THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Twelfth Edition

Editor
Aidan Synnott

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In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. This year, we read with particular interest the discussions of activity in many jurisdictions regarding digital platform competition issues.

We also continue to see the evolution and refinement of general approaches to competition law enforcement in several jurisdictions. For example, The International Competition Network, which is a group of national and multinational competition authorities, adopted a Framework on Competition Agency Procedures, and 62 agencies have signed on. Mexico adopted ‘regulations related to client–attorney privilege protection in the context of antitrust investigations’. Japan has also introduced an ‘attorney–client privilege [which] will apply to administrative investigation procedures against’ cartels, and the discussion in that chapter of how this privilege will be applied will be of interest to many. The chapter from Belgium discusses that country’s newly modified competition law, and in this edition we welcome to the Review a new chapter from Nigeria, which provides an informative overview of that country’s new competition law. Before this law was enacted, our authors write, ‘Nigeria had no comprehensive competition legislation that dealt with antitrust, abuse of dominant position and merger control issues’.

In the past year, antitrust compliance featured prominently on several enforcers’ agendas. In 2019, the US Department of Justice (DOJ) notably focused on encouraging compliance efforts: the agency announced a new policy allowing, under certain conditions, companies to receive credit for antitrust compliance programmes when the DOJ considers criminal charges. Elsewhere, the Taiwan Fair Trade Commission has made efforts in the past year to assist Taiwanese business organisations in their antitrust compliance efforts. Poland implemented an online whistle-blower platform and Brazilian authorities issued a whistle-blower protection ordinance.

The policing of cartels remains a focus of competition agencies around the globe. The chapter from Greece notes an increase in cartel enforcement activity in 2019. Authorities there conducted their largest dawn raid yet, and they have also updated the manner in which they prioritise particular cases. The authors of that chapter note that ‘it appears that the [Hellenic Competition Commission] has taken a turn toward more pre-emptive action against cartels, by emphasising dawn raids and ex officio investigations and by acting swiftly on complaints and news publications about price increases in specific sectors’. Portuguese authorities are reported to have imposed their largest fines to date. The contribution from Japan notes an aggregate level of penalties that is higher than in recent years, which, the authors note, is partly attributable ‘to the record-breaking surcharge imposed in the asphalt cartel case’ there.
That country is implementing a revised leniency programme. Meanwhile, the chapter from Mexico notes a decline in the number of leniency applications there.

As noted above, online platforms – and the ‘digital economy’ more generally – continue to be the subject of regulatory scrutiny, including in Brazil, France, India, Japan, Mexico, Poland and the United States. For example, both United States competition enforcement agencies are investigating large platforms, and the UK Competition and Markets Authority (CMA) has launched a market study of online platforms and digital advertising. Taiwan has also begun to prioritise this area. In addition to platform issues, there have been several other notable developments in the areas of restrictive agreements and dominance. Authorities in Canada concluded an inquiry into several pharmaceutical companies without taking action but ‘confirmed that healthcare remains a top enforcement priority’. The United States authorities remained active in this area. In addition, Belgian authorities conducted a dawn raid in the pharmaceutical sector. Several jurisdictions took enforcement actions against resale price maintenance (RPM) practices: the UK’s action involved guitars; an action in Poland involved online sales of printers and was the result of a whistle-blower complaint; and Japanese authorities took action against manufacturers of various baby products. China concluded four RPM matters.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many sectors. The chapter from Argentina discusses the Antitrust Commission’s new merger control guidelines and the chapters from France and India report on streamlined merger control procedures there.

Once again this year, the chapter from the United Kingdom is particularly informative. In addition to describing a busy year of merger and conduct enforcement activity for the CMA, the chapter discusses the effect of Brexit on the competition enforcement regime there, including the transition period and how competition law may factor into the negotiation of a trade agreement between the UK and the EU. Our contributors discuss the future of the CMA and potential consequences of various possible future scenarios. We will continue to watch with interest to see how competition enforcement in the United Kingdom evolves in the year to come.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
March 2020
Chapter 1

ARGENTINA

Miguel del Pino and Santiago del Río

I  OVERVIEW

After many years of effort by practitioners and authorities, on 24 May 2018 the National Congress enacted the new Antitrust Law No. 27,442 (the Antitrust Law), bringing significant changes to antitrust enforcement in Argentina. After this milestone, 2019 was a significant year for antitrust in Argentina due to certain changes that have been implemented, while some others remain to be developed.

The Antitrust Law prohibits certain acts relating to the production and exchange of goods and services if they restrict, falsify or distort competition, or if they constitute an abuse of a dominant position, and provided that in either case they cause or may cause harm to the general economic interest. The majority of these conducts are not unlawful as such, nor must they cause actual damage; it is sufficient that the conduct is likely to, or may potentially, cause harm to the general economic interest. Additionally, in order to enhance cartel prosecution, the Antitrust Law now presumes that there are certain behaviours (hardcore cartels), which are absolute restrictions to competition, and thus, anticompetitive per se.

The provisions of the Antitrust Law apply to all individuals and entities that carry out business activities within Argentina, and those that carry out business activities abroad to the extent that their acts, activities or agreements may affect the Argentinian market (the effects theory).

There is also a merger control proceeding set out by the Antitrust Law by means of which companies that meet certain requirements (jurisdictional thresholds) must seek the approval of an economic concentration.

Regarding the authority in charge, the Antitrust Law creates a new antitrust authority, the National Competition Authority, which will be a decentralised and autarchic body within the Executive Branch. This new regulator will be organised in three divisions: the Antitrust Tribunal, the Anticompetitive Conduct Secretariat and the Merger Control Secretariat. However, the members of the new Antitrust Authority have not been appointed yet. In the meantime, the current two-tier regulatory system will remain in force, composed of the Antitrust Commission (responsible for preparing technical reviews on mergers and investigations and for issuing recommendations to the Secretary of Trade) and the Secretary of Trade, the ultimate ruling body. For the purposes of this chapter, all references to the Antitrust Commission will encompass the Secretary of Trade unless expressly stated.

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1 Miguel del Pino and Santiago del Río are partners at Marval, O'Farrell & Mairal. The authors would like to thank Victoria María Battipiedi for her assistance on this chapter.
i Prioritisation and resource allocation of enforcement authorities

The Antitrust Law provides the Antitrust Commission with several standard enforcement powers, such as:

- the ability to summon witnesses for hearings;
- examinations of books and documents;
- the issuance of requests of information to other regulators;
- the initiation of investigations *ex officio*; and
- the execution of dawn raids with a court order.

During 2019, the Antitrust Commission focused its analysis on abuse of dominance and cartel investigations. In particular, the Antitrust Commission initiated an *ex officio* major investigation related to a corruption scandal that took place in Argentina, known as the Notebooks case.

As regards merger control proceedings, owing to the implementation of the new Antitrust Law the Antitrust Commission has accelerated its review time frame of merger control cases. The new Antitrust Law set up a summary proceeding that is foreseen for certain concentrations (fast-track), for which the review time frame for approval is approximately three months; this has been applied for conglomerate transactions with no overlapping products. Even though the regulator has not traced a clear path on this matter yet, deals that may raise a competitive concern will not likely benefit from this proceeding and will be reviewed in the regular time frame, which at present ranges between six and 12 months and can be longer for complex deals.

ii Enforcement agenda

The enforcement agenda of the Antitrust Commission can be mainly summarised as follows:

- The appointment of the members of the National Competition Authority is expected to occur during the current year. After the new Antitrust Law was enacted, Decree 480/2018 was issued regarding the selection procedure for the appointment of the members of the National Competition Authority, which is expected to take place during the year.

- There has been a greater interest in the detecting and prosecuting of anticompetitive conduct. In that regard, as will be analysed below, the Antitrust Commission has continued several market investigations and initiated some others with the intent of determining whether there are any anticompetitive actions taking place in such markets. Furthermore, anticompetitive conduct investigations are expected to be triggered by the leniency programme introduced by the new Antitrust Law.

- There has been a greater interest on excessive pricing, which has been the subject of court appeals.

- The elimination of the cumbersome merger control review methods that had taken place prior to 2016 by using a more practical approach regarding transactions under analysis, especially with regard to non-material cases. Pursuant to the statements of the Antitrust Commission, it has reduced the delay in the review from an average of 3.2 years to approximately six to 12 months.

- The Antitrust Commission has initiated a more open approach with other authorities and supra-national entities in order to carry out joint exercises and training programmes with authorities such as the Federal Trade Commission and the European Union.
The Antitrust Commission has published a draft version of the Guidelines for the Concept of Merger Notification for public consultation and is currently working on a draft version for Guidelines for the Leniency Programme. These are expected to be released during the course of 2020.

2019 was an election year in Argentina, which brought a change in the Executive Branch. Considering that the Commission is a body belonging to the Executive Branch, it is currently undergoing changes in its integration, and, at the time of writing, a new president has been appointed.

II CARTELS

Significant cases

Cartel cases in Argentina have generally involved the following:

a. the arrangement of prices or production quotas;

b. the distribution of market shares;

c. agreements between different bidding parties in public bids; or

d. the transfer of competitively sensitive information with the sole purpose of restricting competition.

According to the Antitrust Law, in the event that an infringement is proved, the cessation of the infringing conduct will be ordered and a fine could be imposed on the perpetrators that can be of: (1) up to 30 per cent of the volume of business related to the products or services involved in the unlawful conduct committed, during the last fiscal year, multiplied by the number of years that the conduct has lasted, which may not exceed the national consolidated volume of business registered by the economic group of the parties during the last fiscal year; or (2) up to twice the economic benefit produced by the unlawful conduct committed. In the event both of them are applicable, the highest amount will be imposed. On the contrary, if none of them is applicable, the fine could be of up to 200 million adjustable units, as will be analysed below.

Between 2000 and 2005, the Antitrust Commission showed an interest in prosecuting cartels and heavy sanctions were imposed (most notably in the cement2 and liquid oxygen3 cases), but from thereon until recently, cartel detection activity has been low.

Notebooks case

The Notebooks case is a recent corruption scandal that was unveiled in 2018 entailing an organised corruption scheme, which included the delivery of bribes to several people and locations, including politicians and many business people who allegedly benefited from large public contracts between 2005 and 2015. This case has been under criminal investigation since 2018.

The Antitrust Commission initiated a parallel investigation on bid-rigging allegations that have arisen from the depositions within the frame of the criminal investigation, and served notice to the involved companies of an ex officio investigation in May 2019. The

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alleged collusive conduct entailed the agreement, coordination of positions or abstention in bid, tenders or auctions referring to public works, in the sectors of roadworks, energy, transport and infrastructure in general.

At the time of the writing, the investigation is still in progress, and it remains to be seen how the new roster of the Antitrust Commission will continue with this high profile investigation.

**ii  Trends, developments and strategies**

*Per se anticompetitive practices*

Under the new Antitrust Law certain collusive conduct are considered as anticompetitive per se, and harmful to the general economic interest without further analysis, specifically, Section 2 of the Antitrust Law provides that the following are absolute restrictive behaviours:

- price-fixing;
- the setting of production or commercialisation quotas, or the restriction of said activities with the same intention;
- market, client or supply allocation; and
- bid-rigging.

The Antitrust Law sets out that these types of conduct will be deemed as anticompetitive, and thus will be considered null.

This inclusion seeks to address two main issues: the lack of an efficient prosecution of cartels (which is further enhanced by the creation of the leniency programme, as analysed below) and the elimination of having to resort to conscious parallelism theories that have been rejected by the courts.

Furthermore, the Antitrust Commission has issued new guidelines for the prevention of anticompetitive acts by business associations, chambers and professional associations. This reflects the growing interest of the Antitrust Commission in the activities carried out by these groups, which have often been the facilitating vehicle for the commission of anticompetitive conduct. In 2017, the Antitrust Commission had issued guidelines in this regard within a resolution regarding market investigation on milk. However, in 2018, the Antitrust Commission released specific guidelines that deal with: (1) measures and recommendations on price-fixing and market allocation; (2) exchange of information between competitors; (3) measures on the entry and exit of members; (4) measures on standardisation; (5) measures on publicity; and (6) recommended practices.

*Leniency programme*

One of the most important developments introduced by the new Antitrust Law is the incorporation of a leniency programme in order to facilitate the prosecution of cartels. The Antitrust Law now incorporates a leniency programme, setting out two different scenarios for infringing parties, namely an exemption scenario and a reduction scenario, both based on a ‘race-to-the-door’ structure.

Pursuant to the Antitrust Law, infringing parties must comply with the following requirements to obtain an exemption from the sanctions set out therein:

- they must be the first party, among the participants of the conduct, that provides the Antitrust Commission with information and evidence, either in the event that the Antitrust Commission has not initiated an investigation, or if it has initiated an investigation but has not been able to gather sufficient evidence;
they must immediately cease the performance of the infringing conduct, unless the Antitrust Commission requests otherwise in order for it to be able to continue an investigation;

they must collaborate until the end of the investigation; and

they must not destroy, forge or hide evidence of the anticompetitive conduct, nor make public the fact that they have filed for the leniency programme, unless this communication is to another antitrust regulator.

Parties that are not the first to apply for the leniency programme may request a reduction of the sanctions, if they are able to meet the remaining requirements and provide the Antitrust Commission with useful information for the investigation. The reduction may range from 20 to 50 per cent of the sanction. The reduction ratios are to be determined by the Antitrust Commission by taking into account the chronological order of the filing.

The Antitrust Law also includes a ‘leniency plus’ provision, by means of which those parties that would not be able to request an exemption regarding anticompetitive conduct, but that could provide information on a second instance of anticompetitive conduct, can obtain an exemption on the latter, and a one-third reduction in the former. Additionally, the Antitrust Law specifically sets out that there cannot be a joint enforcement by two parties of the leniency programme, the sole exception being if a company and its directors or other members of its staff request the enforcement of the leniency programme.

Finally, the Antitrust Law sets outs that in the event of follow-on litigation regarding conduct uncovered by parties that have applied for the leniency programme, there will be no access to the documents or information provided by the applicants, safekeeping their confidentiality.

As of the time of the writing of this edition, there is no confirmation of any filing for leniency.

iii Outlook

The renewed interest in pursuing collusive conducts, in addition to the greater tools granted to the regulator in the Antitrust Law, show that it is quite likely that cartel enforcement will be a top priority for the Antitrust Commission in the years to come. It remains to be seen how the leniency system will be effectively implemented and what its results will be, but the legislative push towards its approval shows that cartel prosecution is once again a priority in Argentina.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Section 5 of the Antitrust Law sets out that a person has a dominant position when it is the only buyer or supplier of a given product within the market or when, without being the only supplier or buyer, it lacks substantial competition or it is able to determine the economic feasibility of competitors because of a certain vertical or horizontal degree of integration.

Section 6 establishes three relevant factors to determine the existence of a dominant position: the degree of substitution for a product or service; the existence of regulatory barriers; and the extent to which a company can unilaterally set prices or restrict output.

