliers, for example, by selling at an unfairly high price.

In 28 July 2017, NDRC imposed 443,900 yuan in cumulative fines, equivalent to 2 per cent of the companies' sales value in the relevant market in 2016, on Zhejiang Second Pharma and Tianjin Handewei Pharmaceutical, for alleged abuse of dominance in relation to isoniazid APIs. Two companies allegedly sold isoniazid APIs at excessive prices and engaged in unjustifiable refusal to trade. This demonstrates the antitrust enforcement agencies' willingness and capacity to deal with exploitative abuse behaviours.

V REMEDIES AND SANCTIONS

i Sanctions

In accordance with Article 47 of the AML, an undertaking that has abused its dominant position may be fined between 1 and 10 per cent of its turnover in the preceding year. In addition, the regulator may confiscate its illegal gains. Article 49 of the AML further states that when calculating the amount of the fine, the regulator shall consider factors such as the nature, gravity and duration of the illegal conduct. As mentioned in Section I, the NDRC has already released a draft Guideline on Fines, which further explains the key points regarding imposing fines and confiscation of illegal gains.

ii Behavioural remedies (including interim measures)

Along with sanctions, Article 47 of the AML provides that the regulator may impose cease-and-desist orders to stop illegal abusive conduct, but there is no explicit legal basis regarding whether and how the regulator may impose such interim measures for abusive conduct. Previous cases provide little clarification in this regard, owing to their lack of transparency.

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iii Structural remedies

To date, there are no effective antitrust-related laws, regulations or rules in China explicitly authorising the SAIC or NDRC to impose structural remedies on undertakings for violation of Article 17 of the AML. Accordingly, all previous cases suggest that the regulators do not adopt structural remedies for abuse of dominance.

However, Article 45 of the AML does not delineate the scope of the commitment that the undertakings under investigation may make, so it remains to be seen whether a dominance investigation can be closed on the basis of structural commitments. As mentioned above, on 2 February 2016, the NDRC posted a notice on its official website soliciting opinions for the Guideline for Commitments, which aims to clarify the scope of possible commitments to be borne by undertakings.

VI PROCEDURE

Although the SAIC and the NDRC have their own respective procedural rules, they are consistent with each other. The stages of SAIC and NDRC investigations are as follows:

a An antitrust investigation can be triggered largely from four possible sources:
   • reports;
   • transference from other government agencies;
   • ex officio discovery; and
   • assignment by superior entities.

b The SAIC delegates antitrust enforcement to its provincial branches on a case-by-case basis, while the NDRC grants a general authorisation to local branches. The two authorities still maintain control at central government level for cases that carry a potentially nationwide impact.

c It falls within the regulators’ discretion to determine whether to open a formal investigation after receiving a lead.

d Investigative measures include:
   • conducting an inspection by entering business premises or another relevant place;
   • interviewing business operators under investigation, interested parties or other relevant entities or individuals;
   • checking and duplicating, inter alia, relevant documents, agreements, account books, business correspondence and electronic data for the business operators under investigation, interested parties, and other relevant entities or individuals;
   • seizing and detaining relevant evidence; and
   • checking the bank accounts of the business operators under investigation.

e Undertakings under investigation can offer commitments at any stage of an investigation. The regulators are entitled to decide whether to accept the commitments.

f The regulators may issue an exemption when the undertaking concerned fulfils the conditions set out by Article 15 of the AML. The authorities may also issue punishment decisions when they consider that the undertaking concerned has violated Article 17 of the AML. The regulators may publish the decisions, but are not obliged to do so.

g If unsatisfied with a decision, the undertakings under investigation may apply for an administrative review or file an administrative lawsuit with a court for judicial review.
The SAIC and the NDRC’s investigations vary significantly in terms of duration, and no statutory deadlines apply. Therefore, investigations may last for years, such as they did in, for example, the Tetra Pak and Microsoft cases.

VII FUTURE DEVELOPMENTS

The most significant landmark in 2018 is the merger of the antitrust enforcement agencies. The People’s Congress passed the ‘Institutional Reform Programme’, which aims to merge the three antitrust agencies into one agency under the State Administration for Market Regulation (SAMR), on 17 March. After four days, Zhang Mao, the former Director-General of the SAIC, was nominated as the new director of SAMR.

The newly formed SAMR was officially listed on 10 April 2018. The antitrust agencies under NDRC and MOFCOM moved to SAMR respectively on 8 May and 10 May, and the antitrust activities of the previous agencies have resumed as normal under SAMR. For example, SAMR has been accepting merger control filings since 14 May 2018 following a pause on 10 and 11 May. For now however, the number of bureaux to be set up, along with their related divisions and leaders, are still under discussion, and probably will be finalised and published sometime in early July.

Considering that the AML’s enforcement power has always been vested mainly with the state and provincial-level (by authorisation from the former) government agencies, the phased implementation may have less implications on the reform of the AML enforcement agencies, which is to say that implementation of the reform in terms of AML enforcement will be seen in phase one.

The merger will likely improve the stability of the AML enforcement agency, and foster certainty and consistency of AML-related practices and rules in China. As such, businesses will be afforded with an improved level of certainty regarding how to work out their compliance efforts.

Under the new unified agency model, previous confusion about whether a specific conduct (such as offering loyalty rebates) falls within the price violation category or the non-price violation category will disappear. This will expedite the handling of and responses to AML-related complaints on the part of the regulator.

In the long run, the unnecessary inconsistency among different sets of rules issued by three parallel agencies on one issue might also disappear. The effectiveness of the regulations and soft laws published or in contemplation by each of the three agencies, or through joint efforts between them, is unclear at this stage. In this respect, a key question is how to harmonise inconsistencies among the rules and practices relating to the application of leniency and sanctions, and of the ‘safe harbour’ that has been contemplated in the draft guidelines to be applicable to the motor vehicle industry and intellectual property rights.

There will be several issues worth close observation, including:

a the way in which AML enforcement activities will be carried out procedurally by the new agency;

b the way in which the existing regulations and soft laws will be applied in cases after the merger;

c the enforcement priorities of the new agency;

d the head of the new agency; and

e the style that the new agency will adopt.
Chapter 8

COSTA RICA

Edgar Odio1

I INTRODUCTION

The Law for the Promotion of Competition and Consumer Protection No. 7492 (Competition Law) was enacted in Costa Rica in 1994 and came into effect in January 1995. The Law contains provisions related to deregulation, competition, unfair competition, consumer protection, comparative advertisement and strict liability. It also created the competition enforcement agency and the consumer protection enforcement agency, by creating two separate bodies under the Ministry of Economy, Industry and Commerce: the Commission for the Promotion of Competition (COPROCOM) and the National Consumer Commission. These two bodies are part of the Ministry, but they are independent on technical matters. This means that decisions of COPROCOM cannot be appealed, and cannot be revoked by the Minister. The Competition Law is based on Article 46 of the Constitution. COPROCOM has five commissioners and another five reserve commissioners, who meet once a week to discuss cases and issue resolutions, but they are not regular employees of the agency. The agency has its own staff.

The telecommunications industry has its own competition regulations (similar to those discussed herein regarding vertical restraints), which are enforced by SUTEL, the regulator. Competition regulations and opinions issued by SUTEL are not discussed in this chapter for reasons of space constraints.

The Competition Law is based on the Federal Competition Law of Mexico. It includes provisions regarding horizontal practices, which are deemed *per se* illegal, and vertical practices, which are subject to the rule of reason, as discussed below. Horizontal practices are called ‘absolute monopolistic practices’, and vertical practices are called ‘relative monopolistic practices’. The Competition Law also contains merger control provisions.

In 2005, the United Nations Conference on Trade and Development sponsored a project presented by COPROCOM under the Competition and Consumer Protection for Latin America programme to draft an amendment to the Competition Law. The proposed amendment covered both competition and consumer protection sections of the Law and was finally presented to Congress by the government in 2008. This proposal ran in parallel with another initiative presented by a congressman that only covered the competition section of the Competition Law, and that was very concerned with the presence and expansion of large retailers, and the potential impact on local suppliers. Ultimately, of the two proposals, the

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latter moved faster in Congress, and therefore COPROCOM tried to incorporate in it most of the changes contemplated in its proposed amendment, and to make it more technically sound.

In 2012, the legislature passed the amendment to the Competition Law initiated by a congressman; in the end, however, the amendment was the result of an extensive review and discussion during the procedure before Congress, in which COPROCOM played a key role offering technical support, and seeking to modify the bid to reflect the government’s proposal. The consumer protection section was not modified, and the amendment did not exactly match that proposed by the government. It is not necessary to consider in detail which sections of the current law stem from that congressman’s initiative and which from the above-mentioned procedure; we will only refer to this briefly in relation to Section 12 and the vertical restraints contemplated therein.

The amendment reduced the scope of application of the exceptions contemplated in the Competition Law, modified the sections related to horizontal and vertical practices, and incorporated provisions related to dawn raids, settlement agreements and pre-merger notification.

The amendment modified Section 12 of the Competition Law, which refers to vertical restraints. This Section already included:

- exclusivity agreements and vertical market segmentation;\(^2\)
- resale price maintenance (RPM) and the imposition of other conditions on the reseller;\(^3\)
- tying and reciprocity;\(^4\)
- exclusive dealing;\(^5\)
- vertical boycott;\(^6\)
- predatory pricing;\(^7\) and
- any other conduct intentionally implemented to drive competitors out of the market or prevent their entrance.\(^8\)

Some anticompetitive practices were not included in Section 12; therefore, COPROCOM had to investigate them under Subsection (g), such as abuse of dominance. The authority did investigate and ruled on a number of refusal-to-deal cases under this Subsection, in which the incumbent refused competitors access to essential facilities, but the lack of regulation was clearly a limitation to the authority. As such, based on the proposed amendment, the authority managed to incorporate in the final amendment the following practices: refusal to deal,\(^9\) price discrimination or discriminatory treatment, and\(^10\) unjustified increases of competitors’ costs;\(^11\) and to modify Subsection (f) to specify that predatory pricing will take

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2 Subsection (a).
3 Subsection (b).
4 Subsection (c).
5 Subsection (d).
6 Subsection (e).
7 Subsection (f).
8 Formerly Subsection (g), now Subsection (k).
9 Subsection (g).
10 Subsection (h).
11 Subsection (i).
place when the incumbent sells below the average cost for long periods, and when there are indicators that losses may be recovered by future price increases (except in the case of sales promotions and the introduction of products to the market).

The amendment also included additional vertical restraints that were part of the congressman’s original initiative. Subsection (j) includes the request to, or the obligation of the supplier to, change, modify or substitute its trademark as a condition to sell its goods or services; or to request from the supplier the production of similar goods or services for a private trademark. Subsection (l) includes additional obligations that, according to established business practices, are not part of the object of the transaction; and Subsection (m) includes the threat of termination of a business relationship to obtain payment, or other business conditions different from the generally accepted business conditions. No case has yet been brought under these Subsections.

The other components of the amendment relevant for this topic are the incorporation of dawn raids, which require judicial authorisation; settlement agreements to terminate cases before the private hearing phase of the proceeding; and the amendment of the penalties sections, which now clearly establish that penalties can be as high as the equivalent of 10 per cent of an economic agent’s sales.

II YEAR IN REVIEW

During 2017, COPROCOM did not condemn any conduct under Article 12 of the Competition Law. The most important case under review by COPROCOM is still the case filed against the largest drugstore company and drugs distributor in the country. The complaint for exclusionary vertical restraints was filed in 2013, the private hearing has already taken place and the final resolution may be expected by the end of the year. Before the hearing, the company offered COPROCOM a settlement to terminate the case based on several commitments that included selling products to its own drugstores at the same price offered to the largest non-related customers, eliminating minimum volume requirements to non-related customers and guaranteeing it will not request access to financial information of its customers. The complainant opposed the proposal, and COPROCOM rejected the offer because it was not specific enough and did not guarantee the return to market conditions, and offered the company the opportunity to amend the proposal. The company appealed the decision, but COPROCOM rejected the appeal.

Horizontal conduct cases have not been on the agenda, either. Therefore, it seems the Commission continues to dedicate its resources to merger control. Most of the complaints filed under Article 12 have been dismissed. Thus, the following is a summary of the activity regarding vertical restraints.

In four different cases, the Caja Costarricense del Seguro Social (CCSS), the social security provider for the country, reported to COPROCOM issues of excessive pricing by sole providers of medication and equipment it was required to purchase. COPROCOM correctly determined there was no anticompetitive conduct to be sanctioned, since excessive pricing is not illegal. However, COPROCOM failed to acknowledge that entry barriers usually create sole providers; thus, it did not recommend that the CCSS should review its selection criteria to determine whether regulatory or market-created entry barriers were the reason for its sole providers. No analysis was made of the tender bid conditions to determine if the barriers were created by the CCSS itself.
COPROCOM also dismissed a complaint filed by an importer of automobiles manufactured in China. The importer filed a complaint against AIVEMA, which is an association of the importers and dealers of automobiles, for vertical restraints. AIVEMA organises a trade show every year where a large number of automobile sales take place. The importer’s affiliation to AIVEMA was rejected because he failed to provide two recommendation letters from current AIVEMA members. The importer also asked COPROCOM to order AIVEMA to allow him to participate in the trade show (as a pre-emptive measure). COPROCOM rejected the pre-emptive measure, and opened an investigation on the existence of a vertical restraint. This case opens a lot of questions, because COPROCOM might even consider the existence of a horizontal boycott.

In addition to the above, last year COPROCOM started investigating two cases. One case is against the largest producer of sugar in the country based on a complaint filed by a new importer, who claims the incumbent has created entry barriers by offering loyalty discounts and exclusive dealing arrangements to its customers. In turn, the incumbent filed a dumping complaint against the importer for products imported from Brazil. The incumbent operates under a special law that regulates the production and commercialisation of sugar, which has allowed the incumbent to operate under virtual monopolistic conditions. This is a strategic market that affects other industries, so it is likely this is going to be a highly contentious case.

The other case was filed by the Costa Rican Union of Chambers and Associations of the Private Sector (UCCAEP) against the state. The complaint argues that the state has been abusing the use of Article 2 of the Administrative Contracting Act and Guideline 023-H, published on 20 April 2015, which allows hiring by public entities without a public bid procedure. The UCCAEP added to the complaint a list of 46 hiring incidents between public entities based on the mentioned Act. All these contracts represented more than 32.4 billion colones between 2014 and 2016 in contracts related to telecommunication services, and technology and IT systems, which had exclusionary effects.

III MARKET DEFINITION AND MARKET POWER

According to Section 12 of the Competition Law, vertical restraints are illegal when an economic agent that has market power in the relevant market embarks on a practice listed in Section 12, with the object or effect of displacing competitors from the market, substantially preventing their access to the market, or establishing exclusive benefits in favour of one or more persons.

The rules for defining the relevant market in each competition case and for determining whether market power exists are established in Sections 14 and 15 respectively.

Section 14 refers to demand substitution as the first criterion for defining the relevant market. It also contemplates distribution costs from other places in the country and from abroad, including freight, insurance, taxes and other kind of restriction, as well as the time required to supply the market from elsewhere. The cost of consumers having to move to other markets is also considered, as are national and international regulations that might limit consumers’ access to suppliers, or suppliers’ access to alternative customers.

When defining the relevant market, COPROCOM has to define both the product and the geographical market; it usually makes reference to demand and supply substitutability explaining the logic of the hypothetical monopolist test (SSNIP test). Even though some opinions include references to cross-elasticity as a way of measuring demand substitution, in practice this is rarely an economics-based analysis because of the lack of quantitative
information. Required data for this sort of analysis is rarely available, and COPROCOM does not have the resources to collect it. Thus, in practice this has become a legal analysis, sometimes simply based on common sense. Surprisingly, the lack of proper evidence to define the market has not yet been brought to court.

The concept used in the Competition Law is substantial power, instead of market power, but COPROCOM has not established any difference between these. It has defined the concept as the ability of an economic agent (or a group of agents) to unilaterally determine the price or impose conditions upon suppliers or customers that cannot be resisted or overcome at present or in the near future by other economic agents.

The criteria established in Section 15 of the Competition Law to determine whether market power exists include market share, barriers to entry, existence and power of competitors in the relevant market, access to inputs and raw materials, and recent behaviour.

Although collective dominance is not a concept expressly contemplated or defined in the Competition Law, COPROCOM has ruled that it is possible for an economic agent to have market power when acting in concert with other economic agents, even though it might not have such power when acting alone.

In the discussion of this concept, COPROCOM has indicated that market power is a matter of degree, but it has not developed any guidelines as to, for instance, what percentage of the market would be considered as an indicator of market power, although on some occasions, reference has been made to US or EU guidelines in this regard. It has also made clear that market share is a strong indicator of market power, but that it is not the only one. In a case involving a large bottled water company that had been in the market for many years, and that had around 90 per cent of the market, COPROCOM held that it did not have market power because the company was facing very hard financial conditions: two very strong and dynamic competitors had also entered the market, each of which had a large portfolio of consumer products and a very sophisticated distribution system that could easily reach more customers than the incumbent.

IV ABUSE

i Overview

Under Sections 12 and 13, COPROCOM repeatedly indicates in its opinions that a vertical restraint exists and has to be declared illegal when three elements exist:

a the economic agent has market power in the relevant market;
b the conduct is contemplated in the list of restraints of Section 12 (see the list in Section I); and
c the conduct has the object or effect of causing anticompetitive effects by unduly displacing economic agents from the market, substantially preventing access to the market, or establishing exclusive benefits for one or more persons.

Based on this, COPROCOM has further indicated that vertical restraints can create efficiencies and therefore must be presumed legal. Accordingly, they are subject to the rule of reason.

The amendment of the Competition Law added a final paragraph to Section 12, according to which COPROCOM must analyse and rule on the evidence presented by the parties to probe the pro-competitive effects or the efficiencies in the market caused by the conduct being investigated.
In spite of these indications, COPROCOM’s analysis does not always include a discussion of the effects of the conduct, and when it does, it is rarely based on quantitative data. The introduction of the final paragraph of Section 12 seeks to force COPROCOM to carefully include and review this sort of evidence.

Based on a recent precedent, it can now be said that COPROCOM will rule on abuse of dominance cases based on Subsection 12(k), particularly when the conduct is not listed in any other paragraph of that Section.

**ii Exclusionary abuses**

There have not been many cases on predatory pricing. In addition to the difficulties that this practice typically presents to the authorities, the previous wording of Subsection 12(f) defined the conduct as the commercialisation of goods or services below their normal value. COPROCOM interpreted this as average cost. However, following the amendment of the Competition Law, the wording now clearly states that predatory pricing is pricing below average cost, and that the practice must take place for long periods of time, with indicators that the losses may be recovered by future prices increases.

Exclusivity, exclusive dealing and loyalty rebates have been a concern for COPROCOM. It has looked at these restraints in investigations and cases in markets such as beverages, beans, banking insurance and credit cards. The concerns are focused on limitations on the freedom of trade and on market foreclosure. With regard to the former, COPROCOM is apparently more willing to consider justifications for the restraint, but has considered as excessive an exclusivity provision that is in effect for a term longer than the time required for the manufacturer to recover the investment. With regard to market foreclosure, the problem is that COPROCOM is concerned about the potential impact of the conduct, with little or no reference at all to actual evidence with regard to the portion of the market that is being foreclosed. In one case, against Costa Rica’s largest beverage bottler, COPROCOM ruled that the problem with the contractual exclusivity provisions in place was that the term was too long and that there were heavy penalties for termination. In other cases, however, it has found a violation even if the contract was short term and there was no penalty for termination.

The refusal-to-deal cases concerned economic agents denying access to an essential facility (lampposts) to carry TV cable or broadband cable for internet services. The rationale of the opinions was correct both on economic and legal terms, but there was little or no evidence of the anticompetitive effects of the conduct.

**iii Discrimination**

As explained above, discriminatory treatment was not expressly included in the Competition Law prior to the amendment. Subsection 12(h) includes as a vertical restraint agreeing different terms and conditions with parties that are in the same situation. COPROCOM has not yet ruled on a discrimination case. Whether COPROCOM will consider the effect on competition when analysing these cases or whether it will treat them more as a *per se* rule is still an open question. On the basis of how RPM has been treated, it is possible that similar treatment will be given to discrimination.

**iv Exploitative abuses**

Excessive pricing is not illegal in Costa Rica, but COPROCOM may recommend that the government (the government may also take the initiative, but COPROCOM’s opinion
is required) implement price regulations and additional restrictions on commerce in exceptional circumstances, and on a temporary basis (i.e., to be reviewed every six months). In oligopolistic and monopolistic markets, the government may regulate prices.

V REMEDIES AND SANCTIONS

i Sanctions

Section 28 of the Competition Law lists the type of sanctions COPROCOM may impose, most of which are fines. Subsections (a) and (b) include cease-and-desist orders, correction of practices and actions needed to counteract anticompetitive effects. The latter refers to structural and behavioural remedies for merger cases. Subsection (a) is discussed below (see Section V.iii).

Subsections (c) to (k) contain fines for different events. These fines are indexed to the minimum salary (approximately US$550); thus, the amount of the fine is equivalent to a number of minimum salaries. For vertical restraints infringements, Subsection (f) contains a fine of up to 410 times the minimum salary. According to Subsection (h), individuals can also be fined an amount of up to 75 times the minimum salary.

However, Section 28 also stipulates that if an economic agent has repeated the same type of infringement, or if the first infringement is particularly serious, the amount of the fine may be up to 10 per cent of the annual sales of the economic agent during the past fiscal year prior to the date in which COPROCOM issues the final opinion in that particular case.

To determine the amount of the fine, COPROCOM must consider:

- the seriousness of the infringement;
- the damage caused by the infringement;
- the intent;
- the market share;
- the size of the relevant market;
- the duration of the infringement;
- whether the economic agent has committed the same infringement before; and
- the payment capacity of the economic agent.

ii Behavioural remedies

Subsection 28(a) grants COPROCOM the capacity to suspend, correct or suppress anticompetitive conduct as well as to order the actions required to counteract the anticompetitive effects caused by anticompetitive conduct.

Thus, when COPROCOM finds an infringement of the Competition Law, it usually orders the suppression of the conduct and payment of a fine. In a couple of cases where COPROCOM found that the incumbent had denied a competitor access to an essential facility to provide an additional service (a cable TV company wanted to expand its business and asked the owner of the posts infrastructure to allow the use of the infrastructure to allow the use of the infrastructure to provide internet service), COPROCOM ordered the incumbent to allow the competitor access to the facility on reasonable and non-discriminatory terms. The parties agreed on terms and conditions, and access was finally granted. If the parties had not reached such an agreement, it is an open question whether COPROCOM would have moved to fix a price and to determine the terms and conditions of access.
In one of these cases, the owner of the infrastructure decided to terminate the existing agreement with the cable TV company. As a pre-emptive measure, COPROCOM ordered it to keep the agreement in place during the investigation and until final resolution of the case.

### iii Structural remedies

COPROCOM may use structural remedies in merger control, because Subsection 16.3 specifically contemplates that possibility, but the application of structural remedies to vertical restraints is far from clear.

The statutory basis for structural remedies for vertical restraints would be Subsection 28 (a), referred to above, ‘to order the actions required to counteract the anticompetitive effects caused by the anticompetitive conduct’.

The position that this provisions allows for structural remedies seems to have little support, first, because there is no specific reference to structural remedies, and the word ‘actions’ seems to refer to conduct or behaviour; and second, because COPROCOM has never tried to impose a structural remedy in a vertical restraint case.

### VI PROCEDURE

A case may start from a complaint filed by a third party or ex officio by the authority. Depending on the merits of the complaint, COPROCOM may dismiss it, open a formal case against the economic agent that allegedly committed the anticompetitive practice or open a preliminary investigation. The preliminary investigation usually consists of a review of the market conditions to determine the possibility of the existence of an anticompetitive behaviour. Even though, at that point, a case has not been formally opened against an economic agent, it is usually possible to anticipate the direction of the investigation. Therefore, information requests from the authority should be responded to accordingly, and sometimes it is also convenient to anticipate arguments and justifications for the conduct under investigation to avoid the formal opening of a case. This seems to have been the case in the complaints dismissed this year by COPROCOM.

When a case is formally open, COPROCOM issues a resolution indicating the economic agents and the conduct that will be investigated. The resolution should also indicate, inter alia, what provision of Section 12 has allegedly been breached, what the penalties may be if the violation is found, what documents are in the file and whether there is a confidential file. COPROCOM will also appoint three people from its staff, who will be responsible for the procedure and who will write a final report to the commissioners so that they can issue the final resolution.

During the investigation process, the authority can request information from any economic agent. The Competition Law also authorises dawn raids provided there is a court authorisation. During dawn raids, the party and its lawyers can be present.

The parties have access to the records of the investigation, except to confidential information presented by other economic agents, and they can present all kinds of evidence up to the day of the hearing.

When the authority collects all the information, it will set a date for the private hearing, where the parties have to present their arguments and the evidence, including witness testimonies. The hearing ends with the closing statements of the parties, and then the directors of the procedure will write their final report for the commissioners. The commissioners have access to the file, but they do not attend the hearing. This lack of access to the administrative
judges is the subject of some criticism, as the parties tend to feel that the authority acts as both prosecutor and judge. Another criticism of COPROCOM concerns the length of time it takes to reach a final resolution. This varies from two to four or five years, but there have been cases where final resolution has taken up to 10 years.

Settlement agreements to terminate a procedure are allowed at any time before the private hearing takes place.

The parties can request the authority to issue interim measures at any time during a procedure. A party must alert the authority where it is necessary to maintain a certain situation or conditions that might otherwise deteriorate during the procedure, where the party has good legal grounds for the request and where no superior interests would be affected by the measure. However, as discussed above, there has only been one case in which COPROCOM has issued an interim measure.

VII PRIVATE ENFORCEMENT

Although there is a constitutional principle according to which any person or entity that has been damaged or has suffered an injury has the right to receive proper compensation, no private action has yet been filed to claim civil damages derived from a competition infringement.

COPROCOM may initiate an investigation and open a case based on a third-party complaint, but such a complaint cannot include a civil compensation claim, as COPROCOM cannot award civil damages in its rulings.

Section 21 of the Competition Law contains a provision according to which the administrative procedure before COPROCOM has to be completed prior to the judicial hearing. Some may consider this an obstacle to filing a civil complaint before court, which may be unconstitutional.

VIII FUTURE DEVELOPMENTS

Costa Rica is in the process of being accepted by the Organisation for Economic Cooperation and Development (OECD), and therefore is being evaluated in many aspects by the OECD’s experts. Competition is one area undergoing evaluation, and the OECD has conducted two peer reviews. The first was published in 2014; the second was conducted this year, the publication of which is expected by the end of the year.

The conclusions of the experts point towards, among other things, a lack of independence of COPROCOM, and recommend that the Commission becomes independent of the Ministry and establishes full-time commissioners to promote specialisation and avoid conflicts of interest. As a result of the OECD recommendations, the government recently published a bid that intends to eliminate COPROCOM and to create a more independent authority: the National Competition Council. It also includes leniency provisions and the elimination of the possibility to notify mergers after closing (the law currently allows notifications five days after closing). The bid has been presented to Congress, and during the discussion process, members of Congress have already introduced significant changes. At this point, it is difficult to predict when the bid will be submitted to vote and what the final content will be.

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In the medium term, more development on a regional basis should be expected as the competition authorities of Central American countries increase their communication and collaboration, and advance towards the implementation of the agreements incorporated in the European Union–Central American Association Agreement, according to which there will be one competition regulation and one authority for the region.\textsuperscript{13} Thus, we may see the investigation of cross-border practices some time in the future.

\textsuperscript{13} Title VII of the European Union–Central American Association Agreement.
Chapter 9

EUROPEAN UNION

Thomas Graf and Henry Mostyn

I  INTRODUCTION

The statutory provision that governs abuses of dominance in the European Union is Article 102 of the Treaty of the Functioning of the EU (TFEU). The regulatory body with the power to investigate and sanction abuses is the Competition Directorate-General of the European Commission. National competition authorities of individual Member States (NCAs) are competent to apply Article 102 TFEU as long as the Commission has not opened a formal investigation into the same matter.

The procedure for the Commission’s enforcement and application of abuse of dominance rules is set out in Regulation 1/2003. There are a series of implementing regulations, notices and guidance papers, the most important of which for Article 102 TFEU is the Article 102 Guidance Paper.

In broad terms, four conditions must be met for Article 102 TFEU to apply:

a. the entity engaged in the relevant conduct constitutes an ‘undertaking’;
b. the undertaking must hold a dominant position on a relevant market;
c. the conduct at issue must qualify as an abuse and restrict competition; and
d. the conduct must affect trade between Member States.

II  YEAR IN REVIEW

2017 and the first half of 2018 were particularly busy for the Commission and EU courts in terms of applying Article 102 TFEU. The Commission reached three infringement decisions,

1 Thomas Graf is a partner and Henry Mostyn an associate at Cleary Gottlieb Steen & Hamilton LLP.
2 With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty became Article 101 and Article 102 TFEU. The two sets of provisions are, in substance, identical, and references in this paper to Article 102 TFEU should be understood as a reference to Article 82 of the EC Treaty.
4 Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the Guidance Paper), OJ 2009 C 45/7.
5 The concept of ‘undertaking’ has been interpreted widely by the European courts. See Case C-41/90, Höfner and Elsner v. Macroton GmbH, judgment of 23 April 1991, EU:C:1991:161, paragraph 21: ‘The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.’

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including in its high-profile Google Shopping and Qualcomm cases.\(^6\) It closed one investigation via commitments (concerning Amazon's most-favoured nation clauses),\(^7\) and it closed two cases without taking any action (the Exhaust systems case, and the investigation into DuPont's and Honeywell's collaboration to develop an environmentally-friendly refrigerant).\(^8\)

In the Google Shopping case, the Commission fined Google €2.42 billion for showing groups of ads for product offers differently to free results for comparison shopping services.\(^9\) The Commission found that the different way that Google ranks and displays product ads compared to free results for comparison shopping services amounts to unlawful favouring. As a remedy, the Commission requires that Google should show product ads from rival services based on the same processes and methods as for its own product ads.

Google has appealed the decision to the General Court in Luxembourg,\(^10\) explaining that:

\(a\) it ranks all its results based on consistent standards;

\(b\) the product ads at issue are in an enhanced ad format that helps users find relevant products, and are more efficient for advertisers;

\(c\) showing ads in a clearly marked ad space separate from free results is not favouring them: it is how Google monetises the free search service it offers to users; and

\(d\) Google has no obligation to supply rivals with access to its search results pages because it is not an essential facility.

Google also points to what it considers a thriving product search space, where Amazon (not Google) is the leading player.

In the Qualcomm case, the Commission fined Qualcomm almost €1 billion for granting exclusive rebates to Apple.\(^11\) Although at the time of publishing the non-confidential decision has not been released, it appears from a press release that the Commission reviewed and rejected Qualcomm's price-cost test, holding that the results did not support Qualcomm's claim that its exclusivity payments were not capable of having anticompetitive effects.\(^12\)

In the Amazon case, Amazon offered commitments to address the Commission's concerns (under Article 102 TFEU) concerning MFN-type clauses in its agreements with e-book publishers. In particular, Amazon's price-related parity clauses required that publishers

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\(^6\) Case AT.39740, Google Search (Shopping), Commission decision of 27 June 2017; Case AT.40220, Qualcomm (exclusivity payments), Commission decision of 24 January 2018 (no public version available); and Case AT.39813, Baltic Rail, Commission decision of 2 October 2017.

\(^7\) Case AT.40153, E-book MFNs and related matters (Amazon), Commission decision of 4 May 2017.

\(^8\) Case AT.40170, Exhaust systems, closed on 28 April 2017; and Case AT.39822, Refrigerants, closed on 25 October 2017. In the Refrigerants case, the Article 102 TFEU aspect of the case focused on whether Honeywell and DuPont had committed a patent ambush by not disclosing IP protection during the testing procedure for the new refrigerant. The Commission closed the case without taking any action.

\(^9\) Case AT.39740, Google Search (Shopping), Commission decision of 27 June 2017.

\(^10\) Case T-612/17, Google and Alphabet (2017/C 369/51).

\(^11\) Case AT.40220, Qualcomm (exclusivity payments), Commission decision of 24 January 2018 (no public version available).

\(^12\) European Commission, 'Antitrust: Commission fines Qualcomm €997 million for abuse of dominance market position', 24 January 2018.
should provide Amazon with the same prices as rival platforms. The Commission raised concerns that this restricted other e-book retailers from competing with Amazon on price. Amazon agreed not to enforce the clauses in all EEA e-book agreements for five years.\textsuperscript{13}

At the court level, 2017 was most notable for the Court of Justice’s long-awaited judgment in the \textit{Intel} case.\textsuperscript{14} The Court of Justice set aside the General Court’s 2014 judgment,\textsuperscript{15} upholding a Commission decision\textsuperscript{16} fining Intel €1.06 billion for abuse of dominance through exclusivity rebates. The Court of Justice held that the General Court erred in failing to examine all Intel’s arguments calling into question the anticompetitive effects of the arrangements under an as-efficient competitor analysis.

The judgment brings important clarity to the treatment of ‘by nature’ abuses, such as exclusivity rebates, which the General Court had treated as akin to \textit{per se} abusive. By nature abuses remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive. This entails, in particular, an assessment of rivals’ efficiency, because competition law does not seek to protect inefficient rivals. In addition, even if the conduct does produce exclusionary effects, the Commission (or Court) must determine whether those effects ‘may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer’.\textsuperscript{17}

In his opinion in \textit{Orange Polska}, Advocate General Wathelet confirmed that the \textit{Intel} judgment does not merely set out a procedural requirement, but raises a matter of substance: if the dominant firm submits plausible evidence, the Commission must properly review that evidence and demonstrate that the conduct will nonetheless exclude equally efficient rivals.\textsuperscript{18}

In \textit{MEO}, the Court of Justice continued the theme of focusing on anticompetitive effects as a necessary element of an infringement of Article 102 TFEU.\textsuperscript{19} It confirmed that establishing a discrimination abuse under Article 102(c) TFEU requires the Commission to demonstrate – ‘having regard to the whole circumstances of the case’ – that the conduct leads to a distortion of competition.\textsuperscript{20}

Finally, in \textit{AKKA-LAA}, the Court of Justice reached a decision (supposedly) clarifying the circumstances to find an exploitative pricing abuse.\textsuperscript{21} The Court found that a comparison of prices in different Member States can be a valid way of assessing price levels (benchmark countries must be selected ‘in accordance with objective, appropriate, and verifiable criteria’). If prices are significantly and persistently above that benchmark, there may be room for an exploitative price abuse. By contrast, Advocate General Wahl’s Opinion in the same case had

\begin{footnotes}
\item[17] \textit{Intel}, paragraph 140.
\item[20] Ibid., paragraph 27.
\end{footnotes}
expressed strong scepticism about exploitative abuse cases, noting that ‘there is simply no need to apply that provision in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.’

III MARKET DEFINITION AND MARKET POWER

i Market definition

Market definition serves as an analytical framework to assess market power and competitive effects. A relevant market for the purpose of EU competition law circumscribes the sources of competitive constraint faced by companies under investigation. The Commission’s Market Definition Notice provides guidance on the Commission’s approach to market definition for all areas of EU competition law, including the application of Article 102 TFEU, as the Guidance Paper is silent on the topic. The relevant product market comprises all those products or services ‘which are regarded as interchangeable or substitutable by the consumer, by virtue of the products’ characteristics, their prices and their intended use’. This definition draws on the principles established by the Court of Justice in Michelin, holding that:

for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.

The Commission acknowledges that qualitative differences only allow it as a first step to limit the field of possible substitutes. Actual interchangeability is assessed by the hypothetical monopolist (SSNIP) test. This asks whether a hypothetical monopolist could profitably impose a 5 to 10 per cent permanent price increase over the candidate products without a sufficient number of consumers at the margin switching to other products to render the price increase unprofitable.

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A number of EU court judgments have discussed basic principles of market definition in the context of Article 102 TFEU cases.\(^\text{29}\) However, some of these cases are relatively old and remain quite general.\(^\text{30}\) The Commission's decisional practice and court case law in other areas of EU competition law, including merger control, provide additional insight that is also relevant for Article 102 TFEU cases.\(^\text{31}\)

### ii Dominance

The application of Article 102 TFEU requires the company under investigation to have a high degree of market power that is referred to as 'dominance'. The Court of Justice has described dominance as 'a position of economic strength' that provides a company with 'the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers'.\(^\text{32}\)

Despite the ubiquitous nature of this dictum (it is cited in virtually every Article 102 TFEU decision and judgment), it provides limited guidance for companies to understand whether they hold a dominant position. It does not explain, for example, how 'independently' an undertaking must be able to behave\(^\text{33}\) or when the threshold of 'appreciable extent' is crossed.\(^\text{34}\) What is clear is that no single factor is determinative in assessing a company's dominance.\(^\text{35}\) Nor does dominance require that there is no competition on the relevant market.\(^\text{36}\)

The Guidance Paper equates the concept of competitive independence with the ability to profitably raise prices above the competitive level.\(^\text{37}\) Unlike in the context of merger control, where the question is whether the merged entity will prospectively gain power to raise prices, in Article 102 TFEU cases the question is whether the company under investigation already has such power. This does not require the Commission to show that the company could raise prices beyond the level that it currently charges (this is known as the 'cellophane fallacy').\(^\text{38}\) If the company has market power, it will already charge above the competitive level at the

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\(^\text{29}\) For example, Case 6/72, Continental Can, judgment of 21 February 1973, EU:C:1973:22 (Continental Can); and Case 85/76, Hoffmann-La Roche, judgment of 13 February 1979, EU:C:1979:36 (Hoffmann-La Roche).

\(^\text{30}\) For an example that engages in a detailed discussion of market definition principles in the pharmaceutical sector, see the judgment of the General Court in Case T-321/05, AstraZeneca, judgment of 1 July 2010, EU:T:2010:266; confirmed in Case C-457/10 P, AstraZeneca, judgment of 6 December 2012, EU:C:2012:770 (AstraZeneca).


\(^\text{33}\) Of course, no undertaking can literally act 'independently' of its customers: even a monopolist is constrained by the demand curve for its product, which is affected by extra-market constraints, and the reduction in demand from customers as price increases.

\(^\text{34}\) See Bo Vesterdorf, 'Article 102 of the TFEU and sanctions: appropriate when?', ECLR 2011, 32(11), 573–579.

\(^\text{35}\) United Brands, paragraph 66.

\(^\text{36}\) United Brands, paragraph 113.


profit maximising point. Direct proof of dominance would therefore involve comparing the company’s prices with what is expected to be the competitive price level. Because determining the competitive price level as a review benchmark is hard, if not impossible, case law has developed indicators for the existence of dominance. The Guidance Paper classifies these broadly into criteria relating to: constraints imposed by competitors (i.e., an assessment of market structure and market shares); constraints imposed by the threat of expansion and entry; and constraints imposed by the bargaining strength of customers.39

**Market shares**

In the *Akzo* judgment, the Court of Justice established a (rebuttable) market share presumption for dominance under which a company is assumed to be dominant if it holds a market share of 50 per cent or more in the relevant market.40 The rationale is that shares of sales indicate whether a company can ‘more easily pursue a pricing policy independent of competitive conditions’ and therefore is ‘able to control prices’.41 The Guidance Paper notes that dominance is ‘not likely if the undertaking’s market share is below 40 per cent’.42

That said, even above the 50 per cent threshold it is necessary to consider the particular nature and competitive dynamics of the relevant market when assessing market shares. For example, in bidding markets characterised by a limited number of large orders, temporary high shares do not indicate market power.43 Similarly, in markets subject to a high degree of innovation or where services are offered for free, market shares are not a proxy for market power, either.44

**Expansion and entry**

Any presumption of market power that might accompany a high market share is inapplicable in markets where competitors are able to meet rapidly the demand from customers who want to switch away from the firm with the largest share.45 In other words, lack of barriers to entry and expansion can prevent a dominant position if a company faces no current competitive

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39 Guidance Paper, paragraph 12.
40 Case C-62/86, *Akzo Chemie*, judgment of 3 July 1991, EU:C:1991:286 (AKZO), paragraph 60: ‘With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share of 50 per cent such as that found to exist in this case.’
42 Guidance Paper, paragraph 14.
43 For this reason, the Guidance Paper notes that ‘the higher the market share and the longer the period over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position’, Guidance Paper, paragraph 15.
44 Thus, in *IBM/Telelogic*, the Commission held that market share data did not represent a ‘direct proxy for market power’ in markets characterised by competition on quality and innovation, in particular because ‘competitors who do not regularly upgrade their products, or who do not introduce new products meeting increasing customers’ requirements, will rapidly lose out’, Case COMP/M.4747, *IBM/Telelogic*, Commission decision of 5 March 2008, paragraph 151. See also Case T-79/12, *Cisco Systems and Messagenet*, judgment of 11 December 2013, EU:T:2013:635 where the General Court confirmed that because of the high degree of innovation and the fact that services are provided for free (so that any attempt to increase prices ‘would encourage consumers to switch supplier’), market shares of 80 to 90 per cent were not indicative of market power.
45 *Hoffmann-La Roche*, paragraph 41.
constraints, but the existence of barriers will not create a dominant position if a company already faces competitive constraints. As recognised in the Guidance Paper, ‘an undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient’.\(^{46}\) In assessing this likelihood, the Commission considers barriers that prevent timely entry or expansion. These can take the forms of legal barriers (such as legislation conferring a statutory monopoly,\(^{47}\) or intellectual property rights),\(^{48}\) or barriers such as economies of scale or scope,\(^{49}\) technological advantages\(^{50}\) or network effects.\(^{51}\)

**Buyer power**

Customers with sufficient countervailing bargaining strength can prevent a company from exercising market power. Buyer power, however, may not negate dominance where a strong buyer can protect only itself, but not the entire market.\(^{52}\)

Generally, exercising buyer power requires the buyer to have viable competitive alternatives to the dominant company, or the ability to develop such alternatives.\(^{53}\) Even a large buyer will have little or no power if it has no alternative supply options to which it can realistically turn.\(^{54}\) That said, in some instances, buyer power may also come from the buyer's ability to retaliate against the seller. For example, in the case of patent licensing, a patent owner may be constrained by the patent portfolios of licensees if it is vulnerable to countersuits in the event of overcharging for its own patents. In the case of a multi-product firm that serves the same buyers in different product markets, buyers may constrain the firm’s ability to charge supra-competitive prices in a dominant market by threatening to switch their purchases in non-dominant markets.

**IV ABUSE**

**i Overview**

Holding or acquiring a dominant position is not in itself unlawful under EU competition law. A dominant company only infringes Article 102 TFEU if it abuses its dominant position to restrict competition.

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\(^{46}\) Guidance Paper, paragraph 16.

\(^{47}\) See, for example, Case 89/113/EEC, *Decca Navigator Systems*, Commission decision of 21 December 1988.

\(^{48}\) See, for example, Case COMP/35.141, *Deutsche Post*, Commission decision of 20 March 2001.

\(^{49}\) *United Brands*, paragraph 122. The extensive investments that a new entrant to the banana market would need to make were held to be ‘particular barriers to competitors entering the market’ since they generated ‘economies of scale from which newcomers to the market cannot derive any immediate benefit and … the costs of which are irrecoverable if the [entry] attempt fails’.

\(^{50}\) See, for example, *Hoffmann-La Roche*, paragraph 48.

\(^{51}\) This refers to the phenomenon whereby a product or service becomes more valuable to each user when more people use it. See, for example, Case COMP/39.530, *Microsoft (Tying)*, Commission decision of 16 December 2009, paragraph 420.

\(^{52}\) Guidance Paper, paragraph 18.

\(^{53}\) Guidance Paper, paragraph 18.

\(^{54}\) See, for example, Case COMP/37.990, *Intel*, Commission decision of 13 May 2009, paragraphs 886 and 889: ‘Throughout its argumentation on buyer power, Intel ignores the fundamental element in its relationship with OEMs, namely the fact that it is an unavoidable trading partner for them: OEMs depend on Intel for what is the most important single hardware component in their computers. As such, Intel is a must-stock brand.’
The classic formulation of an abuse is from Hoffmann-La Roche:

The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operator, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.\(^\text{55}\)

### ii Exclusionary abuses

An exclusionary abuse takes place if a dominant company forecloses competitors in an anticompetitive manner. Not every foreclosure of competitors is anticompetitive. It is a normal (and desirable) part of the competitive process that competitors that have less to offer to customers may leave the market. This has been recognised in the Guidance Paper, and has now been affirmed by the Court of Justice in Post Danmark I and Intel, where the Court stressed that ‘not every exclusionary effect is necessarily detrimental competition’ and that ‘it is in no way the purpose of Article 102 TFEU to …. ensure that competitors less efficient than the undertaking with the dominant position should remain on the market’. To the contrary: ‘Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, inter alia, price, choice, quality or innovation.’\(^\text{56}\) The key task in an abuse analysis is therefore to distinguish between anticompetitive conduct and competition on the merits.

Article 102 TFEU lists a number of abusive practices, but these are not exhaustive: *sui generis* abuses can be identified in individual cases.\(^\text{57}\) The Guidance Paper discusses legal criteria for categories of exclusionary abuses that have been identified in past cases. These legal criteria serve as successive filters to distinguish between abusive behaviour and legitimate pro-competitive conduct.

Outside the abuse categories discussed in the Guidance Paper, conduct must be assessed based on general principles. New abuses cannot be postulated without limitation: if a type of conduct falls within an existing category of abuse (such as refusal to supply or tying), the legal conditions necessary to establish that abuse need to be satisfied.

The case law qualifies certain categories of conduct as ‘by nature’ abuses (e.g., discounts conditioned on exclusivity, as discussed below). The recent *Intel* judgment brings important clarity to the treatment of these abuses: by nature, abuses remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive. This entails, in particular, an assessment of rivals’ efficiency, because competition law does not seek to protect inefficient rivals.\(^\text{58}\)

\(^{55}\) Hoffmann-La Roche, paragraph 121.


\(^{57}\) See Continental Can, paragraph 26. *AstraZeneca*, with its regulatory-type abuses, represents another example.

\(^{58}\) *Intel*, paragraph 142.
Outside the ‘by nature’ exceptions, a ‘fully-fledged analysis of effects has to be performed’. This fully fledged analysis requires proving at least the following five elements:

a the dominant company’s abusive conduct must hamper or eliminate rivals’ access to supplies or markets;

b the abusive conduct must cause the anticompetitive effects. Proving causation requires comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur;

c the anticompetitive effects must be reasonably likely. If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place;

d anticompetitive foreclosure must be determined by reference to equally efficient competitors. Any possible foreclosure of competitors can only conceivably be anticompetitive if it is liable to exclude competitors that are at least as efficient as the dominant company; and

e the anticompetitive effects must be sufficiently significant to create or reinforce market power.

Even if a company abuses its dominance, it retains the possibility to justify its conduct – even for ‘by nature’ abuses (referred to as ‘objective justification’). To do so, the company must show that the conduct is either objectively necessary or produces efficiencies that outweigh restrictive effects on consumers. If a dominant company raises evidence of objective justification, it ‘falls to the Commission ... to show that ... the justification put forward cannot be accepted’.

These general principles are discussed in relation to various different types of abuse below.

**Predatory pricing**

Predatory pricing arises where a dominant company prices its products below costs such that even equally efficient competitors cannot viably remain on the market. In *Akzo*, the Court
of Justice established a two-test rule for the assessment of predatory pricing conduct under Article 102 TFEU:70 pricing below average variable cost (AVC) is presumptively abusive;71 and pricing below average total cost (ATC) but above AVC is abusive if it is shown that this is part of a plan to eliminate a competitor.72 The principle set out in the Guidance Paper in assessing predatory pricing conduct is that of a profit sacrifice (i.e., the dominant company deliberately foregoes profits in the short term so as to foreclose competitors with a view to strengthening market power).73 There may be cases where alternative benchmarks, such as average incremental costs, are more appropriate, where, for example, an industry is characterised by high fixed costs and very low variable costs.74

**Margin squeeze**

A margin squeeze occurs when a vertically integrated company sells an input to its downstream competitors at a high price and at the same time prices its own downstream product at a low price such that its competitors are left with insufficient margin to compete viably in the downstream market. This is abusive in EU law when ‘the difference between the retail price charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market’.75

Margin-squeeze cases were originally viewed as instances of a constructive refusal to supply. The Court’s judgments in TeliaSonera and Telefonica have held that it is not necessary to establish the legal conditions for an abusive refusal to supply in such cases. These judgments treat margin-squeeze practices as akin to predatory pricing behaviour, particularly as they analyse the margin squeeze under Article 102(a) TFEU. To end the margin squeeze, the dominant company is not required to provide access to its facilities; it only needs to change the level of prices to remove the squeeze.

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71 See AKZO, paragraph 71: ‘A dominant undertaking has no interest in applying such prices except that of eliminating a competitor so as to enable it to subsequently raise its prices by taking advantage of its monopolist position.’

72 Ibid., paragraph 72: ‘Such practices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.’

73 See Guidance Paper, paragraphs 64–66. The Guidance Paper in fact refers to cost benchmarks of average avoidable cost and long-run average incremental cost, but recognises that these are likely to be good proxies for AVC and ATC respectively. See Guidance Paper, paragraphs 26–27.

74 See, for example, Post Danmark I, paragraph 33. The Court of Justice in Post Danmark I (at paragraphs 39–40) also appeared to suggest that proof of anticompetitive effects can substitute for proof of intent in the second AKZO scenario (i.e., where a dominant firm’s price is between AVC and ATC).

75 Case COMP/C/1/37.451, Deutsche Telekom, Commission decision of 21 May 2003, paragraph 107, upheld on appeal by the General Court. Confirmed in Case C-52/09, TeliaSonera, judgment of 17 February 2011, EU:C:2011:83, paragraphs 31–34. A test for a margin squeeze formulated in the Guidance Paper at paragraph 80 is as follows: ‘Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a ‘margin squeeze’).’
Exclusive dealing
The Guidance Paper describes exclusive dealing as an action by a dominant undertaking ‘to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates’. Both Articles 101 TFEU\(^\text{76}\) and 102 TFEU can apply to exclusive dealing, although traditionally the approach under Article 101 TFEU has been more economic, while under Article 102 TFEU exclusive dealing has historically been treated as presumptively unlawful.\(^\text{77}\) The recent \textit{Intel} judgment clarifies that this presumption remains, but if firms submit evidence that the conduct is not capable of restricting competition, the Commission must then assess all the circumstances to determine whether the conduct is abusive.\(^\text{78}\)

Exclusive purchasing
An exclusive purchasing obligation requires a customer to purchase all or a large majority of its needs for a specific product from one supplier. The current approach of the Commission and the courts is to look closely at the actual or likely effects of a particular agreement on the relevant market and assess whether it harms consumers.\(^\text{79}\) Factors the Commission will take into account include the duration of the obligation, customers’ switching costs and whether the dominant undertaking is an unavoidable trading partner.\(^\text{80}\)

Exclusionary discounts
While the grant of discounts (also known as rebates) is generally pro-competitive, certain forms of discounts may constitute an abuse if applied by a dominant company. The concern is that the dominant company leverages its larger base of sales for calculating discounts in ways that preclude smaller (but equally efficient) competitors from competing for the contestable portion of a customer’s demand. While the discount remains above costs for the dominant company because it can spread the discount across a larger base of sales, smaller competitors would be forced to price below costs to match the discounts since they would have to amortise it over a smaller base.

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\(^{76}\) In many cases the block exemption regulation on vertical agreements will apply to exempt such agreements from Article 101 TFEU, provided that the supplier has a market share of no more than 30 per cent; the exclusive purchasing contract contains no hard-core restrictions; and the exclusivity lasts for less than five years. See Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

\(^{77}\) See, for example, \textit{Hoffmann-La Roche}. This approach was partially questioned in Case T-65/98, \textit{Van den Bergh Foods}, judgment of 23 October 2003, EU:T:2003:281 (\textit{Van den Bergh Foods}).

\(^{78}\) \textit{Intel}.

\(^{79}\) See \textit{Van den Bergh Foods}, paragraph 160.

\(^{80}\) Guidance Paper, paragraph 36.
The case law generally distinguishes between three categories of rebates:

a volume-based rebates that pay out based on the volume of a customer’s purchases: reflecting gains in efficiency and economies of scale, volume-based rebates are presumptively lawful;81

b rebates conditioned on exclusivity, which require a customer to obtain all or most of its requirements from the dominant company in order to get the rebate, are presumptively unlawful (Hoffmann-La Roche, Michelin, British Airways82 and Tomra83). The recent Intel judgment clarifies that while exclusive dealing remains presumptively unlawful, if firms submit evidence that the conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive; and

c fidelity-building rebates that possess a loyalty-building mechanism without being directly linked to exclusive or quasi-exclusive supply: these require an assessment of all the circumstances to determine whether the rebate is likely to foreclose equally efficient competitors.84 The relevant circumstances include:

• whether the rebates are individualised or standardised;
• the length of the reference period;
• the conditions of competition prevailing on the relevant market;
• the proportion of customers covered by the rebate; and
• whether a rebate is retroactive or incremental.85

Tying

Tying occurs when a supplier sells one product, the ‘tying product’, only together with another product, the ‘tied product’. The seminal case on tying involved Microsoft’s tying of its Windows operating system with its Windows Media Player.86 The Court found that Microsoft’s tying of Windows Media Player (a qualitatively inferior product) to Windows, the ubiquitous operating system, degraded the quality of the Windows operation system and foreclosed original equipment manufacturers as a distribution channel for rival media

81 Hoffmann-La Roche, paragraph 90; Case T-203/01, Michelin, paragraph 58.
84 Post Danmark I, paragraphs 31–32.
85 Post Danmark II. Post Danmark held a market share of 95 per cent in bulk mail. It calculated its retroactive rebates across customers’ total demand for bulk mail, covering both non-contestable demand protected by the statutory monopoly and contestable demand. In this way, the retroactive rebates enabled Post Danmark to tie contestable demand to its non-contestable share, which represented around 70 per cent of total demand. Customers switching contestable demand to competitors would lose discounts on their large portion of non-contestable demand. This protected Post Danmark’s position in bulk mail, where competition was already limited by the partial statutory monopoly. The Court held that for determining whether the discount system was abusive, it was necessary to consider ‘all the circumstances’ of the case. Unsurprisingly, in the circumstances, the Court concluded that Post Danmark’s retroactive rebate system infringed Article 102 TFEU.
86 Prohibition decisions have been adopted in a number of other cases involving tying allegations, including Case T-30/89, Hilti, judgment of 12 December 1991, EU:T:1991:70; and Case C-193/83, Windsurfing, judgment of 25 February 1986, EU:C:1986:75.
players. Rival means of distribution, notably internet downloads, were not viable because they were slow, difficult and prone to failure. The Commission, upheld by the General Court, identified five conditions for an abusive tying:
   
a. the tying and tied goods are two separate products;
b. the undertaking concerned is dominant in the tying product market;
c. customers have no choice but to obtain both products together;
d. the tying forecloses competition; and

e. there is no objective and proportionate justification for the tie.87

A central element of a tying analysis is to establish whether two components constitute separate products or an integrated whole. In Microsoft, the General Court held that such an assessment must be based on 'a series of factors', including 'the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and … commercial practice'.88

A dominant company may achieve the same effect as tying by ostensibly offering a stand-alone version of the dominant tying product alongside a bundled version, but at a price that renders it commercially unrealistic for customers to take the stand-alone version. Past cases have condemned the grant of discounts on dominant products that are conditioned on customers also taking non-dominant products.89 In the Guidance Paper, the Commission takes the position that such bundled discounts must be assessed by allocating the discounts fully to the price of the non-dominant ‘tied’ product. If that calculation results in a price below the dominant company’s long-run average incremental costs of supplying the ‘tied’ product, the discount is anticompetitive (unless rivals are able to replicate the bundle).90

Refusal to deal

As a general rule, companies, including dominant companies, are free to decide whether to deal with a counterparty. As Advocate General Jacobs confirmed in Bronner, it is ‘generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business’.91 A refusal by a dominant undertaking to supply its products can therefore amount to an abuse under Article 102 TFEU only in exceptional circumstances. According to established case law, the following general conditions must be met for a refusal to supply to be abusive: the requested input must be indispensable to compete viably; the refusal is likely to eliminate all competition in the downstream market; and there is no objective justification for the refusal.92

87 See Case COMP/C-3/37.792, Microsoft, Commission decision of 24 March 2004, paragraph 794. The Court of First Instance confirmed that the five conditions were ‘consistent both with Article 82 EC and with the case law’ and followed from ‘the very concept of bundling’. See Microsoft, paragraph 859. See also Guidance Paper, paragraphs 47–74.
88 See Microsoft, paragraph 925.
89 See for example, Hoffmann-La Roche, paragraphs 110–111; Case COMP/37.859, Hays/La Poste Belge & Key Mail, Commission decision of 5 December 2001.
90 Guidance Paper, paragraph 60.
The indispensability requirement is a high threshold: the input must be essential for a commercially viable business to compete on the downstream market. The test is whether there are ‘technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult’ to create alternatives, or to create them within a reasonable time frame.\(^93\) If there are ‘less advantageous’ alternatives, that means the input is not indispensable. For example, in Bronner, access to newspaper distributor Mediaprint’s delivery network was not indispensable because Bronner could have used kiosks, shops and post (even though these were less advantageous). Mediaprint’s refusal to grant access was, therefore, not abusive.

In its Google Shopping decision, the Commission appears to have imposed a duty on Google to grant rival comparison shopping services access to its search results pages, without establishing a duty to supply by reference to the Bronner criteria.\(^94\) Google has challenged this apparent change in the law in its pending appeal.\(^95\)

If the refusal involves intellectual property rights (i.e., a refusal to license), it is moreover necessary to demonstrate that the refusal would prevent the emergence of a new product, or would hinder technical development and innovation more generally.\(^96\)

iii  Discrimination

Unlawful discrimination under Article 102(c) TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions. However, such abusive ‘price discrimination’ requires proof that similar situations are being treated in a dissimilar manner without legitimate commercial reasons; and that some customers are placed at a ‘competitive disadvantage’ relative to other customers to such a degree that it creates a risk of foreclosing equally efficient competitors. In MEO, the Court of Justice has recently confirmed that establishing a discrimination abuse under Article 102(c) TFEU requires the Commission to demonstrate – ‘having regard to the whole circumstances of the case’ – that the conduct leads to a distortion of competition.\(^97\)

Not every different treatment is discriminatory. As a general matter, the EU courts have recognised that differences arising from individual negotiations of terms can be explained by legitimate commercial reasons.\(^98\) Other considerations that may be taken into account include, for example, whether the transactions involve similar products,\(^99\) costs\(^100\) or timing.\(^101\) Moreover, even if there is ‘discrimination’, the ECJ’s Post Danmark judgment has made clear that such discrimination is only abusive if it is liable to foreclose equally efficient

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\(^93\) Case C-7/97, Bronner, judgment of 26 November 1998, EU:C:1998:569, paragraph 44.
\(^94\) Case AT.39740, Google Search (Shopping), Commission decision of 27 June 2017.
\(^95\) Case T-612/17, Google and Alphabet (2017/C 369/51).
\(^96\) Microsoft, paragraph 332; Case C-418/01, IMS Health, judgment of 29 April 2004, EU:C:2004:257, paragraph 52; and Case C-241/91 P, RTE and ITP, judgment of 6 April 1995, EU:C:1995:98 (Magill), paragraphs 50–56.
\(^97\) Case C-525/16, MEO, judgment of 19 April 2018, EU:C:2018:270, paragraph 27.
\(^98\) Michelín, paragraph 90.
\(^100\) See, for example, Case 95/364/EC, Brussels National Airport, Commission decision of 28 June 1995.
\(^101\) See, for example, Case IV/28.841, ABG/Oil Companies, Commission decision of 19 April 1977.
companies. In past cases, discrimination-type concerns have typically been raised as an ‘added’ consideration in connection with abusive exclusionary pricing practices, such as retroactive volume rebates.

iv Exploitative abuses

Article 102(a) TFEU provides that an abuse may consist of ‘directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions’. The difficulty in determining a benchmark by which prices can be assessed as being unfair has led to a dearth of decisional practice on this issue, although the Commission and national authorities have recently begun to pursue more exploitative abuse cases. In Scandlines Sverige, the Commission set out what it considers the most appropriate methodology for assessing unfair prices. The questions to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive; and, if the answer to that is yes, then whether a price has been imposed that is either unfair in itself or when compared to the price of competing products.

In AKKA-LAA, the Court of Justice has provided guidance on the conditions under which the imposition of high prices by a dominant firm might infringe Article 102(a) TFEU. The Court found that to identify unfair prices, comparisons with prices in neighbouring Member States may be appropriate, provided that the reference countries are selected ‘in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis’. The Court also confirmed that excessive prices need to be significantly and persistently above the competitive level for there to be an exploitative abuse. Advocate General Wahl’s opinion appeared to set a higher threshold, advising that ‘in its practice, the Commission has been extremely reluctant to make use of that provision against (allegedly) high prices practiced by dominant undertakings. Rightly so, in my view. In

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102 Post Danmark I, paragraph 30: ‘The fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as ‘price discrimination’, that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.’

103 See, for example, press release of 5 March 2014, ‘Commission fines Romanian Power Exchange OPCOM for discriminating against EU electricity traders’, IP/14/214. In that case, the Commission found that OPCOM had wrongfully discriminated against electricity traders from outside Romania by requiring them to have a Romanian VAT registration for accessing the spot electricity markets. Through this provision, OPCOM managed to impose a competitive disadvantage on electricity traders that were already registered for VAT in other EU Member States.

104 See, for example, United Brands, paragraphs 248–268: the Court of Justice annulled the Commission’s decision that unfair prices had been charged for Chiquita bananas in Germany, Denmark and Benelux since the difference in prices between branded Chiquita bananas and non-branded bananas was not deemed to be excessive.

105 In May 2017, the Commission opened an investigation into whether Aspen Pharma committed an exploitative abuse by allegedly imposing sudden price increases for cancer medicine of up to several hundred per cent. See European Commission, ‘Antitrust: Commission opens formal investigation into Aspen Pharma’s pricing practices for cancer medicines’, 15 May 2017.

106 Case COMP/36.568, Scandlines Sverige, Commission decision of 23 July 2004, paragraph 147.

107 Case C-177/16, AKKA-LAA, judgment of 14 September 2017, EU:C:2017:689, paragraph 51.
particular, there is simply no need to apply that provision in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.108

V REMEDIES AND SANCTIONS

Regulation 1/2003 provides the mechanism by which the Commission sanctions infringements of Article 102 TFEU. The Commission is entitled to impose structural or behavioural remedies, interim measures, fines and periodic penalty payments.109 Alternatively, an undertaking can itself offer commitments to bring the infringement to an end, thereby avoiding a formal finding of an infringement and a fine.

i Sanctions

The Commission can impose a fine of up to 10 per cent of a company’s total turnover of the preceding business year for infringements of Article 102 TFEU. The Commission has set out in detail the methodology by which it sets fines, which will take into account, among other things, the nature, length and scope of the infringement; the value of sales of goods affected by the infringement; and whether there are aggravating or mitigating circumstances.110

Before 2004, the Commission had never imposed a fine for an infringement of Article 102 TFEU that exceeded 1 per cent of the turnover of the undertaking involved. In recent years, the Commission has shown a tendency to impose increasingly high fines for abusive conduct, both in absolute and percentage terms, culminating in cases such as Tomra,111 where the fine represented 7 per cent of annual turnover; Intel,112 where the Commission imposed a fine of €1.06 billion (albeit the Court of Justice has quashed the General Court judgment upholding the Commission decision);113 and in Google Shopping, where the Commission imposed a record fine of €2.42 billion (the decision is currently under appeal).114

Fines can be imposed for a failure to abide by interim measures or commitment decisions. In 2013, the Commission fined Microsoft €561 million for failing to comply with its browser choice screen commitments. The Commission is also entitled to impose procedural fines of up to 1 per cent of an undertaking’s annual turnover if an undertaking

109 Articles 7, 8, 23 and 24 of Regulation 1/2003 respectively. Interim measures can only be imposed where there is a prima facie infringement of Article 102 TFEU; there is urgency due to the risks of serious and irreparable damage to competition; damage is considered ‘irreparable’; and the balancing exercise between the public interest and the harm caused weighs in favour of the interim measure.
110 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003 (Fining Guidelines), OJ C 210, 1 September 2006.
111 Case COMP/E-1/38.113, Prokent-Tomra, Commission decision of 29 March 2006.
113 See also Frances Dethmers and Helleen Engelen, ‘Fines under article 102 of the Treaty on the Functioning of the European Union’, ECLR, 2011, Issue 2, pp. 86 and 88; and Bo Vesterdorf, ‘Article 102 TFEU and sanctions: appropriate when?’ for criticism of the trend of higher fines, in particular considering the lack of legal certainty in the concepts of both abuse and dominance.
114 See Case AT.39740, Google Search (Shopping), Commission decision of 27 June 2017.
provides false answers or answers late to the Commission’s requests for information. Finally, the Commission is empowered to impose periodic penalty payments to compel companies to abide by remedies and commitments decisions.\(^ {115}\)

Firms can also win a reduction in the fine if they admit liability. In the 2016 *ARA waste management* decision, the Commission for first time employed the settlement mechanism traditionally used for cartel cases. ARA admitted liability for refusing to supply its rivals with access to its essential household waste management infrastructure in return for a 30 per cent fine reduction.\(^ {117}\)

**Remedies**

Remedies, whether imposed by the Commission or offered voluntarily by an undertaking as commitments, must fulfill certain objectives. They must bring the infringement to an end, be proportionate in both scope and duration, and not be easily circumvented.\(^ {118}\)

Where an infringement can be brought to end in different ways, the Commission cannot ‘impose … its own choice from among all the various potential courses of actions which are in conformity with the treaty’.\(^ {119}\) This means that the Commission can only impose a specific behavioural remedy if it is ‘the only way of bringing the infringement to an end’.

**Behavioural remedies**

Considerations of expediency and proportionality mean that behavioural remedies are preferred in Article 102 TFEU cases.\(^ {120}\) Structural remedies are only a means of last resort. Behavioural remedies may require the dominant undertaking either to engage in a positive action to bring the infringement to an end or to abstain from a certain type of conduct.\(^ {121}\)

Positive obligations have included the granting of a compulsory licence;\(^ {122}\) raising prices above an exclusionary level;\(^ {123}\) and other forms of compulsory dealing.\(^ {124}\)

\(^{115}\) Article 23(1) of Regulation 1/2003.

\(^{116}\) Article 24(1) of Regulation 1/2003. These can amount to 5 per cent of an undertaking’s average daily turnover.


\(^{118}\) See Article 5(4) TFEU and Case C-441/07 P, *Alrosa*, judgment of 29 June 2010, EU:C:2010:377 (*Alrosa*), paragraph 36; see also Commission Notice on Best Practices for the Conduct of Proceedings concerning Article 101 and 102 TFEU, paragraph 115: ‘the Commission has undertaken to verify that the commitments address the identified competition concerns and that the commitments offered do not manifestly go beyond what is necessary to address these concerns’. The Court of Justice has confirmed that these principles apply both to remedies imposed under Article 7 and remedies voluntarily offered under Article 9. See *Alrosa*, paragraph 36.


\(^{120}\) This is evident from the text of Article 7 of Regulation 1/2003: ‘Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective remedy would be more burdensome for the undertaking concerned than the structural remedy.’


\(^{124}\) See, for example, *Magill*: certain broadcasting companies were forced to make available their TV listings and to permit their reproduction subject to payment of reasonable royalties.
Meanwhile, negative obligations have included unbundling products and bringing rebates conditioned on exclusivity to an end.

**Structural remedies**

Structural remedies are used to rectify effects or abuses that have caused a change in the structure of the market. They will only be proportionate where ‘there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking’. In *ENI*, the Commission identified concerns with regard to conduct by ENI that result from its ownership of strategic natural gas pipeline infrastructure. ENI offered to divest its stake in its international transport businesses and, as a result, the Commission held that ‘ENI will no longer be subject to the inherent conflict of interest it faced operating both as a transmission system operator and as a company active on the Italian wholesale market’.

**VI  PROCEDURE**

The procedural rules for the conduct of Commission investigations are laid out in Regulation 1/2003 and the Commission’s Implementing Regulation. In 2012, the Commission published a version of its internal manual of procedure, which provides additional guidance on the Commission’s handling of competition law proceedings. A brief summary of the main procedural steps in a typical Article 102 TFEU investigation follows.

a. The Commission can begin investigations both as a result of complaints by third parties or on its own initiative. Sector inquiries can also provide the impetus for investigations.

b. The Commission’s primary instrument of investigation is issuing requests for information. In the past few years, such requests have become increasingly detailed, and may involve the production of large quantities of data and internal documents. The Commission may oblige companies to respond to requests for information through the adoption of formal decisions that are subject to penalty payments.

c. The Commission may conduct unannounced inspections, or ‘dawn raids’, at a company’s premises to obtain documents and information, although such dawn raids are relatively rare in Article 102 cases. Documents that contain advice from external counsel are protected by legal professional privilege, while in-house counsel documents do not benefit from such protection.

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127 Recital 12 of Regulation 1/2003.


129 Ibid., paragraph 89.

130 Commission Regulation EC No. 773/2004 of April 2004 on the conduct of proceedings pursuant to Articles 81 and 82 of the EC Treaty.


132 Privilege applies only to independent external counsel; advice given by in-house lawyers is excluded from the scope of legal professional privilege. See Case C-550/07 P, *Akzo Nobel*, judgment of 14 September 2010, EU:C:2010:512.
After considering the evidence, the Commission will decide whether to close proceedings, enter commitment discussions or issue a statement of objections (SO) to the company concerned.

The addressee of the SO is entitled to review the Commission’s file and respond to the SO in writing. The Commission will also grant the company in question an oral hearing, if requested.

Following the defendant’s reply to the SO, and a possible oral hearing, the Commission will proceed to a decision (this may occur only after a number of supplementary SOs or letter of facts that seek to bolster the Commission’s initial charges). An adverse decision can be appealed to the General Court on both points of fact and law, and from there to the Court of Justice on points of law only.

Commission proceedings can be resolved through the offer of commitments. Negotiation of commitments can take place both prior to adoption of an SO or following an SO and response. If the Commission considers the offered commitments to be acceptable, it will subject them to a public market test and, if confirmed, make them binding through adoption of a decision under Article 9 of Regulation 1/2003. Commitment decisions involve no finding of infringement and entail no fines. Regulation 1/2003 also makes clear that commitments are not appropriate if the conduct at issue is not sufficiently serious to warrant a fine.

In addition, the Commission can settle cases with companies under investigation. This involves the company admitting liability in exchange for a fine reduction. Traditionally, this procedural mechanism has been limited to cartels, but in the ARA case the Commission employed the settlement mechanism for the first time, rewarding ARA with a 30 per cent fine reduction in exchange for admitting liability.133

VII PRIVATE ENFORCEMENT

While public enforcement is the core of EU antitrust enforcement, actions brought by private claimants before national courts are an increasingly important complement to public enforcement activity.134 The Commission aims to encourage and facilitate such actions. To this end, it published a proposal for a Directive on private damages actions in 2013, which was signed into law on 26 November 2014135 together with a practical guide on quantifying harm resulting from competition infringements,136 and a recommendation for

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133 Case AT.39759, ARA foreclosure, Commission decision of 20 September 2016.
136 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, 11 June 2013.
The Directive’s stated aim is to optimise the interaction between public and private enforcement of competition law; to minimise discrepancies between rules applicable to antitrust damages actions in Member States; and to ensure that victims of infringements of EU competition law can obtain full compensation for the harm they have suffered. Among other things, the Directive introduces rules on the disclosure of evidence in such cases, as well as on the standing of indirect customers, the length of limitation periods, the joint and several liability of infringers, and the passing-on of damages as a possible defence.

VIII FUTURE DEVELOPMENTS

We identify three main trends to watch out for in the coming year:

First, while exploitative abuse cases remain rare and exceptional, there seems to a renewed appetite to bring such cases. While the revival in these cases is spearheaded by national authorities, the Commission appears to be catching on. We see a risk, however, that the concept of exploitative abuse is stretched to address policy issues beyond the scope of competition law that require broader discussion outside individual cases. Much of the debate in the future may turn on the extent to which the high standard expressed by Advocate General Wahl in *AKKA/LAA* has been embraced by the more ambiguous Court of Justice judgment.

Second, the Commission will need to ensure that its enforcement complies with the Court of Justice’s *Intel* judgment and its focus on as-efficient competitors. Publicly, the Commission appears to take the position that *Intel* largely imposes a procedural requirement: Commissioner Vestager has stated that the Commission ‘can presume that this sort of rebate, from a dominant company, is against the competition rules’ and ‘in practical terms, our main conclusion is that you won’t see fundamental change’. This appears to conflict with Advocate General Wathelet’s opinion in *Orange Polska* that the obligations set out in the *Intel* judgment are ‘by no means a purely procedural requirement’.

Third, Commissioner Vestager’s term ends in 2019 and, despite rumours that she may seek an unprecedented second term as Competition Commissioner, she may look to wrap up several cases that have been on the Commission’s desk for some time during the coming year.
I INTRODUCTION

The abuse of a dominant position is prohibited under Section 7 of the Competition Act. Furthermore, the concept of dominance is defined in Sections 4(2) and 4a of the Competition Act. The Finnish Competition and Consumer Authority (FCCA) has the authority to investigate competition matters. The FCCA may order a dominant undertaking to terminate an unlawful conduct or resolve a restriction through commitments. The decisions of the FCCA may be appealed to the Market Court and further to the Supreme Administrative Court. The Market Court has the authority to impose fines that have been proposed by the FCCA.

The enforcement procedure in abuse of dominance cases is set out in the Competition Act. The concepts of dominance and abuse thereof are, with minor exceptions, similar to those found in the EU competition rules. When an abuse of dominance may affect trade between EU Member States, the Finnish authorities must also apply the provisions of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and the interpretation thereof. The FCCA may issue legally non-binding guidelines that are consistent with the guidelines and Block Exemption Regulations of the European Commission. To date, no specific guidelines on abuses of dominance have been issued by the FCCA; however, the guidelines on the assessment of the amount of fine and guidelines on prioritisation are relevant to abuse of dominance cases. In addition, the FCCA’s brochure on the inspection of business premises is relevant also to abuse of dominance cases.

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1 Jussi Nieminen is a partner and Kiti Karvinen is a senior associate at Castrén & Snellman Attorneys Ltd.
2 948/2011 as amended. The Competition Act replaced the old Act on Competition Restrictions (480/1992, as amended). The provisions of the Act on Competition Restrictions apply to a large extent to violations that occurred prior to the entry into force of the Competition Act on 1 November 2011.
3 Regional state agencies also have limited powers to investigate competition matters and, by mandate of the FCCA, to take measures to promote competition in their region.
7 In addition, the FCCA has issued guidelines on leniency and guidelines on merger control.
8 Brochure on the inspection of business premises under Section 35 of the Competition Act (2017).
II YEAR IN REVIEW

Based on published data, the FCCA decided not to investigate or not to take an action in most of the abuse of dominance cases decided in 2017. Some cases were resolved after the companies in question had changed their behaviour during the FCCA’s investigation, and therefore the FCCA concluded that there was no reason to continue the investigation. These decisions indicate that the FCCA effectively uses its authority to prioritise matters and directs its resources to investigating the most harmful competition restrictions from a competition policy point of view.

In 2017, the FCCA made one commitment decision regarding Automatia Pankkiautomaatit Oy’s real-time mobile payment system. According to the FCCA’s preliminary view, Automatia’s payment system may have resulted in adverse competitive effects in the real-time payments market. The FCCA accepted the commitments offered by Automatia concerning the technical implementation and procedures of Automatia’s real-time mobile payment system and resolved the case.9

The administrative courts did not adjudicate any cases related to abuse of dominance in 2017.

III MARKET DEFINITION AND MARKET POWER

The definitions of relevant product and geographical market correspond to the approach of the European Commission and the European court praxis. It is explicitly stated in legislative materials that the definition of markets is an economic-based factual matter that may be determined by, for example, conducting a market survey.10 Substitutability of demand is the most decisive factor in the determination of a relevant product market, but supply-side substitutability is also taken into consideration by the FCCA.

Dominant position is defined in Section 4(2) of the Competition Act as follows:

A dominant position shall be deemed to be held by one or more undertakings or association of undertakings who, either within the entire country or a given region, hold an exclusive right or other dominant position in a specified product market so as to significantly control the price level or terms of delivery of that product, or who, in some other corresponding manner, influence the competitive conditions on a given level of production or distribution.

Despite of the specific definition included in the Competition Act, the concept of dominance is interpreted consistently with EU competition law.11

However, there is an exception to the determination of dominance concerning the Finnish daily consumer goods market. According to Section 4a of the Act, grocery chains with a market share exceeding 30 per cent in the retailing of daily goods in Finland are considered to hold a dominant market position. The aim of the provision was to improve the functionality of competition on the highly concentrated Finnish retail trade market and to ensure that competitors are not excluded from the market. It is, however, explicitly stated that the objective is not to prevent competition on the merits, but to ensure that

9 FCCA Decision No. 1469/14.00.00/2015, Automatia Pankkiautomaatit Oy.
companies deal with suppliers and other market actors in a non-discriminatory manner. The FCCA has publicly stated that the provision does not influence the application of the constituent elements of the abuse of dominance. Furthermore, the FCCA has emphasised that the prohibition of the abuse is only targeted at actions that can be distinguished from the competition on merits.

Two or more undertakings may hold a joint dominant position. In the Automatia case, the FCCA took the preliminary view that joint venture Automatia and its owner banks had joint dominance in the cash-dispensing market in Finland. The FCCA stated that to hold joint dominance, the companies must, in an economic sense, act as one economic entity on the market. The FCCA did not require the companies to act identically in every situation, but it was fundamental that they were able to act in a similar manner and to a reasonable extent independently from their competitors, customers and consumers. The FCCA’s view was also that the joint venture Automatia formed a structural and economic link between the owner banks, since they offered cash withdrawal services to their customers via Automatia. Despite the fact that they made the pricing decisions independently, as a result of this link, they had an incentive to price withdrawals made using auto-teller machines (ATMs) outside the Automatia network in a way that would encourage their customers to use Automatia’s ATMs. The case was closed with a commitment decision. In another more recent Automatia case, which concerned the real-time payment markets in Finland, the FCCA took a similar preliminary view. In its preliminary assessment, the FCCA stated that Automatia and its owner banks had a structural, economic and ownership-based link and a market position where they could influence the market in a harmful manner and abuse the market power of their joint venture without significantly or immediately losing market shares to competitors. However, this case was also closed with a commitment decision.

IV ABUSE

i Overview

The definition of abuse of dominance included in Section 7 of the Competition Act corresponds almost word for word to the wording of Article 102 of the TFEU. The interpretation of the abuse of dominance is also similar to the application of Article 102.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing refers to a pricing policy in which the dominant company prices its products below costs in the short term to foreclose existing or potential competitors from the market. In its assessment of predatory pricing, the FCCA has referred to the criteria set out in the European Court of Justice Akzo judgment.

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13 FCCA Newsletter 26 March 2014.
15 FCCA Decision No. 1469/14.00.00/2015, Automatia Pankkiautomaatit Oy.
In Valio, the Supreme Administrative Court found that the Finnish dairy company Valio had abused its dominant position by engaging in predatory pricing in the fresh milk market. The Supreme Administrative Court upheld the Market Court’s decision to impose a €70 million fine on the company and found that Valio had abused its dominant position in the Finnish fresh milk market. A central issue in the case was the calculation of costs and, in particular, the treatment of the price of raw milk paid to the farmers. Valio is a cooperative owned by farmers, and it has undertaken to buy all the raw milk produced by its owners, and, therefore, the company disagreed with the view to consider the cost of raw milk as a variable cost. The Court, however, held that the relevant average fresh milk prices of Valio were below the company’s average variable costs between 1 March 2010 and 20 December 2012, and that application of such prices generally indicates predatory pricing.

Margin squeeze means that a vertically integrated company weakens the position of a competitor in the end-product market by overpricing an intermediary product. The Market Court has dealt with alleged margin squeeze in several cases concerning subscriber connections in the telecommunications market. In the Oulun Puhelin, Aina Group, Kymen Puhelin and TeliaSonera Finland cases, the Market Court imposed fines totalling €220,000 on the companies for the abuse of a dominant position. According to the Market Court and the FCCA, the companies held dominant positions in their respective geographical areas and abused their market positions by favouring their own service providers with regard to the rents they charged for subscriber connections. The price bias made it difficult for competitors to gain access to the market in consumer services provided over subscriber connections, such as broadband and business-to-business services.

The Lännen Puhelin case concerned margin squeeze and refusal to supply in the broadband services market. As regards the margin squeeze, the company offered end customers a broadband product based on a different network technology from that of its wholesale product available to competitors. The Supreme Administrative Court upheld the Market Court’s decision and considered that, because of the different cost structure of the two technologies, it was not possible to assess whether the company had engaged in margin squeeze. According to the FCCA’s report to the Market Court, the prices for the wholesale product had even exceeded the retail prices.

The FCCA has published a memorandum on its evaluation criteria concerning the abuse of dominance in the broadband market. In its memorandum, the FCCA takes the preliminary view that local telecoms operators have dominant positions in their traditional business areas in the markets of subscriber lines as well as the wholesale of broadband services. When assessing the margin between wholesale and retail pricing, the FCCA calculates a weighted average of the monthly gross margin of the asymmetric digital subscriber line (ADSL) connections. If this is negative, the FCCA takes the preliminary view that the pricing fulfils the criteria for an illegal margin squeeze.

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17 Ibid.
19 Supreme Administrative Court Decision No. 2474/2/08 and Market Court Decision 260/04/KR, Lännen Puhelin Oy.
21 FCCA Memorandum 3 September 2009.
**Exclusive dealing**

In the *Abloy* case, the FCCA assessed, *inter alia*, whether the marketing support paid by the company to accredited dealers constituted an illegal retroactive target rebate. The FCCA took into consideration that, for about half of the dealers, the support amounted to approximately one-third of their operating income, and was thus highly important and loyalty enhancing. The FCCA considered that the marketing support was non-transparent and its grounds were unclear. According to the FCCA, this could have had exclusionary effects at least on some individual product groups. Following negotiations, the FCCA decided not to proceed with the case after the company voluntarily amended its discounting system on the basis of FCCA guidance.22

**Refusal to deal**

In *Lännen Puhelin*, the Supreme Administrative Court rejected the FCCA’s claim that the company had abused its dominant position by refusing to supply its wholesale ADSL broadband product to its competitors. The Court quoted the *Oscar Bronner* criteria and stated that it was necessary to assess whether the refusal to supply in fact removed all competition from the market. According to the decision, the fact that two competitors had managed to construct their own networks covering a significant area of Lännen Puhelin’s network coverage area proved that the refusal had not effectively removed competition.24

In the *SNOY* case, the Supreme Administrative Court generally upheld the Market Court’s decision and fined Suomen Numeropalvelu (the Finnish number service) €90,000 for refusal to supply in the wholesale market for telephone subscriber information. The company maintained the only nationwide database of telephone subscriber information in Finland and refused to deliver the information to its customer, which offered its services on the internet for free and without registration. Suomen Numeropalvelu justified its refusal by invoking data protection legislation, but this argument was not accepted by the Market Court.25

**iii  Discrimination**

In the *Automatia* case, the FCCA considered that the three banks holding joint dominance in the cash distribution market engaged in discriminatory pricing. According to the FCCA, the price difference of withdrawals made from their joint venture’s ATMs and withdrawals made from other ATMs was higher than the difference in costs. The FCCA accepted the commitments offered by the banks, through which the companies undertook to price the cash withdrawals in a non-discriminatory manner.26

**iv  Exploitative abuses**

There is quite a lot of old Finnish case law concerning excessive pricing, but the assessment in these cases has been somewhat formal, and it is expected that the FCCA will concentrate more on economic effects in its future assessments. This shift to a more economic approach can be seen in the district heating survey. The FCCA assessed the reasonableness of the

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23 Case C-7/97, *Oscar Bronner*.
24 Supreme Administrative Court Decision No. 2474/2/08 *Lännen Puhelin Oy*.
pricing of district heating companies in a large survey from 2009 to 2011. The FCCA closed its investigations by stating that the average price level of the district heating companies were high compared with the profitability and risk level of their business operations, but it considered that the threshold for intervention required by the Competition Act was not exceeded.27

V REMEDIES AND SANCTIONS

According to the Competition Act, the FCCA is entitled to impose behavioural remedies, determine commitments offered by the undertakings as binding, withdraw the benefit of a block exemption, issue interlocutory injunctions and impose periodic penalty payments. The Market Court has the authority to impose fines proposed by the FCCA for competition restrictions.

i Sanctions

The Market Court may impose a maximum fine of 10 per cent of the concerned undertaking’s turnover during the year in which the undertaking was last involved in the infringement. The fine will be imposed unless the conduct is deemed minor or the imposition of the fine is otherwise unjustified in respect of safeguarding competition. It is explicitly stated in the Competition Act that the fine may also be imposed on a company to which the business activity has been transferred. The Market Court shall impose the fine proposed by the FCCA.

In its Fining Guidelines, the FCCA states that the fine needs to generate a sufficient deterrent and general preventive effect.28 The amount of the fine is based on an overall assessment, and attention will be paid to the nature and extent, the degree of gravity and the duration of the infringement.

In Valio,29 the Supreme Administrative Court upheld the Market Court’s decision to impose a fine of €70 million on the company for its abuse of dominance. This is the highest fine imposed in dominance cases – and in all competition restriction cases in general – in Finland to date. In the assessment of the fine, the Supreme Administrative Court and Market Court took into account, inter alia, the object of Valio’s conduct, the notion that Valio’s conduct was not in line with the fundamental principles of the internal market and the fact that Valio has previously been the subject of an abuse of dominance decision that included the imposition of a fine on the company.

Furthermore, the FCCA and the Market Court may impose periodic penalty payments to enforce an order, condition, prohibition or obligation issued on the basis of the Competition Act. The Market Court has the authority to order a periodic penalty payment to be paid.

ii Behavioural remedies

If the FCCA considers conduct to amount to an abuse of dominance prohibited in the Competition Act or Article 102 of the TFEU, it may impose behavioural remedies. First, the FCCA can order the undertaking to terminate the prohibited conduct. This was done in the Valio case, where the FCCA ordered Valio to cease the alleged predatory pricing of

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28 FCCA Fining Guidelines, p. 6.
29 Decision of the Supreme Administrative Court, KHO:2016:221, Valio Oy.
fresh milk and thus, in practice, raise its prices. The Market Court further obliged Valio in its interim decision\(^{30}\) to comply with the FCCA’s order. The FCCA may also oblige an undertaking to deliver a product to another undertaking on conditions similar to those that it offers others in a similar position. In addition, the FCCA is also entitled to give these orders as interim measures. Furthermore, the FCCA may issue an interlocutory injunction if the application of a competition restraint is deemed to require immediate cessation. After the interlocutory injunction, the FCCA must take a final decision or make a proposal to the Market Court within 60 days. Prior to issuing an interlocutory injunction, the FCCA must hear the undertaking.

iii Structural remedies

Unlike the Commission, the Finnish competition authorities do not have the authority to impose structural remedies (however, see Section VIII).

VI PROCEDURE

The FCCA is responsible for the investigation of competition restraints and the effects thereof as well as for initiating the necessary proceedings to eliminate the harmful market effects of the restraints. The FCCA can begin investigations as a result of complaints by third parties and on its own initiative. The FCCA can also conduct sector inquiries, and these may result in the initiation of further proceedings.

In addition to the FCCA, the regional state administrative agencies have the authority to investigate competitive conditions and competition restrictions. Upon the mandate of the FCCA, the agencies are also entitled to take other measures to promote competition within their respective regions.

The FCCA has the right to prioritise its tasks. According to Section 32 of the Competition Act, it shall not investigate a case in the following situations: it cannot be deemed likely that an infringement prohibited in Sections 5 or 7 (Articles 101 and 102 of the TFEU, respectively) of the Competition Act exists; competition in the relevant market may be considered functional as a whole, irrespective of the suspected infringement; and the complaint in the matter is manifestly unjustified.

The prioritisation of cases can also mean that the handling of a case with potential significance and likely anticompetitive objects or effects may be postponed if there are other ongoing investigations with even greater significance.\(^ {31}\)

The FCCA must take the decision to not to investigate a matter without delay. In its Guidelines, the FCCA has set the following non-binding deadlines: one month for closing cases to which Article 32 is clearly applicable; four months for completing a preliminary survey according to which further actions can be determined; and six months for closing non-significant cases, and drafting of investigation plans and determining objective internal deadlines for cases that require further actions.\(^ {32}\) Overall, the FCCA seeks to handle all competition cases within three years.\(^ {33}\) To date, however, more extensive investigations have, in practice, required a longer process.

\(^{30}\) Market Court Decision No. 36/13/KR, Valio Oy.

\(^{31}\) FCCA’s Guidelines on prioritising the handling of competition restrictions, 4/2011, p. 9.


\(^{33}\) The FCCA’s operational and financial plan for 2017 to 2019.
The undertaking subject to the FCCA’s investigation is obliged to submit information to the FCCA or the relevant regional state administrative agency upon request. This obligation covers all documents and other information needed for the investigation of the content, purpose and impact of a restraint on competition and for clarifying the competitive conditions, as well as information necessary to enable the authority to determine whether the undertaking holds a dominant position. In practice, the FCCA usually sends an undertaking a request for information or arranges a meeting with the representatives of the undertaking to gather the information. Furthermore, the FCCA has the right to hear representatives of the undertaking in person if it is considered necessary for the investigation and the person may, for a justified reason, be suspected of having acted in the implementation of the restraint on competition.

The FCCA also gathers information by conducting inspections. These inspections may be announced, or they may be ‘dawn raid’ inspections. In addition to business premises, the FCCA has the right to inspect other premises (e.g., the homes of the management of the undertaking) if reasonable suspicion exists that bookkeeping or other documents relating to the business and the object of the investigation may be held there and if these documents may have relevance in proving a serious violation of Section 7 of the Competition Act or Article 102 of the TFEU. However, the FCCA must seek advance permission from the Market Court to conduct an inspection outside the business premises, and the Market Court may prohibit the inspection if it considers it arbitrary or excessive. Although unannounced inspections are usually conducted in cartel investigations, the FCCA has conducted several dawn raids in abuse of dominance investigations during recent years. The rights of the FCCA to carry out inspections of companies that have outsourced their information management to a third party were added to the Competition Act in 2015. After this amendment, the FCCA has had the right to request information directly from such third-party service providers at the expense of the company subject to inspection and regardless of location of the outsourced information. In 2017, the FCCA published a brochure on the inspection of business premises under Section 35 of the Competition Act.

The rights of defence of an undertaking subject to proceedings, including the right to be informed about an ongoing investigation, the right to receive information and the right to be heard, are set out in the Competition Act.

Prior to making a final decision or a proposal to the Market Court, the FCCA will issue a confidential draft decision to the undertaking under investigation. The undertaking has the right to respond to the draft decision, and it may request an informal meeting with the FCCA to present its opinion on the draft decision. A decision may be appealed to the Market Court and further to the Supreme Administrative Court. A decision of the Market Court concerning the imposition of fines may be appealed to the Supreme Administrative Court.

A case can also be resolved through a commitment decision. The FCCA may accept the commitments offered by an undertaking as binding if the commitments are such that the restrictive nature of the conduct can be eliminated. If an underlying fact significantly changes, the undertaking infringes the commitments, or the decision has been based on insufficient, false or misleading information, the FCCA may reinitiate proceedings.

34 A proposal to the Market Court to impose a fine is not considered an administrative decision of the FCCA.
VII PRIVATE ENFORCEMENT

The Finnish competition law regime is twofold: in addition to administrative enforcement, it contains rules for private enforcement according to which a private litigant can have an unlawful agreement declared null and void, and damage that occurred from the violation compensated.

Section 8 of the Competition Act provides that an unlawful agreement cannot be applied or implemented (i.e., the agreement or part thereof is null and void by law). The provision applies only *inter partes* and cannot be invoked by third parties.

Actions for damages based on an infringement of competition law are covered by the Act on Actions for Antitrust Damages, which entered into force on 26 December 2016. Section 2 of the Act provides the right for damages to anyone who has suffered damage from an infringement regardless of whether the relationship is contractual or non-contractual. The liability to compensate the damage is joint and several. Joint and several liability of immunity recipients and small and medium-sized enterprises is, however, limited.

Collective actions are available but only to a limited extent in disputes between consumers and undertakings under the Act on Class Actions. A class action can only be brought by the Consumer Ombudsman and, to date, the Consumer Ombudsman has not brought any class actions for competition law damages. In the pending Asphalt cartel and Raw wood cases, however, which involve numerous plaintiffs, practices that resemble those of collective actions have been adopted. In these cases, the court has joined the separate actions of each of the claimants to proceed together, thus entailing procedural and cost benefits.

An action for damages can be brought either as a stand-alone or a follow-on case in arbitration or in a general court. Except for the follow-on cases related to abuse of dominance that are currently pending before the general courts, there have not been many follow-on cases related to the abuse of dominance in Finland, and so far, all cases have been withdrawn; instead, abuse of dominance is more often invoked as grounds for action in contractual disputes. In general, a claimant's burden of proof is easier to meet in a follow-on case than in a stand-alone case. As of 26 December 2016, a final administrative decision concerning an infringement of competition law has a binding effect on the civil court.

In Finland, only single damages can be awarded, and the damages law doctrine relies heavily on the principle of non-enrichment. Compensation covers both direct and indirect economic damage, *inter alia*, compensation of costs, price difference or lost profits. Compensation also includes interest; in practice, penal and return interest may form a significant part of the compensation.

The burden of proof is reversed with respect to cartels; a cartel is expected to have caused damage unless proven otherwise by the defendant. Unlike in cartel damages cases, there is no legal assumption of damage in Finland in cases concerning the abuse of dominance, and

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36 If the infringement occurred prior to 26 December 2016, the repealed Section 20 of the Competition Act or other applicable laws apply to the right for damages and liability thereof.


the claimant bears the burden of proof of damage. There is no single way of calculating the damage, but in recent case law related to cartel damages, competition economics and extensive economic evidence on the financial effects of the infringement have been utilised. The court has the power to assess the quantum of damage if the claimant has proven the damage suffered, but evidence of the amount cannot be presented or can be presented only with difficulty.

Furthermore, there must be a causal link between the harm suffered and the violation of the competition law. The claimant must prove that the damage has resulted from the competition law infringement, and not from the market conditions or general market structure. In addition, liability for damage also requires that the occurrence of the damage as a consequence of the violating act was foreseeable by the undertaking at the time the act was made. This means that there is no liability for indirect damage or consequential loss. Contributory negligence on the part of the injured party may also have a significant effect on the liability.

According to Chapter 21 of the Code of Judicial Procedure, the party that loses the case is liable for all reasonable costs incurred by the necessary measures of the opposing party.

According to Section 10 of the Act on Actions for Antitrust Damages, the right to claim compensation expires if the action has not been instituted within five years of the date when a claimant has become aware, or should have become aware, of the infringement, the damage and the party responsible. The five-year limitation period is, however, suspended for the duration of an investigation by the competition authorities, until one year has elapsed from the issuance of a binding decision, as well as for the duration of settlement negotiations. The right to damages is not, however, time-barred if proceedings are brought within one year of the issuance of a binding decision, or within 10 years of the day of infringement of the competition law or the end of a continued infringement.

VIII FUTURE DEVELOPMENTS

The FCCA has indicated that it will focus on removing structural restraints on competition, and on discriminating and binding practices aimed at foreclosing competitors from a market. The FCCA’s focus on exclusionary practices has already been seen in the recent case law of the FCCA where the authority has been most concerned with conduct involving margin squeeze, predatory pricing, refusals to deal and restrictive rebates. The review of abuse of dominance cases is likely to give more weight to economic-based assessments in the future. The importance and effectiveness of private enforcement is expected to increase in Finland, both through the landmark judgments in the Asphalt cartel case and Raw wood case, as well as through the recent Act on Actions for Antitrust Damages.

In March 2017, the Ministry of Employment and Economy published a report of the working group on reforming the Competition Act, and the government proposal relating

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39 See the judgment in Qvist v. John Crane Safematic, where the district court found the abuse of dominance but dismissed the claim because the claimant failed to prove the damage. The Appeal Court later overruled the judgment of the district court.


41 The operational and financial agreement for 2018 to 2021 between the Ministry of Employment and Economy and the FCCA, p. 2.

to the first part of the reform was given in May 2018. As regards the abuse of dominance, the government proposal contains an additional ground for prioritisation of the FCCA's cases. According to the government proposal, the FCCA could take into consideration the significance of a competitive restraint as a ground for prioritisation. Other amendments relate, *inter alia*, to the inspection powers of the FCCA and information exchange between certain authorities notwithstanding the confidentiality regulations. Some of the amendments proposed by the working group, such as the possibility of structural remedies as a consequence of an abuse of dominant position, were left out of this government proposal due to the ongoing legislative process of the proposal for a directive to make national competition authorities more effective enforcers (ECN+ Directive).

The amendments of the Competition Act are expected to enter into force by the end of 2018.

I INTRODUCTION

Article L420-2 of the French Commercial Code provides for the prohibition of abuses of a dominant position and abuses of economic dependence under French law. Article L420-4 of the Commercial Code, however, provides for exemptions from the prohibition of Article L420-2 when the practices at stake result from a regulation or if they have the effect of achieving economic progress – including creating and maintaining employment – while reserving for consumers a fair share of the resulting benefits and without allowing an undertaking to eliminate competition in respect of a substantial part of the products in question. The exemption is rarely applied in practice. Another relevant provision is Article L420-5 of the Commercial Code, which prohibits abusively low prices to consumers. Abusively low pricing, as defined by Article L420-5, can only be applied to products and services sold to final consumers, but may be found to exist even when the infringing company is not in a dominant position and the victim is not in a situation of economic dependence. Article L420-5 has only been applied in rare cases.

The French Competition Authority (FCA) has jurisdiction over abuse of dominance practices. As an independent administrative body, the FCA may investigate abuse of dominance cases and impose fines of up to 10 per cent of the infringing companies' worldwide turnover. The FCA has not issued formal guidance on the way in which it applies Article L420-2 of the Commercial Code. The European Commission’s guidance on Article 102 TFEU (formerly Article 82 of the EC Treaty), however, provides useful indications as to how Article L420-2 is applied in France. French judges can also directly apply the relevant provisions of the Commercial Code concerning abuse of dominance in the context of civil or commercial litigation.

II YEAR IN REVIEW

In 2017, the FCA issued 19 decisions on the basis of Article L420-2 of the Commercial Code. The FCA imposed fines in four cases of a total of €125.4 million, two of which

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1 Antoine Winckler is a partner and Frédéric de Bure is counsel at Cleary Gottlieb Steen & Hamilton LLP. The authors gratefully acknowledge the brilliant contribution of Sarah Aït Benali of the Paris office of Cleary Gottlieb Steen & Hamilton LLP.


3 FCA decisions No. 17-D-02 of 10 February 2017 concerning practices implemented in the competitive petanque balls sector, which imposed a €320,000 fine on Obut; No. 17-D-06 of 21 March 2017
France

were the result of a settlement. The FCA did not, however, grant any interim measures. Six claims were rejected at a preliminary stage due to lack of supporting evidence, and the FCA dismissed three other cases. In two of these cases, the FCA noted that it did not have jurisdiction to rule on part of the alleged abusive practices. Finally, contrary to 2016, when no commitment decision was issued, the FCA issued five commitment decisions in 2017, and imposed behavioural remedies in one case.

The most noteworthy decisions in the past year are the following.

In Engie, the FCA imposed a €100 million fine on Engie, the French incumbent gas operator, following a complaint by Direct Energie and consumer association UFC-Que Choisir alleging that Engie abused its dominant position in the gas markets to induce its customers to switch to its market-based gas and electricity contracts. The FCA found in particular that Engie had used its historical data file, as well as other means of leveraging its incumbent operator’s status and resources, to convert its customers on regulated gas tariffs to market-based contracts for gas and electricity. Engie did not challenge the objections and settled the case. A few months later, following another complaint by Direct Energie, Engie committed to change its pricing policy and certain terms of the contracts concluded with common hold associations to ensure better competition on the retail gas supply and individual metering for collective supply markets.

In Janssen-Cilag, following a complaint of the pharmaceutical laboratory Ratiopharm (now Teva Santé) that was ultimately withdrawn, the FCA imposed a €25 million fine on pharmaceutical company Janssen-Cilag and its parent company for having abused its concerning practices implemented in the gas and electricity supply sector, which imposed a €100 million fine on Engie; No. 17-D-13 of 27 July 2017 concerning practices implemented in the funeral sector in the Ain department, which imposed a €80,000 fine on Comet; and No. 17-D-25 of 20 December 2017 concerning practices implemented in the Fentanyl transdermal patches sector, which imposed a €25 million fine on Janssen-Cilag and its parent company, Johnson & Johnson.

FCA decisions No. 17-D-05 of 10 March 2017 concerning practices implemented by the SACD; No. 17-D-08 of 1 June 2017 concerning practices in the passenger transport sector; No. 17-D-15 of 9 August 2017 concerning practices implemented by Reed Expositions France in the organisation of trade fairs and exhibition sector; No. 17-D-17 of 27 September 2017 concerning practices implemented by the Française des Jeux in the scratch cards sector; No. 17-D-23 of 11 December 2017 concerning practices implemented in the press distribution sector; and No. 17-D-24 of 18 December 2017 concerning practices implemented in the online search engine and online advertising intermediation sector.