Despite not being expressly indicated in the Antitrust Law, the Antitrust Commission also considers market share to be an important factor in determining whether there is a dominant position.
Section 1 of the Antitrust Law prohibits the abuse of a dominant position. Section 3, on the other hand, describes some vertical and exclusionary practices that could violate Section 1 as they are likely to cause harm to the general economic interest.

Since the beginning of the 1980s, antitrust authorities have been investigating different types of abuse of dominant position. Additionally, in the view of antitrust authorities, a dominant position may be abused by committing different anticompetitive conduct such as predatory pricing, fixing retail prices, tied-in sales, blocking access to essential facilities and discriminating prices; however, no significant sanctions were imposed until 1995, when a local petroleum company received a significant sanction for abuse of its dominant position by having discriminating prices in the liquid gas market. This would also be the case for which, years later, a sentence would be issued within the framework of private litigation.

**i Significant cases**

*Argentine Society of Music Authors and Composers case*

The Argentine Hotel and Gastronomy Business Federation filed a complaint against the Argentine Society of Music Authors and Composers (SADAIC) for allegedly charging an abusive fixed price that consisted in a percentage of the companies’ turnover under the notion of unifying the collection of certain compensations. It further stated that SADAIC was eliminating all possibilities of negotiation, option or choice and that under said argument it charged fixed prices that would not exist in regular market conditions.

The Antitrust Commission considered that SADAIC had a monopoly regarding the granting of authorisations for the playing of music in hotels and that it had abused its position of dominance, imposing excessively high, unreasonable and discriminatory fees. Therefore, it decided to impose a fine on SADAIC and to issue a recommendation to the public entities in charge of the supervision of SADAIC’s activities in order to adjust its conduct with regard to hotels and similar establishments (such as restaurants).

On 20 August 2019, the Federal Civil and Commercial Court of Appeals (the Court of Appeals) overruled this resolution and reversed the sanctions imposed by the Secretary of Trade, but maintained the recommendations for the Executive Branch. The Court of Appeals concluded that one of the purposes of antitrust regulations is to indirectly protect consumer welfare, by sanctioning practices that affect competition. Finally, it criticised the fact that the Secretary of Trade had not ordered the termination of the conduct, nor established what the tariffs or equilibrium prices should be, but rather limited itself to determining a sanction and issuing recommendations to the Executive Branch.

It is not the first time that the Court of Appeals has limited the powers of the National Antitrust Commission. It remains to be seen how the Supreme Court will resolve the extraordinary appeal filed by the national government on 6 September 2019.

**ii Trends, developments and strategies**

The new Antitrust Law has not brought forward any major amendments to the former Antitrust Law regarding abuse of dominant position. Furthermore, it must be noted that no abuse of dominant conduct is listed under the ‘per se’ prohibited practices of the Antitrust Law.

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4 Resolution No. 371 of the Secretary of Trade, dated 26 June 2018.
The Civil and Commercial Code includes a provision regarding the prohibition of abuse of dominant position, but does not provide a definition of what should be understood by ‘abuse of dominant position’. Thus, a judge would have to resort to Section 5 of the Antitrust Law in order to accurately define whether the conduct under consideration is, in fact, an abuse of dominant position.

The inclusion of the concept of abuse of dominant position could also help the prosecution of those types of cases by courts without the intervention of the Antitrust Commission. Under this new scenario, courts would be able to prosecute these cases without the intervention of said regulator. At the time of writing, we are not aware of any case on these terms.

Furthermore, the Antitrust Commission published the Guidelines for the Analysis of Cases of Abuse of Dominance in May 2019. The aim of this document is to provide guidelines regarding practices that constitute infringements of the Antitrust Law and to contribute to predictability in decision-making, notwithstanding its application on a case-by-case basis and the use of complementary criteria that may be developed in the future. These guidelines refer only to unilateral exclusionary abuses, which are the most frequent in comparative jurisprudence.

The guidelines set the requirements that a conduct must fulfilled to be considered as an abuse of dominance: (1) the person or undertaking has to hold a dominant position in a specific market; (2) the alleged conduct must represent an abuse of that dominant position; and (3) the conduct may cause harm to the general economic interest.

As a novelty, these guidelines include a detailed description of the anticompetitive conduct of abusive pricing.

iii Outlook
Over the past year, the Antitrust Commission has focused its analysis on abusive pricing, which entails important challenges in a country with an economy with high inflationary rates, and this will surely remain one of the priorities of the Antitrust Commission. The outcome of the Argentine Society of Music Authors and Composers case will most likely show the rules under which the Antitrust Commission will analyse matters in the future.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES
Before the enactment of the Antitrust Law in 1999, interaction between the Antitrust Commission and the sectoral regulators was rare. That changed with the enactment of the Antitrust Law, since the Law expressly made all sectors subject to its rules. Specifically, Section 82 rules that the only relevant legislation regarding mergers is the Antitrust Law and its Regulatory Decree.

Additionally, Section 17 of the Antitrust Law is a specific rule that applies to mergers in regulated sectors. Said rule states that the Antitrust Commission must require an opinion from the relevant regulator on a transaction concerning its impact on competition or its compliance with the applicable regulatory framework.
i Significant cases
In the past, market investigations have not led to major cartel or dominance cases, since in most cases no final decisions or opinions were issued. As a reference, over the course of 2014, four major investigations were initiated against over 250 companies on a wide range of markets, yet only one cartel investigation arose (in the pharmaceutical industry), of which results are yet to be seen.

When the former administration entered office, it announced several investigations would be initiated in the following markets: aluminium; steel, petrochemical products, mobile communications, credit cards and electronic payment, edible oil, milk, meat, detergents, local bus transportation, air transportation, supermarkets and construction products.

In 2019, the Antitrust Commission issued its opinion on the supermarket investigation. Pursuant to its findings, there were certain practices in the commercial relationship between large supermarket chains and their suppliers that could affect competition in the market. The Commission also remarked that it was important that the conditions for the marketing of exhibition space should be transparent to the parties involved and offered to all suppliers on a non-discriminatory basis.

Thus, the Antitrust Commission recommended the Secretary of Trade to establish a code of good commercial practice between supermarket chains and their suppliers, with the aim of promoting competition, based on a series of general guidelines; and also (1) encourage the adhesion of supermarkets and leading suppliers to the code; and (2) design a follow-up mechanism to monitor the effectiveness of the code and promote relevant modifications in the future.

ii Trends, developments and strategies
As a result of the supermarket investigation, the considerations of the Antitrust Commission were reflected in the text of the Supermarket Shelf Space Bill, which was approved by the Deputies’ Chamber on 20 November 2019 and will soon be analysed by the Senate. The objective of this Bill is in line with the Commission’s view on controlling and regulating relations between supermarkets and suppliers. Some doubts have arisen.

The Bill aims to make the price of certain products transparent and competitive, while seeking to maintain harmony and balance among economic agents through a series of measures involving the promotion of a number of product categories of companies that meet certain requirements, as well as the implementation of restrictions on the use of exhibition space on the shelves.

The most relevant restrictions imposed by the Bill entail a maximum availability of 30 per cent of the exhibition space in each shelf for the products of a single supplier or business group, a minimum of five suppliers per category, 25 per cent of the exhibition space must be guaranteed to products from small and medium-sized enterprises and an additional 5 per cent for family, popular and indigenous producers.

Considering the relevant contribution made by the Antitrust Commission through the supermarket market investigation, it remains to be seen how further involvement of the Antitrust Commission in this matter will be.
iii Outlook
The Antitrust Commission has shown substantial interest and focus on retail, which is evidenced in the supermarket investigation, leading to the discussion of the Supermarket Shelf Space Bill. Possible further Antitrust Commission involvement remains to be seen. Given current inflationary rates, it is quite likely that the Antitrust Commission will remain focused on these markets.

V STATE AID
There are no state aid laws or regulations in Argentina; nor does the Antitrust Commission analyse these issues.

VI MERGER REVIEW
According to the Antitrust Law, certain transactions are deemed to be economic concentrations when they result in the assumption of control of one or more companies by means of any of the following acts:

- merger;
- transfer of businesses;
- acquisition of shares or equity interests, any interest thereto, convertible debt securities or securities that grant the acquirer control of, or a substantial influence over, the issuer; and
- any other agreement or act through which assets of a company are transferred to a person or economic group, or which gives decision-making control over the ordinary or extraordinary management decisions of a company.

Those economic concentrations require approval if the aggregate volume of business of the companies involved in the transaction exceeds 100 million adjustable units in Argentina. Please note that all the amounts set out by the new Antitrust Law will now be fixed in adjustable units, which will be adjusted on an annual basis. The initial value has been set at 1 adjustable unit = 20 Argentine pesos, but at the time of writing, the relevant authority has already updated this unit twice. The current value is 40.61 Argentine pesos, and it is expected to be updated during the following year. The volume of business is defined as the combined gross sales of products or services of the target and the buyer during the preceding fiscal year arising from their ordinary businesses, net of discount sales, value added tax and other taxes directly related to the volume of business.

Economic concentrations that fall within this definition must be mandatorily notified to the Antitrust Commission for clearance. The Antitrust Commission has published the Guidelines for Concept of Merger Notification for public consultation, in which the Commission introduced the economic concentration and control concept, with the purpose of clarifying what type of operations between economic agents constitutes mergers that are notifiable and fall under the provisions of the Antitrust Law.

The new Antitrust Law sets out a suspensive system according to which companies will not be able to close a transaction without the prior authorisation of the Antitrust Commission. However, this system will enter into force one year after the creation of the new Antitrust Authority, which has not occurred yet. Therefore, it is expected that the suspensive system will enter into force by the beginning of 2021 on a best-case scenario. In the interim
period, the post-closing notification is applicable, according to which the mandatory notice must be delivered prior to or within seven calendar days after the closing of the transaction or the publication of any cash tender or exchange offer.

Upon submission of the notice, the Antitrust Commission and the Secretary of Trade have 45 business days (this term is suspended in cases where additional information is requested) in which to decide whether to unconditionally approve the transaction; approve the transaction, but impose conditions; or reject the transaction. Should the Antitrust Commission consider the transaction may restrict or distort competition, prior to the issuance of its final decision, it must communicate in writing its objection to the parties (statement of objections) and summon a special hearing to consider the remedies. In these cases, the term to resolve is extended by up to 120 additional business days.

If a decision is not issued within 45 business days of the filing of an application and relevant documents, the transaction shall be considered tacitly approved. However, it should be noted that the current average review time frame is of nine to 12 months, even in non-material transactions, due to a stop-the-clock interpretation by the Antitrust Commission, which considers that the first request for information stops the 45-business-day term until it has obtained all necessary answers for the issuance of its decision. Under the new Antitrust Law, there is a summary proceeding foreseen for certain concentrations (fast-track), for which the review time frame for approval is approximately three months.

The transaction has no effects with regard to the parties involved or any third parties until it has been approved, whether expressly or tacitly.

The following transactions are exempt from the notification requirement:

a) the acquisition of companies in which the purchaser already holds more than 50 per cent of the shares (understood as already holding exclusive control);

b) the acquisition of bonds, debentures, non-voting shares or debt securities;

c) the acquisition of only one company by only one foreign company that has no assets or shares of other companies in Argentina;

d) the acquisition of wound-up and liquidated companies (which performed no activities in Argentina during the preceding calendar year); and

e) the acquisition of companies if the total local assets of the acquired company and the local amount of the transaction each do not exceed 20 million adjustable units, provided, however, that the exemption would not apply if any of the involved companies were involved in economic concentrations in the same relevant market for an aggregate of 20 million adjustable units in the past 12 months or 60 million adjustable units in the past 36 months.

If the parties do not comply with this requirement, they will be subject to fines of up to 0.1 per cent of the national consolidated volume of business for each day they fail to comply. If this method of calculation of the fine is not feasible, then the fine shall be up to 750,000 adjustable units, which represents approximately 30.5 million Argentine pesos per day of delay.

Section 9 of the Antitrust Law states that any transaction subject to control by the Antitrust Commission does not bring about any effects in relation to the involved parties or any third party until it is approved by the Antitrust Commission, either expressly or tacitly.
Argentina

i Significant cases
During 2019, the Antitrust Commission has continued to improve its merger analysis, reducing its review timeframe.

AT&T/Time Warner Inc

One of the most relevant mergers during 2019 was the transaction that entailed the acquisition of exclusive control over AT&T Inc, on behalf of Time Warner Inc. AT&T Inc is one of the majors undertakings in the telecommunications sector. While Time Warner is active in the distribution and licensing of audiovisual content (for cinema and for TV), the wholesale supply of TV channels and distribution of audiovisual content to households is through different technological platforms. The parties had activities throughout the audiovisual value chain.

The concentration was essentially vertical, with integration between production and distribution of pay TV channels. Furthermore, some horizontal relations had been identified in the transaction. Having analysed the relevant market and the market shares of the parties before and after the transaction, the Antitrust Commission concluded that the transaction did not raise any competitive concern, since it considered that there were sufficient competitive constraints on the resulting entity, especially as regards soccer broadcasting.

ii Trends, developments and strategies
One of the most important modifications introduced by the new Antitrust Law is the creation of a new merger control system, which greatly increases the amounts for both the notification threshold and the de minimis exemption; seeks to reduce review time frames; and sets out a suspensive system, as opposed to the current interim post-closing notification system.

As mentioned above, the new Antitrust Law modifies the notification threshold, using adjustable units that will be updated annually. Pursuant to the Antitrust Law, the new threshold is met if the acquiring group and target surpass a combined turnover of 100 million adjustable units, thus increasing the threshold to an amount closer to the one that had originally been envisaged. It is worth noting that the threshold is the same across industries, and that the entire volume of business of the involved companies must be taken into account, irrespective of whether they have been generated by the market in which the transaction will take place or not.

The same update takes place as regards the de minimis exemption, which is now applicable if both the local amount of the transaction and the local amount of the assets being transferred each do not surpass 20 million adjustable units; and if the previous condition is met, the acquiring group or target must not have carried out transactions in the same relevant market for 20 million adjustable units in the past 12 months or 60 million adjustable units in the past 36 months.

The Antitrust Law also sets up a suspensive regime in which the parties will not be able to close the transaction prior to its approval. This is the most relevant departure from the former Antitrust Law as regards the notification system, in which parties could close the transaction and file for notification up to one week afterwards. The Antitrust Law now sets out fines for gun-jumping, which had hitherto never existed in Argentine merger control proceedings. However, it must be noted that the suspensive regime will become effective one

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5 Resolution No. 691 of the Secretary of Trade, dated 24 October, 2019.
year after the enactment of the law, so as to provide sufficient time for the Antitrust Authority to clear its abundant workload on merger control cases. As the new Antitrust Authority has not yet been appointed, this is expected to be implemented by the beginning of 2021, in a best-case scenario.