FCA decisions No. 17-D-07 of 15 May 2017 concerning practices in the moving of private individuals and transfer of companies sector; No. 17-D-11 of 25 July 2017 concerning practices in the TV advertising sector; and No. 17-D-19 of 6 October 2017 concerning practices in the non-legal auction sales sector.

FCA decisions No. 17-D-17 and 17-D-23, mentioned above.

FCA decisions No. 17-D-09 of 1 June 2017 concerning practices implemented by the National Institute of Preventive Archaeological Surveys in the preventive archaeology sector; No. 17-D-12 of 26 July 2017 concerning practices implemented in the sugar beet procurement sector; No. 17-D-16 of 7 September 2017 concerning practices implemented by Engie in the energy sector; No. 17-D-21 of 9 November 2017 concerning practices implemented in the medium and low-voltage electrical distribution equipment maintenance sector; and No. 17-D-26 of 21 December 2017 concerning practices implemented in the collection and recycling of non-hazardous office waste.

FCA decision No. 17-D-13, mentioned above.

FCA decision No. 17-D-06, mentioned above.

FCA decision No. 17-D-16, mentioned above.

FCA decision No. 17-D-25, mentioned above.
dominant position on the French markets for Fentanyl transdermal patches sold in cities and hospitals. The FCA found that Janssen-Cilag repeatedly tried to convince the AFSSAPS (the French agency for medical safety of health products) to refuse to grant the generic status to products competing with its Durogesic drug, a powerful analgesic containing an active substance called Fentanyl commercialised by Janssen-Cilag, despite this status having been obtained at the European level. The FCA also considered that Janssen-Cilag implemented a disparagement campaign among healthcare professionals using misleading language to create doubts regarding the effectiveness and safety of the generics.

In Petanque balls, the FCA imposed a fine of €320,000 on Obut, the leading French manufacturer of petanque balls, for having abused its dominant position by imposing resale prices on some of its distributors to protect its own sales outlets. Obut did not challenge the facts before the FCA and was therefore granted a fine reduction.

In Office waste, the FCA analysed dominance concerns raised by the conduct of La Poste, the French postal group. The FCA was concerned that La Poste was using competitive advantages linked to the universal postal service in the related non-hazardous office waste management sector and by the predatory nature of La Poste’s pricing policy for services in the collection of non-hazardous office waste. La Poste offered commitments to alleviate the FCA’s concerns. Interestingly, the FCA faced an unprecedented situation since it had to analyse the commitments parallel with the merger control review of a full-function joint-venture between La Poste and Suez in the same sector that was announced on the same day as the launch of the market test for the commitments. The FCA ultimately accepted the commitments and cleared the proposed transaction on the same day, subject to the same commitments.

Finally, it is worth mentioning that the FCA fined for the first time a company on the basis of Article L 464-2 Paragraph V of the Commercial Code, which provides that the FCA can impose a fine of up to 1 per cent of the global turnover of a company that obstructs its investigation. In Brenntag, the FCA fined Brenntag SA and Brenntag AG €30 million for having provided incomplete, imprecise and outdated information to the FCA, and having withheld some information and documents requested by the FCA in the context of an investigation on possible anticompetitive practices, including abuse of dominance allegations such as predatory pricing.

III MARKET DEFINITION AND MARKET POWER

Under French law, as under EU law, regulators and judges must typically start their analysis by defining the relevant markets where the alleged practices took place. They then analyse whether a situation of dominance (single or collective dominance) or of ‘economic dependence’ can be established in the relevant market before assessing the existence of an abuse.

i Market definition

The FCA mostly relies on qualitative criteria, although it may also rely on an econometric analysis to define relevant markets. To assess demand-side substitutability, the FCA takes
into account the nature and use of a product, the price differences between similar products, consumer preferences, the legal environment, the brand image of the products and the distribution channels. If the data is available, the FCA may also use quantitative techniques such as cross-elasticity of demand to delineate product markets. In *Janssen-Cilag*, the FCA found that Fentanyl transdermal patches applied on the skin of patients, such as the Durogesic drug and its generics, were not substitutable with other Fentanyl specialities administered through other modes as they did not have the same therapeutic indication. In addition, the FCA distinguished the market for Fentanyl transdermal patches sold in cities from the market for Fentanyl transdermal patches sold in hospitals since prices in cities are regulated by the government, while prices in hospitals are freely established; and in cities, the demand for Fentanyl transdermal patches comes from wholesalers and pharmacies, while in hospitals, it comes from public hospitals and private clinics.

In situations where there are complementary products (e.g., hardware and consumables or maintenance services), the FCA determines, based on a combination of qualitative and quantitative criteria, whether a single market exists for both or whether the products form distinct product markets. In *Nespresso*, the FCA defined a ‘primary’ market for espresso-pod coffee machines and a distinct ‘secondary’ market composed only of coffee capsules compatible with Nespresso coffee machines. The FCA found that espresso-pod coffee machines and coffee capsules did not belong to the same product market because coffee machines and coffee capsules are not bought simultaneously, necessarily bought at the same shops, and manufactured and marketed by the same firms; and an internal document of Nespresso considered that the two products were separate. The FCA also found that the secondary market should be narrowly defined as only including coffee capsules compatible with Nespresso machines, because users of Nespresso machines were not in a position to use any other kind of capsule.

In *Schneider Electric*, the FCA found that the distribution and the maintenance of electrical distribution equipment constituted separate markets and identified potential primary markets for the supply of medium and low-voltage electrical distribution equipment; secondary markets for the supply of spare parts for Schneider Electric electrical distribution equipment, on which Schneider Electric was likely to hold a dominant position; and potential secondary markets for maintenance services provided on Schneider Electric equipment.

Supply-side substitutability also constitutes a relevant criterion for market definition. In *Mobile telephony*, the FCA found that each operator held a monopoly on the wholesale market for the termination of voice calls on its own network because, inter alia, of the lack of supply-side substitutability, as only the terminating operator is capable of localising the recipient of the call. The Court of Appeal followed the same reasoning. In *Scratch cards*, the FCA found that the market for games sold by Française des Jeux (FDJ), the state-owned company exclusively in charge of gambling and sports betting services in France, was distinct from the casino games market in light of the different sociological profiles and gambling

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16 FCA decision No. 17-D-25, mentioned above.
17 FCA decision No. 14-D-09 of 4 September 2014 concerning practices in the espresso coffee machines sector.
18 FCA decision No. 17-D-21, mentioned above.
19 FCA decision No. 12-D-24 of 13 December 2012 concerning practices in the mobile telephony sector.
20 Paris Court of Appeals, 19 May 2016, *Mobile telephony*.
21 FCA decision No. 17-D-17, mentioned above.
behaviours of gamers. The FCA also took into account the lack of supply-side substitutability to define separate markets, noting that casinos in France are all located along the coast or near cities that attract tourists and can only serve local demand while the FDJ sells its games through 40,000 retail stores deployed across the national territory.

As regards the geographic dimension of the market, the FCA typically determines the area where the conditions of competition are homogeneous. It analyses, for example, the specific geographical features and transportation costs to delineate geographic markets. In Sugar beet, the FCA considered that the sugar beet procurement market had a local dimension, as sugar refineries that collect and process sugar beet are generally located near production areas due to the perishable nature of the products and the relatively high transportation costs of sugar beet. The FCA also uses a SSNIP test approach (i.e., the relevant geographic market is defined as the area in which a company can use its market power or monopoly power to, for example, raise prices profitably without being constrained by other players located in other areas or from other product lines). In Funeral services in the Ain department, the FCA found that the wholesale market for cremation services offered to funeral directors and the retail market for funeral products and services proposed to grieving families in the Ain department were limited to a 30-kilometre radius around the chief town of the department, Bourg-en-Bresse, as families usually prefer having funerals close to their homes. In this regard, the FCA noted that this conclusion was confirmed by the fact that the significant price increases implemented by the Viriat crematorium did not lead customers to go to more distant crematoria of the department.

ii Single dominance

Dominance is achieved when a company can determine its pricing policy in the relevant market independently from its competitors and customers. The FCA typically considers that market shares above 50 per cent are a strong indicator of market power.

To establish single dominance, the FCA also examines the following criteria in addition to market shares:

a the countervailing market power of competitors;
b the intensity of competition on the market;
c the existence of potential new entrants; and
d the specific advantages of the leading firm (e.g., brands, organisation, better products or services).

In Pet food, Royal Canin, which held a market share limited to 40 per cent, was considered to be a dominant player, because the second and third-largest competitors respectively held a 12 and 7 per cent market share; Royal Canin had a very good brand image bolstered by high advertising expenses and regular contact with prescribers; and the relevant market was characterised by high barriers to entry. In Archaeology, the National Institute of Preventive

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22 FCA decision No. 17-D-12, mentioned above.
24 FCA decision No. 17-D-13, mentioned above.
25 FCA decision No. 04-D-48 of 14 October 2004 concerning practices implemented by France Telecom, SFR Cegétel and Bouygues Telecom.
26 FCA decision No. 05-D-32 of 22 June 2005 concerning practices in the pet food sector.
27 FCA decision No. 17-D-09, mentioned above.
Archaeological Surveys (INRAP), a public administrative body that benefits from a monopoly in the preliminary archaeological diagnosis survey market (along with other archaeology departments of local and regional public entities) also in charge of preventive archaeology research in competition with other private actors, was considered to be a dominant player on the national market for preventive archaeological excavations in light of its market share. Interestingly, although its market share in value was below 50 per cent and its competitive position had deteriorated over the years with the opening to competition of the market in 2003, the FCA noted that the fact that INRAP’s market share was higher in value (more than 58 per cent) than in volume constituted evidence that it had greater financial leeway than its competitors. The FCA also highlighted the fact that INRAP remained a central player of the sector due to its monopoly position on the national preliminary archaeological diagnosis related market and its strong reputation inherited from its former monopoly position on the national market for preventive archaeological excavations.

In Petanque balls, the FCA essentially relied on Obut’s very high market share (more than 80 per cent) and its strong brand reputation in the sector to find that the operator was dominant. On the contrary, in Nasse Demeco, the FCA found that market shares below 30 per cent together with the presence of other powerful groups on the markets for moving of individuals, business transfers and international relocation, precluded the Authority from finding that the Nasse group held a dominant position on these markets.

Finally, in Auction sales, the FCA considered that the Drouot group's ability to exercise market power on the Parisian venue rental market for non-legal auction sales could not be demonstrated in light of the significant bargaining strength of its customers, who are able to easily switch to competing venue renters or choose to vertically integrate venue rental services, and in light of the fact that the majority of Drouot’s capital is held by its customers, enabling them to influence the commercial terms and conditions offered to them by the Drouot group.

### iii Collective dominance

Collective dominance may result from structural links between undertakings, whether capitalistic or contractual, from the market structure, or from both. In the absence of structural links, the FCA applies the cumulative Airtours criteria (i.e., oligopolistic market, significant market transparency, possibility to engage in retaliation and absence of countervailing power from the fringe players).

In Saint-Pierre-et-Miquelon, the FCA imposed a total fine of €381,400 on companies active in the aggregates market in the archipelago of Saint Pierre and Miquelon for anticompetitive agreement and abuse of a collective dominant position. In particular, the FCA found that four undertakings held a collective dominant position as:

- they together held an 86 and 88 per cent market share in the upstream and downstream markets for the production and sale of aggregates respectively;
- they had structural links through the operation of a common quarry and had adopted a common strategy;

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28 FCA decision No. 17-D-02, mentioned above.
29 FCA decision No. 17-D-07, mentioned above.
30 FCA decision No. 17-D-19, mentioned above.
32 FCA decision No. 12-D-06 of 26 January 2012 concerning practices implemented in the civil engineering sector in Saint-Pierre-et-Miquelon.
deviation would be unlikely given their historical links;

entry barriers were high; and

there were no alternative competitors.33

Although collective dominance cases are rare (there have been only three cases since 2000),34 the FCA’s decisional practice shows that it tends to resort to collective dominance when it lacks evidence to support a claim of explicit collusion.

iv Economic dependence

Economic dependence is a specific infringement under French competition law, which has no equivalent in EU competition law. Pursuant to Article L420-2(2) of the Commercial Code, abuse of economic dependence of a customer or supplier is prohibited when it is likely to affect competition on the market. This provision was originally drafted to protect suppliers from large retail chains (i.e., supermarkets), but is in practice applied essentially when invoked by resellers confronted with situations of refusal to supply and discrimination.

According to established case law, economic dependence arises when a company is forced into a commercial relationship with another company because it cannot purchase substitutable products under similar terms and conditions, or sell its products to other customers. The FCA examines the following cumulative criteria:

- the commercial partner’s brand notoriety;
- the commercial partner’s market share;
- the commercial partner’s share in the turnover of the dependent company; and
- the possibility for the dependent company to find an alternative commercial partner.35

IV ABUSE

i Overview

Article L420-2 of the Commercial Code specifically mentions a number of abuses, including refusal to supply or deal, tying, discriminatory practices or abuse of economic dependence. However, the list is not exhaustive.

The FCA relies on a ‘by object’ approach to abuses of a dominant position or of economic dependence. It considers that abusive conduct may be found even in the absence of an actual effect on the market. Attempts to abuse a dominant position may, thus, in certain cases also be challenged. In SNCM,36 the court considered that a ferry line operator between Corsica and Marseilles abused its dominant position by submitting a global and

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33 In addition to FCA decision No. 12-D-06 mentioned above, see FCA decision No. 05-D-49 of 28 July 2005 concerning practices in the sector of hiring maintenance for postage machines; and No. 02-D-44 of 17 July 2002 concerning the water market sector. See also FCA decision No. 07-D-08 of 12 March 2007 concerning practices in the supply and distribution sector of cement in Corsica, which was partially dismissed by the Paris Court of Appeals with respect to collective dominance.

34 See FCA decisions No. 12-D-06, mentioned above; No. 05-D-49, mentioned above; and No. 02-D-44, mentioned above. See also FCA decision No. 07-D-08, mentioned above.


36 Paris Court of Appeals, 9 March 2010, SNCM.
indivisible (i.e., island-to-continent) offer to the call for tenders launched by the Corsican Transport Office, while its competitors submitted point-to-point (i.e., harbour-to-harbour) bids as required by the request for proposals. By doing so, SNCM did not allow the tendering authority to compare bids on a point-to-point basis, and to allocate the contract between several ferry operators. Although the bidding procedure was ultimately declared void by the administrative courts and therefore the practice did not have any effect, the FCA fined SNCM for its attempted abuse of a dominant position.

ii  Exclusionary abuses

Predatory pricing

Predatory pricing is a pricing strategy whereby a dominant firm offers below-cost prices, thereby incurring losses or forgoing profits in the short term in order to eliminate actual or potential competition. The FCA considers that the following two situations create a presumption of predatory pricing:

- when the dominant company’s prices are lower than the average variable costs (unless a company can convincingly explain that its behaviour did not result from a predatory strategy aimed at eliminating competitors); or
- when the company’s prices are between average variable costs and average total costs, and there is clear and convincing evidence that its behaviour is part of a predatory strategy aimed at eliminating competitors (the EU Akzo test).

French authorities use a slightly stricter, economics-based test compared to the European Commission’s approach: the presumption of predation is more easily rebuttable, and the FCA has to show that there is a realistic possibility of the dominant player recouping its losses. This may explain why, to date, there has been no successful precedent of predatory pricing.

In SNCF, the FCA held that the French rail operator pursued price-based exclusionary practices for its freight services activity by full-trainload because SNCF’s prices, although higher than direct average variable costs, were lower than the costs that would be avoided over a three-year period if SNCF terminated its freight services activity by full-trainload. Although SNCF’s pricing policy was not considered predatory, as the losses incurred by SNCF were sustainable and pre-dated the opening-up of the sector to competition, the FCA nevertheless considered that it was abusive. The Paris Court of Appeals, however, overturned this part of the decision, considering that charging prices superior to average variable costs but inferior to average total costs could only be considered abusive based on evidence that the dominant firm had made specific plans to exclude competitors from the market. In this case, the FCA had not sufficiently established the existence of an exclusionary strategy.

More recently, in Bottin Cartographes, following an opinion by the FCA, the Paris Court of Appeals dismissed a predatory pricing claim against Google. Bottin Cartographes, a competitor of Google, claimed that offering an enterprise mapping service free of charge constituted an abusive predatory strategy. In particular, Bottin Cartographes alleged that Google was not allowed to offer a free version of its software without monetising it.

37  FCA decision No. 12-D-25 of 18 December 2012 concerning practices implemented in the railway freight sector.
38  Paris Court of Appeals, 6 November 2014.
with advertising or by revenues derived from a premium, paid-for version (a ‘freemium’ business model). In its opinion, later confirmed by the Court, the FCA reaffirmed that for multi-product companies, the predation test to be conducted is a modified Akzo test, where average variable costs are to be replaced by average incremental costs, and average total costs by long-run average incremental costs. In practice, the FCA found that the relevant costs were the costs borne by Google, rather than the costs borne by its less-efficient competitors, and the costs specifically associated with the allegedly abusive activity to the exclusion of common costs supported by Google in its capacity as a multi-service firm (in particular, the costs associated with the acquisition of the underlying maps were not relevant because Google would bear them in any event). Conversely, the FCA and later the Court confirmed that where a product is offered in different versions (one basic, free version, and one premium, paid-for version), the revenues to be taken into account are those associated with all versions of the product. On this basis, the FCA and the Court of Appeals dismissed Bottin Cartographes’ claim by noting that the econometric studies submitted by the parties showed that Google’s revenues exceeded the total relevant costs, and even if Google’s revenues could have been exceptionally lower than the corresponding average total costs, there was no evidence of a predatory strategy. On this last point, the FCA and the Court emphasised that it may be economically rational for Google initially to offer products and services for free in order to increase its number of users, and in any case, strong competition remained in the market, with a number of competitors – in particular, free open source solutions and other multi-product companies – that could not be foreclosed by Google’s behaviour. As a result, it would have been impossible for Google to recoup the potential losses, and as such no predatory strategy could be found.

In Gas market, nevertheless, the FCA imposed interim measures on Engie (the former incumbent operator on the French market for gas distribution) at the request of Direct Energie, which alleged that Engie implemented a price-below-cost strategy on its commercial offers intended for both individual and business customers. In particular, Direct Energie argued that Engie charged predatory prices by attributing some of its marketing and commercial costs, which are common to its competitive and regulated offers, to its regulated activities only. Given the risk that Engie would implement a predatory pricing strategy, and pending the investigation on the merits, the FCA ordered Engie to set the prices of its offers in such a way as to take into account all of the related costs incurred in the short-term for the sale of these offers, including commercial costs. The investigation on the merits did not, however, lead the FCA to impose a fine on Engie as the latter proposed measures to remedy the FCA’s concerns, leading the FCA to accept Engie’s commitments on September 2017. Following a market test and several rounds of amendments, Engie finally committed to:

- reinforce the reliability of its ex ante and ex post profitability analysis by implementing a verifiable cost structure and an internal monitoring process, which requires for instance that prices below the average incremental cost be approved by a person empowered within Engie to do so;

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41 FCA decision No. 16-MC-01, mentioned above.
42 FCA decision No. 17-D-16, mentioned above.
set its prices above the average avoidable cost\textsuperscript{43} as identified in its \textit{ex ante} profitability analysis; and

reinforce its employees’ competition law training programme.

The commitments were entered into for three years, except for the commitment relating to prices offered to individual customers, which will last five years.

In \textit{Office waste},\textsuperscript{44} the FCA also accepted La Poste’s commitments to remedy predation concerns in relation to the collection by La Poste of non-hazardous office waste. In particular, the FCA found that La Poste, which has a dominant position on several national postal markets and is also active on related markets for waste collection and recycling, was likely to offer office waste management services at prices below incremental costs in light of the absence of any reliable tools recording certain cost items, such as those linked to the use of its postal communication tools and of its mail carriers to promote its waste management services. La Poste therefore committed to develop and use for price determination a cost assignment methodology that complies with the competition law rules, and in particular that values the use of its universal postal service to promote and deliver non-hazardous office waste collection services; and implement profitability monitoring.

However, in \textit{Ouibus},\textsuperscript{45} the FCA dismissed a complaint lodged by Transdev, a company operating in the coach transport sector, which had claimed that its competitor Ouibus was using cross-subsidies received from its parent company, SNCF (which benefits from a monopoly in the national railway passenger transport market), to offer predatory or exclusionary prices to customers on the market for interurban passenger coach transport that was recently opened to competition. In this regard, the FCA noted that the \textit{Akzo} predation test had to be adapted in the context of an emerging market to take into account the fact that a company trying to expand on such market might seek to secure a return on its investment within a reasonable time rather than to recover all its costs at once, and that it may be that its prices will not fully cover its costs in the first few years of business. Despite losses incurred by Ouibus since the opening of the market, the FCA therefore concluded that Ouibus’s commercial policy was not, at this stage, part of a strategy aimed at eliminating its competitors.

The same cross-subsidies concern was raised in the \textit{Archaeology} case,\textsuperscript{46} as the FCA feared that the absence of effective accounting and financial separation between INRAP’s public service missions and its competitive activities entailed a risk that public funds received as part of its diagnostic mission could be used by the institute to apply predatory or exclusionary prices in the competitive market for preventive archaeology excavations. This led INRAP to offer commitments in November 2016 to remedy this concern.

\textbf{Leveraging practices}

Leveraging practices consist of a dominant firm taking advantage of its superior market position on a ‘dominated’ market to expand its position in another related market.

\textsuperscript{43} Average avoidable costs are used by the FCA to assess the existence of predatory prices, and correspond to the fixed and variable costs that could have been avoided if the output subject to the FCA’s analysis had not been produced.

\textsuperscript{44} FCA decision No. 17-D-26, mentioned above.

\textsuperscript{45} FCA decision No. 17-D-08, mentioned above.

\textsuperscript{46} FCA decision No. 17-D-09, mentioned above.
In PMU, the FCA expressed concerns that the French legal monopolist for offline horse race betting leveraged its position to exclude competitors from the competitive market for online horse race betting. In particular, the FCA was concerned that by pooling together its online and offline bets, PMU could attract more bettors, discourage potential new entrants and, in time, drive competitors out of the market. The FCA accepted commitments from PMU to stop pooling its online and offline bets, and that online and offline activities would be kept separate. Although this could be interpreted as coming close to ‘an efficiency offence’, because horse racing bettors precisely look for the highest possible winnings (as in any lottery), the FCA justified its preliminary findings by stating that its decision was consistent with the public policy objective of limiting the risk of addiction to online betting.

More recently, in Passenger transport, the FCA accepted the commitments offered by SNCF to prevent its subsidiary Keolis from leveraging SNCF’s monopoly in the railway passenger transport market into the competitive market for the urban transport of passengers (i.e., bus, metro, tram). More specifically, the FCA was concerned that Keolis could rely on its parent company’s railway expertise to submit bids that are not replicable by competitors for the supply of advice and technical assistance to urban transport operators. To alleviate the FCA’s concerns, SNCF committed, in particular, that only its subsidiaries that are fully independent from its railway passenger transport activities would respond to calls for tender regarding technical assistance to urban transport operators. On the contrary, in Ouibus, the FCA rejected Transdev’s claim that Ouibus had relied on its parent company’s brand image, reputation and resources to gain an anticompetitive advantage that could not be reproduced by its competitors on the market for interurban coach transport market. In particular, the FCA considered that there was no evidence that Ouibus’s affiliation to SNCF had any significant impact on the decision of passengers to select a coach operator, and noted that the rapid growth of Flixbus, an operator unknown to the public before its entry on the market that then became the leader on the French coach market, suggests that such advantage is not likely to distort competition on the market.

In Scratch cards, the FCA also rejected a complaint by three casino associations that essentially claimed that FDJ had attempted to leverage its monopolistic position on the market of games sold by the FDJ into that of casino games by selling more and more scratch cards displaying similar marketing terms and graphic charts to the ones found on slot machines and in casinos, thus generating customer confusion regarding these different types of games. However, the FCA found that the claimants had failed to show evidence supporting the existence of a nexus between the market of games sold by FDJ and the casino games market where FDJ is not active, as both markets do not have the same suppliers and customers and have very different operating modes. In the absence of the requisite nexus between the two product markets, the FCA dismissed leveraging allegations.

47 FCA decision No. 14-D-04 of 25 February 2014 concerning certain practices in the online horse race bets sector.
48 FCA decision No. 15-D-05 of 15 April 2015 concerning certain practices in the passenger urban transport sector.
49 FCA decision No. 17-D-08, mentioned above.
50 FCA decision No. 17-D-17, mentioned above.
On the contrary, in *Office waste*, the FCA found that there was a clear nexus between, on the one hand, upstream waste collection markets and the downstream waste recycling market and, on the other, between waste collection markets and postal services, as the latter are offered to the same customers, on the same occasion (during mailmen rounds), and rest on the use of the same network of mail workers. In light of this nexus, the FCA considered that there was a risk that La Poste could rely on its universal postal services to promote its office waste management services to gain a competitive advantage that could not be reproduced by its competitors on the waste collection and recycling markets. The FCA was in particular concerned by La Poste's use of the confidentiality oath taken by mail workers in the context of their postal activities as a guarantee of the confidential treatment of office waste and La Poste's reliance on interactions with customers in the context of its postal activities to promote its office paper waste collection services. To answer the FCA's concerns, La Poste committed to prevent this confusion by means of implementing communication strategies and commercial proposals that clearly distinguish the two sets of services, especially by deleting all reference to the oath of mail workers in materials used to promote waste collection services and by avoiding promoting waste management services to customers that only inquire about universal postal services. La Poste also committed to implement awareness-raising campaigns with the staff in charge of the waste management services.

In *Engie*, the FCA found that Engie abused its dominant position by leveraging its position as the incumbent gas operator in order to obtain more contracts in the competitive gas and electricity markets. In particular, the FCA found that Engie used its historical customer database for regulated tariffs for gas to convert customers to market-based contracts for gas and electricity; used the business infrastructure and resources developed for its regulated tariff activity in order to offer new market-based contracts and win former customers back; and provided misleading sales arguments according to which Engie guaranteed a better security of gas supply than its competitors. The FCA considered that these practices were particularly harmful to competition as they were implemented at a time when the market was opening up to competition. Engie did not challenge the objections and settled the case.

In *Archaeology*, the FCA explained that whenever work planned by a developer is liable to destroy or irreparably damage a site that may contain archaeological remains, the state may stipulate that preventive archaeology excavations be carried out, and in such cases, the developer will contract with a service provider to perform a preliminary diagnostic survey before conducting excavations. In this context, the FCA found that INRAP, in its capacity as the monopolistic operator performing preliminary diagnostic surveys, had privileged access to a more detailed and more complete set of information than its excavation competitors, in particular as it had access to state survey orders and survey reports long before them. The FCA feared that the use by INRAP's teams – whose missions both cover diagnostic survey operations and preventive excavation activities – could procure them an unfair competitive advantage by allowing them to better apprehend and anticipate potential opportunities on the preventive excavations market.

Finally, in *Funeral services in the Ain department*, the FCA found that the funeral company Comtet, which was at the time running the only crematorium in Viriat, a town in

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51 FCA decision No. 17-D-26, mentioned above.
52 FCA decision No. 17-D-06, mentioned above.
53 FCA decision No. 17-D-09, mentioned above.
54 FCA decision No. 17-D-13, mentioned above.

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the east of France, by virtue of a public service delegation agreement, had abused its dominant position by generating confusion about, on the one hand, its public service cremation mission and, on the other, its funeral product and service supply activities for which it competes with other funeral directors. In particular, the FCA took the view that advertising materials used by Comtet to promote its commercial services while also referring to its role as the Viriat crematorium sole manager aimed at leading grieving families to believe that Comtet was the only provider in the Ain department able to organise funerals that include a cremation service. Interestingly, this is not the first time that the FCA has fined crematorium managers given a public service mission, or asked commitments from them to remedy a breach of their neutrality obligation.55

**Margin squeeze**

Margin squeeze is a strategy whereby the dominant vertically integrated firm applies excessive prices on upstream products or services that make downstream customers’ or rivals’ activities unprofitable. French courts consider that margin squeezes restrict competition only if a potentially as-efficient competitor would be unable to enter the downstream market without incurring losses. Such restriction of competition may be presumed only when the products or services supplied to its competitors by the dominant firm are indispensable to enable them to compete on the downstream market.56

In *Eiffel Tower*,57 the FCA found that TDF had implemented a margin-squeeze strategy in the market for the renewal of the national occupancy contract for audiovisual and radio broadcast from the Eiffel Tower site. Among other practices, the FCA found that the offers made by TDF to alternative operators for hosting services (which were indispensable to compete on the downstream market for the broadcasting of radio programmes from the Eiffel Tower) constituted a margin squeeze that did not allow alternative operators as efficient as TDF to submit competitive offers for the operation of the Eiffel Tower facilities. The FCA imposed a fine of €660,000 on TDF on these grounds.

**Exclusivity clauses**

Exclusive dealings entered into by a dominant firm do not constitute a *per se* abuse under French law, provided that the dominant firm’s behaviour does not result in additional foreclosure of its competitors. To assess whether exclusivity clauses may restrict competition, the FCA examines the clauses’ scope and duration, the existence of a technical justification and the economic consideration granted to the customer.58

In *Mobile telephony equipment*,59 the FCA was concerned about the duration (20 years) and the restrictive early termination terms of the agreements between mobile operators and

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55 FCA decisions No. 08-D-09 of 6 May 2008 concerning practices implemented in the funeral industry sector in Lyon and its agglomeration; No. 04-D-70 of 16 December 2004 concerning practices implemented in the funeral industry sector in the Saint-Germain-en-Laye region; and No. 11-D-14 of 20 October 2011 concerning practices implemented in the funeral industry sector in the Manche department.
56 French Supreme Court, 3 March 2009, No. 08-14.435.
57 FCA decision No. 15-D-10, mentioned above.
58 FCA decision No. 08-D-16 of 3 July 2000 concerning practices in the ID photos sector.
59 FCA decision No 15-D-09 of 4 June 2015 on practices implemented in the mobile telephony equipment sector.
TDF for the hosting of their antennae (in particular, early termination was possible only for very few sites each year). To address these concerns, TDF offered commitments designed to allow mobile operators to obtain better conditions for the hosting of their antennae and in cases where they were to switch to alternative operators. TDF committed in particular to limit the duration of new hosting agreements to 10 years, to cap the penalties generated by early termination and to increase the number of sites (or quota) for which early termination was possible.

In Sugar beet,60 Saint-Louis Sucre claimed that the long-term exclusive contracts concluded by Tereos, the number one sugar producer in the French market (and owner of the Beghin Say brand), with sugar beet growers prevented them from supplying alternative sugar producers in the Picardy region, which represents about 40 per cent of French sugar beet production. According to Saint-Louis Sucre, such practices could be qualified as illegal vertical restraints under Article L420-1 of the Commercial Code and as an abuse of Tereos’ dominance. In France, sugar beet growers typically join a cooperative of sugar producers, such as Tereos’ cooperative, and usually commit to produce a contractually agreed volume of beets that they will then sell to the cooperative. In this context, the FCA took the view that the terms offered by Tereos to its cooperative partners raised a number of competition concerns, especially in light of the opening up to competition of the French sugar procurement market following the abolition of the sugar production quotas in October 2017. The FCA found that:

a Tereos could potentially lock in all its cooperative partners until 2022 as it had introduced, starting from a 2017 to 2018 production campaign, a five-year exclusivity commitment for producers willing to increase their beet production by 20 per cent, in addition to the 10-year commitment initially undertaken by Tereos’ cooperative partners to cover usual beet tonnages;

b Tereos’ articles of association did not expressly indicate that cooperative partners could supply part of their beet production to other sugar groups such as Saint-Louis Sucre;

c Tereos had required cooperative partners that wished to leave the cooperative to give a 12-month notice period (instead of three months), making it even more difficult to switch to Tereos’ competitors.

In light of these concerns, Tereos offered a number of commitments that led the FCA to close its investigation.

Loyalty rebates

Under French law, loyalty rebates granted by a dominant firm may be considered abusive when a discount tends to remove or restrict a buyer’s freedom to choose its sources of supply absent a legitimate economic quid pro quo.61 The FCA considers forward-looking quantitative rebates (as opposed to rebates based on historical sales) conditional upon individual orders, volumes or turnover as generally valid, because they tend to reflect efficiency gains and economies of scale. Other forms of loyalty rebates may be considered abusive.

60 FCA decision No. 17-D-12, mentioned above.
61 FCA decision No. 04-D-65 of 30 November 2004 concerning practices in the postal services sector. See also FCA decision No. 05-D-32, mentioned above.
In DTT broadcasting, the FCA considered that TDF had abused its dominant position by granting loyalty rebates to channel editors that hired TDF for a substantial share of their broadcasting sites. The FCA found that TDF generally granted rebates only if channel editors assigned TDF at least 70 per cent of their sites, which prevented other competitors from developing their activity, even though they also offered rebates to channel editors.

**Tying and bundling**

Tying and bundling consist of tying or bundling two distinct products that typically belong to two different markets, either by forcing consumers to buy the tied products together or by providing them an incentive to buy the products together. The FCA considers that tying by a dominant firm may be abusive if the following two conditions are met: the tying and tied products are distinct products; and the tying practice is likely to lead to anticompetitive foreclosure.

Since 2012, the FCA has issued two decisions in relation to tying in the golf insurance sector and in the electrical equipment maintenance sector.

In Golf insurance, the FCA expressed concerns with respect to the inclusion of insurance products – which are theoretically optional – in the licence delivered by the French Golf Federation. The FCA was particularly concerned that the French Golf Federation used its legal monopoly on the delivery of licences to foreclose its rivals from the golf insurance market through tied selling. To address these concerns, the French Golf Federation accepted to take commitments to prevent tying practices. In 2015, the FCA adopted another decision, finding that these commitments were no longer justified given developments in the market.

In Schneider Electric, the FCA was concerned that Schneider Electric had abused its dominant position by refusing to sell a significant number of spare parts necessary for the in-depth maintenance of its equipment to third-party maintenance providers, unless they also agreed to have Schneider Electric’s own employees perform the associated maintenance services. Schneider Electric argued before the FCA that this restriction aimed at ensuring the safety of property and people as well as at protecting its business model, in particular its brand image, know-how and the expertise of its technicians. However, the FCA found that Schneider Electric’s current policy was not necessary to achieve these objectives, as it was likely to constitute an unlawful tied sale by potentially preventing other maintenance providers from carrying out a full range of maintenance services on Schneider Electric’s high voltage and low voltage equipment, which respectively account for around 70 and 60 per cent of equipment sales in France. The FCA found that it was also likely to deprive customers of services that might be cheaper and of higher quality. Schneider Electric offered commitments to address the FCA’s concerns.

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62 FCA decision No. 16-D-11, mentioned above.
63 FCA decision No. 11-MC-01 of 12 May 2011 concerning practices in the delivery of parcels to the collection points sector.
64 FCA decision No. 12-D-29 of 21 December 2012 concerning practices in the distribution of insurance products to the golfers sector.
65 FCA decision No. 15-D-16 of 27 November 2016 concerning the revision of the commitments of the French Federation of Golf.
66 FCA decision No. 17-D-21, mentioned above.
On the contrary, in Engie, the FCA found that Engie did not abuse its dominant position by proposing a bundled offer for electricity and regulated-tariff gas to its customers. The FCA considered that customers were free to subscribe to a separate agreement for regulated tariff gas without subscribing to an electricity supply agreement with Engie, and that no specific discount was granted if both products were contracted for jointly.

Similarly, in Ouibus, the FCA considered that the SNCF’s decision to offer students a ‘mobility package’ composed of an SNCF fidelity card allowing students to enjoy discounts on TGV journeys and €10 vouchers applicable to any SNCF trip, including Ouibus trips, was not likely to have an anticompetitive effect on Ouibus’s competitors in light of the low value of the vouchers and the fact that while students remain free to use them, very often they did not do so in practice.

Finally, in Google ads, 1PlusV, a specialised search engine provider, claimed that Google had abused its dominant position by refusing to allow for the autonomous use of AdSense for Search, its advertising placement service. 1PlusV argued that Google had unlawfully tied AdSense services to that of its search engine tool, Custom Search Engine (CSE), despite 1PlusV’s wish to use AdSense with other search tools, including its own search product. The FCA, however, rejected the complaint, as it noted that Google had actually agreed to the standalone use of its ‘Ads-Only’ product provided that clients met some security requirements laid out by Google and that, since 2010, Google offered its Ads-Only product without any requirement to also buy its CSE product.

**Refusal to deal**

The concept of refusal to deal is regularly used by the FCA. It covers a broad range of practices, such as the refusal to grant access to an essential facility or network, the refusal to supply products to existing or new customers, and the refusal to license intellectual property rights. The FCA’s test is similar to the test adopted by the European Commission. Refusal to grant access to an essential facility is abusive if the following five conditions are met:

- the facility belongs to a dominant firm;
- access to the facility is necessary to compete on a related market;
- competitors cannot duplicate the facility at reasonable costs;
- the dominant firm unduly refuses access to the facility (or imposes unduly restrictive conditions); and
- access to the facility is possible.

The same principles apply mutatis mutandis for refusal to supply a product or service. Concerning intellectual property rights, French courts consider that software may constitute an essential facility only if it is proved that the software is indispensable to operate on a market, and a competitor could not develop an alternative software under economically reasonable conditions (even if such economic conditions were less favourable than those
under which the dominant undertaking operates). In practice, the following facilities have been considered essential under French law: transport facilities, the electricity network, the telephone network, and certain databases or software.

In SNCF, the FCA and the Paris Court of Appeal considered that SNCF abused its dominant position by:

a. delaying the release of information concerning access to freight yards, thereby preventing its competitors from accessing rail capacities essential to their business activity;

b. retaining exclusive use of certain railway cars that are used for large tonnage transportation and constitute an essential part of the infrastructure; and

c. pursuing a train path overbooking policy that prevented its rivals from participating in certain calls for tenders or honouring certain contracts.

In Cegedim, the FCA fined Cegedim, a company active both in the provision of healthcare databases and customer relationship management (CRM) software for refusing access to its database of medical information to pharmaceutical laboratories that used the CRM software of one of its competitors, Euris. The FCA considered that Cegedim’s database was not an essential facility because there were alternative, albeit inferior, rival databases. However, such a refusal to deal nevertheless amounted to an abuse of a dominant position, since Cegedim was found to discriminate against customers using a competing CRM software, thus preventing the competing CRM software provider from gaining market shares (the FCA pointed out that the practice had caused the competitor to lose 70 per cent of its customers between 2008 and 2012). In 2015, the Paris Court of Appeal upheld the FCA’s decision and considered in particular that the practices implemented by Cegedim had unjustifiably disadvantaged Euris in terms of costs and reputation.

In TF1 Publicité, Canal+ claimed that TF1 Publicité abusively refused to sell advertising spaces available on its TF1 channel to the D8 channel, therefore preventing the Canal+ group from making sure that as many television viewers as possible were aware of the launch of the D8 channel. The FCA considered, however, that this refusal was not abusive because the Canal+ group had access to other alternative means to promote its channel, in particular as it could have bought advertising spaces from the M6 channel, one of TF1’s competitors; and the Canal+ group did, at the time, rely on other media sources to promote its channel, which helped D8 to progressively achieve very good audience ratings and generate strong advert revenues. The FCA therefore concluded that TF1 Publicité’s refusal did not deprive Canal+ from an essential service necessary to carry out its activity and actually aimed at protecting its own interests.

Disparagement

Under French law, disparagement consists of publicly discrediting an identified competitor or its identified products or services. The FCA considers that disparagement is distinct from

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71 Paris Court of Appeals, 31 January 2006, NMPP.
72 FCA decision No. 12-D-25, mentioned above, upheld by Paris Court of Appeal, 6 November 2014, SNCF.
73 FCA decision No. 14-D-06 of 8 July 2014 concerning practices in the medical information database sector.
74 Paris Court of Appeals, 25 September 2015, Cegedim.
75 FCA decision No. 17-D-11, mentioned above.
criticism as it originates from an economic player seeking to benefit from an unjustified competitive advantage by discrediting its competitor or products, and may constitute an abuse of dominance (when disparagement originates from a dominant player).

In Sanofi and Schering-Plough, the FCA fined two pharmaceutical companies for disparagement that consisted of widely publicising differences between their originator drug (or the generic manufactured by the producer of the originator drug) and generic drugs at the time of the entry of the generic drugs into the market. Irrespective of whether such differences were verified or not, the companies could not prove that they had therapeutic consequences. Although neither Sanofi nor Schering-Plough had explicitly presented generic drugs as being inferior, but only pointed at factual differences, the very fact of shedding doubts without scientific supporting evidence was found to be abusive by the FCA. Sanofi was fined €40.6 million and Schering-Plough was fined €15.3 million.

In 2017, the FCA adopted a third infringement decision against a pharmaceutical laboratory for disparagement of generics. In Janssen-Cilag, despite the withdrawal of Ratiopharm’s complaint, the FCA imposed a fine of €25 million on Janssen-Cilag for having first prevented and then restricted the development of the generic versions of its Durogesic drug in France, following the expiration of the patent protection for fentanyl. In particular, the FCA found that Janssen-Cilag submitted legally unfounded arguments to the AFSSAPS aimed at casting doubts on the innocuousness and effectiveness of the generic drug. This led the French authority to temporarily refuse to recognise the generic status of Ratiopharm’s fentanyl drug despite not having the power to do so, as the European Commission had already recognised the generic status of Ratiopharm’s drug at the European level, and had directed concerned Member States to grant the national market authorisation within 30 days. The AFSSAPS ultimately granted generic status to Ratiopharm’s drug after a delay of more than a year, but added a warning to this authorisation, recommending careful medical supervision of some patients switching from one fentanyl drug to another. In addition, the FCA found that once the authorisation had been granted, Janssen-Cilag started a massive disparagement campaign of the generic drugs among health professionals, using different media and channels, with the aim of discrediting the generic drugs’ reputation by highlighting quantitative, qualitative and size differences from the Durogesic patch. The FCA also considered that Janssen-Cilag distorted the content of the warning issued by the AFSSAPS by providing an inaccurate and incomplete presentation of the risks associated with substitution. The FCA concluded that Janssen-Cilag’s practices constituted a single and continuous infringement that had significant foreclosure effects on competitors by delaying the arrival of generics, and then contributing to their low penetration rate, on a market already characterised by the reluctance of healthcare professionals to prescribe generics.

76 FCA decision No. 13-D-11 of 14 May 2013 concerning practices in the medicinal products sector. Upheld by the Paris Court of Appeals on 18 December 2014 and by the French Supreme Court on 18 October 2016.

77 FCA decision No. 13-D-21 of 18 December 2013 regarding practices implemented on the French market for high-dosage Buprenorphine sold in private practices.

78 FCA decision No. 17-D-25, mentioned above.
Most-favoured-nation clauses

In Booking.com, the FCA accepted commitments addressing its preliminary concerns that the most-favoured-nation (MFN) clauses imposed by Booking.com could have exclusionary effects. The decision was also based on the concern that the MFN clauses could constitute a restrictive practice. MFN clauses prevented hotels from offering to rival reservation platforms or other distribution channels (including through their own sales channels) lower prices or better commercial conditions (i.e., availability, services) than to Booking.com. In particular, the FCA considered that these clauses could prevent smaller platforms and new entrants from gaining market shares by offering lower prices or better services to customers, including by offering lower commission rates to hotels.

Other exclusionary tactics

The FCA may intervene under Article L420-2 of the Commercial Code where a dominant company’s allegedly abusive conduct is likely to lead to anticompetitive foreclosure.

In Overseas DDT, the FCA imposed a fine of €4.2 million on TDF, considering that TDF had abused its dominant position by failing to provide the technical and pricing information concerning access to its broadcasting infrastructures to competitors. In the context of a call for tender issued by France Télévisions in the overseas territories, access to such information was necessary for the bidders (that also included TDF) to prepare their offers. Separately, the FCA also found that TDF implemented a similar strategy in connection with the Eiffel Tower site.

In Petanque balls, the FCA imposed a fine of €320,000 on Obut for imposing resale prices on some of its distributors. The FCA considered that Obut was in a dominant position in the market for the production of petanque balls for competitions and abused its dominant position in the market for the distribution of petanque balls, in which Obut was also active, by imposing resale prices so as to reduce price competition with other retailers. In addition, Obut’s sales forces monitored compliance with the suggested list prices, and threatened distributors with delayed deliveries, blocked orders and delisting in cases of deviation. In its decision, the FCA noted that such practices are also prohibited under Article L420-1 of the Commercial Code. The FCA decided to rely on Article L420-2 of the French commercial code exclusively, though.

iii Exploitative abuses

Exploitative abuses consist of a dominant firm imposing ‘unbalanced’ conditions on its trading partners, and in particular imposing excessively high prices. Under specific circumstances, the FCA considers that dominant firms are deprived of the right to adopt a course of action or take measures that are not themselves abuses, and that would even be unobjectionable if...
adopted by non-dominant undertakings. In 2016, the FCA did not issue a single sanctioning decision concerning exploitative abuses. In 2009, however, the FCA had fined Orange in the *Telecommunication in overseas départements* case.83

In this case, the FCA investigated the rates applied by Orange for connection services between the island of La Réunion and the mainland, and found that ‘there existed a clear disproportion between these rates and the value of the services’, which resulted in the imposition of excessive pricing on consumers (residential and professional), and hindered the development of the high-speed market on the island of La Réunion, and the development of Orange’s competitors.

**iv Discrimination**

Abusive discrimination basically consists of the application by a dominant company of dissimilar conditions to trading partners in equivalent transactions, thereby placing certain trading partners at a competitive disadvantage.84 The FCA considers that discriminatory practices may restrict competition when such practices have as their object or effect exclusion of a competitor from the market (first-line discrimination); or the dominant firm discriminates between its customers, thereby producing an adverse effect on a market in which the dominant firm is not active (secondary-line discrimination). While first-line discrimination is an exclusionary abuse, second-line discrimination is in the exploitative abuse category.

In *Electronic communications*,85 the FCA found that Orange gave access to more comprehensive information regarding the operation of the copper local loop to its own commercial entities than to third-party operators. The FCA considered that the (first-line) discrimination in the access to information had artificially strengthened Orange’s dominant position, and affected third-party operators by making them appear less reactive and less informed than Orange.

In *NavX*, the FCA took a strict approach towards secondary-line discrimination, suggesting that dominant firms have an obligation to treat all of their customers equally, even when the dominant undertaking is not active in the downstream market.86 In particular, the FCA found that the rules defined by Google for the operation of its AdWords advertising platform should be applied to all advertisers in an ‘objective, transparent and non-discriminatory manner’, and that discriminatory treatments could be considered abusive. The FCA ultimately accepted commitments from Google to clarify certain rules applicable to advertisers, in particular in respect of the conditions of suspension of their AdWords account. In 2015, the FCA also received a complaint and a request for interim measures against Google, essentially on the same grounds as *NavX*. According to the complainant, Gibmedia, Google suspended Gibmedia’s AdWords account in a manner that was not objective, transparent

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83 FCA decision No. 09-D-24 of 28 July 2009 concerning practices implemented in the telecommunications sector in overseas departments.
84 FCA decisions No. 06-D-23 of 21 July 2006 concerning practices in the map editing and tourist information sector; No. 07-D-28 of 13 September 2008 concerning practices implemented by the Havre Port authority; and No. 09-D-02 of 20 January 2009 concerning practices in the press distribution sector.
85 FCA decision No. 15-D-20 of 17 December 2015 concerning practices implemented in the telecommunications services sector.
86 FCA decision No. 10-MC-01 of 30 June 2010 concerning the practices of Google in the online advertising sector; No. 10-D-30 of 28 October 2010 concerning the practices of Google in the online advertising sector.
and non-discriminatory. The FCA refused to grant interim measures in the absence of proof of serious or immediate harm to consumers, the sector or the complainant, but decided to continue the investigation on the merits.\textsuperscript{87}

In 2017, in \textit{Funeral services in the Ain department},\textsuperscript{88} the FCA also found that Comtet, as the only manager of the Viriat crematorium, had abused its dominant position by discriminating competitive funeral directors and their clients for the provision of cremation services for which it was responsible by virtue of the public service delegation agreement concluded with the city of Viriat. The FCA found that this discrimination took the form of a price differentiation through the imposition of a price premium of 20 per cent to competing funeral directors that was not applicable to Comtet’s own customers. In addition, the FCA noted that competing funeral directors were not able to explain this pricing difference to their customers as Comtet did not clearly identify in the forms it provided to its competitors’ clients the funeral services that were covered by the public cremation tariff agreed with the city of Viriat and optional funeral services that the price premium was supposed to cover. The FCA found that this discrimination was not justified by any service improvement or differences in the grieving families’ circumstances and therefore fined Comtet for abusive price discrimination.

\section*{V REMEDIES AND SANCTIONS}

Article L464-2 of the Commercial Code provides that the FCA can impose fines on infringing undertakings of up to 10 per cent of the firms’ worldwide turnover. The FCA can also order undertakings to terminate anticompetitive practices within a specified time limit, impose remedies, or both. As an alternative to sanctions, the FCA may accept commitments offered by the dominant firms being investigated in response to the FCA’s competition concerns. In the event that an undertaking does not comply with the FCA’s decision to terminate anticompetitive practices or with the FCA’s orders, or does not implement their commitments, the FCA may impose penalty payments of up to 5 per cent of the undertaking's average daily turnover.

\subsection*{i Sanctions}

According to Article L464-2 of the Commercial Code, fines should be proportionate to:

\begin{itemize}
  \item the gravity of the infringement;
  \item the importance of the damage to the economy;
  \item the group or company's individual situation; and
  \item recidivism.
\end{itemize}

In any event, fines cannot exceed 10 per cent of the highest consolidated worldwide turnover achieved since the fiscal year preceding the starting date of the anticompetitive practices.

In 2011, the FCA issued guidelines on the methods for determining fines.\textsuperscript{89} The basic amount of the fine is calculated as a proportion of the value of sales related to the infringement, taking into consideration the gravity of the infringement and the damage to

\begin{footnotesize}
\begin{itemize}
  \item FCA decision No. 15-D-13 of 9 September 2015 on the request for interim measures by the company Gibmedia.
  \item FCA decision No. 17-D-13, mentioned above.
  \item Notice of 16 May 2011 on the Method Relating to the Setting of Financial Penalties.
\end{itemize}
\end{footnotesize}
the economy. The proportion of the value of sales is between zero and 30 per cent. The basic amount of the fine is then adjusted taking into account the duration of the infringement, and the existence of aggravating circumstances (e.g., if the undertaking has a specific ability to influence) or mitigating circumstances (e.g., if the infringement was authorised or encouraged by public authorities). Other factors that might also be taken into account are the size and the economic power of the undertaking or its group, the fact that the undertaking is a single product company and recidivism.

With respect to recidivism, the French Supreme Court recently ruled in the SNCF case that recidivism can be established even though the two infringements were implemented on two different markets.90

Since the issuance of the FCA’s fining guidelines, 21 abuse of dominance fining decisions have been issued:

- Saint-Pierre-et-Miquelon;
- Mobile Telephony;
- Rail Freight;
- Ordre National des Experts Comptables;
- Sanofi;
- Schering-Plough;
- EDF;
- Amaury;
- Mobile telephony at La Réunion and Mayotte (two cases);
- Cegedim;
- Antilles dairy products;
- Overseas DDT deployment;
- Eiffel Tower;
- Electronic communications;
- DTT broadcasting;
- Zinc;
- Pétanque balls;
- Engie;
- Funeral services in the Ain department; and
- Janssen-Cilag.91


91 FCA decisions No. 12-D-06, mentioned above; No. 12-D-24, mentioned above; No. 12-D-25, mentioned above; No. 13-D-06 of 28 February 2013 on practices implemented in the sector of teletransmission of tax and accounting data in EDI format to the tax administration; No. 13-D-11, mentioned above; No. 13-D-20 of 17 December 2013 concerning the practices implemented by EDF in the photovoltaic solar power sector; No. 13-D-21, mentioned above; No. 14-D-02 of 20 February 2014 concerning the practices implemented in the sports press sector; No. 14-D-05 of 13 June 2014 on practices implemented in the mobile telephony sector for household customers in La Réunion and Mayotte; No. 14-D-06, mentioned above; No. 14-D-08 of 24 July 2014 regarding practices implemented in the sector for the sale of fresh dairy products in the French West Indies; 15-D-01, mentioned above; 15-D-10, mentioned above; No. 15-D-17 of 30 November 2015 on practices implemented on the mobile telephony market for non-residential customers in La Réunion and in Mayotte; No. 15-D-20, mentioned above; No. 16-D-11, mentioned above; No.16-D-14, mentioned above; No. 17-D-02, mentioned above; and No. 17-D-06, mentioned above; No. 17-D-13, mentioned above; and No 17-D-25, mentioned above.
In 2015, the FCA imposed a record-breaking fine of €350 million on Orange in the Electronic communications case (after settlement).92

ii Behavioural remedies

The FCA can impose behavioural remedies either as an interim measure or as a sanction imposed in decisions on the merits.

Pursuant to Article L464-1 of the Commercial Code, the FCA may grant interim measures and order behavioural remedies in the event that the reported practices cause serious and immediate damage to the general economy, the economy of a sector or the interests of either consumers or the complainant. Since 2010, interim measures have been granted in five abuse of dominance cases.93 In 2016, the FCA granted interim measures in only one case.94

Pursuant to Article L464-2 of the Commercial Code, the FCA may also order undertakings to terminate anticompetitive practices within a specific time frame or impose behavioural remedies in addition to fines in its decision on the merits.

In Electronic communications,95 the FCA ordered Orange to provide competitors with equal access to the information it collects as the operator of the local loop, and to put an end to the loyalty and exclusivity policy subject to the investigation.

In Cegedim,96 the FCA ordered Cegedim to stop any form of discrimination among its customers based on the CRM software they were using (i.e., Cegedim’s or competitors’ CRM software). Similarly, in Funeral services in the Ain department,97 the FCA ordered Comtet to modify its pricing forms so as to clearly show the services that are already covered by the public tariff and that cannot be subject to an additional fee.

iii Structural remedies

Pursuant to Article L430-9 of the Commercial Code, the FCA can order an undertaking or a group of undertakings that abused either their dominant position or the state of economic dependence of a commercial partner to alter or terminate a transaction that gave rise to the underlying dominant position, even in cases where the transaction had been authorised by the FCA in the context of a merger review. This provision enables the FCA to undo a transaction or an agreement for abuse of dominance. The FCA has used this power on only one occasion. In the Water market case,98 the FCA found that the Compagnie Générale des Eaux and the Lyonnaise des Eaux, which had created several joint ventures, were abusing their collective dominance by deciding not to compete against their joint ventures for certain calls for tenders. The FCA found that the termination of the joint ventures was necessary to remedy the behaviour and, ultimately, the Compagnie Générale des Eaux and the Lyonnaise des Eaux voluntarily decided to terminate their joint venture agreements.

92 FCA decision No. 15-D-20, mentioned above.
93 FCA decisions No. 10-MC-01, mentioned above; No. 11-MC-01, mentioned above; No. 14-MC-01 of 30 July 2014 concerning practices in the pay TV sector (partially quashed by Paris Court of Appeals, 9 October 2014); No. 14-MC-02 of 9 September 2014 in the gas and electricity sector (partially quashed by Paris Court of Appeals, 31 October 2014) and No. 16-MC-01, mentioned above.
94 FCA decision No. 16-MC-01, mentioned above.
95 FCA decision No. 15-D-20, mentioned above.
96 FCA decision No. 14-D-06, mentioned above.
97 FCA decision No. 17-D-13, mentioned above.
98 FCA decision No. 02-D-44, mentioned above.
The FCA is also empowered to order structural remedies in case of abuse of dominance or of economic dependence in the retail sector (see Article L752-26 of the Commercial Code).

iv  Commitments

As an alternative to sanctions and remedies, the FCA may also accept commitments offered by undertakings pursuant to Article L464-2 of the Commercial Code. The FCA can make such commitments binding in exchange for the closing of an investigation on the merits without making a finding of any infringement, provided the commitments are offered before the FCA issues a statement of objections. The FCA uses the commitments procedure in order to intervene more quickly and avoid the administrative costs and legal constraints of establishing an abuse of dominance. The FCA issued five commitment decisions in 2017.

In Gas market,99 Engie not only offered commitments in relation to its pricing practices but also in relation to several clauses included in individual metering and gas service contracts concluded with co-ownership associations that raised competitive concerns. The FCA’s concerns focused on the excessive length of the contracts (10 years), the prohibitive cancellation fees customers were charged in the case of early termination and clauses prohibiting customers from using alternative energies for heating purposes. To answer the FCA’s concerns, Engie agreed to inform its customers of the possibility to terminate their contracts at no cost following a five-year commitment period, and not to prevent common hold associations from using alternative energy sources for heating.

In Archaeology,100 in response to the competition concerns raised by the FCA, INRAP offered a set of commitments. Following the market test and in light of the difficulties for INRAP to address all aspects of the identified competition law issues by itself, the state has committed to set up, by March 2018, a secure data hosting platform to enable all excavation service providers to access the preliminary information available to diagnostic survey operators within a comparable time frame. In addition, INRAP has committed to implementing an analytical accounting system guaranteeing the effective and reliable accounting and financial separation of its for-profit and non-profit activities to eliminate any risk of cross-subsidies.

In Sugar beet,101 Tereos offered to clearly limit each cooperative partner’s supply obligation to the contractual volumes agreed with Tereos, thus putting an end to their exclusive supply obligation and enabling them to sell their production to other sugar producers. Tereos also committed to eliminate the dual commitment period, reduce the notice period in the case of termination from 12 to three months, and ensure that Tereos’ sector managers receive training in competition law. The FCA considered that a five-year commitment period from Tereos would be sufficient to address the competitive concerns raised by the FCA, since Tereos’ partners were currently committed to Tereos for a similar or even shorter period of time.

In Schneider Electric,102 the FCA accepted commitments taking the form of mandatory training requirements. Schneider Electric indeed agreed to allow third-party maintenance providers to sell certain spare parts that were previously only available to its own technicians, on the condition that third-party-providers completed training modules and appropriate tests similar to the ones followed by Schneider Electric’s employees in order to be able to handle...

99  FCA decision No. 17-D-16, mentioned above.
100  FCA decision No. 17-D-09 mentioned above.
101  FCA decision No. 17-D-12, mentioned above.
102  FCA decision No. 17-D-21, mentioned above.
any incident and associated risks with the provision of maintenance services. All third-party maintenance providers are now able to receive such trainings, provided that they hold certain educational qualifications and have sufficient skills and experience; and the company that employs them holds the required levels of certification and qualification, and complies with a number of obligations. In particular, the company must ensure that its trained employees carry out a minimum number of maintenance operations – one operation every six months per training module – and must send proof of these interventions through a dedicated portal. Schneider Electric’s commitments, along with monitoring obligations, will be undertaken for five years.

Finally, in Office waste, the FCA noted that the market investigation conducted under the merger control review of the La Poste–Suez joint venture raised the same predatory and leveraging concerns as the ones identified in the abuse of dominance case in light of La Poste’s position on the postal service markets, leading La Poste to take the same commitments in both cases.

VI PROCEDURE

The French Minister of the Economy, certain other public entities and any company may refer practices falling within the scope of Article L420-2 of the Commercial Code to the FCA. The FCA may also initiate investigations ex officio into alleged abuses of a dominant position. The FCA cannot investigate facts that took place more than five years ago unless a procedural act interrupts this statute of limitations (see Article L462-7 of the Commercial Code). If the FCA considers that a complaint is unsubstantiated, it can issue a reasoned decision rejecting the complaint at a preliminary stage.

i Interim measures

Claimants may request interim relief. A request for interim relief must be filed concurrently with the action on the merits and lasts approximately six months. The FCA will order interim measures if the following cumulative criteria are met: the FCA has jurisdiction over the relevant practices on the merits; there is a reasonably strong prima facie case establishing that the alleged practices breach competition rules; and the alleged practices may have serious and immediate effects on consumers, the sector or the interests of the plaintiff. In practice, interim measures are ordered mainly in situations where the defendant’s actions threaten to foreclose a competitor from a market. The interim measure investigation is followed by a hearing and a decision whereby the FCA decides whether interim measures are justified and whether an investigation on the merits is required. The FCA generally issues a decision within one or two months of the hearing.

In 2017, the FCA did not grant any interim measure decision, while in 2016, the FCA ordered interim measures against Engie in the gas market to ensure that the price of some of its offers to business customers reflected its costs. The FCA considered that Engie’s practices could have serious and immediate anticompetitive effects on the sector and justified interim measures pending a decision on the merits.

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103 FCA decision No. 17-D-26, mentioned above.
104 FCA decision No. 16-MC-01, mentioned above.
In 2015, in Gibmedia, the FCA dismissed a request for interim measures against Google. According to the complainant, Gibmedia, Google suspended its AdWords account without prior notice and based on non-transparent and discriminatory grounds. Gibmedia thus requested that its account be reinstated as an interim measure pending the investigation on the merits. The FCA, however, refused to grant any interim measure, as it found that the legal standard for such an urgent procedure was not met. In particular, the FCA found that no serious or immediate harm to consumers, the sector or the complainant could be established.\textsuperscript{105} Similarly, the FCA dismissed a request for interim measures by retailer Concurrence against Samsung.\textsuperscript{106} Concurrence claimed that Samsung had implemented a number of anticompetitive practices, and requested interim measures to force Samsung to supply the Elite product range and accept that its products be sold through marketplace websites. The FCA found that Concurrence did not prove that the alleged practices caused it serious and immediate harm, notably because Concurrence’s financial difficulties dated back to 2008 (i.e., several years before the alleged anticompetitive practices took place) and Concurrence waited two-and-a-half years before requesting interim measures.

\textbf{ii Investigation on the merits}

If the FCA considers that a complaint is well grounded, it appoints case handlers to investigate the case. The case handlers have wide investigative powers and may conduct dawn raids if they are authorised to do so by a court, or request information from undertakings. The investigation period typically lasts from six months to three years (or sometimes more), until the FCA notifies the companies involved of its objections. The investigation procedure is partly adversarial (i.e., each interested party is given an opportunity to present its case during the investigation period). The exchange of written submissions, including two written reports issued by the case handlers, generally lasts one to two years, until a hearing is scheduled.

\textbf{iii Hearing}

The parties are invited to a hearing before the FCA Board, where the case handlers provide an oral presentation of their observations. The parties may also present their observations orally.

\textbf{iv Decision}

The FCA generally issues a decision within three months of the hearing. It may find that the alleged practices are not established, or impose a fine on the undertakings and order remedies. The parties may appeal the decision before the Paris Court of Appeals within a month. Paris Court of Appeal rulings may in turn be challenged before the French Supreme Court, which only has jurisdiction over matters of law.

\textbf{v Commitments}

If the FCA intends to implement the commitment procedure as an alternative to an infringement procedure, the case handlers inform the undertakings of the FCA’s preliminary competition concerns at an early stage during the investigation (before a statement of objections has been issued) and invite them to offer commitments that adequately address

\textsuperscript{105} FCA decision No. 15-D-13, mentioned above.

\textsuperscript{106} FCA decision No. 15-D-11 of 24 June 2015 concerning a request for interim measures for practices in the distribution sector of brown goods, in particular television sets.
the identified concerns. Once the proposed commitments have been received, the case handlers carry out a market test, which is published on the FCA’s website, to ensure that the proposed commitments are considered adequate by the main stakeholders. The FCA may either accept or reject the commitments. The FCA may also require amendments. If the FCA finally considers that the commitments offered address its competition concerns, it makes the commitments binding in its final decision.

vi Settlement

The settlement procedure was recently modified by Law No. 2015-990 of 6 August 2015. Under the new regime, companies that are willing to settle and commit to not challenging the objections notified by the FCA in exchange can negotiate a fine range with the Investigation Service. Companies may also offer compliance and behavioural commitments. The FCA board takes the ultimate decision but will comply with the fine range negotiated with the Investigation Service.

In Electronic communications, although the new regime was not applicable yet, the FCA Investigation Service anticipated the reform of the settlement procedure and negotiated with Orange a €350 million cap on the fine in exchange for Orange’s commitment not to challenge the objections and to implement behavioural remedies. The FCA Board eventually imposed the maximum fine on Orange.

The FCA has adopted two settlement decisions in abuse of dominance cases since the entry into force of the new settlement regime. In Petanque balls, the FCA settled a fine of €320,000 with Obut as well as a commitment to implement an antitrust compliance programme. In Engie, Engie did not challenge the FCA’s objections, and the FCA imposed a €100 million fine following a settlement procedure.

VII PRIVATE ENFORCEMENT

Private enforcement claims may be brought under general tort law provisions (Article 1240 of the Civil Code) generally within five years of the day the victim becomes aware or should have become aware of the wrongdoing.

Private enforcement claims require the defendant to prove a fault, a damage and a causal link between the two. Since the implementation into French law of the EU Damages Actions Directive, an FCA decision to sanction for anticompetitive practices creates an unrebuttable presumption of the existence of such anticompetitive practices before civil and commercial courts, provided that all appeals against the FCA’s decision are exhausted. Establishing a fault is significantly more difficult in stand-alone actions. Proving the existence and the amount of the damage is also difficult in dominance cases, which explains why

107 See Notice of 2 March 2009 on the commitment procedure (engagements).
108 FCA decision No. 15-D-20, mentioned above.
109 FCA decision No. 17-D-02, mentioned above.
110 FCA decision No. 17-D-06, mentioned above.
111 Law No. 2016-1691, 9 December 2016 (article 148); Order No. 2017-303, 9 March 2017 on damages actions relating to anticompetitive practices; and Decree No. 2017-305, 9 March 2017 on damages actions relating to anticompetitive practices.
claimants often have to rely on expert economic and accounting reports. The principle of full compensation for the damage suffered applies (both material and non-material damage, but there are no punitive damages).

Antitrust class actions have been available in France since 2014 under the following conditions:

a. the claim is a follow-on action after a sanction decision by the FCA or the European Commission;

b. the action is brought within five years of the final sanction decision (no longer subject to an appeal);

c. the claim is brought by a consumer association on behalf of consumers; and

d. consumers have opted in to join the class action.

Private enforcement has been limited in France, as there has not been any antitrust class action so far; the majority of cases are settled out of court; and there is no easy access to evidence for claimants who bear the burden of proof (although the implementation of the EU Damages Actions Directive under French law will be helpful for claimants). Furthermore, although specific district courts and commercial courts have exclusive jurisdiction over antitrust claims, the judges are not specialised in antitrust matters, and often do not have sufficient independent means to assess the existence of dominance and the effects of the alleged abuses on the markets. Private claimants in France, therefore, essentially rely on decisions issued by the FCA.

For instance, in Outremer Telecom v. Orange, Outremer Telecom brought an action before the Paris Commercial Court based on a 2009 FCA decision. Outremer Telecom alleged that Orange’s abuses of its dominant position (and anticompetitive agreements) on the mobile telephone market in the Antilles and Guyana (French overseas territories) prevented it from expanding on this market. The Paris Commercial Court awarded Outremer Telecom €7.9 million to compensate for the damage resulting from Orange’s abusive loyalty rebates and excessive prices policy on off-net calls. However, the Paris Court of Appeals recently cut the damages granted to Outremer Telecom to €2.6 million after reviewing the calculation of the damage estimate. In December 2017, in Digicel v. Orange, the Paris Commercial Court ruled on a separate follow-on damages action against Orange in relation to the same FCA decision. The Paris Commercial Court found that Digicel was harmed by Orange’s abusive loyalty rebates and discounts applied on calls from fixed phones to Orange mobiles in the Caribbean overseas territories. In the ruling, the Court acknowledged that Orange’s practices had significant restrictive effects on Digicel’s development since its entry into the Caribbean market in 2000 and therefore awarded Digicel €180 million based on an expert calculation of lost revenues, plus 10.4 per cent interest per year starting from 2009, leading to a total of €346 million in damages to be paid by Orange and its affiliate, Orange Caraïbe. The judge, however, rejected Digicel’s claims in relation to Orange’s other infringements.

112 Paris Commercial Court, 16 March 2015, Outremer Telecom v. Orange.
113 FCA decision No. 09-D-36 of 9 December 2009 concerning practices in the mobile telephony sector in the Antilles and Guyana.
114 Paris Court of Appeals, 10 May 2017, Outremer Telecom v. Orange.
115 Paris Commercial Court, 18 December 2017, Digicel v. Orange.
having found that Orange’s exclusivity clauses with distributors and repairers did not have any impact on Digicel’s development, as the latter had deliberately chosen a single-brand distribution network and had decided to undertake the reparations in mainland France.

Purely stand-alone actions (not based on a previous FCA decision) are rare. Nevertheless, in *Bottin Cartographes v. Google*,116 the Paris Commercial Court granted Bottin Cartographes €500,000 in damages in the first instance, based on a stand-alone claim alleging that Google implemented predatory prices by offering its Google Maps API (application programming interface) service, which enables third-party website operators to display a map on their website, free of charge. On appeal, however, the Paris Court of Appeal overruled the first instance decision and dismissed all the plaintiff’s claims.117 The Court of Appeal decided to support its decision by asking the FCA for its opinion on the existence of a dominant position and the question of predation.118 The FCA found that irrespective of Google’s market position, Google’s behaviour with regards to Google Maps API could not be deemed predatory because the economic analysis submitted to the FCA showed that Google always covered at least its average incremental costs, and in any event, there was no evidence of a predatory strategy, especially as there were a significant number of competitors in the market, many of them offering their products for free or on a ‘freemium’ basis, like Google. On the basis of the FCA’s opinion, the Court of Appeal found that Google’s behaviour could not be deemed abusive and dismissed all claims.

In 2016, in *Aviscom v. La Montagne*,119 the Paris Court of Appeals confirmed a decision of the Paris Commercial Court,120 which found that a local journal had abused its dominant position by tying funeral notices in the journal with the services of an online condolence website (in particular, La Montagne inserted a link towards the online condolence website, and refused to insert a link towards the competing website owned by Aviscom). The Court found that this resulted in excluding Aviscom from the local market for online funeral notices. However, the Court reduced the amount of damages against the local journal from €50,000 to €5,000 to the extent that the anticompetitive practices had stopped since January 2014 and that the harm to the claimant resulted only in a loss of the chance of obtaining additional market shares on the local market for online funeral notices.

In *SFR v. Orange*,121 the Paris Commercial Court granted €51.4 million of damages against Orange following a stand-alone claim made by SFR. SFR claimed that Orange had implemented a margin-squeeze strategy by allowing secondary residence owners to suspend their landlines while they were away from their secondary residence.122 On this upstream market, Orange, however, refused to offer suspendable telephone access to telecom operators. The Commercial Court found that this practice constituted a margin squeeze because as a result, SFR was not in a position to propose to its downstream customers to have suspendable landline access. On appeal, however, the Paris Court of Appeals annulled the Paris Commercial Court’s judgment. The Court of Appeals found that the market for secondary residences was not a relevant product market because from the demand-side perspective, 90 per cent of

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118 FCA opinion No. 14-A-18, mentioned above.
119 Paris Court of Appeals, 7 December 2016, *Aviscom v. La Montagne*.
120 Paris Commercial Court, 7 January 2014, *Aviscom v. La Montagne*.
121 French Supreme Court, 12 April 2016, No. 14-26815.

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secondary residence owners considered that the suspendable line was substitutable with other telephone lines; and from the supply-side, the data used by SFR to demonstrate the cost difference as compared with other telephone lines was not sufficiently reliable. In 2016, the French Supreme Court overturned the Court of Appeals’ ruling. On the demand-side substitutability, the Supreme Court found that the Court of Appeals should have conducted a more detailed analysis, notably by making a distinction between secondary residence owners that purchased a simple fixed line and those that purchased multi-service fixed lines and mobile lines. On the supply-side substitutability, the Supreme Court found that the Court of Appeals should have ignored the unreliability of the data and should have discussed the relevance of the criteria used by SFR. The Supreme Court referred the case back to the appellate court.

In Petanque Longue v. Obut, the Paris Court of Appeals granted interim measures following a stand-alone complaint by Petanque Longue against Obut. Petanque Longue is a reseller and engraver of petanque balls, and Obut is the main French manufacturer of petanque balls (and also provides petanque ball engraving services). Petanque Longue claimed that Obut had started to implement a new loyalty rebate system that discriminated against petanque ball engravers. French courts may grant interim measures when the practice constitutes a manifestly unlawful disturbance or there is a risk of imminent harm caused by such practice. The Court found that the manufacturer’s new loyalty rebates were discriminatory because the distinction between different categories of resellers was not made on the basis of objective criteria (e.g., turnover thresholds or the nature of services offered by resellers). The Court also found that the manufacturer’s underlying goal was to undermine Petanque Longue’s position as a petanque ball engraver, which therefore constituted a manifestly unlawful disturbance. Obut’s practices led to a 40 per cent drop in Petanque Longue’s profit margin, which was sufficient to establish a risk of imminent harm. Consequently, the Court ordered Obut to stop implementing its new loyalty rebate policy until the FCA issues a substantive decision.

Finally, in Betclic v. PMU, the Paris Court of First Instance ruled that a commitment decision that led the FCA to close the investigation on the merits without making a finding of infringement does not prevent ordinary courts from finding that the company having taken these commitments has engaged in abusive conduct, and noted that courts are free to rely on information contained in the commitment decision and use it as an indication or even prima facie evidence of the anticompetitive nature of the practices. The Court clearly stated that a company cannot hide behind a commitment procedure to avoid compensating victims for the damage they suffered. Having said that, the Court of First Instance relied on the FCA’s PMU commitment decision to find that PMU held a dominant position on the offline and online horse racing betting markets. The Court also relied on feedback during the market test when the PMU offered commitments in 2014 to find that the PMU had indeed abused its dominant position by pooling together its online and offline bets to gain an unfair competitive advantage offer. The Court ultimately decided to stay the proceedings.

123 Paris Court of Appeals, 4 October 2014, SFR v. Orange.
124 French Supreme Court, 12 April 2016, No. 14-26815.
125 Paris Court of Appeals, 7 December 2016, Petanque Longue/La Boule Obut.
126 Paris Court of First Instance, 22 February 2018, Betclic v. PMU.
127 FCA decision No. 14-D-04, mentioned above.
and ordered an expert to evaluate what could have been Betclic’s market share had the PMU not pooled together its online and offline bets to determine the amount of damages to award to Betclic.

**VIII FUTURE DEVELOPMENTS**

Private enforcement is expected to continue developing as the EU Damages Actions Directive is now implemented under French law.128

At the FCA, the healthcare sector was under the spotlight in 2017, with Janssen-Cilag being fined for abuse of dominance and also the launch in November 2017 of a new sector inquiry into the functioning of competition in the drug and medical biology sectors.129 The FCA has already issued several opinions in relation to the pharmaceutical distribution chain, the online sale of pharmaceuticals and the sale of hearing aids, but found that some of its recommendations had only partially been implemented, and it therefore deemed it necessary to issue another opinion to update and, if necessary, change its proposals in light of new market developments.

In addition, in a statement of 19 October 2017,130 the FCA explained that although it still values the introduction of compliance programmes by companies wishing to raise their employees’ awareness of applicable competition rules, it now considers that such programmes are part of the day-to-day management of businesses and has therefore indicated that it will not in the future generally consider that commitments aimed at implementing compliance programmes will justify a reduction of a fine that the FCA plans to impose. In the same statement, the FCA also indicated that it intends to publish a notice on the implementation of the new settlement procedure, and in this regard published draft guidelines on its website in March 2018. Although nothing is said in the draft guidelines about whether settlement fines will be lower than under the previous regime, the main rationale behind this project is to provide stronger incentives for companies to cooperate with the FCA. The draft guidelines indicate that companies must request the benefit of this procedure within two months of being notified of objections raised by the FCA, and must unconditionally acknowledge all the objections raised in the statement of objections. The draft also shows that the FCA will be reluctant to engage in hybrid settlements, whereby some companies choose to settle while others decide to defend their case. The public consultation on the draft guidelines to gather comments from concerned parties ended on 30 April 2018.

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128 Law No. 2016-1691, 9 December 2016 (Article 148); Order No. 2017-303, 9 March 2017 on damages actions relating to anticompetitive practices; and Decree No. 2017-305, 9 March 2017 on damages actions relating to anticompetitive practices.


130 FCA statement of 19 October 2017 on the settlement procedure and compliance programmes.
I INTRODUCTION

Under German competition law, unilateral conduct by an enterprise with market power is governed by Sections 18, 19 and 20 of the German Act against Restraints of Competition (ARC), which prohibit the abuse of a (single or collective) dominant position, and specific types of abusive behaviour by enterprises that have ‘relative’ market power in relation to small or medium-sized enterprises (as trading partners or competitors). Germany has thus used the possibility provided for under EU Regulation 1/2003 to enact national legislation on unilateral conduct that goes beyond the substance of the prohibition on the abuse of a dominant position laid down in Article 102 of the TFEU. Another distinct characteristic of German antitrust law on dominance is that there are (rebuttable) statutory market share-based presumptions of dominance.

Guidance on the application of the rules can be gathered from the case law of the German Federal Cartel Office (FCO) and the German courts, notably the Federal Court. There is no formal general guidance on unilateral conduct available, apart from the FCO’s somewhat dated notice on below-cost pricing (which has been under review by the FCO for years now).

Guidance on the amount of fines for restrictive unilateral conduct can be gathered from the FCO’s guidelines on the setting of fines, which apply to all areas of German antitrust law.

No special rules apply in Germany to the public sector or state-owned enterprises. Section 130(1) of the ARC stipulates that the ARC will also apply to enterprises that are entirely or partially publicly owned or are managed or operated by public authorities.

Special rules apply to certain regulated industries, such as electricity, gas, telecommunications and post and railway. The Federal Network Agency monitors compliance with certain of these regulations in cooperation with the FCO.
II  YEAR IN REVIEW

The enforcement activity of the FCO in the abuse of dominance area over the past couple of years has continued to be quite limited in terms of actual decisions, as the FCO issued only one single formal prohibition decision in 2017. In contrast, the FCO initiated or continued several important abuse proceedings. The formal decision concerned CTS Eventim’s use of exclusivity clauses in relation to ticketing offices and event organisers. This decision further highlights the FCO’s continued emphasis on the digital economy and online platforms, complementing other notable ‘online’ cases including, *inter alia*, decisions concerning Google and hotel booking platforms Booking.com and HRS. In addition, the FCO continued its proceedings against Facebook, investigating whether Facebook engaged in abusive conduct by infringing the German data protection rules.

The FCO also initiated proceedings against the German Olympic Sports Confederation (DOSB), and the International Olympic Committee (IOC) regarding the advertising restrictions that they impose on athletes (prohibiting athletes participating in the Olympic Games from using their person, name, picture or performance during the Olympic Games – and several days before and after – for advertising purposes). According to the FCO, these restrictions likely constitute an abuse of the DOSB’s and the IOC’s dominant position (as the athletes – who are performers at the games – do not profit directly from the very high advertising revenues generated by the official Olympic sponsors). The FCO is currently evaluating proposals by the DOSB and the IOC to reduce the scope of the restriction.

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5 CTS Eventim – the operator of Germany’s largest ticketing system (acting as the intermediary between event organisers and ticket offices) – had required organisers of live events to distribute the tickets for their events exclusively via CTS Eventim’s ticketing system, while at the same time requiring ticket offices to source tickets only from the same system. In its decision, the FCO took account of CTS Eventim’s significant market share, but also applied the newly introduced criteria for the assessment of a company’s dominance on multisided platform markets under Section 18(3a) ARC (see FCO decision of 4 December 2017, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/04_12_2017_CTS_Exklusivit%C3%A4t.html?nn=3591568).


7 Most online cases were dealt with under Article 101 of the TFEU and its German equivalent Section 1 of the ARC (prohibiting anticompetitive agreements). However, in the *HRS hotel portal* case, the FCO held that a best-price clause requested by HRS from hotels listed on its platform also violated Sections 19 and 20 of the ARC (abuse of dominance). Given the violation of Article 101 of the TFEU and Section 1 of the ARC, the Düsseldorf Court of Appeal ultimately left open whether the best-price clause also infringed Sections 19 and 20 ARC (judgment of 9 January 2015, case VI – Kart 1/14 (V)).

8 According to the FCO’s preliminary assessment, Facebook’s terms of service violate data protection law as they allow Facebook to collect user data from third-party sources. Given Facebook’s perceived dominant position on the German market for social networks, this illicit use of contractual provisions in relation to its users might also constitute an exploitative abuse of terms and conditions under antitrust law (see the FCO’s background paper of 19 December 2017, available at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=5).

The FCO carried out several sectoral investigations in industries with arguably oligopolistic structures in which it suspected structural problems. These sector inquiries were often followed by individual investigations against specific companies with respect to specific conduct.\(^{10}\)

Recently, the FCO has focused on the internet and food retail sectors. Since May 2011, the FCO has published nine reports on investigations into different sectors, of which seven specifically deal with (possible) abuses of market power (district heating, milk, fuel retail, wholesale fuel, food retail, the sub-metering and billing of heating and water consumption, and cement and ready-mixed concrete).\(^{11}\) For instance, the FCO found in its most recent report (published on 24 July 2017) that the German markets for cement and ready-mixed concrete are highly concentrated with few suppliers and a high degree of market transparency. In its earlier report on the market for sub-metering and billing of heating and water (published on 4 May 2017), the FCO found that this sector is not only highly concentrated, but is basically dominated by only two major players.\(^{12}\) In 2016, the FCO initiated two new sector inquiries into the hospital services (in May 2016)\(^{13}\) and household waste management (in December 2016) sectors.\(^{14}\) However, it is still not clear to what extent the FCO will focus on potential abuses of market power in these new sector inquiries.\(^{15}\)

The following tables list the significant cases and decisions dealing with abuse of a dominant position adopted by the FCO in 2016 and 2017, and important ongoing proceedings.\(^{16}\)

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\(^{10}\) Arguably, this process limits the defence rights of companies subject to the subsequent antitrust proceedings, as they are obliged to respond to the sector inquiry without knowing the specific allegations that will be brought against them later on.

\(^{11}\) English summaries of some of the FCO’s sector inquiry reports are available at www.bundeskartellamt.de/EN/AboutUs/Publications/Sectorinquiries/sectorinquiries_node.html.

\(^{12}\) According to the FCO’s report, it found considerable evidence of an oligopoly with no internal competition consisting of, at least, the two market leaders in Germany, but probably also five other large suppliers: see the FCO’s report of 5 May 2017, available in German only at: www.bundeskartellamt.de/SharedDocs/Publikation/DE/Sektoruntersuchungen/Sektoruntersuchung%20Submetering.pdf?__blob=publicationFile&v=3; and the FCO’s press release of the same day, available in English at: www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/04_05_2017_SektoruntersuchungSubmetering.html?nn=3591568.


\(^{15}\) In October 2017, the FCO initiated another sector inquiry into online price comparison websites, focusing on websites comparing travel, insurance, financial, services, telecommunications, and energy offers (see the FCO’s press release of 24 October 2017, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/24_10_2017_Vergleichsportale.html?nn=3591568). This sector inquiry was initiated based on the FCO’s recently added power to investigate systematic infringements of consumer protection laws under new Section 32e(5) ARC. It is not clear so far whether the FCO will also investigate potential dominance issues.

\(^{16}\) A comprehensive list of the FCO’s past dominance cases is available on the FCO’s website in German only at www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Entscheidungssuche_Formular.html?nn=3589936&cl2Categories_Format=Entscheidungen&gtp=3598628_list%253D2&cl2Categories_Arbeitsbereich=Missbrauchsaufsicht&docId=3590026.
### 2017 FCO decisions

<table>
<thead>
<tr>
<th>Sector</th>
<th>Company</th>
<th>Conduct</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ticketing systems</td>
<td>CTS Eventim</td>
<td>Exclusivity agreements with ticket offices and event organisers</td>
<td>No fine; prohibition decision</td>
</tr>
<tr>
<td>Dairy products</td>
<td>Deutsche Milchkontor eG</td>
<td>Exclusive supply agreements for unpasteurised milk and ex-post determination of milk prices</td>
<td>No fine, case closed*</td>
</tr>
<tr>
<td>Ticket sales</td>
<td>Deutscher Fußball-Bund</td>
<td>Bundling ticket sales for football matches (European football championship 2016) to members of the German Soccer Association (DFB) fan club</td>
<td>No fine; case closed†</td>
</tr>
<tr>
<td>District heating</td>
<td>innogy</td>
<td>Excessive pricing</td>
<td>No fine; case settled</td>
</tr>
<tr>
<td>District heating</td>
<td>Danpower</td>
<td>Excessive pricing</td>
<td>No fine; case settled</td>
</tr>
<tr>
<td>Audiobooks</td>
<td>Audible/Amazon/Apple</td>
<td>Exclusive distribution agreement between Apple’s iTunes Store and Audible</td>
<td>No fine</td>
</tr>
</tbody>
</table>

* The FCO did not issue a settlement decision, but dropped its proceedings after Deutsche Milchkontor eG changed its supply conditions in reaction to the FCO’s investigation. See FCO press release of 9 January 2018, available in English at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/09_01_2018_Milch_Einstellung.html;jsessionid=21AEFEAD798B0B351D5BF508C17C14D2.2_cid362?nn=3591568.
† The FCO investigated the DFB for abusing its dominant position regarding the allocation of the German ticket quota for the 2018 soccer world cup because the DFB intended to sell tickets only to its own members who had to pay an annual membership fee of €40. While the FCO considered that this behaviour could be justified, at least in part, by security considerations (effectively preventing ticket sales to known hooligans), the DFB nonetheless committed to introduce a short-time membership at a reduced fee. Against this background, the FCO dropped its investigation.

### 2016 FCO decisions

<table>
<thead>
<tr>
<th>Sector</th>
<th>Company</th>
<th>Conduct</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ticket resale</td>
<td>Deutsche Bahn</td>
<td>Limitation of competitors’ access to Deutsche Bahn’s ticket sales channels</td>
<td>No fine; case settled</td>
</tr>
<tr>
<td>Lease of mounting surfaces for the installation of FM antennas</td>
<td>Deutsche Funkturm</td>
<td>Discriminating pricing structure</td>
<td>No fine; case closed*</td>
</tr>
</tbody>
</table>

* The FCO did not issue a settlement decision, but dropped its proceedings after Deutsche Funkturm changed its allegedly problematic pricing and contractual terms. See FCO press release of 21 December, 2016, available in German only at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/21_12_2016_Deutsche%20Funkturm.html?nn=3591568.

### Ongoing cases

<table>
<thead>
<tr>
<th>Sector</th>
<th>Company</th>
<th>Conduct</th>
<th>Case opened*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sport federations</td>
<td>IOC and DOSB</td>
<td>Exploitation of athletes (advertising restrictions)</td>
<td>December 2017</td>
</tr>
<tr>
<td>Social networks</td>
<td>Facebook</td>
<td>Potential abuse in social networks by infringing data protection rules</td>
<td>March 2016</td>
</tr>
</tbody>
</table>

* These are the dates on which the authority opened its investigation (where known) or announced that it had opened an investigation.

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17 In addition to the listed cases, where the FCO initiated proceedings, the FCO further intervened against furniture retailer XXXLutz for requesting unjustified ‘wedding’ (post-merger) rebates, albeit without launching a formal investigation. The FCO dropped its proceedings after XXXLutz committed to stop demanding such rebates, see the FCO’s press release of 11 January 2018, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/11_01_2018_Moebel_Hochzeitsrabatte.html?sessionid=20D2BFFFFB2E0D1EB3D04360940ACCDFB.2_cid387?nn=3591568.
In addition to the FCO’s enforcement activities, the German legislator recently passed a ninth amendment to the ARC (Ninth ARC Amendment), which entered into force on 9 June 2017. The amendment includes – among other substantive changes to the ARC, in particular regarding the enforcement of cartel damage claims (as required by the EU Damages Directive) – some changes and additions regarding the ARC sections governing unilateral conduct. These largely editorial changes mostly seek to clarify unsettled legal questions, but also implement previous case law. For instance, the amendment introduced new rules regarding the assessment of dominance on multisided markets and dominant purchasers.

Some of these legislative changes are described in the following sections along with further important case law and other developments.

III MARKET DEFINITION AND MARKET POWER

There are two slightly different concepts of market power in German antitrust law. While the assessment of ‘absolute’ single or collective dominance typically requires a detailed market analysis (of market definition as well as of market power), the assessment of ‘relative’ market power focuses more on a comparison of market power between larger and small and medium-sized companies as trading partners or competitors. Generally, the FCO and the German courts continue to place considerable importance on market shares and have only slowly started to adopt the more sophisticated economic analyses used by the EU Commission.

i Market definition

In defining relevant product markets, the FCO primarily analyses the substitutability of goods and services from a demand-side perspective based on the intended use, characteristics and price of the relevant products. In some cases, the FCO also refers to the ‘small but significant and non-transitory increase in price’ (SSNIP) test as an additional, but not the only or the principal, criterion for market definition. The concept of supply-side substitution (i.e., other manufacturers being able and willing to adjust their production within a short time and without significant cost) is also relevant under appropriate circumstances.

Demand-side substitutability is also the principal basis for defining the relevant geographic market. As under EU law, it comprises the area in which the enterprises concerned compete, in which the conditions of competition are sufficiently homogeneous, and which can be distinguished from neighbouring areas because of appreciably different competitive conditions.

18 2014/104/EU.
19 For example, FCO, decision of 12 December 2003, case B9-60211-Fa-91/03 – ÖPNV-Hannover; decision of 2 July 2008, case B2-359/07 – Loose/Poelmeyer; Federal Court, decision of 4 March 2008, case KVR 21/07 – Soda-Club II.
20 For example, Federal Court, decision of 16 January 2007, case KVR 12/06 – National Geographic II. Specifically with respect to retail markets, the usual product range of a retailer may constitute a single market (‘portfolio market’).
21 Federal Court, decision of 5 October 2004, case KVR 14/03 – Melitta/Schultink.
In practice, *ex post* behavioural enforcement tends to take a somewhat narrower view on market definition than merger control, given that the perspective of specific customers or competitors potentially harmed by the conduct at issue can sometimes influence the assessment.

As part of the Ninth ARC Amendment, the German legislator has now clarified that a relevant market may be found even if the relevant services are rendered free of charge.\(^\text{22}\)

### ii Dominance

As previously noted, German antitrust rules on unilateral conduct apply to companies in a position of single or joint dominance, and to companies enjoying ‘relative’ market power over small and medium-sized companies. Section 18 of the ARC defines single and collective dominance.

#### Single dominance

According to Section 18(1) of the ARC, single dominance exists if a company is without competitors, not exposed to significant competition or in a ‘superior market position’ as compared with its competitors (which can exist even if there is significant competition in the market). According to the FCO’s merger control guidelines (the principles of which can also be applied in the antitrust area), single dominance exists where the market power of an enterprise enables it to act without sufficient constraints from its competitors (i.e., a situation in which an enterprise is able to act to an appreciable extent independently of its competitors, customers, suppliers and, ultimately, the final consumers).\(^\text{23}\)

Section 18(3) of the ARC lists the following criteria that may in particular be taken into account for the assessment of whether a company is in a ‘superior market position’:

- the enterprise’s market share;
- its financial resources;
- its access to input supplies or downstream markets;
- its affiliations with or links to other enterprises;
- legal or factual barriers to market entry;
- actual or potential competition by domestic or foreign enterprises;
- its ability to shift its supply or demand to other products; and
- the ability of the enterprise’s customers or suppliers to switch to other enterprises.

In practice, the FCO and the German courts tend to focus on whether an enterprise has sufficient market power to determine the most important business parameters. A somewhat static appraisal of market shares (both in absolute and relative – compared to competitors – terms) is still the most important factor. The rebuttable market share-based presumption pursuant to Section 18(4) of the ARC provides an important first indication of possible

\(^{22}\) See newly introduced Section 18(2a) ARC.

dominance where the market share of a company exceeds 40 per cent. While not impossible, it is often difficult in practice to rebut the presumption with economic arguments, especially in the case of high market shares substantially above the presumption threshold. This is notably because German law expressly stipulates that a dominant position can be based on a ‘superior’ market position, even if the company concerned faces significant competition from its rivals.

In line with the FCO’s recent focus on digital markets, the German legislator has introduced additional criteria for the assessment of market power in multisided markets and networks as part of the Ninth ARC Amendment. According to the newly introduced Section 18(3a) ARC, in particular the following criteria must be taken into account when assessing a company’s market position on multisided and network markets:

- a) direct and indirect network effects;
- b) the parallel use of more than one service and the difficulties faced by users in switching services;
- c) economies of scale in connection with network effects;
- d) the company’s access to data relevant for competition; and
- e) competitive pressure driven by innovation.

Collective dominance

According to Section 18(5) of the ARC, collective dominance exists where there is no substantial competition between the two or more largest companies in a market and where they jointly are not constrained sufficiently by competition from third parties. Pursuant to the FCO’s merger control guidelines, collective dominance is defined as a few companies in an oligopolistic setting engaging in tacit coordination or collusion with the result that they effectively do not compete with each other.

Section 18(6) of the ARC also provides for market share-based legal presumptions for collective dominance. Thus, three or fewer companies are presumed to be collectively dominant if they have a market share of at least 50 per cent; and five or fewer companies are presumed to be collectively dominant if they have a market share of at least two-thirds. These presumptions are rebuttable, and the companies can show that substantial competition exists between them individually or that they are jointly sufficiently constrained by outsiders or customers.

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24 Dominance may also (exceptionally) be found to exist if the market share remains below the presumption threshold.

25 The FCO already applied these additional criteria in its decision against German ticketing system operator CTS Eventim, finding that it enjoyed a dominant position in relation to event organisers and ticket offices on the two-sided platform market for ticketing services in Germany (see FCO decision of 4 December 2017, available at https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/04_12_2017_CTS_Exklusivit%C3%A4t.html?nn=3591568). The new criteria should also become relevant in the FCO’s current proceedings against Facebook. According to a background paper published by the FCO with respect to its ongoing investigation (available on the FCO’s website), the FCO intends to take into account in particular Facebook’s access to the personal, i.e., competitively relevant, data of users to determine the company’s dominance on the German market for social networks.

26 FCO, Guidance on Substantive Merger Control of 29 March 2012, paragraph 81.
The FCO and the German courts generally employ the criteria established by the EU General Court in *Airtours v. Commission*\(^{27}\) in determining collective dominance (albeit in a somewhat modified form).\(^{28}\) However, until recently, there had not been a case where companies had been considered to be in a collective dominant position in the context of abuse proceedings.\(^{29}\)

In June 2015, the German Federal Court dealt with the first case in which a possible abuse of a collective dominant position was at issue.\(^{30}\) While the lower Stuttgart District Court found that the defendant, a public broadcasting company, did not hold a single dominant position, as it did not – by itself – have a superior market position compared with the private broadcasting companies,\(^{31}\) it found the defendant to have a collective dominant position together with the remaining public broadcasting companies, because there was no competition between the public broadcasters because of their strong commonality of interests, and all public broadcasting companies would – together – hold a superior market position\(^{32}\) compared with the private broadcasting companies. The Court found that public broadcasting companies had a ‘must-carry status’ as input providers for broadband cable providers, as turning to private broadcasters only was not a viable alternative. On appeal, the Stuttgart Court of Appeals left open whether the public broadcasting companies held a collective dominant position because it considered that there had not been an abuse in any event. The Federal Court, upon further appeal, simply referred to the defendant’s must-carry status, and thus considered it dominant on the market for input for cable television providers without elaborating on the distinction between single and joint dominance.\(^{33}\)

### ‘Relative’ dominance

As noted above, going beyond the scope of Article 102 of the TFEU, the ARC prohibits exclusionary (and discriminatory) conduct not only by companies that are dominant in ‘absolute’ terms, but also by companies on which ‘small or medium-sized companies depend’ as suppliers or purchasers of certain kinds of goods or commercial services,\(^{34}\) and by companies enjoying ‘stronger market power in comparison to their small and medium-sized competitors’.\(^{35}\) The prohibitions aim at protecting small and medium-sized companies against anticompetitive conduct by their larger competitors or trading partners.\(^{36}\)

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28 For example, Federal Court, decision of 11 November 2008, case KVR 60/07 – E.ON/Stadtwerke Eschwege, decision of 20 April 2010, case KVR 1/09 – Phonak/GN Store.
29 In contrast, collective dominant positions were held to exist in several merger control cases.
30 Stuttgart Court of Appeals, judgment of 21 November 2013, case 2 U 46/13.
31 Stuttgart District Court, judgment of 20 March 2013, case 11 O 215/12.
32 The term ‘superior market position’ is part of the legal definition of dominance pursuant to Section 18 of the ARC and must not be confused with the term ‘stronger market power’ pursuant to Section 20 of the ARC (see below).
33 Federal Court, judgment of 16 June 2015, case KZR 83/13, paragraph 46; see also judgment of 16 June 2015, case KZR 3/14, paragraph 45.
34 Section 20(1) of the ARC.
35 Section 20(3) of the ARC.
36 The German Federal Court recently passed an interesting judgment regarding the characterisation of retailers as small or medium-sized companies in relation to suitcase manufacturer Rimowa, see Federal Court, judgment of 12 December 2017, case KZR 50/15.
The prohibition on discrimination or unreasonable obstruction for ‘relatively’ dominant enterprises towards dependent companies is primarily designed to address buyer power in the (food) retail trade. Thus, Section 20(1) Second Sentence of the ARC establishes a presumption of dependency if a purchaser of goods frequently receives rebates or similar bonuses from its suppliers that go beyond customary rebates. The protection of small and medium-sized competitors against exclusionary conduct of competitors with ‘stronger market power’ is also principally targeted at retail markets (food, petrol, etc.). An example of prohibited exclusionary conduct is frequent pricing below cost. In the food sector, pricing below cost (by food retailers) even in a single instance is prohibited. Note that the ARC does not precisely define the concept of small and medium-sized companies that enjoy protection under these rules. The concept is generally understood to be turnover-related, but there are no specific turnover ‘thresholds’, and the amounts can differ from industry to industry.

IV ABUSE

i Overview

Section 19(1) of the ARC contains a general prohibition of the abuse of a dominant position. Sections 19 and 20 of the ARC contain non-exhaustive examples of specific types of abusive conduct. Section 20(2) of the ARC extends the prohibition of exclusionary and discriminatory conduct to companies on which small or medium-sized companies depend, and Section 20(3) of the ARC prohibits exclusionary conduct by companies that enjoy superior market power compared with their small and medium-sized competitors.

The most significant specific types of abuse are discussed below (see Section IV, ii to iv). There are no *per se* abuses, as all relevant unilateral conduct may, at least in principle, be justified by means of a comprehensive analysis of all relevant circumstances and a balancing of the conflicting interests. As a practical matter, however, once the FCO has concluded that the type of conduct at issue is generally abusive, it will not conduct an in-depth economic effects analysis. Instead, it is – according to Section 20(4) of the ARC – up to the companies concerned to demonstrate an objective justification for their conduct (e.g., cost efficiencies as justification for rebates).

ii Exclusionary abuses

German antitrust law prohibits exclusionary conduct, including predatory pricing, and notably offers below cost. Section 20(3) ARC now lays out how to calculate cost. The (somewhat dated) FCO notice on below-cost pricing provides further guidance.

37 Section 20(3) of the ARC.

38 In 2014, the Frankfurt District Court (judgment of 18 June 2014, case 2-03 O 158/13) found that Deuter, a German manufacturer of outdoor backpacks, had a ‘powerful market position’ and therefore held a position of relative dominance pursuant Section 20(2) of the ARC, because Deuter had apparently claimed to be the ‘European leader in functional backpacks’ and had not contested the allegation of being dominant during the court proceedings. The judgment does not contain any further discussion of why Deuter was found to be dominant. Upon appeal, the Frankfurt Court of Appeals merely found that the fact that Deuter was ‘relatively dominant’ had not been disputed in the proceedings (judgment of 22 December 2015, case 11 U 84/14 (Kart).

39 See footnote 3.
Another form of exclusionary abuse is exclusive dealing, including strategies such as exclusivity or loyalty rebates. As a general rule, dominant companies may not grant rebates that create an incentive for customers to purchase their entire, or almost-entire, demand for the products or services at issue from the dominant enterprise.

In November 2015, the FCO initiated proceedings in this regard against Apple and Amazon’s subsidiary Audible.com. They had entered into an exclusive long-term agreement regarding Apple’s purchase of digital audiobooks from Audible for resale on the iTunes store.\(^40\) The FCO has meanwhile closed these proceedings.\(^41\)

German antitrust law also prohibits leveraging a dominant position, such as through contractual or economic tying and bundling. Case law is scarce here, and the German practice is similar to the EU practice.

An abuse may also occur if a dominant enterprise refuses to grant another enterprise access to its networks or other infrastructure for a reasonable fee if it is impossible for the other enterprise, for legal or practical reasons, to be active on the upstream or downstream market as a competitor of the dominant enterprise (essential facility).\(^42\)

Upon referral from the Düsseldorf District Court, the ECJ has specified certain perceived discrepancies between German case law and the position that the European Commission took on the conditions under which the holders of standard essential patents may seek an injunction against users of their standard essential patents without committing an abuse (the underlying case is now again pending at the Düsseldorf District Court).\(^43\)

In May 2016, the FCO closed its investigation into a potential abuse of a dominant position in the provision of train station services by state-owned railroad operator Deutsche Bahn AG (DB)\(^44\) after DB had committed, \textit{inter alia}, to sell competitors’ tickets in DB shops and to permit competitors to install ticket machines in train stations.\(^45\)

### iii Discrimination

Section 19(2) No. 1 of the ARC prohibits discrimination (i.e., treating an undertaking, directly or indirectly, differently from other similar undertakings without any objective justification).