Further to this suspensive system, the Antitrust Law defines a review time frame of 45 working days plus an additional 120-working-day term. The former Antitrust Law also had a 45-working-day review time frame, which over the passing of time was ignored, reaching average review time frames of over 30 months even in non-material transactions. However, it must be taken into account that said delays took place in a non-suspensive system that eliminated the pressure for the Antitrust Commission to issue the clearances in time. Under this system, it remains to be seen whether the Commission will be able to meet the time frames set out by the new Antitrust Law.

In that regard, the Antitrust Law sets out a fast-track system for those transactions that do not present competition concerns. However, this system has not been regulated yet.

Finally, the new system also includes a mechanism for third parties to file their comments on the merger, which are non-binding for the Antitrust Commission; nor is there an obligation for it to comment on them.

**Merger Control Guidelines**

In addition to the news introduced by the Antitrust Law, the Antitrust Commission has issued an updated version of its Merger Control Guidelines (which had not been updated since 2001). The new Guidelines provide a much-needed reference for practitioners in their day-to-day interactions with the Antitrust Commission, of which the following matters can be highlighted.

The Guidelines clearly set out that transactions with a combined market share of 20 per cent or less will be considered to be non-problematic, which triggers the application of the fast-track procedure. Unlike past practice, this indicates that these transactions will be cleared in rapidly and will not be subject to intensive review by the Commission.

This approach is further complemented with clear rules on the usage of the Herfindahl–Hirschman Index (HHI), which was previously used without specific rules. Pursuant to the Guidelines, those transactions that have a post-transaction HHI below 2,000 will be considered as non-relevant. Transactions that surpass this amount, but where the delta between the prior and post-transaction scenarios is below 150 points, will also be considered non-problematic. Furthermore, if the post-transaction market shares are lower than 30 per cent and if the post-transaction HHI is less than 3,000 or has a delta of less than 250 points, then the transaction will also be deemed as non-relevant.

Furthermore, the Guidelines now provide for a more fulsome approach as regards the techniques to be used by the Antitrust Commission. In that regard, they now incorporate the notion of upward pricing pressure as a method to determine possible unilateral actions post-transaction as well as including a specific review on coordinated effects. Other factors that are now included as relevant comprise competition from imported products, countervailing buyer power, the creation of a portfolio effect and the failing firm approach to a transaction.

The Guidelines also provide a commentary on the possible review of ancillary restraints, following the current practice by the new Administration of not setting out specific terms for their duration, but rather to analyse them on a case-by-case basis.
In short, the Guidelines provide clearer rules for parties interested in carrying out a merger control notification in Argentina, which allows them to fully assess the type of review that they will be subject to as well as have a better estimate regarding the proposed timeline.

iii Outlook
Owing to the issuance of the new Antitrust Law, the complete overhaul of the merger control system helped the regulator steer away from the slow and cumbersome review process it had for more than a decade, significantly improving the results during the course of 2018 and 2019. It remains to be seen how the new roster of the Antitrust Commission will handle the proceedings and whether the suspensive system can be implemented in the near future.

Furthermore, while the Antitrust Commission has issued draft Guidelines for the Concept of Merger Notification, a final document is expected in 2020.

VII CONCLUSIONS
i Pending cases and legislation
The new Antitrust Law addresses several of the most relevant shortcomings in antitrust enforcement in Argentina. However, some important modifications are yet to be implemented. During 2020, effective progress towards the setting up of the National Competition Authority is to be expected, in addition to the issuance of the final document of the Guidelines for the Concept of Merger Notification and Guidelines for Leniency.

It remains to be seen how the Antitrust Commission will continue the investigation on the emblematic Notebooks case, and if the Supermarket Shelf Space Bill finally reaches the total approval in the Senate, as well as the involvement of the National Antitrust Commission in this matter.

ii Analysis
At the present time, one of the main priorities is to create the Antitrust Authority, which will have a direct effect on notifications, allowing the suspensive system to be implemented. The Antitrust Authority could also help to give certainty to the leniency programme applicants, thus providing more effective tools for cartel-related enforcement.

Great strides have been made over the past years, while great challenges remain ahead.
I OVERVIEW

Prioritisation and resource allocation of the enforcement authorities

Until 2 June 2019, the competition regime in Belgium was based on two Acts, adopted by the Belgian Parliament on 3 April 2013, which inserted a new Chapter IV entitled ‘Protection of Competition’ and a new Chapter V entitled ‘Competition and Price Evolution’ into the Belgian Code of Economic Law (BCEL).

On 3 June 2019, the Act of 2 May 2019, which modified a number of the competition rules in the BCEL, entered into force. The aim of the new law was to improve enforcement and enhance the efficient operation of the Belgian Competition Authority (BCA).

The BCA consists of four distinct components:

- the President of the BCA;
- the Competition College, entrusted with decision-making powers;
- the Competition Board; and
- the Prosecution Body, tasked with investigative powers under the direction of the General Prosecutor.

The Prosecution Body must play the role of an ‘independent filter’ in order to refuse the opening of instructions and to dismiss cases in view of the priority policy and of the available means, or because a complaint is unfounded or time-barred. The General Prosecutor has been granted the power to dismiss a case by adopting a reasoned decision. Such a decision is open to appeal before the President of the BCA.

The BCEL also reiterates the possibility for the Competition College to declare, in a reasoned decision, that according to the elements in its possession, there are no grounds for acting in a case submitted to it by the Prosecution Body.

Another feature under the BCEL is the settlement procedure. A 10 per cent reduction in the antitrust fine will be offered to undertakings concluding a settlement with the General Prosecutor. In these cases, the General Prosecutor will be competent to adopt a final decision, which is deemed equivalent to a decision of the Competition College, despite the fact that no appeal can be lodged against a settlement decision. On 22 June 2015, the Prosecution Body adopted its first settlement decision in the household, body care and hygiene products case.
In the meantime, this procedure has grown in popularity, with the latest settlement decision taken on 15 October 2019, in a case concerning the Professional Body of Pharmacists (see below).4

Another interesting development is the entry into force on 22 June 2017 of a Law inserting the action for damages for infringements of the competition law in Title 3 of Book XVII of the BCEL, transposing into Belgian law Directive 2014/104/EU 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. Based on the new provisions inserted in the BCEL, any natural or legal person having suffered harm caused by an infringement of the competition law has the right to obtain full compensation for this harm. These provisions apply to any infringements of Articles 101 and 102 TFEU or of their Belgian counterparts, or of both. If there is a decision by the BCA finding an infringement, the a finding is deemed irrefutably established for follow-on damage proceedings before national courts.

ii Enforcement agenda

The BCA publishes its enforcement priorities in its yearly priority policy, a document explaining the strategic objectives that will guide its choice when selecting the cases it will focus on. In its priority policy of 2019, the BCA continues to take the following four factors into account when assessing its interest in starting an investigation into a given case:

- a the impact of the case on the functioning of markets in Belgium and on consumers;
- b the strategic importance of that case, notably in view of the economic sectors considered as having priority;
- c risks: the BCA is less inclined to invest resources in the investigation of a possible infringement if there is a significant risk that the investigation cannot succeed; and,
- d resources: the BCA also takes into consideration the amount of resources necessary to start the investigation.5

After having indicated that it will investigate every serious infringement of competition law, the BCA nevertheless specified in that document that it would focus its actions on the following economic sectors, considered as having priority:

- a telecommunications;
- b distribution, including relationships with suppliers;
- c the provision of services to businesses and consumers;
- d public procurement;
- e pharmaceuticals; and
- f logistics.

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Specifically for public procurement, the BCA published a Guide for purchasers in charge of public contracts, which explains in detail the different types of bid-rigging. It also provides a list of indications and suggestions to detect and avoid possible collusion and concerted submissions.6

Considering the BCA’s actions over the course of 2019, it is clear that it indeed focussed on the aforementioned sectors. For example, in 2019, it carried out dawn raids with respect to two investigations: one in the distribution sector and one in the pharmaceutical sector (see below). Moreover, on 8 January 2020, the BCA imposed interim measures upon the telecommunication companies Orange and Proximus in the context of their planned joint venture on network sharing.7

iii Leniency Guidelines

On 22 March 2016, the new Leniency Guidelines entered into force.8 They apply to all leniency applications submitted after that date. The most important change introduced by the Guidelines consists of practical rules for leniency applications submitted by individuals. Clarification regarding how these rules are implemented was required, particularly since the option for individuals to obtain immunity for whistle-blowing became part of the BCEL in 2013, and in light of potential sanctions against individuals for certain types of competition law infringements. Individuals are always granted full immunity, regardless of where they rank in the order of applications submitted, provided that they meet the other conditions set out in the Guidelines. In addition, the first undertaking can still enjoy full immunity even when an individual has already contacted the BCA. The Guidelines also clarify that individuals may apply for leniency alone or together with the undertaking or association of undertakings for whom they work or used to work.

Furthermore, the Guidelines introduce new reduction percentages in relation to partial exemptions. When the BCA already has information regarding the cartel, it may grant a partial reduction to undertakings that submit evidence with a significant value. The fine reduction available to the first partial leniency applicant remains the same, namely between 30 and 50 per cent. The second partial leniency applicant can obtain a reduction between 20 and 40 per cent (previously 10 to 30 per cent). Subsequent applicants can receive a 10 to 30 per cent reduction, which is the same as in the previous Guidelines. While the conditions to be respected by the applicants, including the information that they should provide, are still more or less the same as those under the former leniency provisions, the 2016 Guidelines do provide some practical clarifications. These include:

- a the confidentiality obligations of a leniency applicant;
- b the language to be used in the application;
- c how to contact the Auditor General to submit such an application or to obtain information about the availability of an immunity application for the first undertaking; and
- d the possibility of obtaining a marker.

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7 BCA, Press release No. 2/2020, 10 January 2020, available on the BCA website.
8 BCA, Leniency Guidelines, 1 March 2016, available on the BCA website.
The Guidelines are still limited to cartel cases, with the express exclusion of other types of horizontal agreements and vertical agreements. To the extent that a hub-and-spoke cartel can be qualified as a cartel, it will be covered.9

iv Guide on information exchange
On 6 October 2019, the BCA published a guide on information exchange in the context of associations of undertakings.10 The guide should be read alongside the decisional practice and the Guidelines of the European Commission on the applicability of Article 101 TFEU to horizontal cooperation agreements. The paper contains practical guidelines on (1) periodic overviews of markets, (2) price comparisons, (3) information on the anticipated development of markets and (4) tools for the calculation of costs and pricing structures.

II CARTELS
i Significant cases
Article IV.1 BCEL prohibits ‘agreements between undertakings, all decisions by associations of undertakings and all concerted practices, the aim or consequence of which is to prevent, restrict or distort significantly competition in the Belgian market concerned or in a substantial part of that market’.

In January 2020, the Competition College took two decisions on interim measures. The first decision concerned the joint venture between Proximus and Orange on network sharing.11 This joint venture was opposed by their competitor Telenet, which filed a complaint. The BCA decided to suspend the implementation of the shareholders agreement and the radio access network sharing agreement concluded between Proximus and Orange until 16 March 2020 with regard to the transfer of employees. Furthermore, both companies need to inform the Competition College and Prosecution Body about their discussions with the Belgian Institute for Postal Services and Telecommunications by 9 March 2020 at the latest.

The second case dealt with a rule of the Belgian Golf Billiards Association (BGBA), which imposed restrictions on which balls may be used during games and competitions.12 The Competition College left the BGBA with two choices. The first option entails that the BGBA suspends all contractual and regulatory obligations to use the current exclusively authorised balls, from the start of the season 2020–2021 until receipt of the final decision on the substance. The alternative option requires the BGBA to determine the authorised balls used from the start of the season 2020–2021 after a tender for a sponsoring contract, which can only last for maximum two playing seasons.

In 2019, the BCA took one infringement decision with regard to the Professional Body of Pharmacists (PBP). This case follows on from an interim measures decision taken in 2017.13 The Competition College condemned the PBP for excluding MediCare-Market

9 The BCA has already granted immunity and leniency in a hub-and-spoke cartel case in 2015; See decision No. ABC-2015-I/O-19-AUD of 22 June 2015, case CONC-I/O-06/0038, Hausses coordonnées des prix de vente de produits de parfumerie, d’hygiène et de droguerie, available on the BCA website.
10 BCA, Gids: Uitwisseling van informatie in het kader van ondernemingsverenigingen, 1 October 2019, available on the BCA website.
11 BCA, Press release No. 2/2020, 10 January 2020, available on the BCA website.
from the market for services provided by pharmacists and preventing the development of MediCare-Market’s model. The measures taken by the PBP in this respect were considered to be a restriction of competition by object: legal proceedings; disciplinary actions; and defamatory actions.\textsuperscript{14} The PBP was fined €1 million. On appeal, the Brussels Market Court confirmed the infringement but annulled the decision with regard to the amount of the fine.\textsuperscript{15}

Furthermore, the BCA took two other decisions involving the PBP, following a number of complaints from, inter alia, Multipharma, V-Pharma and Newpharma. First, the BCA found that the PBP restricted competition by object through prohibiting the use of certain (online) advertising practices regarding parapharmaceuticals. The case was settled, and the PBP was fined €225,000.\textsuperscript{16} Interestingly, using the new Article IV.58 CEL, the PBP also offered a number of commitments on a new deontological code and on the principle of free advertising. In a second decision concerning a specific grievance from the same complaints, the BCA accepted the same commitments from the PBP as in the other case. As a result, the case was partially dismissed.\textsuperscript{17}

In 2019, the Prosecution Body also took a settlement decision with regard to vertical resale price maintenance. It imposed a fine of €98,000 on HM Products Benelux for fixing the maximum discount levels its distributors could grant. HM Products Benelux imports and distributes infrared cabins of the brand Healthmate that are used to alleviate muscle and joint pains. Abiding by the maximum discount levels was a necessary precondition for being allowed into the distributor network. The system was accompanied by price monitoring and possible sanctions. The whole system was perceived as a single and continuous infringement spanning eight years and six months. The basic amount of the fine exceeded the 10 per cent Belgian turnover threshold. As a consequence, the amount of the fine was limited to the 10 per cent ceiling. As HM Products Benelux is not part of a large international group, the BCA agreed to further reduce the fine on proportionality grounds. Finally, the amount was reduced by an additional 10 per cent because HM Products Benelux agreed to settle.

\section*{ii Trends, developments and strategies}

One of the major changes under the BCEL is the introduction of the possibility of imposing administrative penalties on individuals for direct involvement in hardcore antitrust infringements (with the exception of abuse of a dominant position). At the time of writing, the BCA has not yet imposed administrative penalties on individuals on that basis. However, these sanctions have caused individuals to consider whether they would, separately or jointly with the undertaking that is their employer, file an application for immunity. This possibility has been used by individuals and it is expected that this will be a growing source of information for the BCA.

\textsuperscript{14} Decision ABC-2019-I/O-14 of 28 May 2019, case CONC-I/O-16/0011 - MediCare Market - Ordre des Pharmaciens,

\textsuperscript{15} Brussels Market Court, 8 January 2020, 2019/MR/3.

\textsuperscript{16} Decision ABC-2019-P/K-34-AUD of 15 October 2019, cases CONC-P/K-10/0024 - CONC-P/K-13/0009, CONC-P/K-17/0024 and CONC-P/K-17/0030, Multipharma/V-Pharma/B./ Newpharma.

\textsuperscript{17} Decision ABC-2019-P/K-35-AUD of 15 October 2019, cases CONC-P/K-10/0024 - CONC-P/K-13/0009, CONC-P/K-17/0024 and CONC-P/K-17/0030, Multipharma/V-Pharma/B./ Newpharma.
Another interesting development in 2018 was the judgment by the Belgian Supreme Court confirming the Brussels Court of Appeals 2015 ruling that the dawn raids carried out by a number of stevedores did not meet the constitutional requirements for carrying out such a raid. As a consequence, the BCA was prevented from using any documents collected during the dawn raids. This was ultimately one of the reasons why the BCA decided to close the investigation on 5 February 2019.

Finally, in two separate cases, the Brussels Market Court clearly established the rules for the composition of the BCA when the latter has to rule again in a case where the first decision was (partly) annulled by the Brussels Market Court. Members of the BCA who ruled on the first case cannot be part of the BCA who will rule on the same case (or part of it) the second time. If these rules are not respected, the second decision will be annulled by the Brussels Market Court.

iii Outlook

Over the past few years, a number of inspections have taken place, which is an indication that further decisions may be expected.

In May 2016, inspections took place of a number of Belgian undertakings operating in the sale of non-prescription products in pharmacies, given the fact that the BCA had information about possible infringements of Article IV.1 BCEL and Article 101 TFEU. In November 2016, other inspections took place at companies active in the wholesale distribution of pharmaceutical and para-pharmaceutical products to pharmacies in relation to alleged participation in anticompetitive agreements and concerted practices between wholesalers active in Belgium relating to services that they provide to pharmaceutical laboratories on the one hand, and to pharmacies on the other.

In May 2017, the BCA conducted a series of inspections for different suspected infringements of Article IV.1 BCEL and Article 101 TFEU. On 5 May 2017, inspections took place at the premises of one undertaking that distributes and sells water softeners. Three days later, an undertaking active in the distribution and sale of cooking utensils and wine accessories was searched by the inspectors of the BCA. Finally, on 29 May 2017, the BCA conducted searches of some manufacturers and wholesalers of tobacco products.

Also in 2018 a number of inspections were carried out. One concerned the sector of immunoglobulins and was carried out at the request of the Romanian authority. A second inspection was carried out jointly with the French authority and involved cosmetics. The last inspection carried out during 2018 concerned fire safety equipment and was carried out at one company's premises.

In 2019, the BCA carried out dawn raids in two separate investigations. The first inspection concerned the sector of mass distribution and related to a number of undertakings that were suspected to engage in anticompetitive practices in the form of a buying group. The supermarket Carrefour and the purchasing organisation Provera (which gathers Louis Delhaize, Cora-hypermarkets and the supermarket chains Smatch and Match) confirmed that they were subject to these dawn raids. The second dawn raid involved the pharmaceutical...
sector and related to the alleged practices of restricting, impeding and hindering the access or expansion of biosimilar drugs. Press reports stated that Roche Pharmaceuticals and Ghent University Hospital were subject to these investigations.

At the time of writing, none of these inspections has led to a decision of the Prosecution Body or of the Competition College.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

1 Significant cases

Article IV.1 and Article IV.2 BCEL are the Belgian competition rules equivalent to Articles 101 and 102 TFEU. As already mentioned above, Article IV.1, Section 1, BCEL includes a prohibition on anticompetitive agreements; whereas Article IV.2 BCEL forbids the abuse by one or more undertakings of a dominant position in the Belgian market concerned or in a substantial part of that market.

With regard to abuses of a dominant position, it is important to recall that in 2015, the Prosecution Body adopted a settlement decision in relation to an abuse of a dominant position, which was a first in Belgium. The European Commission, for example, does not apply the settlement procedure to abuses of a dominant position.

No infringement decisions relating to an abuse of a dominant position were taken in 2019. However, in one case the BCA imposed interim measures following a request by the Flemish Radio and Television Broadcasting Organisation (VRT). VRT had concluded a service level agreement with Norkring Belgium, a company that owns the telecommunication masts used by VRT for the provision of FM transmission services. As this agreement was due to expire on 5 March 2019, the VRT issued a public tender for the broadcasting of its FM programmes and awarded it to another company called Broadcast Partners. VRT complained that the continuity of its broadcasts would be compromised, given that Norkring and Broadcast Partners did not yet reach an agreement to this end. The Competition College found that, in light of avoiding damage to the general economic interest, there could be a prima facie infringement of Article IV.2 BCEL and 102 TFEU if the continuity of VRT’s FM broadcasts is not ensured on and after 5 March 2019. Therefore, Norkring needs to assure the continuity of the FM broadcasts at the same financial terms which it included in the bid that it submitted during the tender procedure.

In another case, the BCA decided to terminate an ex-officio investigation into a possible abuse of a dominance by Proximus vis-à-vis Alpha 11, a group using Proximus’ network. Allegedly, Proximus would have impeded the launch of Alpha 11’s new TV platform through artificially increasing or maintaining its costs at a high level. As the investigation did not

result in sufficient elements to prove the existence of these restrictive practices, the General Prosecutor decided to close the investigation. This decision was taken in accordance with the new Article IV.45 BCEL, introduced by the Law of 2 May 2019.

ii  Trends, developments and strategies

The BCA has shown its willingness to adopt settlement decisions in the past and continued to do so in 2019. Another interesting evolution to watch will be how the entry into force of the 2016 Leniency Guidelines will have an influence on the activities of the BCA and whether more leniency applications will be introduced.

Finally, decisions could be expected in the areas where dawn raids took place in the last three to four years.

IV  SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

According to Article IV.47 BCEL, the Competition Board can decide, upon request of the President, the Minister or the Minister responsible for the sector concerned, that the President should carry out general or sectoral investigations, in case there are indications of market disturbances. In that regard, the President may request the assistance of the Prosecution Body. To date, the President of the BCA has not yet used his powers in this area.

V  STATE AID

The BCA has no competence in the area of state aid. The European Commission is the only authority within the European Union that can approve state aid measures.

VI  MERGER REVIEW

i  Significant cases

In 2019, about 28 merger decisions were adopted by the BCA, which cleared the majority of the examined concentrations under the simplified procedure. Only one of the decisions involved commitments, namely the acquisition of sole control by Telenet (a cable network provider) over De Vijver Media (a group company active in the area of TV broadcasting, VOD services, sale of advertising and the production of television programmes). Aforementioned concentration was initially notified to the European Commission but was referred to the BCA following a request for referral. The transaction would result in Telenet having sole control over a vertically integrated group covering the production of content, TV-channels and a dominant distribution platform. The General Prosecutor found

26  17 out of 28 cases in 2019. The simplified procedure can only be used if certain conditions are met, for instance if two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships) provided that their combined market share is less than 25 per cent. The simplified procedure has the advantage that the prosecutor will render a decision within 15 working days. See the rules adopted by the General Assembly of the Competition Council on 8 June 2007, available on the BCA website.

27  Decision BMA-2019-C/C-16 of 13 May 2019, case MEDE-C/C-19/0006, Telenet Group BVBA/De Vijver Media NV.
that on certain markets, the transaction could result in input foreclosure and partial customer foreclosure and, therefore, a significant impediment of effective competition. Telenet proposed a number of commitments, such as providing access to De Vijver’s channels to other TV platforms, and the transaction was cleared subject to commitments.

Furthermore, in 2019, the BCA had to decide on an actualised request to lift all the conditions imposed on the Kinepolis Group, following the merger of two independent movie theatre companies forming Kinepolis in 1997. They required prior approval for any acquisition of another movie theatre even when notification thresholds were not met. The commitments even required Kinepolis to obtain prior approval for internal growth, leading to a raft of closures of movie theatres in order to replace them by others in other commercially more interesting geographic areas and to avoid the prior authorisation process for internal growth. Finally, a number of commitments were also given relating to not concluding programming agreements with independent movie theatres, and not concluding exclusivity or priority deals between Kinepolis and its daughter, KFD, which is a movie distribution company. The Competition College partially granted Kinepolis’ request and decided that Kinepolis does no longer need the BCA’s prior approval to establish new cinema complexes, comprising seven or fewer screens and 1,125 seats or fewer. This was further restricted as the new complex may not be established less than 10km from an already existing Kinepolis complex and the new complex may also not be extended to more than seven rooms or more than 1,125 seats. On appeal, the Brussels Market Court annulled the decision with regard to the restrictions on the lifted condition and referred the case back to a differently composed chamber of the BCA.

As a reminder, Kinepolis already attempted to lift the conditions between 2006 and 2010. It filed a new request in 2017, resulting in a partial lifting of the conditions: as of 31 May 2019, Kinepolis was allowed to grow internally without having to apply for prior approval. However, the Brussels Market Court annulled the 2017 BCA decision in as far as that decision lifted the requirement of prior approval by the BCA for Kinepolis’ internal growth. Following that judgment, the BCA adopted a new decision on 26 April 2018 reconfirming the lifting of the prior approval condition for internal growth as from 26 April 2020. That decision was again annulled by the Brussels Market Court because the BMA was composed of the identical group of individuals that took the 2017 BCA decision.

ii Trends, developments and strategies
Belgium has turnover thresholds that are too high when compared with its economy and the average size of companies active in Belgium.

A concentration must be notified when two of the undertakings involved in the transaction each have a turnover in Belgium amounting to €40 million. In addition, all the undertakings concerned must have jointly a €100 million turnover in Belgium. Exceptions to this rule are the referral provisions

33 Article IV.7 BCEL.
Contained in Articles 4 and 9 of Regulation 139/2004 on the control of concentrations between undertakings. Article IV.11 BCEL clearly stipulates that in the case of the referral of a transaction to the Belgian level, a new notification must be filed with the Prosecution Body.

Accordingly, only a few transactions must in principle be examined by the BCA, since operations implying undertakings that do not meet these thresholds do not have to be notified, whereas transactions implying bigger companies must rather be notified at the European level.

In May 2017, the BCA published an evaluation report regarding the notification thresholds for concentrations in Belgium. It concluded that these thresholds are already sufficiently high and should not be raised, and that there is also no need to lower them. The Prosecution Body nevertheless proposes that in the event that the notification thresholds would be lowered, this should happen only in relation to certain specific sectors, as this is the case in France, but not in general. In any event, the BCA indicates that a public consultation should be organised should a concrete proposal to modify the notification thresholds be discussed.

In January 2020, the Competition Board approved additional rules on the simplified procedure. The rules set out additional situations in which the simplified procedure may be applied, subject to conditions relating to market shares.

VII CONCLUSIONS

The volume of significant decisions rendered by the BCA is clearly increasing. In 2019 and the beginning of 2020, the BCA took a number of important decisions relating to cartel enforcement. Furthermore, the BCA was involved in a number of merger control cases. The bulk of the resources is still used in simplified merger cases.

As rightly indicated in the explanatory memorandum of the proposal for the BCEL, in view of the fact that the European Commission does not take more than eight decisions per year establishing an infringement, it cannot be expected that the Belgian authority conducts more than four investigations a year that result in the discovery of an infringement. Moreover, the BCA focuses on finding cartels, as does the Commission and many other national competition authorities. Part of the reasoning is that cartels are most damaging to consumer welfare. However, another, less encouraging, explanation is that the entire detection system is directed towards cartels (leniency is available only for cartels), and that more difficult analyses (i.e., does an agreement infringe Article 101 TFEU or Article IV.1 BCEL?) are not undertaken because of the lack of resources (legal and economic) and the greater likelihood of the Competition Authority’s decision being overturned on appeal. Developments over the last three years however, seem to indicate that the BCA has now shifted up gears in imposing interim measures in several sectors, adopting commitment and settlement decisions, and, occasionally, taking on an abuse of a dominant position case.

34 BCA, Evaluation des seuils de notification des concentration en Belgique, 16 May 2017, available on the BCA website.

I OVERVIEW

Since Law No. 12,529/2011 (the Brazilian Competition Act)\(^2\) entered into force in May 2012, introducing a system that concentrated the roles of three competition bodies into one, a pre-merger review system\(^3\) and revised rules to create better incentives and provide more legal certainty to leniency agreements and cease-and-desist agreements (settlements or TCCs, to use its acronym in Portuguese), the Administrative Council for Economic Defence (CADE), the Brazilian competition agency, has been functioning at a higher level of efficiency and improving the quality in its investigations and decisions. CADE’s current institutional design, which is organised into three divisions or units (i.e., the Office of the Superintendent General (SG), the Administrative Tribunal (with seven commissioners) and the Department of Economic Studies (DEE)) is considered to have resolved overlaps of responsibilities that used to cause delays in the processing of investigations for anticompetitive conduct and in the review and approval of mergers.\(^4\) In addition to this, the pre-merger review system has exceeded expectations as to timing and efficiency, and CADE has been able to review and clear merger filings at a fast pace in recent years.

2019 was certainly a singular year to CADE. For almost three months, CADE’s Administrative Tribunal did not have the minimum quorum to deliberate because the Federal Senate did not approve the individuals nominated by President of the Republic to become commissioners of the Administrative Tribunal. Therefore, during this period, all legal deadlines were suspended.

Despite these difficulties, CADE maintained the efficiency presented in previous years and tried to boost institutional strength of the authorities even more.

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1 Mariana Villela and Leonardo Maniglia Duarte are partners, Gabriela Reis Paiva Monteiro is an associate and Vinicius da Silva Cardoso is a junior lawyer at Veirano Advogados.
2 The new Brazilian Competition Act (Law No. 12,529/2011).
4 Broadly, the SG is in charge of investigating anticompetitive conduct and approving merger cases that do not raise competition concerns; the Administrative Tribunal is responsible for rendering decisions on all investigations of anticompetitive conduct and for deciding merger cases that may present competition concerns; and the Department of Economic Studies is responsible for issuing non-binding economic opinions and for carrying out economic studies in general.
In this regard, CADE continued to impress with its fast review of merger notifications, with an average review time for cases eligible for the fast-track procedure of 16.8 days in 2019. Transactions reviewed under the regular procedure were cleared within an average of 89.4 days.5

According to CADE’s estimates, 433 concentration acts were analysed in 2019, of which five were approved with restrictions. The SG declined to review a total of 17 transactions, concluding that they did not require a merger filing because either they did not meet the legal turnover thresholds or they did not qualify as a concentration act as per the wording of the Brazilian Competition Act.6

CADE’s Administrative Tribunal continued the past years’ trend, subjecting mergers to substantial scrutiny and opposition, and even effectively blocking high-profile mergers. The competition analysis in merger control cases has become more complex and sophisticated as a result of CADE’s accumulated experience and knowledge and of increasing challenges and contributions by third parties.