After the German legislator introduced an ancillary copyright for news publishers in 2013, the collecting society VG Media (representing several German news publishers) adopted a new tariff for the use of news publishers’ online content and raised monetary claims against Google for the display by Google of small text excerpts (‘snippets’) from their websites. Google refused to pay, and announced it would discontinue the display of snippets from VG Media members unless they agreed to the display of their snippets without payment. VG


\(^{42}\) See, in particular, Federal Court, decision of 11 December 2012, case KVR 7/12 – Puttgarten/German ferry terminal for further details. The case was referred back and remains pending before the Düsseldorf Court of Appeal.

\(^{43}\) ECJ, judgment of 16 July 2015, case C-170/13 – Huawei/ZTE.

\(^{44}\) The FCO in particular examined whether DB had abusively charged higher commissions to competitors than to its own subsidiaries for selling tickets.

Media filed a complaint with the FCO, arguing that Google abused its allegedly dominant position by refusing to pay for the display of snippets. The FCO informally rejected the complaint in August 2014,\(^{46}\) and issued a formal rejection decision in September 2015\(^{47}\) holding that Google did not engage in discriminatory conduct. In particular, the FCO considered Google’s conduct justified by its interest to preserve its business model and to reduce the risk of liability for damages. These interests would outweigh those of VG Media.

### iv Exploitative abuses

Section 19(2) No. 2 of the ARC prohibits exploitative abuses, notably ‘imposing prices or other trading conditions that differ from those likely to exist on a market with effective competition’. To determine whether prices are excessive, the FCO and the German courts follow the EU law approach of comparing the dominant company’s prices with prices charged on comparable markets with functioning competition, its competitors’ prices and the dominant company’s costs. The FCO followed this approach, for instance, in its recently concluded proceedings against suppliers of district heating, where it compared the average revenues that several suppliers of district heating had generated throughout a certain period of time in different regions and found that the revenues of certain suppliers were significantly higher than those of suppliers in comparable markets. Based on this comparison, the FCO concluded, at least preliminarily,\(^{48}\) that these suppliers had engaged in excessive pricing. These proceedings were initiated based on the FCO’s earlier sector inquiry into the district heating sector in which the FCO had identified significant differences in revenues of district heating.\(^{49}\)

In another recent abuse case concerning the food retailer EDEKA, the FCO found that EDEKA had abused its dominant position (according to Section 19(2) No. 5 ARC) by urging its suppliers to grant EDEKA certain commercial benefits (sometimes called ‘wedding rebates’) after its acquisition of retailer PLUS.\(^{50}\) While the Düsseldorf Court of Appeal considered the rebates to have resulted from negotiations between parties with approximately

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\(^{48}\) In most cases, the FCO adopted commitment decisions (and in some cases, the FCO closed the proceedings without a decision, as it did not find its initial suspicions confirmed by the results of its investigations). As there were therefore no final non-commitment decisions in this case, the FCO was able to leave several legal questions ultimately open.

\(^{49}\) The FCO in particular found that this conduct not only had negative effects on the suppliers, but also on smaller competing retailers from whom the suppliers might try to recover the rebates (‘waterbed effect’). See FCO, decision of 13 February 2017, case B8-30/13, paragraphs 28 et seq. – innogy; decision of 13 February 2017, case B8-31/13, paragraphs 33 et seq. – Datapower. A press release concerning both cases is available in English at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/14_02_2017_Fernw%C3%A4rme.html?nn=3591568.

equal negotiation power, the Federal Court reinstated key aspects of the FCO’s decision, and found that Edeka’s retroactive ‘cherry picking’ of rebates granted to itself or PLUS was abusive.

Since the Ninth ARC Amendment abolished the previously required causal link between the grant of the advantage and the exploitation of a dominant position from Section 19(2) No. 5 ARC, the FCO should find it easier to establish an abuse by a dominant purchaser. In this respect, the FCO already intervened against furniture retailer XXXLutz for requesting unjustified wedding rebates (XXXLutz asked suppliers to retroactively grant discounts to purchases that Möbel Buhl had made before it had been acquired by XXXLutz) from its suppliers. The FCO did not launch a formal investigation, but closed the file after XXXLutz committed to stop demanding such rebates.

An exploitative abuse may not only concern pricing, but also the use of certain contractual terms and conditions by a dominant company can be exploitative under Section 19(1) or 19(2) No.2 ARC. The FCO intends to also use this theory of harm in its current proceedings against Facebook: it considers that it is abusive under Section 19(1) ARC that Facebook, in its alleged dominant position on the German market for social networks, not only imposes contractual clauses on its users that violate the data protection law, but also invokes these clauses to collect these user’s data (from third-party websites).

V REMEDIES AND SANCTIONS

i Sanctions

Persons or entities that participated in an infringement of antitrust law or violated an FCO decision can be fined within the framework of an administrative offence procedure. German antitrust law is different from EU law in this respect, insofar as the FCO in principle needs to identify one or more individuals (who will likely also be fined, albeit more moderate amounts) who have committed the infringement and then attribute their behaviour to the legal entity they represented in order to also impose a fine on that entity.

Parental liability

As a consequence, it has been difficult for the FCO to fine a parent company for infringements committed by employees of its subsidiaries, as it needed to find either that employees of the parent company were involved in the misconduct or that parent company employees neglected their supervisory duties. However, Section 81 Paragraphs 3a–3e, introduced by the German legislator as part of the Ninth ARC Amendment to the ARC, now establish a principle of parental liability that is – eventually – similar to EU competition law, as it introduces strict liability for controlling group companies. Accordingly, the FCO may now

51 Düsseldorf Court of Appeal, decision of 18 November 2015, case VI-Kart 6/14 (V).
52 The Federal Court considered it abusive under Section 19(1) ARC if a dominant enterprise invokes terms and conditions that are invalid under civil law. Such conduct is in particular abusive if the clause in question had only been accepted because of the companies dominance, see FCJ, judgment of January 24, 2017, case KZR 47/14 – VBL Gegenwert II, paragraph 35.
53 See the FCO’s background paper on the Facebook investigation of 19 December 2017, available in German only at https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=5.
hold a parent company (jointly and severally) liable for fines that were imposed because of a subsidiary's infringement even if the parent company did not participate in the infringement or violate any supervisory duties with respect to the subsidiary.\textsuperscript{54}

**Legal successor liability**

According to Section 30(2a) of the Administrative Offences Act, legal successor entities (i.e., entities resulting from corporate transformations) are liable for their predecessor’s fines. This regulation was introduced in 2013 to close an important enforcement gap under the previous rules.\textsuperscript{55} In addition, the German legislator has also now introduced a provision regarding legal successor liability (outside of the universal succession addressed by the Administrative Offences Act) in the ARC in order to close the ‘sausage gap’.\textsuperscript{56} According to the newly introduced Section 81a (covering the singular succession), cartel fines may be imposed on an enterprise taking over the business of an enterprise that committed an infringement (provided that the infringing enterprise has ceased to exist (legally or economically) and the purchaser continued the business).

**Maximum fine**

The maximum fines amount to €1 million for an individual and 10 per cent of the consolidated group turnover for a legal entity.\textsuperscript{57}

In June 2013, the FCO published its current fining guidelines. Contrary to the previous guidelines, which were fairly similar to the European Commission's 2006 guidelines,\textsuperscript{58} the new guidelines deviate significantly from the Commission's guidelines.\textsuperscript{59}

According to the current guidelines, the 10 per cent maximum for a fine on a company should not be considered a cap limiting a fine calculated independently of the relevant

\textsuperscript{54} Several German commentators have severely criticised this new rule. They argue that the new rule violates the constitutional principle of fault, as a legal entity may be held liable without any culpable behaviour of its own or of its bodies. Therefore, litigation on this issue may be expected over the following years.

\textsuperscript{55} Under the old rules, liability for fines was – in principle – limited to the specific legal entity that had committed the infringement and did not extend to new legal entities resulting from corporate transformations, such as corporate mergers. This gap had been used by several companies to avoid fines through corporate restructurings. However, according to the Federal Court's case law, a legal successor can also be held liable under the old rules (which remain applicable to conduct that occurred prior to the change in law) if – from an economic perspective – the legal successor's assets were (nearly) identical with those of the legal entity that committed the infringement. In this context, the Düsseldorf Court of Appeal recently confirmed a fine imposed by the FCO on a German coffee roaster (judgment of 10 February 2014, case V-4 Kart 5/11 (OWi)).

\textsuperscript{56} German sausage producer Tönnies had effectively used remaining legal loopholes to avoid fines for its participation in the Sausage cartel by conducting internal restructuring measures.

\textsuperscript{57} Section 81(4) of the ARC.

\textsuperscript{58} According to the previous guidelines, the FCO first determined a basic amount of the fine, taking into account the gravity as well as the duration of the infringement, and then adjusted the basic amount by a deterrence factor, reflecting aggravating and mitigating circumstances.

\textsuperscript{59} This was in particular because of a decision of the Federal Court of Justice (judgment of 26 February 2013, case KRB 20/12 – Zementkartell). The current FCO fining guidelines are available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3.
company’s turnover that could otherwise be higher (as is the case under EU law), but rather the upper limit of the fining scale, which should, thus, be applied only in cases of the most extreme hard-core infringements.

Pursuant to the fining guidelines, the FCO first determines the basic amount of the fine, which is 10 per cent of the group’s relevant turnover achieved with the products or services related to the infringement for the period during which the infringement was ongoing. In a second step, this initial amount is multiplied depending on the size of the group by a factor between two and six, or even higher in cases where the group’s turnover exceeds €100 billion. The resulting basic amount may then be adjusted in a third step for mitigating or aggravating circumstances.

To date, the FCO has imposed fines applying the new guidelines in several cartel proceedings as well as in proceedings concerning vertical proceedings against mattress manufacturers. In addition, the FCO also based a (relatively small) fine in a dominance case concerning a producer of carbon dioxide cartridges for soda water preparation on the new guidelines. The FCO has stated that the new guidelines would also apply to infringements that took place prior to the adoption of the new guidelines.

Collecting benefits of infringement

German administrative offence law allows the FCO also to collect proceeds derived from an infringement, either in separate administrative proceedings or by determining a fine that reflects such proceeds (in which case the total fine may exceed the 10 per cent maximum).

ii Behavioural remedies

Sections 32 to 34 of the ARC allow for behavioural remedies. Thus, the FCO may impose all measures necessary to bring an infringement effectively to an end and that are proportionate to the infringement. This includes the right to impose measures that require action by the infringer. Section 32a of the ARC allows the FCO to impose interim measures in cases of urgency if there is a risk of serious and irreparable damage to competition. Such measures should, however, not last longer than one year.

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60 The proceedings concerned rail manufacturers, breweries, sausage manufacturers, manufacturers of concrete paving stones, providers of specialist mining services, automotive parts producers, providers of container transport services, manufacturers of prefabricated garages, and a customer allocation proceeding concerning certain services provided in power plants.


For instance, the FCO has ordered hotel online booking platforms HRS\textsuperscript{64} and Booking.com\textsuperscript{65} to delete best-price clauses from their contracts with hotel partners.\textsuperscript{66}

### Structural remedies

Section 32(2) of the ARC provides for the possibility of structural remedies, including divestitures (unbundling) of companies; however, structural remedies are subject to a strict proportionality test and may only be applied where behavioural remedies would be insufficient to remedy the infringement. To date, the FCO has not imposed any structural remedies in abuse cases.

### VI PROCEDURE

In administrative proceedings, the FCO carries out investigations to decide whether to issue a prohibition decision and, if appropriate, a fine. Such decisions can be taken simultaneously or consecutively, and both are subject to judicial review of the facts and the law by the Düsseldorf Court of Appeal. The Court’s decisions can be further appealed – on points of law only – to the Federal Court. In practice, the courts indeed carry out an independent review of the cases brought before them. While they often side with the FCO, it is by no means rare that FCO decisions are overturned based on factual or legal errors of the FCO.

#### i Commencement of investigations and investigative powers

The FCO may commence investigations \textit{ex officio} or, and in practice more frequently, following complaints of third parties (e.g., competitors, customers or suppliers).\textsuperscript{67} The FCO may carry out informal discussions or send informal questionnaires. It can also take formal measures such as making information requests or, subject to a prior court order, conducting surprise inspections (dawn raids) in the course of which it can seize documents and electronic files.

#### ii Right to be heard

During all stages of an investigation, the enterprises investigated have the right to be heard. The FCO will usually serve a statement of objections before it issues a decision to which the company concerned may respond. The party concerned also has the right of access to the file, including digitally stored data and media.

#### iii Guidance

There is no formal procedure for obtaining guidance on individual cases, but the FCO is open to informal contacts and may provide informal guidance in this context.


\textsuperscript{66} The FCO’s proceedings against Expedia are still ongoing.

\textsuperscript{67} There is no formal complaint procedure, though, which means notably that complainants do not have a legal remedy against a rejection of their complaint.
iv Settlements
The FCO often ends proceedings by adopting commitment decisions, that is, by declaring remedies offered by the party concerned as binding. In light of the increasing importance of such settlements in German antitrust proceedings over the past few years, the FCO published a guidance paper on its settlement practice on 23 December 2013. Settlements have frequently been reached in hard-core cartel and vertical restraints cases (resale price maintenance, online impediments). In its guidance paper, the FCO notes that there is no regulatory framework for settlements, but that its power to conclude settlements derives from its discretion to pursue cases. A party to an investigation has no right to a settlement, but can of course suggest it to the FCO. A settlement does not require parties to commit not to appeal any fining decision included in the settlement; however, there are no cases where an enterprise would have actually appealed an administrative fine on which it had previously settled.

v Cooperation with other authorities
Cooperation between the FCO, the other national competition authorities and the European Commission takes place via the European Competition Network (ECN). This cooperation may involve exchanging information about cases and decisions, exchanging evidence and mutually assisting each other with investigations. For example, the FCO and ECN jointly published a monitoring report on developments in the German electricity and gas markets in 2015. The FCO has set up an internal coordination unit to represent the authority within the ECN. The FCO is also an active member of the International Competition Network (ICN), and the FCO’s President has chaired the ICN’s Steering Group since 2013.

VII PRIVATE ENFORCEMENT
Section 33 of the ARC provides an express legal basis for damage claims based on infringements of antitrust law. Following a significant increase in cartel-related follow-on damage litigation over recent years, damage actions or other types of litigation (e.g., requesting the termination of discriminatory conduct, access to a network or infrastructure) based on alleged restrictive unilateral conduct have also become fairly frequent. Unlike cartel damage cases, these actions often do not follow an investigation and decision by the FCO (or other competition authorities), but are brought on a stand-alone basis.

68 See, for instance the FCO’s recent commitment decisions regarding several operators of district heating networks that were alleged to have abused a dominant market position by charging excessive prices: decision of 13 February, 2017, case B8-30/13 – innogy; decision of 13 February, 2017, case B8-31/13 – Danpower; and decision of 15 October 2015, case B8-34/13 – Stadtwerke Leipzig. The FCO’s press releases regarding these cases are available in English at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/14_02_2017_Fernw%C3%A4rme.html?nn=3591568; and www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/16_10_2015_Stadtwerke_Leipzig.html?nn=3591568.

69 The guidance paper is available in German at www.bundeskartellamt.de/SharedDocs/Publikation/DE/Merkbl%C3%A4tter/Merkblatt-Settlement.pdf?__blob=publicationFile&v=2. In contrast to the EU settlement programme, under German law, settlements can also be concluded in cases other than those involving cartels, including dominance cases.
German law currently does not provide for class actions seeking damages.70 A practical way to consolidate damages claims of various victims of anticompetitive behaviour is to assign the claims to one party or institution, which then brings the lawsuit. In a case in which claims had been assigned to the company Cartel Damages Claims (CDC), the Düsseldorf District Court dismissed CDC's collective damages claims against various German cement manufacturers, holding that the assignments of the claims to CDC for the purpose of enforcing them in court were null and void in violation of public policy.71 Under German procedural rules, the defeated party in a court case has to pay the court fees and must reimburse the winning side for its costs. As CDC's special purpose vehicle for the enforcement of the claims was only minimally funded, it would not have been able to cover such costs had it lost the case. The fact that CDC did not bear any of the risks of losing the case was considered a violation of public policy. The Düsseldorf Court of Appeals affirmed the judgment.72 However, if properly funded, a company to which damage claims were assigned should be able to bring consolidated lawsuits. Of course, the decision means that entities bringing such claims must assume considerable financial risk (or have the assignors of the claims share such risk), which reduces the attractiveness of the scheme. To limit this financial risk, the Ninth ARC Amendment provides for a capped value of the claims resulting in limited fees (see new Section 89a(3)).73

In addition, consumer associations may bring actions on behalf of consumers, but only for injunctions, not for damages. Where a company has derived benefits from abusive or predatory conduct, the FCO, or, if the FCO has not done so, consumer associations, may in principle seek to collect such benefits on behalf of the state (private damage claims and fines imposed by the FCO already reducing such benefits are taken into account). In practice, however, such actions are very rare.

In the context of follow-on suits, German courts are legally bound by any (final) decision of the European Commission, the FCO or any other national competition authority in an EU Member State finding an infringement of EU antitrust law.74 The binding effect is, however, limited to the determination of the antitrust infringement, so causation and the amount of damages need to be established subject to the normal rules on the burden of proof in German court proceedings.75

VIII FUTURE DEVELOPMENTS

According to its President, Andreas Mundt, the FCO intends to continue to take a leading role among competition authorities with respect to the internet economy and in the e-commerce sector. The internet economy would be of primary interest for the FCO, as 'big data' is quickly becoming a source of market power (that may now be evaluated according

70 In December 2014, the EU Directive on Antitrust Damages Actions (2014/104/EU) came into effect. Member States had to implement the Directive in their national law by the end of 2016. In Germany, this Directive is being implemented by the Ninth ARC Amendment.

71 Düsseldorf District Court, judgment of 17 December 2013, case 37 O 200/09 – CDC.

72 Düsseldorf Court of Appeals, judgment of 18 February 2015, case VI U 3/14; CDC has not further appealed this decision.

73 In Germany, the court and legal fees in civil proceedings are determined based on the value of the claim.

74 Section 33b of the ARC (formerly, Section 33(4) of the ARC, changed by the Ninth ARC Amendment).

75 Munich Court of Appeals, judgment of 21 February 2013, case U 5006/11 Kart; Berlin District Court, judgment of 6 August 2013, case 16 O 193/11 Kart.
to the new criteria laid down in Section 18(3a) ARC. According to Mundt, it is essential for safeguarding competition that markets remain assailable. The FCO is thus currently investigating whether Facebook’s terms of use infringe data privacy laws, and whether such an infringement would be abusive under antitrust law (in this respect, it will be of particular interest whether the FCO will expand its investigation also to Facebook’s collection and use of user data on its own platform (the current investigation relates only to the collection and use of data from third-party sources).

Interestingly, the German legislator has also expanded the FCO’s competences in the area of consumer protection. The FCO may now in particular conduct sector inquiries if there is evidence of sustained, significant and repeated violations against consumer protection law in an industry (Section 32e(5) ARC). On that basis, the FCO has already launched its first sector inquiry focusing on the conduct of price comparison websites in the area of travel, insurance, financial services, telecommunications and energy.76 In addition, the FCO can now act as amicus curiae in court proceedings that concern such violations (Section 90(6) ARC).

In addition, the FCO is still working on a guidance paper on the control of abusive practices with respect to electricity generation (in cooperation with the Federal Network Agency). According to Mundt, the FCO wants to provide electricity producers with a higher level of legal certainty.77 The FCO can also be expected to take another stab at updating its notice on below-cost pricing to reflect the most recent amendment of the ARC in this regard.78

The Monopolies Commission recently repeated that it sees competitive deficits in the railway transportation, postal services and energy sectors. While the Monopoly Commission does not have enforcement or legislative powers, the FCO and the legislator take its view into account in their enforcement and legislative strategy and practice.

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77 See the FCO’s press release of 1 April 2016, available in German only at www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/01_04_2016_Fragebogen_Leitfaden_Stromerzeugung.html?nn=3590016.

78 See above and footnote 3.
I INTRODUCTION

The conduct of dominant enterprises is regulated by Section 4 of the Indian Competition Act 2002, as amended (Act). Section 4 prohibits the abuse of a dominant position by an enterprise or group. Notably, an abuse of a dominant position is prohibited, not dominance itself or the creation of dominance. The Act regulates the conduct of both private and public sector (state-owned) enterprises as well as departments of the government that engage in non-sovereign functions, across all sectors of the Indian economy.

From 20 May 2009 (the date Section 4 entered into effect), the Competition Commission of India (Commission) has enjoyed exclusive jurisdiction for the enforcement of Section 4 of the Act. Section 60 of the Act states that the provisions of the Act shall have effect notwithstanding any inconsistent provision of any other law currently in force. In addition, Section 62 clarifies that provisions of the Act will operate in addition to the other laws currently in force. In early 2018, the total strength of the Commission was reduced from seven members comprising one chairperson and six members, to four members comprising one chairperson and three members.

Under the Act, the Commission has wide powers of investigation and enforcement. When conducting investigations into alleged anticompetitive activities, the Commission is assisted by the office of the Director General (DG).

Appeals from the orders of the Commission must be filed with the Competition Appellate Tribunal (Compat), the appellate tribunal. In May 2017, the Compat was merged into the National Company Law Appellate Tribunal (Tribunal). The Supreme Court of India (Supreme Court) is the final appellate authority for all matters under the Act.

No formal policy statements in respect of Section 4 and its application have been made by the Commission to date, and the Commission’s decisions continue to remain the primary source of guidance for the application of Section 4.

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II YEAR IN REVIEW

During 2017 to 2018, the Commission adopted 10 decisions under Section 4 of the Act: four related to fresh hearings in the Coal India matters2 and the Board of Control for Cricket in India (BCCI).3 The other decisions included:

a Google;4

b Ghaziabad Development Authority (GDA);5

c DLF Limited (DLF);6

d MSEB Holding Company Limited (MSEB);7

e Ola Cabs8 and

f Wave Distilleries.9

The Commission found infringements in seven cases: the three Coal India matters, BCCI, Google, GDA and DLF. The most notable among these is Google, where the Commission levied fines on Google of 1.35 billion rupees for abusing its dominant position in the online general web search and web search advertising services markets in India in violation of the provisions of Sections 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Act. In the remaining cases, that is, MSEB, Ola Cabs and Wave Distilleries, the Commission found no infringement of Section 4 of the Act.

In another 14 cases involving claims of abuse of dominance, the Commission adopted a prima facie view under Section 26(1) of the Act directing the DG to investigate the complaints under Section 4 of the Act. Some of the important cases in which such orders have been rendered relate to the real estate sector (and involve state-owned builders and developers such as Delhi Development Authority (DDA)11 and Haryana Urban Development Authority (HUDA)), the broadcasting sector (where the Commission has directed two investigations against Prasar Bharti,12 which enjoys a monopoly position in providing infrastructure facilities

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3 Case No. 61/2010, In Re: Surinder Singh Barmi v. The Board of Control of Cricket in India.
5 Case No. 86/2016, In Re: Satyendra Singh v. Ghaziabad Development Authority.
6 Case No. 01/2014, In Re: Ashutosh Bharadwaj v. DLF Limited and Others.
7 Case No. 12/2014, In Re: Vidarbha Industries Association v. MSEB Holding Company Limited and others.
8 Case No. 6/2015, In Re: Fast Track Call Cab Pvt Ltd v. ANI Technologies Pvt Ltd; case No. 74/2015, In Re: Meru Travel Solutions Pvt Ltd v. ANI Technologies Pvt Ltd.
9 Case No. 47/2014, In Re: Duarekesh Sugar industries v. Wave Distilleries and Breweries Ltd and others.
10 Case No. 61/2010, In Re: Surinder Singh Barmi v. Board of Control for Cricket in India.
and licenses to FM Radio broadcasters); and one investigation against Star India Limited\textsuperscript{13} for unilaterally imposing unreasonably high licence fees for the distribution and subscription of its channels as compared to some of its competitors.

The Commission has, at the \textit{prima facie} stage, also rejected more than 40 complaints alleging abuse of dominance, including against companies operating in technology-driven markets, such as www.BookMyShow.com\textsuperscript{14} (an online ticket booking platform for films, dramas, etc.). The Commission has also rejected various miscellaneous complaints reportedly filed by industry associations representing online sellers alleging abusive conduct by online marketplaces such as www.amazon.in and www.flipkart.com.\textsuperscript{15}

In 2017 and 2018, prior to the merger of the Compat with the Tribunal, the Compat rendered some important decisions relating to Section 4 of the Act. The Compat upheld the Commission's decisions in the \textit{Coal India} appeal,\textsuperscript{16} \textit{Power Grid Corporation of India Limited (PGCIL)}\textsuperscript{17} and \textit{Dakshin Haryana Bijli Vitran Nigam (DHBVN)}.\textsuperscript{18} In the \textit{Coal India} appeal, the Compat upheld the Commission's findings that Coal India and its subsidiaries abused their undisputed dominance in the market for non-coking coal by imposing unfair terms on the bidders in the spot e-auction scheme. In \textit{DHBVN}, the Compat upheld the Commission's order under Section 26(2) and found that no case of contravention was made out (against DHBVN and others) as the fuel and power cost surcharge adjustment charged by DHBVN, as an electricity supplier, was based on the consumption of electricity. In \textit{PGCIL}, the Compat upheld the Commission's order under Section 26(2) and found that no case of contravention was made out (against PGCIL) as it was well within PGCIL's rights to stipulate a tender condition that only labs with National Accreditation Board for Testing and Calibration Laboratories accreditation will be used for testing the quality of construction materials used in PGCIL's sites. In two other cases, the \textit{DLF} appeal\textsuperscript{19} and \textit{Financial Software Services};\textsuperscript{20} there were no substantive findings on the merits of the cases. After the merger of the Compat with the Tribunal, the Tribunal has expeditiously disposed of a number of appeals against the Commission's decisions under Section 26(2) of the Act relating to Section 4 of the Act while upholding the Commission's findings.\textsuperscript{21}

\textsuperscript{13} Case No. 13/2017, \textit{In Re: Thiruvanthapuram Entertainment Network v. Star India Limited}.
\textsuperscript{14} Case No. 08/2016, \textit{In Re: Justickets Pvt Ltd v. Big Tree Entertainment Private Limited and others}.
\textsuperscript{16} Appeal No. 80/2014, \textit{Coal India Limited and another v. Competition Commission of India and others}; appeal No. 81/2014, \textit{Coal India Limited v. Competition Commission of India and others}.
\textsuperscript{17} Appeal No. 67/2016, \textit{Prem Prakash v. Competition Commission of India and another}.
\textsuperscript{18} Appeal No. 33/2016, \textit{Anand Parkash Agarwal v. Dakshin Haryana Bijli Vitran Nigam and others}.
\textsuperscript{19} Appeal No. 9/2017, \textit{DLF Home Developers Limited and Another v. Competition Commission of India}.
\textsuperscript{20} Appeal No. 70/2016, \textit{Financial Software & Systems Private Limited v. Competition Commission of India and others}.

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In the *Karnataka State Road Transport Corporation (KSRTC)* appeal,\(^{22}\) while the Tribunal upheld the Commission’s finding that KSRTC is a dominant entity that had not engaged in any abusive conduct, the Tribunal nevertheless set aside the directions issued by the Commission urging KSRTC to review in the larger public interest the issues that were the subject matter of the complaint. The Tribunal observed as follows:

*once the Commission came to a definite conclusion that the person holding [a] ‘dominant position’ has not abused its power and/or activities and its activities are not unfair and anti-competitive, in [the] absence of any specific evidence and finding, the Commission has no jurisdiction to issue any direction for the alleged prima facie case of contravention.*

The Supreme Court issued its first ever decision in *Kansan*,\(^{23}\) a case relating to Section 4 of the Act, where the Supreme Court clarified an important question of law relating to the application of the provisions of Section 4(2)(c) of the Act in relation to parties who are not in a competitive relationship. Importantly, the Supreme Court upheld the Commission’s findings on the merits of the case while overturning the findings of the Compat. The Supreme Court unfortunately limited its reasoning to the findings of the Compat without addressing the larger issue of whether there could be any competition-related rationale for a dominant firm to exclude a party that is not its actual or potential competitor, thereby exacerbating the concern raised by the Commission’s orders in the first *DLF* case: whether the Act’s substantive provisions can or should be invoked to address non-competition concerns. It may be recalled that DLF is arguably not a competition case at all, but rather a matter to be resolved under Indian consumer protection legislation.

### III MARKET DEFINITION AND MARKET POWER

Market definition and market power remain the starting point of every competition law assessment for determining dominance and the abuse of dominance by an enterprise.

#### i Relevant market

The Act defines ‘relevant product market’ as a market comprising all those products or services that are regarded as interchangeable or substitutable by the consumer by reason of characteristics of the products or services, their prices and intended use. The notion of ‘relevant geographic market’ is defined in the Act as a market comprising an area in which the conditions of competition for supply of goods or provision of services or demand for goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in neighbouring areas. The notion of ‘relevant market’ is defined by the Act as a market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market, or with reference to both the markets. In Section 19, the Act also identifies an exhaustive list of factors that the Commission must take into account in defining the relevant market.

\(^{22}\) Competition Appeal No. 6 of 2017, *Karnataka State Road Transport Corporation v. Sree Gajanana Motor Transport Company Limited and others*.

\(^{23}\) Civil Appeal No. 7215/2015, *Competition Commission of India v. M/s Fastway Transmission Pvt Ltd and others*. 

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In Google, the Commission defined two relevant product markets: the markets for online general web search services and online search advertising services. The Commission found that online general web search services constitute a distinct relevant product market that is not substitutable for the direct search option, which requires the users to type website URLs in internet browsers. In addition, because users may not be aware of the URLs of all websites that offer the information they are searching for, search engines become the first port of call for a user looking for information online. As a result, general web search services were a distinct market. While reviewing information in the DG’s report on online search advertising services, the Commission noted that online and offline advertising services are not comparable because:

a) online advertising is not substitutable with newspapers, radio or television for advertisers seeking to target user groups having limited internet access;

b) advertising rates are much lower for online advertising; and

c) online advertising allows users an accurate monitoring of the effectiveness of an advertisement in terms of actual views.

The Commission also found that search and non-search advertising are different because:

a) search advertising is used for demand fulfilment and non-search advertising is used for creating brand awareness; and

b) search and non-search advertising have different pricing factors: search advertising is priced based on cost-per-click and non-search advertising is priced based on cost-per-thousand impressions.

Based on these reasons, the Commission found that online search advertising services constituted a distinct market.

As regards the relevant geographic market, the Commission noted that the relevant geographic market for online general web search services and online search advertising services are national in scope. The Commission then concluded that the two relevant markets for a determination of dominance were the market for online general web search services in India and the market for online search advertising services in India.

In Coal India and BCCI, after hearing the parties once again (since these cases were sent back to the Commission by the Compat for a fresh review), the Commission reconfirmed the determination of abuse of dominance by Coal India and BCCI. In Coal India, consistent with its past practice, the Commission refused to consider global markets. In BCCI, the Commission identified the relevant market as the market for the organisation of professional domestic cricket leagues and events in India.

The market definitions adopted by the Commission in cases relating to the real estate sector continue to remain unpredictable because of the Commission’s inconsistent assessment. In contrast to the earlier DLF cases, where the Commission while defining the relevant market had classified residential apartments priced at 2 billion rupees (approximately) as high-end apartments, the Commission adopted an objective and price-neutral approach for defining the relevant market in the DLF case. In this case, where the residential apartments under scrutiny were priced in the range of 4 million to 6 million rupees, the Commission

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defined the relevant market as the market for the ‘provision of services for development/sale of residential apartments in Gurgaon’. This was consistent with the Commission's findings in DDA and HUDA where, for the purposes of forming a prima facie view, the Commission adopted a price-neutral and objective market definition. However, in GDA, the Commission has once again identified the relevant market (with reference to the pricing of the apartments) of low-cost residential flats under affordable housing schemes for economically weaker sections. This flip-flop by the Commission in defining relevant product markets in the real estate sector remains inexplicable, and there is little likelihood of achieving consistency until the Supreme Court decides the appeal before it in one of the DLF cases (where DLF already has deposited with the Court a fine of 6.30 billion rupees) and addresses this matter.

In Ola Cabs, the Commission identified the relevant market as the market for radio taxi services in Bengaluru (an Indian city) in assessing whether Ola Cabs engaged in predatory pricing by offering discounts to passengers and incentives to driver partners in contravention of the provisions of the Act.

In MSEB, which involved competitive conditions in the power sector, the Commission noted that electricity distribution services constituted a separate market in comparison to electricity generation, transmission and retail services. The Commission identified the electricity distribution services market as the relevant market in the state of Maharashtra (except in Mumbai).

Thus, even in 2017 and 2018, the Commission has continued to define India-wide and regional and local geographic markets. As previously stated, the definition of dominance restricts the Commission from defining global geographic markets, and the Commission expressly recognises this limitation in the Google case.

ii Dominance

In assessing dominance and market power in the relevant market, the Commission is required by Section 19 of the Act to assess dominance in the context of a broad range of non-exhaustive factors, including market share, size and resources of the enterprise in question, the size and importance of the competitors, vertical integration, entry barriers and the dependence of consumers on the allegedly dominant enterprise. The role and importance of each of these factors will vary on the facts of each case and the alleged theory of harm, but in its decisions, the Commission will assess dominance of an allegedly dominant enterprise under each of the Section 19 factors. Generally speaking, market share and the size and resources of an enterprise will be the most important criteria in the Commission's assessment of dominance.

In Google, despite acknowledging that in high technology markets (frequently characterised by network effects), innovation is key, and in multi-sided markets, market shares should be transient, the Commission found Google to be dominant in both the relevant markets, that is, the markets for online general web search services in India and online search advertising services in India. In arriving at this conclusion, the Commission, inter alia, took into account Google's consistently high market shares over a period of time resulting from (in the Commission's view) other technical and structural advantages enjoyed by Google that the Commission omitted to identify.

In Coal India and MSEB, the Commission was of the view that the statutory and regulatory framework together with government policies led to the dominance of these state-owned enterprises (i.e., Coal India (as producer and supplier of coal) and MSEB (as
the sole licensee in the electricity distribution services market in the state of Maharashtra (except for Mumbai)). On appeal, the Compat confirmed the Commission’s assessment of dominance of Coal India.

In BCCI, the Commission concluded that BCCI’s dominance was the result of a number of factors, including its regulatory powers, control over infrastructure and control over players, and its ability to approve and control the entry of other leagues. The Commission did not assess market share information, presumably because BCCI already held 100 per cent of the relevant market based on its historical monopoly position.

In DLF, despite adopting a different market definition when compared to the earlier DLF cases, the Commission did not separately assess DLF’s dominance in the market for residential apartments in Gurgaon. The Commission continued to base its assessment of DLF’s dominance upon the historical data used by it in the earlier DLF cases to hold DLF dominant in the relevant market, presumably on the basis that there has been no change in market dynamics, making the finding of dominance highly questionable. In the cases involving the state-owned builders and developers, i.e., DDA, GDA and HUDA, the Commission noted that these authorities had gained absolute control over the sale and development of residential and institutional or commercial plots, as the case may be, by virtue of the statutory framework in place and the financial support of the concerned state governments. As a result, no competitor in the market could match the size and structure of these authorities.

In Ola Cabs, the Commission acknowledged that, in technology-based markets, high market shares are possible in the early years of the introduction of a new technology, but that these market shares are ephemeral and often fluctuate over a period of time. The Commission noted that even Uber had a comparable market share in the relevant market during the investigation. The Commission also took into account network effects. The Commission found that because Ola Cabs and Uber were vigorously competing with each other, the market had not tipped in favour of any player, and that most of the consumers were multi-homing on both platforms. Based on these findings, the Commission did not find Ola Cabs to be in a dominant position. The Commission also rejected the informant’s claim of collective dominance of Ola Cabs and Uber on the basis that the Act does not contain any provision for the assessment of collective dominance absent strong structural links in the form of equity participation. A similar claim of collective dominance was also rejected by the Commission in Wave Distilleries.

IV ABUSE
i Overview
Under Section 4(2) of the Act, an enterprise (or a group) abuses its dominant position if it:

a directly or indirectly imposes unfair or discriminatory conditions in the purchase or sale of goods or services or price in the purchase or sale (including predatory price) of goods or services (exclusion: discriminatory conditions or prices that may be adopted to meet competition);

b limits or restricts the production of goods or the provision of services or markets therefor, or technical or scientific development relating to goods or services to the prejudice of consumers;

c indulges in conduct resulting in the denial of market access in any manner;
Section 4(2) of the Act appears to contain an exhaustive list of conduct that would constitute abuse of dominance, unlike Article 102 of the TFEU. The list of ‘abuses’ in Section 4(2) is sufficiently broad, and could cover most exploitative and exclusionary conduct that could be characterised as an abuse of dominance. Section 4(2)(c), in particular, which prohibits any conduct by a dominant enterprise resulting in ‘denial of market access in any manner’, is frequently used by complainants or informants to cover exclusive dealing, refusal to supply and other theories of anticompetitive harm that do not fall within any of the other categories in Section 4(2).

It is notable that the Act does not provide for objective justifications as defences to the anticompetitive conduct of dominant enterprises. In MSEB, however, while reviewing whether the long-term power procurement agreement between the sole licensee (in the power distribution services market) and one of its group companies led to denial of market access, the Commission took into account the justifications offered by the parties, including that the long-term agreements were concluded in difficult circumstances of power shortage and load shedding. In addition, the Commission also considered that the power supply from the group company only constituted 41 per cent of the total power requirement of MSEB with the remaining power requirement being met through third parties. On this basis, the Commission concluded that no case of infringement was made out against MSEB. Thus, in its MSEB decision, the Commission has taken these factors into account.

Under the Act, the only defence recognised for the abusive conduct of a dominant enterprise is the ‘meeting competition’ defence. To date, the Commission has not provided any published guidance, including in its decisions, on the scope of this defence.

Exploitative abuses

In Google, while assessing Google’s conduct, the Commission emphasised the special responsibilities and obligations of dominant enterprises in digital markets. In the Commission’s view, digital markets are often characterised by network effects, which become more pronounced in multi-sided digital platforms. While acknowledging that network effects promote innovation, the Commission observed that: ‘it cannot be disputed that network effects can raise switching costs for users and barriers to entry for potential competitors. As a consequence, market entries become less likely and users switch less frequently to other suppliers, which has a market power enhancing effect.’ The Commission noted that since Google is the gateway to the internet for a vast majority of internet users, it is under an obligation to discharge its special responsibility resulting from its dominance in the online web search market. The Commission also stated that Google’s ‘special responsibility’ is ‘critical in ensuring not only the fairness of the online web search and search advertising markets, but also the fairness of all online markets given that these are primarily accessed through search engines’.
The Commission found that the following conduct of Google constituted an abuse of dominant position:

a rankings of universal results: such rankings prior to 2010 were pre-determined to appear at the first, fourth or 10th position on the search engine results page (SERP) and were not generated based on their relevance. The Commission found that this practice of Google was unfair to users and infringed Section 4(2)(a)(i) of the Act. However, since Google had modified its practice from October 2010 onwards, thereby ensuring that the search results were displayed on a free floating basis, the Commission did not issue any ‘cease and desist’ order and only directed Google to desist from engaging in such practices in the future;

b prominent display of commercial flight unit: the Commission found the prominent display and placement of the commercial flight unit on the SERP with links that led users of search services to Google’s specialised search options and services (Google Flight) infringed Section 4(2)(a)(i) of the Act. Google, through its search design, had not only placed its commercial flight unit at a prominent position on the SERP, it had also allocated disproportionate space to such units to the disadvantage of non-Google website verticals trying to gain market access; and

c prohibitions under the negotiated search intermediation agreements: prohibitions on publishers under negotiated search intermediation agreements were found to be an unfair imposition (under Section 4(2)(a)(i) of the Act), restricting the choice of these partners and preventing them from using search services provided by competing search engines.

In Coal India, the Commission, following the Compat’s directions, conducted fresh hearings and passed orders against Coal India. Thereafter, the Compat also assessed the Commission’s findings against Coal India in a case concerning an e-auction scheme. Both the Commission (in recent orders) and the Compat found that Coal India, taking advantage of being the lone producer and supplier of coal in India (which is the most important raw material for power generation in India), abused its dominant position. The Commission found the terms and conditions imposed by Coal India through the fuel supply agreements to be unfair, particularly in relation to the grading of coal, sampling process, sampling and supply of ungraded coal, and force majeure. The Compat found that the conditions in the e-auction schemes were onerous and one-sided, which disturbed the normal contractual equilibrium.

In MSEB, the Commission dismissed allegations of excessive pricing on the basis that the tariffs were set by the sectoral regulator under the Electricity Act, 2003.

In DLF, the Commission noted that the terms and conditions of the apartment buyer agreements were similar to those previously examined by the Commission; and that DLF’s arbitrary conduct (of keeping buyers in the dark about the ultimate shape, size and location of apartments; increasing the number of floors without prior notification to buyers; increasing the super area of the apartments followed by unfair additional demands on account of such increase of the super area; and arbitrary cancellation of allotments and subsequent forfeiture of booking amounts) had been previously examined by the Commission in its earlier orders. Based on its findings, the Commission found DLF’s conduct to be in contravention of Section 4 of the Act.
iii  **Exclusionary abuses**

In *Google*, the Commission found a clause in the negotiated search intermediation agreements that required publishers not to implement search technologies on their sites that are the same or substantially similar to that of Google as restrictive of competition. The Commission also found that Google prevented partners with whom it entered into negotiated search agreements from implementing search services from a competitor providing similar or substantially similar search services. The Commission found that by restricting websites from partnering with competing search services, Google denied its competitors access to the search business and further marginalised them. These restrictions were found to be a *de facto* imposition of online search exclusivity in contravention of Section 4(2)(c) of the Act. The Commission also took into account the effects of the exclusivity clauses of the negotiated intermediation agreements in light of the network effects in the online search and search advertising markets and Google's dominance in these markets. Although the number of intermediation agreements entered into with Indian partners were not substantial and the term of such agreements varied between two to three years, the Commission found that the exclusivity clauses created conditions for extending and preserving Google's dominance in search intermediation in perpetuity. As a result, the Commission concluded that Google was using its dominance in the online general web search market to impose restrictive conditions in the negotiated search intermediation agreements in contravention of Section 4(2)(c) of the Act.

In *BCCI*, the Commission found the BCCI Rules and Regulations, read with a clause in the media rights agreement executed with the broadcaster of Indian Premier League (IPL) stating the following – ‘it [BCCI] shall not organize, sanction, recognize, or support during the Rights period another professional domestic Indian T20 competition that is competitive to the league [IPL]’ – infringed Section 4(2)(c) of the Act. The Commission noted that these created an insurmountable entry barrier for organising domestic professional leagues and were not backed by any plausible regulatory rationale.

In *Kansan*, the Supreme Court upheld the Commission's findings relating to abuse of dominance by the multisystem operators (MSOs) who accounted for 85 per cent of the subscriber share in the cable television market of Punjab and Chandigarh. The Commission noted that the unilateral termination by the MSOs of the channel placement agreement with the broadcaster of a news channel called ‘Day and Night News’ violated the provisions of Section 4(2)(c) of the Act. On appeal, the Compat had set aside the Commission's decision on the basis that the abuse of denial of market access, as contemplated by Section 4(2)(c), applies only to a situation where one competitor restricts the access of another competitor to the market. Since the broadcaster and the MSOs were not competitors, the Compat was of the view that Section 4 was not applicable. The Supreme Court, while analysing the provisions and purport of the Act, noted that the term denial of market access ‘in any manner’ is of wide import and must be given its natural meaning. Thus, once the existence of a dominant position is proven, the question of whether a broadcaster is in competition with MSOs is a factor that is irrelevant for the purpose of application of Section 4(2)(c) which ... becomes applicable for the simple reason that the broadcaster is denied market access due to an unlawful termination of the agreement between the broadcaster and the Respondents’.
V REMEDIES AND SANCTIONS

Pending final determination of a case by the Commission, the Commission may issue interim orders restraining parties from engaging in anticompetitive activities during the course of an investigation.

If an enterprise or group is found to have abused its dominant position, in terms of Section 27 of the Act, the Commission may impose fines of up to 10 per cent of the enterprise’s or group’s average turnover for the preceding three financial years. Keeping in view the principles of proportionality, while deciding the amount of penalty, the Commission takes into account any aggravating or mitigating factors based on the facts and circumstances of each case. In addition, the Commission may pass a cease-and-desist order together with any other orders or directions as the Commission may deem fit. So far, the Commission has not issued any guidelines on penalties.

In a cartel case under Section 3 of the Act, the Supreme Court has clarified that for determining the amount of penalty, the Commission must take into account the relevant turnover (that is, the turnover generated from products and services affected by the contravention) as opposed to total turnover, which is considered by the Commission for the purpose of levying penalties. The Supreme Court held that any penal law imposing a punishment is made for the general good of society and emphasised the principle of proportionality, which requires that the penalties imposed must not exceed what is appropriate and necessary for attaining the objective pursued.

During 2017 and 2018, the Commission found Section 4 contraventions by five enterprises, namely, Google, Coal India, DLF, BCCI and GDA.

In Google, after considering the aggravating and mitigating factors, the Commission imposed a monetary penalty of 1.35 billion rupees at a rate of 5 per cent of the average of the revenues generated from Indian operations for financial years 2013, 2014 and 2015. Interestingly, the Commission noted that the concept of ‘relevant’ turnover cannot be applied to a technology platform such as Google in the same manner as it is applied in the context of a conventional multi-product firm. The Commission noted that this is because in a two sided market, the search side is free whereas the other side is monetized through advertisements. Although Google’s revenues from its various business segments were taken into account, the Commission ultimately considered a sum total of the revenues generated by Google only from its India operations for the purpose of calculating the fine. The Commission also imposed certain remedial measures. Following an appeal by Google, a ‘stay’ has been granted by the Tribunal upon payment of this fine until the Tribunal renders its order on the appeal.

In both DLF and Coal India, since the Commission had already imposed a penalty of 6.3 billion rupees (at 7 per cent of the average of the turnover for the three preceding financial years) and 591 million rupees (at 1 per cent of the average of the turnover for the three preceding financial years), respectively, on the two enterprises in previous orders involving the same or similar facts, there was no fresh imposition of penalties on these enterprises.

In BCCI, after rehearing the matter, the Commission confirmed its previous findings of abuse and imposed a penalty of 522.40 million rupees (at a rate of 4.48 per cent of the average turnover for the three preceding years) – the same as the penalty previously imposed. The Commission also passed certain ‘cease and desist’ orders against BCCI.

In GDA, the Commission imposed a penalty of 10.06 million rupees (at a rate of 5 per cent of the average turnover for the three preceding financial years) and also passed ‘cease-and-desist’ orders.
It is important to note that the Commission is empowered to proceed against company officers under the provisions of Section 48 of the Act. Recognising this power, both the High Court of Delhi (in the exercise of concurrent writ jurisdiction) and the Tribunal (as the appellate authority) have clarified that the Commission must record a finding of contravention against a company before proceeding against company officers under Section 48 of the Act.

VI PROCEDURE

i Proceedings before the Commission

The Act provides the procedure for the filing of information (i.e., the complaint), the investigation process, the inquiry by the Commission and the procedure for appeal.

Any person may file ‘information’ (i.e., a complaint) with the Commission (in the prescribed format together with requisite fees) alleging contravention of the provisions of the Act. The informant (i.e., the complainant) may also file an application with the Commission for interim measures by describing the harm that would be caused if no interim protection is granted. Once the information is filed, the Commission, as far as possible, is required to record its opinion on the existence of a *prima facie* case within 60 days of the filing of the information. If the Commission is of the opinion that there exists a *prima facie* case, the Commission may direct the DG to conduct an investigation into the alleged anticompetitive conduct and submit its report within the time specified by the Commission.

Upon completion of an investigation, a non-confidential version of the DG’s report is provided to the informant and a confidential version of the report is provided to the enterprises under investigation. The parties are then directed to file their respective comments or objections to the report within the time limit specified by the Commission. Thereafter, the Commission schedules the case for hearing the parties – both the informant and the enterprises that allegedly infringed Section 4. The hearing is sometimes attended by a representative of the DG, but the DG is not present to defend the investigation report in all cases. Rather, in a case where the report finds an infringement of Section 4, the Commission relies on the informant to provide its submissions and, where the DG’s report is favourable to the informant, to defend the DG’s report. Where the report finds no infringement of Section 4, the Commission invites only the informant for a hearing before rejecting the information or complaint. The Commission is not obligated to accept the DG’s report, and there have been cases where the Commission has disagreed with the findings of the DG and rejected the report.

ii Appellate procedure

An appeal against a final order of the Commission may be made to the Tribunal within 60 days of the date of the final order. An appeal against an order of the Tribunal may be made to the Supreme Court of India within 60 days of the date of the Tribunal’s order.

Interim measures are available to parties before the Commission, the Tribunal and the Supreme Court of India. Frequently, parties also file writ petitions before the high courts if they believe that principles of natural justice are being violated or their legitimate legal rights are being ignored by the Commission.
VII PRIVATE ENFORCEMENT

Although the Act does not provide for private enforcement, it does allow a successful informant or any other person affected by the findings of the Commission to make an application before the Tribunal for compensation from the dominant enterprise based on the findings of the Commission or the orders of the Tribunal.

VIII FUTURE DEVELOPMENTS

i  Principles of natural justice

The Compat and the High Court of Delhi (in the exercise of concurrent writ jurisdiction) have been critical of the Commission for procedural lapses, and have highlighted some of the fundamental (and fairly obvious) rules of procedure previously ignored by the Commission. For example, an order of the Commission must be signed by those members of the Commission who have heard the parties. As a result, any order of the Commission signed by a member who has not attended a hearing must be set aside. In addition, a party under investigation must be provided with all the materials and evidence being used against it. The affected parties must also be given notice if the Commission decides to differ from the findings recorded by the DG in the investigation report. In addition, the right to conduct a cross-examination has been recognised.

On the question of the DG’s investigative powers, the Supreme Court has clarified that it is well within the DG’s powers to expand the scope of investigation, and has observed that a Commission’s order directing an investigation under Section 26(1) of the Act is merely the starting point for the DG.

ii  Dawn raid powers

For conducting investigations into anticompetitive practices, the DG’s office has been conferred with wide-ranging investigation powers for collecting evidence, including the powers of a civil court under the Indian Code of Civil Procedure, 1908. The DG is also vested with the power to use ‘dawn raids’ or unannounced search and seizures to inquire into allegations of anticompetitive conduct (including abuse of dominance), and the parties being raided have an obligation to cooperate during the search. Dawn raids may also be carried out by any person appointed by the DG in this regard. While conducting a raid, the DG or any person authorised by him or her for this purpose has been granted the power to enter any premises, conduct a search at the premises, and seize books, papers and electronic media that he or she considers necessary for the purpose of the investigation. These raids generally occur without any warning and are usually conducted at times that are least expected, often in the very early hours of the morning; they may even occur over a weekend. Search and seizure operations are planned in a highly confidential manner, leaving no room for the party under investigation to scuttle the search or to ‘sanitise’ the records. If a company has several offices, it is possible that simultaneous raids will be conducted at more than one office of the company. Dawn raids are regarded as an effective tool for inquiry into anticompetitive practices, and are authorised by the Chief Metropolitan Magistrate, New Delhi through a warrant.

These dawn raid powers have been used sparingly and, thus far, there have been two instances of dawn raids in India: the first case relating to an abuse of dominance investigation against a worldwide manufacturer of excavators and back-hoe loaders, and the second case
relating to a cartel investigation arising from a leniency application. The raid conducted by the DG in the abuse of dominance investigation is presently under appeal before the Supreme Court. While the DG reportedly has obtained significant damaging evidence against the allegedly dominant firm from the dawn raid in the abuse of dominance case, the DG's investigation has been paralysed by court proceedings. This matter is currently before the Supreme Court, and the DG has been restrained from using the evidence obtained during the dawn raid until the conclusion of these court proceedings. Having learnt from its experience in the dawn raid in the abuse of dominance case, the Commission successfully concluded the cartel investigation in the second case involving a cartel of dry cell manufacturing companies, where the DG had simultaneously conducted dawn raids at the premises of three dry cell manufacturing companies. Interestingly, following the raids conducted by the DG, the other two companies (which were being investigated for suspected cartelisation) also filed leniency applications and admitted to cartel activity. With the dawn raid success in the cartel case, it is likely that dawn raids will become more frequent, and companies in India must be prepared for such raids in investigations under both Section 3 (prohibition of cartels) and Section 4 (prohibition on abuse of dominance) of the Act.

iii Overlapping jurisdiction

In the Ericsson writ petition, the High Court of Delhi upheld the Commission’s jurisdiction to examine issues covered by the Act and held that matters covered under the Act do not fall within the domain of the patent enforcement authorities under the Indian Patents Act, 1971. This decision is currently under appeal before a division bench comprising two judges of the High Court of Delhi.

In the Jio writ petition, the High Court of Bombay ousted the Commission’s jurisdiction to examine issues relating to the telecom sector, which was held to be exclusively governed by the jurisdiction of the Telecom Regulatory Authority of India Act. This decision of the High Court of Bombay has been challenged by the Commission before the Supreme Court.
I INTRODUCTION

Abuse of dominance within the Italian market, or in a substantial part of it, is prohibited by Article 3 of the Competition Act, which closely resembles Article 102 of the Treaty on the Functioning of the European Union (TFEU). Article 3 does not provide a definition of abuse, but lists examples of abusive conduct.

According to Article 1(2) of the Competition Act and Article 3(1) of Regulation (EC) No. 1/2003, if the Italian Competition Authority (ICA) applies Article 3 to abuses that affect intra-EU trade, it must also apply Article 102 TFEU. Furthermore, pursuant to Article 1(4) of the Competition Act, Article 3 must be interpreted in accordance with well-established EU principles.

The ICA has not issued formal guidance on abuses of dominance. However, the Commission Guidance on exclusionary abuses (Guidance) may provide useful indications on the interpretation of Article 3.

Article 3 applies also to public firms and to those in which the state is the majority shareholder. Pursuant to Article 8 of the Competition Act, antitrust rules do not apply to firms entrusted with the supply of services of general economic interest or holding a legal monopoly, insofar as this is indispensable to perform the specific tasks assigned to them.
II YEAR IN REVIEW

In 2017, the ICA closed 10 investigations regarding abuse of dominance. In five cases, it found an infringement and imposed a fine.6 In four cases, it accepted commitments offered by the dominant firm and closed the proceedings without establishing the alleged infringement.7 In one case, the ICA eventually concluded that the firm under investigation was not dominant in the market concerned.8 At the beginning of 2018, the ICA issued an additional infringement decision.9

In 2017, the Regional Administrative Tribunal of Latium (TAR) partially annulled two decisions adopted by the ICA in 2012 and 2015, respectively, by reducing the amount of the fine,10 and upheld another decision adopted by the ICA in 2016.11 In addition, in April 2017, the Council of State upheld the ICA's choice to issue a recommendation, instead of a decision, following a complaint for an alleged abuse of dominance.12

The abuse cases in the period under review concerned many different practices, including excessive pricing and unfair trading terms, refusal to deal, exclusive dealing, loyalty-inducing rebates, margin squeeze, discriminatory practices, and misuse of rights and legitimate interests.

In January 2017, the ICA accepted the commitments offered by Net Service in proceedings initiated in May 2016 concerning an alleged abuse committed by Net Service in the market for the application software used to create and manage online legal documents and files on PCT, the online civil trial platform.13 Net Service had the exclusive right to develop and manage the PCT platform, which was considered an essential facility to operate in the related market for application software. According to the ICA's preliminary findings, Net Service had used its monopoly in the management of the PCT platform to leverage its market power in the downstream market. In particular, the dominant company would have used upgrades to technical specifications of the PCT platform in advance of other operators in the downstream market for application software. This would have granted Net Service a competitive advantage in the provision of application software in the downstream market.

9 Decision of 28 February 2018, No. 27503, A487, Compagnia Italiana di Navigazione - Trasporto marittimo delle merci dal per la Sardegna.
10 TAR, 23 January 2017, No. 1188; 1 August 2017, Nos. 9140 and 9141.
12 Council of State, 12 April 2017, No. 1708.
To remove the ICA's concerns, Net Service undertook to implement a functional and physical separation of its upstream and downstream activities, through structural and behavioural remedies. In particular, Net Service committed to:

a. split its activities into two different divisions dealing with the PCT platform and application software, respectively;
b. open a blog in which firms active in the PCT sector can discuss things between themselves and with Net Service, thus promoting a useful debate on technical issues; and
c. prepare reports relating to the activities carried out by the PCT blog to increase transparency on possible technical problems.

The ICA considered that this set of remedies would address its concerns and solve the issues raised by the competitive advantage enjoyed by Net Service because of its monopoly in the upstream market.

In March 2017, the ICA closed another investigation by accepting the commitments offered by an allegedly dominant firm. The investigation concerned commercial practices implemented by NUOVOIMAIE, the successor of the former legal monopolist (IMAIE) in the market for collective rights management and intermediation on behalf of artists, authors, musicians and other holders of copyrighted works. According to the ICA's preliminary findings, NUOVOIMAIE had implemented a complex exclusionary strategy aimed at hindering access by new entrants through:

a. the refusal to grant competitors access to the general database of authors and copyrighted works developed under IMAIE's legal monopoly, which the ICA considered essential to enable competitors to identify and contact rightholders; and
b. discrimination against rightholders registered with competitors, in particular in relation to payments due by the former monopolist, which were managed and made by NUOVOIMAIE as legal successor.

The dominant firm offered a number of commitments aimed at solving the competition problems caused by the above-mentioned practices. In particular, NUOVOIMAIE committed to:

a. implement a system of access to its database based on licence agreements with competitors;
b. implement initiatives aimed at removing the alleged discrimination;
c. grant foreign collecting companies a right of termination of current agreements, and enter into one-year agreements without tacit renewal in the future; and
d. implement a series of behavioural remedies aimed at removing the concerns regarding the agreements with the most relevant national customers (such as offering certain counterparties a licensing agreement on fair, reasonable and non-discriminatory terms and proposing arbitration proceedings to solve issues relating to payments).

In March 2017, the ICA closed another investigation by accepting the commitments offered by Codipra, a crop protection association active in the province of Trento. Codipra provides its affiliated farmers with intermediation services relating to the grant of public contributions

to agricultural firms supporting the payment of crop insurance premiums and the purchase of insurance services through the negotiation of a collective preferential policy with insurance companies (collective policy). According to the ICA’s preliminary findings, Codipra had implemented a complex exclusionary strategy to preserve its monopoly by:

\[ a \] requiring de facto exclusivity on insurance companies, which were deterred from negotiating similar agreements with another crop protection association, COOP DI, because of the risk of retaliation by Codipra;

\[ b \] requiring its affiliated farmers to use Codipra’s mutual fund for supplementary insurance policies (covering risks below certain thresholds, not covered by the collective policy), while preventing insurance companies from offering similar policies to Codipra’s members; and

\[ c \] offering a discount on membership fees to farmers using Codipra’s insurance broker, Agriduemila, thereby leveraging its monopoly in the market for intermediation services into the downstream market for insurance broker services.

To remove the ICA’s concerns, the dominant firm committed to:

\[ a \] adopting an experimental system based on online auctions to negotiate the economic terms of the collective policy with insurance companies;

\[ b \] allowing its subscribers to freely enter into supplementary insurance policies with other insurance companies;

\[ c \] unbundling the collective policy and supplementary insurance policies;

\[ d \] clarifying that adhesion to Codipra’s mutual fund is optional and voluntary;

\[ e \] adopting and implementing a code of ethics and professional conduct for Codipra’s corporate bodies, management committee members and employees;

\[ f \] amending its past statement that it would not negotiate agreements with operators that also dealt with other crop protection associations, as well as publicly stating that Codipra’s activity must comply with the principles of neutrality, proportionality and non-discrimination; and

\[ g \] organising a periodic antitrust compliance training programme for Codipra’s bodies, management committee members and employees.

In May 2017, the ICA concluded two proceedings initiated in September 2016 concerning alleged exploitative abuse by Sorgenia and Enel. Sorgenia and Enel own the only power generation plants in the Brindisi area. According to the ICA’s preliminary findings, they had taken advantage of their position as unavoidable trading partners to charge the network operator Terna excessive prices for dispatching services. The ICA closed the investigation into Sorgenia’s commercial practices on the ground that Sorgenia was not dominant, as its market behaviour depended on Terna’s demand and Enel’s supply conditions. On the other hand, the ICA accepted the commitments offered by Enel to address its competition concerns. In particular, Enel committed to:

\[ a \] setting a cap on the yearly profitability of its Brindisi plant, monitoring on a monthly basis the profitability level and returning possible sums exceeding the ceiling to Terna;

\[ b \] offering the entire capacity of at least two production units of the Brindisi plant to the day-ahead wholesale electricity market for a three-year period (2017 to 2019); and

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setting a cap on the fixed costs to be reimbursed by the competent energy authority in
the event that the Brindisi plant is found to be essential for the security of the electricity
system, thus falling under the regulatory reimbursement regime.

In the second half of 2017, the ICA adopted two infringement decisions concerning, *inter
alia*, loyalty discounts and rebates, showing the ICA's reluctance to apply the as-efficient
competitor test introduced by the Guidance and endorsed by the European Court of Justice
(ECJ) in *Intel*.\(^\text{17}\)

In particular, in October 2017, the ICA imposed a fine of around €61 million on
Unilever Italia for an alleged abuse of dominant position in the market for impulse ice
cream.\(^\text{18}\) Unilever holds a dominant position in that market, where it sells impulse ice cream
under the Algida brand. According to the ICA, Unilever implemented a complex strategy
aimed at forcing or encouraging ice cream retailers (mainly cafes) to commercialise just one
brand of impulse ice cream in their premises through:

- exclusive dealing and freezer exclusivity clauses;
- loyalty-inducing contractual terms, such as retroactive target and bundled discounts
  and rebates; and
- other commercial initiatives, such as a strict monitoring policy to ensure compliance
  with the loyalty-inducing strategy, including through payments to trade associations to
  monitor their members' compliance with the loyalty-inducing strategy, and pressure on
  retailers to induce them to buy Unilever's least successful products.

The ICA held that Unilever's practices had foreclosure effects and limited the choices available
to consumers by making it more difficult to find ice creams offered by Unilever's competitors
available for sale.

With specific regard to the retroactive discounts and rebates, in line with the Guidance,
the ICA noted that they encouraged loyalty and created switching costs for customers, as
customers would lose the benefit retroactively granted by Unilever in the event that they did
not meet the thresholds or switched to other suppliers. However, the ICA refused to apply
the as-efficient competitor test provided for by the Guidance. The dominant firm submitted
a test showing that most customers would have been contestable by as-efficient rivals, and
argued that, based on the recent *Intel* judgment of the ECJ, the ICA has to carry out an
adequate price-cost analysis if the party argues, on the basis of supporting evidence, that the
practice is not capable of excluding equally efficient competitors. The ICA stated that the
Unilever case was different from the *Intel* case, as the loyalty discounts and rebates were part of
a broader exclusionary strategy, encompassing also exclusive dealing obligations, which were
as such exclusionary. In the ICA's view, the loyalty discounts and rebates offered by Unilever
were anticompetitive because of the way in which they were structured and applied, and not
because they forced as-efficient competitors to sell below cost. Accordingly, the ICA asserted
that the complex exclusionary strategy allegedly implemented by Unilever should not be
assessed on the basis of the as-efficient competitor test.

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Furthermore, according to the ICA, the *Intel* judgment would have simply required an assessment of all relevant circumstances. In the *Unilver* case, the possible foreclosure effects were demonstrated by:

- the extremely strong market position of the dominant firm;
- the share of the market covered by exclusivity clauses (30 to 40 per cent);
- the duration of the agreements (on average more than two years);
- the exclusivity clauses; the incentives granted by the dominant firm to maintain such exclusivity;
- the fact that the contested practices were specifically targeted at certain customers and competitors; and
- the exclusionary strategy allegedly implemented by Unilever.

In December 2017, the ICA imposed a fine of around €20 million on Poste Italiane (PI) for having offered its business customers economic and technical conditions that could not be replicated by as efficient competitors in the market for bulk mail.\(^{19}\) Bulk mail services are commonly used by large business customers (e.g., banks, insurance companies and telecommunications operators) to send communications to their clients (such as account statements, bills and expiry warnings). The ICA considered that PI (the incumbent in the postal sector in Italy) was dominant in the market for bulk mail services, and continued to be the only operator covering the entire national territory, including extra-urban areas. In contrast, competitors had more limited territorial coverage and needed to purchase bulk mail services from PI to cover certain extra-urban areas.

According to the ICA, starting from 2014, PI squeezed competitors’ margins in extra-urban areas by providing rivals only with the basic bulk mail service in the intermediate market, and offering a value-added service (the certified date delivery service called *Posta Time*) at lower prices to business customers in the downstream market. In addition, competitors could not replicate PI’s technical conditions, as the certified date delivery service was superior to the basic bulk mail service made available to competitors by the incumbent.

Furthermore, PI entered into exclusive dealing agreements and offered selective and retroactive loyalty discounts and rebates to customers that purchased all their bulk mail requirements, or a substantial part of them, from the dominant company. The ICA mentioned that, based on the Guidance, exclusionary effects are more likely when rivals cannot compete for the entire demand of individual customers and, thus, the dominant firm is an unavoidable trading partner. However, even in this case, the ICA refused to apply the as-efficient competitor test. It recalled that, according to *Post Danmark*,\(^{20}\) there is no legal obligation to base a finding that a rebate scheme is abusive on the as-efficient competitor test. The ICA did not even mention the *Intel* judgment.

Even though the ICA did not consider it necessary to carry out further economic analyses, it applied an amended version of the as-efficient competitor test aimed at establishing whether PI’s overall offers could be replicated by other operators, taking into account both the margin squeeze in extra-urban areas and the discounts offered to certain business customers. To this end, it tried to estimate whether PI’s discounted offers in the downstream market

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\(^{19}\) Decision of 13 December 2017, No. 26900, A493, *Poste italiane/Prezzi recapito*.

would have enabled an efficient competitor, which purchases the basic bulk mail service from PI in certain extra-urban areas and directly operates with its own network in other areas, to cover its costs and obtain a profit margin equal to at least 4.7 per cent (i.e., the average earnings before interest and taxes in the postal sector in 2015). The ICA found that, taking into account the actual territorial coverage of other operators’ largest networks (and, thus, their need to purchase basic bulk mail services as input from PI for certain areas), competitors would not have been able to replicate PI’s overall prices in different areas.21

The ICA’s price-cost analysis differs from the standards proposed by the Guidance and used in the Commission’s decision-making practice, and seems to be unprecedented. Inter alia, the ICA tried to assess, at the same time, the impact of the alleged margin squeeze (in certain specific areas) and retroactive rebate schemes (in all areas) without isolating the specific impact of each practice on the ability of rivals to compete. Furthermore, it based its analysis on the territorial coverage of actual competitors instead of hypothetical efficient rivals. The ICA also assumed that competition law should ensure that rivals obtain a certain profit margin, which seems to be more consistent with a regulatory rather than an antitrust approach.

In December 2017, the ICA imposed a fine of around €6 million on Vodafone and a fine of around €4 million on Telecom Italia (Telecom) for having abused their dominant position in the upstream market for short message service (SMS) termination services to exclude as-efficient competitors in the downstream market for bulk SMS.22 Both Vodafone and Telecom, as mobile network operators, were dominant in the market for SMS termination services on their respective networks. According to the ICA, in the upstream market Vodafone had engaged in internal and external discrimination of an economic and technical nature, by charging other licensed operators (OLOs) higher prices for the provision of SMS termination services (€2.3 to €2.6 cent per SMS) compared to the prices applied to its internal divisions (€0 to €0.5 cent per SMS); and providing OLOs with interconnection services that were more expensive and of lower quality than those reserved for itself. As a result, Vodafone could offer prices not replicable by as-efficient competitors in the retail market for bulk SMS services, thereby also hindering infrastructure investment in the sector.

Similarly, the ICA concluded that Telecom had also squeezed competitors’ margins by offering its internal divisions prices lower than those charged to OLOs. In particular, the ICA assessed the bids submitted by Telecom in recent tenders launched by large customers. According to the ICA, Telecom had won all but one of the tenders by presenting offers below the critical threshold represented by termination costs, thus forcing some competitors to bid at a loss.

In December 2017, the ICA imposed a fine of around €1,000 on Società Iniziative Editoriali (SIE), which publishes the main local newspaper (L’Adige) in the province of Trento, for having refused to license the right to reproduce its news to a press review editor, thereby hampering competition in the downstream market for daily press review services in

21 In the ICA’s view, PI’s exclusionary strategy had a significant impact on the competitive dynamics of the market concerned, as the dominant company succeeded in getting numerous clients back and increasing its market share to the detriment of competitors. However, several aspects of the decision seem to be open to question.

the province of Trento.\textsuperscript{23} The ICA assessed the contested conduct on the basis of the case law on refusal to license intellectual property (IP) rights, according to which a refusal may be abusive if it:

\begin{itemize}
\item[a] concerns an input that is objectively necessary to compete effectively;
\item[b] prevents the commercialisation of a new product for which there is potential demand;
\item[c] eliminates competition in a downstream market; and
\item[d] is not justified.
\end{itemize}

In particular, the ICA held that access to \emph{L’Adige}'s news was essential because customers explicitly requested that press reviews also covered that newspaper. In the absence of news from the main local newspaper, press reviews were not considered complete. Furthermore, the refusal prevented the commercialisation of a new product, namely digital local press reviews, which could be personalised on the basis of customers’ needs, interests and requests. Finally, the ICA noted that the refusal would have eliminated, or at least substantially restricted, competition in the downstream market, and was also not objectively justified in light of the fact that SIE had provided access to its news in the past.

In March 2018, the ICA imposed a fine of more than €29 million on the shippers Moby and Compagnia Italiana di Navigazione (CIN) for having abused their dominant position on three transport routes between Italy and Sardinia.\textsuperscript{24} According to the ICA, Moby and CIN implemented complex and aggressive anticompetitive conduct aimed at hindering the growth of competitors. In particular, the two firms had imposed unjustified economic and commercial penalties, and retaliated against logistics companies that also used competitors' transport services; and granted more favourable conditions to logistics companies that had remained loyal to Moby and CIN. The ICA concluded that Moby and CIN's strategy had limited entry and growth of competitors on the routes concerned, thus also harming consumers of the transported goods.

In January 2017, the TAR partially annulled a decision adopted by the ICA in 2015, which had imposed a fine on Società Esercizi Aeroportuali (SEA) for abusive practices in the markets for the management and provision of airport facilities for commercial and general aviation, and ground-handling services for general aviation at Milan Linate airport.\textsuperscript{25}

SEA is the sole manager of Milan Linate and Milan Malpensa airports for both aviation activities (i.e., management, development and maintenance of infrastructures, and handling services) and non-aviation activities (i.e., commercial and real estate services). In 1961, SEA had granted ATA Trasporti (ATA) an exclusive sub concession to manage certain general aviation facilities. In 2013, ATA's main shareholder, a company then in liquidation, held a tender procedure to sell its 98.3 per cent stake in ATA. Cedicor, a Uruguayan company active in the management of airport infrastructure, made a bid to acquire the stake. According to the ICA, SEA adopted three initiatives to hinder access to the market by Cedicor through the acquisition of ATA:

\begin{itemize}
\item[a] SEA tried to obstruct the procedure for the sale of ATA shares by contesting inefficiencies and lack of information by the adviser and the seller;
\end{itemize}

\textsuperscript{23} Decision of 20 December 2017, No. 26907, A503, \textit{Società Iniziative Editoriali/Servizi di rassegna stampa nella provincia di Trento}.

\textsuperscript{24} Decision of 28 February 2018, No. 27503, A487, \textit{Compagnia Italiana di Navigazione - Trasporto marittimo delle merci daper la Sardegna}.

\textsuperscript{25} TAR, 23 January 2017, No. 1188, and decision of 25 March 2015, No. 25397, A474, \textit{SEA/Convenzione ATA}. 
Italy

It terminated the subconcession agreement with ATA after it found out that Cedicor’s offer for ATA shares was higher than its own; and it submitted a second bid, higher than the first, to win the tender.

In the ICA’s view, SEA’s conduct intentionally and irremediably altered competition for the market by preventing the entry of an efficient competitor that was capable of offering a high-quality service.

The TAR upheld the ICA’s view that SEA had prevented Cedicor from entering the market for the management of airport facilities for general aviation by misusing its contractual right to terminate the subconcession agreement. In particular, the TAR confirmed the ICA’s finding that SEA had strategically exercised its contractual right to terminate the subconcession agreement to alter the outcome of the tender procedure for the sale of ATA to the detriment of Cedicor. However, the TAR considered that the ICA had misapplied the 2014 Fining Guidelines and annulled the part of the decision concerning the amount of the fine.

In April 2017, the Council of State upheld the ICA’s choice to pursue a complaint for an alleged abuse by adopting a recommendation instead of a decision.26 In 2013, Valoritalia filed a complaint with the ICA alleging that the Chambers of Commerce of Rome, Taranto and Sassari had abused their dominant position in the market for the certification of quality wines. The ICA closed the preliminary investigation without finding any infringement. Valoritalia brought a successful appeal before the TAR, which set aside the ICA’s decision for lack of sufficient reasoning, and ordered the ICA to re-open the preliminary investigation.27 At the end of the new preliminary investigation, the ICA issued a recommendation addressed, inter alia, to the Minister of Agriculture, the Minister of Economic Development and the Union of the Chambers of Commerce, urging them to intervene to remedy certain competition concerns.28 Valoritalia challenged the recommendation before the TAR, which held that the new preliminary investigation and the adoption of the recommendation did not comply with its previous ruling.29 Accordingly, the TAR appointed a special commissioner to resume the investigation and assessment activities concerning the alleged abuse.30 However, on an appeal brought by the ICA against the TAR’s second ruling, the Council of State stated that the ICA had complied with the TAR’s first ruling, which did not require the ICA to start a formal investigation or to find an infringement. In the Council of State’s view, issuing a recommendation was one of the options available to the ICA under the law to counter possible distortions of competition. The Council of State considered that it was actually the most effective solution in the market concerned, where competition concerns were mainly caused by the national legal framework.

In July 2017, the TAR upheld the ICA’s decision to impose a fine of around €5 million on Aspen for having charged excessive prices for certain drugs (the ‘Cosmos’ oncológical

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26 Council of State, 12 April 2017, No. 1708.
27 TAR, 5 July 2016, No. 7732.
28 Recommendation of 17 March 2016, AS1265, designation of origin and geographical indication in the wine industry.
29 TAR, 9 September 2015, No. 11132.
30 On 17 October 2016, the special commissioner opened a formal investigation (case A501, Chambers of Commerce-Market for the certification of quality wines).
drugs). According to the ICA, Aspen engaged in a very aggressive negotiation strategy towards the Italian Medicines Agency (AIFA) by also threatening to disrupt the direct supply of the products concerned in the Italian market. In particular, Aspen’s negotiation strategy included three types of initiatives:

- repeated requests to include Cosmos drugs in the ‘C-class’ list of pharmaceutical products (the price of C-class drugs is not subject to the renegotiation procedure, can be freely determined by the seller, is paid for by the patient and the Italian National Health Service (SSN) does not reimburse it);
- serious threats to withdraw the drugs from the Italian market; and
- abuse of Aspen’s ‘stock allocation mechanism’, which systematically created artificial product shortages in Italy before the AIFA’s acceptance of Aspen’s request.

The TAR noted, inter alia, that, although certain initiatives implemented by Aspen were not as such unlawful, the ICA had provided convincing evidence of the dominant firm’s intent to misuse its rights to impose excessive prices (the *quid pluris*, according to the TAR). The Administrative Court also held that the ICA had rightly applied the two limbs of the United Brands test, as it had demonstrated that there was a significant disproportion between prices and costs, and the prices were unfair, in light of a number of additional factors. According to the TAR, the disproportion between revenues and production costs could not be justified by any improvements in the products concerned or other reasons.

In August 2017, the TAR partially upheld two appeals brought by ESTRA and its subsidiary ESTRA Reti Gas against an ICA infringement decision for an alleged abuse aimed at hindering a tender for gas distribution in the municipality of Prato. The dominant firm held a legal monopoly in the local market for gas distribution, as it had been awarded the exclusive right to distribute gas in the municipality of Prato. To launch the new tender procedure for gas distribution, the municipality of Prato asked ESTRA and its subsidiary for certain technical and economic information needed by other gas operators to bid. The two companies initially refused to provide the information needed by the contracting authority, and then delayed in providing it. The lack of such information would have negatively affected the tender procedure and would have prevented competitors from participating on equal terms with the two gas operators.

The TAR dismissed the applicants’ argument that they had refused to provide the relevant information in compliance with sector-specific regulation, as confirmed by a previous judgment delivered by the TAR Toscana. The TAR recalled that conduct compatible with sector-specific regulation could still infringe competition rules. However, the TAR held that the recent entry into force of new rules on tenders, which had raised plausible doubts about the legitimacy of the call for tender launched by the municipality of Prato, as well as the above-mentioned TAR Toscana judgment, should have been taken into account by the ICA as mitigating circumstances.

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33 Moreover, the three-month period between the entry into force of the new rules on tenders and the date on which the municipality regularised the call for tenders should not have been considered in determining the duration of the infringement.
In 2017, the Italian civil courts also dealt with a number of abuse of dominance cases that address some aspects of damages actions, including the assessment of dominance, causal link, burden of proof and calculation of damages.

In January 2017, the Court of Appeal of Milan confirmed a first instance ruling holding that Telecom Italia had abused its dominant position in the fixed-to-mobile call termination market by implementing a margin-squeeze strategy to the detriment of BT Italia.\(^{34}\) The action for damages was based on the decision issued by the ICA on 3 August 2007 in case A357 concerning alleged anticompetitive practices implemented by Telecom and Wind. Telecom challenged the first instance ruling, \textit{inter alia}, on the grounds that there was no evidence of causal link between conduct and damage and, in the assessment of the causal link, the Tribunal of Milan had made uncritical reference to the report of the expert witness (CTU). The Court rejected the appeal and increased the amount of the damages awarded to BT Italia. The Court confirmed that the ICA’s infringement decisions constitute privileged evidence of the anticompetitive conduct, and that CTU reports have crucial value in cases involving complex economic assessments, in particular with regard to the assessment of the causal link.

In June 2017, the Tribunal of Milan issued an order stating that Facebook’s refusal to advertise electronic cigarette liquids on its platform did not amount to an abuse.\(^{35}\) Vaporart, a firm commercialising electronic cigarettes and related refill liquids, wanted to advertise its nicotine-free liquids on Facebook’s platform. Facebook refused to provide Vaporart with advertising services in light of its policy, which does not allow advertisements promoting the sale and use of tobacco-related products. Vaporart filed a request for interim measures before the Tribunal of Milan, arguing that Facebook’s refusal was not supported by any objective justification and constituted an abuse of dominance that harmed consumers by limiting the production of goods capable of protecting their health. Vaporart also maintained that Facebook’s advertising policy was discriminatory, as it treated in the same way harmful products (tobacco) and harmless ones (nicotine-free liquids). The Tribunal of Milan dismissed Vaporart’s arguments. It stated that Facebook’s refusal was not discriminatory, because it was based on a policy that was equally applied to all advertisers. Furthermore, Facebook’s refusal was justified by the fact that Vaporart also marketed nicotine products, which could have been indirectly promoted by its advertisements of nicotine-free liquids.

In July 2017, the Tribunal of Rome rejected a damages claim filed by the Ministry of Health and the Ministry of Economics and Finance, following on from the decision issued by the ICA in \textit{Pfizer}.\(^{36}\) In January 2012, the ICA found that Pfizer Italia had abused its dominant position in the market for anti-glaucoma drugs based on prostaglandin analogues through a complex strategy aimed at delaying the entry of generics producers.\(^{37}\) In the ICA’s view, this strategy included Pfizer Italia’s attempt to extend its active ingredient patent coverage until 2011, \textit{inter alia}, by lodging a divisional patent application with the European Patent Office (EPO). It also included Pfizer Italia bringing legal and administrative actions against generics producers before the national courts. The TAR annulled the ICA’s decision, also in light of the decision of the EPO’s Technical Board of Appeal, which had acknowledged the validity of Pfizer’s divisional patent.\(^{38}\) However, in February 2014, the Council of State upheld the

\(^{34}\) Court of Appeal of Milan, 2 January 2017.

\(^{35}\) Tribunal of Milan, 19 June 2017.

\(^{36}\) Tribunal of Rome, 26 July 2017, No. 12806.

\(^{37}\) Decision of 11 January 2012, No. 23194, A431, \textit{Ratiopharm/Pfizer}.

\(^{38}\) TAR, 2 September 2012, No. 7467.
ICA’s appeal, and confirmed the initial finding of abuse of rights and legitimate interests in the context of a complex anticompetitive strategy. In particular, the Council of State agreed with the ICA on the irrelevance of the validity of Pfizer’s divisional patent, taking into account the broader factual framework of multiple practices allegedly pursued by Pfizer to postpone the entry of generics into the market. Following the judgment of the Council of State, the above-mentioned Ministries filed a follow-on action against Pfizer before the Tribunal of Rome, claiming damages of approximately €14 million due to the increase in the costs borne by the Italian National Health System.

The Tribunal of Rome rejected the Ministries’ damages claims. The Tribunal held that Pfizer had lawfully exercised its IP rights, which pursue a pro-competitive objective (i.e., providing the incentive to invest in R&D). According to the Tribunal, Pfizer’s application for a divisional patent, together with its other administrative actions, could not be considered part of an exclusionary strategy because they had a legitimate legal and economic rationale. Similarly, the Tribunal excluded that there was any vexatious litigation strategy by Pfizer, as its actions did not meet the two cumulative conditions necessary to consider them abusive under EU case law, namely that the legal action cannot reasonably be considered as an attempt to establish the right of the claimant, and is part of a plan or is intended to eliminate competition. Moreover, the existence of the alleged infringement was questionable because, after the ICA’s decision, the EPO’s Technical Board of Appeal confirmed the validity of Pfizer’s divisional patent application. Finally, the Tribunal noted that the binding effect of ICA findings of infringement, provided for by Article 7 of Legislative Decree No. 3/2017, did not apply in that case because of the temporal scope of application of the new rules, and thus the ICA decision was not binding on the Tribunal. In light of the above, the Tribunal departed from the ICA’s findings and stated that Pfizer had not committed an abuse. Moreover, the Tribunal found that the claimants had failed to demonstrate a causal link between the abusive conduct and the alleged damages, as well as the amount of the damages.

In November 2017, the Court of Appeal of Milan held that charging lower prices to customers that purchase a larger amount of products, based on objective parameters, is not an abuse. A small retailer had refused to fulfil its payment obligations in relation to a supplier on the ground that, inter alia, the prices charged by the supplier were higher than those offered to large retailers (such as supermarkets). The Court of Appeal dismissed the action brought by the retailer. According to the Court, the fact that large retailers may obtain lower prices due to the greater amount of products purchased constitutes a normal commercial practice, and antitrust law should not aim at ensuring that less efficient competitors remain on the market.

In February 2018, the Tribunal of Milan rejected damages claims filed by Eutelia and Fallimento Voiceplus for an alleged abuse of dominance committed by Telecom Italia in the market for value-added services offered through ‘non-geographical numbers’ (NGNs). Eutelia and Voiceplus were telecommunications operators authorised to use NGNs to provide clients with value-added services (e.g., televoting services). Telecom (and other fixed and mobile telecommunications operators) provided customers with the call origination services needed to use the value-added services offered by NGN operators. The provision of NGN services was based on a system of double invoicing: the firm providing call origination

39 Council of State, 12 February 2014, No. 693.
40 Court of Appeal of Milan, 7 November 2017.
41 Tribunal of Milan, 13 February 2018, No. 1560.
services charged customers for the value-added services, and transferred the amount paid to NGN operators after deducting a fee. Eutelia and Voiceplus claimed before the Tribunal of Milan that, as of 2005, Telecom had refused to transfer to them the amount paid by certain customers, or to charge some customers for the value-added services provided by Eutelia and Voiceplus, by alleging unproven frauds and anomalies in traffic data concerning their customers.

The Tribunal of Milan held that the claimants had not proved to the required legal standard that Telecom was dominant in a properly defined relevant market. In particular, the Tribunal observed that call origination and invoicing services could be provided not only by Telecom, but also by other fixed and mobile telecommunications players, which enabled NGN operators to supply their services to a significant number of customers without the intermediation of Telecom. The Tribunal also stated that the claimants had not provided sufficient evidence of the alleged discriminatory practices, as the available evidence demonstrated that Telecom had adopted the same course of action in the case of possible frauds and anomalies in traffic data concerning not only the claimants’ clients, but also its own customers. Furthermore, Telecom would not have had any economic interest in limiting the traffic of NGN firms, which resulted in additional revenues for the incumbent, as Telecom was entitled to a fee for value-added services.

III MARKET DEFINITION AND MARKET POWER

The first step in abuse of dominance cases is the definition of the relevant product and geographical market. The ICA’s general approach to market definition is consistent with the Commission’s practice (in particular, the ICA typically focuses on demand-side and supply-side substitutability). Similarly, the ICA follows the EU notion of dominance. Market shares are a key factor in the assessment of dominance. Market shares exceeding 40 per cent are normally considered an indication of dominance. However, firms holding market shares lower than 40 per cent may also be dominant if the remaining part of the market is composed of small competitors. The stability of market shares is also important, but the fact that the market share is decreasing does not necessarily preclude a finding of dominance. In the assessment of dominance, the ICA and national courts may consider a number of additional factors that give the firm concerned a competitive advantage or raise barriers to entry.
A dominant position may be held by one or more firms. In accordance with EU case law, collective dominance may be based not only on structural or contractual links between the companies concerned, but also on the economic interdependence among firms active in an oligopolistic market.49

Abuse of economic dependence in a contractual relationship with a single customer or supplier (relative dominance) is prohibited by Article 9 of Law No. 192/1998. This provision aims at protecting the interests of weak parties in contractual relationships. When a contested conduct affects competition on the market, the ICA may exercise its investigative and fining powers under the Competition Act, and it may apply both Article 9 of Law No. 192/1998 and Article 3 of the Competition Act.50

IV ABUSE

i Overview

A dominant firm violates Article 3 only if it commits an abuse. Dominance itself is not an offence.

Dominant firms have a special responsibility not to impair undistorted competition in the relevant market.51 As a consequence, conduct that would normally be lawful may be considered anticompetitive if engaged in by a dominant firm.

Article 3 applies to both anticompetitive conduct aimed at excluding competitors (exclusionary abuses) and the exploitation of dominant firms’ market power (exploitative abuses).

The list of abuses provided in Article 3 of the Competition Act is not exhaustive, and the ICA has often fined \textit{sui generis} anticompetitive practices. The crucial challenge is to identify the practices that pose unacceptable competitive dangers. In this respect, the ICA has traditionally adopted a case-by-case approach, which does not seem to reflect a coherent theoretical framework.

Behaviour is considered unlawful if it may hinder the (limited) level of competition still existing in the market or the development of that competition. To establish an abuse, it is sufficient to demonstrate a potential prejudice to competition. It is not necessary to prove that the conduct had actual anticompetitive effects.52

Abuse is an objective concept. An anticompetitive intent is not a prerequisite for a finding of abuse.53 However, the existence of an exclusionary intent may play an important role in the assessment of an alleged abuse, in particular when the contested conduct is part of

49 See decision of 3 August 2007, No. 17131, A357, \textit{Tele2/Tim-Vodafone-Wind}.

50 Pursuant to Article 9, paragraph 3 bis, of Law No. 192/1998, in the case of widespread and repeated violations of the rules on payment terms provided for by Legislative Decree No. 231/2002 in contractual relationships with firms (in particular small and medium-sized undertakings), an abuse may be found even in the absence of economic dependence. See decision of 23 November 2016, No. 26251, RP1, \textit{Hera-affidamenti gruppi misura gas/termini di pagamento}.


a plan aimed at eliminating competitors. An exclusionary intent may also justify a finding of abuse when the dominant firm exercises a right in an objectionable manner to pursue an objective different from that for which the right was granted in the first place.

A conduct does not infringe Article 3 if it is objectively justified. This may be the case, in particular, if the conduct is objectively necessary to protect the dominant firm’s or third parties’ legitimate interests or leads to a cost reduction.

ii Exclusionary abuses

Exclusionary pricing

The ICA issued its first decision on predatory pricing in 1995 in Tekal/Italcementi. In accordance with EU case law, the ICA held that prices below the average variable cost (AVC) must be presumed unlawful, while prices between AVC and the average total cost (ATC) are unlawful if they are part of an anticompetitive plan. The contested conduct was considered abusive even though it was not proven that the dominant firm was able to recoup the losses incurred by selling at below-cost prices. The ICA’s view is consistent with the principles established by the ECJ, and contrasts with US case law, which requires the proof of a reasonable likelihood of recouping the losses suffered by selling below cost.

In Caronte, the ICA used different cost benchmarks. Instead of relying on the AVC and ATC, the ICA focused on the short-run average incremental cost (SRAIC) and long-run average incremental cost (LRAIC). According to the decision, prices below SRAIC must be presumed exclusionary, while prices at least equal to SRAIC, but below LRAIC, are unlawful if they are part of an anticompetitive plan. However, a few years later, in Mercato del calcestruzzo cellulare autoclavato, the ICA made reference to average avoidable cost (which was considered equal to the AVC) and the ATC.

More recently, in TNT/Poste Italiane, the ICA used the LRAIC benchmark in the analysis of the pricing policies of the incumbent in the postal sector. However, the ICA adopted a strict approach in calculating the LRAIC. The latter was considered essentially


63 Decision of 14 December 2011, No. 23065, A413, TNT Post Italia/Poste Italiane.
equal to the average operating cost reported by regulatory accounts, which typically also include a share of common costs. The decision was annulled by the TAR, whose judgment was upheld by the Council of State. 65

In a few cases, the ICA and national courts have held that even above-cost prices offered to strategic customers (selective discounts) may be abusive. This may be the case, in particular, if they are part of a broader exclusionary strategy implemented through different abusive practices, or the dominant firm uses privileged information that it holds because of its status of incumbent and vertically integrated operator but that is not available to rivals, to implement win-back or retention policies. 66 Furthermore, according to the ICA and the TAR, a discount may be per se abusive, regardless of the relationship between price and cost, if it is the result of a privilege exclusively conferred on the dominant firm by sector-specific rules incompatible with EU rules. 67

A vertically integrated firm active in the supply of an input and a final product may infringe competition rules if it sets its upstream or downstream prices so as to squeeze competitors’ margins.69 For instance, in Telecom, the ICA held that the Italian incumbent in the electronic communications sector abused its dominant position by charging competitors more than it charged its commercial divisions for the relevant inputs, thus reducing rivals’ margins and excluding equally efficient firms.70 A price squeeze may also be the result of discounts offered to retail customers. 71

Exclusive dealing

Exclusive dealing obligations may constitute an abuse under Article 3 when the conduct may significantly foreclose access to the market. In Diritti calcistici,72 the ICA found that

64 TAR, 25 June 2012, No. 5769.
65 Council of State, 6 May 2014, No. 2302. The Council of State held that the analysis of LRAIC was erroneous in several respects: (1) the predation analysis should have been carried out ex ante, on the basis of data and information available when the firm set its prices, and not ex post, on the basis of regulatory costs; (2) the ICA had not taken into account the increase in regulatory costs because of universal service obligations; (3) the ICA had assessed the profitability of the service over the first year-and-a-half of activity without considering that initial losses in the launch of a new product may be inevitable; and (4) the ICA had wrongly identified the incremental costs borne for the supply of the services concerned by allocating to these services resources used mainly for other services.
68 Decision of 27 March 2013, No. 24293, Case A441, Applicazione dell’IVA sui servizi postali, Bulletin No. 16/2013; TAR, 7 February 2014, No. 1525.
71 See, e.g., decision of 9 May 2013, No. 24339, A428, Wind-Fastweb/Candidote Telecom Italia, confirmed by the TAR, 8 May 2014, No. 4801, which was upheld by Council of State, 15 May 2015, No. 2479. See also decision of 15 July 2015, No. 25561, A473, Fornitura acido colico, concerning both an increase in the upstream price and selective discounts in the downstream market.
Mediaset, the main Italian TV operator, violated Article 102 of the TFEU on the market for the sale of TV advertising lots. In 2004, Mediaset concluded with the major Italian soccer clubs various contracts concerning the broadcasting rights of their home matches for the 2004 to 2007 seasons. Moreover, Mediaset negotiated with the same clubs exclusive pre-emption rights for the broadcasting of their matches through all platforms from 2007 to 2016. Through exclusivity, ‘English clauses’ and pre-emption rights, Mediaset rendered the relevant TV content de facto unavailable for a long period for its competitors.

The ICA may also find an abuse even when a dominant firm imposes de facto exclusivity through the threat of retaliation and other measures, or uses contractual clauses that lead to an exclusive commercial relationship, especially within the framework of a broader exclusionary strategy that includes other practices aimed at limiting competitors’ access to suppliers, distribution channels or customers.

The ICA has also held that loyalty discounts and rebates, conditioned upon the customer obtaining all or most of its requirements from a dominant supplier, or reaching a given target, may infringe competition rules, because they tend to eliminate or restrict purchasers’ freedom to choose their supply sources, thus hindering rivals’ access to the market or development. The loyalty-inducing effect is stronger when loyalty discounts are applied retroactively to all units purchased during a given reference period.

Furthermore, according to the ICA, loyalty discounts may be anticompetitive because they imply discrimination between customers.

The treatment of loyalty discounts is consistent with the traditional formalistic approach of the EU institutions. The ICA does not consider it necessary to apply a price-cost test to establish whether a loyalty discount scheme is capable of excluding an as-efficient competitor, especially when the contested conduct is part of a broader exclusionary strategy.

**Leveraging**

Article 3(d) of the Competition Act prohibits firms in a dominant position in the market for a particular product or service (the tying product or service) from conditioning the sale of that product or service upon the purchase of another (the tied product or service). Tying may also be obtained through price incentives such as, in particular, bundled discounts and

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73 See, e.g., decision of 25 July 2017, No. 26704, A499, Assicurazioni agricole/Comportamenti escludenti Codipra.

74 See decision of 31 October 2017, No. 26822, A484, Unilever/Distribuzione gelati, concerning, inter alia, a commitment to provide retailers with freezer cabinets without any charge, on the condition that retailers would not stock competitors’ ice creams in the freezer (freezer exclusivity).


76 In some cases, intent and the existence of an overall exclusionary strategy played an important role in the finding of infringement. See, for example, Council of State, 10 March 2006, No. 1271.


78 See decisions of 13 December 2017, No. 26900, A493, Poste italiane/Prezzi recapito; 31 October 2017, No. 26822, A484, Unilever/Distribuzione gelati.
rebates. For instance, in *Albacom Servizio Executive*, the ICA found that the incumbent in the telecommunications sector infringed Article 3 by making certain rebates on the price of a monopolised service conditional upon attaining certain traffic volumes in a liberalised service.

**Refusal to deal**

Refusal to deal may amount to an abuse when it may substantially weaken competition in the market where the dominant firm operates or in a different market and is not objectively justified. Refusal to deal encompasses a considerable range of practices, including the refusal to supply products or services, to provide information and to grant access to an essential facility. Practices such as refusal to begin negotiations, refusal to renew a contract or unilateral termination of a contract may be considered instances of refusal to deal. The imposition of onerous conditions by a dominant firm, dilatory strategies and other forms of constructive refusal to deal might have the same effect as an outright refusal to deal. Differences in the processes for the management of requests for services submitted by internal divisions and by competitors may amount to a constructive refusal to deal if they entail more complexity and, possibly, higher costs for competitors.

The ICA defines the notion of essential facility in accordance with principles established by EU case law. Intellectual property rights and information required to carry out an economic activity may also be considered essential facilities.

The ICA has applied the principles on refusal to deal and essential facilities in a number of cases, especially in liberalised sectors. In its decision practice, the ICA has made extensive

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80 See decision of 6 November 1997, No. 5446, A129, *Infocameri/Cerved*. A refusal to deal by a dominant firm is abusive only if it is capable of having a significant impact on the market. Evidence of a single refusal to supply may not be sufficient to find an abuse. See TAR, 21 February 2001, No. 1371.

81 See decision of 25 July 2012, No. 23770, A436, *Arenaways-Ostacoli all’accesso nel mercato dei servizi di trasporto ferroviario passeggeri*. However, the decision was annulled by the TAR, 27 March 2014, No. 3398, according to which the ICA had erroneously held that the administrative procedures initiated by the dominant firm were merely dilatory.


83 Id.

84 See, for example, decision of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*.


reference to EU competition law principles. However, it has often adopted a broad and flexible interpretation of the requirements set by the ECJ’s case law.87

A refusal to deal is not abusive if it is objectively justified. This may be the case, for instance, when the dominant firm does not have enough capacity to satisfy third parties’ demand, the customer is insolvent or does not respect the contractual terms, or the firm requesting access does not meet the technical or security requirements needed to access an infrastructure.88

In principle, lack of capacity on a facility (capacity saturation) should constitute an objective justification.89 In exceptional circumstances, however, a dominant firm may be obliged to invest in the development of the facility. Indeed, in Eni-TPPC,90 the ICA held that the interruption of the expansion of a pipeline used for the international transport of gas and the termination of the ‘ship or pay’ agreements entered into by the firm managing the facility – a dominant firm’s subsidiary – with independent shippers amounted to an abuse of dominant position. The ICA did not apply the essential facility doctrine since alternative infrastructures could be used to transport gas into Italy, and the dominant firm was not under an obligation to invest in the development of the pipeline. Nonetheless, the ICA held that the interruption of the expansion was abusive due to the interference of the mother company in the subsidiary’s investment decisions. In a similar case,91 the Commission adopted a different approach, as it explicitly relied on the essential facility doctrine. In particular, the Commission held that the different infrastructures used to transport gas into Italy, taken as a whole, constituted a single essential facility, and stated that the incumbent may have an obligation to invest in the development of an infrastructure if a system operator not vertically integrated in the sale of gas would do so.

iii Discrimination

Article 3(c) prohibits dominant firms from applying dissimilar conditions to equivalent transactions, thus placing a trading party at a competitive disadvantage. Charging different prices may be abusive only if it is not economically justifiable.92 For instance, charging lower

87 See, for example, decision of 15 June 2005, No. 14388, A364, Merck-Principi attivi; TAR, 3 March 2006, No. 341.
88 See, for example, decision of 2 March 1995, No. 2854, A61, De Montis Catering Roma/Aeroporti di Roma.
89 However, the ICA has normally rejected the defence in the light of the specific facts of the case: see, for example, decisions of 25 February 1999, No. 6926, A221, Snam-Tariffe di Vettoramento; 6 June 1996, No. 3953, A107, Fina Italiana/Compagnia Italpetroli; 2 March 1995, No. 2854, A61, De Montis Catering Roma/Aeroporti di Roma.
91 Commission decision of 29 September 2010, case COMP/39.315, ENI.
92 For instance, in Alitalia, the ICA held that Alitalia’s incentive schemes for travel agents were discriminatory because, in some cases, different commissions were granted to travel agents for reaching similar sales targets. Thus, the agreements placed some travel agents at a competitive disadvantage without an acceptable justification. See decision of 27 June 2001, No. 9693, A291, Assoviaggi/Alitalia. See also, inter alia, decisions of 17 March 1993, No. 1017, A11, IBAR/Aeroporti Roma; 10 April 1992, No. 452, A4, Ancico/Cerved.
prices to customers that purchase a larger amount of products, based on objective parameters, may be justified.\textsuperscript{93}

In many cases, the ICA has fined dominant firms for having favoured their subsidiaries or commercial divisions active in downstream markets to the detriment of competitors by granting preferential access to certain resources\textsuperscript{94} or applying discriminatory conditions.\textsuperscript{95} Non-price discrimination may also amount to an abuse of dominance.\textsuperscript{96} Furthermore, discriminatory practices may be prohibited when they aim at penalising customers that also deal with other operators in order to prevent the entry or limit the growth of competitors.\textsuperscript{97}

iv Exploitative abuses

A firm may abuse its dominant position if it directly or indirectly imposes unfair selling or purchasing prices. To establish an exploitative abuse, it may be necessary to engage in an in-depth cost analysis aimed at verifying whether the difference between the costs actually incurred and the price actually charged is excessive.\textsuperscript{98} If this analysis cannot be carried out or is inconclusive, the ICA may compare the prices imposed by the dominant firm with those charged by the same firm or competitors for the same product or service in other markets\textsuperscript{99} or in the past.\textsuperscript{100} In some cases, the ICA applied both the aforementioned tests in the assessment of prices charged by the dominant firm.\textsuperscript{101}

In 2016, in \textit{Aspen}, the ICA applied a two-stage test to determine whether the prices charged by the dominant firm were excessive and unfair: first, it considered the disproportion between prices and costs; then it took into account a number of additional factors that confirmed the unfairness of the prices (including the historical prices for the products concerned, the lack of economic justifications for the price increases, the absence of any non-economic benefits for final users, the nature of the products, the characteristics of the dominant firm and the harm caused by the practice).\textsuperscript{102}

\textsuperscript{93} Court of Appeal of Milan, 7 November 2017.

\textsuperscript{94} See, for example, decisions of 27 February 2014, No. 24819, A444, \textit{Akron-Gestione rifiuti urbani a base cellulosa}; 8 January 2017, No. 26350, A490, \textit{Net Service-Software proceso civile telematico}.