On the investigations front, CADE has been boosting enforcement of unilateral conduct offences. After eight years, the Administrative Tribunal dismissed three investigations against Google without convictions. In addition, CADE initiated 36 new investigations related to unilateral conducts.

Regarding cartels, CADE’s Administrative Tribunal decided a relevant pending case fining 11 companies 535 million reais in relation to a cartel in public bids related to the State of São Paulo’s subway and train systems. The investigation had been initiated many years ago after one of the companies executed a leniency agreement with CADE, the Federal Public Prosecutors’ Office and the State of São Paulo Prosecutors’ Office. Due to this leniency agreement, the Brazilian authorities conducted dawn raids in which they gathered 30 terabytes of data that were used as evidence. Several individuals were also convicted in criminal proceedings related to the case.

In 2019, CADE also executed 11 leniency agreements and 19 cease-and-desist agreements.7 The new evidence received helped to boost the number of investigations opened, which amounted to 89 cases in 2019.

Finally, the DEE also published seven papers8 regarding: (1) the Brazilian payment processing market; (2) the Brazilian cement market; (3) the rock cartel, decided by CADE in 2005; (4) antidumping; (5) the Sadia/Perdigão merger, approved by CADE in 2011; (6) the oil market in the Federal District; and (7) cartels in public bids.

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II CARTELS

Since 2012, the SG, CADE’s unit responsible for investigating anticompetitive conduct has been trying to clear the backlog of cartel cases. In 2019, CADE’s Administrative Tribunal decided 15 cartel cases. In seven of them (46.7 per cent), CADE did not convict any defendants.

i Significant cases

In 2019, CADE concluded several administrative proceedings concerning cartels.

In April, CADE’s Administrative Tribunal convicted 27 gas stations, two distribution companies and two individuals for cartel practice in the fuel distribution and resale market in the city of Belo Horizonte. They received a 154 million reais fine.

In July, CADE found 11 companies and 41 individuals guilty of rigging public biddings related to the operation of subways and trains in the Federal District and in the states of Minas Gerais, Rio Grande do Sul and São Paulo. According to CADE, the total fines amounted to 515.6 million reais (US$135 million approximately). In addition, some defendants were also prohibited from executing agreements with the public administration.

In June, CADE’s Administrative Tribunal approved two cease-and-desist agreements in investigations in the automobile sector. According to the investigations, three companies reportedly set prices and commercial conditions, divided markets and exchanged commercially and competitively sensitive information in the national market of exhaust systems.

Another important case was the conviction, in January, of Hitachi LG Data Storage, Quanta Storage and 17 individuals for a cartel in the international market of thin film transistor liquid crystal display (TFT-LCD), with effects in Brazil. The fines amounted to 27.4 million reais. According to the reporting commissioner, Mr Mauricio Oscar Bandeira Maia, the collusion occurred between 2001 and 2006. During this period, Brazil did not manufacture the product, which is the main component of monitors and LCD notebooks, and the country depended entirely on importations. CADE stated the participants of the cartel made use of price fixing, market division, sharing of commercially sensitive information and restriction of production, controlling the supply and demand of the product. The cartel was coordinated by emails and regular periodic meetings between the companies’ representatives.

In February 2019, CADE concluded that manufacturers of air-insulated switchgear (AIS) had colluded. According to the Brazilian antitrust authority, the cartel was active between 1996 and 2007. The Administrative Tribunal convicted Toshiba do Brasil, Inepar Energi and Lael Reativos, besides nine individuals, for national cartel activity in the AIS market, imposing fines totalling 56.1 million reais.

In October, CADE also executed several cease-and-desist agreements in different cartel investigations.

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12 Administrative Proceeding No. 08700.001486 /2017-74.
The authority executed a cease-and-desist agreement proposed by Takata Corporation and a related individual in an investigation of an alleged cartel in the international market of airbag modules, seat belts and steering wheels. The defendants were accused of sharing of sensitive information, marketing division and pricing offering.14

CADE executed a cease-and-desist agreement in the market of commercialisation of orthoses, prostheses and similar materials. The agreement was executed between CADE and the company Hemocat Comércio e Importação. The defended agreed to pay around 1 million reais.15

CADE executed a cease-and-desist with Sensus Metering Systems do Brasil and an individual in the market of water meter. According to CADE, there was evidence that the companies agreed and discussed prices in order to divide the market. Additionally, there is evidence that the companies involved in the conduct exchanged competitively sensitive information, combined prices, conditions, advantages or abstentions in bids, between 2010 and 2012. The company agreed to pay 2.6 million reais.16

CADE executed a cease-and-desist agreement with Refisa Indústria e Comércio and two individuals involving the national salt market. CADE stated there were evidence of price-fixing, customer division, exchange of sensitive information and meetings between competitors, between 2005 and 2013. The company agreed to pay around 200,000 reais.

CADE carried out three dawn raids related to cartels in 2019. In March, the Federal Prosecution Office, Rio de Janeiro’s Prosecution Office and CADE carried out a dawn raid in an investigation on several public bids conducted by the city of Rio de Janeiro.17 In April, CADE and several state prosecution offices executed several search and seizure warrants in an investigation on several healthcare public bids.18 Finally, in October, CADE carried out a dawn raid in the states of São Paulo, Espírito Santo, Bahia and Minas Gerais in relation to the transportation of new vehicles.19

CADE also initiated 39 new cartel investigations in 2019,20 including investigations in relation to the 2014 FIFA World Cup,21 the national insurance market22 and the national pay-TV sports channel market.23

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14 Administrative Proceeding No. 08700.002938/2017-35.
15 Administrative Proceeding No. 08700.009165/2015-56.
16 Administrative Proceeding No. 08700.009165/2015-56.
ii Trends, developments and strategies
Since CADE enacted Regulation No. 5/2013, on 6 March 2013, over 249 TCCs have been executed under the new Regulation, which modified the rules regarding settlements with the purpose of increasing the incentives for companies to cooperate by adding more predictability and transparency regarding the amount of contribution to be paid. In 2019, the Administrative Tribunal and the SG executed a total of 19 TCCs for anticompetitive conduct involving several markets, which amounted to 168 million reais in financial compensation being paid by the defendants. The aforementioned regulation on settlements has been proving to be a very effective tool to end investigations that otherwise could take years to be decided, releasing a significant amount of public resources that could be redirected to other investigations in Brazil.

In September 2018, CADE’s Administrative Tribunal issued Resolution No. 21/2018, which governs the publicity of the documents used as evidence in administrative proceedings, including those obtained from leniency and cease-and-desist agreements. CADE’s main objective was to allow access to the evidence obtained in the administrative investigations to third parties and to encourage private damages lawsuits. As mentioned above, Resolution No. 21/2018 may have an impact on the defendant’s willingness to execute settlements or leniencies with CADE, and it may make CADE’s leniency and settlements programmes riskier and less attractive. Its effects are yet to be seen and assessed.

iii Outlook
An examination of the cases initiated and concluded in recent years suggests that the investigation of cartels continues to be an enforcement priority for CADE. In 2017, CADE executed an all-time high number of leniency agreements and settlement agreements, many of which were related to Operation Car Wash. In 2018, CADE continued to analyse and to execute agreements concerning public biddings and, in 2019, in spite of the lack of quorum, CADE’s Tribunal decided one of its most important pending cases – the cartel in public bids related to São Paulo’s subway and trainway systems.

In the past few years, CADE has devoted a substantial amount of resources to the investigations and leniency agreements related to Operation Car Wash. Owing to the profiles of the new Ministers of Justice and of Economy, CADE is expected to allocate even more resources to tackling cartels, especially cartels in public biddings. This may have the side effects of delaying other investigations and of preventing CADE from pursuing new ones. This scenario highlights the importance of boosting CADE’s human and financial resources as soon as possible, as CADE has historically been understaffed. Despite the agency’s strong commitment to efficient enforcement and continuing developments in recent years, there is a risk that certain antitrust violations may go undetected and unpunished to the detriment of free competition and of Brazilian consumers due to a lack of enough personnel and resources.

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24 The Regulation contains guidelines on the levels of the settling sums to be paid by settling parties, which will vary depending on, inter alia, the level of cooperation and the moment of the investigation. Parties who are being investigated for cartel behaviour, however, need to acknowledge their participation in the violation in order to be able to settle.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i  Significant cases

In 2019, CADE’s Administrative Tribunal ruled on 10 cases related to unilateral conducts. Since 2017, the investigation of unilateral anticompetitive behaviour has been one of the priorities of CADE’s current General Superintendent. 26

In June 2019, CADE closed three administrative proceedings involving Google, which concerned an investigation into online search marketing.

The first case was related to Google Shopping, a price comparison tool. 27 The case was based on a complaint filed by E-Commerce Media Group Informação e Tecnologia in 2011 in which the company stated Google was using its regular search tool to leverage Google Shopping by prioritising Google Shopping in the list of search results. However, CADE’s Administrative Tribunal decided that there was no evidence of anticompetitive conduct and dismissed the complaint. 28

In the second investigation, Google was also accused of practicing ‘scraping’ 29 – a strategy used to scrape relevant content from its competitors’ websites. According to the complaint, Google Shopping had unlawfully collected customers’ reviews from competing price comparison websites, such as Buscapé and Bondfaro. Therefore, once opinions of users about products and services add relevant information to the websites as well as represent an attraction for price comparison tools, Google was misusing its dominant position acquiring competitive advantages with that practice. 30 In this case, CADE’s Administrative Tribunal dismissed the complaint, due to lack of evidence in the investigated period. Commissioner Polyanna Vilanova concluded that no anticompetitive acts were committed. 31

Microsoft also filed a complaint against Google, claiming that the company abused its market dominance by imposing restrictive clauses in contracts with third-party websites involving Google's marketing platform named Google AdWords. 32 Through AdWords for Search, Google provides advertising space on its website page to advertisers, allowing them to manage the keywords to which they want to associate their ads. According to Microsoft, Google would have imposed restrictions that would have made it difficult for advertisers to manage their advertising campaigns simultaneously on Google and other competing search tools. The practice – called ‘multihoming’ – seeks to facilitate and reduce the costs of setting up and managing campaigns on different search platforms, as well as to simplify the comparison of the performance of each platform. Therefore, Google would end up discouraging advertisers from also running campaigns on rival search engines, hindering the development of these

29 Administrative Proceeding No. 08700.009082/2013-03.
31 See www.cade.gov.br/noticias/cade-arquiva-processo-contra-o-google-sobre-suposta-copia-de-conteudo-de-concorrentes-na-internet.
32 Administrative Proceeding No. 08700.009082/2013-03.
competitors with a reduced market share. As a conclusion, CADE’s Administrative Tribunal decided that there were no abusive clauses in the investigated contracts, concluding for the dismissal of the complaint.

In June 2019, CADE’s Administrative Tribunal opened six administrative proceedings in order to investigate exclusivity agreements executed with the federal government relating to the supply of consigned credit. The companies involved were Itaú Unibanco S/A, Caixa Econômica Federal, Santander S/A, Bradesco S/A, Banco do Estado do Rio Grande do Sul S/A and Banco de Brasil. The investigation started in 2012, after the cease-and-desist agreement executed between CADE and Banco do Brasil. The state-owned financial institution committed itself to end the exclusivity agreements. During the negotiations, Banco do Brasil claimed that other banks were practicing the same unlawful acts, starting the investigations. Regarding HSBC, Banco do Estado do Espírito Santo, Bank of the State of Sergipe and Bank of the State of Pará, the investigation was closed due to lack of evidence. For the others above-mentioned banks, the investigations are still ongoing.

In October 2019, CADE condemned Tecon Suape to pay 71.1 million reais for abuse of its dominant position in the market of storage of containers in the Port of Suape, located in the state of Pernambuco. According to Suata Serviço Unificado de Armazenagem and Terminal Alfanegado e Atlântico Terminais, the companies that requested the preventive measure granted by CADE’ Administrative Tribunal’s, Tecon Suape, in its capacity as port operator, was imposing additional charges as investment recovery and equipment maintenance in an attempt to meet the requirements of the International Ship and Port Security Code. Commissioner Maurício Bandeira Maia concluded that Tecon Suape was a monopolist in the port terminal in which it was active and abused its dominant position to impose commercial conditions. The Commissioner also decided that the charge caused significant harm to Tecon Suape’s competitors, once it superficially increases the prices of the storage of containers services. Additionally, the Commissioner points out that the charges would be lawful if imposed on shipowners as a part of the box rate, and not on the storage of containers. As a conclusion, CADE’s Administrative Tribunal decided that Tecon Suape is not allowed to demand any charges in that sense.

In October 2019, CADE also executed five cease-and-desist agreements with major banks after a lengthy investigation into anticompetitive practices in the electronic payment market. CADE initiated this investigation in 2016 to probe, among other things, the banks’ exclusivity contracts with commercial establishments and the adoption of other anticompetitive practices that prevented small companies from accessing the market. As a pecuniary contribution, Itaú and Rede agreed to pay 21 million reais to the Fund for

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33 See www.cade.gov.br/noticias/cade-investiga-supostas-praticas-anticompetitivas-do-google-no-mercado-brasileiro-de-buscas-online.
37 Administrative Proceeding No. 08700.005418/2017-84.
38 See www.cade.gov.br/noticias/cade-condena-tecon-suape-por-abuso-de-posicao-dominante.
39 See www.cade.gov.br/noticias/cade-condena-tecon-suape-por-abuso-de-posicao-dominante.
40 Administrative Proceeding No. 08700.001860/2016-51.
the Defence of Diffuse Rights. In addition, Banco do Brasil and Bradesco agreed to pay 1.9 million reais and 2.2 million reais in fines, respectively. Cielo SA, which is controlled by Banco do Brasil and Bradesco and is considered Brazil’s largest credit and debit card operator, also paid 29.7 million reais. This was the largest nominal contribution ever collected by CADE in a TCC involving unilateral conduct.

**ii Trends, developments and strategies**

As previously mentioned, since 2017, the current General Superintendent has been stating in public speeches that, after focusing on cartels and mergers for so long, it is now time for CADE to focus more attention on unilateral conduct, which can be very harmful to competition. This statement was reinforced by CADE’s President in his 2018 review. In 2019, CADE initiated 36 new investigations on unilateral conduct.

**iii Outlook**

CADE’s enforcement priorities were always clearly focused on fighting cartels, meaning that cases involving unilateral conduct represented a lower proportion of CADE’s enforcement activities. Since 2017, public speeches by competition authorities have been indicating a possible shift on this policy and more enforcement in this area. Although there was a noticeable change in the level of enforcement against unilateral conduct, CADE still allocates much more resources to fighting cartels. It will be important to track closely how CADE’s efforts related to unilateral acts will unfold in 2019, especially considering the new authorities to be appointed by the new government.

**IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES**

**i Significant cases**

In 2019, CADE’s investigations on regulated markets clearly focused on the financial industry – especially regarding Brazil’s five major bank conglomerates. In April 2019, CADE initiated a proceeding to investigate possible unilateral practices of Banco do Brasil, Bradesco, Caixa Econômica Federal and Santander aimed at preventing the entry of fintechs in the credit card issuer market. In October 2019, CADE initiated an investigation on the Itaú Group to assess whether the group was conducting anticompetitive practices in the payment market. CADE’s Administrative Tribunal preventively ordered that Rede (a company of the Itaú Group) ceased a commercial practice that charged lower payment rates to sellers that had an Itaú bank account.

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41 See www.cade.gov.br/noticias/acordo-revoga-tabela-de-honorarios-para-corretores-de-imoveis. Exchange rate as at 31 December 31 (1 real = US$0.2580778).
42 See https://globalcompetitionreview.com/article/1149505/cade-to-focus-on-unilateral-conduct.
ii  Trends, developments and strategies

Even though the Brazilian Competition Act does not limit CADE’s jurisdiction to enforce competition law in regulated sectors, certain aspects of its jurisdiction are still unclear and are being analysed by the Brazilian courts. After years of discussion regarding CADE’s jurisdiction to enforce competition law over banking mergers and conduct, CADE and the Brazilian Central Bank (BACEN) have finally reached an agreement. As the Brazilian Competition Act does not limit CADE’s jurisdiction to enforce competition law in regulated sectors, CADE understood that it had jurisdiction to enforce competition law in all sectors, including in the banking sector, although the Brazilian courts have so far sided with the argument sustained by BACEN, according to which BACEN should be solely responsible for enforcing competition law in the banking sector due to the sector’s peculiarities. In 2017, CADE and BACEN established a working group to develop studies about competition defence in the Brazilian financial system. In 2018, these bodies signed a memorandum of understanding (MoU) to coordinate and give greater predictability to the assessment of mergers involving companies in the financial sector. This MoU states that BACEN and CADE will foster the exchange of information and that a consent from both bodies will be required for approval of mergers.45

In addition, CADE was also active in trying to influence public policy regarding regulated sectors. In May 2018, due to the truckers’ strike initiated after a rise in diesel prices, CADE proposed several measures to reduce gas prices in Brazil. The government, however, decided to fix delivery prices. In June, CADE sent an opinion to the Brazilian Supreme Court (STF) arguing the government’s policy harmed consumers, the market and the free competition. CADE opposed the policy, arguing it had effects similar to those of a cartel. The authority also initiated a preparatory procedure to probe any anticompetitive conduct.46 The STF did not render a final decision on this matter.

As result, in January, 2019, CADE and the National Agency of Land Transportation executed a technical cooperation agreement to establish an institutional partnership, including the sharing of exchange documents and information, databases, reports, diagnostics and statistics technical opinions or results of studies.47 In the same month, CADE and the National Agency for Supplementary Health Services executed a similar technical cooperation agreement.48 In November, CADE held an open audience to debate the competitive impacts of the Brazilian financial sector’s verticalisation. The panels counted on the contributions of several experts, public officers and companies’ representatives, who debated the structure of this specific market and related competition concerns. CADE’s President declared ‘CADE understands the necessity to participate actively in discussions about possible solutions to enhance the competition environment in the financial sector’. In December, CADE and the National Civil Aviation Agency of Brazil (ANAC) also held a joint seminar to discuss the competitive impacts of ANAC’s regulations on the market. The event discussed major questions in this market, such as: joint business agreements, slots competition, a ban on companies controlled by foreigners, competition between airports, and low-cost flights.

In May, CADE issued Ordinance No. 292/2019, which seeks to anonymise the identity of a whistle-blower for 100 years. The secrecy of identity seeks to offer greater

security to people who report cartels and other anticompetitive conduct to CADE without being involved in illicit practices.\textsuperscript{49} In the same month, CADE and Rio de Janeiro’s and Pernambuco’s State Prosecutors Office signed a co-operation agreements with the objective of expanding the communication between Cade and state prosecution offices to ensure greater efficiency and agility in actions to prevent and repress cartel practices and other violations of the economic order.\textsuperscript{50}

In 2019, CADE’s Department of Economic Studies published seven papers,\textsuperscript{51} regarding: (1) the Brazilian payment processing market; (2) the Brazilian cement market; (3) the rock cartel, decided by CADE in 2005; (4) antidumping; (5) the Sadia/Perdigão merger, approved by CADE in 2011; (6) the oil market in the Federal District; and (7) cartel in public bids.

iii Outlook

The increase in cooperation between CADE and various regulatory agencies, and the cases involving regulated markets that have been subject to CADE’s scrutiny, suggest that CADE will continue to play an important role in shaping the regulatory framework of several industries in Brazil. CADE is expected to continue to enforce competition law in regulated sectors, particularly where sectoral regulation fails to prevent and repress practices that may be harmful to competition.

V MERGER REVIEW

CADE continues to clear merger filings under a pre-merger review system quickly and efficiently, leaving far behind the anxieties and doubts that had been raised when the current Brazilian Competition Act entered into force in 2012. Simple cases eligible for the fast-track procedure have consistently been cleared in less than 20 days on average, while more complex cases have taken, on average, no more than 100 days to be decided.\textsuperscript{52}

In 2019, 442 concentration acts were submitted to CADE’s review and the authority ruled on 433 cases. The vast majority (406 out of 433) were approved unconditionally, and only five were approved subject to remedies. The other 22 transactions were either withdrawn or not subjected to the mandatory filling criteria provided by the Brazilian Competition Act.

i Significant cases

CADE reviewed several high-profile merger cases in 2019, including transactions that were approved subject to sophisticated remedies packages (including structural and behavioural commitments). This is a positive effect of the merger control system enacted in 2012, which provides better incentives and a more suitable legal framework to encourage CADE and parties to seek negotiated solutions in merger cases.


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In February 2019, CADE approved with restriction the acquisition of AllChemistry by SM Empreendimentos, both pharmaceutical compounding companies.

One of the 2019 most important transaction subject to remedies was the acquisition of 21st Century Fox by The Walt Disney Company. The transaction received the green light subject to the sale of the Fox Sports channels, among other measures negotiated in a merger control agreement. The Tribunal decided for the application of structural remedies, since it understood that the merger generated competition concerns in the market of cable sports channels, which included ESPN (owned by The Walt Disney Company) and Fox Sports (owned by 21st Century Fox). CADE stated the transaction would leave the market of cable sports channels even more concentrated, with increased probability of The Walt Disney Company exercising its market power. Furthermore, there would be a potential decrease in the quality and diversity of available sports content, as well as an increase in costs that could be passed along to consumers. On November 2019, CADE decided that the acquisition of 21st Century Fox by The Walt Disney Company will be reviewed due to the impossibility of complying with the executed merger control agreement. The review is still pending; however, it will be the first time since the Brazilian Competition Act came into force, that CADE will review its own decision.

In May, CADE also approved with restrictions Notre Dame Intermédica’s acquisition of Mediplan. The reporting commissioner, Polyanna Vilanova, analysed possible risks to competition resulting from the verticalisation of healthcare operators with their own hospitals. The parties agreed to behavioural remedies such as not to discriminate against competing healthcare operators or hospitals, or both.

In April 2019, CADE also approved with restrictions the joint venture formed by GSK and Pfizer. According to the reporting commissioner, Paula Azevedo, there was a low offensive potential to competition in national markets for calcium-based products; dermatological topical antifungals; topical anti-rheumatic and analgesic products; non-narcotic pain relievers; and non-prescription antipyretics. However, the post-operation scenario in the national market for simple antacids reveals high concentration, a fact that raises competitive concerns.

In December 2019, CADE’s Administrative Tribunal also approved the transaction between Prosegur and Transvip with remedies. During the analysis, competitive concerns were raised regarding the movement of acquisitions in the securities transportation market, evidenced by the high number of transactions submitted to CADE in recent years. This has generated an increase in concentration and a non-organic growth pattern for economic agents in this sector. According to the reporting commissioner, Paula Azevedo, the proposed agreement aims to mitigate these concerns by limiting the acquisition during a three-year period.

53 Concentration Act No. 08700.005972/2018-42.
54 Concentration Act No. 08700.005705/2018-75.
Gun jumping

In December 2019, CADE initiated an administrative procedure to investigate an act of concentration (APAC) concerning the consummation of the acquisition of Red Hat by IBM before CADE’s final decision. IBM and Red Hat filed the transaction to CADE in April 2019. The SG recommended the unrestricted approval of the merger in June and, days later, the Administrative Tribunal called the case for second review. In July, when the process was still under the revision of the Tribunal, the companies informed CADE of the closing of the transaction. The companies were fined 57 million reais for closing the transaction before CADE’s Tribunal rendered its final decision on the case.

ii Trends, developments and strategies

The new trends in merger review in 2019 and 2020 are as follows:

a As CADE’s merger review grows more sophisticated, the amount of merger challenges – and their relevance to the result of merger cases – is on the rise.

b In the past few years, CADE has toughened its assessments regarding mergers in general. Vertical integrations that, at another time, would be easily cleared under the fast-track procedure are now strictly scrutinised by CADE.59

c Based on the profile of the new government and on analyses carried out by the specialist press,60 there is an expectation that the new members appointed by the new government in 2019 to take seat at CADE’s Tribunal may adopt a more pro-business approach in the review and approval of mergers and acquisitions.

iii Outlook

CADE has proved to be capable of efficiently examining simple transactions under a pre-merger review system, overcoming the difficulties of a limited staff and a lack of experience of the new model. Nevertheless, there are aspects of the interpretation and implementation of the new Competition Act regarding merger control that are still unclear. The improvement of the Brazilian merger control system continues to be on CADE’s agenda, as demonstrated by the new regulations and procedural matters enacted in 2019.

VI CONCLUSIONS

i Pending cases and legislation

In the area of anti-cartel enforcement, CADE’s Administrative Tribunal is expected to decide various cases that were reviewed by the SG in 2019 and that have been under investigation for a few years. The decisions rendered in these cases and the approach the SG may take with respect to new investigations are issues that deserve the attention of the antitrust and business communities, as they may frame the enforcement environment for the next few years.

59 E.g., see CADE, Concentration Act No. 08700.002276/2018-84, a RAN sharing agreement between Oi and Tim. Initially, SG-CADE decided the transaction did not meet the criteria of mandatory filing. However, CADE’s Tribunal decided to call up the case and analyse it thoroughly.
ii Analysis

Developments in recent years have shown Brazil to be a dynamic jurisdiction for competition law. The new competition law framework, which has been in place for almost seven years, has been reasonably successful so far. However, it is natural that new challenges will appear as it develops. One significant concern is the risk that CADE may be over-influenced by and pressured from a political perspective, given that several cartel investigations that derived from the Car Wash Operation affect several Brazilian high-level authorities and politicians. In 2019, CADE was also affected by the lack of quorum in the Administrative Tribunal. However, with the quorum re-established, CADE is expected to return to its normal activities and be more active in 2020 than in 2019.

Nonetheless, CADE has already developed solid institutional foundations inspired by the best international practices in competition law enforcement and has continuously improved. Therefore, CADE is well positioned to successfully deal with all these challenges adequately, given the difficulties that it has already overcome and considering the overall evolution of competition law and policy in Brazil. CADE has also been able to convince Congress to increase its annual budget, which is expected to translate in more resources to increase competition enforcement in the country.
I OVERVIEW

Enforcement of competition law in Canada remains vigorous and high profile more than a year into Commissioner Matthew Boswell’s tenure. In addition, the Competition Bureau (the Bureau) continues to encourage compliance with competition laws, promote pro-competitive public policy and regulatory outcomes (including with respect to telecommunications, big data, consumer protection and gender), modernise its policies (including its abuse of dominance and intellectual property enforcement guidelines) and establish and improve working relationships with law enforcement in other legal areas and other jurisdictions.

II CARTELS

Enforcement against cartel and bid-rigging, especially for infrastructure contracts, continues to be an area of priority for the Bureau. The cartel (Section 45) and bid-rigging (Section 47) provisions of the Competition Act (the Act) are indictable offences with serious monetary and jail penalties for convicted offenders. There is no limitation period for these offences.

The Bureau has consistently identified the detection and remedying of cartels and bid-rigging as among its most important commitments.

i Significant cases

In 2017, the Bureau conducted dawn raids at the offices of seven bread wholesalers and grocery retailers in a criminal investigation tied to the alleged price-fixing of packaged bread products. In court filings, the Bureau alleged that bread wholesalers Canada Bread and Weston Bakeries communicated with one another to set bread prices that retailers then agreed to pass through to consumers. Retailers subject to the dawn raids were Loblaw Companies Ltd (whose parent company, George Weston Ltd, owns Weston Bakeries), Walmart Canada Corp., Sobeys Inc., Metro Inc. and Giant Tiger Stores Ltd.

In December 2017, George Weston and Loblaw publicly admitted to their participation in what the companies say has been an industry-wide arrangement over the past 14 years to coordinate and fix the price of bread, and identified themselves collectively as the immunity applicant in this case. According to documents released by the Ontario Superior Court of

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1 Michael Koch and David Rosner are partners and Justine Johnston is an associate at Goodmans LLP.
Justice, the investigation alleged that prices were increased at least 15 times over this time period, in a pattern known as the 7/10 convention – seven cents more at wholesale and 10 cents more for consumers in stores.

Of the remaining companies implicated in the alleged price-fixing, Walmart has declined to comment, while the others have denied contravening any provisions of the Act. The Bureau has not offered a timeline for when charges may be laid, and in early 2018, publicly clarified that there was no conclusion of wrongdoing at that time. At the time of writing, class action lawsuits have been launched against the implicated companies seeking more than C$5 billion in damages.

Another significant case that the Bureau recently concluded involved an alleged conspiracy to rig bids for 21 infrastructure contracts for the City of Gatineau, Quebec between 2004 and 2008. In 2018, four individuals who held senior positions at the implicated engineering firms were charged, and in 2019, all four individuals pleaded guilty for their roles in the scheme. Cumulatively they received conditional sentences totalling five years and 11 months, and court-ordered community service totalling 260 hours.

### ii Trends, developments and strategies

In 2018, the Bureau published revised immunity and leniency programmes under which a party that reveals the existence of criminal conduct and cooperates may be granted immunity or leniency from prosecution. Under the revised programmes, immunity is withheld until the applicant’s cooperation and assistance is no longer required. In practice, this would result in applicants only benefiting from a provisional grant of immunity (instead of a final grant of immunity) for the long periods of time typically associated with cartel investigations, and potentially up until the applicant has testified at the trial of alleged co-conspirators. This change addresses the risk that, following the initial application, the applicant may reduce or cease the extent of its cooperation. Prosecutors faced this challenge in a prior bid-rigging trial where a cooperating witness who benefited from the Bureau’s programmes provided testimony that was different from what the Bureau expected.