\textsuperscript{97} See, for example, decision of 28 February 2018, No. 27503, A487, \textit{Compagnia Italiana di Navigazione - Trasporto marittimo delle merci dal porto di Cagliari alla Sardegna}.


\textsuperscript{99} In that case, it is for the dominant firm to justify the price differential by showing objective differences between the situation in the markets concerned. See, for example, decision of 25 February 1999, No. 6926, A221, \textit{Snam-Tariffe di Vettoriamento}. See also decision of 28 July 1995, No. 3195, A48, \textit{SIL/R/SIAE}.

\textsuperscript{100} See, for example, decision of 4 May 2017, No. 26562, A498A, \textit{Enel - Prezzi servizi di disimpegno area Brindisi}.

\textsuperscript{101} See, for example, decisions of 15 November 2001, No. 10115, A306, \textit{Alitalia/Veraldi}; 10 April 1992, No. 452, A4, \textit{Anci/Cerved}.

In some cases, the ICA has fined a dominant company for having charged prices remunerating activities or services that were not rendered. In these cases, prices were considered by definition unfair. Article 3 also prohibits the direct or indirect imposition of unfair non-price trading conditions.

V REMEDIES AND SANCTIONS

i Sanctions

Pursuant to Article 15 of the Competition Act, the ICA may impose on firms fines of up to 10 per cent of their total turnover. However, fines actually imposed by the ICA are normally significantly lower than the above-mentioned cap.

In setting the amount of the fine, the ICA normally applies the principles set out by the Commission guidelines.

If a firm fails to comply with an order to cease an abusive conduct, the ICA may impose a fine of up to 10 per cent of the firm’s total turnover. If the original infringement decision imposed a fine, the new sanction is at least twice the previous fine up to 10 per cent of the turnover. If a firm repeatedly violates an order of the ICA, the latter may suspend the firm’s activities for up to 30 days.

ii Behavioural remedies

Pursuant to Article 15(1) of the Competition Act, if the ICA finds a violation of antitrust rules, it orders the companies concerned to put an end to the infringement. The ICA typically asks the companies involved to desist immediately from the anticompetitive conduct, to enact positive measures to restore conditions of effective competition in the affected markets within a certain time-limit, and to report on its progress.

According to Article 14 bis of the Competition Act, in urgent cases, where there is a risk of serious and irreparable damage to competition and a cursory examination of the facts reveals the existence of an infringement, the ICA may order interim measures on its own motion.

103 See, for example, decision of 23 May 2002, No. 10763, A299, *International mail express/Poste Italiane*.

104 Examples of unfair trading conditions include the imposition of a contractual clause that prohibits customers from reselling products bought from a supplier (decision of 10 April 1992, No. 452, A4, *Ancis/ Cerved*), the refusal by a dominant firm providing toll payment services to reimburse cards not used, or only partially used, after their expiration (decision of 26 July 2007, No. 17069, A382, *Autostrade/ Carta prepagata Viacard*), and the request of payment of unpaid bills of former customers as a condition to enter into new agreements for the supply of electricity or communications services (decisions of 10 October 2007, No. 17481, A390, *Enel Distribuzione/Attivazione subordinata a pagamento morosità pregresse*; 21 August 2008, No. 18692, A398, *Telecom-Morosità pregresse*).

105 See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, 2006 OJ (C 210) 2.
iii Structural remedies

The Competition Act does not expressly empower the ICA to impose structural remedies. As a matter of principle, however, the administrative courts’ case law seems to leave the door open to the imposition of structural remedies in competition law cases, subject to a strict proportionality requirement.106

VI PROCEDURE

The ICA may start proceedings after assessing the information at its disposal or brought to its attention by third parties, such as public authorities, consumer associations and competitors. The ICA may also start antitrust proceedings following a general sector investigation. Antitrust investigations are often triggered by third-party concerns, but this is not always the case.

The decision to start proceedings, which is published in the ICA’s Bulletin and on its website, contains the essential elements of an alleged infringement. The ICA serves the decision upon the parties concerned (i.e., the parties whose conduct is at issue and third parties who submitted complaints or reports). The decision to start proceedings is sometimes served upon the firm under investigation during an unannounced inspection.

Companies under investigation have the right to:

a be heard by the ICA within the time limit indicated in the decision to open proceedings;
b obtain a final oral hearing before the end of the investigation;
c submit briefs and documents; and
d access the case file.

Within 30 days of publication of the decision to start proceedings in the Bulletin, interested third parties (individuals, consumer associations, competitors, or other bodies whose interests might be directly and immediately harmed by the alleged infringement or any measures adopted as a result of the investigation) may request to participate in the proceedings. Complainants and interveners may access the case file and submit briefs and documents. In addition, they may be heard by the ICA officials and be allowed to participate in the final oral hearing, if the latter is requested by the firms under investigation.

Following the opening of the proceedings, the ICA can exercise extensive investigative powers, such as the power to:

a require specific documents or information;
b carry out unannounced inspections at business premises (as opposed to residential premises);
c interview companies’ legal representatives;
d image computer hard drives by using forensic IT tools;
e require explanations about any documents or information supplied by the company concerned; and
f secure premises overnight by seal.

The ICA may impose fines on firms that fail to provide the information or exhibit the documents requested or, intentionally or negligently, supply incorrect or misleading information.

The Italian legal system does not provide for special rules on legal privilege in antitrust proceedings. In its decision practice, the ICA generally follows the principles and criteria established by EU case law.

Pursuant to Article 22 of Regulation (EC) No. 1/2003, the ICA may seek the assistance of other national competition authorities to carry out investigative activity in their jurisdiction on its behalf.

In urgent cases, the ICA may order interim measures, which cannot be renewed or extended. If the addressee of the interim measures does not comply with the decision, the ICA may impose a fine of up to 3 per cent of the annual turnover.

Investigations may last for several months and often more than one year. When the ICA considers that it has acquired sufficient evidence, it issues a statement of objections (SO) by which it notifies the companies concerned and any complainants of its objections at least 30 days before the closing date of the investigation. The SO contains an extensive elaboration of the reasons underlying the ICA’s assessment of the case.

If the companies being investigated request to be heard by the ICA, a final hearing takes place, typically on the date of closure of the investigation. After the final hearing, the ICA issues a decision. If the ICA finds that the contested conduct is abusive, it orders that the infringement be put an end within a given time limit. If the infringement is serious, the ICA can impose a fine.

Under Article 14 ter of the Competition Act, firms may offer commitments aimed at removing the ICA’s competition concerns within three months from the opening of proceedings. After assessing the suitability of such commitments, including by means of a market test, the ICA may make them binding on the firms concerned and close the proceedings without ascertaining any infringement or imposing a fine. Commitment decisions have become a frequently used enforcement tool.

The ICA’s decisions are subject to judicial review by the TAR. The parties may file an appeal within 60 days from receipt of the notifications of the decision. The parties can ask the TAR for a stay of execution of the ICA’s decision. Hearings for interim measures are usually granted within a short time after the filing of a notice of appeal. A hearing on the merits of a case usually takes place within one year of the filing of an appeal. If the appeal is denied, the party may appeal to the Council of State.

The ICA’s decisions are subject to full judicial review with respect to the imposition of fines. Accordingly, administrative courts may also change the amount of the fine. However, they cannot increase the fine, since this would violate the non ultra petita rule.\(^{107}\)

In principle, the judicial review of substantive findings is limited to a control of legality. Accordingly, courts must assess whether the ICA based its conclusions on accurately stated facts and supported its decision on adequate and coherent grounds.\(^{108}\) The administrative courts have clarified that the judicial review of substantive findings is strong, effective and penetrating, and also covers the economic analysis carried out by the ICA.\(^{109}\) However, when complex assessments carried out by the ICA remain questionable, the administrative court

\(^{107}\) See Council of State, 2 March 2009, No. 1190.

\(^{108}\) See Council of State, 19 July 2002, No. 4001 and, more recently, TAR, 10 March 2003, No. 1790.

\(^{109}\) See, for example, Council of State, 6 May 2014, No. 2302; 20 February 2008, No. 597; 8 February 2007, No. 515.
cannot substitute its own assessment for that of the ICA. The limits of judicial reviews of antitrust decisions were confirmed by Article 7(1) of Legislative Decree 19 January 2017, No. 3, implementing Directive No. 2014/104/EU on actions for antitrust damages.

In Menarini, in light of the judicial review actually exerted by the administrative courts, the European Court of Human Rights held that the Italian administrative enforcement system is compatible with the right to full and effective access to an independent and impartial tribunal established by Article 6(1) of the European Convention on Human Rights (ECHR).

VII PRIVATE ENFORCEMENT

Victims of abusive conduct may bring private antitrust actions before the competent Italian civil courts to ask for compensation, declarations of nullity, restitution or injunctive relief.

Damages for breach of antitrust rules may be claimed by victims of anticompetitive conduct pursuant to Article 2043 of the Italian Civil Code, according to which ‘any act committed with either intent or fault causing an unjustified injury to another person obliges the person who has committed the act to compensate the damages’. The Italian Supreme Court has clarified that consumers also have standing to bring damages actions in tort for breach of the Competition Act.

A collective action system has been recently introduced in the Italian legal system. Pursuant to Article 140 bis of the Consumer Code, in cases of anticompetitive practices affecting a number of consumers or users, any of them has standing to file a class action with the competent court. At the end of the first hearing, the court decides whether the conditions for the certification of the class action are met. If the class action is admitted, a notice about the lawsuit is published, and all consumers or users who claim to have a right homogeneous to that for which the class has been established can join it. The opt-in declaration must be filed with the register of the competent court within a certain time. Consumers and users who opt in do not assume the role of parties to the proceedings, and thus do not have procedural powers. If the court eventually finds that the class action is well founded, it orders the defendant to pay a certain sum to each member of the class or, alternatively, establishes the criteria on the basis of which these sums must be calculated.

110 See, e.g., Council of State, 6 May 2014, No. 2302; 24 September 2012, No. 5067.
112 ECHR, Case No. 43509/08, A Menarini Diagnostics/Italy.
113 Supreme Court, 4 February 2005, No. 2207.
114 See Article 140 bis of Legislative Decree No. 206/2005 (Consumer Code). The collective action is applicable only with respect to infringements committed after 15 August 2009.
115 A collective action can be rejected by a court for a number of reasons. For instance, it can be dismissed when the consumer or user concerned has interests conflicting with those of the proposed class or does not seem to be able to protect adequately the class’s interests.
116 Individuals can decide not to join the class and file a separate lawsuit on their own.
In addition, pursuant to Articles 139 and 140 of the Italian Consumer Code, consumer associations registered with the Ministry for Productive Activities have standing to request cease-and-desist orders against certain practices that may harm consumer interests, and appropriate measures for correcting or eliminating the detrimental effects thereof.

Damages are limited to the plaintiff’s actual losses (i.e., ‘out-of-pocket’ losses plus loss of profits). Punitive or exemplary damages are not available in the Italian legal system. Plaintiffs can only claim damages that they actually incurred. Where a precise amount cannot be determined, the court may also calculate damages on an equity basis.\(^{117}\)

The calculation of damages based on loss of income is especially difficult when the injured company could not enter the market due to abusive conduct. In *Telesystem*,\(^{118}\) the Court commissioned an expert report on losses suffered by a potential first mover into the sector for leased-lines services, which failed to enter this new market because of the dominant firm’s refusal to grant access to certain essential facilities. The damage liquidation was based, *inter alia*, on the advantage that the plaintiff would have had as first entrant into the sector for leased-lines services. However, the Court considered also that, in a free market economy, monopoly rent, such as that of a first mover, tends to be neutralised by competition within a certain time frame.

Contractual clauses amounting to an abuse of dominant position may be found void. In *Avir*, the Court of Appeals of Milan stated that the clauses provided for by a gas supply agreement, which imposed an excessive price, were void because they were incompatible with Article 3(a) of the Competition Act, and granted restitution of the abusive overcharge paid by the customer.\(^{119}\)

As a matter of principle, civil courts do not have the power to permanently enjoin a defendant from repeating an anticompetitive conduct in their final judgments, unless the antitrust violations are also qualified as unfair competition acts pursuant to Article 2598 of the Italian Civil Code.

A plaintiff may obtain interim remedies, including temporary injunctions and any other remedy that the court may deem appropriate to preserve the plaintiff’s rights until a final judgment is issued. To this end, the claimant must provide sufficient factual and legal grounds to establish a *prima facie* case, as well as the risk of imminent and irreparable damage.

In some cases, the Italian Supreme Court has stated that findings contained in an ICA decision constitute privileged evidence, from which a court may legitimately infer the existence of the alleged infringement, damage and causal link. In principle, the presumption is rebuttable. However, the nature of privileged evidence of the ICA’s findings prevents defendants from arguing against the very same facts and grounds that the ICA relied upon to find a violation of antitrust rules.\(^{120}\) In a judgment delivered in 2014, the Supreme Court stated that, in principle, the ICA’s findings are not binding on civil courts and there is no legal category of privileged evidence distinct from that of legal proof.\(^{121}\) Nonetheless, the Court

\(^{117}\) Court of Appeal of Naples, 28 June 2007, No. 2513.

\(^{118}\) Court of Appeal of Milan, 18 July 1995 and 24 December 1996.

\(^{119}\) Court of Appeal of Milan, 16 September 2006.

\(^{120}\) Supreme Court, 20 June 2011, No. 13486. As a consequence, the defendant can rebut, for instance, the presumption of a causal link by alleging and proving different and specific factors, which were *ex se* capable of causing the damage or contributed to its causation, but it cannot rely on factors already examined and dismissed by the ICA. See Supreme Court, 10 May 2011, No. 10211; Court of Appeal of Milan, 2 January 2017.

\(^{121}\) Supreme Court, 28 May 2014, No. 11904.
confirmed that the findings contained in an ICA decision have ‘high evidentiary value’ in proceedings before civil courts. According to lower courts, commitment decisions may also have evidentiary value, as they imply at least that an abuse was considered likely on the basis of an investigation carried out by the ICA.

As to stand-alone private actions, the Supreme Court stated that, in light of the information asymmetry between claimants and defendants and the complexity of antitrust cases, civil courts should not adopt a strict application of the burden-of-proof principle. To ensure an effective application of competition rules in private actions for damages, national courts should use the procedural tools available under Italian law (such as orders to submit documents, requests for information from administrative authorities and expert opinions) to acquire and evaluate data and information useful for establishing the alleged anticompetitive conduct.


Inter alia, the Decree strengthens the rules on disclosure of evidence. Upon motivated request, national courts can order the parties to civil proceedings or third parties to disclose relevant evidence in their possession. Courts have to specifically indicate the evidence to be disclosed and, in the case of confidential information, they must adopt the necessary measures to protect it (e.g., by redacting sensitive information). If a piece of evidence cannot be produced by the parties or any third party, courts can order the exhibition of the documents in the case file of a national competition authority – apart from leniency statements and settlement submissions – provided that certain conditions are met.

According to the Decree, ICA decisions and administrative court definitive judgments constitute legal proof of antitrust infringements. Nevertheless, a claimant still has to prove the other requirements for civil liability, including the causal link between the conduct and the damage. Decisions of competition authorities and courts of other Member States constitute evidence that may be considered by the national courts together with other available evidence.

Damages claims based on antitrust infringements are time-barred after five years. However, the limitation period is stayed during ICA proceedings, and for an additional year from the moment the infringement decision becomes final or the proceedings otherwise terminate.

The Decree confirms the principle that victims of antitrust infringements are entitled to full compensation, but overcompensation should be avoided. The alleged infringer may claim

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122 In the case at hand, the Court held that the ICA decision was sufficient to prove the alleged infringement, its capability to harm customers and the existence of damage to customers in general. In a few cases, lower courts have departed from the findings of the ICA’s infringement decision: see, e.g., Tribunal of Rome, 26 July 2017, No. 12806, holding that the dominant firm had not committed an abuse, also in light of certain developments subsequent to the ICA decision.

123 Tribunal of Milan, 28 July 2015, No. 9109.

124 Supreme Court, 4 June 2015, No. 11564; see also Supreme Court, 1 April 2016, No. 6366.
that the claimant has passed on all or part of the overcharge to its customers (passing-on defence). In this case, the burden of proof lies with the defendant, which may also ask for a judicial order of disclosure of evidence from the claimant or third parties.

The parties to a cartel are jointly and severally liable for the damage caused, but this principle does not apply when the cartelist is a small or medium-sized enterprise; or the cartelist received full immunity in the context of leniency applications.

The Decree attributes exclusive competence over actions for antitrust damages to the specialised business divisions of the Courts of Milan, Rome and Naples, which are competent for Northern, Central and Southern Italy, respectively.

VIII FUTURE DEVELOPMENTS

The effects-based approach to abuse of dominance cases does not seem to have established itself in Italian decision practice and case law. ICA and national court decisions frequently rely on certain traditional statements of EU case law, which reflect the formalistic and structural approach adopted in the past. They usually consider it sufficient to show that the contested conduct tends to restrict competition or is capable of having anticompetitive effects, without carrying out a comprehensive economic assessment of the impact of the practice. This approach seems to be confirmed by the recent *Unilever* and *Poste* cases on loyalty discounts and rebates, in which the ICA did not consider it necessary to carry out a price-cost analysis aimed at establishing the risk of exclusion of equally efficient competitors, despite the guidance in the *Intel* judgment of the ECJ.

The transition towards an effects-based approach would require a stronger and more penetrating judicial review by administrative courts. The approach of the administrative courts in the review of antitrust decisions still seems erratic. In some cases, such as *TNT/Poste Italiane*, they engaged in an in-depth review of the decision, also taking into account grounds of appeal raising complex economic issues. In other cases, however, the administrative courts seemed to limit themselves to reiterating the ICA’s views, also through extensive references to the contested decision, or have simply overlooked some of the arguments put forward by the parties, without providing adequate explanations as to why they should have been dismissed. A more stringent judicial review of antitrust decisions is necessary not only to foster the transition towards an effects-based approach but also to guarantee full compliance with the fundamental right of access to an independent and impartial tribunal established by Article 6(1) of the ECHR, as interpreted by the European Court of Human Rights in *Menarini*.

Unfortunately, Legislative Decree 19 January 2017, No. 3, implementing Directive No. 2014/104/EU, confirmed that the judicial review of antitrust decisions does not extend to complex assessments carried out by the ICA when these assessments are disputable. The entry into force of the binding effect of the ICA’s findings of infringement in private damages actions, pursuant to Article 7 of Legislative Decree No. 3/2017, will probably increase the tension between antitrust proceedings and the protection of fundamental rights. The Tribunal of Rome’s judgment in *Pfizer* in 2017 (which refused to find an infringement already found by the ICA and confirmed by the Council of State) confirms that, in some cases, the civil

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courts may have valid reasons to depart from the position taken by an antitrust authority (including the need to take into account new events and factual evidence). The binding effect of antitrust decisions in damages actions is difficult to reconcile with the protection of fundamental rights if findings of infringements are not subject to full and unlimited review by an independent court (including with regard to complex economic assessments).

Many cases decided by the ICA and national courts in the past few years have concerned highly regulated sectors. The interaction between competition law and sector-specific regulation seems to give rise to an increasing risk of conflicts of jurisdiction and interferences between different authorities. In some cases, the application of competition rules has led to the imposition of obligations incompatible with sector-specific rules, which has often been criticised by the administrative courts. In other cases, the application of competition rules seemed to supplement sector-specific regulation by imposing additional and stricter obligations. The use of competition law to impose additional and stricter obligations on firms already subject to pervasive sector-specific regulation also raises delicate issues as to the interference and overlapping between the two sets of rules.

The Wind-Fastweb/Condotte Telecom Italia case is a notable example of the risk of conflicts and inconsistencies between the two sets of rules. Access regulation in the electronic communications sector in Italy (and many other states) was traditionally based on the equivalence of output principle, according to which access services offered by the incumbent to alternative operators must be comparable to the services it provides to its retail division in terms of functionality and price, but they may be provided through different systems and processes. By contrast, in its 2015 ruling, the Council of State seemed to consider that differences in supply processes (provided for by sector regulation) are problematic in themselves, because they inevitably entail a different treatment of external and internal requests for access services. To reduce the risk of further antitrust proceedings and damages actions, in 2016 the incumbent introduced a new equivalence model based on the use of the same systems and processes for external and internal requests. Thus, antitrust intervention eventually resulted in a radical shift in the regulatory model, which went beyond the remedies imposed by sector-specific regulation.

In the past few years, the ICA and Italian courts have also shown more activism in the assessment of new types of abuse. Some decisions belong to the controversial line of cases concerning the misuse of rights and legitimate interests arising from sector-specific rules through the initiation of administrative or judicial proceedings aimed at obstructing competitors’ activity. In Pfizer, the Council of State clarified that this type of abuse – which has been inspired by EU case law – is:

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\text{nothing but the specification of the broader category of abuse of right, whose precondition is the existence of a right which is used artificially, for a purpose which is incoherent with that for which that right is granted: in the case at issue, the exclusion of competitors from the market.}
\]

129 In particular, in AstraZeneca, the Commission and the General Court held that the firm concerned had abused its dominant position by obtaining a supplementary protection certificate on the basis of misleading information and representations provided to the competent authorities. See Case C-457/10 P, AstraZeneca v. Commission, ECLI:EU:C:2012:770.
130 Council of State, 12 February 2014, No. 693.
Even the exercise of contractual rights, such as the right to termination of a contract, has been considered abusive on the ground that it was strategically exercised with the sole purpose of excluding a competitor.\(^{131}\)

The misuse of rights and legitimate interests lies at the boundary of antitrust liability. An abusive exercise of a right or legitimate interest may be found when the contested conduct is characterised by an additional element that is intrinsically objectionable, such as the provision of false or misleading information to a regulatory authority, or when it is part of a broader exclusionary strategy implemented also through other anticompetitive practices.\(^{132}\) The distinction between legitimate exercise and abuse of right becomes much more complex, however, when a dominant firm merely exercises its rights in administrative or judicial proceedings to (artificially) protect its position and interests.

The ICA and administrative courts have often emphasised a dominant firm’s alleged exclusionary intent, which seems to be a crucial factor in the assessment of the alleged abuse;\(^{133}\) however, the distinction between abuse and legitimate exercise of right should not be based merely on the dominant firm’s intent. Reference to the dominant firm’s exclusionary intent opens the door to considerable uncertainty, and to a high margin of appreciation in the assessment of corporate statements, internal documents and commercial choices. In addition, a firm’s intent is not in itself sufficient to distinguish legitimate from anticompetitive conduct. Indeed, the aim pursued by any firm competing on the market is, in a sense, to prevail against, and eventually to exclude, its competitors. Moreover, in many cases, the rationale behind the rules invoked by the dominant firm is just to exclude or limit competition from other players. This is the case, for instance, with the rules granting and protecting intellectual property rights, as well as those allowing competitors to access a facility or to carry out an economic activity only within certain limits and under certain conditions.\(^{134}\)

The judgments delivered by the TAR in *Arenaways* in 2014 and by the Tribunal of Rome in *Pfizer* in 2017 seem to confirm that, as a general rule, firms may not be deprived of the chance to exercise their rights and legitimate interests, even though this may negatively affect competitors’ access to the market; however, the boundaries between legitimate exercise and abuse of right remain unclear and need to be clarified by the competent authorities in the future.

As to the enforcement policy, in the past few years the ICA has adopted a more rigorous approach in the assessment of commitments offered by parties. In the past, the ICA often used the commitment procedure to exercise *lato sensu* regulatory functions by negotiating and making legally binding measures aimed at improving the competitive conditions or at benefiting consumers, even in the absence of a clear and direct link between the commitments and the competitive concerns identified by the ICA. From the introduction of commitments procedures, in 2006 to December 2010, the ICA made extensive use of commitment decisions, which represented around 85 per cent of decisions concluding abuse of dominance cases (28 out of 33), but this trend reversed a few years ago, also due to some rulings by

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132 See, e.g., decision of 3 September 2015, No. 25035, A476, *Conai-Gestione rifiuti da imballaggi in plastica*.
133 Council of State, 12 February 2014, No. 693. See also, *inter alia*, Council of State, 8 April 2014, No.1673.
134 A narrower interpretation of the concept of abuse of dominance is necessary, in particular, in cases concerning the exercise of fundamental rights enshrined in the EU Charter of Fundamental Rights or Member States’ constitutional traditions, such as the right of access to justice.
the administrative courts, which have constrained the ICA’s discretion in commitment procedures. In the period from 2011 to 2014, the ICA issued commitment decisions in only slightly more than 30 per cent of investigations concerning abuses of dominance.¹³⁵

In 2015 and 2016, commitment decisions represented the majority of abuse of dominance cases closed by the ICA (two out of three cases each year). In 2017, the ICA issued commitment decisions in four out of 10 cases, while in five cases it found an infringement and imposed a fine on the dominant firm. In addition, at the beginning of 2018, the ICA issued an infringement decision.

Compared to past practice, the ICA now seems to pay more attention to the nexus between the competitive concerns and the commitments offered by the parties. Furthermore, the fact that lower courts tend to consider that commitment decisions may also have evidentiary value may reduce the incentive of firms to offer voluntary remedies.¹³⁶ Nonetheless, negotiated enforcement continues to play a very important role in antitrust decision-making practice. This may have both positive and negative effects. Commitment decisions may reduce risks for firms, and enable the ICA to address more rapidly the issues raised by potentially anticompetitive practices. On the other hand, an extensive use of commitment decisions may negatively affect the development of case law on abuse of dominance, as these decisions do not contain a complete and detailed analysis of the alleged infringement, and the robustness of their reasoning and interpretative choices is normally not tested before courts.

¹³⁵ Two out of six, three out of nine, one out of five and one out of two, respectively.
¹³⁶ Tribunal of Milan, 28 July 2015, No. 9109.
Chapter 15

JAPAN

Yusuke Kashiwagi

I INTRODUCTION

i Characteristics of the regulations on private monopolisation and unfair business practices

The Japanese regulations on dominance and monopolies come in two forms: restrictions on private monopolisation and those on unfair business practices.

Private monopolisation

The concept of ‘private monopolisation’ is derived from Article 2 of the US Sherman Act, and was enacted at the time of the establishment of the Antimonopoly Act (AMA) in 1947, which is based on American judicial precedents on monopolisation. Two types of conduct are prescribed – ‘exclusionary conduct’ and ‘controlling conduct’ – with ‘controlling conduct’ being unique to Japanese law. There are also restrictions on such conduct being committed by multiple enterprises simultaneously, although there are few actual examples of this. Private monopolisation is defined in the provisions of the AMA as follows:

The term ‘private monopolisation’ as used in this Act means such business activities, by which any enterprise, individually or by combination, in conspiracy with other enterprises, or by any other manner, excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.2

While ‘any particular field of trade’ is the JFTC’s English translation, this has the same meaning as the term ‘relevant market’, which is generally used globally.

In actual practice, the provisions against controlling-type conduct are rarely applied, and five of the six private monopolisation cases that have taken place since 2000 have been exclusionary-type cases. While the title ‘private monopolisation’ is used, there is in fact no need for the subject of the relevant conduct to be a private company, so nowadays this expression is essentially meaningless. There is also no requirement for the subject of the conduct to be ‘monopolising’ the market in the economic sense of the term (that is, having only one seller or one buyer).

1 Yusuke Kashiwagi is a partner at TMI Associates.
2 AMA, Article 2, Paragraph 5.
Unfair business practices

While ‘unfair business practice’ means a conduct that has a likelihood of impeding fair competition, and is derived from Article 5 of the US Federal Trade Commission Act, a notable feature of the provisions on such practices is that they prescribe various types of conduct. Essentially, while an unfair business practice is the same as private monopolisation in that the AMA regulates against anticompetitive conduct impeding the function of competition in the relevant market, it differs from private monopolisation in that the AMA also restricts unfair conduct that has a ‘likelihood’ of having such an effect. There are debates over what constitutes such a ‘likelihood’, as described later in this chapter.

Market share

While with private monopolisation there are no provisions imposing requirements on a company’s market share, under the Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act enacted by the JFTC (Guidelines), companies with a share of roughly 50 per cent or more are subject to the restrictions, and in actual cases to which private monopolisation has applied, the share of companies in the relevant market has been high.

For instance, from a general overview of cases since 2000, we see examples including a share of approximately 85 per cent in NIPRO, 70 per cent and above in NTT East (NTT’s share of fibre-optic lines in the East Japan region), 72 per cent in USEN Corporation (up from 68 per cent due to a implementation of exclusionary conduct), 89 per cent in Intel (up from 76 per cent, again due to the implementation of exclusionary conduct) and approximately 100 per cent in JASRAC.

In this way, all cases of private monopolisation since 2000 have identified exclusionary conduct by companies with a market share of 50 per cent or more as a breach of the prohibitions thereon. However, even companies that do not have a market share of 50 per cent or more are regulated by the rules against unfair business practices.

Exclusionary conduct and controlling conduct

In recent years there have been a series of important Supreme Court judgments concerning exclusionary conduct, in which the concept of ‘excluding the business activities of other enterprises’ was defined as ‘causing a clear obstruction to the business activities of a competitor, or clearly making it difficult for a competitor to enter the market, in each case through practices of an artificial nature which deviate from normal competitive methods’. While this definition has become generally accepted, opinion is divided when it comes to the actual determination of exclusionary conduct. However, there is no disputing the fact that there is no need for a company to completely expel a competitor from the market, or to bar it completely from entering it, for such conduct to be considered exclusionary. In addition, in the same judgment a ‘substantial restraint of competition’ is defined as ‘creating, maintaining or strengthening market power’, and so is consistent with actual practice to date.

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3 Conducts are designated as unfair by the AMA or the JFTC (AMA Article 2, Paragraph 9, Items 1–6, and JFTC General Designations (General Designations), pp. 1–16).
5 Judgment of the Supreme Court in the NTT East case: Supreme Court decision – 17 December 2010 Minshu Vol. 64, No. 8, p. 2,067).
On the other hand, controlling conduct is generally defined (albeit not in a Supreme Court judgment) as ‘conduct which imposes restrictions on another enterprise’s decision-making concerning their business activities, and so causes them to comply with one’s own wishes’.

Other matters
While a company that creates market power is essentially free to raise prices, discriminatory price raises, etcetera, of a kind that prevent competitors from entering the market may be caught by the restrictions on private monopolisation.

There are provisions that enable measures to be taken where a market is in a situation whereby it is monopolised by a large company to remove such a situation; however, these have not actually been used in practice, and it is extremely unlikely that they will be in the future, either.

ii Relationship between private monopolisation and unfair business practices
It might be hard for readers in countries that do not have a system of dual restrictions to understand the relationship between private monopolisation and unfair business practices. While the enactment of restrictions on unfair business practices was (as previously mentioned) influenced by the US Federal Trade Commission Act, the AMA is distinct from the latter in that it has provisions on a diverse range of different types of conduct, such as:

- joint refusal to deal;
- restrictions on resale prices;
- dumping;
- discriminatory pricing;
- abuse of superior bargaining position;
- trading subject to exclusive or restrictive conditions; and
- tie-in arrangements and trading interference.

The major difference from private monopolisation is in the extent to which there is an anticompetitive effect on the market, and for private monopolisation to be realised, there must be a ‘substantial restraint of competition’ in the ‘relevant market’.

On the other hand, it is enough for there to be a ‘likelihood of impeding fair competition’ for unfair business practices. The question of to what extent a ‘likelihood’ there should be to satisfy this requirement is, in some cases, the most contested issue. While it also depends on the case in question and how companies compete, the JFTC often sets a low bar in cases to ensure that it wins, while on the other hand companies tend to set a high bar in a way that is substantially the same as a ‘substantial restraint of competition’.

On this point, while the JFTC ruled in the administrative hearing for the Microsoft case (16 September 2008) that ‘the quantitative or substantive effect on competition of the relevant conduct should be determined on a case-by-case basis’, this became the largest point of argument in the actual court case.

6 AMA, Article 8-4.
7 Although in Japan the only enforcing body is the JFTC.
In many cases, if private monopolisation applies it will also constitute one of the types of unfair business practice. On the other hand, the relationship between them is such that conduct does not necessarily constitute private monopolisation just because it is an unfair business practice.

II YEAR IN REVIEW

As the JFTC has tended to enforce the restrictions on private monopolisation in waves, it is worth looking back at previous events to understand the current situation in Japan. There were no such cases between 1972 and 1996, and prior to 1972 there were only a few. During this period, conduct that constituted private monopolisation was regulated as an unfair business practice, as they were generally understood to be at the time, for which the evidential burden was low.

From 1996 to 2009, private monopolisation was actively enforced, with one case a year on average. However, in 2009 the JFTC lost the JASRAC case. JASRAC, which was the monopolistic managing operator for music rights in Japan, was initially determined by the JFTC to have committed a breach of private monopolisation by adopting a blanket collection method for broadcaster licensing fees, whereby it charged a fee by applying its prescribed rate to broadcasters’ broadcasting business revenue as a comprehensive licence for all music managed by JASRAC, regardless of the number of times that music was actually used.

JASRAC contested the decision in the administrative hearing held by the JFTC, which resulted in the JFTC taking the highly unusual step of revoking its own decision of breach.

While it seemed the matter would then be concluded, an action for revocation of administrative disposition was subsequently brought against the JFTC by JASRAC’s competitor, e-license, which claimed that it was excluded by JASRAC. The Tokyo High Court and the Supreme Court both determined that exclusionary conduct had taken place, and the case was referred back to the JFTC.

In 2016, this case finally came to a close, with the withdrawal of JASRAC’s petition for redress, and during the period from 2009 to 2016, shackled as it was by its ongoing conflict with JASRAC, the JFTC did not expose any cases of private monopolisation, with the exception of one small and local case of a controlling-type private monopolisation. However, in recent years the JFTC has become more active again. It has exposed a string of cases that are fascinating from a competition law standpoint, each described later.

On 12 December 2017, the Supreme Court, albeit in an international cartel case, indicated that even where cartel agreements are reached outside Japan, the AMA will apply.

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8 The practice of which has since been abolished.
9 Supreme Court decision, 28 April 2015, Minshu, Vol. 69, No. 3, p. 518. The ruling was as follows:

A collection method which does not take into account the amount of broadcast usage when calculating broadcasting license fees will cause the overall amount of music usage fees borne by broadcasters to increase where they are paying music usage fees to other managing operators. Accordingly, coupled with the fact that the broadcasting usage of music is essentially interchangeable in nature, this has the effect of suppressing the usage by broadcasters of music which is managed by other managing operators, and when one takes into account that the scope of such suppression extends to almost all broadcasters, and that the continuation period thereof extends over a considerably long period of time, one should say that this method clearly has the effect of making it difficult for other managing operators to enter this market.
where these infringe Japan’s free competitive economic order. Although this is self-evident in actual practice, it makes sense that this was made explicitly clear, and it is surmised that this is also applicable to private monopolisation and unfair business practices.

Furthermore, according to press reports, on 15 March 2018 the JFTC conducted an on-site inspection of Amazon Japan’s offices on suspicion of the unfair business practice of ‘abuse of superior bargaining position’. It seems that the investigation will look into Amazon Japan’s conduct in demanding that its supplier companies pay several per cent of the cost of a discount provided to consumers as a form of support money.

Most recently, and again according to press reports, on 22 May 2018 the JFTC conducted an on-site inspection of Mainami Kuko Service, a company providing aviation refueling services, on suspicion of private monopolisation (of the exclusionary type).

It seems that the investigation will look into Mainami’s conduct of allegedly trying to restrict the entry of competitors into the market by asking airlines it has long-term partnerships with not to use refueling facilities provided by competitors.

III MARKET DEFINITION AND MARKET POWER

i Market definition

A market is defined in terms of its product scope and geographical scope. However, markets are sometimes defined very narrowly when compared to merger control, such as in terms of specific areas, services or customers.

The most noteworthy case regarding market definition is NTT East. The JFTC defined the market somewhat narrowly as ‘FTTH [fibre to the home] services for detached residential properties in the East Japan region’. While the company naturally countered that the market should be defined as the broadband services market (including asymmetric digital subscriber line (ADSL) services), the Supreme Court affirmed the JFTC’s decision.10

In the later NIPRO case, the market was defined as ‘the field of supply for glass tubes in the West Japan region for which the consumers are ampoule processing companies with headquarters in the same region and the suppliers are NIPRO and processing companies’, in the USEN Corporation case, as the ‘transmission of music to retail shops in Japan’ and in the Intel case, as ‘the market for the sale of CPUs to Japanese computer manufacturers’.

There is also debate as to whether market definition is required for unfair business practices, and the JFTC’s position is to define markets as necessary on a case-by-case basis. That is to say, its basic position is that this is not necessary. However, in Microsoft, the JFTC did not shy away from defining the market, but instead defined it as the computer audio-video technology trading market. Even for unfair business practices, it is not possible to consider the anticompetitive effect if the market is not defined, and so there are many situations where companies and the JFTC contest the point.

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10 The Court stated that:

given it is clear that there actually existed consumers who prefer FTTH services in terms of the communications side, etc., regardless of the price difference with other broadband services such as ADSL, and so it can be understood that for such persons there was almost no demand substitutability as regards other broadband services, so the FTTH services market can be assessed independently as being the ‘relevant market’ for the purposes of Article 2, Paragraph 5 of the AMA.
ii Market power

As mentioned previously, under the Guidelines a company is required to have a share of over 50 per cent in the relevant market for private monopolisation to apply.

In the case of unfair business practices, there is no need for the company committing the conduct to have market power, and it is enough for them to have a strong position within that market. The Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act\(^\text{11}\) contain safe harbour provisions whereby an enterprise is not considered to have a strong position where it has a share of 20 per cent or less in respect of one type of conduct. Whether the safe harbour provisions apply varies depending on the type of conduct that is alleged to be an unfair trading practice, and the aforementioned Guidelines should be consulted accordingly.

For instance, safe harbour provisions are not available in the case of restrictions on resale prices or abuse of a superior bargaining position, and so may be breached even where the JFTC considers the company in question to have a market share of only 10 per cent. Furthermore, the market share is dependent on the market definition, so it is important to be mindful of the fact that a company’s relative market share will increase where the market is narrowly defined.

IV ABUSE

While conduct constituting private monopolisation may be either exclusionary conduct or controlling conduct, the former is at the heart of such conduct, and one should also be mindful of the following: it is highly likely that the JFTC makes its decisions regarding private monopolisation not only by paying attention to the anticompetitive nature of each such conduct, but also by considering overall the strength and weakness of factors such as (1) the company’s power in the market, (2) the anticompetitive nature of the conduct in question and (3) the effect on the relevant market, as well as the casual relationship between the three, and furthermore taking into account the existence or absence of any pro-competitive effects, and the extent thereof.

For (1), the JFTC takes into account not only the company’s market share itself, but also the characteristics of the market, the difference in share between the company and the player ranking second in the market, and, where necessary, the extent of excess profits, brand strength and so on.

Concerning (2), while the Supreme Court has proposed ‘practices of an artificial nature which deviate from methods of normal competition’, this can simply be taken to mean anticompetitive conduct. The extent of the anticompetitive nature of a conduct can be taken instead to mean the extent of the deviation from normal competition based on price and quality, that is to say from competition on the merits of the relevant products or services.

The effect on the relevant market (3) refers to effects such as competitors failing to enter or being delayed in entering a market, withdrawing therefrom, experiencing fluctuations in their share, or increases or decreases in customer trading.

Because (1) through (3) act on each other, if an anticompetitive effect is quantitatively assessed and given a numerical value, the anticompetitive effect is likely determined not through a summing up of such values, but by multiplying them and subtracting any pro-competitive effects instead. Once this is understood, the following examples become easier to comprehend.

In the Guidelines, four typical examples of exclusionary conduct constituting private monopolisation are given:

a. predatory pricing;
b. exclusive dealing;
c. tie-in arrangements; and
d. refusal to deal or discriminatory conduct.

While this is a simple way to classify such conduct, a much more broad and diverse range of types of conduct can be given.

i. **Exclusionary conduct (private monopolisation)**

**Predatory pricing**

According to the Guidelines, a price is highly likely to constitute exclusionary conduct where it is lower than the 'cost required to supply the product'. On the other hand, where the price is lower than the total cost required to supply a product, but greater than the 'cost which does not arise if the product is not supplied', and there are no special circumstances such as that the product is being supplied over a long period of time and in high volume, there is a low possibility of such pricing constituting exclusionary conduct.

The *USEN Corporation* case[^12] is a typical example of this. USEN Corporation, which had a market-leading share in cable music broadcasting to retail offices (68 per cent rising to 72 per cent as a result of exclusionary conduct), lowered the monthly listening fee that it charged to customers of its largest rival, Cansystem (26 per cent decreasing to 20 per cent as a result of USEN’s exclusionary conduct) as a condition of the customers switching to use its own service, and also extended its promotional campaign to those customers (whereby those monthly fees were made free) from the standard three months to six, and so was determined to have engaged in exclusionary conduct.

**Margin squeeze**

This means conduct whereby a company that does business in both an upstream market and a downstream market tries to bring the price of an upstream product close to that of a downstream product. In some cases it is regulated as a refusal to deal.

The Supreme Court’s judgment in *NTT East* is a typical example of this. When providing new communication services using fibre optics to detached residential properties, NTT East, which owns more than 70 per cent of the fibre-optic lines in the East Japan region, provided users with such communication services under a system whereby one person used a single fibre-optic line (central wire direct connection system). However, the fact that the usage fee

for this was less than the connection fee for other communications providers, when using the same central wire direct connection system, was treated as them being excluded. While the monthly usage fee was ¥5,800, the monthly connection fee was ¥6,328.\(^\text{13}\)

**Rebates**

The Guidelines attempt to draw a line under whether conduct is illegal by listing a diverse range of factors, including loyalty rebates, but are unsuccessful in doing so. As such, analysis of exclusionary conduct is at a developing stage, whereby factors such as the discount aspect of rebates and pro-competitive effects are also taken into account.

A representative example of this is *Intel*.\(^\text{14}\) Intel, which has a larger share of the market for central processing units (CPUs) installed in computers (rising from 76 to 89 per cent as a result of exclusionary conduct), provided its business partner computer manufacturers with rebates, etcetera, on the condition that they would use Intel CPUs for 90 to 100 per cent of their computers, and would not use CPUs from Intel’s competitor, AMD (with a share of 22 per cent falling to 10 per cent as a result of Intel’s exclusionary conduct), for those computers that had a high production volume. Intel’s conduct in causing them not to adopt the CPUs of its competitor was deemed to be exclusionary.

**Mixed conduct**

There are some situations in which various different types of exclusionary conduct are mixed together, or combine to form a consecutive series.

*NIPRO\(^\text{15}\)* is a typical example of mixed conduct. In this case, NAIGAI Group, a business partner of NIPRO that produces and sells glass tubes for use in ampoules (and has a share of 85 per cent) began dealing in non-Japanese made glass tubes, which were competitor products to NIPRO’s. To restrain the expansion of NAIGAI’s dealing in such glass tubes, and with the intention of imposing sanctions on it, NIPRO raised the sale price for glass tubes to NAIGAI Group only (price discrimination); refused to accept orders placed by NAIGAI Group (refusal to deal); and required NAIGAI Group alone to provide security or to settle invoices with cash payments (abuse of superior bargaining position).

The JFTC decided that exclusionary conduct had taken place after taking into account a series of conduct by NIPRO over some four years. While *NIPRO* was the first case of private monopolisation in which the JFTC’s findings were contested, it also alleged in the course of the hearing as a preliminary claim that NIPRO’s same series of conduct also constituted unfair business practices.\(^\text{16}\)

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\(^\text{13}\) The Supreme Court ruled as follows:

> in the case of the conduct concerned, NTT East directly provided subscriber fiber optic equipment installed by it to its subscribers, and at the same time, when providing this equipment to other telecommunications providers with which it competed for connection purposes, made use of its position as effectively the sole supplier in the equipment connectivity market for subscriber fiber optics to set and present them with connectivity terms and conditions which those providers could not accept as reasonable in economic terms. This unilateral and one-sided act of refusal to deal and predatory pricing has an artificial nature which deviates from normal competitive methods, as seen in terms of them creating, maintaining or strengthening their own market power, and as it can be said that this had the effect of clearly making it difficult for those competitors to enter the market, this should be considered as constituting exclusionary conduct in that same market.

\(^\text{14}\) JFTC recommendation decision, 13 April 2005.

\(^\text{15}\) JFTC pretrial decision, 5 June 2006.

\(^\text{16}\) Trading subject to restrictive conditions, General Designations p. 12.
As NAIGAI Group had not decreased its dealings in imported glass tubes despite such course of conduct, NIPRO was able to exclude the imported tubes, but only slightly, and accordingly the JFTC added a charge of unfair business practices, which have a low evidential burden and for which it is sufficient to show that there was a 'likelihood of impeding fair competition'.

Finally, the JFTC returned to its claim of private monopolisation and won its case. *Hokkaido Shimbun*[^17] is also an interesting example of a mixed conduct case. The *Hokkaido Shimbun* newspaper covered the entire Hokkaido area, and had a dominant position even within newspaper sales in the Hakodate region (which is located within the Hokkaido area). Given that Hokkaido Shimbun was established in the same region with the aim of publishing an evening paper, Hokkaido Shimbun both filed a trademark on title lettering that the new market entrant *Hakodate Shimbun* newspaper was likely to use, and also greatly reduced its newspaper advertising fees in the same region and put pressure on the press agency not to broadcast news to Hokkaido Shimbun. It further demanded that the TV stations would not broadcast its commercials. This conduct was treated as Hakodate Shimbun being excluded.

Other examples of mixed conduct are outlined below. While these types of conduct are difficult to typify under the Guidelines, they are clear examples of exclusionary conduct.

In *Japan Medical Foods Association*, the Association, which used to exclusively carry out inspection work on medical food products (that is, it had a share of 100 per cent) through the public inspections system, colluded with Nisshin Healthcare Food Service Co, Ltd, a primary seller of food products for medical use, to construct a production and sale system that made it clearly difficult for new players to enter the market, such as requiring registration for medical food products and certification for production plants, and so was deemed to have excluded new market participants from producing and selling medical food products.[^18] This was the first private monopolisation case in Japan in 24 years.

In *Pachinko machine production patent pool*, 10 pachinko machine producers that held key patents on the manufacturing of such machines (and together held approximately 90 per cent of the pachinko machine market), and that had gathered their patents together and were managing them as a patent 'pool', were deemed to have committed exclusionary conduct for not granting new participants licence rights to those patents.[^19]

In *Paramount Bed*, Paramount Bed placed pressure on the person at the Tokyo metropolitan government in charge of placing orders for medical-use beds (Paramount had an almost-100 per cent share of this market) to enable delivery only of beds for which Paramount Bed had utility model rights, so that competing providers could not supply other beds, and accordingly was found to have committed exclusionary conduct.[^20]

In *Nordion*, Nordion, a Canadian company that held the majority of global production volume and a large part of the sales for Molybdenum 99 (a substance used in radiation therapy) and 100 per cent of the market in Japan, required its Japanese business partners to purchase all of the products they required from it over the course of 10 years, and accordingly was found to have excluded its competitors.[^21]

[^17]: JFTC recommendation decision, 28 February 2000.
[^18]: Japan Medical Foods Association, JFTC recommendation decision, 8 May 1996.
[^19]: Pachinko machine production patent pool, JFTC recommendation decision, 6 August 1997.
[^21]: Nordion, JFTC recommendation decision, 3 September 1998.
ii Controlling conduct (private monopolisation)

There are few cases concerning controlling-type conduct; nor are there any guidelines thereon from the JFTC. An example that constitutes controlling is a company using a given investment in another company to restrict its sales areas against its wishes, and to prohibit the establishment of new factories.22

While *Fukui Agricultural Cooperative*23 is a controlling-type case, the scale thereof was small and it was extremely local in nature.

iii Unfair business practices

*Price discrimination*

In *Hokkaido Electric Power*, the company set different fees for returning consumers that were higher than those for new consumers, and accordingly a JFTC warning was sounded on suspicion of price discrimination by the other party.24

While Japanese electric power companies once tended to dominate certain areas for long periods of time, the regulations were gradually eased to accommodate new market entrants. In particular, in recent years a liberalisation of retail electricity has begun, starting with the super-high voltage field (such as for large-scale power plants), then office buildings, and finally low-voltage family retail electricity as of April 2016, with the result that the Japanese electricity retail market has become completely liberalised. The case of *Hokkaido Electric Power* can be positioned as occurring in the midst of the retail electricity market’s shift to a competitive market.

The JFTC has made it clear to the energy industry (such as electricity and gas) that it will proactively investigate the situation going forward.

*Tying*

Microsoft Japan licensed its word processing software Word to computer manufacturers together with Excel (the spreadsheet software for which it has the leading market share) at the same time as licensing the latter, and accordingly was deemed to have engaged in ‘tying’.25 Following this, Ichitaro, competitor word processing software, suffered a notable reduction in its market share.

*Non-assertion provisions clause*

In this case, Microsoft US was found to have created an anticompetitive effect in the computer audio-video technology market by including in its contracts for licensing Windows (its core software for PCs) original equipment manufacturer (OEM) sales provisions whereby the OEM providers entering into those contracts promised not to sue Microsoft or other OEM providers for breaches of patent infringement by Windows (non-assertion provisions), and so this conduct was found to constitute trading subject to restrictive conditions.26

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22 *Toyo Seikan*, JFTC recommendation decision, 18 September 1972.
23 16 January 2015.
24 JFTC warning, 30 June 2017.
26 Current General Designations, p. 12, JFTC pretrial decision, 16 September 2008.
In the decision, it was determined that the non-assertion provisions were extremely unreasonable given that it enabled the OEM providers’ worldwide patents to be incorporated into the Windows series for free, and accordingly that there was a high probability of OEM providers losing the desire to research and develop new computer audio-video technology.

In addition, given that the OEM providers and Microsoft are competitors in the computer audio-visual technology market, those OEM providers would as a result of those non-assertion provisions lose the desire to research and develop computer audio-video technology if they had such powerful technology in their possession, and accordingly their position would be weakened, while on the other hand Microsoft could rapidly and widely distribute its computer audio-visual technology on a global scale by installing it within the Windows series.

Accordingly, it was determined that the non-assertion provisions had a likelihood of excluding competition in the computer audio-visual market, or causing it to stagnate, and so there was a high probability of an anticompetitive effect being extended to that market.

**Breach of fair, reasonable and non-discriminatory terms**

One-Blue, LLC manages and operates the patent pool for the standard essential patents for Blu-ray disc standards. Despite declaring that it would license these under fair, reasonable and non-discriminatory (FRAND) conditions, it did not reach an agreement with Imation Corporation, which wished to receive a licence under the FRAND conditions, and furthermore told its business partners that the Blu-ray discs produced and sold by Imation would infringe One-Blue, LLC’s patent rights. Accordingly, this conduct was determined to constitute trading interference.27

**Most-favoured nation clause**

Amazon Japan was found to have included in its seller display contracts for ‘Amazon Marketplace’ (its electronic shopping mall) a most-favoured nation clause that required sellers to set prices and terms and conditions for products sold by them on Amazon Marketplace at whichever were the most favourable prices and terms and conditions of the same product as sold by other sales routes, and accordingly was investigated by the JFTC on suspicion of trading subject to restrictive conditions.28 However, as Amazon Japan made a petition to the effect that it would take voluntary measures itself, and those measures dispelled that suspicion, the JFTC broke off its investigation.29

**Exploitative abuse**

The provisions on unfair business practices contain prohibitions on ‘abuse of superior bargaining position’ that are unique to Japan. One aspect to these provisions is the traditional Japanese industrial policy of protecting small and medium-sized companies, and, while they are somewhat hard to understand in terms of pure competition law theory, the JFTC makes frequent use of these provisions, thus making them a key part of the regulations against unfair business practices.

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28  General Designations, p. 12.
29  JFTC press release, 1 June 2017.
It is enough for a company to have a superior bargaining position relative to its suppliers, and there is neither any need for the relevant company to have market power nor to have a strong position in the relevant market. Of course, if such elements exist, the chance of the company being targeted by the JFTC will increase.

As such companies are an important trading partner for suppliers, if they have a relationship with such companies whereby they must accept any demand made by them, no matter how unreasonable, the company in question will be deemed to have a ‘superior bargaining position’.

The rules primarily regulate against large companies such as mass electronics retailers, supermarkets, department stores, home centres and convenience stores demanding cooperation fees from their suppliers, requiring them to dispatch their employees on secondment without charge, and returning products or reducing payments therefor without due cause.

However, there are no restrictions on the types of industry that may be targeted, and in the past there have also been cases where banks were investigated.

V PROCEDURE

Investigations conducted by the JFTC consist of either an on-site investigation or an order to report. While an on-site investigation is the method normally employed where there is strong suspicion of a breach, in recent years some investigations have been commenced through an order to report instead. Although at the time of commencing an investigation the JFTC gives a written notice of the suspected facts, it is common for the JFTC to describe both grounds for private monopolisation and unfair business practices, thereby investigating with the aim of finding both and proving at least one of the two, and for the applicable law to be determined mid-way through an investigation or indeed at the end thereof.

When the JFTC reaches a firm position, it will send the enterprise in question a draft of the measures to be taken, and provide the enterprise with an opportunity to refuse the allegations and view or copy evidence held by the JFTC. Formal measures are then issued once this process is completed. Where the enterprise in question objects to those measures, it must dispute them through an action for revocation of administrative disposition made to the Tokyo District Court.

The sanctions imposed for private monopolisation initially consist of a cease and desist order, which is an administrative measure taken by the JFTC through designated procedures to remove conduct in breach of the AMA. Where there is conduct of a kind that breaches the prohibition on private monopolisation, the JFTC may order the relevant enterprise to take measures concerning the relevant conduct, such as an injunction (Article 7, Paragraph 1). Even where the breach has already been extinguished, the JFTC may, where it deems particularly necessary, order the enterprise, for a period of five years after the extinguishment thereof, to take such measures as are required to ensure that the relevant conduct is removed, such as disseminating notices to the effect that the offending conduct is no longer taking place (Article 7, Paragraph 2). While there is debate over whether the JFTC can order enterprises to take structural measures such as a company split, there has been no case so far of such an order being given.

The revision of the AMA in 2005 led to administrative surcharges also being levied for controlling a private monopolisation. The JFTC does not have discretion over the amount thereof, but rather surcharges are charged at a maximum of 10 per cent of the consolidated annual sales affected by the conduct for the past three years (Article 7-2, Paragraph 2).
Furthermore, with the 2009 revision of the AMA, administrative surcharges came to be imposed on exclusionary private monopolisation as well. These are charged at a maximum of 6 per cent of the consolidated annual sales affected by the conduct for the past three years (Article 7-2, Paragraph 4). However, to date there has been no case of an administrative surcharge being levied for private monopolisation. In addition, while criminal charges are also prescribed in respect of private monopolisation, there is no example of these having actually been imposed.

With the 2009 revision of the AMA, administrative surcharges also came to be imposed for certain types of unfair business practices. The basic rate for these is 3 per cent (but 1 per cent in the case of abuse of superior bargaining position). Administrative surcharges have only been imposed for unfair business practices in the case of abuses of a superior bargaining position. While such surcharges are imposed in respect of the first instance of the conduct in breach of the prohibition on abuse of superior bargaining position, for other unfair business practices they are imposed in respect of the second instance of the offending conduct where it is repeated.

VI PRIVATE ENFORCEMENT

i Claims for damages

A person who suffers damage as a result of private monopolisation or unfair business practices may make a claim for compensation against the offending person pursuant to Article 25 of the AMA or Article 709 of the Civil Code. In Japan, there is no system of punitive compensation for damages or triple damages, so in any case it will only be possible to claim the actual amount of loss suffered.

Claims for compensation made pursuant to Article 25 of the AMA cannot be made unless the JFTC’s order has been finalised (Article 26, Paragraph 1), and in the first instance the Tokyo District Court has exclusive jurisdiction (Article 85-2). Negligence is not required to establish liability, so the party engaging in the relevant conduct cannot avoid liability on the basis that it did not act wilfully or negligently (Article 25, Paragraph 2).

On the other hand, claims for compensation made pursuant to Article 709 of the Civil Code are made based on unlawful conduct in general, and so a claim can be made regardless of whether the JFTC has made an order or not.

These two rights of claim are separate from each other, and while it is in practice unusual, it is lawful to both bring a lawsuit pursuant to Article 25 of the AMA and at the same time another pursuant to Article 709 of the Civil Code, and provided the statute of limitations has not taken effect, it is also lawful for a claimant to bring a lawsuit pursuant to Article 25 of the AMA after losing a lawsuit brought under Article 709 of the Civil Code. While the limitation period is three years in either case, the starting point for calculating that period for lawsuits brought under Article 25 of the AMA is from the time at which the JFTC’s order is finalised (Article 26, Paragraph 2), whereas for lawsuits brought under Article 709 of the Civil Code, it is ‘the point in time at which the loss and the party causing that loss are known’ (Civil Code Article 724).

While at first sight lawsuits brought pursuant to Article 25 of the AMA, which do not require negligence to establish liability, may seem more advantageous to the affected party, these claims are restricted to breaching conduct that is identified by the JFTC, and accordingly it may not necessarily be advantageous to the affected party, inter alia, where the
actual breaching conduct lasts longer than as identified by the JFTC. For this reason, when one excludes cases which that been statute-barred, in most cases affected parties choose to make a claim for compensation pursuant to Article 709 of the Civil Code.

ii  Claims for injunction

Injunction lawsuits by private persons were first introduced in 2001. In Article 24 of the AMA, it is prescribed that a person whose interests are harmed due to unfair business practices, or which are at risk of being harmed thereby, and who clearly suffers loss as a result thereof or is likely to do so, may make a claim against the enterprise or trade association that is harming or at risk of harming its interests to have that infringement stopped or prevented. This system means that the party claiming does not have to wait for the JFTC to take enforcement measures, but can make an injunction claim in its own capacity as the harmed party. In the case of private monopolisation, the harmed party is not specified, and while this is a flaw of the legal system, as mentioned previously, in many cases private monopolisation also constitutes one of the forms of unfair business practices, so if one adjusts the legal configuration, it is in practice possible for a party harmed by private monopolisation to make an injunction claim.

While many lawsuits have been brought since the introduction of the system, there were for a long time no successful cases brought by claimants, with the first such case occurring 10 years after the system was introduced.

This was a case in which an enterprise that had an extremely powerful position in the dry ice market (the leading player with a share of 49 per cent) slandered its competitors to the effect that they were breaching their non-compete obligations, or repeatedly made allegations to stir up its exaggerated claim that they were not reliable suppliers, and in doing so weakened their position in the dry ice market, or tried to prevent them from entering the market altogether. In this case it was deemed that there was ‘a likelihood of impeding fair competition’.30

Following this was a case of a successful claim in the taxi industry (Shintetsu taxi).31

Situations where a person’s interests are ‘clearly harmed’ include ‘situations where damage arises due to conduct in breach of the Antimonopoly Act which is difficult to recover from, or where financial compensation is insufficient to remedy the situation, such as where the relevant enterprise is at risk of being expelled from the market or is being prevented from entering it as a new participant’ (Yamato transport postal service).32

Going forward, it is expected that private court actions will become more frequent. While to date affected persons have made declarations to the JFTC, there have been many cases where the JFTC did not respond, and so those persons ended up filing private actions instead. Consequently, in recent years there have been more cases of persons filing private actions without making any declaration to the JFTC at all.

30  Tokyo District Court judgment – 30 March 2011.
VII FUTURE DEVELOPMENTS

With the Trans-Pacific Partnership agreement being reached after the withdrawal of the US, the bill to revise the AMA to introduce a commitment system procedure will soon be put under Diet deliberation. Although cartels and bid rigging are not within the scope of the commitment, private monopolisation and unfair business practices are precisely subject to this commitment. If the commitment procedure is adopted, there will immediately be more methods to resolve cases through negotiation with the JFTC.
Chapter 16

KENYA

Dominic Rebelo and Edwina Warambo

I INTRODUCTION

The Kenyan competition regulatory regime is governed by the Competition Act (Act) as amended by the Competition (Amendment) Act No 49 of 2016, which amended the Act with effect from 13 January 2017. The Act’s primary purposes are to promote and safeguard competition in the national economy, protect consumers from unfair and misleading market conduct, and establish and provide for the powers and functions of the Competition Authority of Kenya (CAK) and the Competition Tribunal. The amendments that came into force in 2017 granted the CAK increased investigative powers and increased powers to issue sanctions for non-compliance.

Kenya is also subject to the following regional competition law regimes: the East African Community (EAC) Competition Act, 2006, enacted by the East African Community; and the Common Market for Eastern and Southern Africa (COMESA) Competition Commission Competition Regulations enforced by the COMESA Competition Commission.

To help market participants understand the CAK’s mandate and the factors that it will take into consideration when exercising its powers, the CAK has issued the following guidelines, the titles of which reflect their primary purpose:

a Balancing Public Interest Guidelines;
b Guidelines on the Control of Unwarranted Concentration of Economic Power;
c Guidelines on Relevant Market Definition;
d Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices under the Competition Act;
e Consolidated Guidelines on Substantive Assessment of Mergers under the Competition Act;
f Guidelines on Engaging with Consumer Organisations;
g Guidelines on Consumer Protection;
h Leniency Programme Guidelines; and
i Public Interests Test In Merger Determinations Guidelines.

II YEAR IN REVIEW

The Competition Amendment Act came into force in January 2017, and a new provision has been inserted into the Act as a result of the Competition Amendment Act requiring any person to provide information to the CAK in respect of any sector inquiry it might be undertaking.

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As a result, persons who are not the subject of an investigation are required to provide any information requested by the CAK at their own cost. The Competition Amendment Act also introduced the concept of abuse of buyer power. Buyer power has been defined as:

influence exerted by an undertaking ... in the position of a Purchaser ... To obtain from a supplier more favourable terms, or to impose a long term opportunity cost including harm or withheld benefit which if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking.

This amendment catches retailers and wholesalers, particularly retailers such as supermarkets that are likely, by the nature of their business, to have ‘buyer power’.

In addition, a new catch-all provision has been included in the amendments to the Act permitting the CAK to fine undertakings up to 10 per cent of their gross annual turnover for the preceding year where such undertakings have engaged in abuse of dominance or abuse of buyer power. This is an additional penalty to the existing sanction of a maximum fine of 10 million shillings or up to five years’ imprisonment, or both, for engaging in restrictive trade practices under the Act. The fine of up to 10 per cent of turnover is restricted to Kenyan turnover.

With respect to mergers, the Competition Amendment Act gives the CAK the ability to fine undertakings up to 10 per cent of their gross annual turnover for the preceding year or to a fine not exceeding 10 million shillings or to imprisonment for a term not exceeding five years, or to both where such undertakings have either provided materially incorrect or misleading information, or have failed to adhere to conditions imposed on a merger approval. The CAK follows up on compliance with merger conditions annually, so it is important for companies to ensure ongoing compliance.


The CAK considered a total of 151 merger notifications compared to 148 during the 2014–2015 financial year. Out of these 151, 19 were brought forward from the previous year. All the notifications were analysed and approved within the statutory timeline of 60 days.2 In making its evaluation of mergers, the CAK’s mandate is to consider whether a proposed merger is likely to prevent or lessen competition or create or strengthen a dominant position. We have seen an increase in focus by the CAK on public interest concerns, with particular emphasis being placed on the termination of employees. The Public Interests Test In Merger Determinations Guidelines are cognisant of the need to enhance and sustain employment of both human and capital resources through supporting: measures to ensure no substantial job losses occur as a result of mergers, and that the effects on employment are mitigated in the short run; the salvaging of failing and dormant undertakings; and encouraging mergers of media undertakings that will enhance the production of local content and programmes, and support youth employment.3

A notable merger transaction determined by the CAK depicting the CAK’s evaluation of the impact of mergers on the public interest and competition is the global restructuring

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transaction involving the acquisition of Nairobi Bottlers Limited (NBL) by Coca Cola Beverages Limited, and the acquisition of the Keringet Brand in Kenya by The Coca Cola Company.

The first transaction involving the acquisition of NBL by Coca-Cola Beverages Limited (CCBA) for a consideration of equity in CCBA was approved unconditionally because it did not raise any competition or public interest concern, as the acquisition of a controlling stake in NBL by CCBA was not going to change the existing market share. The second transaction, which was a horizontal merger involving 100 per cent acquisition of the Keringet brand, however, was deemed likely to raise negative public interest concerns based on the fact that the merging parties could only give commitments for two years and could not provide the possible post-merger outcomes for the bottling of the Keringet brand in the Molo plant. The CAK therefore approved the transaction based on the following conditions:

a. the production of the Keringet brand shall be continued for at least three years after completion of the transaction;

b. the acquirer shall retain the current 186 employees at the Molo Plant (Keringet brand) for a period of at least two years after the completion of the transaction, and shall thereafter retain 140 employees at the plant;

c. the resultant entity shall retain 72 employees in the administration division in its Nairobi Beverages Limited and Crown Beverages Limited companies;

d. the Coca Cola Company shall continue to honour existing third-party distributor contracts with regard to the Keringet brand; and

e. the merged entity shall provide detailed annual reports on the post-merger effects on employment and future plans on employment for the next five years commencing from January 2016.4

The CAK also investigated 27 restrictive trade practices cases in the year under review compared to the 19 cases investigated in the previous year, 12 of which were concluded. Various remedies, including financial penalties and declaratory orders, were imposed on undertakings found to have infringed the Act. Three exemption applications were evaluated, and an exemption was granted in respect of one application while the other two are still ongoing.5

During the period under review (2015–2016), the CAK handled 66 consumer cases and complaints, representing a 154 per cent increase from the previous reporting period. The CAK finalised 28 consumer cases and complaints, 16 were forwarded to the relevant government agencies and 22 are still ongoing.

III MARKET DEFINITION AND MARKET POWER

i Dominance

According to the Act, dominance can be attained either by way of market share or market power. Market power is defined as the power of a firm to control prices, to exclude competition or to behave, to an appreciable extent, independently of its competitors, customers or suppliers.

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Section 23(1) of the Act defines a dominant undertaking as an undertaking that produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in Kenya or any substantial part thereof; or that provides or otherwise controls not less than half of the services that are rendered in Kenya or any substantial part thereof.

Section 23(2) of the Act provides that:

\[
\text{notwithstanding subsection (1), an undertaking shall also be deemed to be dominant for the purposes of this Act where the undertaking—}
\]

\[
\begin{align*}
&\text{(a) though not dominant, controls at least forty per cent but not more than fifty per cent of the market share unless it can show that it does not have market power; or} \\
&\text{(b) controls less than forty per cent of the market share but has market power.}\text{6}
\end{align*}
\]

Section 4(2) sets out the additional factors to be considered in determining dominance to include the importation of goods or the supply of services by persons not resident or carrying on business in Kenya; and the economic circumstances of the relevant market, including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.

To provide further clarity to market participants, the CAK has published its Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices (RTP Guidelines), which detail the factors the CAK will consider when determining if an undertaking is dominant. These include:

- potential and actual competition;
- barriers to entry into the market;
- the degree to which countervailing market powers can impact an undertaking’s ability to exercise its power in a market;
- product differentiation;
- the stability of market shares; and
- the ability of an undertaking to act independently of its customers and competitors.\text{7}

### ii Collective dominance or relative dominance

The Act does not provide for collective or relative dominance, but collective actions by undertakings may be captured under the prohibited restrictive trade practices. There are also specific provisions relating to the arrangements trade associations may have under the Act.

### iii Market definition

Section 4(1)(c) defines the term ‘market’ as a market in Kenya or a substantial part of Kenya, and refers to the range of reasonable possibilities for substitution in supply and demand between particular kinds of goods or services and between suppliers or acquirers of those goods and services.

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6 The Finance Act 2014 broadened the definition of a dominant undertaking by inserting subsection 23(2).
7 Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices under the Competition Act, page 25.
The Competition Authority Guidelines on Relevant Market Definition (Market Definition Guidelines) take an economics-based approach in defining the relevant market. A market, for competition law purposes, has two dimensions: product market and geographical market.  

A product market ‘constitutes all the goods and/or services which are regarded as reasonably interchangeable or substitutable by the consumers, by reason of the products’ characteristics, their prices and their intended use’. On the other hand, a geographical market is ‘the area within which undertakings concerned are involved in the supply and demand of goods or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas’.  

The Market Definition Guidelines provide for a demand-side substitution approach and a supply-side substitution approach in defining a product market; however, demand substitutability is the key factor considered in market definition. The demand-side substitution approach seeks to identify the alternative products that consumers may turn to when there is an increase in the price of a particular product. The supply-side substitution approach seeks to identify whether undertakings would start supplying a new product were prices to rise.  

The Market Definition Guidelines give a practical example of the application of the demand-side approach in the alcoholic beverages (wines) sector to determine whether different flavours of wines belong to the same market. The question to determine would be whether consumers of flavour ‘A’ would switch to other flavours in the event of a permanent price increase of 5 to 10 per cent. All other flavours to which a sufficient number of consumers would switch, to the extent that the price increase for flavour ‘A’ would no longer be profitable owing to resulting loss of sales, would form part of the same market.

IV ABUSE

i Overview

The Act does not offer a specific definition of ‘abuse’, but lists instances where abuse may be seen to have occurred. The list of instances set out is not exhaustive. The Act provides that abuse of a dominant position includes:

a directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

b limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;

c applying dissimilar conditions to equivalent transactions with other trading parties;

d making the conclusion of contracts subject to acceptance by other parties of supplementary conditions that by their nature or according to commercial usage have no connection with the subject matter of the contracts; and

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9 Guidelines for Market Definition (No. 14) paragraph 8.
10 Ibid., paragraph 9.
11 Ibid., paragraph 21.
We note that the Act makes reference to abuse by dominant undertakings only. Therefore, not every undertaking found to have been involved in one of the above instances will be deemed to have committed an abuse unless the undertaking is dominant in the relevant market. Conversely, the CAK has confirmed that being dominant is not illegal per se – rather, it is the abuse of a dominant position with which they are concerned. The RTP Guidelines provide that the CAK bears the burden of proof. Furthermore, the RTP Guidelines categorise abuse of dominance into two categories: exploitative and exclusionary abuses.

These provisions of the Act have not been subject to judicial interpretation, and the CAK has not published its decisions in sufficient detail to create a body of case law that would give market participants significant guidance on the interpretation of the relevant provisions. As things stand, the Act has supplied the CAK and the courts with a guideline as opposed to an exhaustive list of abuses, monopolisation, monopoly maintenance or illegal unilateral conduct. Additionally, the CAK and the courts will recognise ‘sui generis abuses’ that would be applicable under the general rules of international law as well as any treaty or convention that Kenya has ratified. This would include conventions and treaties against discrimination as well as unfair economic practices under international law.

**Restrictive trade practices**

Under the Act, practices such as price fixing, limitations on sales and production, restrictions on advertising, the exclusion of competitors from the market and the entry into agreements that would otherwise assign distributors to specific regions are deemed to be restrictive trade practices. The CAK is increasingly focusing on enforcement against businesses and undertakings engaging in restrictive trade practices, cartel behaviour and abuse of dominance. The CAK has conducted sector-specific investigations and dawn raids, and has imposed penalties on parties found to be engaged in restrictive trade practices.

The Act makes it an offence for undertakings to engage in restrictive trade practices, providing that ‘agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part’.

The restrictive trade practices provisions apply to any agreement, decision or restrictive practice that:

- directly or indirectly fixes purchase or selling prices or any other trading conditions;
- divides markets by allocating customers, suppliers, areas, or specific types of goods or services;
- involves collusive tendering;

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12 Competition Act, Section 24(2)(e) Part III C.
13 This is pursuant to Article 2(5) and (6) of the Constitution of Kenya, 2010.
14 One such example is the Treaty Establishing Common Market for Eastern and Southern Africa to advance the economic integration of Eastern and Southern Africa adopted on 5 November 1993, which Kenya ratified on 8 December 1994. The treaty sets out various principles including accountability, economic justice and popular participation in the development, recognition and observance of the rule of law.
15 Competition Act, Section 21(1) Part III A.
d. involves a practice of minimum resale price maintenance;

e. limits or controls production, market outlets or access, technical development or investment;

f. applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

g. makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions that by their nature or according to commercial usage have no connection with the subject of the contracts;

h. amounts to the use of an intellectual property right in a manner that goes beyond the limits of fair, reasonable and non-discriminatory use; or

i. otherwise prevents, distorts or restricts competition. 16

Between 2015 and 2016, the CAK investigated 27 restrictive trade practices cases compared to 19 investigated in the previous year. Twelve of the cases were finalised (compared to four in the previous year), and appropriate remedies including financial remedies and declaratory orders were imposed on undertakings found to have infringed the Act. Three exemption applications were evaluated, and an exemption was granted in respect of one application, while the other two applications are ongoing.

The types of agreements, decisions or concerted practices that may be deemed restrictive trade practices are similar to those deemed abusive by undertakings in a dominant position. The key distinction between a restrictive trade practice and an abuse of a dominant position is that the test for a restrictive trade practice looks at the object or effect of the contract, thus arguably utilising an effects-based test and not making such arrangements a per se breach of the relevant sections of the Act.

In addition, the CAK has emphasised under the RTP Guidelines that the CAK considers that the words ‘object’ and ‘effect’ are disjunctive. Hence, while the burden of proving that a restrictive trade practice has occurred falls on the CAK, the CAK need only prove one element of the test.

ii. Exclusionary abuses

As noted above, the Act prohibits conduct by a dominant undertaking that directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions. It also prohibits undertakings from restricting production, market access and development through predatory practices. These prohibitions also appear in the restrictive trade practices provisions. The restrictive trade practices provisions make it clear that such practices apply to both horizontal and vertical arrangements, whereas the latter forms of agreement are generally excluded in Western jurisdictions from being considered anticompetitive by regulators.

The CAK published Exemption Guidelines for Horizontal Practices in 2012, which provide guidance regarding the grounds on which the CAK may exempt an agreement that is anticompetitive. The exclusions will be generally based on compelling public policy reasons, which include demonstrating that the agreement maintains or promotes exports or improves production, distribution of goods or services, or will produce technical or economic progress.

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16 Competition Act, Section 21(3) Part III A.
Predatory pricing

This offence is captured under both the provisions on abuse of a dominant position and restrictive trade practices. Both prohibit an undertaking from directly or indirectly imposing unfair purchase or selling prices, or fixing the purchase price in a manner that restricts or prevents competition.17

There is, unfortunately, scant case law on predatory pricing. One of the few cases in this regard was decided in 2012. It arose from a complaint made by Telkom Kenya Limited (Telkom) (which is the sole landline telephone services provider in Kenya) against Airtel Kenya (Airtel) and Essar Telekom Kenya (Essar) (both mobile phone providers). Telkom alleged that the off-net calling rates of Airtel and Essar were predatory as they were below cost. The CAK conducted an investigation into the matter and found that the allegations were not substantiated.18 Unfortunately, the reported decision is only a summary, and does not provide significant detail on the analysis of the facts and evidence presented.

Exclusive dealing and leveraging

In relation to other forms of exclusionary abuses such as loyalty rebates, exclusivity contracts and price tying, the Act prohibits such arrangements under various provisions. For example, Section 21(3)(g) in relation to restrictive trade practices and Section 24(2)(d) both state that if an undertaking makes the conclusion of a contract subject to acceptance by other parties of supplementary conditions that by their nature or according to commercial usage have no connection with the subject-matter of the contracts, then this will be deemed anticompetitive.

We would emphasise that if the offence is in relation to abuse then the test that must first be met is in relation to dominance, while for restrictive trade practices, the Act requires the practice to have the object or effect of reducing competition.

Refusal to deal

The Act prohibits abuse of intellectual property rights, which would arguably include the refusal to grant a licence, but this provision has yet to be tested in the Kenyan courts. The CAK instituted an investigation into Multi-choice (a leading video entertainment and internet company) regarding whether Multi-choice engaged in abuses of dominance through content exclusivity relating to vertical agreements, which are prohibited under Section 21 of the Act. Upon conclusion of the investigation, the CAK issued Multi-choice with notice of its proposed decision.19

iii Discrimination

The Act prohibits discriminatory conduct by a dominant undertaking, including any agreement or concerted practice that applies dissimilar conditions to equivalent transactions with other trading parties.20 In a case involving the Kenya Association of Travel Agents (KATA) and the International Air Transport Association (IATA), the KATA complained that

17 Competition Act, Sections 21(3)(a) and 24(2)(a).
20 Competition Act, Sections 21(3)(f) and 24(2)(c).
the IATA was engaging in discriminatory behaviour and refusing to deal with it with regard to default insurance. The CAK investigated the matter, found the allegations to be true and issued a cease-and-desist order.21

iv Exploitative abuses

Exploitative abuses are generally prohibited under the restrictive trade practices provisions of the Act. An investigation into major oil marketers based on the allegation that such marketers were engaging in limiting or controlling production, market outlets access, technical development and investment was closed because of a lack of evidence. However, given the CAK’s recent use of dawn raids as a means of obtaining information, future investigations may be more likely to unearth evidence that could lead to prosecutions or fines.

V REMEDIES AND SANCTIONS

i Sanctions

For most breaches, the Act contains two main potential sanctions: fines and prison sentences. For an abuse of dominance or an offence relating to restrictive trade practices, fines can be up to 10 million Kenyan shillings and potential imprisonment can be up to five years. As mentioned above, the CAK may also impose a financial penalty of up to 10 per cent of the immediately preceding year’s gross annual turnover in Kenya of the undertaking in question.

The CAK is further empowered, where it finds that an undertaking has violated any provisions of the Act (including abuse of dominance) after investigations, to:

a restrain the undertaking or undertakings from further engaging in the conduct;
b direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;
c impose a financial penalty; or
d grant any other appropriate relief.

The Act does not set out any factors that may be considered in adjusting fines and sentences upward or downward.

ii Behavioural remedies including interim measures

The Act limits application of interim measures to instances where there is a violation of a prohibited restrictive trade practice. There is no rationale given for this limitation, and it is arguable that this could have been a drafting oversight.

The CAK is empowered to grant interim relief where it believes, on reasonable grounds, that it is necessary to act as a matter of urgency for the purpose of preventing serious and irreparable damage to any person or category of persons or protecting the public interest pending conclusion of investigation.22

22 Competition Act, Section 37(1).
iii Structural remedies

The Act provides for structural remedies only where there is an ‘unwarranted concentration of economic power’, which is defined as the existence of cross-directorship between two distinct undertakings or companies producing substantially similar goods or services and whose combined market share is more than 40 per cent.

The CAK is under an obligation to keep the structure of the production and distribution of goods and services in Kenya under review in order to determine where concentrations of economic power exist under which the detrimental impact on the economy outweighs the efficiency advantages of integration in production or distribution. This has been seen in the report produced on the sugar industry.\(^\text{23}\)

Where the CAK finds that a person holds an unwarranted concentration of economic power in any sector, it may order such person to dispose of such portion of its interests in the production, distribution or supply of services as it deems necessary to remove the unwarranted concentration; however, no order should be issued that has the effect of subdividing a manufacturing facility whose degree of physical integration is such that the introduction of independent management units controlling different components reduces its efficiency and substantially raises production costs per unit of output.\(^\text{24}\) We are not aware of any case to which the CAK has applied this provision.

VI PROCEDURE

i Investigations

Section 31 of the Act empowers the CAK to initiate investigations into any conduct or proposed conduct that is alleged to constitute or may constitute an infringement of the prohibitions relating to an abuse of dominance, on its own motion or upon receipt of information or a complaint from any person, including a government agency. During the course of 2015 and 2016, the CAK increased the number of officers among its staff who deal with investigations. So far, this appears to have led to an increase in reported cases and advisory opinions issued by the CAK.

We expect an increase in reported investigations during the course of 2018 as the CAK becomes bolder in its use of its powers to investigate and the publication of the Leniency Programme Guidelines. As recently as last year, the CAK was involved in a raid of trade associations that were considered to have undertaken cartel-like behaviour. The purpose of carrying out such an investigation is to eliminate such practices that would otherwise deny consumers full benefits that they would otherwise get in a free market.

Upon conclusion of an investigation, if the CAK proposes to make a decision that there has been an abuse of dominance, it is required to give a written notice of the proposed decision to each undertaking that may be affected by the decision. The notice should contain the following: the reasons for the proposed decision and the details of any relief that the CAK


\(^{24}\) Competition Act, Section 52(4).
may consider imposing. The notice should further inform each undertaking that it may make written representations to the CAK and indicate whether it requires an opportunity to make oral representations.

Pursuant to the Competition Amendment Act, the CAK can now make a proposed decision and invite written and oral representations in relation to restrictive trade practices. Unfortunately, these notices are not published, and therefore there is limited guidance for practitioners on how the CAK may view any particular commercial arrangement. This issue has been raised by stakeholders to the CAK, which is considering whether to change its position.

ii Settlement
The CAK may, at any time during and after an investigation into an alleged infringement of the prohibitions of the Act, enter into an agreement of settlement with the undertaking or undertakings concerned. The agreement may include an award of damages to the complainant and any amount proposed to be imposed as a pecuniary penalty.

iii Appeals
A person aggrieved by a determination of the CAK may appeal to the Competition Tribunal. Following the promulgation of the Competition (Tribunal) Rules and the swearing in of the members of the Tribunal in 2017, the Tribunal is now receiving such appeals. Under the provisions of the Act, an aggrieved party has to appeal to the Tribunal within 30 days of the CAK’s decision.25

iv Leniency
The Act at Section 89A states that an undertaking will qualify for a leniency programme if it voluntarily discloses the existence of an agreement or practice that violates the Act and cooperates with the CAK in the investigations. Such undertaking may not be subject to all or part of a fine that could be imposed under the Act.

The CAK has, through a Gazette Notice of 19 May 2017 publishing the Leniency Programme Guidelines, introduced a competition leniency regime that applies to restrictive trade practices. These guidelines set out the principles and conditions that shall govern the processing and granting of leniency.

VII PRIVATE ENFORCEMENT

The Act confers the power of investigation and enforcement on the CAK, and does not empower the CAK to delegate the function. Consequently, no private right of action exists at this time. A person with a grievance must file a complaint to the CAK, which will then investigate the matter.

25 Competition Act, Section 40(1).
VIII FUTURE DEVELOPMENTS

The CAK is expected to increase its focus on restrictive trade practices and cartels by in 2018. In mid-2016, the COMESA Competition Commission (CCC) issued draft guidelines on the enforcement of restrictive business practices and the abuse of dominance, and the CCC is expected to similarly focus on cartels in the near future.

The CAK and the CCC have signed a memorandum of understanding that provides that the two authorities will share information in respect of investigations that concern the other regulator’s jurisdiction.

There are also plans under way to make the EAC competition regime operational during the course of 2018. Once this happens, Kenya will be subject to regulation by the EAC Competition Authority in addition to the CAK and the CCC with respect to transactions that meet the relevant thresholds.

The CAK has recently drafted proposed rules and guidelines (Proposed Guidelines and Rules) to give effect to various provisions of the Act and to give guidance on the implementation of the provisions of the Act. The Proposed Guidelines and Rules include the following:

a the Merger Threshold Rules 2018 (Proposed Merger Threshold Rules);
b the Block Exemption Guidelines 2018;
c the Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act 2018 (Proposed Consolidated Guidelines);
d the Competition General Rules 2018 (Proposed General Rules);
e the Completion (Abuse of Buyer Power Rules) 2018 (Proposed Abuse of Buyer Rules);
f the Search and Seizure Guidelines 2018 (Proposed Search and Seizure Guidelines); and

These guidelines are still undergoing public participation, review and discussion, and are therefore yet to be finalised.
I INTRODUCTION

The Monopoly Regulation and Fair Trade Law (FTL) is the primary antitrust statute in Korea. Abuse of dominance is regulated under Article 3-2 of the FTL and Article 5 of the Enforcement Decree of the FTL (Enforcement Decree). In addition, the Korea Fair Trade Commission (KFTC) has published the Guidelines for Review of the Abuse of Market Dominant Position (KFTC Guidelines), which provide insight into the specific criteria the KFTC applies in reviewing potentially abusive conduct.

Under the FTL, certain types of conduct can be regulated as both ‘abuse of dominance’ and ‘unfair trade practice’, the latter of which refers to (mostly) unfair or anticompetitive unilateral conduct by market players that do not necessarily have dominance. Abuse of dominance is generally more burdensome to prove for the KFTC compared to unfair trade practice, and as a result, the KFTC often brings unfair trade practice claims together with, or in lieu of, abuse of dominance claims.

In its seminal POSCO decision on the abuse of dominance jurisprudence, while differentiating the different policy considerations behind regulating abuse of dominance and unfair trade practices, the Supreme Court expounded that regulating abuse of dominance is critical to maintaining the competitive function of market economy system, but such regulation should not hinder companies from fully realising their potential and ultimately contributing to consumer welfare and economic development. The Court further cautioned that over-deterrence of conduct without clear anticompetitive purpose or intent could result in protecting ‘competitors’ rather than ‘competition’ and undermine the inherent efficiency of a market economy that promotes restructuring of the market in favour of more competent participants.

While the FTL is applicable across all industry sectors, certain industries are also subject to sector-specific legislation – for example, the Telecommunications Business Act generally imposes stricter regulations than the FTL with respect to telecommunication service providers.

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1 Youngjin Jung and In-Sang Kim are partners and Ju-Hyun Park is a foreign attorney at Kim & Chang.
2 Statute No. 14813, partially amended as of 18 April 2017.
3 Presidential Decree No. 27751, partially amended as of 1 January 2017.
5 Supreme Court, case 2002 Du 8626 (22 November 2007). The details of this case are further discussed later in this chapter.
II YEAR IN REVIEW

To date, there are no publicly available statistics on the number of abuse of dominance investigations the KFTC commenced or conducted in 2017.

In 2017, the cases that drew the most attention were Siemens and WL Gore. In Siemens, the KFTC imposed a fine of 6.2 billion won and ordered Siemens to take various corrective actions. These sanctions were based on the finding that Siemens had allegedly abused its dominant position to exclude competing vendors from the market for maintenance and repair services concerning Siemens' magnetic resonance imaging and computed tomography products by offering less favourable terms on its service software if a hospital also used the services of a competing vendor (an independent service organisation (ISO)) (e.g., providing only the service key for basic-level maintenance and support at a certain price within 25 days after the request, while providing the service key for advanced-level maintenance and support for free on the day of the request if the hospital did not use the services of a competing ISO), and exaggerating the safety and copyright issues relating to the use of the competing ISOs in letters it sent to hospitals. In its press release on this matter, the KFTC highlighted that this was the first case in which sanctions were imposed for abuse of dominance in an 'aftermarket' sector, and remarked that the decision was beneficial to small and medium-sized enterprises (SMEs) and enhanced consumer welfare in an industry that had important public health implications.

In WL Gore, the company was found to have violated the FTL by prohibiting outdoor wear makers from selling Gore-Tex products to large discount stores and taking retaliatory action (e.g., forcible return of products sold, supply suspension, termination) if a manufacturer did not comply in order to maintain retail prices at a certain level. This was not strictly an abuse of dominance decision, as the KFTC imposed sanctions (an approximately 3.7 billion won fine and an order to take corrective actions) based on the unfair trade practice provision of the FTL as opposed to the abuse of dominance decision. However, the KFTC noted several times in its reasoning that WL Gore had an around 60 per cent share in the relevant market, and stated that any potential pro-competitive effects of the relevant conduct were reduced, and the anticompetitive risks exacerbated, by such high market share.

On the whole, the KFTC’s enforcement activity has largely been in line with the various business and enforcement plans that it periodically discloses and reports. As such, difficulty in predicting policy direction has not been a significant issue to date. Under the new administration and the leadership of KFTC Chairman SangJo Kim, a main area of focus has been protecting the weaker party in a business-to-business transaction from exploitation.

Limitations on lawyers’ ability to advise in a manner that remains privileged is a potential issue in KFTC investigations, as attorney–client privilege is not formally recognised under Korean law except regarding communications that are made after a criminal investigation has already commenced. Under the KFTC’s procedural rules, investigated companies do have some participatory rights at the document collection and extraction stage and other stages.

6 The KFTC held hearings for this matter on 20 December 2017 and 10 January 2018, and issued a press release disclosing the main points of its decision on 17 January 2018. A formal written decision has been issued but is not yet publicly available.

7 Siemens has appealed the KFTC’s decision to the Seoul High Court.

8 The case was decided on 17 August 2017, and a formal written decision was issued on 20 September 2017 (decision No. 2017-300). Gore has filed an appeal to the Seoul High Court, and the case is now pending.
The KFTC actively monitors enforcement efforts by competition authorities in other jurisdictions and may well commence its own investigation with regard to multinational companies that are investigated by other competition authorities. This works in the opposite direction as well. In-house counsel should closely monitor antitrust issues being raised in other jurisdictions that may potentially trigger an investigation by the KFTC and review response strategies, including the taking of voluntary remedial action in advance if the risk is deemed sufficiently high. The KFTC’s willingness to act boldly, and on occasion even spearhead global enforcement efforts, should also be taken into account.

### Key KFTC decisions in 2016

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* ‘Case opened’ refers to the year in which the authority opened its investigation (where known) or announced that it had opened an investigation.

### Key pending cases

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* ‘Case opened’ refers to the year in which the authority opened its investigation (where known) or announced that it had opened an investigation.

### III MARKET DEFINITION AND MARKET POWER

Article 2, Paragraph 7 of the FTL defines ‘market dominant enterprise’ as ‘any enterprise who, as a supplier or customer, individually or jointly with other enterprises, enjoys market dominance and determines, maintains or changes prices, quantity or quality of products or services, or other terms and conditions of business in a particular business area’. Several factors, such as, *inter alia*, market share, barriers on entry and relative size of competitors, are also to be considered in examining whether a particular enterprise is a market dominant player.

Article 4 of the FTL further provides that an enterprise that meets either of the following criteria is presumed to be dominant, provided that its sales turnover or purchase amount in the relevant business area is more than 4 billion won: the market share of the enterprise is 50 per cent or more; or the aggregate market share of three or fewer enterprises is 75 per cent or more, excluding any enterprise with market share of less than 10 per cent.

Although Article 4 of the FTL uses the term ‘jointly with others, enjoys market dominance’, the Seoul High Court ruled in the case concerning BC Card and its member
financial institutions that the above language only refers to individual companies in an oligopolistic market, not multiple companies ‘collectively’ acquiring and exercising market dominance.9

The above presumption is rebuttable based on factors such as:

- barriers to entry;
- the relative size of competitors;
- the possibility of concerted action with competitors;
- the existence of similar products or adjacent markets;
- the ability to foreclose the relevant market;
- the enterprise’s ability to procure capital;
- customers’ ability to switch to a competitor; and
- technology developed by the enterprise and others.10

As in other jurisdictions, ‘relevant market’ has two components in Korea: the relevant product market and the relevant geographic market.11

The KFTC Guidelines define the relevant product market as follows: ‘the aggregate of products to which major buyers of a specific product can switch, in response to a significant and non-transitory increase in the price of such product’. The KFTC generally focuses on demand-side substitutability and considers supply-side substitutability as a secondary factor when defining the relevant product market. The KFTC usually considers a price increase of approximately 5 per cent when applying this test.

The KFTC Guidelines define the relevant geographic market as follows: ‘the aggregate of the region to which major buyers of a specific region can switch, in response to a significant and non-transitory increase in the price of such specific region’. In determining the relevant geographic market, the KFTC considers, *inter alia*, the following factors:

- characteristics of the product or service;
- supplier’s sales network;
- transportation costs;
- purchasers’ perception of alternative geographic areas and their actual purchasing behaviour;
- suppliers’ perception of alternative geographic areas and their actual supplying behaviour; and
- switching costs.12

## IV ABUSE

### i Overview

Article 3-2 of the FTL provides for five (plus a general catch-all provision) types of abuse of dominance that are regulated in Korea as follows. Detailed discussion of key cases is provided in subsequent sections under the ‘exclusionary abuses’, ‘discrimination’ and ‘exploitative abuses’.

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9 Seoul High Court, case 2001 Nu 15193 (27 May 2003).
10 KFTC Guidelines, Section III.
11 KFTC Guidelines, Section II.
12 KFTC Guidelines, Section II.2.
As a general matter, a ‘rule-of-reason’-like balancing test applies to all types of abuse of dominance, although the bar for the KFTC to prove that the anticompetitive impact outweighs efficiencies is generally considered lower than in jurisdictions such as the US. Following the Supreme Court’s *POSCO* decision, the courts have generally adopted effect-based approaches.

**Unfair pricing**

Unfair pricing is unfairly fixing, maintaining or altering the price of a good or service fee.

This involves substantially increasing, or failing to substantially decrease, the price of products or services, without reasonable justification, in comparison to shifts in supply and demand; or fluctuations in those expenses related to pricing and required to supply the products or services (corresponding to the norms of the relevant or similar industry).

**Unfair output restriction**

Unfair output restriction is unfairly controlling the sale of goods or the rendering of services.

This involves significantly decreasing the supply of products or services in comparison to contemporary trends of supply (i.e., the supply trend for a considerable period of time as classified by product, region, customer or season, or a combination of these factors), without reasonable justification; or decreasing the supply of products or services despite a shortage of supply in the downstream distribution channels, without reasonable justification.

**Unfair business interference**

Unfair business interference is unfairly interfering with the business activities of another enterprise.

This involves directly or indirectly engaging in the following conduct:

- interference with the purchasing of raw materials necessary for manufacturing by another enterprise, without reasonable justification;
- recruitment of personnel essential to the business operations of another enterprise by providing or promising to provide excessive economic benefit compared to customary practice;
- refusal, cessation or restriction of the use of, or access to, inputs essential for the production, supply or sale of products or services by another enterprise, without reasonable justification; or
- any other act that inflicts hardship upon the business operations of another enterprise as set out in the KFTC Guidelines (e.g., refusal to deal, discriminatory pricing, coercion or unfavourable terms and conditions).

**Unfair obstruction of market entry**

Unfair obstruction involves directly or indirectly engaging in the following conduct resulting in the restriction of market entry by a competitor:

- entry into exclusive supply contracts with distributors without reasonable justification;
- purchase of rights (e.g., intellectual property rights, licences and permits) necessary for the continuous business operations of an existing enterprise;
- refusal or restriction of the use of, or access to, facilities essential to the production, supply or sale of products or services of a new competitor, without reasonable justification; or
any other act that impedes market entry by a new competitor as set out in the KFTC Guidelines (e.g., refusal to deal, unfair manipulation of the supply of essential raw materials, or abuse of civil and administrative procedures to impede attempts to enter the market).

Cases involving abuse of unfair obstruction of market entry may also involve ‘unfair business interference’.

Unfair exclusion of competitors

Unfair exclusion of competitors is engaging in unfair transactions to eliminate competitors. This involves supplying products or services at an unreasonably low price or purchasing products or services at an unreasonably high price (in comparison to ordinary transactions), resulting in the potential exclusion of competitors; or transacting with a party on condition that such party shall not engage in transactions with competitors (i.e., exclusive dealing).

In addition to the above types of abusive acts, Article 3-2(1) Paragraph 5 of the FTL provides a catch-all provision that regulates ‘acts that may significantly harm the interests of consumers’.13

The key to the substantive assessment of abusive conduct under the FTL is the existence of ‘unfairness’. Supreme Court decisions of 2007 and 2011 have provided clearer guidance on the meaning and role of ‘unfairness’. In the case involving refusal to supply by POSCO (a Korean steel company) of basic materials to its new competitor, the Supreme Court held that ‘unfairness’ requires both objective (i.e., an actual or potential anticompetitive effect or reduction of competition in the relevant market) and subjective (i.e., purpose or intent to restrain competition) elements.14 According to the Supreme Court, the first step would be to examine if the case at hand generated anticompetitive effects in consideration of factors such as the following, in which case the requisite anticompetitive intent may be inferred:

- increase in price;
- reduction in output;
- interference with innovation;
- reduction in the number of important competitors; or
- reduction of product diversity.

If actual anticompetitive effects are not proved through the above analysis, one may still consider the following factors in a comprehensive manner to examine whether there is a likelihood of anticompetitive effect and the existence of an anticompetitive purpose or intent:

- details and motives for the abusive conduct;
- aspects of the abusive conduct;

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13 Ibid.
14 See footnote 5. POSCO was a dominant player in the upstream hot rolled coil steel market in Korea, which is an essential input for the downstream cold rolled sheet steel market. HYSCO entered the cold rolled sheet steel market, but POSCO refused to supply HYSCO with hot rolled coil steel. The KFTC and the Seoul High Court found this refusal to constitute an abuse of dominance, but the Supreme Court disagreed. After laying out the above test, the Supreme Court held that, because HYSCO successfully entered the market based on the import of its requirements from Japan, there was no anticompetitive effect. Moreover, the KFTC had failed to show any other anticompetitive effect on the Korean market (e.g., decrease of supply or increase of price).
characteristics of the relevant market;
the degree of disadvantages suffered by the transaction counterparty from the abusive conduct;
a change in price and output in relevant market; and
interference with innovation and reduction of diversity.

In a subsequent case involving GMarket, a Korean e-commerce service provider, the Supreme Court\(^\text{15}\) further elaborated upon POSCO. The Supreme Court held that when assessing ‘unfairness’, one needs to focus on anticompetitive effects by considering the following factors in a comprehensive manner:

- the purpose and aspects of the relevant conduct;
- the market share of the market dominant enterprise;
- the degree of exclusion and increase of costs with respect to the opportunity for a competitor to enter into or expand in the relevant market;
- duration of the relevant conduct;
- changes of price and output in the relevant market;
- the existence of substitutes and an adjacent market;
- interference with innovation; and
- reduction of diversity.

### ii Exclusionary abuses

Exclusionary abuses comprise the following:

- exclusionary pricing (including predation, margin squeeze);
- exclusive dealing (including loyalty rebates, exclusivity);
- leveraging (including tying, bundling and price tying); and
- refusal to deal (including refusal to license).

### Exclusionary pricing

Predatory pricing schemes are covered under the FTL as a type of ‘unfair exclusion of competitors’ – a conduct that is likely to exclude competitors by unfairly supplying products or services below the normal transaction price or purchasing above the normal transaction price. For example, the KFTC found that a dominant company in the Korean elevator manufacturing market abused its position when it entered into an agreement to

\(^{15}\) Supreme Court, case 2008 Du 16322 (10 June 2011). GMarket required its suppliers to raise their sales prices to Ample Online, one of GMarket’s competitors, or cease transacting with it. The Seoul High Court affirmed the KFTC’s decision finding GMarket to have abused its dominance based on the following: (1) GMarket’s acts were intended to maintain or strengthen its ‘monopoly status’; (2) Ample Online’s suppliers ceased to supply due to fear of retaliation by GMarket; (3) Ample Online was deprived of the opportunity to increase revenue by transacting with reputable suppliers and thereafter went out of business; and (4) GMarket, by engaging in such acts, successfully maintained or strengthened its dominant position. However, the Supreme Court reversed the Seoul High Court’s judgment based on its review of the ‘unfairness’ factors, and held that since, among others, GMarket’s restriction were imposed on only a small number of sellers and it was not obvious whether GMarket’s conduct discouraged the entry of new competitors or caused Ample Online’s exit, the case should be remanded.
sell its products to a customer at a price that was lower than its production cost in order to induce the customer to cancel a similar agreement previously entered into with the dominant company’s competitor.\textsuperscript{16}

With respect to margin squeeze, while the FTL does not have a specific provision that covers margin squeeze, in certain circumstances it may be captured by the FTL in the form of ‘unfair pricing’, ‘unfair business interference’ or ‘unfair exclusion of competitors’. In 2015, the KFTC found that two telecom companies, KT and LG Uplus, had abused their market dominance by pricing their enterprise messaging service at a price lower than the ‘normal transaction price’ which could squeeze out competitors that did not have telecommunications networks of their own, and thus had to pay network usage fees.\textsuperscript{17} It is noteworthy that the KFTC interpreted the term ‘normal transaction price’ as the price used in normal transactions in a market where fair opportunities for competition are preserved, and noted that therefore in many instances the ‘market price’ prevalent in a monopolistic or oligopolistic market may not be the ‘normal transaction price’ to be used in reviewing predatory pricing cases. Both cases were appealed by the respondents and are now pending at the Seoul High Court.

The FTL does not require ‘recoupment’ for the purpose of predatory pricing-related violations.

\textit{Exclusive dealing}

‘Unfair exclusion of competitors’ under Article 3-2 of the FTL is relied upon by the KFTC to regulate loyalty rebate practices. In Intel, the KFTC found that Intel tried to exclude its competitor, AMD, from the market for x86 central processing unit (CPUs) by providing various loyalty rebates to two Korean original equipment manufacturers (OEMs) (Samsung Electronics and Trigem) contingent upon them not purchasing CPUs from AMD.\textsuperscript{18} The KFTC ordered Intel to cease providing various rebates to the OEMs in exchange for not purchasing CPUs from its competitors or maintaining its market segment share, while imposing an administrative surcharge of approximately 26 billion won.\textsuperscript{19} In the Qualcomm I case, the KFTC also found that Qualcomm, as a dominant player in the code-division multiple access (CDMA) mobile telecommunications technology market and the CDMA modem chip market, provided loyalty rebates to Korean OEMs on the condition that they fulfil most of their demands in CDMA modem chips and radio frequency chips through Qualcomm, and imposed corrective orders and imposed a fine of 273 billion won.\textsuperscript{20} The KFTC’s decision was upheld by the Seoul High Court,\textsuperscript{21} and the case is currently pending before the Supreme Court.