In addition, the programmes no longer automatically protect directors, officers and employees of the immunity or leniency applicant. Instead, such individuals need to demonstrate their personal knowledge of the alleged wrongdoing and their willingness to cooperate with the Bureau’s investigation to obtain protection. The directors, officers and employees of the leniency applicants are offered more narrow protections than those of the immunity applicants. Another significant change allows the Bureau to interview witnesses under oath and to video or audio-record those interviews (as well as corporate proffers). Finally, all applicants are now required to provide confidentiality waivers allowing the Bureau to communicate with agencies in other jurisdictions where the applicant is applying for immunity or leniency.

While the immunity and leniency programmes provide incentives for parties to unlawful conduct to self-report, these changes may render the Bureau’s premier cartel detection tool less attractive, particularly for potential applicants who are attempting to balance varying cooperation requirements of agencies operating across different jurisdictions. In combination, with the general decline in the perceived attractiveness of immunity and leniency programmes around the world, international companies (in particular) should consider carefully the advantages and risks associated with availing themselves of the Bureau’s updated immunity and leniency programmes.
iii Outlook

Given the Bureau's continued focus on the detection, investigation, prosecution and punishment of cartels and bid-rigging matters, companies should continue to give significant attention to ensuring compliance with applicable laws and treating all possible violations very seriously. Companies should note that the Bureau considers having a corporate compliance programme, which conforms to its Corporate Compliance Programs bulletin, to be a mitigating factor in sentencing and will recommend a reduced sentence for companies with such a programme.

In cases of possible international conduct, coordination with counsel in other jurisdictions should be considered as early as possible. This is particularly relevant for cross-border conduct as Canada has a mutual legal assistance treaty and extradition treaty with the United States, which can be used in relation to cross-border criminal investigations.

Above all else, it is critical for companies considering possible international conduct to understand the operation of the Bureau's immunity and leniency programmes, and what the operation of these programmes might entail for the companies' interests under the programmes of non-Canadian agencies and in respect of possible civil suits.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Act contains non-criminal provisions relating to abuse of dominance (Section 79), restrictive agreements among competitors (Section 90.1) and various distribution practices (Sections 75–77). These provisions, which are collectively known as ‘reviewable practices’, permit the Commissioner to seek an order from a specialist court, the Competition Tribunal (the Tribunal), where the Commissioner can show that the reviewable practice is, or is likely to have an anticompetitive effect.

i Significant cases

The Bureau has made enforcing the reviewable practices provisions of the Act a significant priority. A summary of recent notable cases are set out below.

The Commissioner of Competition v. Vancouver Airport Authority

In 2019, the Tribunal dismissed the Commissioner's application against Vancouver Airport Authority (VAA) under the abuse of dominance provision of the Act. The Commissioner subsequently announced that he would not appeal the Tribunal's decision.

In 2015, the Commissioner initiated an inquiry into, and in 2016, the Commissioner brought an application against, VAA before the Tribunal alleging that VAA engaged in anticompetitive conduct because it decided not to grant a licence to a firm that wished to begin supplying in-flight catering to airlines at the Vancouver airport (YVR). VAA denied the Commissioner's allegations; VAA explained that it decided not to permit additional in-flight caterers at YVR to maintain healthy competition between the two full-service caterers already operating at the airport, and that it believed the decision was justified under the Act. The Commissioner sought orders from the Tribunal requiring VAA to grant additional licences to in-flight caterers.

In advance of the hearing, the Commissioner was required to produce documents to the defendant. In this matter, the Commissioner produced a large volume of documents, but asserted ‘public interest privilege’ over a subset and refused to produce them to VAA. In series
of a pre-hearing motions, the Tribunal determined that, in non-criminal proceedings before the Tribunal, the Commissioner did not have to produce any documents or information gathered from third parties in the course of the investigation by relying upon a blanket ‘public interest privilege’. VAA successfully appealed the Tribunal’s decision at the Federal Court of Appeal. The Federal Court of Appeal abolished class-based public interest privilege. The decision – which will apply in all contested proceedings before the Tribunal in the future – only allows the Commissioner to assert public interest privilege on a document-by-document basis. Such assertions of privilege, which will be fact-specific, are more likely to result in a fair process before the Tribunal.

In 2019, the Tribunal dismissed the Commissioner’s application. The Tribunal determined that the Commissioner could not meet two of the three prongs of the abuse of dominance test, namely that VAA had not engaged in a practice of anticompetitive acts and that the Commissioner did not prove that VAA’s conduct resulting in any substantial lessening of competition (in terms of both price and quality).

The decision is also significant because the Tribunal, for the first time, considered and opined on the regulated conduct defence (which is similar to implied antitrust immunity and the state-action immunity doctrine in the United States).

The decision is notable for two reasons.

First, the decision sheds light on whether a firm that supplies inputs to competitors in a market (but does not itself operate in that market) can be held to have abused a dominance position in that market. In a prior case, the Tribunal had held that a prerequisite to finding an abuse of dominance was that the firm have a ‘plausible competitive interest’ in the market (as distinguished from a ‘garden variety’ refusal to supply). The Tribunal’s latest decision sheds light on the concept of ‘plausible competitive interest’ in an impugned market. VAA acted as a market gatekeeper – exercising control over and setting the rules of a market – but did not compete in the market for in-flight catering. The Tribunal’s decision sets a low bar for the competitive interest that a market gatekeeper must have for the Commissioner to pursue enforcement action, which suggests that many platform operators could face scrutiny about their business decisions from the Commissioner. The Tribunal decision also have implications for the essential facilities doctrine in Canada; the same analytical framework could theoretically be applied to digital platforms to ensure that the competition they manage on their platforms is consistent with standards under the Act (which have yet to be articulated).

Second, the decision sheds light on the application of the regulated conduct defence to non-criminal actions under the Act. In theory, the regulated conduct defence allows businesses to justify their conduct because it was required or compelled by law. While the regulated conduct defence has been used in criminal matters under the Act, the Tribunal determined that the defence could not be extended to the abuse of dominance provision of the Act because the provision does not contain the type of ‘leeway’ language that courts in other circumstances have identified when deciding that federal law should not operate to impugn conduct authorised by provincial or other federal law. Despite this finding, the Tribunal also concluded that the regulated conduct defence would not apply because the VAA’s governing legislation did not specifically require or compel VAA to limit the number of in-flight caterers operating at the airport.
The Commissioner of Competition v. Celgene, Pfizer and Sanofi

In 2018, the Bureau announced that it had discontinued a multi-year inquiry into the policies and practices of Celgene, Pfizer and Sanofi, which were alleged to restrict generic drug manufacturer’s access to samples of their branded products contrary to the abuse of dominance provision of the Act. The Bureau’s inquiry focused on two types of conduct: (1) alleged restrictions imposed by Celgene, Pfizer and Sanofi on wholesalers and other distributors that may prevent them from supplying drug samples to generic drug manufacturers and (2) how Celgene, Pfizer and Sanofi dealt with direct requests for drug samples from generic drug manufacturers.

The Bureau concluded that Celgene’s risk management program was not anticompetitive because the restrictive distribution elements of the policy were legitimate measures to ensure safe use and other regulatory requirements and there was insufficient evidence to conclude that Celgene’s approach to dealing with direct requests for drug samples would result in a substantial or lessening of competition. In respect of Pfizer and Sanofi, the Bureau did not find sufficient evidence to conclude that either had policies or practices that would inhibit generic drug manufacturers from obtaining drug samples and substantially delay or prevent their entry. In announcing its conclusions, the Bureau confirmed that healthcare remains a top enforcement priority and that it will continue to investigate conduct in the pharmaceutical industry.

The Commissioner of Competition v. The Toronto Real Estate Board

The Supreme Court of Canada denied the Toronto Real Estate Board’s (TREB) leave to appeal, ending seven years of abuse of dominance litigation. TREB is a professional organisation of real estate agents in Toronto. It operates the local multiple listing service (MLS), which permits agents to post their listings in a single website, viewable to all other agents. The MLS also contains other data concerning property sales that are not readily available to the public, including historical sales prices for individual properties. Some agents began operating with new business models, which made significant use of the data from the MLS, including displaying historical sales prices online to consumers. TREB disapproved of these potentially disruptive business models, and prevented these agents from using MLS data.

At trial, the Tribunal found that TREB, through its operation of the MLS and its membership rules, controlled the market for residential real estate brokerage services in the Greater Toronto Area (GTA), had a ‘plausible competitive interest in adversely impacting competition’ in the market for residential real estate brokerage services in the GTA because it wished to shield its traditional members from new and innovative competitors (and to exclude these new competitors), and the MLS rules were intended to insulate existing members from innovative new competition which had the effect of substantially preventing non-price competition (preventing innovation). The Tribunal ordered TREB to remove restrictions on member access and use of MLS data.

TREB appealed, arguing that the Tribunal was required to quantify the alleged competitive effects (which the Tribunal had not done). The Federal Court of Appeal rejected TREB’s appeal, explaining that under Canadian law, the requirement to quantify competitive effects applied only in the merger review context. TREB sought leave to appeal from the Federal Court of Appeal’s decision to the Supreme Court of Canada, but that request was denied.
Trends, developments and strategies
The Bureau continues to seek document and data production, witness examinations and other orders under Section 11 to investigate reviewable practices. For example, in 2019, the Commissioner sought and obtained orders for production and written returns to investigate whether BNSF continued to comply with the terms of a prior consent agreement that were intended to prevent future anticompetitive conduct in the market. The Commissioner also obtained orders for detailed financial and pricing records and an interview a high-level executive in connection with an investigation into alleged predatory pricing by WestJet Airlines Ltd.’s low-cost carrier, Swoop.

Responding to Section 11 orders can be an invasive and time-consuming process that requires the target company and others involved in an inquiry to make extensive documentary production. The use of this investigative tool clearly raises the costs for businesses of responding to Bureau inquiries. It also increases the likelihood of greater public attention and interest to the Bureau’s inquiry, given the public filings in the Court’s record.

Outlook
The Bureau will continue to investigate and bring enforcement actions for reviewable matters in all sectors of the economy, with a particular focus on innovative and consumer facing sectors. The Bureau continues to focus on the digital economy, and is carefully selecting matters for investigation (and potential enforcement action) that involve or implicate digital economies.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES
The Bureau conducts market studies to examine an industry or business sector from a competition perspective to identify relevant laws, policies, regulations or other factors that may impede competition.

Significant cases
Canada’s broadband industry
In 2019, the Bureau released its report following a year-long study to better understand competition for residential broadband internet services. Broadband internet services are the type of high-speed connections that Canadians typically use to access the internet in their homes.

In Canada, most internet users in Canada access broadband internet services through wired networks deployed by telephone and cable companies. Canada’s telecommunications regulator imposes a mandatory wholesale access obligation that allows independent competitors to access parts of existing networks at regulated wholesale rates, and in turn use these connections to serve consumers in direct competition with network owners.

A key goal of the study was to assess the performance of the wholesale access regime. Among other reasons, this was to ensure the Bureau could meaningfully participate in the Canadian Radio-Television and Telecommunications Commission’s (CRTC) review of Canada’s wireline wholesale regulation and other related matters. The study made four factual findings: (1) wholesale-based competitors (using the wholesale access regime to serve customers), currently provide services to more than 1 million Canadian households;
(2) consumers who are served by wholesale-based competitors report higher satisfaction with their provider than those who use traditional providers; (3) wholesale-based competitors act as a competitive alternative to traditional providers, and their presence is used to negotiate lower prices and other inducements; and (4) several facilities-based competitors that provide services using their own underlying physical networks, have launched fighter brands, at least in part, as a competitive response to wholesale-based competitors. The Bureau has relied on its findings to make submissions to the CRTC in respect of its wireline wholesale regulation review, which the CRTC, in turn, relies on to make significant decisions about Canada’s broadband regulations.

**Fintech**

In 2018, the Bureau released a progress report following the implementation of its market study into technology-led innovation in the Canadian financial services (fintech) sector. As expected, the Bureau adopted an advocacy approach and organised a number of outreach events. In the nine months since the publication of the study, the Bureau made formal submissions to advise Canadian decision-makers on issues such as the modernisation of payment systems, anti-money laundering and counter-terrorist activity financing regimes, and updating securities law frameworks so that they apply to virtual currencies.

The market study focused on payments and payment systems, different forms of lending, including crowdfunding and advice in respect of investing. The report gives an overview of the regulatory and competitive landscape of these areas, and makes broad recommendations for policymakers and regulators, industry participants and customers. These recommendations are intended to help modernise the financial services regulation system in Canada and foster innovation through technology-neutral, principles-based regulation.

**Trends, developments and strategies**

In 2018, the Bureau published its final form Market Studies Information Bulletin. The Bulletin sets out and explains how the Bureau conducts a market study, including identifying potential topics, selecting a study and clarifying its scope and how it treats confidential information.

The Bureau does not have the ability to compel third parties to provide information for a market study. The Bureau relies on publicly available information, information already in its possession and information provided by stakeholders on a voluntary basis. If a third party voluntarily provides information to the Bureau, the information is protected by the confidentiality provisions in Section 29 of the Act (which protects information from disclosure except under certain limited circumstances), and is subject to the Bureau’s Communication of Confidential Information under the Competition Act bulletin.

**Outlook**

The Bureau will continue to use market studies as a tool to understand how competition can be increased in a given industry or sector. The Bureau can be expected to focus market studies on those markets that may be held back by a lack of competition, including the telecommunications sector and those that directly impact Canadian consumers.

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V  MERGER REVIEW

The Bureau’s Mergers and Monopolistic Practices Branch reviews a wide range of mergers, including acquisitions of assets or shares, amalgamations and other combinations to determine whether a merger is or is likely to substantially lessen or prevent competition in Canada. With certain limited exceptions, the parties to a proposed merger that exceeds certain financial thresholds are required to notify the transaction to the Commissioner. The Commissioner retains the jurisdiction to substantively review all mergers, including those that fall below the financial thresholds. The Commissioner may challenge a merger for up to one year after it has been completed by filing an application with the Tribunal requesting an order to dissolve the merger or divest assets or shares or, with the consent of the merging parties, any other action.

As noted above, the Act contains certain financial thresholds, which must be exceeded to trigger a pre-merger notification filing. These thresholds are colloquially referred to as the ‘size of the acquired person’ and ‘size of parties’ thresholds. For 2019, the size of the acquired person threshold is C$96 million, and is adjusted annually for inflation. In general, the ‘size of the acquired person’ threshold is applied by determining the aggregate value of the assets in Canada that are to be acquired or the gross revenues from sales in or from Canada generated from those assets, and checking whether those figures exceeds the threshold. The ‘size of parties’ threshold is exceeded where the parties to the proposed merger, together with their respective affiliates, have either assets in Canada, or have had gross revenues from sales in, from or into Canada that exceed C$400 million in aggregate value. The ‘size of parties’ threshold requires that the vendor’s assets and revenues, even if not included in the transaction, be counted.