The Seoul High Court rejected Intel’s and Qualcomm’s argument that the rebates concerned should not be reviewed as a type of exclusive dealing because they were essentially another form of price discount. With respect to Qualcomm’s rebates, the Seoul High Court

\textsuperscript{16} KFTC decision No. 86-46 (28 May 1986).
\textsuperscript{17} KFTC decisions No. 2015-050 (KT) and No. 2015-049 (LG Uplus) (both, 23 February 2015).
\textsuperscript{18} KFTC decision No. 2008-295 (5 November 2008).
\textsuperscript{19} Seoul High Court upheld the KFTC’s decision. Seoul High Court, case 2008 Nu 35462 (19 June 2013). Intel did not appeal the Court’s decision.
\textsuperscript{20} KFTC decision No. 2009-281 (30 December 2009).
\textsuperscript{21} Seoul High Court, case 2010 Nu 3932 (19 June 2013).
further noted that given the cumulative, retroactive structure of the rebate programme, it could not be equated with ordinary price discount, and that exclusive dealing was the proper characterisation.

Another key case is the Korean Air case, where travel agencies were paid sales incentives (volume discounts) if they met certain sales targets, resulting in the travel agencies’ booking Korean Air flights when otherwise they would have booked competitors’ flights.22

**Leveraging**

‘Leveraging’ in itself is not an enumerated type of conduct regulated as abuse of dominant position, but in relation to tying, the ‘unfair business interference’ and ‘any acts that may considerably harm the interest of consumers’ in general may be invoked to cover tying practices as abuse of dominance. For example, in the Microsoft case in 2006, the KFTC took the position that Microsoft’s practice of offering its Windows Media Player (WMP) and Messenger tied to its Windows PC OS met the requirements for both types of abusive conduct.23 The KFTC found that:

- WMP and Messenger were ‘separate products’ distinct from the Windows PC OS;
- Microsoft coerced unwilling consumers to purchase WMP and Messengers by its tying;
- Microsoft intended to ‘leverage’ its dominance in the PC OS market to obtain competitive advantage in the media player and messenger markets by establishing ‘ubiquitous’ installation of WMP and Messenger, which created a strong network effect and tipping toward WMP and Messenger that competitors could not overcome; and

- competition on the merits was hindered and entry barriers were heightened.

Although the statutory requirements for tying as an abuse of dominance are not expressly set forth under Article 3-2 of the FTL, the KFTC’s Guidelines for Review of Unfair Trade Practices explain, which can serve as reference for determining abusive tying, that to find illegal tying as an unfair trade practice:

- the tying and the tied products should be ‘separate products’;
- purchase of the tied product is coerced even when it is not wanted;
- such practice is inconsistent with the normal market practice; and
- the tying excludes or is likely to exclude competitors.

For multi-product bundling-type conduct, the KFTC and the Seoul High Court found in Qualcomm I that Qualcomm’s licence royalty discounts offered only to OEMs purchasing Qualcomm’s mobile chipsets constituted abusive discriminatory pricing. For single-product bundling-type conduct, the KFTC and the Seoul High Court also found in Qualcomm I that for competing modem chipset makers there were contestable (low-end) and non-contestable (high-end) shares of OEMs’ requirements, and that because Qualcomm’s rebates were offered to both the contestable and non-contestable shares, Qualcomm’s competitors had to compensate the OEMs for the lost rebates on the non-contestable shares as well, which was impossible for them to do, and hence the rebate programme was not an ordinary price discount but an exclusive dealing.

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22 KFTC decision No. 2010-108 (31 August 2010).
23 KFTC decision No. 2006-042 (24 February 2006).
Refusal to deal

‘Unfair business interference’ and ‘unfair obstruction of market entry’ can be used to cover refusal to deal situations. For an example of the KFTC and Supreme Court’s refusal to deal case, see POSCO, above.

In relation to the (now settled) patent dispute between Apple and Samsung, the KFTC concluded in 2014 that Samsung’s filing of an injunction against Apple based on Samsung’s fair, reasonable, and non-discriminatory (FRAND) terms-encumbered standard essential patents (SEPs) (for 3rd Generation Partnership Project (3GPP)/Universal Mobile Telecommunications System (UMTS) standard) did not constitute refusal to grant access to essential inputs. The KFTC explained that the SEPs did not meet the ‘exclusive control’ element of essential inputs (the other two elements are essentiality and non-substitutability) as they are FRAND-encumbered and there are more than 15,000 SEPs in the 3GPP/UMTS standard owned by more than 50 patent holders.24 On the other hand, the Seoul Central District Court, which granted the injunction that Samsung sought against Apple, ruled that Samsung’s SEPs constituted essential inputs, on the grounds that:

a. it was not realistically possible for companies that did not have access to 3GPP standard technology to manufacture or sell 3GPP devices;

b. a SEP is exclusively controlled by the SEP holder; and

c. if the SEP holder refuses to license, other companies would either have no access to substitutable technology, or would theoretically have access but realistically would not be able to compete in a timely manner based on such alternative technology.25

iii Discrimination (including discriminatory pricing)

Discriminatory abuse of market dominance, including discriminatory pricing, would constitute ‘unfair business interference’ under Article 3-2 of the FTL. The Guidelines prohibit unfair discrimination in light of normal industry practices or customs by market-dominant enterprises with respect to the terms or conditions of a transaction. See our discussions regarding Qualcomm I and Siemens, above.

iv Exploitative abuses (including excessive pricing)

Under the FTL, conduct such as unfair pricing, unfair output restriction, unfair business interference and any acts that may considerably harm the interest of consumers in general can cover exploitative conduct such as forcing a trading partner to execute a transaction or conduct that is disadvantageous to the trading partner. Similar to the EU, cases involving exploitative conduct in the form of excessive pricing or output restriction in Korea are quite rare, with no recent cases available.

One of the key cases of price abuse in Korea is the aforementioned BC Card case.26 In this case, several credit card companies increased the rate of commission for the use of cash withdrawal services and instalment payment services, and increased the interest rates for

25 Seoul High Court, case 2011 Ga-Hap 39552 (24 August 2012). However, the Court found that Samsung had not unreasonably refused access to such essential inputs.
26 KFTC decision No. 2001-039.
delayed repayment. The companies attributed the above measures to a hike in interest rates. However, the KFTC found their failure to subsequently lower the relevant rates despite a reduction in the hiked interest rates to constitute price abuse.\footnote{27}

V REMEDIES AND SANCTIONS

i Sanctions

Under the FTL, in case of abuse of dominance the KFTC may impose administrative fines of up to 3 per cent of the relevant turnover, or up to 1 billion won if there is no turnover or it is difficult to calculate the turnover. The KFTC’s Notification on Detailed Standards for Administrative Fines sets forth the calculation method and the factors for upward and downward adjustments, such as:

\begin{itemize}
  \item[a] the degree of anticompetitive effect or concern;
  \item[b] the size of unjust profit gained;
  \item[c] the market share;
  \item[d] the duration of the violation;
  \item[e] the number of past violations; and
  \item[f] cooperation with an investigation.
\end{itemize}

Criminal penalties (imprisonment of up to three years or a criminal fine of up to 200 million won) may be imposed only if the KFTC refers an investigation to the prosecutor’s office. So far, only three cases have been referred for criminal investigation based on abuse of dominance since 2000 (two in 2010, one in 2015).\footnote{28}

ii Behavioural remedies (including interim measures)

In the case of abuse of dominance, the KFTC may impose an order to:

\begin{itemize}
  \item[a] lower the price;
  \item[b] discontinue the act in question;
  \item[c] publicly announce the receipt of a corrective order; and
  \item[d] take other measures necessary for correction.
\end{itemize}

Based on the last catch-all provision, the KFTC has significant latitude in formulating different types of corrective orders. For example, in \textit{Qualcomm II}, the KFTC ordered Qualcomm to, among others:

\begin{itemize}
  \item[a] not impose certain types of unreasonable terms in patent (SEPs for CDMA, wideband code division multiple access (WCDMA) and long-term evolution (LTE) licence agreements with willing modem chip manufacturers;
  \item[b] negotiate in good faith with modem chip manufacturers who make a request to execute a patent licence agreement;
  \item[c] not coerce mobile phone manufacturers to execute a patent licence agreement with Qualcomm as a condition to purchasing Qualcomm’s modem chipsets;
\end{itemize}

\footnote{27}{However, ultimately the KFTC’s decision was revoked at the Supreme Court level (case 2003 Du 6283, rendered on 9 December 2005) because the Court did not recognise the respondent companies’ ‘collective’ dominant position. See footnote 11.}

\footnote{28}{KFTC Statistics Yearbook 2016, p. 47.}
d renegotiate existing modem chipset supply agreements upon request; and
e individually notify mobile phone manufacturers of the KFTC’s corrective order.

In the Siemens case, the KFTC ordered Siemens to provide the service key for basic-level support at a mere cost-level price within 24 hours upon request from the hospitals owning Siemens equipment.

iii Structural remedies

While the KFTC may order a wide range of corrective orders it deems as necessary to remedy anticompetitive effects arising from the antitrust violations concerned, no structural remedies have been issued in abuse of market dominance cases in Korea.

That said, interest in structural remedies has increased overall recently. For example, a taskforce commissioned by the KFTC to study potential areas for regulatory reform indicated in its final report that although there is still a lack of consensus on the appropriateness of certain structural remedies (such as a compulsory spin-off), assuming such remedies are adopted, there would need to be clear rules on the relevant requirements and standards. A draft amendment to the FTL that would allow the KFTC to order companies to spin off business divisions or sell off affiliates is pending at the National Assembly. The KFTC Chairman has indicated that such a system would be useful but is not a matter of priority for the KFTC.

VI PROCEDURE

In general, the KFTC procedure consists of an investigation phase, and a hearing and decision-making phase. While the KFTC’s investigative procedure is administrative, the hearing and decision-making part is a quasi-judicial procedure, as respondents are given an opportunity to present their case before the commissioners in an adversarial setting.

Before commencing an investigation, the KFTC will generally review publicly available information and information provided by third parties (e.g., a complainant). In recent years, the trend at the KFTC has been to increase coordination and information sharing with other competition authorities, including through conference calls with and visits to such authorities, not only in the course of its ongoing cases, but even before the KFTC launches new investigation.

When commencing an investigation, the KFTC may send a letter to the respondents informing them of the opening of an investigation, often accompanied by a comprehensive written request for information. The KFTC may also conduct unannounced on-sight investigations (dawn raids) to obtain relevant evidence and conduct employee interviews. Attorneys are generally allowed to be present at such interviews, and the case examiner will typically prepare a written witness statement to be signed by the employee or employees, which may later be presented to the Commission as evidence supporting the alleged violations.

If a company unreasonably refuses to respond to the information requests, submits false information, or hides, destroys or falsifies evidence during a dawn raid, the company as well as its individual employees may be subject to criminal penalty of imprisonment of up to two years or fine of up to 150 million won. Obstructing dawn raids by means of abusive language, physical violence, or prevention or delaying of officials from entering the premises is already subject to criminal penalty of imprisonment of up to three years or a fine of up to 200 million won.
If a company fails to respond to an information request that was approved at the Commission level (after initially being issued by the case team), it could be subject to an ‘enforcement levy’ of up to 0.3 per cent of the company’s average daily revenue per each day of delay.

At the conclusion of an investigation, the case examiners will either close the case or refer it to the Commission for determination. In the latter case, the examiners will issue a report (an ‘examiner’s report’, equivalent to the statement of objection in the EU) against the respondents. After receipt of the examiner’s report, the respondents can submit a response rebutting the allegations contained in the examiner’s report, typically within two to four weeks (an extension is typically available) of the date of its receipt.

The hearing is generally scheduled to begin within a couple of months from submission of the respondents’ response to the examiner’s report. The hearing proceeds with the case examiner’s opening statement in the form of submission of allegations followed by the respondents’ rebuttals. Factual and expert witnesses of both sides may give testimonies and presentations. The parties may also express their views during the commissioners’ questioning of the witnesses and parties. The hearing ends with the examiners’ recommendation of measures, sanctions, or both, and the respondents’ closing statement.

After the end of the hearing, the commissioners gather to deliberate. The discussion is held in private, and no minority opinion or vote split is announced. The decision of the Commission is typically announced through a KFTC press release a day after the decision is reached. The press release is often several pages long and briefly describes, among others, the history of the investigation, the identity and conduct of the respondents, the status of the relevant markets and any measures or sanctions imposed. After the issuance of the press release, the Commission will prepare a written opinion detailing the reasons and grounds of its decision. The Commission is recommended to send its written opinion within 40 days from the date the decision is made. However, in practice it may take longer depending on the complexity of the case.

The Commission’s decision and order may be appealed within 30 days from receipt of the KFTC’s written decision, either to the KFTC for reconsideration or to the Seoul High Court for revocation. In the event that the decision is appealed to the KFTC, the reconsidered second decision rendered by the KFTC may also be appealed within 30 days to the Seoul High Court. The judgment of the Seoul High Court may be appealed to the Supreme Court.

In 2011, the FTL was amended to introduce a consent decree system as required by the Korea–US free trade agreement. This system was utilised in 2014 by Naver and Daum, two major online and mobile search engine companies in Korea, to reach a resolution regarding the KFTC’s investigation of alleged abuse of dominance including placing the companies’ at-charge services at the top of search results and displaying keyword advertisements alongside search results without clearly labelling them as advertisements. In the consent decree, the companies agreed to take measures such as to fairly treat competitor services when operating their search engine businesses, clearly label all keyword advertisements, and provide funds to be used for causes including creating a public interest foundation to mediate disputes regarding internet searches and providing support to internet users.29

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It is possible for companies to request the KFTC to review business practices in advance to see whether they would violate the FTL.\textsuperscript{30} While this ‘advance review’ system is available for abuse of dominance cases as well, there have not been any cases to date where such review was requested regarding a potential an abuse of dominance matter.\textsuperscript{31}

\section*{VII PRIVATE ENFORCEMENT}

Article 56 of the FTL provides a private right of action to claims for damages caused by antitrust violations, including abuse of market dominance. However, a private enforcement request for injunctive relief (i.e., behavioural or structural remedies) to remove the effect of antitrust violations is not available under the FTL.

The Korean judiciary does not yet have the US-style class action system. It is also important to note that the US-style broad discovery system is not available in Korea, which means that lodging an independent civil action in the absence of the related KFTC enforcement action is difficult.

Under the FTL, the plaintiff generally has the burden to prove the amount of actual damage, and the standard applied is the same as in an ordinary tort action. The damage amount is typically calculated as the difference between the financial position the plaintiff would have been in absent the defendant’s abuse of dominance and the plaintiff’s current financial position. However, where it is difficult for the injured party to provide sufficient evidence on the amount of damages to be awarded, the court may determine the appropriate amount at its discretion.

The KFTC has recently announced that it is planning to seek amendments to the FTL that will allow class actions, punitive damages and injunctive relief in certain cases.

Where a defendant has been found by the KFTC (or a court, if the KFTC’s decision was appealed) to have violated the FTL, the court will generally assume that the violation took place, and will focus its review on whether and to what extent such violation caused damage to the plaintiff.

In February 2013, the Supreme Court ruled in favour of Microsoft in a case in which the plaintiff, an online messenger program provider, brought a civil damages action against Microsoft following the KFTC’s decision against Microsoft for its abuse of dominance, as discussed.\textsuperscript{32} The Supreme Court found that the plaintiff’s business failure was not attributable to Microsoft’s bundling, but more to the tech bubble burst in the Korean economy. As for the funding of the litigation, in Korea stamp duty (payable in the first instance by the party commencing the action, including an appeal), service of process fees and witness fees may all be fully recovered by the party that prevails in the litigation. Legal expenses are, in principle, to be borne by the losing party; however, attorneys’ fees may only be recovered up to the amount calculated pursuant to a tariff schedule that is based on the claim amount.

\begin{itemize}
\item \textsuperscript{30} KFTC’s Operating Guidelines on Petition for Advance Review Regarding Whether There Is Violation of Monopoly Regulation and Fair Trade Law, Etc.
\item \textsuperscript{31} KFTC Statistics Yearbook 2016, p. 121.
\item \textsuperscript{32} Supreme Court, case 2012 Da 79446.
\end{itemize}
VIII FUTURE DEVELOPMENTS

The KFTC has for the past few years been stepping up its enforcement regarding abuse of dominance, unfair trade practices and other violations of the FTL in high-tech industries including the information and communication technology (ICT) and pharmaceutical sectors, and this trend is likely to continue in 2018. For example, in 2017 the KFTC conducted a survey with respect to key domestic and multinational pharmaceutical companies for potential abuses of intellectual property rights and other violations of the FTL, and its investigation of a number of these companies has continued into 2018.

In the same vein, healthcare and ICT were indicated as high-priority enforcement areas in the KFTC’s Business Plan for 2018, with pharmaceuticals, semiconductors, online platforms and big data being mentioned as sectors where vigilant monitoring is warranted. At the same time, the KFTC has also indicated that there is a need to reform regulations that hamper the development of ‘fourth industrial revolution’ sectors such as big data and healthcare.

More generally, the KFTC has shown a high degree of interest in addressing exploitative abuses, particularly when the abuse is perpetrated by a large company in relation to an SME, and this trend is likely to continue.

Finally, the KFTC has formed a special committee to ultimately make recommendations for a draft overhaul of the FTL. The special committee has three subcommittees dealing with the reform of Korea’s competition law, corporate group law and procedural law:

- the competition law subcommittee will consider revising the rules on abuses of dominant market position, the leniency programme and price-fixing regulation;
- the corporate group law subcommittee will seek to modify the rules on designating corporate groups and holding firm structures; and
- the procedural law subcommittee will review ways to enhance defendants’ rights and the KFTC’s independence.

The KFTC plans to submit the FTL amendment bill to the National Assembly by the end of this year after drawing up a final draft by July.
I INTRODUCTION

i Legal framework

In the Netherlands, the statutory framework with respect to abuse of dominance consists of two articles in the Dutch Competition Act (DCA). The prohibition on abuse of dominance is laid down in Article 24 of the DCA, which has been modelled after Article 102 of the Treaty on the Functioning of the European Union (TFEU). Article 25 of the DCA provides for the possibility of an exemption from the application of Article 24 of the DCA in respect of undertakings entrusted with the operation of services of general economic interest (insofar as the application of Article 24 of the DCA would obstruct such operation), and thus substantively resembles Article 106(2) of the TFEU.2

The legislature expressly intended for the decision practice of the European Commission (Commission) and the case law of the EU courts to govern the application of Articles 24 and 25 of the DCA.3 Furthermore, the legislature has indicated that the DCA should be neither more nor less lenient than the EU competition rules.4

The examples of such abuses that are listed in Article 102 of the TFEU are not listed in Article 24 of the DCA, but can be found almost verbatim in the explanatory memorandum to the DCA.5

Insofar as public or state-owned enterprises operate as ‘undertakings’ within the meaning of the DCA, they are bound by the same rules as private enterprises.6 As of 1 July 2012, the DCA has been supplemented with certain special rules applicable to public enterprises, but these do not specifically relate to abuse of dominance.7

Finally, there is special regulation comprising rules on market power in respect of the telecommunications sector (telephone and internet services), the electricity and gas sectors,
the postal sector and the transportation sector. These regimes are all supervised by the
Authority for Consumers and Markets (ACM) as well. For the healthcare sector, pursuant
to the Healthcare Market Regulation Act, the Dutch Healthcare Authority is tasked with
supervision of healthcare companies with ‘significant market power’. A bill to transfer this
supervisory task to the ACM is currently pending.

ii Enforcement practice and policy
The Netherlands ranks among the countries with the lowest number of abuse of dominance
interventions (i.e., decisions by the national competition authority establishing an
infringement). That is the conclusion of a study by economic research organisation, SEO,
commissioned by the Dutch Ministry of Economic Affairs and presented in 2012 (SEO
study). In the study period from 2005 to 2009, only one out of 18 investigations relating
to abuse of a dominant position resulted in an intervention, and that intervention was
eventually overturned in a court review.11

The aforementioned study sought to explain the relatively low enforcement rate of abuse
of dominance cases in the Netherlands, but failed to arrive at any conclusive observations; however, it is probably linked to the prioritisation policy of the ACM, and the NMa before
that, in combination with the ACM’s historically strong focus on cartel enforcement. The
ACM is not obliged to investigate every suspected infringement or complaint: it sets its
priorities on the basis of economic significance, consumer interest, severity of the infringement and likely efficiency of an intervention. Demonstrating harm is generally less expensive in the case of a cartel than it is for an abuse case, as the latter would normally require an analysis as to the (potential) effects on competition, and is thus likely to involve higher levels of
resources. Moreover, as the ACM has pointed out itself in an official reaction to the SEO
study, because of the leniency programme (which is not applicable to unilateral conduct),
cartel cases are generally easier to prove than abuse cases. When its resources have to be
allocated between cartels and an abuse of dominance case, the ACM, therefore, apparently

8 The Health-care Market Regulation Act is available (in Dutch) at www.nza.nl/regelgeving/wetgeving/wmg.
9 Amendment of the Healthcare Market Regulation Act (Wijziging van de Wet marktordening
gezondheidszorg en enkele andere wetten in verband met aanpassingen van de tarief- en prestatieregulering en het marktoezicht op het terrein van de gezondheidszorg). Parliamentary paper 34445.
10 The study is available (in English) at www.seo.nl/uploads/media/2011-63_An_international_comparison_of_the_abuse-of-dominance.pdf.
11 Case No. 3353, decision of the NMa of 6 March 2008; and the decision of the Trade and Industry Appeals Tribunal of 7 October 2010 (case AWB 07/596, LJN: BN9947) (CR-Delta).
12 The study mentions that the following hypotheses could not be proven: (1) differences in the tools and resources available to the five competition authorities and their deterrent effects; (2) whether Dutch firms have violated the abuse of dominance provision to a lesser extent, as compared to other jurisdictions; and (3) the explanation that the Dutch Competition Authority NMa chose to intervene in few abuse of dominance cases in the period studied, or resolved a relatively high number of cases informally.
prefers to pursue the former. Finally, the ACM has suggested that the relatively elaborate special regulation in respect of sectors operated by former state monopolies has rendered the generic abuse of dominance framework less relevant in the Netherlands.  

II YEAR IN REVIEW

As previously explained, there are generally very few abuse of dominance interventions in the Netherlands. In 2017, one violation was established by the ACM. In 2017, the ACM saw its first case of predatory pricing in a tender procedure, imposing a fine of nearly €41 million on Dutch Railways (NS) for abuse of dominance in a regional tender process.  

According to the ACM, NS wanted to prevent its competitors from winning the tender at all costs, because the tender process served as a pilot for a further decentralisation of the main railway network. NS was found to have abused its dominant position on the main railway network in two ways, first by submitting a loss-making bid for a public transport contract in the Dutch province of Limburg. The second infringement related to a combination of conduct aimed at setting competitors at a disadvantage. The conduct consisted of using confidential information obtained from a former director of one of its competitors, providing delayed and incomplete responses to competitors’ access requests to certain services and facilities owned by NS, and passing on confidential information about its competitors to its subsidiary, which also participated in the tender process. NS intends to appeal the decision.

There is generally also very little private enforcement of the prohibition on abuse of dominance in the Netherlands. The above-mentioned SEO study, for example, found that there have been only 42 court cases that featured a claim of abuse of dominance in the five-year study period of 2005 to 2009 (claims that in most cases only served as an ancillary argument), none of which led to an actual finding of infringement of the abuse of dominance prohibition.

The case law in the Netherlands has been too fragmented to be able to deduce any clear trends; however, both the ACM and the courts in the Netherlands try to adhere closely to the Commission's and EU courts’ application of the concept of abuse of dominance, and have been following the Commission's lead in emphasising the importance of an effects-based analysis and attaching great value to economic evidence in abuse cases.

III MARKET DEFINITION AND MARKET POWER

In the Netherlands, the concepts of market definition and market power are applied in a manner that is substantially similar to the approach of the Commission and the EU courts; therefore, see the European Union chapter for more detailed information on European practice.

15 Ibid., paragraph 3.
16 Case No. 16.0691.31, decision of the ACM of 22 May 2017.
17 SEO study, p. 15.
i  Market definition
As to market definition, the ACM and the courts tend to follow the principles embodied in the Commission's Notice on the definition of the relevant market and the standard jurisprudence of the EU courts.18

ii  Market power
The definition of dominance is provided in Article 1(i) of the DCA and is modelled on the definition commonly applied in the EU, and as coined by the ECJ in the United Brands case:

\[
\text{a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users.}\]

The methodologies and standards of proof employed in practice in determining whether a market position fits this definition of dominance also closely follow European practice. Market shares are considered an important indicator, although not decisive on their own. Additional factors have been taken into account, such as the existence of intellectual property rights, the level of concentration of the market and barriers to entry.20 In its 2017 ruling, the District Court of Amsterdam relied on the advice of three appointed experts for its conclusion that online real estate platform Funda held a dominant position on the online housing market in the Netherlands. According to the experts, the combination of Funda’s strong position and the significant entry barriers to the Dutch online housing market enabled Funda to behave independently.21

The ACM and the courts will normally also look for contraindications, such as countervailing power, when determining dominance.

IV  ABUSE

i  Overview
As with the concepts of market definition and market power, the ACM and the courts tend to closely follow the case law of the Commission and EU courts on the concept of abuse. There are no substantive areas in which Dutch practice may be said to clearly deviate from European practice. Still, over the years, some noteworthy decisions have been handed down with respect to the various types of abuse within the abuse of dominance spectrum itemised below.

ii  Exclusionary abuses

Exclusionary pricing
As stated in Section II, the ACM concluded its first predatory pricing case in a tender procedure in 2017 with the imposition of a €41 million fine on NS for submitting a

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19 European Court of Justice 14 February 1978, Case C-27/76 (United Brands/Commission).
20 This also follows from the Explanatory Memorandum to the Dutch Competition Act, No. 24 707, p. 25.
loss-making bid for a public transport contract in the Dutch province of Limburg. Instead of an *ex post* comparison of actual costs and actual revenue, the ACM had to use an *ex ante* approach to determine predation, because the case related to a bid for a concession that was ultimately not awarded to NS. The ACM compared NS’s internal rate of return (IRR) when performing the concession with its weighted average costs of capital (WACC), and concluded that the IRR would be lower than the WACC. As a result, the concession’s expected revenue would be insufficient to recover the anticipated costs. According to the ACM, this made it impossible for as-efficient competitors to match or outbid the NS bid without incurring loss.

The *Sandd* case provides another good example of the ACM’s policy views with respect to exclusionary (predatory) pricing. In May 2012, the ACM confirmed its 2009 decision that formerly public postal service monopolist PostNL (formerly TNT Post) did not abuse its position on the Dutch postal service market, thereby rejecting a complaint by PostNL’s competitor Sandd. Sandd had claimed, *inter alia*, that the ‘free’ use of PostNL’s network by its ‘price fighting’ subsidiary Netwerk VSP distorted competition on the Dutch postal (addressed mail) market. Sandd argued that the predation assessment should consist in comparing Netwerk VSP’s prices and costs, whereby the remuneration paid by Netwerk VSP for the use of PostNL’s network should be considered costs of Netwerk VSP. The ACM rejected that argument, as it held that PostNL constituted an ‘economic unit’ with its subsidiary. Given that the average prices charged for the addressed mail service of Netwerk VSP was above the long-run average incremental costs (LRAIC) of PostNL (including Netwerk VSP) the ACM concluded – in line with the Commission’s guidance on abusive exclusionary conduct – that there was no evidence of abusive pricing, and rejected Sandd’s complaint. The District Court of Rotterdam upheld the ACM’s decision in administrative appeal. The Court dismissed Sandd’s argument that the LRAIC was not an appropriate test to determine abuse in the postal market, as it is based on a comparison with an ‘equally efficient competitor’. Sandd argued that new entrants to the postal market obviously cannot operate as efficiently as the former monopolist. However, the Court considered that the ACM was right to make such a comparison, as otherwise a less efficient competitor would be able to force a dominant company to raise its prices to the detriment of the end user merely because it is less efficient.

**Exclusive dealing**

*Loyalty rebates*

In the *CR Delta* case, the ACM held, *inter alia*, that certain rebates granted by the (dominant) Dutch ‘cattle improvement co-operative’ on its insemination services were of a loyalty-inducing nature and, therefore, anticompetitive. This view was later confirmed by the District Court of Rotterdam. However, the Trade and Industry Appeals Tribunal (CBb), the highest administrative court in cases on appeal of decisions from the ACM, ruled (in 2010) that despite the obvious loyalty-inducing aim of the rebates, the ACM should have examined whether the rebates were capable of having anticompetitive effects before concluding that the

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22 Case No. 6207, decision of the NMa of 21 May 2012.
25 Decision of the Trade and Industry Appeal Tribunal of 7 October 2010, AWB 07/596, LJN BN9947 (*CR-Delta*).
rebates were illegal (referring to the Tomra jurisprudence of the ECJ). According to the CBb, the rebates were not capable of having such effects, as the rebates only accounted for a very small (merely ‘symbolic’) part of the total costs. Moreover, according to the CBb, competitors were able to (profitably) match the prices charged by CR-Delta, which according to the CBb clearly indicates the absence of any exclusionary effects of the rebates. For these reasons, the CBb overturned the decision of the ACM.

Other exclusionary acts
In early 2011, the ACM ruled that GasTerra, a Dutch company active in the trade and supply of natural gas, had used supply conditions in its contracts with energy distributors in the Netherlands that discouraged these distributors from combining their offer with gas obtained from other wholesale suppliers, thereby impeding the creation of competition in the wholesale gas market. However, on administrative appeal the ACM became convinced that the lack of differentiation on the distributors’ side was attributable to a number of other factors as well. For example, after the market had been liberalised, it simply took quite a while before alternatives to GasTerra’s products and services became available. In addition, there may have been practical and legal obstacles to the introduction of contracts that would offer energy companies more freedom. The ACM therefore arrived at the conclusion that it could not be established that GasTerra had abused its dominant position.26

Leveraging
Over the past 15 years, the ACM has performed only two in-depth investigations focused on alleged tying. In one of those cases, KPN, the former state monopolist in telecommunications, filed a complaint against four major cable television companies for alleged abuse of their (regional) dominant position by, inter alia, tying their analogue packages to their digital packages. The ACM dismissed the complaint because it found that the analogue and digital packages were part of one and the same market, and therefore there could be no case of tying.27

Refusal to deal
On the subject of refusal to deal, NVM/HPC confirms that the Dutch courts closely follow the Bronner criteria in their assessment of such cases. In June 2012, the Amsterdam Court of Appeal handed down a decision in a case between the Dutch Association of Real Estate Agents (NVM) and the (bankruptcy trustee of) software company HPC. HPC submitted that the NVM had illegally refused access to technical specifications necessary for third-party software packages to interface with a widely used software system supplied by the NVM. The Court first considered that the case law of the EU courts should be ‘guiding’ in applying Article 24 of the DCA. It then proceeded to assess the cumulative criteria of Bronner to determine whether the alleged (constructive) refusal to deal should be held abusive. It ruled that HPC had not been able to convincingly demonstrate that all competition had been eliminated by NVM’s alleged refusal; and that having access to the specifications was the

26 Case No. 4296_1, decisions of the NMa of 5 January 2011 (213), 21 January 2011 (197) and the decision on appeal of the NMa of 30 June 2011 (214) (GasTerra).
27 Case No. 5702, decision of the NMa of 20 July 2007 (207).
28 European Court of Justice 26 November 1998, Case C-7/97 (Bronner).
only way of building a market presence in view of, inter alia, the fact that HPC had been active on the market with a market share of about 20 per cent. It therefore rejected the abuse of dominance claim.29 The Dutch Supreme Court upheld the Court of Appeal’s ruling and, referring to EU case law, rejected the plaintiff’s argument that not all competition will need to be eliminated for it to constitute abuse.30 According to the Supreme Court, the Court of Appeal rightly deduced that competition by HPC, and thus competition on the market, was not completely eliminated by the NVM’s behaviour, given HPC’s 20 per cent market share.

On the subject of refusal to license, there is an interesting body of case law in which different Dutch courts have applied the relevant EU concepts differently. It concerns a long-standing dispute between the largest Dutch daily, De Telegraaf, and the National Broadcasting Organisation (NOS) together with the public broadcasting organisations that the NOS represents. De Telegraaf claimed, in a complaint to the ACM in 2001, that the refusal of the broadcasters to provide De Telegraaf with television programming schedules for use in a weekly television guide amounted to an abuse of a dominant position. The ACM sided with De Telegraaf, and the decision was subsequently confirmed by the District Court of Rotterdam.31

In the parallel civil (summary) proceedings initiated by NOS and public broadcasters against De Telegraaf and relating to the same subject matter, the courts, all the way up to the Supreme Court, arrived at the same conclusion: they found that NOS abused its dominant position by refusing to supply the programming schedules.32 With respect to the argument raised by the broadcasters before the Supreme Court that the Court of Appeals had not properly considered whether the weekly guide of De Telegraaf would satisfy the ‘new product’ criterion of the Magill case, the Supreme Court responded that the Court of Appeals had done enough by establishing that there would be a certain demand for the De Telegraaf weekly guide.33

However, after this Supreme Court decision in the civil suit, the CBb overturned the ACM’s decision and the District Court’s ruling in the administrative proceedings. With reference to, in particular, the criteria set out in the IMS Health decision that had just been handed down by the ECJ,34 it held that De Telegraaf’s weekly television guide should not be considered a ‘new product’ (there were already weekly television guides on the market, published by various broadcasting organisations), and that the refusal by NOS therefore did not prevent the introduction of a ‘new product’.35 The preliminary relief judge of the District Court of Amsterdam arrived at a similar conclusion in a similar case in 2005, between commercial broadcaster SBS and publisher Quote Media.36

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29 Decision of the Amsterdam Court of Appeals of 12 June 2012, LJN: BX0460.
31 Case No. 501.o119, decision of the NMa of 3 October 2001 and decision of the District Court of Rotterdam of 22 June 2000, LJN: ZF1130.
32 Decision of the President of the District Court of ’s-Gravenhage of 5 January 1999, KG 98/1539, LJN: BM3036; decision of the Court of Appeal of ’s-Gravenhage of 30 January 2001, 99/1.65, LJN: AA9717; and decision of the Supreme Court of 6 June 2003, C01/183HR, LJN: AF5100.
33 Decision of the Supreme Court of 6 June 2003, C01/183HR, LJN: AF5100, paragraph 3.11.
34 European Court of Justice 29 April 2004, Case C-418/01 (IMS Health).
36 Decision of the President of the District Court of Amsterdam of 28 July 2005, LJN: AU0253 (SBS/Quote Media).
Perhaps the different rulings of the CBb and the Supreme Court in the case of *De Telegraaf v. NOS* could be explained by the fact that, unlike in the *Magill* case, the 'new product' criterion was clearly presented as a cumulative criterion in *IMS Health*, which was issued only after the Supreme Court’s decision. However, it still remains doubtful whether, in view of *Magill* alone, the Supreme Court was right to endorse the lack of a more specific assessment of the new product criterion by the Court of Appeals and consider it satisfied by referring to the existence of a demand for the product.

### iii Discrimination

In March 2018, the District Court of Amsterdam dismissed the claim by real estate association VBO that online real estate platform Funda provided preferential treatment to real estate association NVM, co-founder and indirect shareholder of Funda, in terms of, *inter alia*, costs and ranking on its website. The District Court first underlined that applying dissimilar conditions to equivalent transactions with other trading parties only qualifies as abuse if it thereby places them at a competitive disadvantage. As a result, for conduct to qualify as abuse there must be a finding not only that the dominant company’s conduct is discriminatory, but also that the dominant company’s conduct tends, having regard to the whole of the circumstances of a case, to lead to a distortion of competition between business partners. In this context it is particularly necessary to examine whether the discrimination is likely to have a negative effect on the ability of trading partners that are disfavoured to exert competitive pressure on trading partners that are favoured. The District Court found that VBO had failed to demonstrate that the discrimination tended to distort its competitive position. As a result, the Court concluded that it could not be established that Funda had abused its dominant position.

In May 2012, the CBb confirmed an earlier dismissal by the ACM of a complaint by Fresh FM, a Dutch radio broadcaster, against Buma, the Dutch collecting society for composers and music publishers. Fresh FM claimed that Buma had abused its dominant position by discriminating between regional commercial radio broadcasters and other broadcasters in terms of tariffs charged, as well as by charging excessively high tariffs to these commercial regional broadcasters. The ACM provisionally investigated the potential exclusionary effects of the alleged discriminatory pricing. It concluded that Buma clearly had no incentive to exclude Fresh FM or any commercial stations from the market, as these parties operated as Buma’s customers (just as much as other broadcasters). The ACM also investigated whether the tariffs were potentially excessive. Based on an international price comparison it decided that they were not. The ACM thus rejected Fresh FM’s complaint, and reconfirmed its dismissal in administrative appeal. On ultimate appeal to the court, the CBb upheld the ACM’s decision, as – in short – Fresh FM had not submitted (sufficient) evidence contradicting the ACM’s findings. The CBb emphasised that to consider a certain behaviour abusive, while it is not necessary to demonstrate actual effects, the claimant at least needs to show that the targeted conduct tends to restrict competition or that the conduct is

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38 Case No. 3295, Decision of the NMa of 10 May 2007 (78), and decision on appeal of the NMa of 2 April 2008, (133).
capable of having that effect. Fresh FM had not done this. This approach, which is consistent with the Tomra jurisprudence of the General Court and the European Court of Justice, had already been propagated by the CBb in its decision in the CR-Delta case in 2010.

iv Exploitative abuses

The most high-profile investigation of the ACM involving, inter alia, excessive pricing has been the Interpay case. In this case, the ACM investigated whether Interpay had abused its dominant position on the market for network services for PIN transactions in the Netherlands by charging excessive tariffs to its customers (retailers). Interpay was the only supplier on that market.

To determine whether Interpay’s conditions were excessive, the ACM proceeded to assess Interpay’s ‘return on invested capital’ between 1998 and 2001. It compared this return to a benchmark return on Interpay’s equity and borrowed capital. The ACM concluded that the return made by Interpay between 1998 and 2001 was five to seven times higher than the calculated benchmark return. According to the ACM, this result was disproportionate. The ACM therefore concluded that the tariffs employed by Interpay amounted to an abuse of a dominant position.

In administrative review, the banks (the shareholders in Interpay) heavily challenged the calculation method of the ACM, supported by economists. One of the main arguments was that the ACM had failed to appreciate the fact that the banks had been investing in the ‘PIN project’ for many years prior to the period that the ACM had used for its return on investment calculation. Accordingly, the ACM had failed to take into account a large amount of costs (that would have substantially lowered the calculated return on investment).

Furthermore, the banks argued that by only basing its judgment on the return comparison, the ACM fell short of the requirements pursuant to EU (case) law, which prescribes that while an international price comparison is not required, in any event there has to be a direct assessment of the level of the prices itself.

The ACM’s standing advisory committee in review proceedings agreed with the banks on these points. Subsequently, the ACM, in its decision in administrative review, referencing that it was ‘too much work and too expensive to carry out the research for further investigation’, withdrew the part of the fine that was based on abuse of dominance.

In December 2014, the ACM closed its investigation into possible abuse of dominance by pharmaceutical manufacturer AstraZeneca. In December 2011, the ACM sent a statement of objections to AstraZeneca, suspecting it of having abused a dominant position by charging considerably higher prices for its heartburn drug Nexium sold for use outside hospitals (extramural) than when sold inside hospitals (intramural). As a result of the ‘hospital-influence effect’ – patients tend to continue using the same drug that they have been administered by their hospitals, and physicians are inclined to prescribe the same drug –

39 General Court of the EU 9 September 2010, Case T-155/06 (Tomra/Commission) and European Court of Justice 19 April 2012, Case C-549/10P (Tomra/Commission).
40 Decision of the Trade and Industry Appeal Tribunal of 7 October 2010, AWB 07/596, LJN BN9947 (CR-Delta).
41 Case No. 2910, decision of the NMa of 28 April 2004 (700).
42 Ibid., paragraphs 145, 202, 219–221.
43 Case No. 2910, decision on appeal of the NMa of 21 December 2005 (864), paragraphs 10, 12.
44 Ibid.
AstraZeneca allegedly faced little competition with regard to patients that had first been put on Nexium while hospitalised, and could thus offset the losses incurred by offering Nexium to hospitals at a deep discount with higher extramural prices. The ACM concluded, however, that AstraZeneca had not violated the prohibition on abuse of dominance because it could not be sufficiently determined that AstraZeneca had indeed held a dominant position. In its decision, the ACM distinguished an intramural market and an extramural market consisting of users who, as a result of the hospital-influence effects, should be considered captive to Nexium. AstraZeneca did not have a dominant position on the intramural market since it held a market share of less than 40 per cent. Regarding the extramural market, AstraZeneca’s arguments regarding substitution, therapeutic effectiveness and switching behaviour had raised reasonable doubts as to whether a group of Nexium users would indeed be bound to Nexium through the hospital-influence effect on such a scale that, with regard to this group, AstraZeneca was able to behave independently of its competitors. In April 2014, the ACM published a commitment decision relating to a possible abuse of a dominant position.

V REMEDIES AND SANCTIONS

The DCA and the laws underlying the various sectoral regimes supervised by the ACM comprise the basis for the ACM to issue fines for infringements of the rules set out in the respective acts, including Article 24 DCA.46 The fines are administrative, and not criminal, in nature, although the procedural rules that have been applicable to the imposition of fines since 1 July 2009 do take into account the fact that administrative fines are considered a ‘criminal charge’ in the meaning of Article 6 of the European Convention on Human Rights.47

In addition to the statutory law, the ACM relies on policy rule concerning the determination of fines: the 2014 ACM Fining Policy Rule issued by the Ministry of Economic Affairs.48 The fine calculation method applicable to infringements of the cartel prohibition and the abuse of dominance prohibition that follows from these guidelines resembles the EU approach (as laid down in the Fining Guidelines of the Commission49) in several respects, but not entirely. According to the Fining Policy Rule, the basic fine is calculated as a percentage (of zero to 50 per cent) of a company’s turnover during the last full year of the infringement multiplied by the number of years and months the infringement lasted. In setting the fine, the ACM will take account of aggravating or mitigating factors. Fines may reach up to a maximum of €900,000 or, if greater, 10 per cent of the worldwide annual turnover of the undertaking concerned.

The ACM may impose an order subject to periodic penalty payments; for example, when undertakings fail to cooperate during the investigation process. Such an order may

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46 See Act establishing the Authority for Consumers and Market (2012/2013, Nos. 1 and 2, 33 186).
47 These rules, laid down in the General Administrative Law Act, comprise the ‘right to remain silent’ and the ne bis in idem principle.
also be imposed in the form of a structural measure, as referred to in Article 7 of Regulation 1/2003, if that measure is proportionate to the violation committed and is necessary to actually end the violation.\textsuperscript{50}

The ACM can also fine individuals up to €900,000. Such fines can be imposed if it is established that these persons expressly ordered the abuse to be committed or, alternatively, have failed to take adequate preventive measures, and by doing so deliberately accepted the risk that the abuse would be committed.\textsuperscript{51}

\textbf{VI \hspace{2em} PROCEDURE}

\textbf{\hspace{2em}i \hspace{2em} Investigation and sanctioning phase}

The ACM may examine infringements of Article 24 \textit{ex officio} or on the basis of a complaint. The ACM will apply its prioritisation policy in deciding whether to pursue a case (see Section I).

There is no fixed time limit for an investigation. It may take months, but will usually take longer. The investigation is carried out by a case team at the ACM Competition Directorate. If an infringement is established and it is subsequently decided to pursue the case, a report will be issued. This type of document is similar to a statement of objections. The addressed undertaking (and other interested parties, such as complainants) will have the opportunity to present its views on the allegations in the report, in writing and at an oral hearing.\textsuperscript{52} The legal department of the ACM presides at the oral hearing. The department acts partly as an internal review body ‘independent’ of the case team of the Competition Directorate. It has no involvement with the investigation and the drafting of the report, and is tasked with the preparation of the decision subsequent to the oral hearing. Ultimately, however, the board of the ACM decides whether to issue a (fining) decision.

The stage from the launch of the investigation until the issuance of a decision (establishing an infringement) can take a long time in the Netherlands. The duration is rarely less than a year.

\textbf{\hspace{2em}ii \hspace{2em} Appeal}

Decisions of the ACM may first be submitted to administrative review before an ‘independent’ administrative review committee (administrative review), which will render an opinion to the ACM. The subsequent (renewed) decision of the ACM may be appealed to the District Court of Rotterdam. Ultimate appeal lies with the CBb. Parties may agree with the ACM to directly appeal the ACM’s decision before the District Court so that there is no need to follow the administrative review procedure.

Because of the elaborate appeal procedure in the Netherlands, as described above, it often takes a very long time (i.e., more than three years) from the date of a decision of the ACM until the date of a decision of the appellate court, the CBb.

\textsuperscript{50} Dutch Competition Act, Articles 56 and 58a.
\textsuperscript{51} ACM Policy Guidelines Administrative Fines, pp. 4–5.
\textsuperscript{52} Article 59 of the DCA in combination with the rules laid down in Chapter 5 of the General Administrative Law Act.
iii Informal guidance
There are no formal procedures for obtaining guidance on individual cases. It is possible to informally sound out the opinion of the ACM (e.g., in a meeting).

VII PRIVATE ENFORCEMENT
Third parties can base an action for damages or injunctions before the civil courts directly on Article 24 of the DCA (as with Article 102 of the TFEU). So far, there is no specific regime for enforcement of national competition law infringements. The Dutch Act implementing the EU Damages Directive entered into force on 10 February 2017, and only applies to cases where there is a breach of EU competition law.

A consultation on a bill to also apply these provisions to civil damages actions in cases solely featuring infringements of domestic competition law was closed in November 2017. For now, general Dutch tort law applies to such actions. Pursuant to Dutch tort law, claimed damages can only be compensatory in nature: there is no such thing as punitive or ‘treble’ damages in the Netherlands.

The EMS/Equens ruling by the District Court of Central Netherlands is one of the rare cases in which damages were actually awarded for an infringement of the prohibition on abuse of dominance. In this case, the District Court of Central Netherlands ruled that Equens abused its dominant position in the market for network services for credit card transactions by making it more difficult for customers to switch to acquirers other than its own subsidiary, PaySquare. The case was brought before the court by European Merchant Services (EMS), a customer of Equens and a competitor of PaySquare. The Court first established the dominance of Equens on the market for network services for payment transactions by considering that customers could not easily switch networks, since 70 per cent of the payment terminals used by customers were based on a protocol managed by Equens. The Court subsequently ruled that Equens had abused its dominant position by introducing a ‘queue procedure’, pursuant to which customers could only switch to another acquirer with PaySquare’s assistance. PaySquare would subsequently use the time it would

53 For example, in KPN v. NL tres (22 March 2006), the District Court of The Hague ordered KPN to withdraw internet access offers to educational institutions that were deemed to be predatory and to amount to a price squeeze. The Court also ordered KPN to desist from making abusive offers in the future.


55 Wet van 25 januari 2017, houdende wijziging van Boek 6 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering, in verband met de omzetting van Richtlijn 2014/104/EU van het Europees Parlement en de Raad van 26 november 2014 betreffende bepaalde regels voor schadevorderingen volgens nationaal recht wegens inbreuk op de bepalingen van het mededingingsrecht van de lidstaten en van de Europese Unie (Implementatiewet richtlijn privaatrechtelijke handhaving mededingingsrecht), Staatsblad 2017, 28.

56 Concept regeling. Wetsvoorstel wijziging Mededingingswet in verband met markt en overheid, concentratieoëtzicht en privaatrechtelijke handhaving.

57 Decision by the Court of Central Netherlands of 10 July 2013, ECLI:NL:RBMNE:2013:3245.
take to disconnect the customer’s payment terminal to make a counter offer, and as a result, the switch was often prevented or delayed. The Court thereupon ruled, however, that Equens would have to pay EMS only €77,000 in damages, based on lost profits.58

Private enforcement of Article 24 of the DCA is attempted relatively frequently in the Netherlands, but these attempts are mostly unsuccessful. Claimants often fail to meet the evidentiary thresholds. As explained above, Dutch courts tend to follow EU practice and trends, and therefore attach considerable weight to economic evidence. Claimants only rarely make the effort of building a convincing economic narrative to support a claim of abuse of dominance.

VIII FUTURE DEVELOPMENTS

The ACM has stated that the price of prescription drugs will be a key priority for 2018 and 2019. The ACM will thus likely be focusing on excessive pricing in the pharma sector in the near future, and enforcement rates in this area may increase as a result.

58 Decision by the Court of Central Netherlands of 30 December 2013, ECLI:NL:RBMNE:2013:7536.
I  INTRODUCTION

The current Portuguese competition law framework is provided by the Competition Act, which is applicable to all economic activities in the private, public and cooperative sectors.

Article 11 of the Competition Act, mirroring Article 102 of the Treaty on the Functioning of the European Union (TFEU), prohibits the abuse by one or more undertakings of a dominant position in the domestic market or in a substantial part of it. This provision sets out a number of examples of abuses, notably:

a  imposing, directly or indirectly, unfair purchase or selling prices or other unfair trading conditions;

b  limiting production, markets or technical development to the detriment of consumers;

c  applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

d  making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts; and

e  refusing access to a network or to other essential facilities.

Article 12, without precedent in the European Union competition legal framework, prohibits the abuse of economic dependence. This is the case where one or more undertakings abuse the economic dependence under which any of their suppliers or customers may find themselves as a result of no equivalent alternative being available, to the extent that such a practice affects the way the market or competition operates. Infringements of this nature have rarely been found by the competition enforcer.

State-owned undertakings and undertakings to which the state has granted special or exclusive rights are also subject to the Competition Act. Furthermore, undertakings that have

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1 Ricardo Bordalo Junqueiro is a partner and Ana Kéri is a senior consultant at Vieira de Almeida.
2 The 2012 Competition Act (Law No. 19/2012 of 8 May), which entered into force on 7 July 2012, replaced the 2003 Competition Act (Law 18/2003, of 11 June) and the 2006 Leniency Act (Law 39/2006, of 25 August).
3 The Competition Act has, further to the former competition law framework, enhanced the harmonisation of national rules with the EU competition legal framework.
4 In 2000, beer producers Centraker and Unicer were found to have committed this type of abuse in the beer market by the defunct Council of Competition. The Portuguese Competition Authority, created in 2003, has not adopted an infringement decision based on this provision to date.
been legally entrusted with the management of services of general economic interest, or are by their nature legal monopolies, are subject to the Competition Act to the extent that its enforcement does not create an obstacle to the fulfilment of their specific mission.

The Portuguese Competition Authority (PCA) is the public law entity and independent administrative body responsible for competition law enforcement: its action and inspection, sanction and supervision powers were significantly enhanced with the 2012 enactment of the new Competition Act. The PCA’s decisions are subject to appeal to the Competition, Regulation and Supervision Court (Competition Court), a specialised court for competition matters established in 2012.

To date, the PCA has issued no formal guidance on the application of Article 11 (or Article 12) of the Competition Act. Nevertheless, the PCA’s statements and its decisional practice show that national rules on abuse of dominant position are supposed to be applied in accordance with the decisional practice of the European Commission (EC) and with the rulings of the Court of Justice of the European Union (CJEU).

The PCA has consistently applied both Article 11 of the Competition Act and Article 102 of the TFEU as a joint legal basis in its decisions, as the cases at stake have been found by the PCA to affect trade between Member States. However, in one case, the Competition Court found that only Article 11 was breached.

Furthermore, the prosecution of dominant abuses has consistently been outlined by the PCA as one of its annual policy priorities.

II YEAR IN REVIEW

i Royalty-collecting societies

On 19 April 2018, the CJEU ruled on Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência, declaring that when a dominant undertaking applies discriminatory prices to its commercial partners in the downstream market, the concept of ‘economic disadvantage’ under Article 102(c) of the TFEU must be interpreted in the sense that this behaviour might have as an effect the distortion of competition among those partners. Furthermore, the CJEU considered that the determination of such ‘competitive disadvantage’ does not require proof of an effective and measurable deterioration of the competitive position. It shall thus be based on an overall analysis of the relevant circumstances of the case, which allows the conclusion that the referred-to behaviour influences the costs, profits or other relevant interests of one or several of those partners in a way that that such behaviour is susceptible of affecting the referred-to position.

The case dates back to 2014, when MEO – Serviços de Comunicações e Multimédia SA (MEO), a provider of retail television services, filed a complaint against the royalty-collecting society Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes (GDA) for abuse of dominant position, alleging that GDA had been charging discriminatory wholesale tariffs for artists’ rights licences.

5 In the Sport TV case, the PCA had found that Sport TV had abused its dominant position for applying a discriminatory remuneration system in the distribution agreements for Sport TV television channels entered into between the company and the operators of subscription-based television services. The Competition Court confirmed the PCA’s ruling, although reducing the amount of the fine.

6 Case C-525/16, MEO, Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência.
The complaint was rejected by the PCA as, despite considering that GDA was dominant and had effectively been charging discriminatory prices for equivalent transactions, it concluded that the practice was not likely to place MEO at a significant competitive disadvantage against its competitors.

The PCA decision was challenged by MEO before the Competition Court, which stayed the proceedings and lodged a request for the preliminary ruling referred to above to the CJEU on 13 October 2016, which was first subject to the opinion of the Advocate General Nils Wahl.7

ii Market intelligence
On 22 June 2017, the Lisbon Appeal Court issued a ruling confirming the PCA’s finding that the National Association of Pharmacies (ANF) had abused its dominant position, although the PCA substantially reduced the amount of the fine to €815,000.8 The reduction of the fine was due to the fact that the Appeal Court considered that the parent company of the ANF group, which constituted the main part of the group turnover, should not be responsible for the infringement.

On 31 December 2015, the PCA had originally imposed a fine totalling €10.3 million on ANF and three companies that are part of the ANF Group (Farminveste – SGPS, SA, Farminveste – Investimentos, Participações e Gestão SA and HMR – Health Market Research, Lda) for abuse of a dominant position in the markets for Portuguese pharmacies’ data and for the commercialisation of market studies based on such data. The PCA found that between 2010 and 2013, the ANF Group had practised a collective margin squeezing in market intelligence services, as the prices charged for pharmacies’ commercial data (upstream market) would not allow an equally efficient competitor to operate in the downstream market of pharma market studies based on that data.

The ANF group appealed the PCA decision to the Competition Court, which, on 20 October 2016, confirmed the PCA’s findings, namely that the ANF group engaged in margin squeezing in the market for intelligence services, thereby preventing actual and potential competitors from competing and entering the market.

The judicial review by the Competition Court had already resulted in a reduction of the level of the fine imposed on the ANF group, which, on account of the practices and markets affected, was set at €6.9 million. This fine was further reduced by the Lisbon Appeal Court.

iii Postal services
On 28 December 2017, the PCA submitted to public consultation the commitments offered by Correios de Portugal, SA (CTT) in the proceedings opened by the authority for the abuse of dominant position by the company. These commitments aimed at expanding the scope of CTT’s postal network access offer available to competing postal operators.9

These commitments followed a statement of objections (SO) issued by the PCA on 12 August 2016 to the incumbent postal operator, in which it stated, on a preliminary basis, that CTT had abused its dominant position by refusing its competitors access to its standard mail delivery network, in potential breach of the national and EU competition rules. The

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7 Opinion of Advocate General Wahl on case C-525/16, delivered on 20 December 2017.
8 The amount of the fine had already been reduced by the Competition Court, as described below.
PCA considered CTT’s only nationwide standard mail delivery network in Portugal as an essential facility, and that the company’s behaviour could potentially cause restrictive effects on competition by creating obstacles to the development of effective competition in the market for standard mail services.

Should the case be closed with commitments (as envisaged in the public consultation), it will be the first time that the PCA accepts commitments to close a case after issuing an SO.

iv Wholesale of tobacco products

On 19 January 2017, the Portuguese Supreme Court issued its judgment in favour of the appellant, Portuguese Association of Tobacco Wholesalers (APAT), ordering the PCA to open an investigation against Tabaqueira for abuse of dominant position and abuse of economic dependence. The judgment, mainly based on procedural grounds, held that the complaint had been filed under the former Competition Act, pursuant to which the PCA was bound by the legality principle, which entailed a legal duty to investigate all complaints formally filed.

In 2015, the PCA had rejected a complaint (without opening an investigation) filed by APAT against Tabaqueira for abuse of dominance and abuse of economic dependence, claiming that Tabaqueira, holding a dominant position in the tobacco market, had imposed unfair trading conditions on tobacco wholesalers.

Although the Competition Court upheld the PCA’s rejection decision, APAT challenged the judgment and appealed to the Portuguese Supreme Court.

III MARKET DEFINITION AND MARKET POWER

In its dominance case practice, and absent a legal definition or national guidelines on the matter, the PCA and the Portuguese courts have adopted similar approaches with regard to basic concepts such as ‘relevant market’, ‘dominant position’, ‘unilateral conduct’ and ‘collective dominance’ as are found in the criteria set by the European Commission and developed by the European courts.

The PCA has expressly stated that ‘[i]n order to determine the existence of an abuse of dominant position, it is necessary, first, to determine whether the allegedly dominant undertaking holds a dominant position in a relevant market”,10 which requires the identification of the relevant product (or service) and geographic market (or markets). Depending on the requirements of a case, the PCA uses a more or less economics-based approach regarding the market definition and market power.

Thereafter, and as per European Union practice, an undertaking is deemed to be in a dominant position where it is ascertained that, due to its position of economic strength, it has the ability to behave, to an appreciable extent, independently of its competitors, suppliers, clients and, ultimately, consumers. This position may be due to the characteristics of the undertaking (its market share, financial capacity or vertical integration) or to market characteristics (barriers to entry or expansion, network effects or legal obstacles to entry), or to both.

IV ABUSE

i Overview

Although the 2012 Competition Act does not provide for a definition of dominance, it states that ‘the abusive exploitation, by one or more undertakings, of a dominant position in the national market or a substantial part of it is prohibited’. The PCA also considers that abuse of dominance consists of an unlawful exploitation by one or more undertakings of their market power having an anticompetitive object or effect and resulting in the exploitation of customers or the exclusion of competitors.11

The Competition Act provides for a non-exhaustive list of abuses, and the PCA, in line with the European Commission and the European courts’ practice, has increasingly adopted an effects-based approach (see Market intelligence). This allows for the recognition of the existence of less common or sui generis abuses in some decisions (see OTOC12).

The distinction stated by the PCA between an abusive conduct and competition on the merits is sometimes not reflected in its practice (see Ducts13 and Broadband14), with the courts being more prone to establish the respective line.

Following the European case law, the PCA considers that holding a dominant position confers on the undertaking concerned a special responsibility, the scope of which must be considered in light of the specific circumstances of each case. This special responsibility is not, in itself, an abuse. However, it translates into the idea (also present in the EU case law) that a dominant undertaking has a special responsibility towards the market and the competitive process, which means that a conduct that would be deemed lawful when carried out by a non-dominant undertaking may constitute an infringement when carried out by a dominant undertaking.

In an abuse of economic dependence, which is not expressly foreseen by European Union competition law, the exploitation targets the economic dependence of another undertaking due to the absence for the latter of an equivalent alternative for the supply of goods or the provision of services. Its main elements are, thus:

a the vertical relationship between the undertakings involved;
b the state of dependence due to the absence of equivalent alternatives;
c the abusive conduct of the dominant undertaking; and
d the effects on the market’s functioning or the structure of competition.

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12 The PCA found that the Order of Chartered Accountants had enacted a regulation that artificially segmented the market, reserving for itself one-third of that market.
13 The PCA concluded that the incumbent operator unjustifiably refused access to its underground ducts network to its competitors. This decision was annulled by the courts.
14 Portugal Telecom allegedly abused its dominant position in the wholesale and retail markets for broadband access. The PCA found that Portugal Telecom restricted competition by imposing artificial prices, margin squeeze and discrimination to competing operators, in particular by defining and applying wholesale tariffs that did not allow competitors to offer retail services in a profitable manner. This decision was not confirmed by the courts. In a private action case brought by Optimus against Portugal Telecom, the civil courts found no evidence of abusive conduct or damage.
ii  Exclusionary abuses
The PCA has dealt with exclusionary abuses in some cases. The Ducts case concerned a refusal to deal, and in particular, a refusal of access to essential facilities. The Leased Lines case, the Broadband cases concerned predation and margin squeezing, which was also the centre of the Market intelligence case. Leveraging was the subject matter of the Sugalidal case.

Refusal of access seems also to be at stake in Postal services, with reference to the standard mail delivery network, which was subject to a 2016 SO by the PCA to the national incumbent postal operator.

iii  Discrimination
Discrimination has been discussed mainly in three cases: Leased lines, Broadband and Sport TV. In the respective decisions, the PCA considered that, as a rule, volume rebates should not be regarded as a form of unlawfully restricting competition. However, the issue of discriminatory pricing was raised taking into consideration the circumstances of each case, in which the dominant firm was the main beneficiary of higher discounts.

The recent ruling of the CJEU in the Royalty Collecting Society tariff discrimination case described above may in the future have an impact on the judgments of the Competition Court and other competition authorities with regard to the interpretation of the concept of placing an undertaking at a competitive disadvantage in relation to competitors under Subparagraph (c), Paragraph 2 of Article 102 TFEU.

iv  Exploitative abuses
Exploitative abuses were discussed in the Origination prices case. The investigation and the warning letter sent to all three mobile operators informing them that they were charging excessive prices in Portugal proved that the PCA does not set aside the possibility of intervening in situations of excessive pricing.

V  REMEDIES AND SANCTIONS

i  Sanctions
Abuse of dominance is sanctioned at several levels.

First, and similarly to the European Union’s competition legislation framework, a fine of up to 10 per cent of the turnover of the year immediately preceding a final decision adopted by the PCA may be imposed. For the assessment of fines, the PCA, in December 2012, issued Guidelines on the fining methodology that are in line with the European Commission’s Guidelines on the subject.

Secondly, in cases of non-compliance with a PCA decision determining the adoption of any specific measures or remedies, the PCA may impose daily penalty payments.

15 A case where the incumbent telecoms operator had systematically applied discriminatory conditions to equivalent transactions thereby restricting competition by preventing other operators from competing on equal terms in the market for leased lines and in the downstream market.
16 The PCA concluded that Sugalidal, a manufacturer of tomato products, abused its dominant position by engaging in anticompetitive tied sales practices in its contractual terms with growers of tomatoes for industrial use.
17 See the Sugalidal case.
Further accessory penalties may also be imposed, including the publication of an extract from the PCA’s decision in the Official Gazette as well as in one of the highest-circulation newspapers in the relevant geographic area (national, regional or local), and, in the case of infringements connected with public procurement, exclusion from participation in public tenders for up to two years.

ii Behavioural remedies

According to the Competition Act, infringement decisions regarding restrictive practices may, and often do, impose behavioural measures appropriate to bring an infringement to an end and to avoid persisting violations of the competition rules.

iii Structural remedies

Structural measures necessary for halting prohibited practices or their effects may accompany infringement decisions when there is no behavioural remedy that would be equally effective or, should it exist, would be more onerous for the party concerned than the structural measures themselves. To date, the PCA has never imposed structural measures.

VI PROCEDURE

To exercise its sanctioning powers, the PCA may act on its own initiative or upon a complaint. Although the PCA is receptive to informal contacts, there is no formal procedure that offers guidance on individual cases.

Complaints must be submitted according to a specific form approved by the PCA. Since June 2017, parties can opt to submit their complaints online through the ‘Complaints Portal’. Although the PCA shall make a record of each and every complaint that is submitted, the decision to initiate administrative offence or supervisory proceedings is dependent on:

- the priorities of the current competition policy;
- the elements of fact and of law brought by the parties to the file; and
- the seriousness of the alleged infringement, the likelihood of proving its existence, and the extent of investigation required to make possible the PCA’s mission to ensure compliance with the respective provisions of the Competition Act and the TFEU.

If the PCA decides not to initiate proceedings or concludes, after an investigation has been initiated, that there is no reasonable likelihood of an infringement decision being adopted, it must inform the complainant, which may file observations and, in the event that the PCA does not change its view, appeal the PCA’s decision to close the case.

If the PCA opens an investigation and further decides to pursue the case, it must issue an SO and give the defendant the opportunity to access the file, express its views, produce exculpatory evidence and request that additional investigations be conducted.

In infringement proceedings, the burden of proof of any justification lies with the undertakings or associations of undertakings accused of a breach of the competition law. In principle, the PCA shall conclude inquiries within 18 months and, in the event of an SO, the final decision should be adopted within 12 months of its issuance.

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18 As observed in Market intelligence.
During the course of an investigation, the PCA allows defendants to enter into a settlement discussion with a view to defining the conditions necessary to close the investigation and to obtain a fine reduction conditioned on acknowledging liability for an infringement. With a view to closing investigations, the Competition Act also accepts the submission of commitments to cease the practices that are the object of investigation without acknowledging liability.

Commitments have been well accepted by the PCA in the past, leading to the close of several investigations, in particular with respect to vertical restrictions, and have also become more frequent in proceedings for abuse of dominance. For instance, in Sugalidal and Sport TV, the PCA opt for swift commitments related to changes of behaviour of the undertakings instead of pursuing a lengthy investigation that, despite imposing a penalty, would not provide a swift solution to the problem. In Tabaqueira, the commitments proposed by Tabaqueira regarding its distribution agreements were also accepted by the PCA, which subsequently closed the investigation.

In cases where an investigation indicates that an abuse is on the point of causing serious and irreparable harm to competition, the PCA may, at any phase in the proceedings, issue interim measures ordering the involved undertaking to immediately suspend the practice, or to adopt any other temporary measure needed for restoring competition or required for the final decision on the case to be effective. These urgent measures may remain in force for a period of no longer than 90 days, unless 90-day extensions are granted and duly substantiated, with the PCA having to issue its decision in the proceedings within 180 days.

VII PRIVATE ENFORCEMENT

Pending the entry into force of the Antitrust Damages Directive, proceedings to recover damages deriving from abuse of a dominant position in Portugal are based on the rules set out in the Civil Code and in the Civil Procedure Code. Until then, civil courts are also competent to decide on whether interim relief should be granted and on the type of conduct that should be expected from a dominant firm. Claims for damages, so far, have been subject to the general principles and provisions applicable to civil liability, as there are no special rules for calculating damages deriving from abusive conduct. Compensation is currently aimed at putting a plaintiff in the position he or she would have been in had the tort in question not taken place, with no provision for the award of punitive damage. However, under the new legal diploma, ‘the duty to indemnify comprises not only the damage caused, as well as the benefits that the injured party stopped obtaining as a consequence of the injury, calculated since the moment that the damage occurred’, plus interest.

19 A case concerning an alleged abuse of dominance by Tabaqueira, the dominant undertaking in the cigarettes market, in relation to its wholesalers.
20 Directive 2014/104/EU on actions for damages under national law for infringements of competition law provisions of the Member States and of the European Union.
21 Law No. 23/2018, of 5 June 2018 transposes the Antitrust Damages Directive. The vacatio legis period of the diploma will last for 60 days following its publication. After the entry into force of the new diploma (on 4 August 2018), the rules will follow the EU Directive, with the Portuguese Civil Code and the Civil Procedure Code being applicable subsidiarily.
22 The new diploma provides that after its entry into force, the Competition Court will be competent to judge the private enforcement proceedings based on infringements to competition law, including Articles 11 and 12.
The decision of the PCA in the Broadband case has been used in two follow-on actions for damages. One was dismissed because of the statute of limitations. In the other, the court found no evidence of abusive conduct or damage.

A follow-on action has also been filed against Sport TV following its sanctioning by the PCA for discriminatory conduct. The lawsuit is still pending a court decision. Thus, whether collective actions will provide effective compensation for consumers harmed by antitrust practices remains to be seen.

The current legal framework does not bind the Portuguese courts to PCA decisions, even in cases where they have been reviewed and confirmed by the Competition Court and the Lisbon Court of Appeals: consequently, it is evident that the strength and extent of private antitrust enforcement in Portugal is undermined by this current state of play. The implementation of the Antitrust Damages Directive may change this scenario by providing an incentive to file further damages actions, notably by making the PCA’s decisions binding on the courts.

VIII FUTURE DEVELOPMENTS

2017 was a remarkable year in terms of the PCA’s enforcement activity: the PCA carried out an unprecedented number of dawn raids in various sectors, including touristic river cruises, driving schools, retail distribution and insurance.

2018 marks 15 years of the existence of the PCA, during which time its priorities have been broadened to encompass all fields in order to ensure overall the promotion and defence of competition.

Nevertheless, the PCA still faces a few challenges that require clarification and further action. For instance, the following are continually stated by the PCA to be two of its main concerns and purposes: the conclusion and issuing of guidelines on the applicability of Article 11, and access to files and confidentiality, so as to ensure the promotion of transparency and the interaction of parties in competition proceedings with the PCA.

Finally, the entry into force of the Antitrust Damages Directive will bring major challenges to, and the much-expected enhancement of, competition law enforcement in Portugal.
I INTRODUCTION

Abuse of dominance within the Romanian market or in a substantial part of it is prohibited by Article 6 of the Competition Law, which closely resembles Article 102 of the Treaty on the Functioning of the European Union (TFEU).

The Romanian Competition Council (RCC), which is an independent administrative authority, has jurisdiction over anticompetitive practices including abuses of dominant position, and is the competent body with the power to investigate and sanction abuses. If the abuse of dominance affects intra-Community trade, the RCC will apply both Article 6 of the Competition Law and Article 102 TFEU.

The RCC has not issued formal guidance on abuses of dominance; however, the guidelines on the definition of the relevant market and the guidelines on the assessment of the amount of fine are relevant to abuse of dominance cases. The RCC includes in its decisions references to the European Commission Guidance on exclusionary abuses.

Article 6 applies also to public firms and those in which the state is the majority shareholder.

II YEAR IN REVIEW

Abuse of dominance cases were an important focus of the RCC in 2015, 2016 and 2017.

In 2015, the RCC closed four investigations on abuse of dominance.

In one case, it found an infringement and imposed a fine on Hewlett-Packard (HP) Romania. The investigation was initiated in 2012, following a complaint. The RCC concluded that between 2007 and 2011, HP Romania held a dominant position on the inkjet printer market for the business segment, with a market share of over 80 per cent. The RCC also found that HP Romania was dominant on the secondary market of printer consumables.

The RCC held that HP Romania had taken advantage of its dominant position to terminate a contract before the agreed deadline and without any explanation, which granted its partners special prices for HP supplies, which they delivered to an important client in

1 Livia Zamfiropol is a partner and Cătălin Graure is an associate at DLA Piper Dinu SCA.
2 Competition Law No. 21/1996.
3 Order No. 388 of 5 August 2010 for approving the Guidelines for the definition of the relevant market.
4 Order No. 694 of 11 October 2016 for approving the Guidelines for the individualisation of the sanctions for offences provided under Article 55 of the Competition Law.
the business segment. HP Romania cancelled the contract five months before the deadline, terminating the commercial relationships with the four partner companies and concluding a new contract with only one of the four partner companies.

The RCC held that the early termination, in absence of any objective grounds, by HP Romania of the contract with its four partner companies represented a refusal to supply HP printer consumables in breach of Article 6 of the Competition Law but not falling under the scope of Article 102 TFEU. Moreover, the RCC’s analysis led to the conclusion that HP Romania’s behaviour affected intra-brand competition for HP printer consumables in Romania and completely eliminated intra-brand competition with respect to the respective client.

At the end of 2015, the national company Posta Romana received a fine of €7.4 million. The fine was imposed for an alleged non-fulfilment of the non-discrimination and transparency obligations imposed as behavioural remedies in addition to the €24 million fine applied via the infringement decision adopted in 2010 in Posta Romana. The RCC held that Posta Romana had applied more favourable contractual conditions exclusively to one company when compared to its competitors.

In another case, the RCC rejected the complaint filed by Mailers Serv SRL against Enel Muntenia SA. The authority considered that the complaint concerning unfair increases of prices was ungrounded.

In addition, the RCC accepted commitments offered by the four mobile operators in Romania—Orange Romania, Vodafone Romania, Telekom Romania Mobile Communications and RCS&RDS. The RCC’s investigation started in 2011, in the context of which at that time, the mobile operators were charging different tariffs for the service of call termination at mobile points of the networks they operated, depending on the call origin. Each of the investigated companies offered as a commitment not to differentiate between the level of the tariff for the service of call termination at the mobile points of the network operated by each respective operator supplied to other operators at the level of the wholesale market; and the level of the tariff for service of the call termination at mobile points of the network operated by each respective operator (the service of call termination supplied to its own business for the purpose of making on-net calls on the retail market). Each of the investigated companies undertook such obligation of internal non-discrimination, for a period of two years, which can be either reduced or increased, depending on the market evolution.

Two investigations into potential abuse cases were opened in 2015 (see Table 2).

In 2016, the number of new abuse of dominance investigations increased. The RCC opened 13 new investigations, out of which five concerned potential abuses of dominance, as detailed in Table 2. Two complaints filed against the National Union of Bars and against the certain copyright collective societies were rejected.

The most noteworthy decision in 2016 was the decision concerning the administration of the maritime ports (the CNAPM case).

6 Decision No. 78 of 22 December 2015.
7 Decision No. 52 of 16 December 2010.
8 Decision No. 27 of 10 July 2015.
9 Decision No. 33 of 18 August 2015.
10 Decision No. 12 of 29 February 2016.
In **CNAPM**, the RCC fined seven operators active on the market of pilotage and manœuvring services for ships for having concluded anticompetitive agreements impacting three maritime ports. In addition, the company responsible for the administration of the maritime ports, CNAPM, was found to infringe Article 102 TFEU and Article 6 of the Competition Law for abuse of dominant position on the maritime pilotage services market.

2017 was even more prolific as regards the number of investigations launched by the RCC. Out of the 19 investigations initiated, six cases involved alleged practices of abuse of dominance, as shown in Table 2.

According to information available in the RCC’s 2017 Annual Report, the authority closed two investigations for allegations of abuse of dominance without imposing fines during 2017. In one instance, the RCC accepted the commitments offered by GlaxoSmithKline (GSK) in an investigation related to the distribution of certain pharmaceutical products (the **GlaxoSmithKline** case).

In **GlaxoSmithKline**, the RCC investigated the pharmaceuticals producer for a potential abuse of dominance related to its distribution of Avodart and Seretide drugs. The investigation was opened in 2013, following a complaint.

The alleged abuse of dominance practices consisted in setting up, during the period from 2009 to 2012, a system of supply quotas, and refusing to supply some distributors, with the aim of restricting parallel trade; and implementing, from 1 January 2013, a new supply policy for Romania.

GSK offered commitments to address the RCC’s competition concerns. An initial version of the commitments was published on the website of the competition authority in September 2015. According to this version, GSK committed to set up a hybrid distribution system by adding two additional channels (i.e., a traditional distribution channel and an emergency channel) to its direct-to-pharmacy model. The final version of the GSK commitments accepted by the RCC has not yet been published.

The second abuse of dominance case finalised by the RCC in 2017 was related to the selling of commercial rights over football matches. The RCC closed the investigation after finding the allegations ungrounded.

Moreover, the RCC also rejected two complaints without having opened investigations. One complaint concerned an alleged abuse of dominance by the pharmaceuticals distributor Farmexim of applying discriminatory commercial conditions, while the other related to allegations of abuse of dominance by companies active in the field of packaging waste management.

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12 Decision No. 51 of 10 August 2016.
14 Decision not yet published.
15 Decision not yet published.
17 Decision No. 43 of 5 September 2017.
Table 1: Infringement decisions issued by the RCC in 2015, 2016 and 2017

<table>
<thead>
<tr>
<th>Sector</th>
<th>Undertaking investigated</th>
<th>Conduct</th>
<th>Fines (€)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gas</td>
<td>Otto Gaz</td>
<td>Imposition of discriminatory tariffs</td>
<td>40,000</td>
</tr>
<tr>
<td>Ports</td>
<td>CNAPM</td>
<td>Imposition of commercial terms distorting competition</td>
<td>2.9 million</td>
</tr>
<tr>
<td>Postal services</td>
<td>Posta Romana</td>
<td>Breach of transparency and non-discrimination obligation imposed through an infringement decision</td>
<td>7.4 million</td>
</tr>
<tr>
<td>IT</td>
<td>HP Romania</td>
<td>Cancellation of commercial discounts</td>
<td>665,000</td>
</tr>
</tbody>
</table>

Table 2: Main cases pending before the RCC

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pharmaceuticals</td>
<td>RCC</td>
<td>Abusive practice of Roche Romania allegedly leading to the exclusion of a generic from the market</td>
<td>December 2017</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>RCC</td>
<td>Potential anticompetitive behaviour of Roche Romania in relation to one of its distributors by applying higher wholesale prices than the prices offered in hospital tender procedures</td>
<td>December 2017</td>
</tr>
<tr>
<td>E-commerce</td>
<td>RCC</td>
<td>Potential discriminatory behaviour of Dante International (eMAG) towards retailers of consumer products</td>
<td>December 2017</td>
</tr>
<tr>
<td>Gas</td>
<td>RCC</td>
<td>Potential discriminatory tariffs imposed by Gaz Sud for services connected to gas installations</td>
<td>June 2017</td>
</tr>
<tr>
<td>Energy</td>
<td>RCC</td>
<td>Potential discriminatory behaviour of E-Distributie Muntenia (formerly Enel Distributie Muntenia) towards suppliers of services connected to electricity distribution</td>
<td>May 2017</td>
</tr>
<tr>
<td>Gas</td>
<td>RCC</td>
<td>Potential abuse of dominance behaviour with respect to services connected to gas installations</td>
<td>2017</td>
</tr>
<tr>
<td>Airports</td>
<td>RCC</td>
<td>Potential refusal by International Airport of Cluj to grant access to airport infrastructure for handling services</td>
<td>July 2016</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>RCC</td>
<td>Direct distribution project to pharmacies implemented by Novartis Pharma Services Romania in parallel with traditional distribution via wholesalers</td>
<td>June 2016</td>
</tr>
<tr>
<td>Ports</td>
<td>RCC</td>
<td>Terms offered by Constanța Port for access to infrastructure</td>
<td>June 2016</td>
</tr>
<tr>
<td>Telecoms</td>
<td>RCC</td>
<td>Potential discriminatory tariffs applied by Netcity Telecom SA for access to physical infrastructure for electronic communication</td>
<td>May 2016</td>
</tr>
<tr>
<td>Telecoms</td>
<td>RCC</td>
<td>Potential discriminatory treatment by Orange Romania SA in relation to mobile-related services</td>
<td>April 2016</td>
</tr>
<tr>
<td>Gas</td>
<td>RCC</td>
<td>Potential unfair tariffs offered by Distriț gas Sud Rezecţie for services connected to gas installations</td>
<td>March 2016</td>
</tr>
<tr>
<td>Gas</td>
<td>RCC</td>
<td>Potential tying by Megaconstruct SRL of gas distribution activities and installation activities</td>
<td>March 2016</td>
</tr>
<tr>
<td>Energy</td>
<td>RCC</td>
<td>Practices on the market of energy distribution</td>
<td>2015</td>
</tr>
<tr>
<td>Healthcare</td>
<td>RCC</td>
<td>Practices on the market of prelevation, processing and stocking of stem cells</td>
<td>2015</td>
</tr>
<tr>
<td>Media</td>
<td>RCC</td>
<td>Commercial conditions for commercialisation of TV channels by Pro TV SA</td>
<td>October 2014</td>
</tr>
</tbody>
</table>

* ‘Case opened’ refers to the year or month in which the authority opened its investigation (where known) or announced that it had opened an investigation.
The cases investigated concern various sectors (including, for instance, pharmaceuticals, telecoms, transportation, gas) and a large array of potentially problematic practices, including margin squeeze, refusal to supply, refusal of access to an essential facility, and discriminating or unfair tariffs.

### III MARKET DEFINITION AND MARKET POWER

Under Romanian law, as under EU law, the first step in abuse of dominance is the definition of the relevant product and geographical market. The RCC’s approach to market definition and the notion of dominance is consistent with the Commission’s approach.

Market share is a key factor to the assessment of dominance. Under Romanian law, a relative presumption applies that one or more companies are in a dominant position if its market share or their market shares, respectively, exceed 40 per cent during the relevant period.

### IV ABUSE

#### i Overview

Article 6 of the Competition Law does not provide a definition of abuse, but lists examples of abusive conduct:

- imposing, directly or indirectly, unfair purchasing or selling prices or other unfair trading conditions;
- limiting production, commercialisation or technical development to the detriment of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of a contract subject to the acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the object of such contracts.

Conduct does not infringe Article 6 of the Competition Law if it is objectively justified. This may be the case, in particular, if the conduct is objectively necessary to protect the dominant firm’s or third parties’ legitimate interests, or is because of technical limitations.\(^\text{18}\)

Pending cases concern a variety of potentially problematic behaviours including refusal to deal, discrimination, leveraging or excessive pricing, as mentioned in Section II.

#### ii Exclusionary abuses

The RCC has dealt with exclusionary abuses in some cases; however, some important investigations are still ongoing.

A large number of investigations (including both infringement decisions in *Netmaster Communications v. Vodafone*,\(^\text{19}\) *Netmaster Communications v. Orange*\(^\text{20}\) and cases concerning rejected complaints) referred to refusal to deal. The RCC’s test for refusal to deal is similar to

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\(^{18}\) Decision No. 21 of 29 May 2013.

\(^{19}\) Decision 1 of 14 February 2011.

\(^{20}\) Decision 2 of 14 February 2011.
the test adopted by the European Commission. For instance, in *Discovery v. RCS&RDS*, the RCC analysed whether the refusal by the cable operator RCS&RDS to renew the contract for the retransmission of the Discovery channels amounted to an abuse of dominance. The authority concluded that Discovery had at its disposal alternative cable operators available to retransmit the channels, and that the conduct of RCS&RDS was objectively justified (including because of technical limitations and pricing considerations), and rejected the complaint.

To date, no infringement decisions concerning predation have been issued apart from the *SNTR* case,\(^{21}\) which was finalised in 2003.

### iii Discrimination

Discrimination was discussed mainly in *Posta Romana, Hewlett Packard* and *CFR Marfa*.\(^ {22}\) The issue of discriminatory pricing was assessed taking into consideration the specific circumstances of each case.

### iv Exploitative abuses

A firm may abuse its dominant position if it directly or indirectly imposes unfair selling or purchasing prices. Article 6 of the Competition Law also prohibits direct or indirect imposition of unfair non-price trading conditions.

In recent years, the RCC has not issued any sanctioning decisions concerning exploitative abuses. In 2004, however, in the *Kronospan* case,\(^ {23}\) the RCC held that a 50 per cent increase of the prices imposed by the firm on its trading partners immediately following the approval of a merger that created a significant position on the market qualified as an abuse.

### V REMEDIES AND SANCTIONS

#### i Sanctions

The RCC may impose on firms fines of a minimum of 0.5 per cent and up to 10 per cent of their total turnover in Romania. The fine can be set under the minimum threshold of 0.5 per cent of the total turnover only in cases where the undertaking acknowledges an infringement. However, even in such case, the level of the fine will be at least 0.2 per cent of the total turnover.

In practice, the level of fines imposed can significantly vary depending on the circumstances of the case and the duration of the practice. For instance, a fine of 7.2 per cent was applied to Posta Romana; the company that is responsible for the administration of the maritime ports (CNAPM) received a fine of 4.2 per cent; while fines of 3.6 per cent and respectively 3.45 per cent were applied to Orange Romania SA and to Vodafone Romania SA.

The concept of parental liability has not been applied.

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\(^{21}\) Decision 11 of 13 November 2003.

\(^{22}\) Decision No. 119 of 15 May 2006.

\(^{23}\) Decision No. 329 of 22 December 2004.
ii Behavioural remedies

The RCC may impose behavioural remedies either as an interim measure or as a sanction imposed in its decision on the merits.

Pursuant to Article 50 of the Competition Law, in urgent cases, where there is a risk of serious and irreparable damage to competition, and a cursory evaluation of the facts reveals the existence of an anticompetitive behaviour that is expressly prohibited by law and that needs to be stopped without delay, the RCC may order interim measures. The assessment has usually been done at the request of complainants.

Based on available public information, the RCC has been requested to order interim measures in two abuse of dominance cases. In both cases, the RCC refused to adopt interim measures. In the Timisoara Airport case, the request for interim measures concerned potential changes in the application of the pricing and rebates policy applied by the airport. The case was finalised by the RCC by the adoption of commitments. The RCC has also refused to order interim measures in a case concerning the pharmaceutical sector.

Pursuant to Article 46(1) of the Competition Law, the RCC may also impose specific obligations following a decision on the merits. In the Posta Romana case, in addition to the very large fines applied, the RCC also imposed non-discrimination and transparency obligations, and subsequently sanctioned the non-observance of the obligations imposed.

iii Structural remedies

Infringement decisions can impose structural measures if proportionate to the infringement and necessary for halting the prohibited practices. According to Article 46(1) of the Competition Law, structural remedies can only be imposed when there is no behavioural remedy that would be equally effective, or in cases where a behavioural remedy would be equally effective but would be more onerous for the undertaking concerned than a corrective structural measure. To date, the RCC has never imposed structural remedies.

VI PROCEDURE

The RCC may act on its own initiative or following complaints of third parties. The majority of the abuse of dominance cases handled in the past or currently under assessment were triggered by complaints, usually filed by either customers (e.g., larger distributors or large clients) or competitors. The RCC may also start proceedings against specific undertakings or specific practices following a general sector investigation.

The authority set up a whistleblower portal in 2015, and the online platform has been designed to ensure full anonymity. According to the latest information shared by the RCC, it received 66 messages via the platform throughout 2017, which also led to the opening of an investigation into the market for the sale of agricultural machinery, devices and equipment.

24 RCC decisions to refuse interim orders are not published.
25 Civil judgments upholding decisions of the RCC to refuse interim measures can be found at the following links: www.rolii.ro/hotarari/5897f50ae49009e01e000b65 and www.rolii.ro/hotarari/58ac0cc4e49009982f000245.
26 Decision No. 34 of 26 August 2014.
27 Civil judgment upholding the decision of the RCC to refuse interim measures not published yet.
28 See Section II.
i Commencement of investigations

Usually, a decision is served upon the investigated undertaking only during an unannounced inspection. There is no legal provision requiring the RCC to serve a decision to initiate a procedure upon the parties concerned that have not been the subject of an unannounced inspection. In some cases, the decision to start proceedings is sent to investigated parties, or the RCC publicises the investigation through a press release on its website or in press interviews.

ii Legal privilege

Professional secrecy is broadly defined by the Lawyer’s Statute and covers all types of information and data, in any form and on any medium, provided by a client to a lawyer with a view and in relation to legal assistance, as well as to any documents, materials or other work product elaborated by a lawyer based on such information and data provided by his or her client.29

Additionally, to ensure professional secrecy, client–attorney work product is intangible irrespective of its physical location, and records containing client–attorney correspondence, and notes made in respect of matters related to a client’s defence, may not be taken or confiscated.30

Article 38(8) of the Competition Law also provides special rules on legal privilege in competition proceedings. In the case of unannounced inspections, to the extent that the undertaking does not prove the privileged nature of the communication, the competition inspectors will seal and lift two copies of the document in question, together with the rest of the documents gathered during the dawn raid. The investigated undertaking will be granted a term to submit evidence and explanations with a view to supporting the privileged nature of the document. The President of the Competition Council will then urgently decide, on the basis of the evidence and arguments put forth by the investigated undertaking, whether the document will be deemed privileged. Should the President decide to reject the privileged nature of the communication, the undertaking can challenge this decision before the Bucharest Court of Appeal within 15 days of the decision being communicated to the undertaking. The decision of the Bucharest Court of Appeal can be further appealed before the High Court of Cassation and Justice within five days as of communication. Unsealing can only take place after the expiry of the time period in which the decision of the President can be challenged, or, if challenged, after the court decision becomes final and irrevocable.

iii Guidance

Apart from informal contacts, there are no procedures based on which undertakings could obtain guidance on individual cases.

iv Settlements

A very detailed procedure is applicable in cases where an undertaking is willing to acknowledge an infringement in full or in part.

29 Article 228(2) of the Lawyer’s Statute.
30 Article 35(1) and (11) of Law No. 51/1995 and Article 10(1) and (4) of the Lawyer's Statute.
A simplified procedure can be applied when the acknowledgement of an infringement takes place before the investigation report (similar to the statement of objections under EU law) is communicated to the investigated parties.

The fine reduction is between 10 to 30 per cent, depending on whether the acknowledgement covers all facts included in the investigation report (full admission) or only part of the facts (partial admission), and on the moment in time when the admission is made (before or after the investigation report is communicated).

**v Commitments**

Firms may express their intention to offer commitments aimed at removing the RCC’s competition concerns within six month as of the moment they become aware of the opening of the investigation.

In practice, commitment decisions have become an effective enforcement tool. Out of around 20 investigations closed with commitments as of 2012, six commitment decisions concern potential abuses of dominance proceedings in the following sectors:

- **a** pharmaceuticals; 31
- **b** mobile voice services; 32
- **c** energy; 33
- **d** airports; 34
- **e** financial markets; 35 and
- **f** gas. 36

The procedure is very clearly regulated with specific deadlines for each procedural step, including the market test. In practice, commitments procedures concerning alleged abuse cases were relatively long, ranging from two years up to four years (in more complex cases) as of the opening of the investigation.

**vi Appeal of RCC decisions**

The decisions of the RCC may be appealed to the Court of Appeal of Bucharest and further to the High Court of Cassation and Justice. The appeal does not automatically trigger the suspension of the RCC's decision and of the payment of the fine, but can be requested via a separate procedure subject to the payment or submission of a guarantee.

RCC decisions are subject to full judicial review. Administrative courts may also change the amount of the fine. However, they cannot increase a fine, as this would violate the *non ultra petita* rule. As an exception, as per Article 57(5) of the Competition Law, an undertaking that has entered into a settlement procedure loses the benefit of a fine reduction if it requests the annulment of the RCC's decision as regards matters that have been acknowledged during the settlement procedure.

In practice, RCC’s decisions are rarely overturned by the Romanian courts.

31 *GlaxoSmithKline* case cited above (decision not yet published).
32 Decision No. 33 of 18 August 2015.
33 Decision No. 45 of 31 October 2014.
34 Decision No. 34 of 26 August 2014.
35 Decision No. 79 of 11 December 2012.
36 Decision No. 50 of 5 September 2012.
VII PRIVATE ENFORCEMENT

In Romania, private enforcement has played a modest role until now. However, damages deriving from abuse of dominant positions may be recovered in civil courts.

The decision of the RCC issued in 2010 in *Posta Romana*[^37] has been used in the first follow-on action for damages. The follow-on action has been issued by the Court of Appeal of Bucharest. In December 2010, the RCC sanctioned Posta Romana with a fine of €24 million for abuse of dominance. Posta Romana was found to have favoured one of its clients in relation to standard postal services for advertising mail between 2005 and 2009 to the detriment of the complainant, Mailers Serv SRL. In addition, the RCC considered that Posta Romana granted discriminatory rebates. The High Court of Cassation and Justice upheld the RCC decision in April 2015. In the follow-on action, Mailers Serv SRL claimed damages for the difference in the tariffs (compared to the tariffs applied to the company to which Posta Romana applied more favourable terms). The Court of Appeal awarded damages to Mailers Serv SRL, which included both *damnum emergens* (actual damages) and *lucrum cessans* (loss of profits), consisting of the tariff differences not granted by Posta Romana to Mailers Serv SRL in the period from 2005 to 2009, in line with the RCC's decision. The total damages awarded by the Court amounted to approximately €0.9 million. In November 2016, the High Court of Cassation and Justice upheld the Court of Appeal's decision regarding the damages awarded to Mailers Serv SRL.

In June 2017, Romania also transposed the EU Directive on antitrust damages actions (Damages Directive) by means of Government Emergency Ordinance No. 39/2017 (GEO). The GEO provides for the right of any person harmed following competition law infringements by undertakings or associations of undertakings to claim full compensation before the competent courts (i.e., the Bucharest Tribunal, with an appeal before the Bucharest Court of Appeal and a subsequent appeal available before the High Court of Cassation and Justice). The GEO applies as regards violations of Article 101 or 102 TFEU, breaches of Article 101 or 102 TFEU and the national competition rules, or where only the Romanian competition rules have been breached. The right to full compensation is expressly included in the GEO, the victim of an infringement being entitled to claim damages for the actual loss, any loss of profits and the payment of interest.

The transposition of the Damages Directive should better place both natural and legal persons harmed following competition law breaches to obtain compensation. The introduction of legal presumptions shifting the burden of proof, the new rules on disclosure of evidence and the extended limitation periods together represent a step forward in encouraging victims to bring damage claims before the courts.

At the same time, as declared by the President of the RCC on several occasions, the transposition of the Damages Directive could also ease the burden of public authorities in claiming damages for the harm incurred following anticompetitive practices such as bid rigging.

[^37]: Cited above.
[^38]: Civil judgment No. 1701A of 30 October 2015, which can be found at www.rolii.ro/hotarari/58a021c5e490094810000f70.
VIII FUTURE DEVELOPMENTS

The recent enforcement trend of the RCC confirms that the authority is becoming more and more interested in the pricing behaviour of dominant undertakings: over the past few years multiple investigations have been launched or finalised in this area in various sectors (e.g., IT, telecoms and media, pharmaceuticals, ports).

Based on its draft Strategic Plan for 2017 to 2020, the RCC intends to focus on cartel and abuse of dominance cases, and also to use economic assessment methods for the analysis of market behaviour.

In serious abuse of dominance cases, large fines can be expected.

Dominant companies in the gas, energy, transportation and similar infrastructure sectors should expect an increased level of scrutiny.

The RCC has also reviewed a list of the 14 key sectors that will come under its focus as follows:

- banking;
- insurance;
- media;
- health;
- food;
- transportation;
- electronics and home appliances;
- information technology and communications;
- energy;
- public utilities;
- construction;
- automotive;
- products for personal use; and
- the liberal professions.

It is expected that the new legislation on private damages will help private actions brought by affected parties before the national courts become an important complement to public enforcement.

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I INTRODUCTION

Federal Law No. 135-FZ on Protection of Competition dated 26 July 2006 (Competition Law) is the main statute applicable to the behaviour of dominant undertakings. Article 5 of the Competition Law contains the definition of dominance, while Article 10 prohibits its abuse. Special rules can be found in Federal Law No. 147-FZ on Natural Monopolies dated 17 August 1995 and in industry-specific legislation, such as Federal Law No. 35-FZ on Electric Power Industry dated 26 March 2003 and Federal Law No. 126-FZ on Communication dated 7 July 2003. Decrees of the government are adopted in furtherance of the statutory provisions: they mainly govern non-discriminatory access to certain markets, goods, services or infrastructure. The Russian competition authority, the Federal Antimonopoly Service (FAS), is in charge of the investigation and enforcement of dominance rules. In addition, the FAS has issued several regulations and guidelines relating to, for instance, market definition, determination of monopolistically high and low prices, and the application of Article 10 of the Competition Law.

II YEAR IN REVIEW

Abuse of dominance is one of the enforcement priorities of the FAS. Traditionally, the authority pays particular attention to certain industries of ‘social importance’:

a electrical energy and infrastructure (and, more generally, natural monopolies);
b life sciences;
c oil and gas;
d telecommunications; and
e transportation.

The FAS recently scrutinised the practices of IT and digital companies, including Google and Microsoft. The correlation between IP and abuse of dominance is a topical issue in Russia.

According to the annual report of the FAS, 847 cases relating to abuse of dominance were initiated in 2017, which is 37 per cent less than in 2016 and 72 per cent less than in 2015. This reduction is mostly due to amendments to the Competition Law that introduced a revised definition of abuse of dominance. Similarly, the number of cases initiated in respect
of natural monopolists under Article 10 of the Competition Law has reduced considerably since 2015: only 468 cases were initiated in 2017, compared with 777 and 2,182 cases initiated in 2016 and 2015 respectively.

While significant recent cases are summarised in the table below, the notorious Google case, which was finally resolved in 2017, is of particular interest. The FAS considered Google a dominant undertaking on the market of ‘pre-installed application stores on Android OS’ to be circulated in Russia. Google provided the manufacturers of mobile devices with Google Play for pre-installation on Android OS mobile devices. In this respect, the following actions of Google were viewed by the FAS as abusive:

- mandatory and exclusive pre-installation of other Google applications and services together with Google Play;
- mandatory and exclusive pre-installation of Google’s search engine together with Google Play;
- mandatory placement of pre-installed applications on the screens of mobile devices (specific screen placement); and
- the imposition of prohibitions (or economic incentives) on manufacturers preventing them from dealing with Google’s competitors and pre-installing their products on Android mobile devices.

In its decision, the FAS issued a binding order prescribing Google to complete actions aimed at terminating the violation and restoring competition in the market, including by way of modifying all existing contractual arrangements with its partners, and informing customers of the possibility of deactivating the pre-installed Google applications and search engine and installing alternative competing applications, as well as changing the placement of the application icons on the screen.

The decision was challenged by Google; however, after unsuccessful appeals, the company decided to enter into a settlement agreement with the FAS, pay a significant fine of 438 million roubles and comply with the requirements of the authority.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Fines levied</th>
</tr>
</thead>
<tbody>
<tr>
<td>IT</td>
<td>FAS</td>
<td>Google abused its dominant position by establishing requirements as to the pre-installation of applications and priority settings</td>
<td>438 million roubles</td>
</tr>
<tr>
<td>IT</td>
<td>FAS</td>
<td>Microsoft abused its dominant position by discriminating against an anti-virus provider</td>
<td>Not applicable: the FAS issued a warning that was complied with by Microsoft and no fines were imposed</td>
</tr>
<tr>
<td>Transportation</td>
<td>FAS</td>
<td>Stevedores abused their dominant position in several ports by fixing and maintaining monopolistically high prices</td>
<td>Initially the undertakings concerned were required to transfer around 17 billion roubles to the budget, but this amount was partially reduced due to a settlement agreement (the case is still ongoing)</td>
</tr>
</tbody>
</table>

### III MARKET DEFINITION AND MARKET POWER

Further to Article 5 of the Competition Law, dominance is defined as the position of an undertaking or a group of undertakings allowing them to have a decisive influence on the general terms of circulation of goods on a relevant market, eliminate other entities from the relevant market or impede other entities’ access to this market. Market share of an undertaking is the cornerstone in the assessment of a dominant position.
The dominance standard is primarily economic. The associated test is discussed in detail in the FAS Guidelines on Application of Article 10 of the Competition Law issued on 7 June 2017. In the meantime, the approach of the authority regarding market definition, which is the essential part of the analysis, is outlined in the FAS Regulations No. 220 on Procedure for Assessment of Competition on the Market dated 28 April 2010. Market analysis under the Regulations is necessary in antitrust cases involving abuse of dominance. Since the rules provided for in the Regulations are often rather broad, the competition authority enjoys considerable discretion in defining markets.

As part of the market assessment the FAS generally conducts its own analysis of an industry, existing suppliers and customers, and specifics of the business. The FAS prepares a questionnaire that covers potential interchangeability of the goods in question, and distributes it to the market players in order to collect information from the inside. Initially, the temporal boundaries are defined. One year (or the period during which the market exists, if it is less than a year), including the time when an infringement took place, constitutes a minimum period of time relevant for the market analysis.

The definition of the relevant product market, which is based on the concept of interchangeability, may turn out to be a rather sensitive issue. The geographical boundaries of a market are normally defined as the territory of the Russian Federation or its regions and municipalities. To assess the geographic boundaries of the market, the FAS identifies the territory within which it is feasible for a customer, from a business and technical perspective, to buy similar products. Other factors that are taken into account by the authority include information on the region, pricing structures and differences in prices throughout the Russian territory, and the structure of goods flow.

The Competition Law applies to both dominant sellers and buyers; in certain instances, arguments concerning buyer power are taken into account by the FAS.

As to the market share thresholds, the general rule is that a company is deemed to be dominant if it has a market share of over 50 per cent unless the FAS determines otherwise (presumption of dominance). Under such circumstances, an undertaking is entitled to provide evidence to the contrary suggesting that it does not exercise monopoly power; however, such claims are hardly ever successful.

Further, dominance may be established where a company has a market share of less than 50 per cent. If an undertaking’s market share is between 35 and 50 per cent, it can be considered as a dominant entity should the FAS manage to prove it so on the basis of such criteria as:

a. the relative stability of its market share;
b. its correlation with the market shares of competitors;
c. accessibility of the market to new competitors (barriers to market entry); and
d. other factors characteristic of the market.

An undertaking with a market share of less than 35 per cent can be viewed as dominant only in a situation of collective dominance or if the thresholds provided for in industry-specific legislation apply.

Special dominance rules are established in respect of:

a. telecommunications (a service provider with a market share exceeding 25 per cent is considered as a dominant firm);
b. river and sea ports (a share of more than 20 per cent within a port);
c. electrical energy (if an entity’s share of capacity of the generating facilities or share of the generated electrical energy within the boundaries of the free power transfer zone

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exceed 20 per cent; or if the share of electrical energy or capacity, or both (bought or consumed) within the boundaries of the free power transfer zone exceeds 20 per cent; and

d financial organisations: a financial organisation is dominant if its market share is more than 10 per cent of only the market in the Russian Federation, or if it exceeds 20 per cent if its products circulate on other markets; and if, within a considerable period of time, its market share has been increasing or always exceeds the above threshold.

The Competition Law rules on unilateral conduct deal with collective dominance. For an undertaking to be considered collectively dominant, the following criteria shall be met:

a the aggregate market share of no more than three market players exceeds 50 per cent; or the aggregate market share of no more than five market players exceeds 70 per cent, while the market share of each undertaking concerned exceeds 8 per cent. Furthermore, their market share is supposed to remain stable within an extended period of time (of more than a year);

b there are barriers to market entry for competitors;

c the relevant goods cannot be substituted by other products;

d an increase in prices does not result in a corresponding decrease in demand; and

e the information on the prices and terms of distribution and sale of goods is publicly available.

Historically, the highest fines in the FAS history (several billion roubles) were imposed on major Russian oil companies that abused their position of collective dominance in the form of discrimination.

Finally, an undertaking with a revenue below 400 million roubles cannot be declared dominant if certain conditions set forth by the Competition Law are met (this exemption is mainly relevant for small and medium-sized enterprises rather than undertakings that have substantial market power).

IV ABUSE

i Overview

Dominance of a market is, in itself, not an infringement. Under Article 10 of the Competition Law, abuse of dominance is defined through its consequences as acts or omissions of a dominant undertaking that result or may result in the prevention, restriction or elimination of competition; or the infringement of rights of other undertakings in a field of business activities or an unlimited number of consumers; or both (effects-based approach).

The Competition Law provides for a non-exhaustive list of types of unilateral conduct that amount to abuse of dominance and are prohibited per se (i.e., there is no need for the FAS to establish a conduct’s adverse effect on competition as such):

a fixing or maintaining monopolistically high or low prices;

b withdrawal of products from circulation if this results in an increase in prices;

c imposing unfavourable contractual terms (or contractual terms unrelated to the subject matter of an agreement) on a counterparty;

d reducing or terminating the production of goods, works or services without an economic or technological justification;

e refusal to deal with certain customers without an economic or technological justification;
establishing different prices for the same product without an economic or technological justification;
fixing high or low prices for financial services without any substantiation (for financial institutions);
establishing discriminatory conditions;
creating barriers to market entry or exit for other undertakings;
failure to comply with the regulatory requirements as to pricing; and
manipulation of prices on the wholesale or retail markets, or both, for electrical energy (capacity).

The FAS is required to prove that an undertaking is a dominant entity and that it has been involved in abusive conduct caught by Article 10. As to the available defences, an undertaking may contest the assessment of its market position as dominant and, as occurs frequently, claim that its behaviour was part of an ordinary business strategy (i.e., competition on the merits), and can be substantiated by commercial and technological reasons. Still, in many cases the success of these arguments is far from obvious.

More importantly, by statute, an undertaking may provide evidence suggesting that its conduct is admissible only in relation to certain types of abuse (reduction or termination of production, establishing discriminatory conditions and creating barriers to market entry). In particular, potentially abusive conduct may be admissible if it:

- does not eliminate competition on the market;
- does not impose limitations on third parties;
- results in production improvement, technological progress or increased competitive performance of Russian products; or creates benefits for consumers.

ii  **Exclusionary abuses**

**Exclusionary pricing**

Exclusionary pricing practices such as predation fall under the prohibition on establishing monopolistically low prices. There are two main criteria for a price to be qualified as monopolistically low: it is below the necessary production and distribution costs, as well as the profit; and it is below the price that was formed under competitive conditions in a market with a comparable composition of suppliers and customers and conditions of goods circulation. Margin squeeze is not specifically mentioned in the Competition Law, but this type of abusive behaviour can be viewed as creating barriers to market entry (and fixing monopolistically low prices, as in the case of predatory pricing).

**Exclusive dealing**

Exclusive dealing practices are caught by the prohibitions of Article 10 of the Competition Law if they result in market foreclosure by creating barriers to market entry or refusal to deal with other market players. Loyalty rebates are not prohibited *per se*, but should always be treated with caution by dominant undertakings, as rebates are usually viewed by the FAS as price components. Establishing such rebates may be considered as abuse of dominance in the form of discrimination or establishing different prices for the same products.

**Leveraging**

Leveraging practices, including tying and bundling, are prohibited under the Competition Law and are not uncommon in the FAS’ practice. For example, the competition authority
has looked into such practices in relation to the electrical power industry and insurance. Tying and bundling essentially lead to the imposition of unfavourable terms (terms that are not relevant for the subject matter of the agreement) on a counterparty. There are no uniform criteria, so the FAS usually analyses the economic nature of the parties’ arrangement to establish, among other things, whether the customer was duly informed and aware of its options.

**Refusal to deal**

Unjustified refusal to deal is among the most common types of abuse in the FAS’ practice (in particular, in the pharmaceutical industry). Special rules apply to natural monopolists and dominant undertakings with a market share of more than 70 per cent to ensure access to certain products and infrastructure. Currently, refusal to license does not fall foul of the Competition Law requirements. Due to the IP-related exemption, the prohibitions of Article 10 as to abuse of dominance do not apply to the exercise of IP rights, but the relevant legal framework may change in the near future. The overall abolition of this exemption and the subsequent introduction of such mechanisms as compulsory licensing are being considered.

Dominant market players cannot refuse to enter into a contract with certain customers without a reasonable commercial or technological justification (should it be possible to manufacture or supply such products). The following shall be confirmed by the FAS to establish the violation:

- a customer contacted a dominant undertaking and sent a corresponding request;
- a dominant undertaking refused to deal or supply (such a refusal can take different forms; it can be indirect or implied, e.g., by delaying responses or ignoring negotiations);
- a dominant undertaking can (objectively) procure the production or supply of the products; and
- a dominant undertaking does not have any proper commercial or technological grounds to substantiate its refusal to deal.

When reviewing cases on abusive refusal to deal by a dominant undertaking, the FAS has also looked into the potential interplay between the antitrust and anticorruption concerns. According to the competition authority, refusal to enter into an agreement with a potential distributor should be based on established facts and decisions of the competent bodies rather than any informal sources (mass media, online publications, phone calls, private investigators, etc.). The FAS is of the opinion that a Russian counterparty is supposed to act in compliance with Russian law, which does not provide for an obligation to undergo a compliance check essentially relating to foreign anticorruption laws (this requirement can also amount to exploitative abuse).

The ability to present evidence and build a well-grounded position is of the utmost importance in such cases. The FAS decides on a case-by-case basis whether there are valid reasons for a dominant undertaking not to deal with a particular distributor. In certain instances, the impracticality and unprofitability of cooperation for a dominant entity were found to be proper and sufficient grounds.

**iii Discrimination**

All forms of discrimination, including discriminatory pricing and other issues relating to interactions with counterparties, are prohibited for dominant entities. Thus, customers in the same position should be offered comparable deals, and customers not in the same position
should be differentiated on an objective basis according to their divergent circumstances. FAS and court practice suggests that the same pricing policy shall be applied to all counterparties, whether they are part of the same group or not.

As suggested by the FAS’ practice, the basic principle here is the following: while the ‘freedom of contract’ concept still applies, prices and rebates offered by a dominant undertaking shall be substantiated (i.e., based on transparent, objective, clear and well-grounded criteria), and at the same time shall not be discriminatory (e.g., they shall not be drastically different in comparable situations).

Additional rules preventing discrimination can be found in sector-specific legislation, such as Federal Law No. 381-FZ on Fundamentals of State Regulation of Trading Activities in the Russian Federation dated 28 December 2009, which governs relationships between retail food chains and their suppliers and specifically prohibits discrimination (and other forms of abuse).

iv Exploitative abuses
Prohibitions of Article 10 of the Competition Law apply to exploitative abuses. Excessive pricing is assessed in the same way as predatory pricing in terms of the Competition Law provisions preventing dominant undertakings from establishing monopolistically high and low prices. In most cases, other types of exploitative abuse are qualified as imposing unfavourable and excessive terms on counterparties.

V REMEDIES AND SANCTIONS

i Sanctions
The most common penalties imposed on a dominant undertaking as a result of its abusive conduct are administrative fines of up to 1 million roubles (if the infringement does not result in an adverse effect on competition) or turnover fines of up to 15 per cent of the company’s turnover in the market concerned for the preceding year. Company officials may be held liable (and be fined up to 50,000 roubles or disqualified for up to three years). The competition authority can only impose administrative fines on offenders; disqualification (a prohibition to hold certain posts or carry out certain activities) can be applied only by a court.

Both mitigating circumstances (e.g., an offender stopped a violation, contributed to an investigation or took certain steps to remedy a violation) and aggravating circumstances (e.g., an offender refused to stop a violation or repeated a violation, or a prohibited practice resulted in damage exceeding 1 million roubles or allowed a dominant firm to generate profit of over 5 million roubles) stipulated in the Code on Administrative Offences are taken into account for the purposes of a fine’s calculation and possible reduction.

Alternatively, the FAS is entitled to issue an order requiring an infringer to transfer to the state budget all revenue received as a result of an antitrust violation. It is expressly prohibited to resort to administrative liability (as discussed above) if an offender complied with such an order and transferred the prescribed amount to the budget.

ii Behavioural remedies
Behavioural remedies are clearly preferred by the FAS and are frequently used in practice. The FAS is authorised to issue orders aimed at putting an end to a violation. This is a binding instruction, further to which the undertaking may be obliged to stop its abusive conduct,
enter into (amend or terminate) contracts or take other measures to restore competition. Such orders normally describe in detail what actions are expected from a dominant undertaking. Thus, both positive and negative obligations may be imposed on an infringing entity.

In certain instances (particular types of abuse of dominance), the FAS is required to issue a warning (i.e., a specific request to terminate anticompetitive behaviour). If a dominant entity complies with the requirements contained therein within the timeline set forth in the warning, formal proceedings cannot be initiated. Similarly, in this case a company cannot be held liable for an antitrust violation (i.e., no fines shall be imposed).

This (relatively new) procedure allows the infringing party to deal with the antitrust risks in a relatively straightforward manner; however, it still requires compliance with the terms of a warning. Practically speaking, the number of such cases is rising, so fewer infringements are resulting in investigations. A dominant undertaking will be expected to act, as prescribed in the warning (i.e., enter into an agreement, supply products or ensure a level playing field among its distributors), which may be challenging in practice. In cases of non-compliance, the proceedings continue, and a formal ‘case’ is initiated.

For completeness, in the most extreme cases, the FAS has a right to invalidate agreements (or certain clauses thereof) through court proceedings.

### Structural remedies

In accordance with Article 38 of the Competition Law, the FAS may initiate court proceedings aimed at splitting up a dominant undertaking that is engaged in systematic (more than twice in three years) abuse of its dominant position. However, the competition authority has never exercised this right and applied structural remedies to dominant entities.

### PROCEDURE

The FAS investigates antitrust violations and determines whether an undertaking holds a dominant position. The competition authority investigates and reviews cases of abuse of dominance, conducts scheduled inspections and dawn raids, and imposes sanctions on offenders. Its officials have a right to access and inspect premises, offices and documents of a legal entity, request and review any documents and information, and interview those involved.

The FAS initiates investigations within its powers and on its own initiative. Information on alleged abuse can be obtained by the authority from different sources, including data from other state bodies, complaints of individuals and legal entities, publications in the media and the results of its own inspections. A commission composed of FAS officials is set up to review a case once initiated. Dominant undertakings and interested parties may participate in the hearings of the above commission, present evidence and give further clarifications.

Cases are supposed to be reviewed within three months, but this initial term may be extended further for up to six months. On average, cases on abuse of dominance are resolved within six months, while in more complex, high-profile cases, the authority may exceed the above time frame, which is not preclusive, and conduct an in-depth analysis that may easily take more than one year.

The Competition Law does not provide for mechanisms such as early resolution. Settlement procedures are not available at the stages of an FAS investigation and a review of the case. An amicable settlement agreement can be entered into with the FAS when a decision of the FAS is appealed in court. A settlement agreement must be approved by the court and is
binding on the parties (the dominant entity and the competition authority). The settlement implies that the offender is required to acknowledge the violation, while the competition authority agrees to reduce the fine. Additional behavioural commitments may be imposed on the dominant firm. From a practical perspective, settlement agreements are viewed as something extraordinary, and are often entered into in high-profile cases (e.g., Google).

FAS decisions can be appealed to the commercial courts within three months as from the date of the decision on abuse of dominance. It is possible to appeal decisions of the regional offices of the competition authority to the FAS Presidium (within one month after a decision was issued). This internal appeal, introduced in 2016, is allowed in situations where a decision of the regional office is not in line with the FAS’ practice and the uniform application of the Competition Law by the authority. If an appeal is filed with the FAS Presidium, then further appeal to court is still allowed, but only within one month. Dominant undertakings usually prefer to challenge FAS decisions; however, FAS decisions stand in courts in the absolute majority (more than 90 per cent) of cases.

VII PRIVATE ENFORCEMENT

Although a private right of action is possible under Russian law, and there have been several successful actions brought by private claimants following abuse by a dominant undertaking, for the time being private antitrust enforcement does not play a large role. A private action may be initiated before the court by any person whose rights and interests have been violated by an antitrust infringement. General procedural rules apply to the review of private antitrust actions and their funding: legal costs (stamp duty and, within reasonable limits, legal fees) may be recovered from the defeated party.

By way of illustration, a private claimant may seek to have access to the infrastructure of a dominant entity or to enter into a contract with it. Further, actual damages and lost profits can be claimed. For example, in 2015 a dominant pharmaceutical company was ordered to pay around 408 million roubles in damages (lost profit) to its distributor for refusal to supply.

Difficulties relating to the calculation of damages (in particular, lost profit) and associated high standards of proof traditionally adhered to by the Russian courts are among the major problems preventing the development of private antitrust actions. There is a clear preference for government enforcement by the FAS; market players are generally reluctant to opt for private enforcement. The competition authority is adamant about changing the existing situation: its Guidelines on Proof and Calculation of Damages Resulting from Antitrust Violations shed some light on certain aspects of private litigation.

To recover damages, a plaintiff is supposed to prove a violation of the Competition Law, the existence of damage (including the amount), and the cause-and-effect relationship between the violation and the inflicted damage. Naturally, an FAS decision establishing a violation is instrumental during the court proceedings, but it does not lower the burden of proof imposed on the plaintiff (as to the amount of damage and the cause-effect relationship). While an FAS decision serves as evidence, the competition authority in any case urges future plaintiffs to be more active in collecting and presenting evidence in the course of private antitrust proceedings.

Collective (class) actions are not available for antitrust matters. The FAS acknowledges this problem: some time ago, a proposal to introduce such actions was elaborated, but was not eventually enacted. Key market players were strongly opposed to this idea, as its
implementation would have opened the floodgates for multiple proceedings. Nonetheless, the competition authority is willing to return to the introduction of collective antitrust actions in the near future.

VIII FUTURE DEVELOPMENTS

Further amendments to the Competition Law are to be expected in the near future: they may cover such topics as correlation between IP and antitrust regulations, and issues relating to the digital economy. Currently, the prohibitions on abuse of dominance do not apply to conduct associated with the exercise of exclusive rights to IP, or equivalent means of individualisation of a company, products, works or services. Still, fairly recent cases support the FAS’ outlook on the interplay between IP and antitrust (dominance): as long as right holders can benefit from the existing exemption, there is room for abusive conduct (according to the competition authority, IP rights should not create any benefits in terms of the circulation of products in the market).

The FAS tends to view the above immunity as obsolete; it seeks to exert control over unilateral conduct and contractual arrangements in the area of IP, and to look into existing practices in terms of their compliance with the Competition Law (in particular, in relation to the pharmaceutical industry). Similarly, the competition authority remains a proponent of compulsory licensing and liberalisation of parallel imports, claiming that such reforms will ensure a level playing field. Although this initiative is strongly criticised by many practitioners and will require further regulations, there is a strong drive by the FAS to see these changes implemented.
Chapter 22

SLOVENIA

Andrej Fatur and Helena Belina Djalil

I INTRODUCTION

The statutory provision dealing with the behaviour of dominant firms is Article 9 (Prohibition of the Abuse of a Dominant Position) of the Slovenian Prevention of the Restriction of Competition Act (PRCA), which entered into force on 26 April 2008. Its main wording corresponds to Article 102(1) of the Treaty on the Functioning of the European Union (TFEU) and provides that 'the abuse of a dominant position in the market by one or more undertakings in the territory of the Republic of Slovenia or in a substantial part of it shall be prohibited'. Article 9(4) of the PRCA also lists the same examples of infringements as Article 102(2) of the TFEU.

The Competition Protection Agency (CPA) is an independent administrative authority with powers to investigate abuse of dominance cases (in administrative proceedings) and impose fines of up to 10 per cent of the infringing companies' worldwide turnover (in minor offence proceedings). The CPA has not adopted formal guidance on the way in which it applies Article 9 of the PRCA; nor has it adopted guidelines on the setting of fines for breaches of Slovenian antitrust law. Therefore, guidance on the application of the current rules can be gathered mostly from case law of the CPA and the Slovenian courts. The European Commission's guidance on Article 102 of the TFEU, as well as European Commission's and European courts' decisional practice, also provide useful information for the application of Article 9.

Article 9 of the PRCA applies to undertakings. The PRCA defines the concept of 'undertaking' as any entity that is engaged in economic activities, regardless of its legal and organisational form and ownership status. An 'economic activity' means any activity that is performed on the market for payment. Accordingly, state-owned enterprises, public entities and other legal entities subject to public law and performing economic activities are also

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1 Andrej Fatur is a senior partner at Fatur Law Firm and Helena Belina Djalil is an attorney-at-law and external expert at Fatur Law Firm.
2 ZPOmK-1 (Official Gazette of the Republic of Slovenia No. 36/08), ZPOmK-1A (Official Gazette of the Republic of Slovenia No. 40/09), ZPOmK-1B (Official Gazette of the Republic of Slovenia No. 26/11), ZPOmK-1C (Official Gazette of the Republic of Slovenia No. 87/11), ZPOmK-1D (Official Gazette of the Republic of Slovenia No. 57/12), Act Amending the Courts Act (Official Gazette of the Republic of Slovenia No. 63/13), ZPOmK-1E (Official Gazette of the Republic of Slovenia No. 33/14), ZPOmK-1F (Official Gazette of the Republic of Slovenia No. 76/15) and ZPOmK-1G (Official Gazette of the Republic of Slovenia No. 23/17).
subject to the PRCA. An undertaking also means an association of undertakings that is not
directly engaged in an economic activity but that affects or may affect the behaviour in the
market of undertakings as defined above.

Under Slovenian competition law in the PRCA, no sectoral exemptions exist in terms
of dominance. Article 9 of the PRCA applies to all undertakings, irrespective of the industry
sector to which they belong.

II YEAR IN REVIEW

In 2017, some important amendments to the PRCA in relation to the private enforcement of
antitrust rules (see Sections VII and VIII) have been adopted.

As regards administrative proceedings, in 2017 the CPA initiated two new cases in the
area of abuse of dominance, at least according to publicly disclosed information. In January
2017, the CPA initiated proceedings against Pro Plus regarding alleged abuse of its dominant
position in the national wholesale market for TV programmes, and in July 2017 against
Renault Nissan Slovenija for allegedly abusing its dominant position in the national market
for the provision of technical information and technical training needed by (authorised and
independent) service shops of Renault motor vehicles.

The CPA adopted no prohibition decisions in abuse of dominance cases in 2017, but
it succeeded to close one case (Geoplin) related to the market for gas supply by accepting
commitments.3

Some other older cases are still open on which the CPA must take a decision. The
IKO case was initiated in 2015 against IKO, the supplier of TV channels with sports
content in Slovenia, for alleged abuse of its dominant position with regard to limiting and
hindering access to sport TV channels by retail TV operators. A second case was opened
in August 2016 and relates to e-commerce, where Panteon Group, a provider of services
of inter-organisational business operations, allegedly refused access to certain electronic
data exchange systems held by providers of electronic data exchange services and their
users. There are still some pending cases that the courts have referred back to the CPA
for re-examination. The first case, Mobitel/Telekom Slovenije (Itak Džabest),4 relates to the
telecoms sector with the alleged infringement of Article 9 and Article 102 of the TFEU in
the retail mobile market. The second, Telekom Slovenije (ISDN/ADSL),5 also concerns the
Slovenian national telecommunication incumbent, whose customers were forced to lease
integrated services digital network (ISDN) connections to purchase asymmetric digital
subscriber line (ADSL) broadband internet access, although they did not need it and it was
not technically necessary.

As regards court reviews, the last relevant decision was adopted recently in 2018 when
the Administrative Court6 almost entirely upheld the CPA decision in another Telekom

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4 CPA decision No. 306-14/2009 of 13 February 2012. See also Supreme Court decision No. G 9/2012 of
   26 November 2013.
5 CPA decision No. 3072-2/2004-132 of 25 October 2013. See also Administrative Court decision No.
   I U 1871/2013 of 9 December 2014, Supreme Court decision No. X Ips 58/2015 of 15 July 2015 and
   Administrative Court decision No. I U 1057/2015 of 3 November 2015.
6 Administrative Court decision No. I U 423/2015 of 9 January 2018.
Slovenija (2015) case\(^7\) where the CPA held that the incumbent operator, Telekom Slovenije, abused its dominant position on the wholesale markets for broadband bit-stream access and for access to physical network infrastructure by various individual conducts that jointly represent a single and continuous infringement of Article 102 of the TFEU and its equivalent in the PRCA.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Type of case</th>
<th>Decision</th>
</tr>
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<tbody>
<tr>
<td>Energy</td>
<td>CPA</td>
<td>Concluding long-term contracts with industrial customers connected to the transmission network, which included contracted quantities of gas to be taken over the whole contract period as well as the obligation to take delivery of minimum quantities</td>
<td>Commitment decision: November 2017</td>
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<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale of cars and light motor vehicles</td>
<td>CPA</td>
<td>Restriction of access to technical information to independent car repair shops</td>
<td>July 2017</td>
</tr>
<tr>
<td>Distribution of audiovisual content</td>
<td>CPA</td>
<td>Making supply of popular pay TV channels to retail TV operators conditional on the inclusion of all the provider’s TV channels in a prime position in the entire operator’s programme scheme; offering popular TV channels exclusively in packages, including must-have TV channels, that are four times more expensive than they were in the period before the price increase; and different price treatment of retail TV operators purchasing the TV channels</td>
<td>January 2017</td>
</tr>
<tr>
<td>Electronic commerce</td>
<td>CPA</td>
<td>Refusing access to certain electronic data exchange systems held by providers of electronic data exchange services and their users</td>
<td>August 2016</td>
</tr>
<tr>
<td>Media – TV channels</td>
<td>CPA</td>
<td>Limiting and hindering access to sport TV channels by retail TV operators</td>
<td>February 2015</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>CPA</td>
<td>Various conducts raising the entry costs and risks of the alternative operators that would enter the retail market using wholesale services, including less favourable conditions for alternative operators in comparison to Telekom's own downstream business and refusal to give access to essential infrastructure</td>
<td>September 2008, February 2009, April 2009, August 2010, March 2013</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>CPA</td>
<td>Predatory pricing (the ‘Itak Džabest’ retail package for mobile users)</td>
<td>March 2009</td>
</tr>
<tr>
<td>Telecommunications</td>
<td>CPA</td>
<td>Making ADSL connections for internet providers conditional on the prior leasing of ISDN connections by end-users, although an ISDN connection was not needed or technically necessary</td>
<td>October 2004</td>
</tr>
</tbody>
</table>

* ‘Case opened’ refers to the date on or month in which the authority opened its investigation (where known) or announced that it had opened an investigation.

### III MARKET DEFINITION AND MARKET POWER

Article 9(2) of the PRCA defines ‘a dominant position’ as a position of an undertaking or several undertakings when they can, to a significant degree, act independently of competitors, clients or consumers. Such an approach follows the case law of the European courts.

The basic definition of a ‘relevant market’ is provided in Article 3 of the PRCA, which also reflects EU competition legislation and case law, and is the same as the one used for merger control purposes. A ‘relevant market’ means a market defined by the relevant product

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\(^7\) CPA decision No. 306-23/2013-151 of 2 February 2015. See also press release of the CPA, 16 February 2015: ‘Slovenian Competition Protection Agency concluded with the assessment of abuse of dominant position by Telekom Slovenije’, available (in English) on the CPA’s website: www.varstvo-konkurence.si.
or service market and the relevant geographical market. The ‘relevant product or service market’ represents a market that, as a rule, comprises all products or services that are regarded as interchangeable or substitutable by the consumer or user given their characteristics, their prices or their intended use. In turn, ‘relevant geographic market’ is defined as a market that, as a rule, comprises an area in which competitors in the relevant product or service market compete in the sale or purchase of products or services, and an area in which the conditions of competition are sufficiently homogeneous and that can be distinguished from neighbouring areas because the competition conditions are substantially different. In determining the dominant position, the CPA takes into consideration, in particular:

- the market share;
- financial options;
- legal or actual entry barriers;
- access to suppliers or the market; and
- existing or potential competition.

Article 9(5) of the PRCA defines the market-share threshold for dominance as follows: ‘An undertaking shall be deemed to have a dominant position on the market if its market-share within the market of the Republic of Slovenia exceeds a threshold of 40 per cent.’

Even though the market-share threshold creates a legal presumption, such a presumption may be rebutted, since market share is an important, although not crucial, indicator of dominance.

Article 9 covers collective dominance, although there are no details on the assessment of collective dominance prescribed in the PRCA except for its presumption when the collective market share reaches a threshold of 60 per cent on the relevant market.

Although economics play a key role in the application of the dominance provisions, there are only a few cases where economic expert witnesses as external experts have been used in proceedings before the CPA; the analytical procedure is mostly performed by CPA employees who have knowledge of economics. Nevertheless, economic analysis is becoming a crucial part of more complex dominance cases. Court reviews of the CPA’s administrative decisions in the abuse of the dominant position cases show that the CPA will have to strengthen its economic analysis. In the Mobitel (Itak Džabest) telecoms case, the Supreme Court (2013)\(^8\) annulled the CPA’s infringement decision since the CPA, \textit{inter alia}, failed to establish and transparently present all the relevant elements on which its cost–price analysis was based. Moreover, in Geoplin (2015), the Administrative Court\(^9\) held that the CPA, \textit{inter alia}, failed to carry out an economic analysis of factors that are necessary for defining the relevant market, and returned the case to the CPA for re-evaluation.

### IV ABUSE

#### i Overview

Similar to EU competition law, abuse of a dominant position as such is not defined by the PRCA. The PRCA generally prohibits the abuse of a dominant position, and lists four typical examples of abusive behaviour:

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9 Administrative Court decision No. I U 203/2015 of 13 May 2015.
a directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;
b limiting production, markets or technical development to the prejudice of consumers;
c applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
d making the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts.

The CPA’s case law is generally aligned with that of the EU, and it shows that abuse is still defined more in terms of the form of conduct, rather than in relation to the effects of specific conduct in the market and on consumers. It follows from the above list that the concept of abuse covers exploitative as well as exclusionary practices. An example of exploitative abuse of dominant position as set out by the PRCA is unfair pricing or trading conditions. Examples of exclusionary abuse of dominant position as set out by the PRCA include predatory pricing, discrimination, refusal to deal and tying. It must be noted that the list of forms of abuse in Article 9 is not exhaustive, so the CPA is not excluded from dealing with other types of abusive practices.

Similar to the EU competition law, there is no direct causality between the creation of a dominant position and its abuse under Slovenian competition law. To apply Article 9, the existence of a dominant position must first be established, but simply having a dominant position is not *per se* illegal. Although in most cases a causal link between dominance and abuse is obvious, an abuse may exist even if there is no causal link between the dominant position and the inspected conduct. Further, it is also possible that abusive conduct can take place in a market other than the market where the dominant position is established.

If abuse of a dominant position is established, it must be prohibited with no explicit exemptions. The PRCA does not provide an efficiency defence. Nevertheless, while the existence of the efficiency defence under Slovenian law has never been confirmed by the CPA, it is expected that its future case law will follow that of the EU. So far, the most common defence used by dominant undertakings has been that their conduct has been justified on objective grounds. In such cases, the CPA must assess whether the dominant undertaking has provided all necessary evidence to show that the conduct is indispensable and proportionate to the goal pursued by the undertaking.

**ii Exclusionary abuses**

**Exclusionary pricing**

In 2012, the CPA issued its decision in *Mobitel/Telekom Slovenije (Itak Džabest)*, finding that Telekom Slovenije (previously Mobitel) had been abusing its dominant position in the retail mobile telecommunications service market by offering the ‘Itak Džabest’ retail package to mobile phone users at unfair prices. The CPA established that Telekom Slovenije acted in a predatory manner by imposing its ‘Itak Džabest’ package at below-cost prices (lower than the costs incurred). With such prices, Telekom Slovenije gained new users and made it more difficult for other equally efficient competitors to gain new users and not suffer losses by doing so. The Supreme Court did not confirm the CPA’s decision, and returned the case to the CPA, which has reopened the administrative proceedings. The Court considered, *inter alia*, that the CPA failed to give reasons for the method that was used to calculate the
incremental costs, and explicitly stated that a transparent calculation of negative margin per subscriber is crucial in cases such as this one where there is no clear and direct evidence of a ‘predation strategy’.

While accepting that the cost-price analysis is an element in deciding whether a price is predatory, the Supreme Court noted that also relevant is the effect of the introduction and sale of the contested package, which was likely to be the elimination of competitors, which (in the long run) harms consumers.

Price squeezes are not specifically mentioned in Article 9(4) of the PRCA. In principle, the CPA tends to follow the practice as developed under the Article 102 of the TFEU. The CPA dealt with an alleged abuse of dominant position by price squeeze in *Mobitel/Telekom Slovenije (Itak Džabest)* (2012) and *Telekom Slovenije* (2015). In both cases, the CPA ultimately decided to drop the price-squeeze part of the complaint, and ended the proceedings against Telekom Slovenije at the part regarding the possibility of creating margin-squeeze policy.

**Exclusive dealing**

Generally, rebates and discounts of dominant undertakings in exchange for ensuring business with customers are considered abuses of a dominant position. The CPA dealt with loyalty rebates in *Pro Plus* (2013). It established that a leading broadcasting and internet media company in Slovenia that is part of the multinational enterprise CME had abused its dominant position in the market for television advertising airtime by concluding exclusive dealing arrangements with advertisers, granting conditional rebates with loyalty-inducing effects and, in particular, granting high levels of discount as a reward for exclusivity. Concluding exclusive dealing arrangements with advertisers was also considered an abusive behaviour in *Pro Plus*.

In particular, the CPA concluded that Pro Plus abused its dominant position by requiring individual advertisers to devote their advertising budgets exclusively to Pro Plus in return for granting rebates.

In the *Gasilska oprema* case (2010), the CPA established that Gasilska oprema, a wholesale company for fire extinguishers and related equipment, had a dominant position in the upstream market for the sale of new fire extinguishers. Although Gasilska oprema was not directly involved in after-sales services and maintenance of the fire extinguishers, the CPA held that it was indirectly present in the downstream market through its right to conclude contracts for after-sales services and maintenance of fire extinguishers with the trademark Pastor. The CPA decided that Gasilska oprema abused its dominant position by terminating the contract for after-sale services of Pastor-branded fire extinguishers concluded between the complainant and Gasilska oprema when the complainant obtained an authorisation to maintain a competitor’s fire extinguishers, as well as maintaining the contracts in force for the maintenance of the Pastor fire extinguishers, which were subject to abstention from selling competitors’ fire extinguishers and maintaining competing brands.

**Leveraging**

Article 9 of the PRCA prohibits ‘making the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no
connection with the subject of their contracts’. In a renewed case, *Telekom Slovenije (ADSL/ ISDN)* (2013), establishing potential abuse of a dominant position regarding ISDN and ADSL tying, the CPA concluded that Telekom Slovenije had abused its dominant position on the inter-operator broadband access market with bit-streaming via the copper-based network in Slovenia by making ADSL connections for internet providers conditional on the prior leasing of ISDN connections by end-users, although an ISDN connection was not needed or technically necessary.12

In *Geoplin* (2015),13 the CPA held that Geoplin abused its dominant position in the market of gas supply to large industrial customers through prohibited contractual clauses that caused industrial customers connected to the transmission network to be entirely tied to Geoplin. Following the re-examination of the case in the resumed procedure, the CPA finally accepted the proposed commitments in 2017.

### Refusal to deal

An example of refusal to deal by a dominant undertaking without objectively justified reasons is *Luka Koper* (2009). An operator of the seaport of Koper refused, without justification, to allow its competitor access to the port, making it impossible for the competitor to perform towing and mooring activities. The CPA concluded that Luka Koper abused its dominant position by refusing such access, and doing so had the effect of excluding all competition on the markets for towing and mooring services in the port of Koper.

In the past, the CPA has dealt with cases of refusal to deal, and refusal of access to essential facilities as a similar form of abuse as refusal to deal, mainly in the telecommunications sector. In the recent case of abuse of a dominant position by Telekom Slovenije (2015), the CPA held that on the market for access to the physical network infrastructure, Telekom refused alternative operators access to key infrastructure necessary for the equivalent operation in the retail market for fixed broadband services. It refused access to the optical local loop even in locations where copper loops were not available and it did not allow alternative operators to offer broadband bitstream access services to third-party operators on its unbundled local loops.

### iii Discrimination

Both price and non-price discrimination are included in the exemplary list of Article 9(4), and are described as ‘applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’. So far, the most frequently investigated types of abuse have been price and non-price discrimination.

For example, in *SAZAS* (2011),14 the CPA established that SAZAS, a Slovenian collective authors’ society, had established a non-transparent system that favoured certain authors, especially those who were included in the decision-making process concerning distribution of collected royalties, which led to discrimination among authors.

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12 The case is still pending (see Section II).
In *SODO* (2012), the CPA found that SODO, the electricity distribution system operator in Slovenia, had abused its dominant position in the market for the management of the electric energy distribution network by charging only some electric power producers for excessive electric energy received, thus applying discriminative conditions on undertakings.

In a recent case of abuse of dominant position by Telekom Slovenije (2015), the CPA also concluded that, as concerns bitstream access, Telekom abused its dominance by not providing the wholesale ‘naked xDSL’ service to alternative operators, thereby preventing them from providing the xDSL service without the underlying telephone subscription to final customers. The CPA held that Telekom Slovenije, in the case of the provision of services to operators, applied dissimilar conditions to equivalent transactions, and placed alternative operators at a competitive disadvantage compared to Telekom’s retail division.

### iv Exploitative abuses

Exploitative prices or terms of supply are included in the list of Article 9(4) as examples of ‘directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions’. The CPA has not yet decided on any relevant excessive pricing case in practice.

In the recent court judgment in *Telekom Slovenije* (2015), the Administrative Court held that certain allegations in the CPA’s decision amounted to exploitative abuse. These allegations concerned, in particular, the CPA’s claim that Telekom Slovenije:

- made the provision of certain services conditional on use of its telephone connection, even though final users did not need it and it was not technically necessary, which in the view of the CPA represented a limitation on technical development to the prejudice of consumers; and
- made the conclusion of contracts subject to the acceptance of supplementary obligations that, by their nature or according to commercial usage have no connection with the subject of their contracts.

The Administrative Court considered that when assessing the existence of consumer harm in the context of exploitative abuse, it is necessary to determine what may constitute consumer harm, and that the CPA failed to demonstrate this. However, this does not apply to cases of exclusionary abuses where, according to the Administrative Court, the CPA is not obliged to determine specific consumer harm, to quantify the harm, or both.

### V REMEDIES AND SANCTIONS

Article 9 expressly prohibits abusive practices and is directly applicable. The CPA may issue a decision establishing the existence of an infringement of Article 9 of the PRCA or Article 102 of the TFEU, or both, and require the undertaking concerned to bring such an infringement to an end. The CPA may, in addition, impose on the undertaking the obligation to take reasonable measures to bring an infringement and its consequences to an end (behavioural or structural remedies). When there is a possibility of infringement of Article 9 of the PRCA or Article 102 of the TFEU, or both, and in cases of urgency owing to the risk of serious and irreparable damage to the effectiveness of competition on the market, the CPA may impose

16 Administrative Court decision No. I U 423/2015 of 9 January 2018.
interim measures. In the case of a breach of Article 9 of the PRCA or Article 102 of the TFEU, or both, the CPA is entitled to impose fines. In Slovenia, the leniency programme does not apply to undertakings involved in abuse of dominance cases.

i Sanctions

In the case of a breach of Article 9 of the PRCA or Article 102 of the TFEU, or both, the CPA may, under Article 73 of the PRCA, impose a minor offence fine on a legal entity, entrepreneur or individual who performs an economic activity, of up to 10 per cent of its annual turnover in the preceding business year. A fine of between €5,000 and €30,000 can also be imposed on the responsible person within a legal entity or on an entrepreneur. Under the Minor Offences Act, legal entities cannot be held solely responsible for offences, as the CPA needs to identify one or more individuals (offenders) who have committed the infringement, and then attribute their behaviour to the legal entity they represented and impose a fine on that entity. In Slovenian legislation, detailed guidelines on the method of setting fines in competition cases do not exist. When setting a fine, the CPA takes into account the provisions of the Minor Offences Act and, thus, all circumstances that may reduce or increase the sanction (mitigating and aggravating circumstances), such as:

- the level of the perpetrator’s liability for a minor offence;
- the motives for committing it;
- the level of threat or violation of a protected good;
- the circumstances in which the minor offence was committed;
- the perpetrator’s previous conduct;
- the perpetrator’s personal circumstances; and
- the perpetrator’s conduct after the minor offence was committed: in particular, whether he or she compensated for the damage.

The calculation of a fine imposed on a legal person or individual sole trader will take into account their economic strength and any previously imposed sanctions. When imposing a fine on the responsible person of a legal entity or entrepreneur, the calculation of the fine will also take into account the perpetrator’s financial conditions, salary, other incomes, and property and family duties.

The Slovenian case law on imposing fines in abuse of dominance cases is still limited to a few cases that were concluded with the force of res judicata. The CPA’s case law shows that it also takes into account the nature and gravity of the infringement, the market power of the undertaking, effects on the market, the geographical scope of the infringement and the duration of the infringement.

In addition, fines at the same level as for breaches of Article 9 of the PRCA or Article 102 of the TFEU, or both, can be imposed for failure to abide by imposed remedies, interim measures or commitment decisions.

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17 The Criminal Code contains, in Article 225, the criminal act ‘unlawful restriction of competition’, which incriminates abuses of a dominant position of one or more companies. However, although criminal sanctions are theoretically available, undertakings or individuals are not pursued in practice. Additionally, a business entity can also be held responsible for the same offence in accordance with the Liability of Legal Persons for Criminal Offences Act.
Remedies

The CPA can also impose behavioural or structural remedies on an undertaking. According to Article 37 of the PRCA, the CPA may impose the obligation to take reasonable measures to bring an infringement and its consequences to an end on the undertaking, in particular through the disposal of the business or part of the undertaking’s business, by:

- division of an undertaking or disposal of shares in undertakings;
- the transfer of industrial property rights and other rights;
- conclusion of its licence and other contracts that may be concluded in the course of operations between undertakings; or
- ensuring access to infrastructure.

VI PROCEDURE

The CPA has the power to enforce Article 9 of the PRCA and also Article 102 of the TFEU. The CPA conducts two types of proceedings: administrative proceedings, in which infringements of Article 9 of the PRCA and Article 102 of the TFEU are assessed and brought to an end, and minor offence proceedings, in which fines are levied.

Proceedings before the CPA are initiated only on the basis of information obtained by third parties (i.e., competitors or other market participants, public authorities or consumers) or information gathered by the CPA itself.

The CPA has extensive investigatory powers with regard to discovering abuses of a dominant position. It can issue requests for information and carry out inspections not only at the premises of undertakings against which a procedure has been initiated, but also at private residences.

An inspection of the premises of an undertaking against which a procedure has been initiated must be based on the consent of the undertaking or a reasoned written court order. If the latter is the case, the inspection must be carried out in the presence of two adults.

When conducting an inspection, authorised persons may enter and inspect the premises at the registered office of the undertaking and at other locations at which the undertaking itself or another authorised undertaking performs the activity and business for which there is the probability of an infringement of Article 9 of the PRCA or Article 102 of the TFEU. They may examine accounts and other documentation, irrespective of the medium on which they are stored. The authorised persons may ask any representative or member of staff of the undertaking to give an oral or written explanation of facts or documents relating to the subject matter and the purpose of the inspection, and then record it.

Subject to certain conditions, the CPA may also search the premises of an undertaking against which a procedure has not been initiated, and residential premises of members of the management or supervisory bodies or of the staff or other associates of the undertaking against which the procedure has been initiated.

If there are reasonable grounds to suspect that business books and other documentation relating to the subject matter of an inspection are being kept at the mentioned premises. In this case, Article 33 of the PRCA provides that the CPA must obtain a court order to search the premises from a judge of the competent court in Ljubljana, and that during the inspection of the residential premises, two adult witnesses must be present.
Therefore, it is important that undertakings subject to investigations by the CPA, especially in the event of a dawn raid, are assisted by legal counsel as soon as possible. The CPA is not obliged to wait for the arrival of a lawyer, and is entitled to start an inspection without his or her presence.

The legal representatives and employees of the undertaking are obliged to cooperate with the authorised persons of the CPA. If the undertaking refuses to permit an authorised person entry to the premises, interferes with the person's entry, denies access to accounts or other documentation, or obstructs or otherwise interferes with an inspection, the authorised persons have the right to enter the premises or to access such accounts and other documentation with the assistance of the police.

It is also important that undertakings give clear instructions to their employees not to destroy any documents or electronic data, or communicate with other undertakings about the inspection; otherwise, the undertaking risks incurring the penalty for obstruction. In the case of the obstruction of an inspection, the CPA may impose a penalty payment amounting to 1 per cent of an undertaking's annual turnover in the preceding business year; or, if it is deemed that the inspection has not been obstructed by the undertaking, a penalty payment amounting to €50,000 on an obstructing natural person.

An undertaking will be deemed as obstructing an inspection if the inspection is obstructed by members of its management or supervisory bodies, its employees or even by its external contractors.

Letters, notifications and other means of communication between the undertaking, against which the procedure has been initiated, and its lawyer (privileged communications), are excluded from inspection to the extent that such communications pertain to the procedure in question. An undertaking or its lawyer may refuse to allow access to information, claiming it to be privileged communication. If an authorised person considers that such claim is evidently unfounded, the authorised person may seal the document (or its copy) in an envelope signed by both the undertaking and its lawyer and send it to the Administrative Court of the Republic of Slovenia. The Court then decides on the justification of the claim for privileged communication within 15 days of the date of the request being filed by the CPA.

It is also advisable to form a team of employees who accompany and communicate with the authorised persons at the beginning of the inspection. Although the CPA usually obtains copies of the original documents, it is crucial to make copies of all documents taken by the CPA in order to prepare an effective defence.

A formal investigation of a specific case should last no more than two years after the order for commencement of a procedure, and the CPA should adopt a decision in that time. However, in practice there are no legal consequences if the CPA adopts its decision later. The CPA normally comes to a decision without an oral hearing. The CPA official conducting the procedure determines whether an oral hearing needs to take place to clarify or establish essential facts.

In administrative proceedings, the CPA can, after investigation:

a. issue a decision establishing the existence of an infringement of Article 9 of the PRCA or Article 102 of the TFEU, and require the undertaking concerned to bring such an infringement to an end;

b. issue a decision making binding commitments proposed by the undertaking against which the procedure has been initiated; or

c. terminate the proceedings.
A judicial protection procedure may be initiated against decisions adopted by the CPA in administrative proceedings. The parties may bring an action before the Administrative Court within 30 days of service of the decision.

**VII PRIVATE ENFORCEMENT**

Affected parties (companies or consumers) can enforce Article 9 before the national courts, although they do not have competence to prohibit abusive practices.

The PRCA provides that a person who has suffered harm caused by an infringement of competition law has the right to compensation for harm under the general rules of the law governing contractual obligations, unless otherwise provided by the PRCA. Since the adoption of amendments in 2017, the PRCA contains some specific rules for private enforcement. Private enforcement in Slovenia is mainly focused on damage claims, where the general rules for damages apply. District courts are competent in civil disputes and can adjudicate on such claims. If the damage has been caused by the infringement of provisions of Article 9 of the PRCA or Article 102 TFEU, the court shall be bound by the final infringement decision of the CPA or the final infringement decision adopted in the judicial protection procedure against a CPA decision. If the existence of an infringement of competition law is found by a final decision of an authority of another Member State or a final decision of the court in another EU Member State, empowered by ordinary means of appeal to review decisions of an authority of another Member State, it is presumed that the infringers specified in the infringement decision acted unlawfully, whereby evidence to the contrary is admissible.

The statute of limitations for compensation claims is suspended from the date when the competition authority (i.e., the CPA, the European Commission or an authority of another Member State) takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to one year after the infringement decision has become final or after the proceedings are otherwise concluded. The time elapsed before the suspension of the limitation period is included in the limitation period.

In the past, filing collective (class) actions was not possible under Slovenian law. However, courts were able to join actions if several actions have been lodged at the court with the same or similar factual and legal bases. In autumn 2017, a new Class Actions Act was adopted that will, as of May 2018, allow collective actions for antitrust damages claims.

Article 37(2) of the PRCA provides a legal basis for the CPA to order a dominant firm to grant access (to infrastructure or technology), supply goods or services, or conclude a contract. This provision does not apply to private suits before the national courts. Consequently, the national courts have the power to order a defendant to provide access to its infrastructure or network or other obligations only within the scope of the provisions of Article 133 of the Code of Obligations, which provide that at the request of an interested person, the court can order appropriate measures to prevent the occurrence of damage or alarm or to dispose of a source of danger, to be taken at the expense of the possessor thereof should the latter fail to do so.

In practice, cases of private enforcement have tended to be rare, mostly because of difficulties in meeting the burden of proof in damage claims. The injured party must prove

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19 Official Gazette of the Republic of Slovenia No. 55/17.
20 See, for example, Supreme Court decision in the telecommunications case No. III Ips 98/2013 of 23 May 2014.
the existence of an unlawful damaging act, damage (existence and amount of loss) and causation. Nevertheless, in recent years there has been an increase in the number of private suits before the national courts where market participants seek protection of their interests directly through damage claims.

VIII FUTURE DEVELOPMENTS

In May 2017, a number of significant changes were made to the PRCA with the implementation of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. As a result of the transposition of the Directive into national law, the PRCA now also includes provisions governing, most notably:

- the uniform right to full compensation for natural or legal persons who have suffered harm caused by an infringement of competition law;
- evaluation of damages;
- disclosure of evidence;
- implications of final infringement decisions of the CPA;
- specific rules on joint and several liability;
- limitation periods;
- the 'passing-on' defence;
- indirect purchasers;
- the effect of consensual settlements on subsequent actions for damages; and
- cooperation between the courts, European Commission and the CPA, etc.

It is expected that these new substantive and procedural rules will facilitate the private enforcement of competition law in Slovenia.
I INTRODUCTION

The key Spanish law provision regulating the abuse of a dominant position is Article 2 of the 2007 Spanish Competition Act (LDC). Article 2 is drafted in a similar way to Article 102 of the Treaty on the Functioning of the European Union (TFEU), the essential differences being:

- the territorial reach of the prohibitions (while the LDC prohibits abuse of a dominant position ‘in all or part of the national market’, the TFEU forbids abuse of a dominant position ‘within the internal market or in a substantial part of it … in so far as it may affect trade between Member States’);
- the inclusion of an additional example in the list of potentially abusive conduct (i.e., ‘[t]he unjustified refusal to satisfy the demands of purchase of products or provision of services’); and
- the inclusion of Article 2(3) of the LDC, establishing that such prohibition also applies when dominance derives from the law.

Other key provisions include Articles 4 to 6 (legal exemptions, conduct of minor importance and findings of inapplicability), Chapters I and II of Title IV (antitrust procedure), Title V (sanctions) and Title VI of the LDC (private enforcement). Moreover, the Spanish Competition Rules (RDC) implement the LDC, regulating, notably, a number of procedural issues (e.g., investigation and interim measures). Furthermore, the National Markets and Competition Commission (NMCC) has adopted ‘soft law’ measures, in particular, a Communication on the quantification of sanctions and Guidelines on the termination of infringement proceedings by means of commitments.

These rules apply to private and public undertakings alike. According to the LDC and in line with EU case law, the notion of ‘undertaking’ refers to any person or entity carrying out
an economic activity, regardless of their legal statute and form of financing. Although, a priori, public institutions are not subject to these provisions when exercising public prerogatives, the NMCC has interpreted the notion of 'economic activity' widely, and even seems to have upheld the applicability of antitrust rules in a case where a public entity did not act as an economic operator, but merely facilitated the commission of an antitrust infringement.

II YEAR IN REVIEW

The NMCC adopted three fining decisions in 2017 for abuse of a dominant position, namely, Renfe Operadora (discriminatory practices), Nokia (margin squeeze) and Criadores de Caballos 2 (discriminatory practices). These cases led to the imposition of fines totalling €17.06 million.

The total number of fining decisions and level of fines for abuse of a dominant position in 2017 were higher than in recent years, albeit lower than in 2012:

a in 2016, the NMCC imposed one €638,770 fine for abuse of a dominant position; b in 2015, the NMCC imposed one €2.79 million fine for abuse of a dominant position; c in 2014, the NMCC adopted four fining decisions for abuse of a dominant position, which led to the imposition of fines totalling €12.62 million; d in 2013, the NMCC imposed abuse of a dominant position fines reaching a total of €3.5 million in three fining decisions; and e in 2012, the NMCC adopted six fining decisions, which imposed fines amounting to €162.4 million, including several key decisions such as Transporte Televisión (margin squeeze), Endesa Instalación (leveraging and exploitation) and Mensajes Cortos (excessive pricing).

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9 Case S/DC/0511/14, Renfe Operadora, 28 February 2017.
10 Case S/DC/0557/15, Nokia, 8 June 2017.
12 Case S/DC/0540/14, Istobal, 30 June 2016.
14 In 2014, the NMCC adopted the following fining decisions for abuse of a dominant position: Correos 2 (case S/0373/11 on margin squeeze), Endesa Instalación (case S/0446/12 on excessive pricing), Criadores de Caballos (case S/0345/11 on leveraging) and SGAE-Conciertos (case S/0460/13 on excessive pricing).
15 In 2013, the NMCC adopted the following fining decisions for abuse of a dominant position: Correos (case S/0341/11 on refusal to deal), AGEDI (case S/0360/11 on unfair, non-transparent and discriminatory management of intellectual property rights) and Tanatorios Coslada (case SAMAD/12/10 on refusal to deal).
16 Case S/0207/09, Transporte Televisión, 8 February 2012.
17 Case S/0211/09, Endesa Instalación, 21 February 2012.
18 Case S/0248/10, Mensajes Cortos, 19 December 2012.
The increase in the number and level of fines in 2017, compared with recent years, is likely because of the specific circumstances of the cases at hand and not because of a general trend of an increase of fines in abuse of dominant position cases.

<table>
<thead>
<tr>
<th>Case reference</th>
<th>Sector</th>
<th>Conduct</th>
<th>Case opened*</th>
</tr>
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<tbody>
<tr>
<td>S/DC/0590/16 DAMA v. SGAE</td>
<td>Intellectual property collecting societies</td>
<td>Discriminatory tariffs</td>
<td>19 October 2017</td>
</tr>
</tbody>
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* ‘Case opened’ refers to the date on which the authority opened its investigation (where known) or announced that it had opened an investigation

III MARKET DEFINITION AND MARKET POWER

The criteria used by the NMCC to define the relevant market are practically identical to those described in the Commission Notice on the definition of the relevant market and applied by the Commission in its decisional practice. In fact, according to well-settled decisional practice, the provisions of the Notice are fully applicable to Article 2 of the LDC cases.19 No formal provisions exist in Spanish law or in the ‘soft law’ regulating market definition. Although the NMCC is often not very detailed in justifying its specific choice of market definition, this tendency is changing, and its analysis is progressively becoming more sophisticated and grounded in economics.20

Given the lack of a provision defining ‘dominant position’, this task has been carried out by the NMCC, which, since 1999, has interpreted this notion in line with EU case law. Indeed, in 1999 the NMCC established that such a position exists when an undertaking has a sufficient degree of economic power and independence in the market to enable it to modify prices or commercial conditions, or both, without taking account of the reactions of competitors or consumers.21 This definition has been repeated by the NMCC, with small variations, in its more recent decisions.22

The specific criteria used by the NMCC to assess dominance are very similar to those used by the Commission. For instance, in Bacardi, it was stated that to establish dominance it is necessary to focus on both the structure of the undertaking concerned (resources and methods of production, methods of presentation, transport and sales, technology and vertical integration) and the competitive environment (number and strength of competitors, market shares and sales volumes, prices and barriers to entry).23 In McLane/Tabacalera, however, it was established that the Bacardi criteria constitute the basis of a ‘structural’ approach, and that account may also be taken of behavioural elements and of the relationship between clients and providers and the undertaking in question.24

19 See, for example, case 677/05, Distribuidoras Prensa Ciudad Real, 24 April 2006, p. 10.
20 See, for example, Mensajes Cortos, above, pp. 129–139.
21 See, for example, case 441/98, Electra Avellana, 7 July 1999, p. 9.
22 See, for example, case S/0157/09, EGEDA, 2 March 2012, p. 52; case S/0220/10, SGAE, 3 July 2012, p. 37; Correos, above, p. 20; AGEDI, above, p. 41; AGEDI/AIE Radio, above, p. 48; Criadores de Caballos 2, above, p. 35.
23 Case R 362/99, Bacardi, 30 September 1999, p. 8.
24 Case 486/00, McLane/Tabacalera, 24 April 2002, pp. 20–21.
Finally, it is noteworthy that the NMCC interprets Article 2 of the LDC, which refers to ‘[a]ny abuse by one or more undertakings’, as empowering it to pursue the collective abuse of a dominant position.  

**IV ABUSE**

The NMCC has also adopted the definition of ‘abuse’ developed by the EU courts in numerous decisions, such as in *Retevisión/Telefónica.* Furthermore, the TS has explicitly established that Article 2 of the LDC must be interpreted in light of the EU case law concerning Article 102 of the TFEU. It has also been confirmed that Article 2 of the LDC and Article 102 of the TFEU do not prohibit dominance in itself, but only the use of such a position to impose commercial conditions and to obtain advantages that the undertaking would not be able to obtain under normal competitive conditions.

In line with *Michelin I* and subsequent abuse of a dominant position EU case law, the NMCC and the courts have held that dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition. As to the list of activities contained in Article 2 of the LDC, it is well established that it must be interpreted as being open-ended.

Abuse of a dominant position has generally been described by the NMCC as constituting an objective concept: thus, *a priori*, intent should be irrelevant in determining whether conduct is abusive. However, traditionally intent has played a significant role in distinguishing between abusive conduct and competition on the merits. In fact, it has even been held on some occasions that intent is a necessary element that must be taken into account when assessing the lawfulness of allegedly anticompetitive behaviour. It is also noteworthy that the NMCC’s early decisional practice did not consider it necessary to prove actual anticompetitive effects to establish that conduct was abusive.

In an attempt to clarify the conditions of the notion of ‘abuse’, in 2006, the TS established that the decisive element in identifying an abuse is not the intention of the dominant undertaking, but rather the objectively illegal nature of its conduct. It was stated, for instance, that the willingness to prevent an operator from entering the market may not

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29 *SGAE*, above, p. 37.

30 See, for example, case S/0003/07, *E.On*, 8 November 2011, p. 34; *SGAE-Conciertos*, above, pp. 30–31; *Criadores de Caballos*, above, pp. 28, 30, 32, 39, 41, 49, 59 and 61; *Criadores de Caballos 2*, above, p. 36. See also TS judgment in appeal 3042/2008, 10 February 2011, point of law 6.


32 *Retevisión/Telefónica*, above, p. 28.

33 See, for example, *Retevisión/Telefónica*, above, p. 29.


be objectionable in itself if implemented through legitimate means. However, although such a statement places the emphasis on objective considerations, it does not definitively rule out the need to take intent into account.

In this context, it has been noted that even if this test does not formally require the proof of anticompetitive effects, in practice, it is very similar to an effects-based approach.\(^{36}\) It has been argued that today, Article 2 of the LDC leaves no room for \textit{per se} abuses and, therefore, a given conduct may only be deemed contrary to such a provision if it is liable to give rise to anticompetitive effects, even if these effects do not actually materialise in a specific case.\(^{37}\) Recent NMCC decisions confirm this shift towards an effects-based approach.\(^{38}\) This said, the relevance of effects and intent in the assessment of potentially abusive conduct must logically be analysed by reference to the specific forms of abuse.

Finally, although the NMCC has often been criticised for not being sufficiently rigorous in its economic assessment of exclusionary practices,\(^{39}\) decisions such as \textit{Transporte Televisión} suggest that the NMCC is increasingly willing to base its decisions on solid economic grounds and analysis.\(^{40}\)

\subsection*{i Exclusionary abuses}

In its \textit{Altadis} judgment on predatory pricing,\(^{41}\) drawing on the criteria set out in \textit{Akzo} and \textit{Tetra Pak}, the TS held that when prices are set below average variable costs, they are presumed to be abusive, while if they are set at a level above average variable costs but below average total costs, they are only deemed abusive if they constitute part of a strategy to exclude competitors. The TS concluded that the decisive element defining predation was the intention to eliminate a competitor. While in the former case such intention would be presumed, in the latter case it must be proven.

In \textit{Transporte Televisión},\(^{42}\) the NMCC fined Abertis Telecom for having abusively squeezed the margin between the wholesale prices at which access was granted to digital terrestrial television (DTT) transmission centres and the retail prices for DTT signal transport services. The NMCC held that Abertis had control over essential inputs and, after applying the ‘as-efficient competitor test’, concluded that such conduct constituted abuse.

\begin{itemize}
\item TS judgment in appeal 915/2002, 13 December 2004, point of law 7.
\end{itemize}
of a dominant position, insofar as it hindered the entry of competitors in the DTT signal transport and distribution market. The NMCC noted that entry in the retail market was both technically viable and economically possible, and thus the lack of effective competitors could only be the result of the pricing policy adopted by Abertis.

The NMCC’s decisions in Llamadas Móviles, Correos 2 and Telefónica confirmed that the key test to determine whether a margin squeeze has taken place is the ‘as-efficient competitor test’.\(^43\) In Llamadas Móviles, the NMCC established that proving the existence of exclusionary anticompetitive effects is essential to conclude that a margin squeeze constitutes a violation of Article 2 of the LDC and Article 102 of the TFEU.\(^44,45\)

In its most recent margin squeeze case, Nokia, the NMCC fined Nokia for having abusively squeezed the margin between the wholesale prices for its support services for Global System for Mobile Communications-Railway (GSM-R) Nokia equipment and the retail prices for GSM-R network maintenance services. The NMCC held that Nokia’s support services were necessary to provide GSM-R network maintenance services downstream. The NMCC concluded that Nokia had abused its dominant position because the margins of an ‘as-efficient competitor’ would be negative and it was ‘likely’ that Nokia’s conduct had hindered competition.\(^46\)

The NMCC decision in Iberia\(^47\) constitutes a key precedent on loyalty rebates. This case concerned a target rebate scheme whereby travel agencies benefited from rebates only if their purchases had increased in comparison with their purchases in the previous year. These rebates were analysed in light of the criteria set out in Hoffmann La Roche and Michelin and were deemed to be abusive insofar as they gave rise to harm to consumers and competitors.

In Unión Española de Explosivos,\(^48\) the TS assessed exclusivity clauses in light of Article 2 of the LDC. The TS held that such clauses constituted part of a foreclosure strategy engaged in to prevent potential competition. It has been argued that while exclusivity clauses had been traditionally considered as per se abuses by the NMCC, this approach changed in Airtel/Telefónica, where the NMCC applied an effects-based approach to exclusivity,\(^49\) and as a result of the de minimis rule contained in Article 5 of the LDC.\(^50\)

As regards leveraging practices, in BT/Telefónica,\(^51\) the NMCC considered that Telefónica had unlawfully tied the renting of international circuits to that of national circuits, where competition was less intense, which had the effect of restricting potential competition. In recent years, the NMCC has imposed severe fines on several energy companies for having engaged in leveraging practices. For instance, in Endesa Instalación,\(^52\) this company was deemed to have taken advantage of its position in the distribution market to increase its

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\(^{43}\) Llamadas Móviles, above, p. 66; Correos 2, above, pp. 30, 31 and 36; case S/0409/12, Telefónica, 29 October 2015, pp. 6–7.

\(^{44}\) Llamadas Móviles, above, pp. 65–68.


\(^{46}\) Nokia, above, pp. 44–52.

\(^{47}\) Case 514/01, Iberia, 1 April 2002.

\(^{48}\) TS judgment in appeal 4609/2003, 4 April 2006.

\(^{49}\) Case 413/97, Airtel/Telefónica, 26 February 1999, p. 40.

\(^{50}\) Gutiérrez, above, pp. 205–206.

\(^{51}\) Case 412/97, BT/Telefónica, 21 January 1999.

\(^{52}\) Endesa Instalación, above, pp. 40–48.
market power on the neighbouring market for electrical installation work (i.e., by making use of information to which it had privileged access because of its status as a distributor, offering to carry out installation work for large customers).53

Regarding refusal to deal, it has been noted that the NMCC has generally been more willing to consider such conduct abusive when the company requesting supply was already a client or competitor of the dominant undertaking and when such refusal constituted an absolute refusal to deal.54 In McLane/Tabacalera, the NMCC concluded that by refusing to supply certain products, Tabacalera abused its dominant position since the products in question were indispensable to compete in the wholesale distribution market.55 Tabacalera was deemed to have attempted to foreclose potential competition to protect its position in the market, which had recently been liberalised. In an older case, Iasist/3M,56 a refusal to license case, the NMCC considered such conduct abusive despite the lack of indispensability, given the ‘excessive influence’ that this conduct could have on the competitive conditions of the market in which the complainant operated.

In Correos, a more recent refusal-to-deal case, the NMCC fined Correos, the Spanish public postal services operator and owner of the public postal network, for ceasing to supply competitors with wholesale access services, and in particular, those related to the delivery of administrative notifications. The NMCC found that this conduct was abusive because access to the Correos network was necessary to effectively compete in the downstream market for the delivery of administrative notifications, this network could not be replicated and such conduct was not objectively justified.57

ii Discrimination

According to Article 2(2)(d) of the LDC, discriminatory pricing may be abusive if it unjustifiably places certain competitors at a disadvantage. In recent years, there has been a considerable amount of abuse of a dominant position enforcement in this field. For instance, in Mediapro, the NMCC considered that by engaging in unjustified discrimination in licensing the use of broadcasting rights, Mediapro had hindered competition in the market for the resale of audiovisual broadcast rights of football matches and in the downstream television markets (especially pay TV).58 In Renfe Operadora, the NMCC fined Renfe, the state-owned railway company in Spain, for imposing discriminatory commercial conditions on certain purchasers of its railway traction services for the transport of goods (e.g., only some purchasers were subject to cancellation penalties).59

The NMCC has also focused on discrimination in several cases concerning collecting societies.60 For instance, in AGEDI/AIE Radio, the NMCC concluded that the remuneration

53 See similarly case S/0089/08, Unión Fenosa Instalación, 20 September 2011; case 2795/07, Hidrocantábrico Instalación, 20 September 2011; E.On, above.
54 Gutiérrez, above, p. 184.
55 McLane/Tabacalera, above, p. 25.
56 Case 517/01, Iasist/3M, 5 April 2002.
57 Correos, above, pp. 21–36.
58 Case S/0153/09, Mediapro, 17 March 2011.
59 Renfe Operadora, above, pp. 64–68.
60 See case 2785/07, AIE, 23 February 2011; case S/0297/10, AGEDI/AIE, 14 June 2012; SGAE, above; AGEDI, above; AGEDI/AIE Radio, above.
system created by two collecting societies for the use of music by radio stations was in breach of Article 2 of the LDC and Article 102 of the TFEU, as it unjustifiably placed certain radio stations that were subject to higher fees at a competitive disadvantage.61

### iii Exploitative abuses

Exploitative abuses are at the forefront of the NMCC’s enforcement priorities. This lies in stark contrast to the Commission’s quasi-exclusive focus on exclusionary abuses.62 By far the largest fine in recent years was levied on three telecommunications companies for excessive pricing.63

In the past, a number of benchmarks have been used to determine whether prices are excessive (e.g., historical price data, production costs and costs in other competitive geographic markets). In recent cases, the NMCC has relied on a variety of benchmarks, such as, among others, those contained in regulatory prescriptions,64 price levels in other EU Member States65 and prices charged by the same undertaking to operators in other sectors.66

In Mensajes Cortos, the NMCC concluded that three mobile network operators had priced termination services at an excessively high level, leading to higher retail prices for short message service (SMS) and multimedia messaging service (MMS) services users. In reaching these conclusions, it was noted, inter alia, that prices of termination services had been high and stable over the relevant period, despite considerable traffic increase and cost reductions; and wholesale termination services prices for short messages in Spain were among the highest in Europe.67

In Endesa Instalación, the NMCC laid out a non-exhaustive list of the structural market conditions under which excessive pricing is likely, and of the benchmarks that may be used to determine whether prices are excessive.68 As regards the former, the NMCC concluded that excessive pricing is likely when prices are set by a company that is in a monopoly or quasi-monopoly situation, and in markets characterised by the existence of high barriers to entry and relatively inelastic demand. As regards the latter, the NMCC concluded that prices may be deemed excessive by reference to the costs of the product or service, or to the prices of the product or service in a competitive situation, in other geographical markets or in a different time period.69

In SGAE-Conciertos, the NMCC established that the fees charged by the SGAE, a collecting society, as consideration for the right to publicly play musical content subject to copyright in concerts in Spain, were excessive and thus in breach of Articles 2 of the LDC

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61 AGEDI/AIE Radio, above.
62 It has been argued that both the sheer number of abuse of a dominant position infringement decisions adopted by the Spanish authorities (nearly three times more than the Commission from 1992 to 2009) and the large proportion of exploitative abuses cases (34 out of 74) reflect the fact that Spanish abuse of a dominant position enforcement may be at a different stage of development from that of Commission Article 102 of the TFEU enforcement. See Ortiz, Ibáñez, above, pp. 85–87.
63 Mensajes Cortos, above. The NMCC imposed a fine of €119.96 million on Telefónica, Vodafone and Orange.
64 Endesa Instalación, above, p. 51.
66 EGEDA, above, pp. 41–44 and 55–60.
67 Mensajes Cortos, above, pp. 141–154.
69 See also, for example, case S/0501/13, Continental Automotives, 15 October 2015, p. 31.
and 102 of the TFEU. The NMCC carried out an in-depth analysis of the rates charged by collecting societies in other EU Member States, and observed that the fees charged by the SGAE were significantly higher than the rates paid in 73 per cent of the EU Member States and in the United States.\textsuperscript{70} The NMCC concluded that such fees had an exploitative effect on concert promoters and could indirectly prejudice consumers by leading to higher ticket prices.\textsuperscript{71}

V REMEDIES AND SANCTIONS

i Sanctions

The key provisions concerning sanctions are Articles 61 to 70 of the LDC.

As a general rule, abuse of a dominant position is considered a serious infringement punishable with a fine of up to 5 per cent of the total turnover of the infringing undertaking in the immediately preceding business year. However, when abuse of a dominant position is committed by an undertaking operating in a recently liberalised market, and such an undertaking has a market share near monopoly or it enjoys special or exclusive rights, it will be considered a very serious infringement, and the NMCC may levy fines of up to 10 per cent of such turnover.

The aggravating and mitigating circumstances provided for in the LDC are very similar to those enshrined in the 2006 Commission Fining Guidelines. Certain differences, however, exist as regards the regulation of mitigating factors: the LDC explicitly provides that the NMCC may reduce a fine due to the adoption of actions intended to repair the damage; and according to the Fining Guidelines, the Commission may reduce a fine where the undertaking provides evidence that the infringement has been committed as a result of negligence and where the anticompetitive conduct has been authorised or encouraged by public authorities or legislation.

The NMCC may also impose fines of up to €60,000 on the legal representatives and managers of the infringing undertakings and periodic penalty payments (PPPs) of up to €12,000 per day under specific circumstances.

ii Behavioural remedies

The NMCC has often adopted behavioural remedies in abuse of a dominant position cases. For instance, in the SGAE case, the SGAE was ordered to withdraw a specific clause from its contracts that was deemed unfair and discriminatory.\textsuperscript{72} In AIE, this undertaking was given two months to proceed to the publishing of the decision and to send it to certain clients, under threat of PPPs.\textsuperscript{73} In Correos, this company was given two months to grant private postal operators access to its network.\textsuperscript{74}

Moreover, the NMCC may adopt interim measures, either ex officio or at the request of one of the parties, at any moment throughout the proceedings. These measures may consist of cease-and-desist orders or orders imposing specific obligations to prevent potential damage;

\textsuperscript{70} SGAE-Conciertos, above, pp. 17–18 and 22–26.
\textsuperscript{71} SGAE-Conciertos, above, pp. 25–26.
\textsuperscript{72} SGAE, above, p. 49.
\textsuperscript{73} AIE, above, p. 42–43.
\textsuperscript{74} Correos, above, p. 41.
or securities to ensure the availability of funds to face future damages claims. The conditions for the adoption of interim measures are the existence of *fumus boni iuris* and *periculum in mora*.

### III Structural remedies

Structural remedies may only be imposed in the absence of equally effective behavioural remedies or when these remedies would be more onerous for the undertaking in question than the imposition of structural remedies. The NMCC has not yet imposed this type of remedy in its Article 2 of the LDC and Article 102 of the TFEU enforcement.

### VI Procedure

The NMCC abuse of a dominant position infringement proceedings are regulated in Chapters I and II, Title IV of the LDC, as well as in Chapters I and II, Title II of the RDC. These proceedings are divided into two phases, before two different bodies within the NMCC: the Competition Directorate (CD), in charge of the investigation of the case and of making proposals to the Council; and the Council of the NMCC (CNMCC), with adjudicatory functions and power to issue sanctions.

Proceedings may be initiated *ex officio* by the CD, on its own initiative or on that of the CNMCC; or by a complaint made by any natural or legal person. In practice, investigations are commonly triggered either way. Once the CD receives information concerning a potential infringement, it may conduct a preliminary investigation (prior to the opening of formal proceedings) to determine whether it may open such proceedings. As a result, the CD may carry out inspections. Although at this stage the parties’ procedural guarantees are limited, the NMCC must abide by fundamental rights standards (e.g., impossibility to access premises without consent or a court order) and must respect legal professional privilege. The CNMCC may then adopt a decision either dismissing a case or opening formal proceedings.

Once proceedings have been opened, interested parties will have the right to access the file. The CD may carry out two types of investigatory acts: inspections at the undertaking’s premises, means of transport or in the private homes of the companies’ managers and staff (with consent or judicial authorisation); and requests for information directed at any natural or legal person. If an undertaking fails to comply with its obligation to submit to an inspection, it may be subject to a fine of up to 1 per cent of its total turnover in the immediately preceding business year. Companies are also obliged to reply to requests for information, under threat of PPPs of up to €12,000 per day. All acts and decisions adopted by the CD may be subject to appeal before the CNMCC if they breach the parties’ rights of defence or give rise to irreparable damage.

Subsequently, the CD may issue a statement of objections. Interested parties have 15 days to reply to it and to submit relevant evidence. After carrying out all necessary investigatory acts, the CD may propose a draft decision, and interested parties may submit allegations and request that an oral hearing be held before the CNMCC. This puts an end to the first phase of the proceedings and marks the beginning of the second phase before the CNMCC.

The CNMCC may order the production of evidence as well as complementary measures to clarify certain issues. It may also hold a hearing upon request of the parties. The CNMCC then issues its final decision, which may be challenged within two months before the High Court of Spain (AN), which exercises full judicial review and may adopt interim measures such as, for instance, the suspension of the decision. The adoption of
interim measures, regulated in the Law on Contentious Administrative Jurisdiction, may be requested at any stage of the judicial proceedings. These measures may remain in force until a final non-appealable judgment is issued.

Alternatively, administrative proceedings may be terminated through the acceptance of commitments proposed by the parties before the end of the 15-day period to reply to the statement of objections. While the decision as to whether to begin a commitments procedure is the responsibility of the CD, it is the CNMCC who adopts the final decision accepting, rejecting or requesting new commitments. Commitment proceedings are regulated in the NMCC Guidelines on the termination of infringement proceedings by means of commitments.

As to the timing of proceedings, while the duration of the preliminary investigation is not subject to a statutory limit, formal proceedings may not last more than 18 months and the first phase may last no longer than 12 months.

Concerning international cooperation, it suffices to note that the NMCC and the courts are subject both to Chapter IV of Regulation 1/2003 on cooperation as well as to the Commission Notice on cooperation within the Network of Competition Authorities and the Commission Notice on the cooperation between the Commission and the courts of the EU Member States.

Although the LDC empowers the NMCC to issue findings of inapplicability with regard to conduct a priori falling under Article 2 of the LDC, these powers may only be exercised ex officio and where the public interest so requires.

Finally, it is noteworthy that there are reasonable prospects for successfully appealing NMCC decisions before the Spanish courts.

As an example, in July 2015, the AN annulled the NMCC’s margin squeeze decision in Correos 2. In Correos 2, the NMCC concluded that Correos, the Spanish public postal services operator and owner of the public postal network, had abused its dominant position by squeezing the margins of its competitors, thereby preventing them from providing postal services to a specific category of customers, that is, to ‘large customers’ whose yearly budget for postal services exceeds €100,000. Citing recent case law of the EU courts, such as Post Danmark, the AN concluded that Correos could not be held to have breached Article 2 of the LDC or Article 102 of the TFEU, because the NMCC had not demonstrated that Correos’

76 The NMCC has adopted several commitments decisions in Article 2 of the LDC or Article 102 of the TFEU cases in recent years. For instance, in Estudios de Mercado Industria Farmacéutica, the NMCC investigated whether ‘multiple supply’ clauses contained in some of IMS’ contracts with wholesale pharmaceutical distributors for the purchase of sales data were exclusionary and gave rise to abuse of a dominant position. Pursuant to these clauses, if a distributor decided to supply sales data to competitors of IMS, (1) IMS had to be notified in advance, (2) IMS could terminate its contract with the distributor, and, in cases where IMS were not to terminate its contract with the distributor, (3) the amounts paid by IMS to the distributor would be reduced by 40 or 60 per cent depending on the number of competitors the data was sold to (price reduction clause), and (4) the terms and conditions of supply to IMS could not be less favourable than those offered to IMS’ competitors (‘most favoured customer clause’). The NMCC terminated the proceedings after IMS committed to eliminate clauses (1), (2) and (4) from its current and future contracts, and not to increase the percentages of the price reduction clause. See case S/DC/0567/15, Estudios de Mercado Industria Farmacéutica, 13 July 2017, pp. 10–11 and 31–33.
77 AN judgment in appeal 118/2014, 1 July 2015. This judgment was confirmed by the TS on 5 February 2018 (see TS judgment in appeal 2808/2015).
conduct had actually or potentially excluded its competitors from the market. The AN stressed that a finding of illegal margin squeeze requires proof of actual or at least potential exclusionary anticompetitive effects.

Additionally, in September 2017, the AN annulled the NMCC’s decision in *Mensajes Cortos*, in which the NMCC imposed fines on Telefónica, Vodafone and Orange totalling approximately €120 million for excessive pricing in relation to SMS and MMS termination services. The AN concluded that the NMCC had not demonstrated that the three companies held a dominant position in the wholesale SMS and MMS termination services markets for each of their respective networks. The AN noted, in particular, that the NMCC’s market definition was based primarily on a report of CMT, the Spanish telecommunications authority, and that the NMCC had failed to carry out an *ex novo* analysis of the relevant markets based on updated economic data. The AN also outlined a series of inconsistencies in the NMCC’s assessment of dominance, and concluded that the NMCC had failed to assess the relevance of countervailing buyer power.

**VII PRIVATE ENFORCEMENT**

Although private enforcement in the form of actions for damages arising from abuse of a dominant position has traditionally been fairly limited, it is slowly becoming a reality, and more and more courts are ruling against competition law infringers and considering them to be civilly liable. In these cases, much controversy has arisen concerning the quantification of damages, especially that of *lucrum cessans*. In practice, damages have been calculated on the basis of a number of often case-specific considerations. To date, no final judgments have been issued in Spain awarding damages as a result of a collective action. However, Article 11 of the Code of Civil Procedure recognises the possibility for consumer protection organisations to bring collective actions in representation of these. This provision may be applicable by analogy to other organisations or groups of individuals. As to the interplay between public and private enforcement, since 2007, the possibility of pursuing civil actions is no longer conditional upon the prior finalisation of the administrative procedure. However, the law does provide for the possibility of suspending the time limit to issue a judgment when the judge deems it necessary to have prior knowledge of the content of the administrative decision. Moreover, the NMCC has the power to provide information and submit observations during judicial proceedings. With regard to the effect of documents and statements made during the administrative proceedings, it has been noted that these should be interpreted in accordance with the general rules set out in the Code of Civil Procedure and may thus be used as evidence within the civil proceedings.

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78 AN judgments in appeals 36/2013 (1 September 2017), 40/2013 (1 September 2017) and 41/2013 (4 September 2017).
80 Law 1/2000, 7 January.
The new Title VI (Articles 71 to 81) of the LDC, in force since May 2017, transposes Directive 2014/104/EU into Spanish law. Article 71 of the LDC establishes that undertakings that have infringed Article 2 of the LDC or Article 102 of the TFEU are responsible for damages. Article 71(2)(b) extends the doctrine of parental liability to private damages actions, and Article 73 clarifies that when two or more undertakings infringe competition law through joint behaviour, they are jointly and severally liable for the harm caused. Article 72 of the LDC establishes that any victim of an infringement of Article 2 of the LDC or Article 102 of the TFEU has the right to claim full compensation for the harm caused before the civil courts, including for actual loss (damnum emergens) and for loss of profit (lucrum cessans), as well as interest. Articles 72 and 78 clarify that the right to obtain full compensation may not lead to overcompensation, whether by means of punitive, multiple or other types of damages, and that a victim's compensation for actual loss must not exceed the overcharge borne by such victim. The burden of proof for the quantification of harm is on the plaintiff, who must bring an action for damages within a five-year period. Article 75 of the LDC establishes that a finding of a competition law infringement made in a final NMCC decision or judgment of the Spanish courts constitutes irrefutable evidence of an infringement for the purposes of an action for damages before the Spanish courts. If the national competition authority or the courts of another EU Member State have found a competition law infringement, there is a iuris tantum presumption that there has been an infringement for the purposes of an action for damages before the Spanish courts. Finally, Articles 77 and 81 regulate the effects of consensual dispute resolution.

VIII FUTURE DEVELOPMENTS

In 2013, the Spanish authorities merged a number of regulatory authorities, including the former National Competition Commission, into a single institution, the NMCC. The aim of this institutional reform was, primarily, to maximise economies of scale, attain synergies and reduce public expenditure. While such reform gave rise to a new institutional structure, it did not bring about any substantive changes to antitrust enforcement. In December 2016, however, a proposal was tabled in the Spanish Parliament to divide the NMCC into two independent bodies, namely the Independent Markets Regulation Authority, which would be in charge of sector-specific market regulation; and the Independent Competition Authority, which would be in charge of competition law enforcement. The aim of this proposal was to guarantee the independence of and separation between the regulatory authority and the competition authority. In March 2017, the Ministry of Economy launched a public consultation process regarding the possible division of the NMCC into two independent bodies, namely the Independent Administrative Authority for the Supervision and Regulation of the Markets, and the Independent Administrative Authority for Competition. The Ministry of Economy stated that the aim of this proposal is to adapt the institutional architecture for competition law enforcement to international best practices, to strengthen the independence of the regulatory and competition authorities, and ultimately to improve governance. At this stage, it remains unclear whether or when such a reform will take place.

Additionally, in September 2017, the NMCC organised a technical workshop to discuss possible reforms of the enforcement procedure and sanctions for infringements of Articles 2 of the LDC and 102 of the TFEU (e.g., the possibility to qualify the obstruction of NMCC inspections as a serious – as opposed to a minor – infringement).

Finally, in its Action Plan for 2018, the NMCC announced, *inter alia*, that it intends to:

a. strengthen its *ex officio* investigations of potentially anticompetitive conduct through the creation of an economic intelligence unit;

b. publish guidelines for the submission of economic evidence; and

c. strengthen the NMCC’s supervision in specific sectors, including the financial sector, sports rights, TV advertising and the pharmaceutical sector.84

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Chapter 24

SWEDEN

Marcus Glader and Trine Osen Bergqvist

I INTRODUCTION

Chapter 2, Article 7 of the Swedish Competition Act\(^2\) prohibits the abuse of a dominant position. The provision reads as follows: ‘Any abuse by one or more undertakings of a dominant position on the market shall be prohibited.’

Such abuse may, in particular, consist in:

a directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;

b limiting production, markets or technical development to the prejudice of consumers;

c applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or

d making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage have no connection with the subject of such contracts.’

The Competition Act entered into force on 1 November 2008. The prohibition against the abuse of a dominant position has remained intact since it was introduced in the former Competition Act\(^3\) in 1993. It corresponds to Article 102 of the TFEU, which applies in parallel to the Swedish provision if the dominant position covers a substantial part of the internal market and the abuse may affect trade between EU Member States.

The Competition Act is enforced by the Swedish Competition Authority (SCA). Neither the legislator nor the SCA has issued any formal guidance on the interpretation of the prohibition. In practice, the SCA and the Swedish courts interpret Swedish and EU case law.

II YEAR IN REVIEW

i Judgments from the Swedish courts

Last year,\(^4\) no judgments regarding abuse of a dominant position were delivered by the court of last instance (i.e., the Patent and Market Court of Appeal). The Patent and Market Court, which is the court of first instance, delivered two judgments. These cases are briefly described below.

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1 Marcus Glader is a partner and Trine Osen Bergqvist is a specialist at Vinge.
3 The former Competition Act (1993:20).
4 1 January 2017 to 31 March 2018.
**Swedish Competition Authority v. Swedish Match North Europe AB**

On 8 February 2017, the Patent and Market Court upheld the SCA’s finding that Swedish Match had abused its dominant position on the market for the sale of wet tobacco (snus) to retailers and imposed fines amounting to 38 million Swedish kronor.

The case concerned a new system for shelf labels that Swedish Match introduced in its snus coolers in October 2012. Swedish Match owned a majority of the snus coolers placed in the retailers’ stores, but had agreed to let competing snus suppliers use parts of the shelf space in the coolers to sell their competing brands. According to the new shelf label system, the competitors were forced to either follow a detailed shelf label template, or have their labels replaced by generic grey/white labels. According to Swedish Match, the new system was introduced to make the increasingly disparate and gaudy labelling more tidy and uniform in its coolers. The system was implemented in about one-third of the market before it was discontinued in April 2013, after the SCA had initiated an investigation.

The Court noted that Swedish Match had more than 80 per cent of the snus market. However, as the market shares were declining, the Court found it necessary to consider all the relevant aspects of the market before concluding that Swedish Match had a dominant position.

As regards the alleged abuse, considering that traditional marketing is significantly restricted by the Tobacco Act, shelf label marketing was deemed to be of particular competitive importance to the snus suppliers. In these circumstances, the Court considered the new shelf label requirements basically amounted to a marketing prohibition in the snus coolers, for which there were no effective countermeasures available for Swedish Match’s competitors.

Although the shelf label system was discontinued by Swedish Match before it was fully implemented, the Court’s assessment of the effects of the system was not limited to the stores in which the system had actually been implemented. The decisive question for the Court was what effects the system would have had, if it had been fully implemented. The Court concluded that the system was capable of restricting price and brand competition and increasing barriers to entry and expansion. It also found that the system was based on an apparently anticompetitive strategy, the primary purpose of which was to reduce price communication and limit Swedish Match’s loss of market shares to low-price competitors.

The judgment has been appealed to the Patent and Market Court of Appeal. The case was heard from 8 May to 1 June 2018.

**Swedish Competition Authority v. Nasdaq AB et al.**

On 15 January 2018, the Patent and Market Court rejected the SCA’s request to impose fines on four companies within the Nasdaq group for abuse of a dominant position.

Nasdaq is the operator of the Swedish, Norwegian and Finnish stock exchanges. Following the EU Markets in Financial Instruments Directive, which entered into force in 2007, the former national stock exchange monopolies in Europe were exposed to competition from multilateral trading platforms (MTFs). For a new MTF, achieving a critical mass of

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5 Case PMT 16822-14, *Swedish Competition Authority v. Swedish Match North Europe AB*.

6 Swedish Match had a large number of ‘must-have’ products and was deemed to be an unavoidable trading partner for the retailers. This, together with the restricted marketing possibilities for tobacco products, led the Court to conclude that the barriers to entry and expansion were relatively high. The retailers’ buyer power was not sufficient to conclude that Swedish Match did not have a dominant position on the market.

liquidity is crucial. One category of customers that may contribute to increased liquidity is high-frequency traders. For these traders, physical proximity to the matching engine of the marketplace is often important to reduce risk caused by time lag in the execution of transactions. It is therefore common that marketplaces offer their customers the opportunity to co-locate with the marketplace (i.e., placing the trading equipment in the same data centre facility as the matching engine of the marketplace).

Shortly after a new entrant, Burgundy, was established in the Nordics, it wanted to move its matching engine to the same location where Nasdaq already had its matching engine along with the trading equipment of a large number of customers. When Nasdaq was informed in October 2010 that Burgundy had finalised negotiations with data centre supplier Verizon concerning the rental of a neighbouring space, Nasdaq contacted Verizon and expressed its dissatisfaction. Nasdaq informed Verizon that, if Burgundy moved in, Nasdaq would move its matching engine from the data centre. Eventually, Verizon decided to withdraw from the negotiations with Burgundy.

In May 2015, the SCA initiated legal proceedings and requested that four different companies in the Nasdaq group pay fines totalling 29 million Swedish kronor. The SCA claimed that Nasdaq's use of coercive methods to exclude Burgundy from the data centre, which made it harder for Burgundy to compete with Nasdaq, was abusive. The SCA argued that the conduct constituted a 'naked restriction', which harmed both Burgundy and customers without improving Nasdaq's own offering. It was therefore not necessary to demonstrate negative effects on competition. In any case, the conduct led to both actual and potential negative effects on competition. The SCA submitted that if Burgundy had been allowed to lease space for its matching engine in the same data centre, the co-located traders would also have been able to get fast and cheap connections to Burgundy. This could have contributed to increased liquidity for Burgundy and increased competitiveness in relation to Nasdaq.

The Patent and Market Court upheld the SCA's finding that Nasdaq had a dominant position in the EU and EEA-wide market for services relating to the trade of Swedish, Danish and Finnish equities, but it did not agree that Nasdaq's conduct constituted an abuse. The Court noted that the SCA did not argue that the relevant data centre was an essential facility, or that the data centre agreements between Nasdaq and Verizon were anticompetitive as such. As regards the questioned conduct, the Court noted that the interference in a contractual relationship between a competitor and a third party may, in principle, constitute an abuse. However, the Court found no support in the case law that such conduct constitutes a 'naked restriction', for which it is not necessary to demonstrate anticompetitive effects. With reference to the CJEU’s judgment in Intel, the Court questioned the concept of 'naked restrictions' under Article 102.

The effects of the conduct were analysed in relation to two different counterfactuals, both of which were found to be implausible. In the first scenario, where customers would cross-connect their trading equipment to Burgundy through Nasdaq's co-location service, the Court reviewed Nasdaq's agreements with Verizon and the co-location customers, and concluded that Nasdaq would have been entitled to refuse such cross-connections. In the second scenario, where customers would connect to Burgundy through a network provider present in the data centre, the Court found insufficient proof that Burgundy had such

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intentions. Against this background, the Court concluded that Nasdaq’s conduct constituted competition on the merits. Rather than abusing power derived from its dominant position, Nasdaq had acted in accordance with its contractual rights.

The judgment has been appealed to the Patent and Market Court of Appeal.

ii SCA cases

Last year, the SCA closed six investigations concerning abuse of a dominant position, only one of which led to a finding of infringement. Currently, as of 21 May 2018, the SCA has two active investigations.

Decisions during the past year

<table>
<thead>
<tr>
<th>Sector</th>
<th>Conduct</th>
<th>Case opened</th>
<th>Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dairy products†</td>
<td>Restrictions of the right to deliver organic milk to other dairies than the dominant dairy; violation of previous commitment decision</td>
<td>September 2015</td>
<td>May 2017: previous commitment decision revoked;† investigation closed†</td>
</tr>
<tr>
<td>Online advertisement of cars§</td>
<td>Tying or bundling of services related to online advertisement of cars</td>
<td>September 2015</td>
<td>June 2017: investigation closed with reference to self-correcting measures</td>
</tr>
<tr>
<td>Charity lotteries#</td>
<td>Exclusivity arrangements in agreements between a charity lottery and its beneficiaries</td>
<td>April 2013</td>
<td>November 2017: investigation closed</td>
</tr>
<tr>
<td>Locks**</td>
<td>Loyalty rebates and margin squeeze</td>
<td>August 2013</td>
<td>November 2017: investigation closed</td>
</tr>
<tr>
<td>Waste management††</td>
<td>Termination of agreement with competitor concerning recycling stations</td>
<td>September 2016</td>
<td>February 2018: finding of infringement; order to revoke termination of agreement</td>
</tr>
<tr>
<td>Fuel‡‡</td>
<td>Application of discriminating terms</td>
<td>December 2017</td>
<td>March 2018: investigation closed</td>
</tr>
</tbody>
</table>

* ‘Case opened’ refers to the date on which the authority opened its investigation (where known) or announced that it had opened an investigation
† Case 630/2015 and 210/2017
‡ Case 210/2017
§ Case 630/2015
¶ Case 601/2015
# Case 263/2013
** Case 494/2013
†† Case 583/2016
‡‡ Case 657/2017

Currently active investigations

As of 21 May 2018, there are two active investigations: Coffins, which involves royalty rebates, was opened in May 2017; and Train tickets, which involves the online advertisement of train tickets, was opened in April 2018.

9 1 January 2017 to 31 March 2018.
10 Case 318/2017.
11 Case 230/208.
MARKET DEFINITION AND MARKET POWER

Market definition

Neither the legislator nor the SCA have adopted guidelines on how to define the relevant market. In its decisions and judgments, the SCA and the courts regularly refer to EU case law and the Commission’s notice on the definition of the relevant market. 12

The purpose of the market definition in abuse cases is to assess whether the undertaking in question has the possibility to prevent effective competition from being maintained on the market by giving it the power to behave to an appreciable extent independently of its competitors. 13

The SSNIP test has been accepted by the courts as an established method for defining the relevant market. 14 A SSNIP test may, however, be misleading in cases regarding abuse of dominance if the test is based on a price that is already above the competitive level (the ‘cellophane fallacy’), or if the market is characterised by strong network effects. 15 In practice, the assessment is based on a number of circumstances, including not only quantitative evidence of substitution, but also qualitative aspects such as the qualities of the products and their intended use. 16 Market definitions in previous cases may provide guidance, but are not precedential. 17

Market power

The term ‘dominant position’ is interpreted the same way as it is in Article 102 TFEU. As regards a definition of the term, the preparatory works to the previous Competition Act (preparatory works) 18 refer to the judgment of the Court of Justice of the European Union (CJEU) in United Brands, in which a dominant position was defined as:

> a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. 19

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13 Judgment from the Market Court, MD 2013:5, TeliaSonera v. the Swedish Competition Authority, 12 April 2013, page 38.


16 See, for instance, MD 2013:5, TeliaSonera v. Swedish Competition Authority, 12 April 2013, page 38.


The term ‘dominant position’ includes both single and collective dominance.\(^{20}\)

The assessment of dominance is based on a number of circumstances that are not individually decisive. A company’s market shares are a natural starting point for the analysis. Market shares above certain thresholds may lead to presumptions of dominance.\(^{21}\)

Despite the existence of market share presumptions, the assessment of dominance is usually based on a full assessment of all the relevant facts in the case, including, in particular:

a. barriers to entry and expansion;
b. advantages (financial, technological, regulatory, historical, etc.);
c. vertical integration;
d. presence in neighbouring markets;
e. whether the company is an unavoidable trading partner; and
f. whether customers have counterweighing buyer power.

In the two last cases regarding abuse of a dominant position, the Patent and Market Court refrained from relying on a market share presumption, despite high market shares.\(^{22}\)

The courts have also referred to the European Commission’s guidance paper on exclusionary abuses for further guidance on the term ‘dominant position’.\(^{23}\)

IV ABUSE

i Overview

The prohibition against the abuse of a dominant position does not define the term ‘abuse’; the type of abuses mentioned in the prohibition are only examples, and do not constitute an exhaustive list. For a definition of abuse, both the SCA and the Swedish courts regularly refer to the CJEU’s judgment in *Hoffman-La Roche*, in which an abuse was defined as:

> an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of markets where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.\(^{24}\)

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\(^{20}\) Like Article 102 TFEU, the prohibition covers abuse by ‘one or more undertakings’. In MD 2011:28, *Uppsala Taxi 100 000 AB v. Europark Svenska AB et al.*, 23 November 2011, the Market Court considered that Europark and Swediavia, by virtue of their agreement concerning the taxi allocation system at Arlanda airport, had a collective dominant position.

\(^{21}\) According to the preparatory works to the former Competition Act (Government Bill 1992/93:56, pages 85–86), market shares above 40 per cent constitute a clear sign of dominance; market shares above 50 per cent lead to a presumption of dominance; and market shares above 65 per cent lead to a presumption that is almost impossible to rebut, in particular if the competitors are relatively small.


\(^{23}\) See, for instance, the Patent and Market Court’s judgment in case PMT 16822-14, *Swedish Competition Authority v. Swedish Match North Europe AB*, 8 February 2017, page 140.

The prohibition covers both exclusionary and exploitative abuses.

Over the past decade, the enforcement of the prohibition has gradually shifted from being rather legalistic to being more effect-based. In 2016, the SCA adopted a new prioritisation policy for its enforcement, which states that the most important factor for prioritising cases is the potential harm to competition and consumers.\textsuperscript{25} It may also be noted that the Patent and Market Court in a recent judgment questioned the existence of 'naked restrictions’, that is, unilateral restrictions that are so harmful to competition that there is no need to show anticompetitive effects to establish an abuse.\textsuperscript{26}

Evidence of an anticompetitive strategy is not sufficient \textit{per se} to establish an abuse, but in practice it seems to play a rather important role.\textsuperscript{27} The SCA has used evidence of anticompetitive intent to argue that conduct does not constitute competition on the merits,\textsuperscript{28} and that a dominant company has considered it likely that the conduct is capable of having anticompetitive effects.\textsuperscript{29} The Patent and Market Court has taken evidence of anticompetitive intent into account in its assessment of a conduct’s effects on competition.\textsuperscript{30}

\section*{ii Exclusionary abuses}

Although the prohibition covers both exclusionary and exploitative abuses, the SCA’s enforcement focuses on exclusionary abuses. The SCA’s enforcement policy states that the SCA prioritises unilateral conduct that is capable of excluding effective competition. When deciding whether conduct is sufficiently harmful to warrant an investigation, particular consideration is given to the share of the market affected by the conduct and, in cases where the foreclosure concerns an input, to what extent the input is essential to enable effective competition. When it comes to price-based conduct, the SCA considers whether the pricing is capable of foreclosing as efficient competitors.\textsuperscript{31} Thus, although as-efficient competitor tests are not strictly necessary to establish an abuse, the SCA regularly performs such tests in cases regarding price-based abuse to decide whether an intervention is warranted.\textsuperscript{32}

\section*{iii Exploitative abuses}

Exploitative abuses are covered by the prohibition. Cases regarding pure exploitative conduct are, however, rare, in particular in public enforcement. Following the adoption of the SCA's

\textsuperscript{25} The prioritisation policy is available at the SCA’s website, http://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf


\textsuperscript{27} In case PMT 16822-14, \textit{Swedish Competition Authority v. Swedish Match North Europe AB}, 8 February 2017, several pages of the Patent and Market Court’s judgment are devoted to the question of whether the conduct was based on an anticompetitive strategy.


\textsuperscript{29} Ibid, page 385 with further references.


\textsuperscript{31} http://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf

\textsuperscript{32} See, for instance, the SCA’s decision in case 494/2013, \textit{Assa AB et al}, 22 November 2017.
new prioritisation policy in 2016, which does not even mention exploitative abuse, the SCA has not initiated any investigations or legal proceedings regarding pure exploitative conduct. Cases regarding exploitative abuse are more likely to occur in private litigation.\textsuperscript{33}

\textbf{iv Discrimination}

Like Article 102 TFEU, the Swedish provision prohibits the application of ‘dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’. The prohibition applies not only to discriminatory prices, but also to other discriminatory terms. It covers discrimination of a dominant company’s competitors (first-line discrimination) as well as discrimination of its customers (second-line discrimination). The latter form of discrimination (sometimes referred to as ‘pure discrimination) is less likely to lead to foreclosure of effective competition, and thus less likely to be prioritised by the SCA.\textsuperscript{34} Such cases are more likely to occur in private litigation.\textsuperscript{35}

\textbf{V REMEDIES AND SANCTIONS}

\textbf{i Overview}

The main remedies and sanctions against abuse of a dominant position are:

\begin{itemize}
  \item \textbf{a} administrative fines;
  \item \textbf{b} fine orders;
  \item \textbf{c} orders imposing obligations (under threat of a fine for default);
  \item \textbf{d} commitment decisions;
  \item \textbf{e} nullity; and
  \item \textbf{f} damages.
\end{itemize}

\textsuperscript{33} The most recent example of a case regarding pure exploitative abuse is a case from 2011 concerning a ‘sign fee’ imposed by the airport operator Swedavia for pre-ordered taxis at Arlanda airport. The fee was imposed on taxis that picked up customers in the arrival hall with a sign with the customer’s name on it. When the complaint was rejected by the SCA on priority grounds, the complainant brought successful private actions to the Market Court. In a judgment delivered on 23 November 2001, MD 2011:28, the Market Court found that there was no ‘necessary connection’ between the fee and the pre-ordered taxi traffic. Without considering whether the fee was excessive, the Court found that the fee was ‘unfair’ and thus abusive. Following the judgment, the SCA submitted a summons application with a request for fines. In its judgment delivered on 9 June 2016 in case T 9131-13, the request was dismissed by Stockholm City Court. The Court agreed that the fee was anticompetitive, but found that it was objectively justified by capacity issues at the airport. The SCA chose not to appeal the judgment.

\textsuperscript{34} \url{http://www.konkurrensverket.se/globalassets/english/about-us/english_prioritisation_policy_for_enforcement.pdf}

\textsuperscript{35} See, for instance, MD 2011:2, \textit{Stockholm Transfer Taxi in Stockholm AB v. Swedavia AB}, 2 February 2011, concerning the alleged discriminatory allocation of taxi lanes at Arlanda airport. When the complaint was rejected by the SCA on priority grounds, the complainant brought private actions in the Market Court. Considering that the taxi space outside Arlanda was limited, the Market Court agreed that Swedavia was obliged to ensure that the allocation of taxi lanes was neutral from a competition perspective, but it did not agree that the allocation was discriminatory. The Court found that the allocation was based on customer demand and that it did not lead to a competitive disadvantage for the complainant. Accordingly, the conduct did not constitute an abuse.

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ii Administrative fines

An undertaking that intentionally or negligently infringes the prohibition against abuse of a dominant position may be ordered to pay administrative fines. The SCA does not have the authority to impose fines itself, but the Patent and Market Court may do so at the SCA’s request.36

When determining the amount of the administrative fines, account shall be taken of the gravity and duration of the infringement, and possible aggravating or mitigating circumstances.37 The gravity is based primarily on the nature of the infringement, the size and significance of the market, and the infringement’s actual or potential impact on competition.38 The amount may be increased if there are aggravating circumstances (if the company has persuaded other companies to participate, or has played a leading role in the infringement) and reduced if there are mitigating circumstances (if the company’s participation has been limited).39 Besides circumstances referable to the infringement, particular account shall be taken of the undertaking’s financial status, whether the undertaking has previously infringed any of the competition prohibitions and whether it has quickly discontinued the infringement.40

The SCA has published a memorandum describing its method of setting administrative fines.41 The purpose of the memorandum is to provide greater clarity on how the SCA interprets and applies the provisions on administrative fines in the Competition Act. The memorandum does not pre-empt the interpretations made by the courts.

The fines may not amount to more than 10 per cent of the undertaking’s total annual turnover.42 The highest fine ever imposed by final judgment in a Swedish case concerning abuse of dominance is 35 million Swedish kronor.43

iii Fine order

Instead of bringing legal proceedings requesting administrative fines, the SCA may in some cases issue a fine order with the same effect as a legally binding judgment. Such orders may only be issued if the undertaking consents thereto and the SCA considers that the material circumstances regarding the infringement are clear.44 According to the preparatory works, fine orders should not be used in cases with legal questions of precedential interest.45

The opportunity for the SCA to issue fine orders has only been used in a limited number of cases. To date, the SCA has not issued any fine orders in cases regarding abuse of a dominant position.

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36 Chapter 3, Article 5 of the Competition Act.
37 Chapter 3, Article 8 of the Competition Act.
38 Ibid.
39 Chapter 3, Articles 9–10 of the Competition Act.
40 Chapter 3, Article 11 of the Competition Act.
42 Chapter 3, Article 6 of the Competition Act.
43 MD 2013:5, TeliaSonera AB v. Swedish Competition Authority, 12 April 2013.
44 Chapter 3 Articles 16–19 of the Competition Act.
iv Orders imposing obligations

A company that abuses its dominant position may be ordered by the SCA to terminate the abuse.46 According to the preparatory works, such orders may not be more far-reaching than what is necessary to eliminate the anticompetitive effects of the infringement.47 The SCA may impose behavioural obligations, such as the obligation to end an agreement or stop a certain conduct, but it may not impose structural obligations.

If there are ‘particular grounds’, the SCA may issue an interim order for the period until a final decision is adopted.48 According to the preparatory works, interim measures should be taken in cases where the infringement is ‘more serious’ and may lead to ‘significant negative effects’ if the company is not ordered to terminate the conduct immediately. Account shall also be taken of the effects on the company addressed by the order.49

A final or interim order to terminate an abuse may be imposed under threat of a fine for default.50

v Commitment decision

If the undertaking investigated offers commitments, the SCA may adopt a commitment decision stating that there are no longer grounds for action.51 As long as the decision applies, the SCA may not issue orders imposing obligations regarding the conduct covered by the decision.52

vi Special right to legal action

If the SCA decides not to investigate a complaint, or to end an investigation without issuing an order, undertakings affected by the conduct are entitled to institute private proceedings before the Patent and Market Court, and to request that the Court orders the company to end the abuse.53

vii Nullity

An agreement that infringes the prohibition against abuse of a dominant position is null and void.54 This means that the agreement cannot be enforced by a court.

46 Chapter 3, Article 1 of the Competition Act.
48 Chapter 3, Article 3 of the Competition Act.
50 Chapter 6, Article 1 of the Competition Act.
51 Chapter 3, Article 4 of the Competition Act.
52 See, for instance, the SCA’s decisions dated 3 May 2017 in case 630/2015 and 210/2017, Arla Foods amba. In February 2016, Arla introduced restrictions in the right for members of the Arla group to supply organic milk to other diaries than Arla. The SCA initiated an investigation regarding abuse of a dominant position (case 630/2015). Considering that the members’ right to supply milk to competing dairies was subject to a commitment decision from 2010, which was unlimited in time, the SCA found that it was not entitled to issue an order against the restrictions introduced in 2016. The new restrictions were, however, deemed to constitute a violation of the said commitment decision. For the SCA to be able to intervene against the new restrictions, the SCA revoked the commitment decision (case 210/2017).
53 Chapter 3, Article 2 of the Competition Act.
54 This does not follow directly from the Competition Act, but is stated in the preparatory works, Government Bill 2003/04:80, page 54.
viii Damages
An intentional or negligent abuse of a dominant position may lead to liability to pay damages.\(^{55}\)

VI PROCEDURE
i Overview
The Swedish procedural rules differ significantly from the EU’s procedural rules and from those of other EU Member States. In particular, the decision-making powers of the SCA are less extensive than those of the European Commission and most other European competition authorities. As regards decisions to impose administrative fines, a pure judicial model applies, meaning that the first instance decision (both on substance and fines) is taken by the court. The SCA may take decisions requiring that an infringement be brought to an end, but if such orders are appealed, the courts are entitled to make a full review of the case.

ii SCA investigations
SCA investigations are governed by the Competition Act and the Administrative Act.\(^{56}\) Subject to certain limitations set out in the Public Access to Information and Secrecy Act,\(^{57}\) a party to an investigation has extensive rights of access to files.

Most SCA investigations regarding abuse of a dominant position start with a tip-off or a complaint from a customer, supplier or competitor. *Ex officio* investigations occur, but are quite rare. The SCA does not investigate all tips and complaints that it receives: the process of selecting cases for investigation is described in the SCA’s Prioritisation Policy for Enforcement.\(^{58}\) If the SCA decides not to open an investigation, the case is closed with no further explanation other than a short reference to the Authority’s prioritisation policy. If the SCA decides to open an investigation, the case is allocated to the Market Abuse Unit, a specialised unit that handles cases regarding abuse of dominance, vertical restraints and competition neutrality.

The SCA has extensive investigative powers. It may order parties and third parties to provide information and documents, conduct interrogations and, upon prior authorisation from the Patent and Market Court, conduct unannounced inspections at the premises of companies.\(^{59}\)

Before the SCA institutes proceedings with request for fines, the party must be given the opportunity to comment on the SCA’s draft summons application.\(^{60}\) The Competition Act contains no corresponding provision regarding orders to impose obligations, but the SCA has nonetheless developed a practice of communicating draft orders before adopting a final decision.

\(^{55}\) The liability to pay damages for competition law infringements is described further under Section VII.
\(^{56}\) The Administrative Act (1986:223).
\(^{57}\) The Public Access to Information and Secrecy Act (2009:400).
\(^{59}\) Chapter 5, Articles 1 and 3 of the Competition Act.
\(^{60}\) Chapter 3, Article 5 of the Competition Act.
A party that receives a draft summons application or a draft order may request an oral hearing of the case. The main purpose of the oral hearing is to complete the party’s written submissions with oral comments and ensure that the SCA’s decision is well-supported.61

When the investigation is completed, the main findings and a proposed decision are presented to the Director General, who makes the final decision on whether to intervene or close the case.

The SCA does not have the opportunity to give negative clearance. Thus, when the SCA decides to close a case, the closing decision normally states that the SCA has not taken a final stand on whether the conduct constitutes an infringement.

The duration of the SCA’s investigations varies from case to case, depending on the complexity of the case and whether the investigation leads to the finding of an infringement. Investigations regarding abuse of dominance tend to take longer than investigations of other competition infringements. In cases that lead to the finding of an abuse, the investigation may take several years.62

iii Early resolutions and settlement procedures

The SCA does not have the possibility to make settlement agreements. If a party consents thereto, the SCA may issue a fine order with the same effect as a legally binding judgment, but the SCA is not entitled to grant reductions in the fines in return for such consent.

iv Appeals and judicial review

The right to appeal decisions adopted by the SCA is governed by Chapter 7, Article 1 of the Competition Act. Orders by the SCA to impose obligations may be appealed. Decisions not to investigate a case may not be appealed, but undertakings affected by the conduct may institute private proceedings and request that the court issues an order to end the conduct.63 Fine orders may under certain circumstances be set aside.64

As of 1 September 2016, the competent court in competition law cases is the Patent and Market Court, a division of Stockholm District Court that is specialised in competition, patent and market law.65

Judgments and decisions by the Patent and Market Court may be appealed to the Patent and Market Court of Appeal, which is a division of Svea Court of Appeal. Leave to appeal is required. Decisions and judgments by the Patent and Market Court of Appeal in competition cases may normally not be appealed. The Patent and Market Court of Appeal may, however, allow the judgment to be appealed to the Supreme Court if the Supreme Court’s review is important from a precedential perspective.66

61 The oral hearing is described on the SCA’s website (Swedish only), http://www.konkurrensverket.se/omossmyney/om-oss/sa-arbetar-vi/beslut-och-kvalitetssakring/muntligt-forfarande.

62 From recent investigations leading to the finding of an abuse, it may be noted that the SCA’s investigation of FTI, Swedish Match and Nasdaq took approximately one-and-a-half years, two-and-a-half years and four-and-a-half years, respectively.

63 Chapter 3, Article 2 of the Competition Act.

64 According to Chapter 3, Article 19 of the Competition Act, a fine order for which consent has been given shall upon appeal be set aside under the preconditions in Chapter 59, Section 6, First Paragraph of the Code of Judicial Procedure.

65 Chapter 8, Article 1 of the Competition Act.

The courts’ review is not limited to a legal review: both the Patent and Market Court and the Patent and Market Court of Appeal make a full review of the case.

The number of judgments delivered by the Patent and Market Courts in cases regarding abuse of a dominant position is too limited to make any general conclusions regarding the length of the court proceedings in these types of cases.67

VII PRIVATE ENFORCEMENT

A company that intentionally or negligently abuses a dominant position may be held liable to pay damages for the harm caused. The right to claim damages is governed by the Competition Damages Act,68 which implements the EU Directive on Competition Damages into Swedish law.69 When the Competition Damages Act entered into force on 27 December 2016, it replaced the previous provisions on competition damages in the Competition Act.

The liability covers compensation for actual loss, loss of profit and interest. The claimant has to demonstrate the existence of an abuse, the extent of the harm, and the existence of a causal link between the abuse and the harm. As opposed to cartels, abuse of a dominant position is not presumed to cause harm. Following the entry into force of the Competition Damages Act, final infringement decisions of the SCA or Swedish courts constitute full proof that an infringement has actually occurred.70

Collective actions are available and governed by the Swedish Group Proceedings Act,71 which is based on an opt-in system.

Last year, three judgments were handed down in cases regarding claims for damages based on abuse of a dominant position: two judgments from Svea Court of Appeal and one judgment from the Patent and Market Court.

The two judgments from Svea Court of Appeal concerned claims for damages against Telia concerning margin squeeze on the broadband market. Whereas Stockholm District Court found in favour of the claimants and awarded damages of 65 million Swedish kronor to Yarps and 240 million Swedish kronor to Tele2, both claims were ultimately rejected by Svea Court of Appeal. In Yarps, the Court concluded that Telia’s pricing policy did not constitute an abuse, despite the fact that an abuse had already been established by the Market Court.72

67 Following the entry into force of the new court system, the Patent and Market Court has delivered two judgments regarding abuse of a dominant position: Swedish Match (PMT 16822-14), 8 February 2017, and Nasdaq (PMT 7000-15), 15 January 2018. Both judgments have been appealed to the Patent and Market Court of Appeal, and the cases are still pending.


70 The Competition Damages Act applies to infringements conducted and harm that arose after the Act entered into force on 27 December 2016.


72 Judgment by Svea Court of Appeal in case T 2673-16, Yarps Network Services AB v. Telia Company AB, 21 February 2017. In the Market Court’s case, MD 2013:5, TeliaSonera v. Swedish Competition Authority, 12 April 2013, the Market Court found that Telia’s margin squeeze constituted an abuse of a dominant position and ordered Telia to pay fines. As the harm was caused prior to the entry into force of the Competition Damages Act, the new provisions regarding the probative value of infringement decisions of the SCA and Swedish courts were not applicable.
In Tele2, the Court upheld the finding of an abuse, but somewhat surprisingly concluded that the conduct, which involved the application of negative margins over several months, had not caused the harm for which Tele2 claimed compensation. Upon finding that the conduct did not cause the total harm for which Tele2 claimed compensation, the Court rejected the claim without making use of the possibility to estimate a reasonable amount. Both judgments were appealed to the Supreme Court, which decided not to grant leave to appeal.

The judgment from the Patent and Market Court concerned a claim for damages against the data and telecommunication provider Gothnet. When the City of Gothenburg procured data communication services in 2009, Gothnet, which owned fibre connections to a large number of the addresses specified in the procurement, charged its competitor, Net at Once, a wholesale access price that was higher than the price Gothnet offered in the tender. Net at Once argued that Gothnet had abused its dominant position by way of discrimination, margin squeeze or unfair trading conditions. The Patent and Market Court rejected the claim. The Court concluded that the relevant wholesale market was broader than the fibre connections covered by the specific procurement, and Gothnet did not have a dominant position on this broader market. The judgment has been appealed.

Apart from these cases, we are not aware of any ongoing cases regarding competition damages caused by abuse of a dominant position.

There are no general prohibitions against third-party funding of private litigation.

VIII FUTURE DEVELOPMENTS

A key aspect for the future will be how abuse cases are assessed by the new courts in Sweden. Following the entry into force of the new court system on 1 September 2016, no final judgments on abuse of dominance have been delivered. However, it may be noted that so far, the Patent and Market Court of Appeal has sided with the defendant in all competition law cases it has heard. The outcomes in the Swedish Match and Nasdaq cases are thus being followed with great interest. Considering the complexity of these types of cases, and the time and resources required, it is fair to assume that the outcome of these cases will influence the SCA’s future priorities and possibly private enforcement in this field.

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75 The new court system is described in Section VI.
76 The Patent and Market Court of Appeal has decided on four cases; three cases regarding anticompetitive agreements and one merger case.
I  INTRODUCTION

i  General legal framework

In Switzerland, unilateral practices of dominant undertakings are regulated by the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act). Similar to Article 102 of the Treaty on the Functioning of the European Union (TFEU), Article 7 of the Cartel Act contains both a general clause (Paragraph 1) and a non-exhaustive list of examples of potentially abusive practices (Paragraph 2).

According to Article 7 Paragraph 1 of the Cartel Act, dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or if they disadvantage trading partners. Dominant undertakings are defined as one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market (Article 4 Paragraph 2 of the Cartel Act).

Article 7 Paragraph 2 of the Cartel Act further enumerates a (non-exhaustive) list of practices which can in particular be considered as unlawful, as follows:

a  any refusal to deal (e.g., refusal to supply or to purchase goods);
b  any discrimination between trading partners in relation to prices or other conditions of trade;
c  any imposition of unfair prices or other unfair conditions of trade;
d  any under-cutting of prices or other conditions directed against a specific competitor (predatory pricing);
e  any limitation of production, supply or technical development; or
f  any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.

Article 7 of the Cartel Act has been conceived on the basis of Article 102 TFEU. As a result, although Article 7 of the Cartel Act constitutes independent Swiss law, the case law developed in the European Union in regard to Article 102 TFEU may serve as an interpretative source for the assessment of certain abusive practices. Nevertheless, it should be noted that there are several differences between EU and Swiss law in the context of abuse of dominance, mainly with regard to the sanctioning regime for abusive practices.

1 Franz Hoffet and Marcel Dietrich are partners and Allegra Schär is an associate at Homburger AG.
In addition to the Cartel Act, the Federal Price Surveillance Act of 20 December 1985, which aims at the avoidance of abusive pricing, may be relevant for dominant undertakings.

Finally, in the context of abusive pricing, the Federal Act against Unfair Competition of 19 December 1986 should be taken into consideration, in particular as regards dumping prices (Article 3 Paragraph 1 Letter f of the Unfair Competition Act).

ii Interplay between the Cartel Act and other statutory provisions

The interplay between the Cartel Act and other regulations is governed by Article 3 Cartel Act: according to Article 3 Paragraph 1 of the Cartel Act, statutory provisions that do not allow for competition in a certain market take precedence over the provisions of the Cartel Act. This is in particular the case for provisions that establish an official market or price system, as well as provisions that grant special rights to specific undertakings to enable them to fulfil public duties. In practice, such statutory provisions usually do not establish a fully comprehensive market or price system. The extent of the applicability of the Cartel Act thus needs to be assessed on a case-by-case basis.

Regarding intellectual property, the Cartel Act does not apply to effects on competition that result exclusively from the legislation governing intellectual property. However, import restrictions based on intellectual property rights are covered by the Cartel Act (Article 3 Paragraph 2 of the Cartel Act).

iii Sector-specific regulations

Special rules apply to certain industry sectors:

In the telecommunications sector, the Federal Telecommunications Act of 30 April 1997 provides for specific *ex ante* obligations for dominant telecommunication providers. In particular, providers of telecommunications services that have a dominant position in the market must provide access to their facilities and services to other providers in a transparent and non-discriminatory manner at cost-oriented prices. If the question of dominance in the market must be assessed, the Federal Office of Communications shall consult the Competition Commission. The latter may publish its position. While bundling of services is as such permissible for dominant telecommunication providers, they must also offer the services included in the bundle individually.

In the radio and television sector, the Federal Radio and Television Act of 24 March 2006 lays down an obligation for dominant undertakings active in the radio and television market to provide the licensing and supervisory authorities, free of charge, with certain information. Moreover, the Act allows for measures to be taken if, as a result of its abuse of a dominant position, an undertaking has jeopardised diversity of opinion and programming.

In the electricity and postal sectors, specific regulations govern historic monopolist providers to ensure access to other suppliers.

Despite the special rules applicable to certain industry sectors, it should be noted that these rules do not preclude the application of the Cartel Act. Rather, sector-specific regulations shall be taken into account in the application of the Cartel Act. Exceptionally, sector-specific provisions effectively aiming at excluding competition may lead to the non-applicability of the Cartel Act.

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3 Federal Supreme Court, RPW | DPC 2015 | 1, p. 131, *Hors-Liste Medikamente*. 

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II YEAR IN REVIEW

In 2017, the most significant decision rendered in an abuse of dominance case in Switzerland concerned the postal sector. In December 2017, the Competition Commission (ComCo) sanctioned Swiss Post with a fine of approximately 22.6 million Swiss francs for its (alleged) abuse of a dominant position in the market for addressed bulk mail of over 50 grams from business customers. In particular, the ComCo found that Swiss Post hindered its competitor Quickmail and discriminated against certain customers through price discrimination and non-transparent pricing systems. In fact, Swiss Post had a uniform pricing system in place at the time of the alleged abuse. However, for ‘contractual clients’ with a yearly sending volume exceeding 100,000 Swiss francs, Swiss Post (allegedly) granted special pricing conditions (in the form of discriminatory rebates). Moreover, since April 2011, Swiss Post granted additional rebates to selected customers that achieved a certain monthly turnover target. Overall, the non-transparent pricing system was found not only to have discriminated against customers but also to have prevented certain customers from having their bulk mail sent via Quickmail, the competitor.

More recently, in March 2018, the Federal Supreme Court handed down a landmark judgment in a case through which Swatch Group sought, as declaratory relief, confirmation from the civil courts that it was under no obligation to supply a British company with spare parts for watches. By way of background, Swatch Group terminated its supply agreement for spare parts with the British company in 2015, which caused the latter to threaten Swatch Group to introduce court proceedings before the London courts to oblige Swatch Group to continue its supply agreement. In the meantime, Swatch Group had already introduced a court action in Switzerland aiming at having it confirmed that it was under no obligation to supply the British company concerned with spare parts. The proceedings in Switzerland so far were limited to the procedural question of the existence of a sufficient legal interest in bringing a negative declaratory action before the Swiss civil courts. While the first instance court held that Swatch Group was lacking such interest, the Federal Supreme Court, on appeal, overturned this decision as well as its previous practice and found that, at least in an international context, the interest of a party to seek negative declaratory relief before Swiss courts was given. In fact, the Federal Supreme Court held that, if such interest was not admitted, a party seeking negative declaratory relief in Switzerland would be disadvantaged in an international context as compared to a party seeking such relief abroad. The sole interest of a party to be able to file proceedings in one jurisdiction rather than in another may be considered as sufficient, given the important implications with regard to diverging due process rights, language, duration and costs. That being so, the case has been referred back to the first instance court for the continuation of the proceedings on the merits.

4 The case is not published yet. For the press release announcing the sanction see https://www.weko.admin.ch/weko/de/home/aktuell/medieninformationen/nsb-news/msg-id-69262.html.
5 Federal Supreme Court, decision of 14 March 2018, 4A_417/2017, destined to be published in the official register of Federal Supreme Court decisions.
i  Significant decisions in 2017

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Fine levied</th>
</tr>
</thead>
<tbody>
<tr>
<td>Internet, TV, telecommunication</td>
<td>ComCo</td>
<td>Abuse of a dominant position by Naxoo in the market for cable network connections in the city of Geneva through inadequate terms of supply towards property owners, producers and third-party suppliers of network connections, as well as through obstructions of third-party suppliers in their own downstream markets</td>
<td>3.6 million Swiss francs</td>
</tr>
<tr>
<td>Postal services</td>
<td>ComCo</td>
<td>Abuse of a dominant position by Swiss Post in the market for addressed bulk mail of over 50 grams on business customers through price discrimination between trading partners and non-transparent pricing systems</td>
<td>22.6 million Swiss francs</td>
</tr>
<tr>
<td>Pay TV</td>
<td>ComCo</td>
<td>Refusal by the ComCo to grant interim relief in an investigation concerning an alleged abuse of a dominant position by UPC Schweiz GmbH in the Swiss market for the transmission of ice hockey on Pay TV</td>
<td>N/A</td>
</tr>
<tr>
<td>IT and pharmaceutical industry</td>
<td>ComCo</td>
<td>Abuse of a dominant position by HCI Solutions AG, an affiliate of Galenica group, in the market for the commercialisation of electronically available information on pharmaceuticals in Switzerland through exclusive dealing as well as tying and bundling practices</td>
<td>4.5 million Swiss francs</td>
</tr>
</tbody>
</table>

ii  Currently ongoing cases

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pay TV</td>
<td>ComCo</td>
<td>Investigation concerning the alleged abuse of a dominant position by UPC Schweiz GmbH in the Swiss market for the transmission of ice hockey on Pay TV through refusal to grant access to the transmission of ice hockey games to competing TV platform operators</td>
<td>May 2017</td>
</tr>
<tr>
<td>Spare parts for watches</td>
<td>Commercial Court of the Canton of Berne (first instance); Federal Supreme Court (second instance)</td>
<td>Case concerning declaratory relief sought by Swatch Group from the civil courts aimed at receiving confirmation that Swatch Group is under no obligation to supply spare parts to a British customer</td>
<td>2016</td>
</tr>
</tbody>
</table>

* ‘Case opened’ refers to the date on which the authority opened its investigation (where known) or announced that it had opened an investigation

III  MARKET DEFINITION AND MARKET POWER

i  Definition of the relevant market

In abuse of dominance cases, the rules applicable in merger control cases are being used by analogy for the purpose of defining the relevant market. According to Article 11 of the Merger Control Ordinance of 17 June 1996, the relevant product market comprises those goods and services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other with regard to their characteristics and intended use. The relevant geographic market is defined as the area in which on the one hand consumers purchase and on the other suppliers sell the goods or services that constitute the relevant product market.
This provision also serves as the basis for defining the relevant market in dominance cases. From a temporal perspective, it must be examined whether any goods or services that allow for substitution in terms of product and geography are available all year round or just for a certain period of time.

The Swiss authorities generally rely on the test of cross-price elasticity and the SSNIP (small but significant and non-transitory increase in price) test to determine the relevant product market. In the context of an abuse of dominance case, it needs to be assessed whether the allegedly disadvantaged opposite side of the market (i.e., the trading partners of the dominant undertaking) could switch to alternative offers from a product, geographic and temporal perspective. If there are reasonable alternative offers for the opposite side of the market, it is likely that the undertaking considered is not dominant on a certain market.

It should be noted the ComCo has previously considered cases in which the market has incorrectly been defined too broadly due to the presence of already monopolistic prices (‘cellophane fallacy’).

### iii Definition of dominance

According to Article 4 Paragraph 2 of the Cartel Act, an undertaking is dominant if it can to an appreciable extent behave independently of other market participants (competitors, suppliers or buyers). In the course of the amendment of the Cartel Act in 2003, the text in brackets defining other market participants was added. According to the Message of the Federal Council, the aim of this amendment is to ensure that authorities do not rely only upon market structure data to determine whether an undertaking is dominant, but also take into consideration the actual relations of dependence on the market. The ComCo has had the occasion to discuss the amended wording of Article 4 Paragraph 2 of the Cartel Act. It has generally confirmed the previous understanding of dominance (i.e., the capacity to behave independently on the market), but has, in addition, specified under which circumstances actual relations of dependence would also fall under Article 4 Paragraph 2 of the Cartel Act (and thus be subject to abuse of dominance rules). It should be noted that, based on the wording of Article 4 Paragraph 2 of the Cartel Act, market dominance may exist both on the supply as well as on the demand side.

There is no statutory threshold above which an undertaking must be considered as dominant under Swiss law. As a rule of thumb, market shares below 20 per cent are not considered to confer a dominant position to an undertaking. Market shares of between 20 and 40 per cent generally do not confer a dominant position to an undertaking, unless special circumstances are present. Market shares of 40 per cent and above are an indicator of dominance, unless there are special circumstances that allow denying such dominance.

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6 RPW | DPC 2012 | 1, pp. 103 and 105, Vertrieb von Tickets im Hallenstadion.
7 Federal Supreme Court, RPW | DPC 2013 | 1, p. 114, Publigroupe.
8 Regarding the substitutability of offer and demand, see RPW | DPC 1997 | 3, p. 364 st, Migros | Globus and RPW | DPC 1998 | 3, p. 394 ff, Bell | SEG-Poulets.
9 See, for example, RPW | DPC 2015 | 1, p. 105, Valona Holding | LS Distribution Suisse.
10 See RPW 2005 | 1, p. 149 ff, CoopForte; RPW 2008 | 1, p. 129 ff, Migros | Denner.
11 See, for example, RPW | DPC 2003 | p. 7, Plakatierung in der Stadt Luzern, in which case a market share above 50 per cent was considered as sufficient to confer dominance. In a more recent decision of the Federal Supreme Court, market shares above the 50 per cent threshold were considered as an indicator for market dominance (Federal Supreme Court, RPW | DPC 2013 | 1, p. 130, Publigroupe).
In any event, market shares constitute mere indicators and are never in themselves sufficient proof of dominance. In practice, the ComCo performs an in-depth analysis of the market characteristics, such as the situation of competitors (current competition), the market entry barriers (potential competition) and the position of the other side of the market (countervailing market power). Such an analysis is made even in cases where the definition of the relevant market reveals market shares of 100 per cent.\(^{12}\) In accordance with the practice of the EU Commission, the ComCo assesses the competitive pressure and market position of the potentially dominant undertaking and its competitors. It also takes into consideration the competitive pressure due to the imminent expansion of already existing competitors or the imminent market entry of new suppliers. Finally, the ComCo assesses the competitive pressure due to the negotiating strength of the other side of the market (i.e., the countervailing buying power). In its more recent practice, the ComCo has analysed the competitive position of the opposite side of the market only in cases of collective dominance. In fact, the ComCo seems to consider that, although the disciplinary effect of countervailing buyer power may prevent abuses in individual cases, it does establish or re-establish the dynamic functions of effective competition.

Market dominance may only be achieved by ‘undertakings’. This corresponds to the personal scope of application of the Cartel Act. According to Article 2 Paragraph 1 bis of the Cartel Act, undertakings are all buyers or suppliers of goods and services active in commerce, regardless of their legal or organisational form. The concept of an undertaking follows an economic approach, based on the entrepreneurial activity of an entity. Therefore, it also covers undertakings governed by public law, as well as private commercial companies part of a public body (e.g., the federal government, cantons or communes).\(^{13}\) In case of groups of companies, the entire group is considered as a single economic entity to the purpose of assessing market dominance.

**Collective dominance**

According to the definition of dominance contained in Article 4 Paragraph 2 of the Cartel Act, a dominant position may be held by one or more undertakings. Thus, collective dominance is also covered by the law. In 1998, the ComCo held for the first time that there was a case of collective dominance.\(^{14}\) Collective dominance requires two (duopoly) or several (oligopoly) undertakings deliberately adopting a parallel (i.e., collusive) behaviour. If the collusive element in the parallel behaviour is lacking, such behaviour is generally legal, as it constitutes the normal reaction of competitors to exogenous market developments.

In its decisional practice, the ComCo has developed several indicators taken into account in the assessment of potential collective dominance:\(^{15}\)

\(\begin{align*}
a & \quad \text{high market concentration (the fewer companies are active on a certain market, the more likely it is for collusion to occur);} \\
b & \quad \text{similar and stable market shares;} \\
c & \quad \text{similar cost structures as well as a personal and financial intertwining between competitors, and the resulting symmetry of interests;} \\
d & \quad \text{high market entry barriers;} \\
\end{align*}\)

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\(^{12}\) RPW | DPC 2008 | 2, p. 242, *Terminierungsgbühren beim SMS-Versand via Large Account.*

\(^{13}\) Federal Supreme Court, BGE 137 II 199, c. 3.1.

\(^{14}\) RPW | DPC 1998 | 3, p. 400 ff., *Bell | SEG-Poulets.*

\(^{15}\) See, more recently and instead of many others, RPW | DPC 2008 | 4, p. 630 ff., *Coop | Carrefour.*
Switzerland

Taking these indicators into consideration, it is necessary to perform an overall assessment of the competitive landscape on the relevant market as well as on the upstream and downstream markets thereof to determine whether the relevant market offers sufficient incentives for durable collective dominance.

In the planned merger between France Télécom SA and Sunrise Communications SA, the ComCo applied the aforementioned criteria. It found that the envisaged merger between these two companies needed to be prohibited since the newly created entity would, together with Swisscom, have held a collectively dominant position in the mobile communications market and, in the absence of new competitors entering said market, would have had no incentive to compete by reducing its prices.

When assessing the planned merger between Switzerland’s two largest ticketing providers, Ticketcorner and Starticket, the ComCo considered potential collective dominance. However, in the case at issue, the ComCo did not find sufficient evidence for the existence of a collectively dominant position.

More recently, the ComCo investigated a potential collective dominance of Booking.com, Expedia and HRS in the market for hotel booking platforms. While it did not formally conclude that the undertakings concerned held a single or joint dominant position, the ComCo did not rule out the existence of such dominant position, either.

IV ABUSE

i Overview

The application of Article 7 of the Cartel Act requires three cumulative pre-conditions to be met: an undertaking is dominant on a certain market; through abusing this dominant position, this undertaking hinders other undertakings from starting or continuing to compete, or disadvantages trading partners; and there are no legitimate business reasons for the abusive behaviour of the dominant undertaking.

These pre-conditions need to be met even for the (non-exhaustive) list of examples of conduct that may be considered as abusive. In other words, the examples of Article 7 Paragraph 2 of the Cartel Act need to be applied in conjunction with its Paragraph 1. Article 7 of the Cartel Act covers both exclusionary and exploitative practices. The first mainly concern competitors while the second aim at harming commercial partners or consumers.

When assessing a potentially abusive behaviour, it is necessary to consider the specific circumstances of the case at hand. The Cartel Act does not contain any per se prohibitions. An assessment on a case-by-case basis is required, taking into consideration the specific market conditions. In particular, it needs to be analysed whether the conditions of a specific (contractual) relationship significantly diverge from those that could be expected in the

16 RPW | DPC 2010 | 3, p. 499, France Télécom | Sunrise Communications.
17 Decision of the ComCo of 22 May 2017; not published in the official ComCo collection of cases (RPW | DPC) yet.
18 RPW 2016 | 1, p. 67, Online-Buchungsplattformen für Hotels.
19 Federal Supreme Court, RPW | DPC 2013 | 1, p. 114, Publigroupe.

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context of effective competition. In practice, the authorities examine the competitive and anticompetitive effects of a certain conduct on the market, in particular when a conduct does not fall under one (or several) of the abuses listed in Article 7 Paragraph 2 of the Cartel Act, but is covered by the umbrella clause of Paragraph 1. The intent of an undertaking to abuse its dominant position is not a necessary requirement for an abusive behaviour to be considered as illegal. However, the presence of such intent facilitates the assessment of a certain competitive behaviour.

As mentioned, the enumeration of abuses contained in Article 7 Paragraph 2 of the Cartel Act is not exhaustive. Other types of conduct not covered by one of the examples listed but meeting the pre-conditions enumerated in Article 7 Paragraph 1 of the Cartel Act fall into the scope of application of this umbrella clause. This is, for example, the case for margin squeeze behaviour.20

Abusive behaviour needs to be distinguished from competition on the merits. This distinction is particularly important to bear in mind when assessing the existence of legitimate business reasons for a certain behaviour. Even a dominant undertaking needs to be allowed to protect its own legitimate business interests by competing on the merits in order to maintain its leading market position. As a result, if a certain practice simply aims at improving the quality of a product (e.g., by requiring from suppliers the respect of a specific standard), such practice shall be considered legitimate even if it may eliminate certain suppliers or competitors.

ii Exclusionary abuses

Exclusionary abuses may take various forms, such as exclusionary pricing, exclusive dealing and refusal to deal or to license, as well as tying and bundling practices.

Refusal to deal

Refusal to deal is the first type of abusive conduct mentioned in the list of examples of Article 7 Paragraph 2 Letter a of the Cartel Act. It should be noted that this provision does not imply a general obligation to contract for dominant undertakings. According to the law, refusal to deal (e.g., refusal to supply or to purchase goods) is only unlawful if it has as its effect (or is likely to have as its effect) the anticompetitive foreclosure of the market and if it cannot be justified by legitimate business reasons (e.g., lack of quality of a certain supplier; precarious financial situation of a prospective franchisee). In particular, a refusal to deal is likely to be considered illegal if a dominant undertaking, by refusing to enter into a business relationship, intends to boycott its business partner or aims at forcing its business partner to behave in a certain way. Moreover, refusal to deal may, under certain circumstances, be considered unlawful if a dominant undertaking refuses to grant access to an essential facility. The concept of refusal to deal includes both the refusal to continue existing business relationships as well as the refusal to enter into new such relationships.

One of the first major cases in which the ComCo applied the ‘essential facilities doctrine’ concerned the refusal of an electricity distribution network company with a local monopoly to transport through its network the electricity from a third-party provider to

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20 See, for example, the case RPW | DPC 2015 | 3, p. 561, Preispolitik Swisscom ADSL, in which the Federal Administrative Court imposed a heavy fine on Swisscom for its margin squeeze practices in the broadband internet sector (ADSL).
a customer located in the monopolist’s territory.\textsuperscript{21} In another significant case, the ComCo fined SIX Group 7 million Swiss francs for refusing to supply interface information to other competitors and thus rendering their products incompatible with the SIX card payment terminals.\textsuperscript{22} In a decision of 2013, the ComCo accepted an amicable settlement between the Secretariat of the ComCo (Secretariat) and Swatch Group, according to which the latter may gradually reduce the supply of third-party customers with mechanical watch movements.\textsuperscript{23} Swatch Group thereby committed to supply certain minimum amounts per year and to treat all customers equally. In 2016, the ComCo fined Swisscom approximately 72 million Swiss francs for having refused to supply certain competitors with broadcasts of live sports for their platforms and for having granted only partial access to a reduced range of sport contents to others.\textsuperscript{24} An appeal against the ComCo decision is currently pending.

As far as refusal to license is concerned, such refusal would generally not be considered as abusive if no standard essential patents are concerned. In fact, it is inherent to intellectual property (IP) rights that the holders of these rights enjoy some form of exclusivity, which will allow them to act independently on the market to a certain extent. Article 3 Paragraph 2 of the Cartel Act explicitly exempts the effects on competition that result exclusively from the legislation governing IP from its scope of application. It is only the modalities to exercise an IP right that may be considered abusive, namely if they go beyond the scope of protection conferred by the IP legislation (e.g., registration of patents for the sole purpose of blocking the technical development of competitors). However, the line is difficult to draw.

\textbf{Exclusive dealing}

Exclusive dealing practices are not enumerated in the list under Article 7 Paragraph 2 of the Cartel Act. They may fall under the umbrella clause of Article 7 Paragraph 1. In a 2016 decision, the Federal Administrative Court found likely abuses of the dominant positions held by the ticketing provider Ticketcorner and the operator of the event location Hallenstadion in Zurich through exclusive dealing practices.\textsuperscript{25} In fact, the operator of the event location imposed an obligation upon event organisers to sell at least 50 per cent (\textit{de facto} resulting in 100 per cent) of all tickets for events in the Hallenstadion via Ticketcorner. The case is currently pending before the Federal Supreme Court.

\textbf{Rebates}

Discrimination between trading partners in relation to prices or other conditions of trade may be unlawful under the Cartel Act (Article 7 Paragraph 2 Letter b). Rebates can be considered as practices discriminating between trading partners, namely where only bigger customers above a certain turnover threshold may benefit from special (more favourable) agreements.\textsuperscript{26} In particular, fidelity rebates are illegal if they reward customers for procuring their entire demand from the same dominant undertaking, independently of the actual quantity procured.\textsuperscript{27} Such rebate systems are considered to impede the market entry of

\begin{footnotesize}
\begin{enumerate}
\item 21 RPW | DPC 2001 | 2, p. 255, \textit{Watt | Migros-EEF}.
\item 22 RPW | DPC 2011 | 1, p. 96, SIX | \textit{Terminals mit Dynamic Currency Conversion (DCC)}.
\item 23 RPW | DPC 2014 | 1, p. 215 ff., \textit{Swatch Group Lieferstopp}.
\item 24 RPW | DPC 2016 | 4, p. 920 ff., \textit{Sport im Pay-TV}.
\item 25 Federal Administrative Court, decision of 24 November 2016, B-3618/2013.
\item 26 RPW | DPC 2008 | 3, p. 385 ff., \textit{Publikation von Arzneimittelinformationen}.
\item 27 RPW | DPC 1997 | 4, p. 506 ff., \textit{Telecom PTT-Fachhändlerverträge}.
\end{enumerate}
\end{footnotesize}
potential competitors since customers are reluctant to switch away from the dominant undertaking granting fidelity rebates. 28 Target rebates are also illegal if they are granted under the condition that the customers achieve certain turnover targets set by the dominant undertaking. Their effect is considered to be comparable to the one of fidelity rebates. On the other hand, quantitative rebates based on cost efficiencies (e.g., economies of scale) are generally legitimate.

By a 2014 decision, the ComCo imposed a fine of approximately 1.9 million Swiss francs on the leading Swiss news agency Schweizerische Depeschenagentur (SDA) for offering exclusivity rebates (which were qualified as fidelity rebates) to a certain group of customers. 29 The ComCo found that, by granting discounts of 20 per cent to customers who agreed to exclusively subscribe to the news service of SDA (without also being subscribed to the news service of a competitor), SDA had abused its dominant position. In the absence of any legitimate business reasons, the exclusivity rebates were considered illegal.

**Predation**

According to the law, any under-cutting of prices or other conditions directed against a specific competitor may be unlawful (Article 7 Paragraph 2 Letter d of the Cartel Act). Such pricing strategies are, however, only illegal if they aim at driving competitors out of the market or preventing new competitors from entering the market (predatory pricing). 30 Typically, a dominant undertaking would, in a first step, under-cut prices of competitors until they leave a certain market, and then in a second step re-increase its prices once the competitive pressure has been decreased (or eliminated). In general, the ComCo is likely to infer that prices under average variable costs are aimed at driving competitors out of the market or preventing new competitors to enter the market. In contrast, low price strategies pursued by a dominant undertaking in order to access new markets or to sell off outdated products are legitimate business practices that shall not be considered as unlawful.

The ComCo has investigated presumed predatory pricing strategies on different occasions 31 without having issued any decisions. In its previous practice, the ComCo has, however, developed some guidance on the conditions under which a pricing practice is likely to be considered abusive:

- a. the price cutting strategy needs to be systematic and occur over a certain period of time;
- b. it is aimed at one or several weaker (actual or potential) competitors;
- c. there is no possibility to increase profits in the short term (as it would be the case if outdated remaining stock was sold at low prices); and
- d. the low prices may be re-increased at a later stage.

**Price or margin squeeze**

As a special form of price discrimination between trading partners (see Article 7 Paragraph 2 Letter b of the Cartel Act), price or margin squeezes may be considered an abuse of a dominant position. The ComCo defines price squeeze as a situation where a vertically integrated dominant undertaking sets its retail prices at a level that is so low compared to
its wholesale prices that equally efficient competitors on the retail market, dependent on procuring a certain good or service from the dominant undertaking on the wholesale market, are not able to compete and make profits in the retail market.\textsuperscript{32}

In 2009, the ComCo fined the telecommunications provider Swisscom approximately 220 million Swiss francs for abuse of its dominant position in the market for broadband internet through margin or price squeeze behaviour.\textsuperscript{33} The ComCo found that, until the end of 2007, Swisscom, which also offered its asymmetric digital subscriber line (ADSL) broadband internet services to end customers on the retail market, charged its competitors such high prices on the wholesale market that those competitors were not able to profitably offer their services on the retail market. The abusive and anticompetitive behaviour was corroborated by the fact that Swisscom generated large profits on the wholesale market, whereas its subsidiary active on the retail market incurred losses. On appeal by Swisscom, the Federal Administrative Court confirmed the ComCo decision in its substance, but reduced the fine imposed to approximately 186 million Swiss francs.\textsuperscript{34} The case is currently pending before the Federal Supreme Court. More recently, the ComCo imposed a fine of approximately 7.9 million Swiss francs on Swisscom for a price squeeze (and other abusive practices) in the wide area network (WAN) sector.\textsuperscript{35} A WAN is a telecommunications or computer network that extends over a large geographical distance. In a public tender process organised by Swiss Post in 2008, Swisscom offered a price for its WAN services that was approximately 30 per cent below its next competitors’ price, the latter having to acquire prior facilities from Swisscom on a wholesale level before being able to offer its WAN services to Swiss Post. Swisscom’s wholesale price for the prior facilities allegedly was significantly above the price with which Swisscom won the public tender, which did not allow any competitor to compete on the retail market. An appeal against the ComCo decision is currently pending before the Federal Administrative Court.

\textit{Tying and bundling}

According to the Cartel Act, any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services is unlawful (Article 7 Paragraph 2 Letter f of the Cartel Act). By such tying practices, a dominant undertaking aims at forcing its trading partners to procure unwanted goods or services in order to be able to procure the goods or services actually wanted. Trading partners are thus restricted in their freedom to take business decisions, whereas competitors are pushed out of the market. Tying practices may be legal if the tied good or service is a necessary prerequisite for the main good or service to be procured. There needs to be a factual link between the two items. Such factual link may exist for technical or safety reasons (e.g., if a licensor requires its licensee to procure certain raw materials for the production of the licensed product from the licensor, given the specific quality or characteristics of the raw materials needed). An indicator for the existence of a factual link between the main product or service and the tied one is the fact that they both belong to the same product markets. Conversely, if separate product markets exist, a factual link requiring tying of both products and services is unlikely.

\textsuperscript{32} RPW | DPC 2010 | 1, p. 146 ff.,\textit{ Preispolitik Swisscom ADSL} and RPW | DPC 2015 | 3, p. 636 ff., \textit{Sanktionsverfügung – Preispolitik Swisscom ADSL}.
\textsuperscript{33} RPW | DPC 2010 | 1, p. 116 ff.,\textit{ Preispolitik Swisscom ADSL}.
\textsuperscript{34} RPW | DPC 2015 | 3, p. 561 ff.,\textit{ Sanktionsverfügung – Preispolitik Swisscom ADSL}.
\textsuperscript{35} RPW | DPC 2016 | 1, p. 128,\textit{ Swisscom WAN-Anbindung}.
The ComCo has investigated tying practices on several occasions, usually denying the finding of an abusive behaviour. In a 2002 case, for example, the Secretariat found that the Swiss national railway company, SBB, holding a dominant position on the main relevant market (but being non-dominant on the tied market), had abused its position through an illegal tying practice. In fact, a company called Lokoop requested an offer from SBB for the use of its railway system on certain routes to transport parcels. In addition, Lokoop requested a separate offer for various extra services at specific train stations (e.g., for the shunting of trains). In response to this request, SBB insisted on offering a bundle of services to Lokoop, which was considered unlawful by the Secretariat. Ultimately, the ComCo closed the investigation without a sanction since SBB agreed to abandon its allegedly abusive tying practice.

iii Discrimination (including discriminatory pricing)
Under the Cartel Act, any discrimination between trading partners in relation to prices or other conditions of trade is considered unlawful (Article 7 Paragraph 2 Letter b of the Cartel Act). As mentioned above, discriminatory practices may appear in different forms, such as loyalty or target rebates granted or accessible only to customers achieving a certain turnover threshold, as well as margin or price squeezes. The term ‘in relation to other conditions of trade’ used by the law is to be interpreted broadly. It covers any contractual provisions entailing an economic advantage or disadvantage (e.g., in regard to discounts or payment terms). However, the prohibition to discriminate between trading partners does not imply a general obligation of equal treatment. Unequal treatment shall be considered unproblematic as long as it can objectively be justified (e.g., quantity rebates, justified by corresponding economies of scale).

iv Exploitative abuses (including excessive pricing)
The imposition of unfair prices or other unfair conditions of trade is considered unlawful (Article 7 Paragraph 2 Letter c of the Cartel Act). To determine if a price is ‘unfair’, it is necessary to examine the market value of the product or service offered and the ability of the dominant undertaking to behave independently in setting its prices. This ability is likely to be a given if customers lack alternatives. The imposition of unfair prices (implying an element of coercion) by a dominant undertaking is thus facilitated. It is unclear whether, under Swiss law, it is necessary to prove the ‘imposition’ as a coercive element under Article 7 Paragraph 2 Letter c of the Cartel Act, or whether it is sufficient to prove the existence of a causal link between the dominant position and the unfair prices.

It is important to note that the prohibition on imposing unfair prices does not imply an obligation to set fair prices. Neither does this prohibition aim at protecting customers from paying unduly high prices. Rather, this provision shall promote effective competition and

36 RPW | DPC 2002 | 1, p. 72 ff., Lokoop v. SBB.
37 In a decision of 2011, the Federal Supreme Court found that, contrary to EU law, the ‘imposition’ as coercive element was a separate requirement under Swiss law that needed to be established (Federal Supreme Court, decision of 11 April 2011, BGE 137 II 199, c. 4, Terminierung Mobilfunk). However, in a more recent case, the Federal Supreme Court amended its previous statement by holding that the Swiss Cartel Act was strongly geared towards EU competition law and that, therefore, the case law under Article 102 TFEU needed to be taken into account (Federal Supreme Court, decision of 29 June 2012, BGE 139 I 72, c. 8.2.3, Publigroupe).
ensure that prices are the result of an interplay between offer and demand. In this context, the ComCo considers that the Federal Price Surveillance Act of 20 December 1985, which aims at the avoidance of abusive pricing, may be applied in parallel.\footnote{38}

In a decision of 2007, the ComCo imposed a record fine of approximately 333 million Swiss francs on Swisscom as it considered its termination rates in the mobile network sector as unfair.\footnote{39} However, the decision was annulled by the Federal Administrative Court and the annulment confirmed by the Federal Supreme Court.\footnote{40} The latter considered that, due to the regulatory framework applicable in the telecommunications sector, Swisscom could not exert any coercion on its trading partners. More recently, the ComCo also fined Swisscom for imposing unfair prices on its competitors when offering its WAN connection services on a wholesale level.\footnote{41}

**V REMEDIES AND SANCTIONS**

**i Sanctions**

An undertaking abusing its dominant position risks a fine of up to 10 per cent of the turnover that it achieved in Switzerland in the preceding three financial years (Article 49a Paragraph 1 of the Cartel Act). The amount of the fine is dependent on the duration and severity of the unlawful behaviour, taking into account the likely profit that resulted from it. For the calculation of the turnover, all reductions such as discounts, rebates, VAT and other consumption taxes as well as other taxes directly related to turnover shall be deducted from the amounts derived by the undertakings concerned from the sale of products and the provision of services within the ordinary business activities of the undertakings concerned (Article 4 Paragraph 1 of the Merger Control Ordinance of 17 June 1996, which is applicable by analogy).

The calculation method for fines is regulated in detail by the Cartel Act Sanctions Ordinance of 12 March 2004. It is important to note that the imposition of a fine is mandatory in the case of an established abuse of a dominant position. Contrary to the laws of other jurisdictions, the Swiss Cartel Act does not provide for sanctions that may be imposed on individuals acting on behalf of an undertaking having abused its dominant position (unless the individual itself qualifies as an undertaking in the sense of the Cartel Act).

The largest fine imposed by the ComCo so far, amounting to 333 million Swiss francs, was cancelled by the Federal Administrative Court and subsequently also by the Federal Supreme Court upon appeal by Swisscom.\footnote{42} Another fine of 220 million Swiss francs imposed on Swisscom for margin-squeeze behaviour in the ADSL market was ultimately reduced by the Federal Administrative Court to approximately 186 million Swiss francs.\footnote{43} An appeal
against this decision is currently pending before the Federal Supreme Court. For further examples of recent fines imposed, please refer to the sections above discussing different abusive behaviour.

ii Behavioural remedies (including interim measures)

Other than imposing a fine, the ComCo has a wide range of decision-making and remedial powers at its disposal. In particular, the ComCo may order injunctions (measures) to cease or desist from an unlawful practice (e.g., order that a contract be entered into in the case of an abusive refusal to deal) (Article 30 Paragraph 1 of the Cartel Act). The ComCo may also, under certain conditions, grant interim relief to terminate a certain abusive conduct or modify specific business practices. In a recent case, however, the ComCo refused to grant interim relief requested by Swisscom in the context of an investigation opened against the largest cable network operator in Switzerland, UPC Schweiz GmbH. The latter is suspected to have abused of its dominant position by the (alleged) refusal to grant access to its ice hockey coverage, for which UPC held exclusive rights, to other competitors (including Swisscom). The ComCo rejected Swisscom's request for interim measures on the grounds that such measures required, inter alia, that, in their absence, competition would suffer a disadvantage that could not easily be rectified. According to the ComCo, this requirement was not fulfilled in the case at hand since it seemed likely that Swisscom would remain active on the relevant market and be able to win back customers at the end of the investigation proceedings.

iii Structural remedies

In abuse of dominance cases, the Cartel Act does not explicitly provide for the possibility for the ComCo to order structural remedies.

VI PROCEDURE

Under the Cartel Act, the investigation procedure for (suspected) restraints of competition, including abuse of dominance cases, follows two stages: a preliminary investigation and an investigation. The Secretariat may open a preliminary investigation ex officio, at the request of undertakings involved or in response to a complaint from third parties (Article 26 Paragraph 1 of the Cartel Act). During this preliminary stage, the Secretariat usually gathers information by sending out questionnaires to the undertaking(s) concerned. It may also propose measures to eliminate or prevent restraints of competition (Article 26 Paragraph 2 of the Cartel Act). If the Secretariat concludes that there are indications of an unlawful restraint of competition, it shall, in consultation with a member of the presiding body of the ComCo, open an investigation (Article 27 Paragraph 1 of the Cartel Act). Such opening of an investigation is published in the Swiss Official Gazette of Commerce (Article 28 of the Cartel Act), as well as (generally) in a press release.

44 There is no explicit provision in the Cartel Act allowing for the possibility to request interim relief. However, based on the general reference of Article 39 of the Cartel Act, the Administrative Procedure Act of 20 December 1968 is applicable, which contains such provision.
45 RPW | DPC 2017 | 3, p. 410 ff., Vorsorgliche Massnahmen - Eishockey im Pay-TV.
46 RPW | DPC 2017 | 3, p. 419, Vorsorgliche Massnahmen - Eishockey im Pay-TV.
In the context of an investigation, the Secretariat has broad investigative powers. It may hear third parties as witnesses and require the parties to an investigation to give evidence (Article 42 Paragraph 1 of the Cartel Act). It may also perform searches (i.e., dawn raids) and seize evidence (Article 42 Paragraph 2 of the Cartel Act). The parties have an obligation to cooperate and a duty to provide information (Article 40 of the Cartel Act). In particular, they must provide the Secretariat with all the information required for the conduct of an investigation and produce the necessary documents. A limit to the obligation to cooperate is the legal principle *nemo tenetur se ipsum accusare* (right against self-incrimination).47 Non-compliance with the obligation to provide information or produce documents can entail an administrative fine of up to 100,000 Swiss francs (Article 52 of the Cartel Act). The Secretariat has published its best practices relied upon in investigations, in particular for searches, seizure of evidence and hearings, in an explanatory note of 6 January 2016 on selected instruments of investigation.48

During the investigation procedure, it is possible to reach an amicable settlement with the Secretariat (and approved by the latter) (Article 29 of the Cartel Act). Moreover, a leniency application may be filed if the undertaking concerned assists in the discovery and elimination of an unlawful restraint of competition (Article 49a Paragraph 2 of the Cartel Act), which may allow for a full or a partial waiver of fines.

Moreover, recently, the Secretariat increasingly seems to use its preferred tool of market investigations in order to detect abuse of dominance cases.

VII PRIVATE ENFORCEMENT

The Cartel Act contains explicit provisions empowering civil courts to issue measures in the case of unlawful hindrance of competition. A person hindered by an unlawful restraint of competition from entering or competing in a certain market is entitled to request the elimination of or desistance from the hindrance; damages and satisfaction in accordance with the Swiss Code of Obligations; and surrender of unlawfully earned profits (Article 12 Paragraph 1 of the Cartel Act). Hindrances of competition include in particular the refusal to deal and discriminatory measures (Article 12 Paragraph 2 of the Cartel Act). Moreover, a plaintiff may request civil courts to rule that any contracts are null and void in whole or in part, or that the person responsible for the hindrance of competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (Article 13 of the Cartel Act).

To date, private enforcement against unlawful practices of dominant undertakings has not been a very successful tool in Switzerland. This is due to various reasons, namely procedural hurdles and an unfavourable standard of proof to claim damages. Nevertheless, in a few specific circumstances, civil court proceedings may be more favourable than administrative proceedings before the ComCo. For example, in cases of a refusal to deal (Article 7 Paragraph 2 Letter a of the Cartel Act), there may be situations in which only a civil court judgment can order a certain business relationship to be entered into in an enforceable

47 RPW | DPC 2015 | 3, p. 590 ff., Sanktionsverfügung – Preispolitik Swisscom ADSL.
48 The explanatory note of 6 January 2016 from the Secretariat on selected instruments of investigation is available (in English) at https://www.weko.admin.ch/weko/en/home/documentation/communications.html.
way (e.g., order to grant access to a trade fair\textsuperscript{49}). Moreover, particularly for cases with a smaller economic significance, civil court proceedings may be preferable since civil courts are obliged to treat each case whereas the ComCo, guided by the discretionary principle, may decide not to consider a case of minor importance. As a result, the ComCo’s reluctance to take cases may mean that civil court proceedings are relatively frequent. In the car industry, for example, it may occur that a garage accredited for a certain brand of cars, whose accreditation is withdrawn, sues the general importer or the car manufacturer, or both, before the civil courts, claiming that there is a certain obligation to continue existing business relationships.

By way of example, in a 2013 decision, the Federal Supreme Court confirmed an order of a lower instance civil court that obliged a cooperative managing a cheese-maturing cellar to grant access to its maturing cellar to a cheese producer\textsuperscript{50}.

\section*{VIII FUTURE DEVELOPMENTS}

Following the rejection by the Swiss Parliament of the proposed revision of the Cartel Act, several individual reform proposals were filed. For example, the parliamentary initiative ‘Excessive import prices. End the Compulsory Procurement on the Domestic Market’ has been filed and admitted by the Commission for Economy. The initiative aims at introducing the concept of ‘relative market power’ (already known under German competition law) into the Swiss legislation. In a nutshell, this shall prevent foreign undertakings from abusing their relative market power by charging higher prices in Switzerland as compared to their prices abroad, subject to legitimate business reasons.

Moreover, in December 2017, the Fair Price Initiative (‘Stop to the Swiss Island of High Prices – Pro Fair Import Prices’), which is a federal popular initiative, was filed and admitted. This initiative is also based on the introduction of the concept of ‘relative market power’ in Swiss law. It aims at ensuring fair prices for consumers in Switzerland, including non-discriminatory purchasing conditions for online sales. Currently, the Federal Council is assessing the initiative and has a deadline of 12 months from filing of the initiative to submit a proposal for a statement on the initiative to the Parliament. Alternatively, the Federal Council may also submit a counterproposal to the initiative, in which case the deadline to do so would be 18 months.

\textsuperscript{49} RPW | DPC 1997 | 4, p. 626 ff., \textit{Teilnahme an einer Fachmesse (Handelsgericht des Kt Aargau)}.

\textsuperscript{50} Federal Supreme Court, decision of 23 May 2013, BGE 139 II 316, \textit{Etivaz}. 

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I INTRODUCTION

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). It provides that ‘any abuse on the part of one or more undertakings individually or through joint venture agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited’.

Pursuant to Article 6, the abusive exploitation of a dominant market position is prohibited in general. Therefore, the Article 6 prohibition applies only to dominant undertakings, and in a similar fashion to Article 102 of the Treaty on the Functioning of the European Union (TFEU) dominance itself is not prohibited: only the abuse of dominance is outlawed. Further, Article 6 does not penalise an undertaking that has captured a dominant share of the market because of superior performance.

Dominance provisions as well as the other provisions of Law No. 4054 apply to all companies and individuals to the extent that they act as an ‘undertaking’ within the meaning of Law No. 4054. An ‘undertaking’ is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Law No. 4054 therefore applies to individuals and corporations alike if they act as an undertaking. State-owned and state-affiliated entities also fall within the scope of the application of Article 6.

Furthermore, Law No. 4054 does not recognise any industry-specific abuses or defences; therefore, certain sectoral independent authorities have competence to regulate certain activities of dominant players in the relevant sectors. For instance, according to the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority, firms with a significant market share are prohibited from engaging in discriminatory behaviour among companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility sharing. Similar restrictions and requirements are also applicable in the energy sector. The sector-specific rules and regulations bring about structural market remedies for the effective functioning of the free market. They do not imply any dominance-control mechanisms. The Turkish Competition Authority (Competition Authority) is the only regulatory body that investigates and condemns abuses of dominance.

On a different note, structural changes through which an undertaking attempts to establish dominance or strengthen its dominant position (for instance in cases of acquisitions)
are regulated by the merger control rules established under Article 7 of Law No. 4054. Nevertheless, a mere demonstration of post-transaction dominance in itself is not sufficient for enforcement under the Turkish merger control rules, but rather ‘a restriction of effective competition’ element is required to deem the relevant transaction as illegal and prohibited. Thus, the principles laid down in merger decisions can also be applied to cases involving the abuse of dominance. For instance, recently the Turkish Competition Board (Competition Board) rejected the acquisition of Ulusoy Ro-Ro by UN Ro-Ro, as it concluded that the transaction will strengthen UN Ro-Ro’s dominant position in the market for Ro-Ro transport between Turkey and Europe; and that UN Ro-Ro would be in a dominant position in the market for port management concerning Ro-Ro ships upon consummation of the transaction.3

On a separate note, mergers and acquisitions are normally caught by the merger control rules contained in Article 7 of Law No. 4054. However, there have been cases, albeit rarely, where the Competition Board found structural abuses through which dominant firms used joint venture agreements as a back-up tool to exclude competitors, which is prohibited under Article 6.4

II YEAR IN REVIEW

According to the Competition Authority’s 2017 statistics, the Competition Board made a decision in 37 pre-investigations or investigations, out of a total of 80, on the basis of allegations regarding violations of Article 4 of Law No. 4054, which prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part of thereof. Further, 29 finalised investigations were carried out on the basis of allegations regarding violation of Article 6 of Law No. 4054, which prohibits any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country. The Competition Board also decided on 13 investigations that have been initiated on the basis of both Article 4 and Article 6 concerns. The remaining one investigation was reviewed under Articles 4, 6 and 7. Accordingly, it would be justified to state that cooperative offences, referring to both horizontal and vertical arrangements, continue to be the area of heaviest enforcement under Turkish competition law.5

Over the past five years, the Competition Board has shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuse of dominance. With regards to cases on abuse of dominance, it is worth emphasising the Competition Board’s recent decision regarding Mey İçki, a subsidiary of Diageo plc, in terms of the interpretation of the non bis in idem principle under the Turkish competition law regime. In April 2016,

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4 See, for example, Biryay, 00-26/292-162, 17 July 2000.
5 In 2016, the Competition Board decided on a total of 83 pre-investigations or investigations. Among these pre-investigations and investigations, 41 concerned violations of Article 4 of Law No. 4054, 29 concerned violations of Article 6 of Law No. 4054 and 13 cases were evaluated from the aspect of both Article 4 and Article 6.
the Competition Board launched an investigation against Mey İçki aimed at exploring the validity of allegations of abuse of dominance in the Turkish markets for vodka and gin. After 18 months of investigation, the Competition Board found that:

- **a** Mey İçki holds dominant position in the vodka and gin markets by unanimous vote;
- **b** Mey İçki has violated Article 6 of Law No. 4054 in the vodka and gin markets with unanimous vote; and
- **c** Mey İçki has been subjected to an administrative monetary fine for the consequences of the same strategy in the raki (traditional Turkish spirit) market, and that there is no room for a further administrative monetary fine imposition by majority vote.\(^6\)

With regards to the fight against cartels, the Competition Board recently levied an administrative monetary fine within an investigation launched against 13 financial institutions, including local and international banks, active in the corporate and commercial banking markets in Turkey. The main allegations concerned the exchange of competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. After 19 months of in-depth investigation, the Competition Board unanimously concluded that Bank of Tokyo-Mitsubishi UFJ AŞ (BTMU), ING Bank AŞ (ING) and the Royal Bank of Scotland Plc, Merkezi Edinburgh, İstanbul Merkez Şubesi (RBS) violated Article 4 of Law No. 4054 on Agreements, Concerted Practices and Decisions Limiting Competition. In this respect, the Competition Board imposed an administrative monetary fine on ING and RBS in an amount of 21.1 million lira and 66,400 lira, respectively, over their annual turnover in the 2016 financial year. However, the Competition Board resolved that BTMU should not have an administrative monetary fine imposed upon it pursuant to its leniency application granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine.\(^7\)

The following table shows the Competition Board’s most recent landmark decisions regarding abuse of dominance:

<table>
<thead>
<tr>
<th>Date and number of the Competition Board decision</th>
<th>Summary of the case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Akdeniz Elektrik Dağıtım AŞ, CK Akdeniz Elektrik Perakende Satış AŞ and AK DEN Enerji Dağıtım ve Perakende Satış Hizmetleri AŞ, No. 18-06/101-52, 20 February 2018</td>
<td>The Competition Board concluded that Akdeniz Elektrik Dağıtım AŞ and CK Akdeniz Elektrik Perakende Satış AŞ abused their dominant position in the Mediterranean region within the retail electricity distribution market.</td>
</tr>
<tr>
<td>Mey İçki, No.17-34/537-228, 25 October 2017</td>
<td>In October 2017, at the end of a full-fledged investigation launched against Mey İçki to determine whether it had abused its dominant position, thereby hindering its competitors in vodka and gin markets, the Competition Board concluded that Mey İçki abused its dominant position in the relevant market. However, it decided that there is no need to impose a further administrative monetary fine on Mey İçki, since it already had an administrative monetary fine imposed on it for the consequences of the same conduct in the raki market within the same time period (No. 17-34/537-228, 25 October 2017). To that end, the decision is candidate to set a landmark precedent in terms of the interpretation of the <em>non bis in idem</em> principle under the Turkish competition law regime.</td>
</tr>
</tbody>
</table>

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The Competition Board fined Booking.com and concluded that it had abused its dominant position through imposing most favoured customer (MFC) clauses in its contracts with the accommodation facilities.

High-profile investigations of the Competition Authority that are ongoing at the time of writing are provided in the table below:

<table>
<thead>
<tr>
<th>Investigated party</th>
<th>Alleged abuse of dominance activity</th>
<th>Date of initiation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Air Ekspres Dağıtım Taşımacılık Lojistik Hizmetleri ve Tic Ltd Şti, Aras Kargo Yurtiçi Yurtdışı Taşımacılık AŞ, Asılkar Lojistik Dağı Hır Iç ve Dış Tic Ltd Şti, MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık AŞ, Paket Taşımacılık Sistemleri ve Turizm Bilgisayar Ticaret AŞ, Solmaz Nakliyat ve Ticaret AŞ, STF Kargo Nakliyat Ticaret Ltd Şti, TNT International Express Taşımacılık Ticaret Ltd Şti ve Unsped Paket Servisi San ve Tic AŞ</td>
<td>Restricting competition through customer allocation</td>
<td>15 February 2018</td>
</tr>
<tr>
<td>Arçelik Pazarlama AŞ and Vestel Ticaret AŞ</td>
<td>Restricting competition by exchanging competition-sensitive information</td>
<td>8 February 2018</td>
</tr>
<tr>
<td>Tirsan Karaden Sanayi ve Ticaret AŞ and Tiryakiler Yedek Paçası Sanayi ve Ticaret AŞ</td>
<td>Restricting competition by abuse of dominance</td>
<td>8 February 2018</td>
</tr>
<tr>
<td>Oncosrem Onkolojik Sistemler San ve Tic AŞ, Santek Sağlık Tırt Tıksı San ve Tic AŞ, Meditera İthalat ve İhracat AŞ, Onkofar Sağlık Ürünleri San ve Tic AŞ, İnovtek Sağlık Teknolojileri Tic Ltd Şti ve Korulu Grup Sağlık Hizmet İmarat Taahhüt Makina Temizlik San ve Tic Ltd Şti</td>
<td>Restricting competition by colluding in tenders for chemotherapy medication</td>
<td>18 January 2018</td>
</tr>
<tr>
<td>Google Inc, Google International LLC and Google Reklamcılık ve Pazarlama Ltd Şti</td>
<td>Restricting competition through practices related to offering mobile operating systems and mobile applications and services</td>
<td>6 March 2017</td>
</tr>
<tr>
<td>Enerjisa Enerji AŞ, Toroslar Elektrik Dağıtım AŞ, Enerjisa Toroslar Elektrik Perakende Satış AŞ, Başkent Elektrik Dağıtım AŞ, Enerjisa Başkent Elektrik Perakende Satış AŞ, İstanbul Anadolu Yakası Elektrik Dağıtım AŞ and Enerjisa İstanbul Anadolu Yakası Elektrik Perakende Satış AŞ</td>
<td>Restricting competition through aggravating independent suppliers' activities and preventing consumers from choosing their own supplier</td>
<td>27 January 2017</td>
</tr>
<tr>
<td>Sahibinden Bilgi Teknolojileri Paz ve Tic AŞ</td>
<td>Restricting competition within the online automotive advertisement market by abusing its dominant position through predatory pricing</td>
<td>27 September 2017</td>
</tr>
<tr>
<td>Sony Eurasia Pazarlama AŞ</td>
<td>Restricting competition by resale price maintenance exercised on its distributors</td>
<td>7 September 2017</td>
</tr>
</tbody>
</table>

III MARKET DEFINITION AND MARKET POWER

The definition of dominance can be found in Article 3 of Law No. 4054, which states that ‘the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution independently from competitors and customers’. Enforcement trends show that the Competition Board is inclined to broaden
the scope of application of the Article 6 prohibition by diluting the ‘independence from competitors and customers’ element of the definition to infer dominance even in cases where clear dependence or interdependence between either competitors or customers exists.8

When unilateral conduct is in question, dominance in a market is the primary condition for the application of the prohibition stipulated in Article 6. For establishing a dominant position, first the relevant market has to be defined, and secondly the market position has to be determined. The relevant product market includes all goods or services that are substitutable from a customer’s point of view. The Guideline on Market Definition considers demand-side substitution as the primary standpoint of the market definition. Thus, the undertakings concerned have to be in a dominant position in the relevant markets, which are to be determined for every individual case and circumstance. Under Turkish competition law, the market share of an undertaking is the primary point for evaluating its position in the market. In theory, there is no market share threshold above which an undertaking will be presumed to be dominant. On the other hand, subject to exceptions, an undertaking with a market share of 40 per cent is a likely candidate for dominance, whereas a firm with a market share of less than 25 per cent would not generally be considered dominant.

In assessing dominance, although the Competition Board considers a large market share as the most indicative factor of dominance, it also takes account of other factors such as legal or economic barriers to entry, and the portfolio power and financial power of the incumbent firm. Thus, domination of a given market cannot be solely defined on the basis of the market share held by an undertaking or other quantitative elements: other market conditions, as well as the overall structure of the relevant market, should also be assessed in detail.

Collective dominance is also covered by Article 6. On the other hand, precedents concerning collective dominance are not mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.9

Being closely modelled on Article 102 of the TFEU, Article 6 of Law No. 4054 is theoretically designed to apply to unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in Article 6. In practice, however, indications show that the Competition Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of Article 4, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows Article 4 enforcement against a ‘discriminatory practice of even a non-dominant undertaking’ or ‘refusal to deal of even a non-dominant undertaking’ under Article 4, the Competition Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm.

Owing to this peculiar concept (i.e., Article 4 enforcement becoming a fall-back to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain

8 See, for example, Anadolu Cam, 04-76/1086-271, 1 December 2004; Warner Bros, 07-19/192-63, 8 March 2007.
9 See, for example, Turkcell/Telsim, 03-40/432-186, 9 June 2003; Biryay, 00-26/292-162, 17 July 2000.
unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) if it has been reviewed under Article 4 (restrictive agreement rules). The Booking.com and Trakya Cam decisions are the latest examples of this same trend. In Booking.com,\(^\text{10}\) the Competition Board analysed whether Booking.com, which was found to be in a dominant position in the online accommodation reservation platform services market, lessened competition in the said market through the ‘best price guarantee’ practices in terms of the booking services they offer. Booking.com was fined for violation of Articles 4 and 6 of Law No. 4054. In Trakya Cam,\(^\text{11}\) the Competition Board assessed that Trakya Cam Sanayii AŞ de facto implemented distribution agreements in 2016 that had been determined to be in violation of Articles 4 and 6 of Law No. 4054 through a Board decision dated 2 December 2015,\(^\text{12}\) and revoked the individual exemption granted to Trakya Cam’s industrial customer purchasing agreement that it signed with its industrialist customers. Trakya Cam was fined 17,497,141.63 lira, and it was decided that 18 of its distributors would be given written notices by Trakya Cam stating that there is no regional exclusivity, and that therefore they may conduct sales activities throughout Turkey.

IV ABUSE

i Overview

As mentioned above, the definition of abuse is not provided under Article 6. Although Article 6 does not define what constitutes ‘abuse’ \(\textit{per se}\), it provides five examples of prohibited abusive behaviour, which forms a non-exhaustive list, and falls to some extent in line with Article 102 of the TFEU. These examples are as follows:

\(\textbf{a}\) directly or indirectly preventing entry into the market or hindering competitor activity in the market;

\(\textbf{b}\) directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;

\(\textbf{c}\) making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions such as:

\(\textbullet\) the purchase of other goods and services;

\(\textbullet\) acceptance by intermediary purchasers of the display of other goods and services; or

\(\textbullet\) maintenance of a minimum resale price;

\(\textbf{d}\) distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and

\(\textbf{e}\) limiting production, markets or technical development to the prejudice of consumers.

Moreover, Article 2 of Law No. 4054 adopts an effects-based approach for identifying anticompetitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of the conduct at issue. Notably, the concept of abuse covers exploitative, exclusionary and discriminatory practices. Theoretically, a causal link must be shown between dominance and abuse. The Competition Board does not yet apply a stringent test of causality, and it has in the past inferred abuse from the same set of circumstantial evidence that was employed in

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\(^\text{10}\) Booking.com, 17-01/12-4, 5 January 2017.

\(^\text{11}\) Trakya Cam, 17-41/641-280, 14 December 2017.

\(^\text{12}\) No. 15-42/704-258.
demonstrating the existence of dominance. Furthermore, abusive conduct on a market that is different from the market subject to a dominant position is also prohibited under Article 6. On the other hand, previous precedents show that the Competition Board is yet to review any allegation of other forms of abuse, such as:.

- strategic capacity construction;
- predatory product design or product innovation;
- failure to pre-disclose new technology;
- predatory advertising; or
- excessive product differentiation.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board. That said, complaints on this basis are frequently dismissed by the Competition Authority due to its welcome reluctance to micromanage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims. Nonetheless, in the UN Ro-Ro case, UN Ro-Ro was found to abuse its dominant position through predatory pricing and faced administrative monetary fines.

Furthermore, in line with EU jurisprudence, price squeezes may amount to a form of abuse in Turkey, and recent precedents involved an imposition of monetary fines on the basis of price squeezing. The Competition Board is known to closely scrutinise price-squeezing allegations.

Exclusive dealing

Although exclusive dealing, non-compete provisions and single branding normally fall within the scope of Article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be raised within the context of Article 6.

On a separate note, Block Exemption Communiqué No. 2002/2 on Vertical Agreements no longer exempts exclusive vertical supply agreements of an undertaking holding a market share above 40 per cent. Thus, a dominant undertaking is an unlikely candidate to engage in non-compete provisions and single-branding arrangements.

Additionally, although Article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute a form of abusive behaviour. In Turkcell, the Competition Board condemned the defendant for abusing its dominance in

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15 UN Ro-Ro, 12-47/1412-474, 1 October 2012.
17 See, for example, Mey İçki, 14-21/410-178, 12 June 2014.
18 Turkcell, 09-60/1490-37, 23 December 2009.
by, *inter alia*, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that work with its competitors. The Competition Board also condemned Doğan Yayıncılık Holding for abusing its dominant position in the market for advertisement spaces in the daily newspapers by applying loyalty-inducing rebate schemes.\(^{19}\)

**Leveraging**

Tying and leveraging are among the specific forms of abuse listed in Article 6. The Competition Board has assessed many tying, bundling and leveraging allegations against dominant undertakings, and has ordered certain behavioural remedies against incumbent telephone and internet operators in some cases, to make them avoid tying and leveraging.\(^{20}\)

**Refusal to deal**

Refusal to deal and grant access to essential facilities are forms of abuse that are frequently brought before the Competition Authority, and there have been various decisions by the Competition Board concerning these matters.\(^ {21}\)

**iii Discrimination**

Both price and non-price discrimination may amount to abusive conduct under Article 6. The Competition Board has in the past found incumbent undertakings to have infringed Article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions.\(^ {22}\)

**iv Exploitative abuses**

Exploitative prices or terms of supply may be deemed to be an infringement of Article 6, although the wording of the law does not contain a specific reference to this concept. The Competition Board has condemned excessive or exploitative pricing by dominant firms.\(^ {23}\) That said, complaints on this basis are frequently dismissed by the Competition Authority because of its above-mentioned reluctance to micromanage pricing behaviour.

**V REMEDIES AND SANCTIONS**

**i Sanctions**

The sanctions that could be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In the case of a proven abuse of dominance, the incumbent undertakings concerned shall be (separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if

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19 Doğan Holding, 11-18/341-103, 30 March 2011.
20 See, for example, TTNET-ADSL, 09-07/127-38, 18 February 2009, Türk Telekomünikasyon AŞ 16-20/326-146, 9 June 2016.
21 See, for example, POAS, 01-56/554-130, 20 November 2001; Eti Holding, 00-50/533-295, 21 December 2000; AK-Kim, 03-76/925-389, 12 April 2003; Çukurova Elektrik, 03-72/874-373, 10 November 2003; Congresium Ato 16-35/604-269, 27 October 2016
22 See, for example, TTAŞ, 02-60/755-305, 2 October 2002; Türk Telekom/TTNet, 08-65/1055-411, 19 November 2008; MEDAŞ 16-07/134-60, 2 March 2016; Türk Telekom, 16-20/326-146, 9 June 2016.
23 See, for example, Tüpraş, 14-03/60-24, 17 January 2014; TTAŞ, 02-60/755-305, 2 October 2002; Belko, 01-17/150-39, 6 April 2001; Soda 16-14/205-89, 20 April 2016 (the Competition Board did not initiate a full-fledged investigation).
this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account. Employees or members of the executive bodies of the undertakings or association of undertakings (or both) that had a determining effect on the creation of the violation are also fined up to 5 per cent of the fine imposed on the undertaking or association of the undertaking. Following amendments in 2008, the new version of Law No. 4054 makes reference to Article 17 of the Law on Minor Offences to require the Competition Board, when determining the magnitude of a monetary fine, to take into consideration factors such as:

1. the level of fault and amount of possible damage in the relevant market;
2. the market power of the undertakings within the relevant market;
3. the duration and recurrence of the infringement;
4. the cooperation or driving role of the undertakings in the infringement;
5. the financial power of the undertakings; and
6. compliance with commitments.

Additionally, Article 56 of Law No. 4054 provides that agreements and decisions of trade associations that infringe Article 4 are invalid and unenforceable with all their consequences. The issue of whether the ‘null and void’ status applicable to agreements that fall foul of Article 4 may be interpreted to extend to cover contracts entered into by infringing dominant companies is a matter of ongoing controversy. However, contracts that give way to or serve as a vehicle for an abusive contract may be deemed invalid and unenforceable because of violation of Article 6.

The highest fine imposed to date in relation to abuse of a dominant position was in Tüpraş,24 where Tüpraş incurred an administrative fine of 412 million lira (equal to 1 per cent of the undertaking’s annual turnover for the relevant year).

In addition to monetary sanctions, the Competition Board is authorised to take all necessary measures to terminate infringements, to remove all de facto and legal consequences of every action that has been taken unlawfully, and to take all other necessary measures to restore the level of competition and status to the condition they were in before the infringement.

**ii Behavioural and structural remedies**

Law No. 4054 authorises the Competition Board to take interim measures until the final resolution on a matter in cases where there is a possibility of serious and irreparable damage.

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural or behavioural remedies (i.e., require undertakings to adhere to certain conducts, such as granting access, supplying goods or services, or concluding a contract). Failure by a dominant firm to meet the requirements so ordered by the Competition Board would lead to an investigation, which may result in a finding of infringement. The legislation does not explicitly empower the Competition Board to demand performance of a specific obligation, such as granting access, supplying goods or services, or concluding a contract through a court order.

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24 Tüpraş, 14-03/60-24, 17 January 2014.
VI PROCEDURE

The Competition Board is entitled to launch an investigation into an alleged abuse of dominance *ex officio* or in response to a complaint. In the event of a complaint, the Competition Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Competition Board remains silent for 60 days. The Competition Board decides to conduct a pre-investigation if it finds a notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (e.g., formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Competition Board within 30 days of a pre-investigation decision being taken by the Competition Board. It will then decide within 10 days whether to launch a formal investigation. If the Competition Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months, by the Competition Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30 days to reply to the additional opinion (third written defence). When the parties’ responses to the additional opinion are served on the Competition Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held *ex officio* or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Competition Board. The Competition Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Competition Board to serve a reasoned decision on the counterparty.

The Competition Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2018 is 21,036 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Recently, the Competition Board imposed
a monetary fine of 7,551,953.95 lira on Türk Telekom for providing false or misleading
information or documents within an investigation conducted on Türk Telekom and TTNet
to determine whether their pricing behaviour violated Article 6 of Law No. 4054.25

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site
investigations. Accordingly, the Competition Board can:

a. examine the books, paperwork and documents of undertakings and trade associations,
and, if need be, take copies of the same;

b. request undertakings and trade associations to provide written or verbal explanations
on specific topics; and

c. conduct on-site investigations with regard to any asset of an undertaking.

Law No. 4054 therefore provides broad authority to the Competition Authority on dawn
raids. A judicial authorisation is obtained by the Competition Board only if the subject
undertaking refuses to allow the dawn raid. Computer records are fully examined by the
experts of the Competition Authority, including deleted items.

Officials conducting an on-site investigation need to be in possession of a deed of
authorisation from the Competition Board. The deed of authorisation must specify the
subject matter and purpose of the investigation. The inspectors are not entitled to exercise
their investigative powers (copying records, recording statements by company staff, etc.) in
relation to matters that do not fall within the scope of the investigation (i.e., that which
is written on the deed of authorisation). Refusal to grant Competition Authority staff
access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the
turnover generated in the financial year preceding the date of the fining decision (if this is
not calculable, the turnover generated in the financial year nearest to the date of the fining
decision will be taken into account). The minimum fine for 2018 is 21,036 lira. It may also
lead to the imposition of a periodic daily-based fine of 0.05 per cent of the turnover generated
in the financial year preceding the date of the fining decision (if this is not calculable, the
turnover generated in the financial year nearest to the date of the fining decision will be taken
into account) for each day of the violation.

Final decisions of the Competition Board, including decisions on interim measures and
fines, can be submitted to judicial review before the administrative courts by filing a lawsuit
within 60 days of receipt by the concerned parties of the Competition Board’s reasoned
decision. Filing an administrative action does not automatically stay the execution of the
Competition Board’s decision (Article 27, Administrative Procedural Law).

After the recent legislative changes, administrative litigation cases (and private
litigation cases) are now subject to judicial review before the newly established regional courts
(appellate courts), creating a three-level appellate court system consisting of administrative
courts, regional courts and the Council of State (the court of appeals for private cases). The
regional courts will go through the case file both on procedural and substantive grounds,
and investigate the case file and make their decision considering the merits of the case. The
regional courts’ decisions will be considered as final in nature. A decision of a regional court
will be subject to the Council of State’s review in exceptional circumstances, which are set
forth in Article 46 of the Administrative Procedure Law. In such cases, a decision of a regional
court will not be considered as a final decision, and the Council of State may decide to uphold
or reverse the regional court’s decision. If a decision is reversed by the Council of State, it will

be returned to the deciding regional court, which will in turn issue a new decision that takes into account the Council of State’s decision. As the regional courts are only newly established, we have no experience yet as to how long it takes for a regional court to finalise its review on a file. Accordingly, the Council of State’s review period (for a regional court’s decision) within the new system also needs to be tested before an estimated time frame can be provided.

Third parties can also challenge a Competition Board decision before the competent judicial tribunal, subject to the condition that they prove their legitimate interest.

VII PRIVATE ENFORCEMENT

A dominance matter is primarily adjudicated by the Competition Board. Enforcement is also supplemented with private lawsuits. Article 57 et seq. of Law No. 4054 entitle any persons who are injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages plus litigation costs and legal fees. Therefore, Turkey is one of the few jurisdictions in which a treble damages clause exists in the law. In private suits, incumbent firms are adjudicated before regular courts. Because the treble damages clause allows litigants to obtain three times their losses as compensation, private antitrust litigations are increasingly making their presence felt in the Article 6 enforcement arena. Most courts wait for the decision of the Competition Board, and form their own decision based on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on refusal to supply allegations.

VIII FUTURE DEVELOPMENTS

During 2017, the Turkish Competition Authority has covered significant ground on harmonising the Turkish legislative framework in the field of competition law with EU legislation, and the year witnessed fundamental changes in important regulations and supporting guidelines. In this respect:

a The Competition Authority completed its work on revising the Guidelines on Vertical Agreements, which were issued based on Communiqué No. 2002/2 on Vertical Agreements. It took approximately two years for the Competition Authority to finalise its work, and it published the updated version of the Guidelines on its official on 30 March 2018. The amended Guidelines on Vertical Agreements include new provisions concerning internet sales and MFC clauses.

b The Competition Authority published Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 on Mergers and Acquisitions Subject to the Approval of the Competition Board on 24 February 2017 on its official website.


The recent enforcement trend of the Competition Authority shows that it is becoming more and more interested in the review of MFN clauses. In the recent Yataş case, the allegations

were concerned with claims that through its ‘best price guarantee’ campaign, Yataş was restricting competition by either acting in cooperation with its independent retailers or pressuring them with abusive pricing policies. In this regard, the complainant requested the Board to ensure the application of the sanctions adopted in its past decisions concerning MFC or most favoured nation clauses. Ultimately, the Competition Board decided not to initiate a full-fledged investigation at the end of the preliminary review process. Other recent instances where the Competition Board conducted a review on MFC and most favoured nation clauses include the Booking.com27 and Yemeksepeti28 decisions.

In 2013, the Competition Authority prepared the Draft Competition Law (Draft Law). In 2015, the Draft Law was under discussion in the Parliament’s Industry, Trade, Energy, Natural Sources and Information Technologies Commission. The Draft Law proposed various changes to the current legislation, in particular to provide efficiency regarding time and resource allocation in terms of procedures set out under the current legislation. The Draft Law became obsolete as a result of the general elections in June 2015. The Competition Authority has requested the re-initiation of the legislative procedure concerning the Draft Law, as noted in its 2015 Annual Report. However, at the time of writing, there is no indication of whether the Draft Law can be expected to be renewed any time soon.

28 Yemeksepeti, 16-20/347-156, 9 June 2016.
INTRODUCTION

For as long as the United Kingdom remains an EU Member State, the provisions of Article 102 of the Treaty on the Functioning of the European Union (TFEU) will continue to apply in the United Kingdom.²

The United Kingdom has also implemented national legislation that substantially mirrors the provisions of Article 102, contained in Chapter 2 of the Competition Act 1998 (Act). Section 18 of the Act provides that, subject to limited exclusions, ‘any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom’ (Chapter 2 Prohibition). The UK competition authorities and courts are required to interpret the relevant provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission.³

Public enforcement of UK and EU competition law is carried out primarily by the Competition and Markets Authority (CMA).⁴ In addition to the CMA, the following sectoral regulators have the power to enforce competition law in their sectors:

<table>
<thead>
<tr>
<th>Regulator</th>
<th>Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Aviation Authority (CAA)</td>
<td>Air traffic services and airport operation services in the UK</td>
</tr>
<tr>
<td>Financial Conduct Authority (FCA)</td>
<td>Financial services in the UK</td>
</tr>
<tr>
<td>Monitor (part of NHS Improvement)*</td>
<td>Healthcare services in England</td>
</tr>
<tr>
<td>Northern Ireland Authority for Utility Regulation</td>
<td>Gas, electricity, water and sewerage services in Northern Ireland</td>
</tr>
<tr>
<td>Office of Communications (Ofcom)</td>
<td>Electronic communications, broadcasting and postal services in the UK⁵</td>
</tr>
<tr>
<td>Office of Gas and Electricity Markets (Ofgem)</td>
<td>Gas and electricity in Great Britain</td>
</tr>
<tr>
<td>Office of Rail and Road (ORR)</td>
<td>Railway services in Great Britain</td>
</tr>
<tr>
<td>Payment Systems Regulator (PSR)†</td>
<td>Payment systems in the UK</td>
</tr>
</tbody>
</table>

¹ Paul Gilbert is counsel and John Messent is an associate at Cleary Gottlieb Steen & Hamilton LLP. They are grateful for the assistance of their colleague, Philip Herbst.

² See Section VIII on the implications of the UK’s withdrawal from the EU.

³ Section 60 of the Act.

⁴ The CMA was created on 1 October 2013, and acquired its powers and responsibilities on 1 April 2014. It replaced two former public authorities: the Office of Fair Trading (OFT) and the Competition Commission (CC). The OFT had powers to enforce the prohibitions in Articles 101 and 102 of the TFEU and the equivalent UK prohibitions, as well as to carry out Phase I merger reviews and market studies. The CC was a reference body carrying out Phase II merger reviews, market investigations and certain regulatory appeals. Where relevant, this chapter refers to the former OFT and CC.
The United Kingdom has also established a specialist competition court, the Competition Appeal Tribunal (CAT). Any person who is found to have infringed Article 102 or the Chapter 2 Prohibition by the CMA or a regulator has a right of appeal to the CAT. The CAT can also hear follow-on damages claims in competition cases and, since October 2015, has had the power to hear stand-alone claims for damages or injunctive relief, or both. The civil courts can also hear competition claims, but may transfer cases to the CAT.

When enforcing Article 102 and the Chapter 2 Prohibition, the CMA and regulators have regard to the European Commission’s ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’. The CMA also has regard to its own substantive and procedural guidance (including previous OFT guidance that the CMA has formally adopted). These include:

- ‘Abuse of a dominant position’, December 2004;
- ‘Assessment of market power’, December 2004;
- ‘Involving third parties in Competition Act investigations’, April 2006;
- ‘CMA Powers of Investigation of anti-competitive behaviour’, December 2004; and

Separately, the CMA has the power to investigate markets as a whole by carrying out market studies. At the end of a market study, the CMA can make recommendations to businesses and government, or initiate enforcement actions under other statutory powers (including the Chapter 2 Prohibition and Article 102). If the CMA has reasonable grounds for suspecting that a feature of a market is preventing, restricting or distorting competition, it can initiate a full market investigation. A market investigation can also be initiated by any of the concurrent regulators (listed above) or by the Secretary of State. Following a market investigation, the CMA has the power to tackle any features having an adverse effect on competition (including unilateral conduct features) by imposing a wide range of remedies. The identification of anticompetitive features in a market investigation is not a finding that market participants have infringed the law, and remedies are intended to be prospective rather than punitive.

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5 Section 46 of the Act.
6 2009/C 45/02.
7 The investigation procedures followed by the sectoral regulators differ in some respects from the CMA’s procedures.
II YEAR IN REVIEW

i Levels of public enforcement
The CMA has investigated relatively few dominance cases in recent years, but is currently pursuing six dominance investigations. Two main reasons are usually cited to explain the relative lack of enforcement by the CMA:

a cross-border cases affecting the United Kingdom often fall to be investigated by the European Commission, depriving the CMA of jurisdiction to investigate the same conduct in parallel (which is likely to change after the United Kingdom leaves the EU); and

b cases involving natural monopolies generally fall to be investigated by the concurrent sectoral regulators.

On top of this, the CMA can investigate unilateral behaviour through market studies and investigations, which allows it to address perceived competition concerns in a market without the need for formal enforcement action.

Recent government reforms have sought to encourage greater use of competition law enforcement by the sectoral regulators in particular. These regulators now have a duty to apply ex post competition law in preference to ex ante regulation where possible. The government has placed a responsibility on the CMA to monitor the work of sectoral regulators and, if appropriate, take enforcement action in their sectors. The CMA is also obliged to publish an annual report on the functioning of the concurrency regime as soon as practicable after the end of each financial year,8 and the Secretary of State retains a right to remove concurrent powers from sectoral regulators if they are not used.

Nevertheless, in February 2016, the National Audit Office (NAO) published a critical report into the UK competition regime that strongly encouraged the CMA and the concurrent sectoral regulators to find ways to increase levels of competition enforcement. CMA enforcement activity (in dominance cases and more generally) has increased following the publication of the NAO report. Dr Michael Grenfell, the CMA’s Executive Director for Enforcement, referred in November 2017 to ‘the CMA’s recent efforts to ramp up competition enforcement’.9 In 2017, the CMA and sectoral regulators opened four new dominance cases, issued statements of objections in four cases, accepted binding commitments in one case, and closed three other cases (two on grounds of administrative priorities, and one where it found there were no grounds for action). No infringement decisions were issued in dominance cases in 2017.

ii Major developments in public enforcement
The CMA issued four statements of objections in 2017 and closed one investigation on the basis of binding commitments. One of the statements of objections was issued to new parties that had recently acquired a business to which a statement of objections had already been issued.

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8 The fourth Annual Report was published on 30 April 2018. The CMA also published a ‘Baseline Report’ on concurrency on 1 April 2014.

All four of the statements of objections issued by the CMA in 2017 concern the supply of pharmaceutical products to the NHS, including an allegation that Concordia charged the NHS excessive prices. This is the latest in a series of excessive pricing cases. At the end of 2016, the CMA imposed record fines on Pfizer and Flynn (of circa £90 million) for increasing the price of phenytoin sodium by 2,600 per cent, and issued a statement of objections to Actavis UK for increasing the price of hydrocortisone tablets by over 12,000 per cent. Appeals by Pfizer and Flynn were heard before the CAT in November 2017. The CMA’s enforcement activity in respect of allegedly excessive prices represents a departure from its historic reluctance to bring such cases, as well as marking a shift from its previous focus on exclusionary abuses.

Infringement decisions, statements of objections and commitments decisions

Concordia and Actavis UK

In March 2017, the CMA issued a statement of objections to Concordia and Actavis UK relating to the supply of hydrocortisone tablets. The CMA alleges that the parties have infringed Article 101 and the Chapter 1 Prohibition (prohibitions on anticompetitive agreements) by agreeing that Actavis UK would supply Concordia with hydrocortisone tablets at a low price for resale in the UK, thereby incentivising Concordia not to enter the market with its own competing version of hydrocortisone tablets. The CMA also alleged that Actavis UK had abused its dominant position by inducing Concordia to delay its independent entry into the market.

Merck Sharp & Dohme Ltd

In May 2017, the CMA issued a statement of objections to Merck Sharp & Dohme Ltd (MSD), alleging that MSD had operated an anticompetitive discount scheme for the biological medicine Remicade. The CMA provisionally found that MSD sought to restrict competition from generic ‘biosimilar’ products through a discount scheme. Remicade, a brand of infliximab, is used to treat patients with gastroenterology and rheumatology conditions such as Crohn’s disease and arthritis.

ATG Media

In June 2017, the CMA accepted binding commitments and closed its investigation into the supply by ATG Media of live online bidding (LOB) services to auction houses. LOB platforms are used by auction houses to allow for LOB without bidders having to attend the auction house in person.

The CMA was concerned that ATG Media had imposed restrictions on auction house customers, preventing them from using a competing LOB platform. These restrictions included provisions requiring auction houses to offer no less favourable terms to bidders introduced through ATG Media’s platform as to those introduced through third-party or in-house LOB platforms. Other potentially exclusionary provisions included exclusivity conditions and restrictions on the promotion of competing services by competitors.

The CMA closed the case on the basis of binding commitments that ATG Media would not enter into any arrangement restricting auction houses from using competing suppliers; charging lower fees to users of other LOB platforms; or advertising the services of other LOB platforms.
platforms. The CMA also received an application under Section 35 of the Act for interim measures, which became redundant (shortly before the CMA was due to decide whether to impose interim measures) when the CMA accepted commitments.

**Intas Pharmaceuticals Limited and Accord Healthcare Limited**

In August 2017, the CMA issued a statement of objections to Intas Pharmaceuticals Limited and Accord Healthcare Limited, which acquired Actavis UK in January 2017, alleging that Actavis UK was charging excessive and unfair prices in relation to the supply of hydrocortisone tablets in the UK, and proposing to find Intas and Accord jointly and severally liable for the alleged infringements during their period of ownership. In December 2016, the CMA had issued a statement of objections alleging that Actavis UK had breached UK and EU competition law by charging excessive and unfair prices in relation to the supply of hydrocortisone in the UK.

**Concordia**

In November 2017, the CMA issued a statement of objections to Concordia concerning alleged excessive pricing of liothyronine tablets. The CMA provisionally found that the per-pack price for liothyronine tablets, which are primarily used to treat hypothyroidism, rose from around £4.46 before the product was ‘de-branded’ in 2007 (and so no longer subject to price regulation) to £258.19 by July 2017, an increase of almost 6,000 per cent, while production costs remained broadly stable. The cost to the NHS rose from £600,000 in 2006 to more than £34 million. Although liothyronine tablets are not the primary treatment for hypothyroidism, the CMA found that for many patients there is no suitable alternative and, until 2017, Concordia was the only supplier. The statement of objections was also addressed to private equity firms that previously owned entities now forming part of Concordia.

**Conclusion of cases without adopting infringement or commitments decisions**

In February 2017, the CMA closed an investigation into tying practices in the medical equipment sector on administrative priority grounds, without disclosing the names of the parties. The CMA’s case closure statement indicated, in particular, that ‘the impact of the observed conduct on the market for the relevant medical equipment is unclear’.

In June 2017, the CAA closed its investigation into access to facilities for airport car parking operators on grounds of administrative priority. This followed the authority’s decision in December 2016 finding that Manchester Airports Group plc and Prestige Parking Ltd had agreed to fix prices for car parking at East Midlands Airport.

In August 2017, the CMA closed an investigation into a suspected abuse of dominant position by Unilever in the market for single-wrapped impulse ice cream in the UK, finding that there were no grounds for action. The CMA opened its investigation in February 2017. Unilever was offering single-wrapped impulse ice cream products free of charge or at a reduced price if retailers purchased a minimum number of single-wrapped impulse ice cream products from Unilever (e.g., ‘buy eight cases, get four cases free’). The CMA assessed whether these offers were likely to produce an exclusionary effect by providing incentives to retailers to purchase a large proportion of their total requirements from Unilever with the likely effect of filling (or nearly filling) retailers’ freezers, and so of restricting competition in the supply of single-wrapped impulse ice cream products. The CMA concluded, however,
that Unilever’s promotional deals were unlikely to have had an exclusionary effect (given, for example, that sales to retailers were made on a weekly or even daily basis, and that the duration of the promotions was generally short).

### iii  Current abuse of dominance investigations

The CMA and sectoral regulators are currently investigating eight suspected abuse of dominance cases, summarised in the table below.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected anticompetitive agreements and abuse of dominance in relation to the supply of generic pharmaceuticals.</td>
<td>October 2017</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected anticompetitive agreements and abuse of dominance in relation to the supply of generic pharmaceuticals.</td>
<td>October 2017</td>
</tr>
<tr>
<td>Energy</td>
<td>Ofgem</td>
<td>Potential abuse of a dominant position by a company providing services to the energy industry</td>
<td>August 2017</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected unfair pricing in the supply of liothyronine tablets by Concordia.</td>
<td>October 2016</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected abuse of dominance (inducement to delay entry) by Actavis UK in relation to hydrocortisone tablets (as well as suspected anticompetitive agreements between Concordia and Actavis UK).</td>
<td>April 2016</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected abuse of dominance (excessive pricing) by Actavis UK in relation to hydrocortisone tablets.</td>
<td>March 2016</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Discounts offered for Remicade, a branded pharmaceutical product, by Meck Sharp &amp; Dohme Ltd.</td>
<td>December 2015</td>
</tr>
<tr>
<td>Postal services</td>
<td>Ofcom</td>
<td>Complaint by TNT Post UK Limited (now Whistl) about the terms offered by Royal Mail for certain letter delivery services to downstream access customers.</td>
<td>April 2014</td>
</tr>
</tbody>
</table>

* ‘Case opened’ refers to the date on which the authority opened its investigation (where known) or announced that it had opened an investigation.

### iv  Major developments in private actions in 2016 and 2017

#### Unwired Planet

In April 2017, the High Court found that Unwired Planet had not abused its dominant position by seeking an injunction against Huawei for infringing its standard-essential patents (SEPs). Unwired Planet owns a portfolio of SEPs relating to mobile telephone technology. The SEPs were subject to commitments given to the European Telecommunications Standards Institute to license on fair, reasonable and non-discriminatory (FRAND) terms. Unwired Planet sought an injunction against Huawei (a manufacturer of mobile telephones) for infringing those patents. In response, Huawei argued that seeking an injunction was an unlawful abuse of dominance because Huawei had offered to pay FRAND terms for a licence to use the patented technology. While the case has broader implications for the resolution of SEP disputes, the competition law arguments made by Huawei covered five main grounds:

1. Premature injunction proceedings: the Court held that it was not necessarily an abuse of dominance for an owner of SEPs to seek an injunction without complying precisely with the scheme for negotiation of FRAND terms set out in the CJEU’s judgment in *Huawei v. ZTE*. The Court found that, in this case, it was ‘obvious … that the issuing of proceedings did not indicate that the SEP owner did not wish to license its SEPs to Huawei’ (paragraph 753);
excessive or unfair prices: the Court held that offering non-FRAND terms during the course of negotiations did not infringe Article 102(a) unless the terms were ‘so far above FRAND as to act to disrupt or prejudice the negotiations themselves’ (paragraph 765). On the facts, the Court found that the terms offered by Unwired Planet did not cross this threshold.

c multi-jurisdictional tying: Unwired Planet insisted that Huawei accept a worldwide licence, while Huawei sought to license only the UK SEP portfolio. After discussion of the CJEU’s judgments in Microsoft and Post Danmark, the Court found that foreclosure of competition had not been established by offering only a worldwide licence: ‘Given the prevalence of worldwide licences and the prevalence of assessment based on patent families, I am not prepared to assume that the tying of a SEP licence in one country to a SEP licence in another country has by its nature a competitive foreclosure effect. A close analysis of the actual effects would be required and that has not been done’ (paragraph 550);

d tying SEP licences and non-SEP licences: the Court found that, although one Unwired Planet offer had tied SEP and non-SEP licences, it had later offered to separate out the SEPs: ‘I am in no doubt that a patentee subject to a FRAND undertaking cannot insist on a licence which bundles SEPs and non-SEPs together. But it does not follow from this that it is contrary to competition law to make a first offer which puts SEPs and non-SEPs together’ (paragraph 787); and
e discrimination: the Court aligned the ‘non-discrimination’ limb of FRAND with the concept of abusive discrimination under Article 102. Specifically, the Court held that the non-discrimination limb of FRAND does not consist of a further ‘hard-edged’ component that would justify a licensee demanding a lower rate than the FRAND rate simply because another similarly situated licensee had obtained more favourable terms. The non-discrimination obligation in FRAND is only triggered where the discrimination would distort competition between the two licensees.

Although it rejected Huawei’s competition law arguments, the Court confirmed that a FRAND undertaking was a binding legal commitment on which third parties (including Huawei) could rely (without needing to rely on competition law), and that Unwired Planet’s previous offers were not FRAND. The Court identified the terms that would be FRAND, and in particular agreed with Unwired Planet that it was entitled to insist on a licence for its worldwide SEP portfolio, rather than for its UK SEP portfolio only.

In conclusion, the Court found:
a Unwired Planet had established that its patents had been infringed;
b Unwired Planet was not in breach of the competition law;
c Huawei had not been prepared to take a licence on the terms the Court found to be FRAND (as it had not agreed to a worldwide licence); and
d accordingly, a final injunction to restrain infringement by Huawei should be granted.

In June 2017, the final injunction was granted but stayed pending appeal.

Socrates

In May 2017, the CAT found that the Law Society of England and Wales had abused its dominant position in the market for the supply of accreditation to law firms providing residential conveyancing in England and Wales (though its Conveyancing Quality Scheme (CQS)).
The CQS incorporates an element of mandatory training, including training in mortgage fraud and anti-money laundering (AML). Socrates, a rival provider of AML training courses, claimed that the requirement under the terms of the CQS that members of the scheme must obtain these training courses exclusively from the Law Society is an abuse of a dominant position.

The CAT found that accreditation through the CQS scheme was a ‘must-have’ product for firms practising residential conveyancing, as a substantial body of mortgage lenders required CQS accreditation as a condition of panel membership, and that the Law Society was dominant in the market for the supply of such accreditation. The Law Society had abused that dominant position by tying to the grant of CQS accreditation the sale of AML courses provided by the Law Society.

The Law Society argued that its conduct was objectively justified on the grounds that control over the courses’ content allowed for lender input and uniformity. The CAT found, however, that there was limited evidence for those assertions, and that the Law Society could achieve the same objective in a less restrictive manner by specifying topics or a syllabus.

The issue of liability was determined separately from any question of quantum. Following judgment on liability, the parties settled, and the claim was discontinued in September 2017.

Other cases before the CAT and the High Court are summarised below.

<table>
<thead>
<tr>
<th>Case</th>
<th>Allegation</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>UKRS Training Limited v. NSAR Limited</td>
<td>Alleged abuse of dominance on the market for accreditation services to providers of training to work on Network Rail infrastructure.</td>
<td>Pending. Claim stayed in October 2017 pending the conclusion of the appeal of a decision of Network Rail to suspend UKRS from providing accredited training.</td>
</tr>
<tr>
<td>NVIDIA Corporation and others v. Qualcomm Inc and others</td>
<td>Predatory pricing and loyalty-inducing rebates. The same allegations are also being investigated by the European Commission, which issued two statements of objections in December 2015.</td>
<td>Pending. Claim launched in December 2015.</td>
</tr>
<tr>
<td>Secretary of State for Health and others v. Servier Laboratories Ltd and others</td>
<td>Follow-on damages claim relating to the European Commission’s ‘pay for delay’ infringement decision against Servier and others concerning the supply of perindopril.</td>
<td>Pending. Claims launched in December 2011 and suspended during the Commission’s investigation. Servier granted permission in October 2016 to plead that the claimants failed to take reasonable steps to encourage switching from perindopril to cheaper generic alternatives.</td>
</tr>
</tbody>
</table>

UK Regulations implementing the EU Damages Directive came into force on 9 March 2017. Although many of the provisions of the Damages Directive did not require amendment of the UK regime, and many changes relate primarily to cartel infringements, the Regulations contain several provisions that may have a bearing on UK claims for damages from abuse of dominance. For example, the Regulations:

a address the burden of proof with respect to the passing-on defence;
b suspend the limitation period while competition authority investigations or consensual dispute resolution processes are ongoing;
c exclude the award of exemplary damages, as noted below;
d exempt small and medium-sized enterprises, as well as defendants that settle with the claimant, from the principle of joint and several liability; and
e amend the rules on disclosure.
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III MARKET DEFINITION AND MARKET POWER

The assessment of market definition and market power in the United Kingdom is consistent with EU law. The UK competition authorities and courts are required to interpret the provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission.

One difference between EU and UK law is that under the Chapter 2 Prohibition, there is no need to show a cross-border effect, and no minimum market size threshold: a ‘dominant position’ refers to a dominant position in the United Kingdom or any part of the United Kingdom. This means that dominant positions can be found even for small suppliers in small markets.

IV ABUSE

i Overview

The assessment of abuse in the United Kingdom is consistent with EU law. The UK competition authorities and courts are required to interpret the provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission (although this is likely to change after the UK leaves the EU). There is no exhaustive list of abuses under Section 18 of the Act (the equivalent of Article 102). Any conduct by a dominant undertaking that excludes competitors or exploits customers is potentially abusive, unless that conduct is objectively justified. Moreover, the High Court has held that conduct should be looked at ‘in the round’, rather than seeking to identify on a narrow basis whether conduct departs from ‘competition on the merits’.

ii Exclusionary abuses

Enforcement action in the United Kingdom has generally focused primarily on exclusionary abuses (although, more recently, the CMA has pursued a number of exploitative abuse cases relating to suspected excessive pricing).

The OFT decision in Gaviscon is notable in that it demonstrates the OFT’s (and, by extension, the CMA’s) willingness to grapple with novel abuses. The case concerned abusive behaviour by Reckitt Benckiser, which held a dominant position in the market for alginates and antacids. Reckitt Benckiser withdrew its Gaviscon Original product from sale to the NHS when the product no longer benefited from patent protection, even though it remained on sale ‘over the counter’. Reckitt Benckiser replaced Gaviscon Original with a similar product, Gaviscon Advance, which continued to benefit from patent protection. Because of the way the NHS computer system operated, the withdrawal of Gaviscon Original made it more difficult for doctors to prescribe alternative generic products as opposed to Gaviscon Advance. The OFT concluded that this action was expected to ‘hinder the development of generic competition’ to Gaviscon, thereby excluding competition from the market. Reckitt Benckiser entered into a settlement agreement with the OFT, agreeing not to challenge its decision and to pay a fine of £10.2 million.

In Cardiff Bus, the OFT investigated exclusionary behaviour preventing a competing bus company, 2 Travel, from establishing a rival service to the dominant incumbent. The case concerned both price and non-price predation. Cardiff Bus reacted to the launch of a rival
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‘no-frills’ service by introducing its own no-frills service on the same routes, without a valid business case and running at a loss. In both Cardiff Bus and Gaviscon, the OFT uncovered evidence of anticompetitive intent.

The focus on exclusionary conduct is borne out by other recent investigations. For example, in addition to the cases mentioned in Section II:

a In December 2015, the ORR closed an investigation into Freightliner on the basis of binding commitments. The ORR had investigated the terms of Freightliner’s agreements with customers for the provision of rail freight services between deep-sea container ports and inland destinations. The terms included exclusive purchasing obligations, minimum volume commitments and suspected loyalty-inducing rebates. Certain customers were also prevented from reselling capacity purchased under the contracts. Freightliner committed to remove or amend the provisions in its contracts to address the ORR’s concerns.

b In June 2015, the CMA closed an investigation into suspected loyalty-inducing rebates in the pharmaceutical sector on the grounds of administrative priorities. The case was closed before any statement of objections was issued. The CMA nonetheless sent a warning letter to the relevant party, identifying potential concerns that may arise in the context of discounts and rebates.

c In October 2014, Ofcom closed an investigation into a suspected margin squeeze by BT in relation to superfast broadband services following a complaint by TalkTalk Telecom Group plc.

d In September 2014, the CMA closed an investigation into suspected abuse of dominance by Epyx concerning the market for vehicle service, maintenance and repair platforms on the basis of binding commitments. The CMA had investigated whether Epyx’s contracts prevented customers from switching to competing suppliers.

e In June 2014, the CMA closed an investigation into suspected abuse of dominance by Certas Energy UK Limited (previously GB Oils Limited) concerning the wholesale supply of road fuels in the Western Isles of Scotland on the basis of binding commitments. GB Oils had entered into five-year exclusive contracts with filling stations preventing them from sourcing fuel from other suppliers.

f In 2011, the OFT issued a reasoned ‘no grounds for action’ decision in relation to Idexx Laboratories Limited, a supplier of in-clinic companion animal diagnostic testing equipment. The OFT investigated whether Idexx had engaged in anticompetitive bundling and predatory pricing, concluding that there was insufficient evidence that Idexx’s conduct was likely to restrict or impair effective competition in the relevant markets.

g In 2010, the OFT issued a similar ‘no grounds for action’ decision following an investigation of Flybe. The investigation followed a complaint that Flybe had engaged in predatory conduct that excluded a rival airline, Air Southwest, from certain routes. It was clear that Flybe had priced below its average avoidable costs of entry. However, the OFT noted that Flybe was itself a new entrant, and that it was normal commercial practice for an airline in this position to operate at a loss. The situation could therefore be distinguished from the position of a dominant incumbent reacting to new entry.

iii Discrimination (including discriminatory pricing)

Discrimination cases in the United Kingdom have also tended to focus on exclusionary conduct. For example, in 2006 the ORR found that English, Welsh and Scottish Railway
(EWS) had engaged in abusive discriminatory conduct through the prices it charged for access to its coal haulage services. The ORR found that EWS had discriminated against Enron Coal and Steel Limited (ECSL), offering prices that excluded ECSL from bidding effectively for coal haulage contracts. More recently, in SSE, Ofgem accepted binding commitments to address the provisional concern that an upstream supplier was offering discriminatory terms that favoured its own downstream business over those of competitors.

Similar concerns were considered by Ofwat in 2015 in Bristol Water and Anglian Water, and are being considered by Ofcom in its ongoing Royal Mail investigation.

In March 2015, Ofwat closed an investigation into Bristol Water on the basis of binding commitments. Bristol Water holds a local monopoly in the upstream market for the supply and maintenance of water infrastructure. Bristol Water is also active as a ‘self-lay’ contractor in a contestable downstream market, installing pipes that connect to the mains supply. Bristol Water was suspected of abusing its position in the upstream market by offering discriminatory terms to other self-lay contractors. The commitments require Bristol Water to ensure functional separation between its upstream and downstream services, and to ensure that its upstream business offers equivalent price and non-price terms to third-party contractors as offered to its own downstream business.

In December 2015, Ofwat closed an investigation into Anglian Water, finding no grounds for action. This followed a statement of objections issued in December 2011 and a supplementary statement of objections in April 2014. Anglian Water has a statutory monopoly for the provision of water and sewerage services in its region. Ofwat provisionally found that Anglian Water had implemented an illegal margin squeeze when pricing its upstream services to a rival, Independent Water Networks Limited (IWN), which was competing with Anglian Water for the contract to supply a new site with water and sewerage services. Ofwat eventually concluded that, as the site developer evaluated bids for water and sewerage services on a combined basis, it was unlikely that a margin squeeze applied to sewerage services alone would have made it materially more difficult for IWN to compete for the contract.

In July 2015, Ofcom issued a statement of objections to Royal Mail. Ofcom provisionally concluded that Royal Mail had engaged in unlawful price discrimination when setting prices for its bulk mail delivery services – prices charged to other postal operators that collect business mail and pass it to Royal Mail for final sorting and delivery. Ofcom alleged that Royal Mail charged higher prices to customers who competed with Royal Mail in delivery than to those who did not. Ofcom considered that these higher access prices could discourage entry into the downstream delivery market and increase barriers to expansion for postal operators seeking to compete with Royal Mail.

In Purple Parking, the High Court found that Heathrow Airport had abused a dominant position by offering discriminatory terms of access to providers of valet parking services. Heathrow permitted its own valet parking service access to its forecourts at Terminals 1 and 3, while requiring rival service providers (including Purple Parking) to relocate from the forecourts to the car parks. The High Court held that the forced relocation of rival providers placed them at a competitive disadvantage, and that this was sufficient to show abuse. The case is unusual in that there was no requirement to show that access to the forecourts was an essential facility or that competition would be eliminated entirely.

Similarly, in Streetmap, the High Court proceeded on the assumption that, at least in principle, a dominant undertaking might commit an abuse by promoting its own products or services in a separate market over those of a rival, provided the conduct had an appreciable effect on competition in the second (non-dominated) market and was not objectively justified.
The Court did not specifically consider whether a dominant undertaking that was not an essential facility could be required to provide access to downstream rivals on equivalent terms to those offered to its own downstream business. This question was not necessary to decide the case on the facts, and arguably overlaps with questions currently being considered by the European Commission.

The Court went further in ATS v. London Luton Airport Operations. In this case, the Court concluded that a concession agreement granted to National Express by London Luton Airport Operations that carved out easyBus from the exclusivity provisions was discriminatory against other bus operators, even though Luton Airport Operations (the upstream supplier) was not active in the downstream bus market. The Luton Airport case clarifies a question previously considered in SEL-Imperial Ltd v. British Standards Institution.

iv  Exploitative abuses (including excessive pricing)

While the focus of UK enforcement action has mostly been on exclusionary conduct, excessive pricing has been considered in a number of cases, including Napp Pharmaceutical Holdings Limited (OFT decision of 2001), Thames Water Utilities Ltd/Bath House and Albion Yard (Ofwat decision of 2003) and Albion Water v. Ofwat (Ofwat decision appealed to the CAT, judgment of 2006). These cases have all considered the potential exclusionary effect of pricing behaviour. More recently, as noted above, the CMA fined Pfizer and Flynn Pharma for ‘pure’ excessive pricing (where there was no exclusionary effect), and it has two ongoing investigations in suspected excessive pricing. In the past year, the CMA also issued a statement of objections addressed to Actavis UK and opened an additional investigation concerning suspected excessive pricing.

The Court of Appeal grappled with the concept of excessive pricing in 2007 in Attheraces Limited v. British Horseracing Board Limited. This case concerned the price at which the British Horseracing Board made available pre-race data to Attheraces for sale to overseas bookmakers. Attheraces claimed that the price charged was excessive, as well as discriminatory, amounting to a refusal to supply. Attheraces was successful at first instance, but its claim was overturned by the Court of Appeal. The Court of Appeal accepted that, in principle, prices were excessive if they significantly exceeded the economic value of the product. However, in assessing economic value, it was insufficient merely to show that prices exceeded costs by a reasonable amount without having regard to the price customers (in this case the overseas bookmakers) were prepared to pay. The Court also noted that there was little evidence of harm to ultimate consumers (i.e., the betting public) from the alleged excessive pricing.

V  REMEDIES AND SANCTIONS

i  Sanctions

An undertaking that has abused a dominant position may be fined up to 10 per cent of its worldwide turnover in the last business year, calculated according to rules set out by
statutory instrument. An undertaking may be fined only if its conduct was intentional or negligent (i.e., where the undertaking ought to have known that its conduct would result in a restriction or distortion of competition). Any undertaking whose turnover does not exceed £50 million benefits from immunity from fines for infringing the Chapter 2 Prohibition (but not Article 102), although immunity may be withdrawn on a prospective basis.

The CMA is obliged to publish guidance as to the appropriate amount of a penalty (which is subject to approval by the Secretary of State). The CMA (as well as concurrent regulators and the CAT) must have regard to that guidance when imposing penalties. The OFT published new guidance in September 2012, following a series of successful appeals against its fining decisions before the CAT. The guidance, which was updated by the CMA in April 2018, sets out a six-step approach to calculating fines:

- calculation of a starting point by multiplying the undertaking’s turnover in the relevant market by a percentage of up to 30 per cent depending on the seriousness of the infringement (under its previous guidance the maximum was 10 per cent);
- adjustment for duration;
- adjustment for aggravating and mitigating factors;
- adjustment to achieve sufficient deterrence and to ensure proportionality;
- adjustment to ensure the statutory cap (10 per cent of worldwide turnover) is not exceeded; and
- adjustment to reflect any leniency or settlement discount, or approval of a voluntary redress scheme, or both.

The CMA’s guidance states that it will generally apply a starting point percentage of between 21 and 30 per cent of relevant turnover when considering the most serious abuses of a dominant position. Seriousness will be assessed by reference to the nature and extent of the demand for that product, the structure and size of the market, the effect on competitors (and others), the need for deterrence and the damage caused to consumers.

**ii Behavioural remedies (including interim measures)**

On reaching an infringement decision, the CMA (or regulator) may give any person such directions as it considers appropriate to bring the infringement of Article 102 or the Chapter 2 Prohibition to an end. Directions may be enforced through the civil courts.

The CMA and regulators also have the power to impose interim measures. Interim measures may be imposed only where the authority has opened a formal investigation (and therefore has ‘reasonable suspicion’ of an infringement) and considers it necessary to impose interim measures as a matter of urgency for the purposes of preventing significant damage, or to protect the public interest.

The CMA is yet to impose interim measures, although it did consider and reject an application by Worldpay against Visa UK Limited in 2014. The OFT imposed interim measures only once (in 2006), and those measures were subsequently withdrawn. However, the legal threshold for the OFT to impose interim measures was one of ‘serious, irreparable damage’, whereas the CMA need only show the prospect of ‘significant damage’. This change in the legal threshold is intended to make it easier for the CMA to impose interim measures in future. Until now, parties seeking interim relief have generally found it necessary to resort to the civil courts.

In its investigation of ATG Media, described in more detail above, the CMA received an application under Section 35 of the Act for interim measures relating to allegedly
exclusionary practices in respect of live online auction platform services. The application was made in November 2016. In June 2017, however, shortly before the CMA was due to make a final decision on whether to impose interim measures, the CMA accepted an offer of commitments from ATG Media and closed its investigation. Dr Michael Grenfell, the CMA’s Executive Director for Enforcement, referred to this case as ‘an example of how, when faced with an interim measures application in a fast-moving market, we were able to resolve the problem within just over 6 months’.

iii Structural remedies

The CMA and regulators have no power to impose structural remedies following a finding of abuse of dominance. However, it is possible for a dominance investigation to be closed on the basis of structural commitments. This has happened on one occasion.

In January 2013, Ofwat accepted binding commitments from Severn Trent Water, the first time it had accepted commitments in a competition case. The investigation considered whether Severn Trent Water was cross-subsidising its water analysis business, Severn Trent Laboratories, from its core regulated business. Specifically, Ofwat considered whether (as a result of cross-subsidisation) Severn Trent Laboratories was able to price below cost when competing for contracts with other providers of water analysis services. The commitments included the divestment of Severn Trent Laboratories. The decision to accept commitments in this case is notable not only because it included a structural divestment, but also because the decision to accept commitments departed from the published guidance, which states that commitments will not generally be accepted in serious abuse of dominance cases, such as predatory pricing.

In *Bristol Water* and *SSE* (mentioned above), Ofwat and Ofgem (respectively) accepted quasi-structural commitments under which the suppliers agreed to introduce functional separation between their upstream and downstream businesses.

The CMA also has the power to impose structural measures to address unilateral market power following a market investigation:

a In 2014, following its *Private Healthcare* market investigation, the CMA decided that HCA International Limited should divest private hospitals in central London (although that decision was subsequently quashed by the CAT and remitted for reinvestigation by the CMA, and the CMA decided at the conclusion of its remitted investigation in September 2016 that ordering a divestiture would be disproportionate).

b In 2014, following a market investigation into aggregates, cement and ready mix concrete, the CC found that Hanson had exclusive rights to produce ground granulated blast-furnace slag (an input into cement) in Great Britain and forced it to divest one of its facilities to create competition.

c In 2010, the CC required BAA plc (the owner of the largest UK airports) to divest two London airports and one Scottish airport to improve competition in the relevant markets.

VI PROCEDURE

The UK enforcement procedure is similar in many respects to the procedure that applies at EU level (under Regulation 1/2003). The CMA (or concurrent regulator) investigates a suspected infringement and reaches an administrative decision in the first instance. That decision is then subject to appeal. The stages of a CMA investigation are as follows:
Investigations are usually triggered by complaints. However, this is not always the case, and the CMA is able to investigate on its own initiative. The OFT’s Gaviscon investigation, for example, began after evidence was submitted by a whistle-blower.

Before opening a formal investigation, the CMA must be satisfied that it has ‘reasonable suspicion’ of an infringement. The CMA has no power to use formal investigation powers unless this legal threshold is met. For this reason, it typically carries out ‘informal’ information-gathering in the first instance (including seeking further information from complainants).

As well as satisfying the legal threshold, the CMA must decide whether a case is an administrative priority, in accordance with its published Prioritisation Principles. The Prioritisation Principles are intended to ensure the CMA makes efficient use of its resources when deciding which cases to pursue. The High Court has upheld the CMA’s right to prioritise its cases in this way, and to close investigations on administrative grounds, even after considerable investigation has been carried out.

Once it has opened an investigation, the CMA will publish a short notice on its website indicating in broad terms the relevant sector and conduct under investigation. It does not usually name the parties to its investigations before a statement of objections is issued. However, in exceptional circumstances, the CMA can decide to publish the names of the parties in its initial public notice. Exceptional circumstances include instances where a party’s involvement is already in the public domain, or where the CMA considers that the potential harm to consumers or other businesses from non-disclosure is sufficient to justify disclosure.

Provided the legal threshold for opening a case is met, the CMA has wide powers to require the production of information. It may require the production of specified documents or information, ask individuals oral questions or carry out interviews with individuals. Individuals are required to answer the CMA’s questions, subject to their privilege against self-incrimination, and failure to do so can result in civil sanctions. The CMA may also carry out unannounced visits to business or domestic premises (i.e., ‘dawn raids’). It may enter premises without a warrant, or it may enter and search premises with a warrant (which it can obtain from the Competition Appeal Tribunal or the High Court).

If the CMA is minded to reach an infringement decision against an undertaking, it must issue a statement of objections, setting out its case and the evidence it intends to rely on. The decision of whether to issue a statement of objections must be taken by the case team’s senior responsible officer. The CMA must also allow access to its case file when it issues a statement of objections. The CMA’s file must contain all material relevant to the matters in the statement of objections (subject to certain redactions). Any party receiving a statement of objections has the right to submit written representations and to attend an oral hearing. The same process applies in relation to any proposed fine (i.e., the CMA will provide details of its proposed fine, and allow the opportunity for written representations and an oral hearing).

The CMA will consider entering into settlement discussions in any case where it considers that the evidential standard for giving notice of its proposed infringement decision is met. ‘Settlement’ is the process whereby a business under investigation is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the CMA’s investigation of that business’s conduct. If so, the CMA will impose a reduced penalty.
on the business. Settlement discussions can be initiated either before or after the statement of objections is issued. The CMA retains broad discretion in determining which cases to settle, and this includes the discretion whether to explore interest in settlement discussions, whether to continue or withdraw from settlement discussions and whether to settle at all. Businesses do not have a right or an obligation to settle in a given case and may withdraw from settlement discussions at any time.

Parties can offer commitments at any stage of an investigation, although the CMA encourages parties considering commitments to offer them before a statement of objections is issued. The commitments process is similar to the EU process under Article 9 of Regulation 1/2003. There is no obligation on parties to offer commitments. However, if accepted, the commitments become binding and are enforceable through the courts.

Following parties’ written and oral representations, the CMA must decide whether to issue an infringement decision. This decision is taken on a collective basis by a three-member case decision group (CDG), which may include any senior CMA staff or board member or any member of the CMA panel. To ensure that the final decision is taken by officials who were not involved in the decision to issue the statement of objections, the senior responsible officer may not be a member of the CDG. The CMA may equally decide at this stage to issue a reasoned decision that it has no evidence of an infringement. Final decisions are published (in redacted form) on the CMA’s website.

CMA infringement decisions are subject to appeal to the CAT, and subsequently to the civil appeal courts on points of law.

CMA investigations vary significantly in duration, and no statutory deadlines apply. Very broadly, a CMA investigation is likely to take around three years (from case-opening until decision), with the statement of objections being issued roughly halfway through that period.

During an investigation, disputes over procedural matters (such as deadlines for responding to information requests, or confidentiality redactions) that cannot be resolved with the case team itself may be referred to the CMA’s Procedural Officer. The Procedural Officer will review the party’s written application and relevant correspondence, and allow an opportunity for each side to present its views orally (which may be by telephone). The Procedural Officer will then issue a short reasoned decision (within a target deadline of 10 working days) that is binding on the CMA. CMA procedural decisions are ultimately subject to judicial review by the civil courts.

As explained above, the CMA has the power to impose interim measures to prevent significant damage or to protect the public interest. If the CMA is minded to impose interim measures, it must first give notice to the party in question and allow it the opportunity to make representations. Interim measures decisions are subject to appeal to the CAT.

The Consumer Rights Act 2015 also gives the CMA the power to certify voluntary compensation schemes following an infringement decision, intended to encourage firms to offer compensation without the need for victims to commence private litigation.

Outside an investigation, the CMA has the power to publish opinions on novel issues of competition law where it considers there is sufficient need for general guidance (e.g., because of their economic importance for consumers). The CMA has never published an opinion in relation to a question of abuse of dominance. The CMA is sometimes prepared to offer private, informal advice on an ad hoc basis, but only in exceptional cases and only where
the matter in question would satisfy its case Prioritisation Principles. By contrast, the CMA does encourage potential complainants to approach it with possible complaints for discussion on an informal and confidential basis.

VII PRIVATE ENFORCEMENT

Two types of private action exist in the United Kingdom: follow-on actions and stand-alone actions.

A follow-on action is a damages action founded on an infringement decision by a UK competition authority or the European Commission. The court is bound by the findings of infringement already made (as well as findings of fact in the infringement decision). The claimant is therefore required only to show loss and causation. In a stand-alone action, the claimant must prove that the defendant infringed the competition law, as well as proving that the claimant suffered reasonably foreseeable loss. Since October 2015, stand-alone actions and follow-on actions can be brought before the CAT as well as the civil courts (the High Court of England and Wales, the High Court of Northern Ireland, or the Court of Session or Sheriff Court in Scotland). The civil courts and the CAT have wide jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality.

In the past, private claims tended to gravitate towards the civil courts, and particularly the High Court of England and Wales, for a variety of reasons. The Consumer Rights Act 2015 aims to reverse this trend. Not only does the CAT now have the power to hear stand-alone actions and grant injunctive relief, it is also the only venue in which claimants can bring opt-out and opt-in collective actions (discussed below). Further, some cases before the CAT will qualify for fast-track review, capping the costs risk for claimants. The civil courts also have the power to transfer competition cases to the CAT. The CAT’s procedural rules and limitation periods are now generally aligned with those that apply to the civil courts, although some questions remain over how the new rules apply to claims relating to conduct pre-dating October 2015. Taken together, these changes are intended to make the CAT the principal venue for competition cases in the United Kingdom.

There are four forms of collective action in the United Kingdom.

a Collective actions before the CAT: since October 2015, any representative of a class of persons may bring a collective action for damages before the CAT on an opt-out basis or an opt-in basis. In either case, the claimant must obtain permission from the CAT (a ‘collective proceedings order’) to continue with a claim on this basis by showing that they are a suitable representative and that the claims in question are sufficiently similar to be brought in collective proceedings.

b Consumer actions by specified bodies: specified bodies can bring follow-on damages actions before the CAT on behalf of consumers, on an opt-in basis. A specified body is a consumer organisation specified by the Secretary of State by statutory order. To date, only the Consumers’ Association (also known as Which?) has been designated a specified body. Which? has brought only one action under these provisions (concerning replica football kits, which was ultimately settled), and has publicly stated that it will not bring any further actions of this type.
c Group litigation orders: the High Court has the power to make a group litigation order combining claims that raise common or related issues. A group litigation order will also provide for the establishment of a group register of the claims forming the group. Judgments are binding on all parties on the group register.

d Representative actions: it is, in theory, possible for a claimant to bring an action in the High Court on behalf of all claimants with the same interest. However, following a 2010 Court of Appeal judgment, it seems highly unlikely that mass representative actions can be brought in competition cases under these provisions, and far more likely that representative claimants will seek to launch collective proceedings before the CAT.

Damages in competition claims are intended to be compensatory: they are intended to place the victim in the position he or she would have been in had the infringement not occurred. In exceptional circumstances, where compensatory damages would otherwise be an inadequate remedy, damages might be awarded on a restitutionary basis (i.e., an account of the profits earned unjustly by the defendant). While the Court of Appeal has accepted in principle that restitutionary damages may apply, they have never been awarded in practice.

As noted above, exemplary damages are no longer permitted in competition litigation, following the enactment of Regulations implementing the EU Damages Directive in the UK. This reverses the principle established in the Cardiff Bus case that exemplary damages were possible in dominance cases where no administrative fine had been imposed.

More generally, the UK has become a popular venue for private actions even where the claimant has a choice of jurisdiction. There are two principal reasons for this. First, the UK rules on disclosure of evidence are favourable to claimants (allowing access to evidence that might not be available in other jurisdictions). Secondly, costs are generally awarded on ‘loser-pays’ basis. A successful claimant is therefore likely to recover a significant proportion of his or her costs from the defendant.

Public funding is generally unavailable for competition law actions. However, other funding options are available. In particular, parties may enter conditional fee agreements (CFAs) with lawyers. Under a CFA, the lawyer will be paid nothing if the case is lost but will be entitled to a success fee (i.e., an uplift) of up to 100 per cent for winning the case. Competition actions in the United Kingdom may also be funded through ‘after-the-event’ insurance or by professional funders. However, in most cases, any uplift or after-the-event insurance premium will not be recoverable from an unsuccessful defendant. Since April 2013, claimants have also been able to instruct lawyers in High Court actions under a damages-based agreement (DBA). Under a DBA, a lawyer is entitled to a percentage of the damages awarded to a successful claimant, but receives nothing if the claim is unsuccessful. DBAs are not permitted in opt-out collective proceedings before the CAT.

VIII FUTURE DEVELOPMENTS

The public enforcement and private litigation regimes in the United Kingdom have undergone considerable reform in recent years. While these reforms are significant from an institutional and procedural perspective, the substantive rules on dominance are unchanged. The reforms were intended to result in more competition law enforcement cases, especially in the regulated sectors, together with greater use of market investigations to tackle concerns about unilateral conduct and an increase in private litigation. The expected boost to public enforcement and private litigation (and collective actions in particular) has been slow to
materialise, although CMA enforcement activity increased significantly following criticism by the National Audit Office in February 2016. There is reason to believe this growth in public enforcement will continue to gain momentum.

In April 2018, the government launched a consultation on whether the CMA needs greater enforcement powers to tackle what it describes as ‘dominant digital platforms’, and recent CMA public statements suggest that it will start to focus more of its enforcement activities on digital markets.

In the longer term, the most significant future development in UK antitrust enforcement will be the withdrawal of the UK from the EU. On 29 March 2017, the government notified its intention to withdraw from the EU under Article 50 of the Treaty on European Union, commencing a two-year countdown (subject to extension only if all Member States agree).

On 28 February 2018, the European Commission published its draft Withdrawal Agreement between the EU and the UK. The draft Withdrawal Agreement sets out the proposed arrangements for the UK’s withdrawal from the EU, including during the transition period (i.e., between the date of entry into force of the agreement and 31 December 2020). The draft Withdrawal Agreement envisages that EU institutions should continue to have the power to initiate administrative procedures under EU law until the end of the transition period. It also provides that the European Commission can open new antitrust investigations after the end of the transition period, provided the underlying conduct occurred before the end of that period. There are inconsistencies between these provisions and the UK’s EU Withdrawal Bill, which envisages that European Commission decisions taken post-Brexit will not be binding on the UK. The draft Withdrawal Agreement is, however, subject to negotiation between the EU and the UK, and a final version is not expected to be agreed before October 2018.

Although the terms of the UK’s post-Brexit relationship with the EU have yet to be determined, likely implications for competition enforcement include the following:

a. EU competition law would no longer be directly applicable in the UK, although it would still apply to UK companies active in the EU;

b. European Commission infringement decisions would no longer extend to the UK;

c. A European Commission investigation would no longer preclude the CMA from investigating the same conduct;

d. The CMA, sectoral regulators, the CAT and UK civil courts may have greater freedom to interpret UK competition law differently from equivalent EU competition law;

e. The European Commission may no longer have the power to conduct dawn raids in the UK; and

f. European Commission infringement decisions adopted post-Brexit would not necessarily be binding on the CAT and UK civil courts, including in follow-on damages claims.

The CMA leadership spent much of 2017 preparing for Brexit, and positioning the UK’s withdrawal from the EU as an opportunity to step out of the Commission’s shadow and establish the CMA as a leading global agency. The CMA’s ability to achieve that ambition will depend in part on the provision of increased resources. The number of significant Competition Act investigations might increase, as the CMA will no longer be precluded from investigating cases pursued by the European Commission. The CMA’s ability to exploit this opportunity could, however, be circumscribed if its resources become consumed by an increased merger workload. The CMA’s resources have started to expand to meet the demands of its post-Brexit responsibilities. After obtaining a modest funding increase in the
2017 Autumn Budget, the CMA has begun recruiting, and announced on 31 January 2018 that it plans to enlarge its current team in Scotland from three employees to between 25 to 30 employees, ‘with ambitions to grow further’. The government announced a further increase in the CMA’s annual budget of up to £23.6 million from April 2018.

In addition to petitioning for the necessary resources, the CMA will need to work with the government to resolve complex issues, including:

a. Will the Commission continue to have exclusive jurisdiction over those antitrust proceedings that it initiated prior to the UK leaving the EU?

b. Will the Commission continue to have exclusive jurisdiction over proceedings initiated post-Brexit in respect of conduct that occurred pre-Brexit? and

c. Which authority, post-Brexit, will enforce antitrust commitments accepted by the Commission pre-Brexit, insofar as they concern the UK?

Any post-Brexit changes to UK competition enforcement will present both challenges and opportunities – for business, for the CMA and sectoral regulators, and for the legal profession. There will inevitably have to be detailed amendments to UK statutes, secondary legislation and guidance, and the UK competition authorities may have to adjust their prioritisation and investigation priorities to meet increased demands on their resources. However this unfolds, it is unlikely that the substantive provisions of the Competition Act 1998 will change materially in the short term.
I INTRODUCTION

The US Supreme Court has emphasised that the opportunity to attain a monopoly and reap its benefits encourages investment and innovation. Thus, possessing and exercising monopoly power does not violate US antitrust law ‘unless it is accompanied by an element of anticompetitive conduct’. Unlike the competition laws of many other jurisdictions, therefore, US antitrust law does not recognise claims for abuses of dominance that merely exploit existing monopoly power, such as claims for excessive pricing. This difference in focus is reflected throughout the standards adopted in US law, as discussed below.

The US antitrust statute specific to monopolies is Section 2 of the Sherman Act, 15 USC Section 2. It provides that ‘[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony’. US law recognises three separate violations that arise under this statute:

a monopolisation, which requires monopoly power, and anticompetitive conduct that helps to obtain or maintain that power;4

b attempted monopolisation, which requires a dangerous probability of achieving monopoly power, anticompetitive conduct that threatens to help achieve that power and a specific intent to monopolise;5 and

c conspiracy to monopolise, which requires a conspiracy, a specific intent to monopolise and an overt act in furtherance of that conspiracy.6

The Sherman Act can be enforced in civil actions through injunctions brought by the US Department of Justice (DOJ) and through private litigation, as detailed below.7

Other statutes also apply to the behaviour of monopolists. Most notable is Section 5 of the Federal Trade Commission (FTC) Act, 15 USC Section 45, which prohibits ‘unfair...
methods of competition’. The FTC Act reaches all conduct covered by the Sherman Act and probably reaches more broadly.\(^8\) It can be enforced solely by the FTC through civil action for injunctions and prospective cease-and-desist orders.\(^9\)

Many US states have analogous statutes that apply to monopolists. In addition, in certain industries, other regulations can also apply to and potentially limit monopolists.

II YEAR IN REVIEW

In the past year, the FTC pursued litigation challenging abuse of government processes in the pharmaceutical industry. The FTC went to trial in one such case, while another case was dismissed by the district court on procedural grounds. As in prior years, the FTC and private litigants continued to challenge ‘reverse payment’ settlements. The FTC also continued its litigation against a semiconductor device manufacturer that allegedly raised its rivals’ costs and foreclosed those rivals from key customers through its patent licensing practices.

i The FTC challenges sham litigation at trial

In 2014, the FTC brought a lawsuit against AbbVie alleging sham litigation related to AndroGel, a topical testosterone replacement therapy.\(^10\) In 2011, AbbVie brought patent infringement lawsuits against two generic entrants, alleging that their use of specific ‘penetration enhancers’, which accelerate the drug’s delivery through the skin, infringed AbbVie’s patents. The FTC alleged that, during the patent approval process, AbbVie had surrendered any claim to those penetration enhancers and that the patent lawsuit was therefore a sham. In 2017, the court granted partial summary judgment to the FTC, holding that AbbVie’s patent infringement lawsuits were objectively baseless. In 2018, the case proceeded to trial on the remaining elements of the FTC’s claim: whether AbbVie had monopoly power and whether the lawsuits were subjectively motivated by an anticompetitive intent to interfere with generic entry. The FTC sought over US$1 billion in disgorgement, and the court’s decision was pending at the time of writing.

ii Federal court dismisses FTC lawsuit against Shire ViroPharma for abuse of government process

In February 2017, the FTC filed a complaint in federal court against Shire ViroPharma (ViroPharma). The FTC’s lawsuit alleged that ViroPharma abused government processes to delay entry of generic competitors to ViroPharma’s branded Vancocin capsules, which are used to treat a gastrointestinal infection.\(^11\) Specifically, the FTC alleged that, between 2006 and 2012, ViroPharma made more than 40 regulatory and court filings aimed at delaying Food and Drug Administration approval of competing generics, failed to support its filings with any clinical data and continued making filings even after an independent panel rejected its claims. ViroPharma moved to dismiss the lawsuit, challenging the FTC’s statutory authority to challenge conduct that was wholly in the past and arguing that its conduct did not qualify

\(^9\) 15 USC Sections 45, 53(b).
\(^10\) In its complaint, the FTC also alleged anticompetitive reverse payment settlements, but those claims were dismissed in 2015.
as an abuse of government process. The district court ruled that the FTC could not challenge ViroPharma’s past conduct, holding that the FTC could not seek a permanent injunction because it did not allege an ongoing or imminent violation of the FTC Act. While the court dismissed the case on that procedural basis, it noted that the factual allegations would have otherwise been sufficient to state a monopolisation claim. The FTC has appealed this ruling. If the district court’s ruling is accepted, that would significantly limit the FTC’s ability to seek injunctions, as well as other equitable relief, in federal court for alleged violations of the antitrust laws.

iii The FTC and private litigants continue to target ‘reverse payment’ settlements

In 2013, the US Supreme Court held in FTC v. Actavis that ‘reverse payment’ settlements – that is, payments made by a drug manufacturer to delay the entry of a generic competitor – ‘can sometimes violate the antitrust laws’. Over the past few years, the FTC has continued its enforcement efforts against these settlements. In 2017, brand-name manufacturer Endo Pharmaceuticals settled FTC claims that Endo entered into anticompetitive payment settlements that blocked entry by generic versions of the drugs Opana ER and Lidoderm. At the same time, the FTC brought an administrative action against Impax (a generic manufacturer of Opana ER) and a federal lawsuit against Watson Laboratories (a generic manufacturer of Lidoderm) for their part in these settlements. In 2018, the administrative law judge in the Impax proceeding ruled that the pro-competitive benefits of Impax’s ‘reverse payment’ settlement, which gave Impax a broad licence for all patents needed to enter, outweighed the anticompetitive effects. As this was an administrative action within the FTC, the FTC staff that brought the case appealed the decision to the Commission. At the time of writing, the Impax appeal was pending, and the Watson litigation had been stayed by the district court while Watson challenged the FTC’s authority to challenge conduct that occurred wholly in the past (similar to the ViroPharma case discussed above).

Private litigants have also continued to bring enforcement actions against reverse payment settlements. During the past year, the Third Circuit Court of Appeals clarified that plaintiffs are not required to estimate the dollar value of the reverse payment to plead an antitrust violation, and affirmed summary judgment for the defendants in an appeal involving antidepressant Wellbutrin XL where the district court had found that plaintiffs failed to prove that the generic drugs would have entered the market earlier but for the alleged anticompetitive settlement.

iv The FTC continues action against Qualcomm for standard-essential patents licensing terms

In January 2017, the FTC filed a complaint in federal court against Qualcomm, charging it with using anticompetitive patent licensing practices to maintain its monopoly in the supply of baseband chips, which are semiconductors used in cell phones and other products. Apple and other private plaintiffs have also brought similar claims against Qualcomm.

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The FTC alleged that Qualcomm implemented a ‘no license, no chips’ policy, meaning that Qualcomm would only supply its baseband chips to cell phone manufacturers that also agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm even when using baseband processors purchased from Qualcomm’s competitors. The FTC also alleged that Qualcomm refused to license its standard-essential patents to its competitors in contravention of its commitments to license its technology on fair, reasonable and non-discriminatory (FRAND) terms. The FTC argued that these practices imposed an anticompetitive ‘tax’ on competitors and raised the cost of using competing baseband processors.

Qualcomm moved to dismiss the case, but the district court denied that motion in June 2017. The FTC was still pursuing the case at the time of writing, but it is possible that the Trump Administration FTC could eventually decide to voluntarily dismiss the case. Notably, when the FTC filed its complaint, Republican Commissioner Ohlhausen dissented, arguing that the FTC failed to allege that Qualcomm charged more than a reasonable royalty for its patents and that this omission ‘speaks to the dearth of evidence in this case’.15 DOJ officials from the Trump Administration have also expressed concerns that certain aspects of antitrust enforcement in the intellectual property area have been too aggressive. For example, the DOJ Antitrust Division’s Assistant Attorney General Makan Delrahim suggested that antitrust policy with respect to standard-setting organisations should shift from focusing on ‘hold up’ by patent holders to the ‘more serious risk’ of ‘hold out’, where patent implementers use their leverage against patent holders to impose anticompetitive licensing terms.16 The DOJ also wrote a letter to the American National Standards Institute (ANSI), suggesting that ANSI should include both patent holders and implementers on a task force revising its intellectual property policies, explaining that pro-competitive standard setting ‘is furthered when standard setting is attractive to both patent holders and implementers’.17

III MARKET DEFINITION AND MARKET POWER

Monopoly power is a prerequisite to bringing a monopolisation claim. Monopoly power is the ability to control prices or exclude competition.18 It can be proven through direct evidence of actual price increases or the exclusion of rivals. More typically, however, courts infer monopoly power from the combination of high market shares and entry barriers. Higher

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18 See, for example, United States v. E I DuPont de Nemours & Co, 351 US 377, 391 (1956).
market shares are more likely to support the inference of monopoly power, and typically shares below 50 per cent cannot support that inference. But even a very high share does not automatically establish monopoly power.20

Monopoly power is not required for attempted monopolisation or conspiracy to monopolise claims. Attempted monopolisation instead requires only a ‘dangerous probability’ of achieving monopoly power, and thus can be sustained with a lesser showing of market power. A conspiracy to monopolise arguably requires no showing of market power at all, although cases alleging a conspiracy to monopolise in the absence of market power are relatively rare.

Inferring monopoly power requires measuring market shares, and thus requires defining a relevant market. Relevant markets have both product and geographic dimensions. Product markets are defined by looking at what products are reasonably interchangeable substitutes for one another.21 Geographic markets are defined by looking at what other geographies sellers operate in and buyers can turn to.22 One method that is often used to determine what products or geographies are in the market is to ask whether customers would substitute from one product or geography to another in response to a small price increase above competitive levels.23

IV ABUSE

i Overview
Monopolisation requires anticompetitive conduct that helps to obtain or maintain a monopoly. Obtaining or maintaining a monopoly through other means, such as ‘superior product, business acumen or historic accident’, is therefore not a violation.24

US courts and antitrust regulators have not established a definitive list of what conduct can be anticompetitive; nor have they adopted clear standards for distinguishing between pro-competitive and anticompetitive conduct. The DOJ did issue guidance on monopolisation in 2008, but withdrew it in May 2009.25 The list below, although not exhaustive, discusses the most important types of potential anticompetitive conduct that courts and regulators have recognised could support a monopolisation claim.

ii Exclusionary abuses

Exclusionary pricing
Predatory pricing is charging low prices to try to drive competitors from the market. Because low prices are generally pro-competitive and beneficial to consumers, US law imposes rigorous

19 See, for example, *Domed Stadium Hotel Inc v. Holiday Inn Inc*, 732 F.2d 480, 489 (5th Cir 1984) (‘Supreme Court cases, as well as cases from this court, suggest that in the absence of special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization.’).
20 US law does not recognise ‘relative dominance’ or ‘collective dominance’.
requirements to sustain a predatory pricing claim. Specifically, a plaintiff must prove that the defendant’s prices are below cost, and that the defendant has a ‘dangerous probability’ of recouping the losses it incurs when charging below-cost prices by raising its prices above competitive levels after driving competitors from the market.26 The US Supreme Court has not specified the precise measure of cost that should be used in this analysis, although most lower courts have required pricing below some measure of incremental cost.

A price squeeze or margin squeeze is when a firm that is active in upstream and downstream markets charges high prices for the upstream input and low prices for the downstream product. The potential antitrust concern is that a downstream competitor that is not vertically integrated must therefore pay high prices for an input while charging low prices to compete downstream. However, US law does not recognise price-squeeze claims without either an upstream duty to deal with competitors or downstream predatory pricing.27

**Exclusive dealing**

Exclusive dealing can have many pro-competitive benefits, including encouraging investment by reducing uncertainty about future sales, encouraging relationship-specific investments, and encouraging better product promotion and related services. However, exclusive dealing can also have anticompetitive effects when it forecloses rivals from the market and impairs their competitiveness. Under US law, exclusive dealing cannot be anticompetitive unless it forecloses a ‘substantial share’ of the relevant market.28 What counts as ‘substantial’ is unsettled. Some courts have suggested that foreclosure of 30 per cent or less may suffice, while others have suggested that 40 to 50 per cent may be required.29 Courts have also suggested that the foreclosure required to sustain a claim may be somewhat lower where the defendant is a monopolist.30

Loyalty conditions are when a seller charges customers one price if the customer purchases a certain percentage of its needs of a product from the seller and a higher price if the customer does not. Loyalty conditions can pro-competitively reduce costs, shift risk in volatile industries, or lead to efficient contracting such as by encouraging promotional or marketing efforts. However, like exclusive dealing, they can also foreclose rivals and impair their competitiveness. US law on loyalty discounts is unsettled. Some courts have applied a predatory pricing analysis, finding loyalty conditions to be potentially anticompetitive only when the resulting price is below cost.31 Other courts have applied an exclusivity analysis, finding loyalty conditions to be potentially anticompetitive whenever they foreclose a

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26 **Brooke Group Ltd v. Brown & Williamson Tobacco Corp**, 509 US 209, 222–24 (1993). In a predatory pricing claim based on price discrimination brought under the Robinson-Patman Act, 15 USC Section 13, a plaintiff must prove a ‘reasonable prospect’ of recoupment. Id. at 224.


29 Compare **Twin City Sportservice Inc v. Charles O Finley & Co Inc**, 676 F.2d 1291, 1298, 1304 (9th Cir 1982) (finding substantial foreclosure where defendant ‘controlled 24 per cent’ of the market), with **Stop & Shop Supermarket Co v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 68 (1st Cir 2004)** (foreclosure is ‘unlikely to be of concern where they are less than 30 or 40 per cent’), with **United States v. Microsoft Corp**, 253 F.3d 34, 70 (DC Cir 2001) (en banc) (‘roughly 40 per cent or 50 per cent share usually required’ for an unreasonable restraint of trade claim).

30 See **Microsoft**, 253 F.3d at 70.

31 See, for example, **Concord Boat Corp v. Brunswick Corp**, 207 F.3d 1039, 1060–62 (8th Cir 2000).
substantial share of the market. Some courts and regulators may also focus on the loyalty condition’s effect on the incremental price of a customer’s ‘contestable’ share that it would be willing to switch to the defendant’s rivals.

Most favoured nation (MFN) clauses provide that a customer will receive pricing or other terms as good as those that the seller offers other customers. MFNs can pro-competitively help buyers obtain low prices and can help prevent opportunism when one party makes relationship-specific investments. However, MFNs can also anticompetitively limit competition by preventing new entrants from obtaining prices as low as they otherwise would have. US case law on MFNs is relatively undeveloped. However, antitrust regulators have pursued enforcement actions against MFNs, most often in healthcare.

**Tying**

Tying is when a supplier conditions its sale of one product (the tying product) on the customer purchasing another product (the tied product). Tying can be accomplished through an absolute refusal to sell the items separately, or through a price difference between the bundle and the separate items if the difference is sufficiently large that most or all customers would purchase the bundle. Tying can pro-competitively lower costs or increase the value of the items to customers, improve quality or protect goodwill, and efficiently meter consumption. On the other hand, tying may anticompetitively allow a company with monopoly power in the tying product to increase its market power in the tied product, help it protect its monopoly power in the tying product or otherwise increase its monopoly profits. A successful tying claim requires that the tying and tied items be separate products. Items are deemed separate products when customers want to buy them separately and when offering them separately is possible and efficient. Additionally, tying requires that the defendant have market power in the tying product. More recent cases have recognised the potential pro-competitive benefits of tying, although some older precedents could be read to suggest that pro-competitive justifications are inadmissible in a tying case. Proving that a substantial share of the relevant market is foreclosed is not a requirement for a tying claim.

Bundling is when a supplier charges one price if a customer purchases two or more products together, but charges a higher price when the products are purchased separately. Bundling can pro-competitively lower costs or increase the value of the products to customers, but raises similar potential anticompetitive concerns as tying. Bundling can also be combined with loyalty conditions, such that obtaining a lower price requires that the customer buy a certain share of its needs across multiple products from a particular company. Similar to loyalty conditions, US case law on bundling is unsettled. Some courts have ruled that bundling

32 See, for example, *LePage’s Inc v. 3M*, 324 F.3d 141, 157–59 (3d Cir. 2003) (en banc).


cannot be anticompetitive unless it results in prices that are below ‘an appropriate measure’ of cost.\footnote{See, for example, \textit{Cascade Health Solutions v. PeaceHealth}, 515 F.3d 883, 903 (9th Cir 2008).} In applying this cost-based test, some courts have used a ‘discount attribution test’ that applies the entire price ‘discount’ across all bundled products to the standalone price of the competitive product, and then compares the resulting price to the cost of the competitive product.\footnote{See Id., at 906–08.} Other courts have instead found that bundling can be potentially anticompetitive whenever it forecloses a substantial share of the market.\footnote{See, for example, \textit{LePage’s Inc v. 3M}, 324 F.3d 141, 154–57 (3d Cir 2003) (en banc).}

Exclusionary product design – where a company designs its product in a way that makes it difficult for competitors to develop compatible or interoperable products – can raise similar concerns as tying. Although exclusionary product designs can in certain circumstances be actionable,\footnote{See, for example, \textit{United States v. Microsoft Corp}, 253 F3d 34, 65 (DC Cir 2001) (en banc); \textit{CR Bard Inc v. M3 Systems Inc}, 157 F3d 1340, 1382 (Fed Cir 1998).} antitrust laws encourage innovation, and US courts are generally reluctant to second-guess product design decisions.\footnote{See, for example, \textit{Berkey Photo Inc v. Eastman Kodak Co}, 603 F2d 263, 286-87 (2d Cir 1979).} Unless the product design clearly has no benefits to customers, a court is relatively unlikely to sustain an exclusionary product design claim.

\textit{Refusal to deal}

US law generally does not impose a duty to deal with competitors, because the possibility of obtaining monopoly power and the ability to exclude rivals encourages investment and innovation, and because setting the terms of dealing and monitoring would be administratively burdensome. However, in limited circumstances, a refusal to deal with rivals can be anticompetitive conduct. The cases where courts have found a duty to deal generally involve the defendant ceasing a prior, voluntary and profitable course of dealing with its rivals and the defendant dealing with rivals on different terms than with non-rivals (such as where the defendant refuses to sell a product to rivals that the defendant sells at retail).\footnote{See, for example, \textit{Verizon Communications Inc v. Law Offices of Curtis V Trinko LLP}, 540 US 398, 409–10 (2004); \textit{Aspen Skiing Co v. Aspen Highlands Skiing Corp}, 472 US 585, 605–11 (1985).} Even when other US regulations mandate dealing between competitors, US courts generally will not find an antitrust duty to deal.

\textit{iii Discrimination}

Discriminatory pricing occurs when a seller charges different customers different prices for the same product. Unless the pricing is predatory, price discrimination alone is not anticompetitive conduct. However, a separate statute called the Robinson-Patman Act, which is not specific to monopolists, prohibits discriminatory pricing in the sale of commodities where the effect may be to reduce downstream competition between customers.\footnote{15 USC Section 13.} This aspect of the Robinson-Patman Act has been widely criticised, and enforcement of it is relatively rare. Although the statute requires an effect on competition, US courts typically infer that effect from the fact of differential pricing.\footnote{See \textit{FTC v. Morton Salt Co}, 334 US 37, 47 (1948).} Discriminatory pricing is not prohibited by the Robinson-Patman Act if the sale does not involve commodities; if the customers do not compete with one another downstream; or if the price differential is justified by differential
costs, an effort to meet competitors’ pricing or changing conditions. The Robinson-Patman Act therefore does not prohibit price discrimination between final consumers, as they do not compete downstream.

iv Exploitative abuses
As noted, exercising monopoly power is generally legal under US law. US law therefore does not in general recognise exploitative abuses.

v Miscellaneous
A variety of other types of conduct can, in certain circumstances, support a monopolisation claim. A non-exhaustive list is discussed here.

Monopoly leveraging is using monopoly power in one market to gain an advantage in a second market. However, under US law, monopoly leveraging likely cannot support a monopolisation claim unless it involves some anticompetitive conduct (such as tying, exclusive dealing or a refusal to deal) and it helps the defendant obtain or maintain a monopoly in the second market (or creates a dangerous probability of doing so).49

Monopolisation claims have also been brought against patent holders for abusing standard-setting processes. Such claims might be brought where the patent holder induces a standard-setting organisation to adopt a standard that includes its patents but either deceptively promises to license the patents on FRAND terms and reneges or fails to disclose the existence of its patents in the first place. The concern is that such abuses may result in monopoly pricing that otherwise could have been avoided. Some courts have allowed such claims to go forward, while others have suggested they do not constitute monopolisation.50 The FTC has also used Section 5 of the FTC Act to pursue enforcement actions against alleged abuses of the standard-setting process.51

Monopolisation claims can also be brought against companies that abuse government processes. For example, ‘sham’ litigation and other abuses of the litigation process can be monopolisation.52 Similarly, enforcing intellectual property rights obtained through fraud can be monopolisation.53 Other abuses of governmental processes are also possible.

Additionally, in extreme cases, more general tortious conduct can support a monopolisation claim. For example, one US court allowed a monopolisation claim when a defendant removed its rival’s products and advertising from retail stores without permission.54

48 15 USC Section 13(a), (b).
49 See Trinko, 540 US at 415 n. 4.
52 See, for example, Professional Real Estate Investors Inc v. Columbia Pictures Industries Inc, 508 US 49, 60–61 (1993) (holding that sham litigation requires both objective and subjective baselessness); California Motor Transport Co v. Trucking Unlimited, 404 US 508 (1972) (allowing claims based on abuse of the litigation process through repetitive lawsuits).
Mergers that help obtain or maintain a monopoly can constitute monopolisation, although typically mergers are challenged under Section 7 of the Clayton Act, 15 USC Section 18, which prohibits mergers that ‘substantially … lessen competition’ or ‘tend to create a monopoly’.

V REMEDIES AND SANCTIONS

Available remedies in monopolisation cases include injunctive relief and monetary damages. Civil fines are not available.

Both the US antitrust regulators and private plaintiffs can seek injunctive relief, a court order that either requires the defendant to take certain actions or prohibits the defendant from taking certain actions. Injunctive relief has multiple purposes, including stopping the anticompetitive conduct, reversing its anticompetitive effects and denying the defendant the fruits of that conduct. Courts have broad discretion to frame appropriate injunctive relief to achieve these goals. Appropriate relief may include structural remedies (such as dissolving or splitting the defendant or requiring divestitures) or behavioural remedies (such as prohibiting the defendant from engaging in certain activities in the future or requiring that the defendant grant rivals access to certain property). Moreover, injunctive relief can include monetary equitable remedies such as disgorgement (an order requiring the defendant give up supra-competitive profits related to the antitrust violation) or restitution (an order requiring that the defendant compensate victims for their losses).

Private plaintiffs can seek monetary damages equal to three times their actual injury, plus litigation costs and reasonable attorneys’ fees, as detailed below. US and state governments also can seek treble damages for injury to their own business or property (as can foreign governments, although they are usually limited to single damages). In addition, a US state can bring a parens patriae action seeking treble damages on behalf of its residents.

VI PROCEDURE

Monopolisation enforcement principally occurs through government investigations by the US antitrust regulators, and court proceedings initiated by the US antitrust regulators, states or private plaintiffs.

Investigations by US antitrust regulators can start in a variety of ways, including the regulator’s own initiative, complaints from private parties or requests from other governmental actors (e.g., Congress). The DOJ and the FTC can work voluntarily with the target of the investigation and third parties, or can use compulsory process, including subpoenas and ‘civil investigative demands’, to obtain documents, written responses to questions and witness testimony. Entities subjected to a compulsory process often seek to negotiate the scope of the discovery and sometimes seek to quash it, although in practice doing so is relatively

55 As noted, criminal sanctions are theoretically available but not pursued in practice.
56 See, for example, United States v. United Shoe Mach Corp, 391 US 244, 250 (1968).
57 15 USC Section 15.
58 15 USC Section 15(b); 15a.
59 15 USC Section 15c.
60 See 15 USC Sections 46, 49, 57b-1; 15 USC Sections 1311–1314.
61 See 15 USC Section 1314(b); 16 CFR 2.7(d).
difficult, particularly for a target of an investigation. An investigation can be dropped at any time, and that decision is unreviewable by a court. An investigation can also be resolved through settlement at any time. The DOJ, as an agency of the US executive branch, must obtain court approval of its settlements, while the FTC, as an independent administrative agency, must approve settlements by majority vote of the FTC Commissioners.

An investigation can also lead to litigation. The DOJ must pursue litigation in federal court, following the procedures described below. The FTC, by contrast, has its own administrative courts, with somewhat different procedures, followed first by an appeal to the Commission itself and then an appeal to a federal appellate court. (The FTC can also bring lawsuits in federal court seeking equitable relief but, as noted above, one recent district court case held that the FTC did not have authority to pursue equitable relief in federal court for conduct that was solely in the past.)

Court proceedings in a monopolisation case are similar to court proceedings in other cases. US federal courts have exclusive jurisdiction to hear cases under the federal antitrust laws, although state courts can hear cases under state antitrust laws. Antitrust cases that seek monetary damages are generally tried before a jury, while antitrust cases that seek only injunctive relief are instead tried before a judge. A court case starts with the plaintiff filing a complaint laying out the allegations against the defendant. The defendant can move to dismiss a complaint on several grounds, most importantly that the allegations fail to state a plausible claim. If the case proceeds, parties engage in potentially wide-ranging discovery, including document production, written interrogatories, requests for admissions and depositions. After discovery, a party may move for summary judgment on some or all issues if no genuine dispute exists as to any material fact and, given the material facts, the party is entitled to judgment as a matter of law. During and after a trial, parties can again move for judgment as a matter of law. Adverse decisions can be appealed, although typically not until after a final judgment. In general, the parties are free to settle at any time during this process.

Both the US antitrust regulators and private plaintiffs can also seek preliminary relief prior to a full adjudication by moving for a temporary restraining order or preliminary injunction to stop the challenged conduct. Preliminary relief can only be obtained from a court. Whether preliminary relief is appropriate depends on balancing the likelihood each party will succeed on the merits with the harm to the defendant from granting the preliminary relief and the harm to the plaintiff and the public from not granting it. In general, preliminary relief is unusual in a monopolisation case.

Further, the DOJ offers a business review process and the FTC offers an advisory opinion process that may allow businesses to obtain guidance about the DOJ’s or the FTC’s present enforcement intentions as to certain conduct. Businesses must submit a written request to the DOJ or the FTC describing the conduct and provide documents and other information. The DOJ or the FTC typically will consider only requests related to proposed conduct (and thus typically will not consider requests related to conduct that is already ongoing), and they can decline to issue guidance. If the DOJ or the FTC responds, the response and request are made available publicly. The guidance is not legally binding, but in practice the DOJ and the FTC are unlikely to pursue enforcement action against a requesting party that relies on it (except in special circumstances, such as if the facts provided were inaccurate).

63 See 16 CFR Sections 1.1–1.4; 28 CFR Section 50.6.
VII PRIVATE ENFORCEMENT

As explained above, private plaintiffs can and often do seek treble damages and injunctive relief in monopolisation cases. Private actions can be brought by individual plaintiffs or through an opt-out class action that adjudicates the claims of many similarly situated plaintiffs in a single lawsuit. Class actions have additional procedural requirements that must be satisfied. Often, antitrust actions are viewed as amenable to resolution on a class-wide basis because many of the relevant issues will be market-wide and thus common to the class. Still, procedural hurdles remain, including demonstrating that impact can be proven on a common basis.

Typically, monopolisation suits are brought either by customers alleging that they paid more because of the reduction in competition caused by the monopolisation or by competitors alleging that they made less profit because their ability to compete was impaired. In general, indirect purchasers cannot bring claims under US federal antitrust laws, although many states allow indirect purchasers to bring claims under state antitrust laws.

To obtain damages, a private plaintiff must establish more than the antitrust violation itself: it must also show that it was injured, that the violation was a material cause of its injury, that its injury was sufficiently closely related to the violation and that its injury resulted from an anticompetitive effect of the violation. Finally, it must prove the amount of damages. Conceptually, the appropriate measure of damages is the difference between the plaintiff's position in the actual world and what its position would have been in the but-for world without the challenged conduct. Establishing what would have happened in the but-for world is often difficult, so courts typically require plaintiffs to prove damages only with reasonable certainty. Plaintiffs can do so by offering a rough approximation, and in practice, they typically compare the actual world to a baseline unaffected by the challenged conduct (e.g., the same market before the challenged conduct began or a similar market where the challenged conduct never occurred). Increasingly, damages are modelled using econometric techniques.

To obtain an injunction, by contrast, a private plaintiff must generally show that monetary damages would not be an adequate remedy because it cannot prove the amount of damages with reasonable certainty. The forms of injunctive relief discussed above (including behavioural and structural remedies) are in theory available to private plaintiffs.

Private enforcement also interacts with public enforcement. Private plaintiffs can encourage the government to open an investigation. If the government brings a public enforcement action and obtains a favourable judgment, that may benefit private plaintiffs by precluding the defendant from re-litigating certain issues in future private actions by providing prima facie evidence of a violation under the antitrust statutes or under more general procedural principles governing preclusion. In contrast, if the government chooses not to bring an action, or if it brings an action and loses, that does not prevent a future private action. A settlement likewise does not prevent a future private action and, if entered before testimony is obtained, also cannot be used as prima facie evidence of a violation. In addition, regardless of whether the government decides to bring an action, private plaintiffs

64 See Fed R Civ P 23.
66 See 15 USC Section 16(a).
can often benefit from the fruits of a government investigation, such as the discovery that the
government obtains. The statute of limitations for private actions can also be suspended by
a government action.

VIII FUTURE DEVELOPMENTS

At the time of writing, there were no significant monopolisation cases pending before the
US Supreme Court. There was, however, a pending antitrust case brought against credit
 card network American Express under Section 1 of the Sherman Act, 15 USC Section 1,
which prohibits anticompetitive agreements in restraint of trade. The case challenges certain
anti-steering restraints that American Express places on its merchants. These restraints
are similar to MFN clauses, and the Supreme Court’s ruling could potentially impact US
monopolisation law related to exclusionary agreements.
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Helena Belina Djalil has extensive experience in competition and corporate matters across various industries. In her professional career, she has worked in both the public and private sectors. Upon graduating from University of Ljubljana she began her career as a trainee attorney, moving on to a consultancy firm where she was the head of the legal department and also advised clients on areas of corporate law, labour law, public procurement, intellectual property law, including IT, consumer protection and e-commerce. She spent nearly five years at the Slovenian Competition Agency, where she gained a thorough knowledge and understanding of competition law, policy and proceedings at national and EU level, with a primary focus on assessment of restrictive agreements, abuses of a dominant position and concentrations between undertakings. She joined Fatur Law Firm as an associate attorney in 2014. At the beginning of 2016, she became an independent attorney-at-law and continues to work with Fatur Law Firm as an external expert, where she primarily deals with competition and corporate law.
MATTEO BERETTA
_Cleary Gottlieb Steen & Hamilton LLP_

Matteo Beretta is a partner at Cleary Gottlieb Steen & Hamilton LLP, based in the Milan office. His practice primarily focuses on European law and antitrust law. He advises numerous major international companies with regard to merger control procedures, and cartels and abuse of dominance matters. He regularly lectures at numerous conferences on competition matters, and has authored several articles in US and European legal journals.

Mr Beretta is distinguished as a leading competition and European law expert by _Chambers Europe_. He is also recommended for competition law by _The Legal 500 EMEA_ and _Who’s Who Legal_. In 2013, he was named the ‘Best Italian Competition Law Lawyer of the Year’ by Italian legal magazine _TopLegal._

He graduated from the University of Milan in 1991 and obtained an LLM degree from the Institut d’Études Européennes de l’Université Libre de Bruxelles in 1992, as well as an LLM from the New York University School of Law in 1999. He has been a member of the Bergamo Bar since 1995.

MAXIM BOULBA
_CMS Russia_

Maxim Boulba heads the competition group at CMS Russia and advises clients on competition law issues, such as merger control as well as antitrust behavioural, regulatory matters and IP issues. Maxim has been practising competition law since 2000.

Maxim has handled a large number of difficult merger clearances in Russia and the other CIS countries. As part of M&A transactions and corporate reorganisations, Maxim advises foreign investors on Russian merger control requirements, and obtaining merger clearance in relation to the acquisition of companies and assets located in Russia and the CIS.

He has also successfully represented corporate clients in various administrative proceedings, inspections and dawn raids by the antitrust authorities, and has worked on projects related to antitrust compliance.

Maxim was chosen as one of the leading practitioners in Russia in the competition and antitrust sphere according to _Best Lawyers_ and has been ranked by _Chambers and Partners_ legal directory since 2012.

FRÉDÉRIC DE BURE
_Cleary Gottlieb Steen & Hamilton LLP_

Frédéric de Bure is a Cleary Gottlieb Steen & Hamilton LLP counsel based in the Paris office, and his practice focuses on EU and French competition law.

Mr de Bure has advised clients in complex merger control cases before the European Commission and the French Competition Authority. He has also represented clients in a number of international cartel and abuse of dominance investigations, including several recent investigations in the internet and pharmaceutical sectors. He has wide experience in litigation before the European courts and the French courts in private enforcement matters.

Mr de Bure teaches competition law at Sciences Po and Université Montpellier 1 (DJCE/DCI). He is co-author of the book _EU Competition Law – Abuse of Dominance under Article 102 TFEU_ (Claeys & Casteels Publishing).
Mr de Bure joined the firm in 2003 and became counsel in 2012. From 2003 to 2008, he was resident in the Brussels office. Mr de Bure graduated from the Institut d’études politiques de Paris (IEP) in 1997 and received a master of science degree from the London School of Economics in 1999. He also received a law degree from the Université Paris 1 Pantheon-Sorbonne in 2002.

CAMILA CORVALÁN

Estudio Beccar Varela

Camila Corvalán is based in Estudio Beccar Varela’s Buenos Aires office and practises in a broad range of antitrust matters, including investigations of anticompetitive conduct as well as merger and acquisition control. She is also involved in antitrust litigation cases before judicial courts.

Ms Corvalán received her college degree from the Catholic University of Argentina. She graduated with honours. Ms Corvalán took her graduate studies at the same University and specialised in competition law in Madrid, Spain. She worked as an editor of the Argentine journal El Derecho in parallel with her office work. For the past few years, Camila has been committed to women’s empowerment and has spent many hours in various women’s organisations undertaking activities to promote gender and diversity. Camila is a member of the board of FAME (Fondo Argentino de Mujeres Empresarias).

DANIEL CULLEY

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Daniel Culley is based in Cleary Gottlieb Steen & Hamilton LLP’s Washington, DC office and practises in a broad range of antitrust matters, including litigation, mergers, cartels and counselling across a wide number of industries.

Mr Culley received his JD, magna cum laude, Order of the Coif, from Georgetown University Law Center in 2008, and received his BS, magna cum laude, in international economics, from Georgetown University School of Foreign Service in 2005. He has written a number of articles on antitrust and competition law, with a particular focus on the application of antitrust and competition law to intellectual property and high-technology industries.

MARCEL DIETRICH

Homburger AG

Marcel Dietrich is the head of Homburger’s competition and regulatory team, and a partner in the corporate team as well as in the white collar, investigations and real estate teams. He has extensive and long-standing experience in all areas of Swiss and European competition law as well as in administrative law and regulated markets.

MAURITS DOLMANS

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Maurits JFM Dolmans is a partner based in the London office of Cleary Gottlieb Steen & Hamilton LLP.

Mr Dolmans’ practice focuses on EU, UK and international competition law, as well as EU regulatory and EU intellectual property law. Mr Dolmans has extensive experience in the
information technology, telecoms, media and entertainment sectors, as well as in the energy, medical devices, chemicals and manufacturing industries. He has appeared in proceedings before the EU Commission and the EU courts, national courts and national competition authorities of several Member States, and ICC and NAI arbitrations. Many of his competition cases involve abuse of dominance, licensing or refusals to license, European standardisation, access to networks, mergers, joint ventures and other transactions in the IT, telecoms and other areas, intellectual property arbitration and litigation, abuses of dominance and cartels. He has published widely in these areas.

Mr Dolmans' public cases include the EU’s clearance of Google's acquisition of Motorola, the UK OFT clearance of Google's acquisition of Beatthatquote and Waze, the successful closure of a range of complaints against IBM for alleged abuse of dominance, representation of Google in a wide range of matters involving alleged abuse of dominance relating to patents, search services and advertising, and various antitrust cases against Microsoft.

Mr Dolmans is distinguished by Chambers’ guides on ‘the world’s leading lawyers’ and by other publications as a leading lawyer in the areas of competition, antitrust and communications.

BERNT ELSNER
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Bernt Elsner leads the Austrian team for EU competition law, public procurement law and public law. He is head of the global CMS practice group public procurement and a member of the managing team of the global CMS practice group, competition and EU. Bernt studied law at the University of Vienna and business administration at the Economic University of Vienna. He was a law clerk at the Austrian Constitutional Court and has over 20 years of experience as an attorney in Vienna and Brussels. Bernt has authored numerous books and articles. He is a well-known expert with specific experience on cross-border merger control matters, anticompetitive behaviour in tender procedures, antitrust damage and antitrust compliance.

MARIA ERMOLAEVA
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Maria Ermolaeva is an associate in the competition team of CMS Russia. Her practice focuses on competition law and IP issues.

Maria advises clients on a broad range of antimonopoly matters such as anticompetitive agreements, concerted actions and distribution structuring as well as obtaining merger clearances. Her experience also includes advising on general competition compliance and industry-specific antimonopoly issues.

GIANLUCA FAELLA
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Gianluca Faella is a counsel at Cleary Gottlieb Steen & Hamilton LLP. His practice focuses on EU and Italian competition law, state aid and economic regulation (including electronic communications and media regulation). He advises leading companies in proceedings before
competition and regulatory authorities and EU, administrative and civil courts concerning abuses of dominance, restrictive agreements, mergers, state aid and regulatory issues.

He is an adjunct professor of competition law and policy at the University of Siena, and of competition and high-tech markets, and law and economics at the LUISS Guido Carli University of Rome. In December 2013 he obtained the national scientific qualification as an associate professor in economics, financial and agri-food markets law and regulation. He is a senior research fellow at the Law and Economics LAB (Rome) and lectures regularly on antitrust law issues in several LLM courses at various universities. He was also an adjunct professor at the University of Bologna and the University of Naples Federico II, a research fellow at LUISS Guido Carli University (2008–2012) and a research scholar at the New York Law School (2005).

He obtained an LLM degree in competition law and economics at the Erasmus University Rotterdam in 2003, and a PhD in law and economics at LUISS Guido Carli University in 2005.

Mr Faella is the author of a book on discounting policies of dominant firms (*Politiche di sconti delle imprese dominanti*, Giappichelli, Turin, 2012), as well as several articles and essays on competition law, unfair competition, intellectual property and civil law, and he has delivered speeches at several conferences and seminars in Italy and abroad.

**ANDREJ FATUR**

*Fatur Law Firm*

Andrej Fatur is a senior partner, and has extensive international experience gained from studying and working in New York, London, Luxembourg and Amsterdam. He specialises in competition and corporate law. As an attorney he has advised numerous leading domestic and foreign corporations on complex competition law issues, especially on information and communication technology, pharmaceuticals and trade, as well as on the restructuring and regulation of the energy and pharmaceutical sectors. He is the author of numerous articles and papers, particularly in the field of competition law. In 2012, Hart Publishing published his book, *Information and Communication Technology Networks Industries and EU Competition Policy*. He was also a recipient of several prestigious international scholarships, such as the Fulbright and Chevening Scholarships. He regularly lectures at international seminars and conferences. Besides his legal practice in Slovenia, Dr Fatur is also a licensed attorney in New York. Since March 2012, he has also been a member of the supervisory board of Nova KBM dd, a Slovenian bank. He is listed by *Chambers and Partners* as one of the leading competition lawyers in Slovenia, and is especially praised for his excellent knowledge of EU competition law.

**ARLAN GATES**

*Baker McKenzie LLP*

Arlan Gates is a partner in Baker McKenzie’s global antitrust and competition practice group and heads the antitrust and competition team in Canada. His practice focuses on merger control and counselling in the areas of pricing, distribution and trade practices, abuse of dominance, competitor collaboration, marketing practices and misleading advertising. He has significant experience in the pharmaceuticals, health, food and consumer products sectors, as well as in technology, communications and other industries. He is based in the firm’s Toronto office and has also worked in its Sydney office.
PAUL GILBERT
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Paul Gilbert is counsel based in the London office of Cleary Gottlieb.

Mr Gilbert’s practice focuses on EU and UK competition law, including merger control, anticompetitive agreements, abuse of dominance and sectoral regulation. He has represented clients before the European Commission, the UK Competition and Markets Authority (and its predecessors, the Office of Fair Trading and Competition Commission), as well as in litigation before the UK Competition Appeal Tribunal and Court of Appeal.

Mr Gilbert joined the firm in January 2011 and became counsel in January 2015. Before joining the firm he was Deputy Director of Competition Policy at the UK Office of Fair Trading. Mr Gilbert graduated with first class honours from Trinity College, Oxford in 1997. He obtained postgraduate diplomas in law and legal practice from the College of Law in 2000 and 2001, both with distinction.

Mr Gilbert is a solicitor of the Senior Courts of England and Wales and a practising Irish solicitor.

MARCUS GLADER
Vinge

Marcus Glader specialises in competition law and is a partner in Vinge’s EU, competition and regulatory practice group. Marcus works with all types of EU and competition law matters, and focuses in particular on transactions, abuse of dominance issues and competition law litigation. Marcus has a wealth of international experience after several years in Brussels, including at the European Commission and a leading international firm, before managing Vinge’s Brussels office. He is ranked among the top five competition law specialists in Sweden. Marcus holds a doctor of laws from Lund University, and is a guest lecturer at Lund University and Stockholm University.

FRANCISCO ENRIQUE GONZÁLEZ-DÍAZ
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Francisco Enrique González-Díaz is a partner based in the Brussels office.

Mr González-Díaz’s practice focuses on European and Spanish competition law, including mergers and acquisitions, restrictive practices, abuse of dominance and state aid.

Mr González-Díaz has a law degree from the University of Granada (Spain), as well as LLM degrees from the Free University of Brussels (Belgium) and Harvard University (United States), and an economics and mathematics degree from the Open University (UK).

Prior to joining Cleary Gottlieb Steen & Hamilton LLP, Mr González-Díaz held a number of positions within European institutions. Between 1998 and 2003, he headed one of the enforcement units of the European Commission’s Merger Task Force, and led the European Commission in its review of a number of large and complex cases in a wide array of market sectors. Between 1996 and 1998, Mr González-Díaz clerked at the European Court in Luxembourg. From 1990 to 1996, Mr González-Díaz was a member of the European Commission’s Legal Service.

Mr González-Díaz has written extensively on EU law matters, particularly in the field of antitrust and competition law. He has recently authored and edited a book on abuse of
dominance at the EU level. He was a lecturer in private international law at the University of Alicante from 1985 to 1989. He also serves on the advisory and editorial boards of a number of legal publications.

Mr González-Díaz is a member of the Bars in Madrid and Brussels. His native language is Spanish, and he is fluent in English and French.

THOMAS GRAF

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Thomas Graf is a partner at Cleary Gottlieb Steen & Hamilton LLP. Mr Graf’s practice focuses on EU competition law, regulatory affairs and intellectual property law. His experience includes work in a number of industries, including IT, pharmaceuticals, media, sports rights, energy and engineering.

CĂTĂLIN GRAURE

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Cătălin Graure is an associate in the competition practice of the DLA Piper Bucharest office. He advises clients regularly on various aspects of competition law. Mr Graure provides assistance in relation to investigations carried out by the Romanian competition authority, merger cases, and internal compliance measures and programmes. Mr Graure holds an LLM in international law from Paris 1 Panthéon-Sorbonne University, and is a frequent writer of articles on various aspects of Romanian and EU competition law.

GÖNENÇ GÜRKAYNAK

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Mr Gönenç Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 87 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York, Brussels and England and Wales (currently a non-practising solicitor). Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year Mr Gürkaynak represents multinational companies and large domestic clients in more than 20 written and oral defences in investigations of the Turkish Competition Authority, about 15 antitrust appeal cases in the high administrative court and over 60 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish through
various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.

FRANZ HOFFET
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Franz Hoffet is a partner of Homburger’s competition and regulatory practice team. He has extensive experience in all areas of Swiss and European competition law, ranging from merger control to administrative and civil antitrust litigation.

BEN HOLLES DE PEYER
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Ben Holles de Peyer is an international attorney based in the Washington D.C. office. Mr Holles de Peyer joined Cleary Gottlieb Steen & Hamilton LLP in 2012.

Mr Holles de Peyer’s practice focuses on EU and Spanish competition law. He has experience advising clients in a wide array of market sectors. Moreover, he has appeared before the EU courts in litigation involving data protection and abuse of dominant position.

Mr Holles de Peyer has a law degree and a political science degree from the Autonomous University of Madrid (Spain), as well as LLM degrees from the College of Europe (Belgium) and Harvard University (United States). He also participated in an international exchange programme at Sciences Po, Paris.

Mr Holles de Peyer is a member of the Bar in Madrid. His native languages are English, Spanish and Catalan, and he is fluent in French.

YOUNGJIN JUNG
Kim & Chang
Dr Youngjin Jung is a senior member of Kim & Chang’s antitrust practice group. He has extensive experience in all areas of antitrust and competition law in the industries such as the IT, telecoms, semiconductor, aviation and chemical industries. He has served as a member of the cartel advisory board of the KFTC and as a non-governmental adviser for the International Competition Network. Dr Jung, an author of numerous articles including an ABA treatise entitled ‘Competition Laws outside the United States’, ‘Cartel Enforcement Worldwide’ (Cambridge University Press) (2009), received his doctoral degree from Yale Law School, and has served as a visiting professor at Duke Law School and an adjunct professor at Georgetown Law School. Dr Jung is an officer of the IBA International Antitrust Committee and a member of the IBA Cartels Group. He is listed in The International Who’s Who of Competition Lawyers and in Chambers Asia, and is noted as a leading expert in technology, media and telecommunication by Euromoney.

RICARDO BORDALO JUNQUEIRO
Vieira de Almeida
Ricardo Bordalo Junqueiro joined Vieira de Almeida in 2018 as partner in the EU and competition law practice, where he regularly works on transactions in the electronic
communications, energy, pharmaceutical, financial, media and infrastructure sectors. Ricardo also works on all regulatory matters involving electronic communications.

He graduated the Portuguese Catholic University, Faculty of Law. Ricardo holds a master of law (LLM) in EU law from the Department of Law, University of Essex, and undertook postgraduate studies in EU competition law at King’s College London, University of London.

He also attended the advanced programme in regulatory economy and competition at the Portuguese Catholic University’s Faculty of Economic and Entrepreneurial Sciences.

Before joining Vieira de Almeida, Ricardo was a partner at Cuatrecasas until 2017. Between August 2013 and December 2016, he was of counsel at Cuatrecasas.

Between 2002 and 2013, he worked at Vieira de Almeida as a lawyer in the competition and EU groups, actively participating in transactions in the electronic communications, pharmaceutical, infrastructures and postal sectors.

Between 2005 and 2006, he was in charge of the Vieira de Almeida office in Brussels. Ricardo has authored several works in competition law, notably Abuse of Dominant Position, Almedina, 2012.

He is a member of the Portuguese Bar Association, the Portuguese Circle of Portuguese Lawyers of Competition Law and the Portuguese Association for the Development of Communications.

KITI KARVINEN
Castrén & Snellman Attorneys Ltd

Kiti Karvinen is a senior associate at Castrén & Snellman Attorneys Ltd’s competition and procurement practice. Kiti Karvinen joined the practice at the beginning of 2015. Prior to joining the firm, she worked at another law firm for several years advising clients on a wide range of issues relating to competition law with particular focus on issues of dominant companies. In addition to her LLM degree from the University of Helsinki, she completed a postgraduate diploma in EU competition law at King’s College London. Ms Karvinen specialises in antitrust and competition law. She advises clients in EU and Finnish competition law across a variety of business sectors.

YUSUKE KASHIWAGI
TMI Associates

From 2004 to 2008, Mr Kashiwagi was Chief Investigator at the Investigation Bureau of the Japan Fair Trade Commission (JFTC), during which time he led the JFTC to victory in its fight against several companies in cases such as NIPRO (private monopolisation) and Microsoft (unfair business practices, non-assertion provisions). He has also reviewed other cases such as the Marine Hose cartel case and the Qualcomm case. From 2007, he also served in the JFTC’s Merger and Acquisitions Division, was responsible for legal revisions of the prior notification system, drafted revised clauses for Chapter 4 of the Antimonopoly Act and conducted a review of BHP Billiton/Rio Tinto.

Since joining TMI in 2008, he has obtained both maximum immunities and reductions of fines imposed by various countries on Auto part cartels, been involved in numerous international cartels such as Auto shipping cartels, and has also been involved in some highly complex merger control cases, as well as numerous cases of private monopolisation and unfair business practices.
ANA KÉRI
Vieira de Almeida
Ana Kéri is a senior consultant at Vieira de Almeida. She graduated from the Portuguese Catholic University, Faculty of Law, from which she also holds a postgraduate degree in commercial law. She holds a master of laws (LLM) from the University of Chicago, and a postgraduate degree and master of laws in EU competition law from King’s College London. Before joining the firm, she worked in the competition and antitrust law department at Gleiss Lutz, Stuttgart (Germany) as a foreign associate (2012–2017) and as an associate at the European and competition law department at Cuatrecasas (2006–2012). From 2003 to 2005, she worked as a lawyer at the law firm Lima, Gameiro, Vasques, Antunes & Associates. From 2001 to 2003, she practised law as a trainee at Neville de Rougemont & Associados.

She is a member of the Portuguese Bar Association, the New York Bar Association and the Circle of Portuguese Competition Laywers.

IN-SANG KIM
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In-Sang Kim is a senior attorney within the antitrust practice group as well as other practice groups, such as the TMT industry practice group, logistics industry practice group and mergers and acquisitions practice group. In relation to the antitrust and competition practice, Mr Kim represents and advises a broad range of global companies in various industry sectors such as technology, finance, logistics and manufacturing in their dealings with the KFTC, before the courts and in their day to day operational issues involving all aspects of competition law compliance.

MOLLY KOS
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Molly Kos is an attorney-at-law at CMS Reich-Rohrwig Hainz in Vienna. Her main areas of expertise include competition and EU, mergers and acquisitions as well as public law. Currently she is very active in cross-border merger control matters. She holds a master’s degree in law from the University of Vienna as well as a master of laws from the Queen Mary Law Faculty of the University of London. In October 2016, she passed her bar exam with distinction and became a member of the Austrian Bar in November 2017. Prior to joining CMS, she clerked at the European Court of Human Rights and worked for the Austrian Embassy in London, as well as interning with a well-known international law firm in Vienna focusing on corporate law.

TILMAN KUHN
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Tilman Kuhn is a counsel based in the Cologne office of Cleary Gottlieb Steen & Hamilton LLP and a member of the Cologne Bar.

Mr Kuhn’s practice focuses on European and German competition law, including administrative and civil litigation. He publishes regularly on antitrust topics and is a co-author of the Frankfurt commentary on EU and German competition law.
Mr Kuhn joined Cleary Gottlieb Steen & Hamilton LLP in 2004 and became counsel in 2012. From 2004 to 2009, he was resident in the Cologne office, and from 2009 to 2010, he was resident in the Brussels office. He received an LLM degree from the University of Amsterdam in 2001 and a doctorate in law (Dr iur), *summa cum laude*, from the University of Cologne in 2005. Mr Kuhn passed his second state examination in the state of North Rhine Westphalia in 2003 and the first state examination at the University of Bonn in 2000.

**ANA PAULA MARTINEZ**
*Levy & Salomão Advogados*

Ana Paula Martinez is a partner at Levy & Salomão Advogados. Ms Martinez served in Brazil’s federal government from 2007 to 2010, where she was responsible for government antitrust investigations and enforcement actions. As part of her government service, she also served as the co-chair of the cartel subgroup of the International Competition Network (ICN), alongside the US Department of Justice, and represented Brazil before the OECD. Ms Martinez served as an antitrust adviser to UNCTAD, the World Bank and the government of Colombia, and is currently a non-governmental adviser to the ICN. Before entering government, Ms Martinez was an associate with Cleary Gottlieb Steen & Hamilton LLP and Levy & Salomão Advogados. She is a frequent speaker at both Brazilian and international colloquiums. *Global Competition Review (GCR)* named her on its lists ‘Top Women in Antitrust’ and ‘40 under 40’. *Chambers and Partners, The Legal 500* and *Who's Who Legal* have listed her among the world’s leading competition practitioners. In 2015, she was selected as one of the top five lawyers globally in merger clearance matters by *GCR*, and in 2014 and 2016 *GCR* awarded her ‘Lawyer of the Year – Under 40’. Ms Martinez is admitted to practise in New York and Brazil. She holds master of laws degrees from both Harvard Law School and the University of São Paulo (USP), and a PhD degree in criminal law from USP.

**JOHN MESSENT**
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John Messent is an associate based in the London office of Cleary Gottlieb. Mr Messent’s practice focuses on EU and UK competition law, including merger control, anticompetitive agreements, abuse of dominance and sectoral regulation. He is a practising barrister and has represented clients before the European Commission and the UK Competition and Markets Authority, as well as in litigation.

Mr Messent joined the firm’s Brussels office in 2008, and moved to the London office in 2012. From October 2013, he spent six months on secondment in the policy department of the UK Office of Fair Trading, working on guidance documents to be published by the new Competition and Markets Authority (including guidance on mergers, Competition Act investigations and criminal cartel offence prosecutions).

**HENRY MOSTYN**
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Henry Mostyn is an associate in the London office of Cleary Gottlieb Steen & Hamilton LLP, having joined the firm in 2012. He is a barrister of England and Wales. Mr Mostyn’s practice focuses on all aspects of EU competition law.
MORGAN L MULVENON
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Morgan Mulvenon is based in Cleary Gottlieb Steen & Hamilton LLP’s Washington, DC office and practises in a broad range of antitrust matters, including litigation, mergers and counselling, across a wide number of industries.

Ms Mulvenon received her JD, magna cum laude, Order of the Coif, from Georgetown University Law Center in 2012, where she was an executive editor for the Georgetown Law Journal, and received her AB, magna cum laude, in public policy studies and history from Duke University in 2009.

JUSSI NIEMINEN
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Jussi Nieminen is a partner at Castrén & Snellman Attorneys Ltd’s competition and procurement practice. Mr Nieminen specialises in competition law, state aid and procurement matters as well M&A transactions. He advises clients in all aspects of Finnish and EU competition and procurement law regimes. Mr Nieminen frequently represents major companies in competition law enforcement proceedings before authorities and courts. He also has extensive expertise in complex merger control filings, substantive analysis and multi-jurisdictional coordination, audits, strategic compliance work and complex commercial arrangements across a number of industries.

Prior to joining Castrén & Snellman in 2009, Mr Nieminen worked in the legal department of a multinational listed construction group. In addition to having completed his LLM degree at the University of Turku, he also studied at the University of Copenhagen in Denmark and has a postgraduate diploma in competition law economics from King’s College London.

EDGAR ODIO
Pragma Legal

Edgar Odio is a founding partner of Pragma Legal. He has been licensed to practise in Costa Rica since 1989. He has a master’s degree in economic development from Essex University and postgraduate degrees in EU competition law and economics for competition from King’s College London. His practice has focused on foreign investment and mergers and acquisitions.

He has served as local consultant for the Competition and Consumer Protection for Latin America programme (COMPAL) implemented by the United Nations Conference on Trade and Development (UNCTAD) to draft the amendment to the Competition Law. Mr Odio also served for four years as member of the local competition authority, COPROCOM, as senior adviser on competition to UNCTAD in Geneva, and is a member of the advisory group of experts for COMPAL. In this capacity, he has participated in training and advisory missions to countries such as Bolivia and Guatemala. He teaches a competition course at La Salle University and a postgraduate distance-learning course on competition and intellectual property at the National University of Distance Education (UNED). He is regularly invited to workshops and training sessions by local and multinational companies, and offers advice on competition matters to local and foreign clients.
TRINE OSEN BERGQVIST
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Trine Osen Bergqvist works as a specialist in Vinge’s EU, competition and regulatory practice group. Before joining Vinge in August 2017, she worked for many years at the Swedish Competition Authority, first as legal counsel at the Legal Department, later as deputy head of the Market Abuse Unit, which investigates cases regarding abuse of a dominant position. She has many years of experience from working as a lawyer at Swedish and Norwegian law firms. Trine holds an LLM from the University of Bergen (1996) and a master’s degree from Stockholm University. She also holds postgraduate diplomas in competition law and economics of competition law from King’s College. She is a member of the Swedish and the Norwegian Bar.

JU-HYUN PARK
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Ju-Hyun Park is a foreign attorney within the antitrust practice group, and other practice groups such as the healthcare industry practice group, environment practice group and privacy practice group. Ms Park advises the firm’s multinational clients in the healthcare, consumer goods and other sectors on various competition law matters including merger reviews, KFTC investigations and leniency applications.

ANAND S PATHAK
P&A Law Offices
Anand S Pathak practises in the areas of US, European and Indian mergers, acquisitions and joint ventures, and technology licensing, distribution and agency arrangements. He attended all of the European Council negotiation meetings leading to the adoption of the EU Merger Control Regulation, and assisted in the drafting of the implementing regulations and guidelines issued by the European Commission. He has represented clients in European Commission proceedings, investigations and notifications of concentrations under EU competition laws, including Toyota, General Electric, Dresser Industries, Ingersoll-Rand, Pepsico Inc and Waste Management, and more recently Ranbaxy Laboratories Limited in a competition law proceeding before the European Commission in the Lundbeck case. He has represented several clients in proceedings before the Indian Competition Commission, the Competition Appellate Tribunal and the Supreme Court of India, including Apple Inc, MCX-SX, Financial Technologies (India) Limited, Sony Pictures Entertainment, Daiichi Sankyo, Eli Lilly, General Motors, Bull Machines, Ericsson, Amazon, Super Cassettes and DLF Limited.

Mr Pathak has practised law for more than 25 years. Prior to joining P&A Law Offices, he was a lawyer in Brussels, Cleveland and Palo Alto. He is admitted to practise law in India, and the states of Ohio and California in the United States. He is a graduate of Cambridge University and Yale University, and has worked at both the European Court of Justice and in the Competition Division of the Legal Service of the European Commission. He has received several awards for M&A and competition law, including ‘Best M&A Lawyer in India in 2008’; ‘India M&A Legal Counsel of the Year’ in 2009; ‘India M&A Lawyer of the Year’ in 2011; ‘India Competition Lawyer of the Year’ in 2012; ‘India M&A Lawyer of the Year – 2012’; and ‘India Competition Lawyer of the Year’ in 2013, 2014, 2015, 2016 and 2017.
DOMINIC REBELO
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Dominic Rebelo is a partner at Anjarwalla & Khanna. He has wide-ranging experience in competition, corporate mergers and acquisitions, private equity, capital markets and natural resources. Prior to joining Anjarwalla & Khanna, he was a partner at Daly & Figgis Advocates.

Mr Rebelo has advised domestic, regional and international private and public listed companies on a variety of commercial transactions including antitrust concerns, share acquisitions, privatisations and public listings. He has also assisted a variety of foreign investors in setting up operations in Kenya.

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Ken Reinker is based in Cleary Gottlieb Steen & Hamilton LLP’s Washington, DC office and practises in a broad range of antitrust matters, including litigation, government investigations and merger review. His practice spans all industries and includes extensive experience in pharmaceuticals, medical devices and healthcare; high-technology industries; mass media; and financial institutions. He has particular expertise in the application of economics to complex legal matters and in working with economic experts, and, after law school and prior to joining the firm, he worked as an antitrust economist on cutting-edge litigation as executive director of Legal Economics LLC.

Mr Reinker received his JD, *magna cum laude*, from Harvard Law School in 2006, where he was on the *Harvard Law Review*, and received his BS, *magna cum laude*, in economics from Duke University in 2003. He clerked for the Honorable Michael Boudin of the US Court of Appeals for the First Circuit, and while in law school taught antitrust economics at Harvard as a teaching fellow.

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Tobias Rump is an associate based in the Cologne office of Cleary Gottlieb Steen & Hamilton LLP and a member of the Cologne Bar.

Mr Rump’s practice focuses on European and German competition law, including administrative litigation. Mr Rump joined Cleary Gottlieb Steen & Hamilton LLP in 2013. He passed his second state examination in the state of Berlin in 2013 and the first state examination at the University of Osnabrück in 2007.

ALLEGRA SCHÄR
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Allegra Schär is a member of Homburger’s competition and regulatory team. She focuses on Swiss and European competition law, in particular merger control law as well as administrative and civil antitrust litigation. Further, she has expertise in the field of doping law.
PRUDENCE J SMITH
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Prudence Smith is a highly experienced competition law practitioner who advises clients on a full range of competition regulatory law issues. She has extensive experience in merger clearance, cartel and anticompetitive conduct investigations and litigation, ACCC immunities, authorisations and notifications of contracts affecting competition.

ROBBERT SNELDERS
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Robbert Snelders is a partner in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr Snelders focuses his practice on EU competition law. He has extensive experience in EU and worldwide merger control proceedings, EU and international cartel and abuse of dominance investigations, litigation before national courts and the European courts in Luxembourg and arbitration proceedings. He is distinguished by *Chambers Global* as an antitrust practitioner in Belgium and by *Chambers Europe* as a European antitrust lawyer. A graduate from Universiteit Leiden (the Netherlands, 1990, highest honours), the College of Europe (1991, DAELS) and Harvard Law School (1992), Mr Snelders is a member of the Bars in Brussels and New York. His native language is Dutch, and he is fluent in English and in French.

MARTIJN SNOEP
*De Brauw Blackstone Westbroek NV*

Martijn Snoep divides his time between Amsterdam and Brussels. Specialising in EU and cross-border matters, he represents companies facing multi-jurisdictional competition or other regulatory infringement allegations, including data protection infringements, dealing with internal investigations, litigation strategy, compliance issues, cost management, personal liability and follow-on damage actions. He is also active in transactional work, representing clients in cases before the European Commission and coordinating merger filings before competition authorities around the world in cases involving complex economic issues. He works closely with leading law firms globally in obtaining clearances for clients.

Mr Snoep is a substitute judge in the Court of Appeal in The Hague, and he serves on the board of the Royal Concertgebouw Orchestra. He was president of the Dutch Association for Competition Law from 2006 to 2010. From 2010 to 2015, Martijn Snoep served as managing partner of De Brauw Blackstone Westbroek.

SONG YING
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Song Ying is a partner at AnJie Law Firm. She graduated from the University of Bonn in Germany with a master’s degree in competition law. Ms Song has extensive experience in representing multinational and domestic clients in antitrust investigations, and has advised clients across a broad range of sectors, such as the internet, aviation, automobile, pharmaceuticals, electronics, telecommunications, energy, household electrical appliances, infant formula, food and semiconductors sectors. In addition, Ms Song has defended clients against competitors’ objections, as well as filed many concentration notifications.
with the Ministry of Commerce of the People’s Republic of China (MOFCOM). She has also represented clients in several high-profile antitrust litigation cases in China. With an in-depth experience of Chinese antitrust enforcement, Ms Song has also assisted companies in antitrust compliance. She has also been involved in the drafting, advising, discussion and formulation of the supporting regulations of the AML. Ms Song has been named as a recommended antitrust lawyer of the PRC by Chambers and Partners and The Legal 500 in 2017 and 2018.

ATHINA VAN MELKEBEKE
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Athina Van Melkebeke is an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Ms Van Melkebeke’s practice focuses on EU and Belgian competition law. She has experience in international merger control proceedings, cartel and abuse of dominance investigations. Ms Van Melkebeke graduated *summa cum laude* from Universiteit Gent (UG, Belgium) in 2013 and obtained an LLM degree as a BAEF scholar at the University of Chicago Law School (2014). Ms Van Melkebeke is a member of the Brussels Bar. Her native language is Dutch, she is fluent in English and she has a proficient knowledge of French.

EDWINA WARAMBO
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Edwina Warambo is a principal associate with the firm involved in M&A transactions and regulatory advice. She is a member of the Law Society of Kenya.

EVA WARDEN
*Baker McKenzie LLP*

Eva Warden is an associate in Baker McKenzie’s global antitrust and competition practice group. She practises mainly in the area of antitrust and competition law, including merger control and compliance advising and training in a variety of industries. She joined the firm’s Toronto office in 2011 and has also worked with the firm’s EU competition and trade practice group in London.

MATTHEW J WHITAKER
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Matthew Whitaker has experience in a range of commercial matters across a broad spectrum of competition law issues in Australia, including in merger clearance and ACCC investigations in different industries. He also has worked on matters involving regulatory issues with other Australian regulators, including the Therapeutic Goods Administration, the Department of the Environment and Energy, and the Department of Health, and has experience in disputes in both the Federal Court of Australia and the Supreme Court of New South Wales.
ANTOINE WINCKLER
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Antoine Winckler is a partner based in the Brussels office, and his practice focuses on European and French competition law. Mr Winckler has advised clients in numerous cartel, merger control and abuse of dominance cases.

Mr Winckler also has extensive experience in representing corporate clients and financial institutions, as well as governments and public entities, regarding EU state aid rules.

Mr Winckler regularly represents clients before the European Commission, the European courts in Luxembourg, the French Competition Authority and the Court of Appeal in Paris.

Mr Winckler joined the firm in 1985 and became a partner in 1992. Prior to joining Cleary Gottlieb Steen & Hamilton LLP, Mr Winckler was an administrative judge. He received law degrees from the Université de Nice Sophia Antipolis in 1984 and from the Institut d’études politiques de Paris in 1979. Mr Winckler graduated from the French Ecole nationale d’administration in 1983 and the Ecole normale supérieure in 1976.

Mr Winckler is a member of the Bars of Paris and Brussels, and he teaches EU and French competition law at the Law School of the Institut d’études politiques de Paris. He has written extensively about EU competition law matters.

THOMAS WOOLFSON
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Thomas Woolfson is an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr Woolfson’s practice focuses on EU and Belgian competition law, as well as other regulatory fields of EU law. Mr Woolfson graduated magna cum laude from the Université catholique de Louvain (UCL, Belgium) in 2010, and worked as a teaching and research assistant at UCL’s Centre for international and European law before earning an LLM degree as a Fulbright scholar at New York University School of Law (2012). Mr Woolfson is a member of the Bars in Brussels and New York. His native language is French, he is fluent in English and has a working knowledge of Dutch.

STEPHANIE WU
AnJie Law Firm

Stephanie Wu is a partner in AnJie Law Firm’s Shanghai office. Stephanie specialises in antitrust and competition law, and advises on all aspects and phases of antimonopoly law, including compliance, investigations, merger notification, antitrust private litigation and fair competition review. Stephanie has extensive experience in advising both multinationals and Chinese companies on antimonopoly law issues pertaining to the compliance of companies’ daily operations and business practices in China, in particular regarding issues relating to, inter alia, supply and distribution, horizontal cooperation, information exchange, sales and marketing and after sales. Stephanie has also advised clients on the formation of tailor-made antimonopoly law compliance systems and the formulating of responses to investigations and complaints, and has provided training and performed internal audits for clients. The clients Stephanie advises range from medical devices, chemicals and pharmaceuticals to electronics, motor vehicles and aviation. Stephanie has authored many articles on various issues relating to China’s antimonopoly law in English and Chinese from a comparative law perspective.
LIVIA ZAMFIROPOL
DLA Piper Dinu SCA

Livia Zamfiropol is a partner in the DLA Piper Bucharest office. She has coordinated and implemented a large number of antitrust compliance programmes for clients acting in various industries (telecommunications, pharmaceuticals and medical devices, automotive, retail & FMCG, food and beverages, cement, electronics and IT&C), and she has assisted a number of companies with complex activities in the Romanian market in procedures with the Romanian Competition Council and the European Commission in relation to cartel and abuse of dominance investigations, mergers and state aid cases.

Mrs Zamfiropol is distinguished as a leading competition law expert by Chambers. According to Chambers 2017, she is considered ‘an innovator’, ‘always finding creative solutions that work in practice as she combines specialist knowledge with an understanding of our business needs’, and according to Chambers 2018, she ‘often assists clients with abuse of dominance investigations, being noted for her ‘strong client-orientation’.

Since 2006, Mrs Zamfiropol has been a member of the Competition and State Aid Committee of the American Chamber of Commerce in Romania, coordinating this Committee on the occasion of the amendments to the competition law that occurred from 2009 to 2016, including both the Competition Law (No. 21/1996) and the secondary legislation.

Livia is a frequent speaker at national and international conferences.

DIETER ZANDLER
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH

Dieter Zandler is a partner at CMS Reich-Rohrwig Hainz in Vienna. He specialises in European and Austrian antitrust law, representing international and Austrian clients especially in cartel (fine), antitrust damage, antitrust compliance, merger control and abuse of dominance proceedings before national competition authorities and courts and the European Commission and EU courts. He has over 10 years of experience as a lawyer and holds a doctorate from the University of Salzburg, as well as a master of laws from Central European University in Budapest. Prior to joining CMS, he clerked at the Austrian cartel court and was an intern with two well-known international law firms in Vienna. In 2011, he was seconded to the CMS EU law office in Brussels.

ZHAN HAO
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Zhan Hao is the managing partner of AnJie Law Firm. He has obtained a PhD in law and conducted postdoctoral research on microeconomics. He has published several books on the AML. In addition, Dr Zhan is an arbitrator for the China International Economic and Trade Arbitration Commission (CIETAC) and the vice president of the International Committee of the All China Lawyers Association.

Dr Zhan has successfully defended clients in antitrust litigations in Chinese courts, conducted competition law training and provided antitrust analysis for a large number of companies, including Fortune 500 companies, listed companies and state-owned enterprises (SOEs).
Dr Zhan also has an abundance of experience in representing clients in antitrust investigations. For instance, he represented respondents in China’s first antitrust investigation into price cartels, obtaining suspension of the investigation.

Dr Zhan has assisted many multinational and SOEs in concentration antitrust filings in China, and to date he has secured approvals for all the transactions he has represented. He has served in multiple fields, including pharmaceuticals, automobile, energy, finance, machinery, electronics, textiles, aviation, high-tech and consumer goods.

He has been extensively involved in the drafting, advising, discussion and formulation of the Antimonopoly Law of the People’s Republic of China (AML) and its supporting regulations. In addition, Dr Zhan has been named as a recommended antitrust lawyer of the PRC by various international institutions, such as Chambers and Partners, Who’s Who Legal, GCR and ALB.
Appendix 2

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