If a proposed merger is notifiable, then it may not be completed until the parties file their complete notifications, and the applicable waiting period has expired, been terminated early or the Commissioner has provided waived the obligation to submit a notification. The initial waiting period is 30 days after the day on which the parties submitted their respective notifications. The merger may be completed at the end of the first waiting period unless the Commissioner notifies the parties that additional information is required and issues a supplementary information request (SIR). If a SIR is issued, then the merger cannot be completed until 30 days after the parties comply with the SIR, and provided that the Tribunal has not issued an order prohibiting the parties from completing the transaction. SIRs are typically issued in complex matters where the Bureau must conduct an in-depth analysis of the likely anticompetitive effects. As a result, the Commissioner’s substantive assessment of a proposed merger may extend beyond the statutory waiting period and the parties may choose not to complete the transaction until after the Commissioner’s review is complete.

4 If the proposed merger is by way of an acquisition of shares, an additional shareholder threshold must also be exceeded. To exceed this threshold, the buyer, together with its affiliates, must hold (1) more than 20 per cent of the voting shares of a publicly traded company or (2) more than 35 per cent of the voting shares of a company that is not publicly traded. The threshold is also exceeded if the buyer, together with its affiliates, already holds more than 20 or 35 per cent of the voting shares as applicable, and as a result of the proposed transaction would hold more than 50 per cent of the voting shares of the target company.
Significant cases

The Bureau reviews all types of transactions, including domestic and multinational transactions, where there are significant assets or sales in Canada. Many of these reviews have resulted in consent agreements requiring the divestiture of assets or other behavioural commitments. Recent notable cases are summarised below.

The Commissioner of Competition v. American Iron & Metal Company

At the end of 2019, the Commissioner and American Iron & Metal Company Inc (American Iron) entered into an agreement to preserve specific assets in respect of American Iron’s acquisition of Total Metal Recovery. American Iron and Total Metal Recovery each operate scrap metal facilities in the Montreal area.

The Bureau was conducting an investigation into the proposed merger when American Iron represented that it was necessary to immediately close the transaction because Total Metal Recovery was in serious financial difficulty and significantly reduced its operations. Due to the Commissioner’s concerns that the transaction may result in a substantial lessening of competition in the purchase, collection and processing of scrap metal and the supply of processed scrap metal in Quebec, the Commissioner and American Iron entered into the preservation agreement while the Bureau continues to investigate.

The preservation agreement, which has the effect of a court order, requires American Iron to preserve the assets it acquired from Total Metal Recovery for 60 days, commencing upon the completion of the transaction. During the preservation period, among other things, American Iron must not sell, and must maintain the viability and marketability of, these assets.

At the time of writing, the Commissioner continues to investigate the transaction and the order remains in place.

Commissioner of Competition v. Thoma Bravo

In 2019, Thoma Bravo, a US private equity firm, whose portfolio company Quorum Business Solutions supplies software to oil and gas companies, including the MOSAIC Reserves Software (MOSAIC), acquired Aucerna, a software supplier to oil and gas companies, including Value Navigator (Val Nav) software.

In reviewing the transaction, the Bureau found that MOSAIC and Val Nav competed directly for the business of Canadian oil and gas companies. The Commissioner found that the merger would have resulted in a monopoly for the supply of this type of software to Canadian and noon-Canadian oil and gas companies, and expressed concern that that the price and non-price benefits of competition between the parties would be lost as a result of the transaction. The Bureau further found that it was unlikely that there would be timely or effective entry or expansion sufficient to constrain the market power of the merged entity.

The Commissioner issued SIRs to the parties, and following the expiry of the 30-day waiting period following compliance, the parties closed the transaction despite the Commissioner’s concerns. The Commissioner subsequently filed an application before the Tribunal seeking that Thoma Bravo divest either MOSAIC or Val Nav. While the application was pending, the Commissioner and Thoma Bravo entered into a hold separate agreement under which Thoma Bravo was required to hold the MOSAIC business separate and apart from the rest of its business. Ultimately, the Commissioner and Thoma Bravo negotiated and entered into a consent agreement whereby Thoma Bravo agreed to divest MOSAIC.
**Parmalat Canada Inc’s acquisition of the Kraft Heinz Canada’s cheese business**

In 2018, Parmalat Canada announced its proposed acquisition of Kraft Heinz Canada’s (KHC) natural cheese business. Parmalat Canada produces and supplies dairy and food products in Canada, including cheese, table spreads, cultured products and beverages. KHC manufactures and markets a wide range of food and beverage products in Canada, including natural cheese. The Commissioner cleared the transaction in 2019.

The Bureau’s review of the transaction is significant because the Bureau sought and obtained a Section 11 order from the Federal Court compelling representatives of Parmalat Canada and KHC to submit to oral examinations under oath or solemn affirmation so that the Bureau could gather information. The Bureau stated that the oral examinations provided additional insight into the industry and the merging parties’ businesses that otherwise would not be available to the Bureau, and that it will consider using oral examinations in mergers on a case-by-case basis in the future.

**ii  Trends, developments and strategies**

In 2019, the Bureau changed the name of its Merger Notification Unit to the Merger Intelligence and Notification Unit (MINU), and expanded its role to include active intelligence gathering on non-notifiable merger transactions that may raise competition concerns. The Bureau has already identified, and is investigating, at least two potentially anticompetitive transactions that were not subject to pre-merger notification.5

Going forward, companies may have a valuable opportunity to close transactions even though a portion of the transaction may potentially be anticompetitive. *Thoma Bravo* and *American Iron & Metal Company* are two examples where the Bureau was notified of the proposed merger, allowed it to close and then took enforcement action in respect of the portion of the merger that it alleged was anticompetitive.

In Canada, the efficiency defence continues to be a powerful tool for firms seeking to engage in strategic transactions that may have competitive effects. Firms seeking to obtain the benefit of the efficiencies defence should engage in careful and early planning and seek the assistance of experts able to organise and marshal the evidence necessary to support efficiencies claims.

The Bureau continues to closely cooperate with competition authorities in other jurisdictions, including the United States Federal Trade Commission and the Antitrust Division of the Department of Justice. Competition counsel in the different jurisdictions where a proposed merger is subject to review should work collaboratively to facilitate consistent outcomes and efficient reviews.

**iii  Outlook**

The Bureau will continue to treat merger review as one of its top priorities, particularly as the number of strategic transactions remains high. Accordingly, firms should continue to expect that the Bureau will thoroughly review and investigate all mergers that have or are likely to

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have significant competitive effects. Parties to smaller transactions should be cognisant of the expanded role of the MINU and carefully consider whether their proposed mergers should be voluntarily notified to the Commissioner.

VI  CONCLUSIONS

Recent developments are likely to reverberate for some time in Canadian competition law. The Bureau’s review and enforcement actions continue to be directed at furthering competition and fostering innovation across all segments of the Canadian economy. Going forward, the Bureau can be expected to focus its efforts on innovative and consumer-facing industries to ensure all Canadians reap the rewards of competition.
Chapter 5

CHINA

Michael Gu

I OVERVIEW

The year 2019 marked the eleventh anniversary of the implementation of the PRC Anti-monopoly Law, which was also the first full calendar year for the State Administration for Market Regulation (SAMR) to take over the role as China’s single central level antitrust enforcement agency. The antitrust functions of China’s three former antitrust enforcement agencies – the National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC) and the Ministry of Commerce (MOFCOM) were integrated to SAMR in 2018. After integration, the SAMR was relatively active in its antitrust enforcement practice. In 2019, the SAMR published 19 penalty decisions on alleged monopoly agreements and abuse of market dominance and concluded 465 merger review cases. In particular, a total of 16 penalty decisions against non-filers of merger cases were published throughout the year, which reached a peak of non-filing enforcement crackdown over the past 10 years. In general, the SAMR demonstrated its professional competence, efficiency and consistency in China’s antitrust enforcement in 2019.

As to legislative work, the SAMR revised three sets of interim provisions on the antitrust enforcement and released a revised draft of the Anti-monopoly Law for public comment (the Revised Draft). The SAMR also published several administrative regulations that provide clearer guidance on antitrust enforcement. The new antitrust regulations and revised draft of Anti-monopoly Law also provide clearer regulations on the compliance construction of undertakings.

As to antitrust enforcement, the SAMR maintained a consistent rigorous attitude. The types of industries investigated by antitrust law enforcement authorities in 2019 were diverse, while the key industries of the investigations were still in the areas closely related to the people’s daily life, for example, gas and water supply, building materials, automobiles and pharmaceutical industries. Some 13 out of 19 cases published by the SAMR were related to the people’s daily life.

As to merger control review, the SAMR maintained a consistently rigorous and prudent attitude towards merger control review in 2019. The overall case handling efficiency has been improved in view of the fact that the total number of cases concluded increased while the average time for case review was reduced. As to the cases that were conditionally approved, the SAMR imposed various tailored conditions. In addition, the SAMR investigated more non-filing cases and imposed more penalties on the non-filers compared with 2018.

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1 Michael Gu is a founding partner of AnJie Law Firm. The author would like to thank associates Sihui Sun, Charles Xiang, Qiang Fu and Grace Wu for their contributions to this chapter.
Prioritisation and resource allocation of enforcement authorities

Before the integration, the three antitrust enforcement agencies had their own responsibility respectively. The NDRC was responsible for price-related antitrust enforcement; the SAIC was responsible for antitrust enforcement that was not directly related to price; while MOFCOM was mainly focused on merger control review. And the Office of State Council Anti-monopoly Commission was seated in MOFCOM. After the integration, all of the above antitrust enforcement functions have been transferred to the Anti-monopoly Bureau of the SAMR.

On 2 January 2020, the SAMR released the Revised Draft for public comment. Although the Revised Draft follows the current Anti-monopoly Law’s basic framework, it significantly enhances the legal liability of AML violators. It also clarifies practical issues such as ‘controlling rights’, improves merger control review procedures and introduces a new type of monopoly behaviour and methodology for identifying dominance in the internet sector. Currently, there is no clear timetable for the finalisation of the Revised Draft and promulgation of the new Anti-monopoly law. Nevertheless, the Revised Draft signals the SAMR’s enforcement priorities and indicates the legislative trends that could have a profound impact on China’s antitrust enforcement landscape.

While the Anti-monopoly Law is under revision, the SAMR released the Anti-monopoly Compliance Guidelines for Undertakings for public comments on 28 November 2019. It was the first time that antitrust compliance guidelines have been issued at the state level. In addition, in 2019 each of the provincial antitrust enforcement agency of Shanghai and Zhejiang also issued the respective antitrust compliance guidelines applicable to local enterprises.

Regarding the legislature in antitrust enforcement, the SAMR revised three sets of interim provisions to implementing the Anti-monopoly Law and unifying both substantive and procedural regulations previously published by NDRC and SAIC. On 26 June 2019, the SAMR promulgated the Interim Provisions on Prohibition of Monopoly Agreements, the Interim Provisions on Prohibition of the Abuse of Market Dominance, and the Interim Provisions on Curbing Abuse of Administrative Power to Exclude or Restrict Competition (collectively as ‘Three Interim Provisions’). The Three Interim Provisions set out detailed behavioural monopoly models and assessment standards of various monopoly behaviours. The Three Interim Provisions also elaborate procedural requirements in the case investigation process. In particular, they specify the form and content of the third-parties report, and the procedures and content of the application, supervision, and decision for suspension and

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2 The original Chinese version is available at the SAMR’s website: www.samr.gov.cn/hd/zjdc/201911/t20191128_308890.html.
4 The original Chinese version is available at the SAMR’s website: http://gkml.samr.gov.cn/nsjj/ldj/201907/t20190725_305165.html.
5 The original Chinese version is available at the SAMR’s website: http://gkml.samr.gov.cn/nsjj/ldj/201907/t20190725_305166.html.
6 The original Chinese version is available at the SAMR’s website: http://gkml.samr.gov.cn/nsjj/ldj/201907/t20190725_305167.html.
termination of the investigation. The Three Interim Provisions are extremely important regulations issued after the integration of the three antitrust enforcement agencies and they promote a more consistent and predictable enforcement practice.

In 2019, the SAMR published 19 cases which increased slightly compared with that of 2018 (14 cases). Due to the decrease in law enforcement personnel numbers, the SAMR faced a shortage of manpower and the average workload has increased significantly. However, the decentralisation of antitrust enforcement has eased the workload pressure of the SAMR. On 17 February 2019, the SAMR released the ‘Notice of the SAMR’s Authorization on Anti-monopoly Law Enforcement’, authorising provincial level Administrations for Market Regulation to take charge of antitrust enforcement in their respective local area. The scope of authorisation included monopoly agreements, abuse of market dominance, and abuse of administrative power cases. In 2019, 18 of 19 behavioural monopoly cases published by the SAMR were initiated and investigated by local enforcement agencies. Due to the better understanding of local market conditions, local enforcement agencies can detect and investigate anticompetitive acts in a timely and efficient manner. Therefore, it is expected that the number of antitrust investigations will increase in the future.

As to merger control review, according to data published on its website, the SAMR concluded 465 cases in 2019. Among the concluded cases, the SAMR unconditionally approved 460 cases in 2019. The number of unconditionally approved cases in 2019 slightly increased from 444 in the previous year. In addition, five cases were conditionally cleared in 2019. Meanwhile, the SAMR significantly strengthened its supervision of and penalties for non-filing parties. A total of 16 penalty decisions were published throughout the year, which reached a peak of non-filing enforcement crackdown over the recent 10 years. In addition, the SAMR released the Interim Provisions for Merger Control Review for public comments on 7 January 2020. The draft Interim Provisions for Merger Control Review incorporate all major regulations for merger control review into one comprehensive regulation.

ii Enforcement agenda

Yaqing Xiao, the chief director of the SAMR, stated in an interview of Xinhuanet on 15 January 2020 that the antitrust enforcement authority has been keeping a close eye on suspected monopolistic behaviours in key sectors that are of particular concern to the people’s daily life such as utilities and active pharmaceutical ingredients.

In terms of merger control, the SAMR’s law enforcement maintained MOFCOM’s professionalism and stability after the integration. According to data released by the SAMR, the number of unconditional approved cases in 2019 is basically the same as the number in 2018. However, in practice, strict rules concerning the material and data required by the SAMR still apply. In particular, during the pre-review stage before official case acceptance, notified parties must often submit detailed materials. Therefore, this requirement may also extend the wait time before case filing. The Revised Draft introduces the ‘stop-clock’ clause that specifies three conditions to discontinue the timelines for merger review: (1) on

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7 The original Chinese version is available at the SAMR’s website: http://gkml.samr.gov.cn/nsjg/bgt/201902/t20190217_289791.html.
8 The original Chinese version is available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/zqyj/202001/t20200107_310322.html.
9 The original Chinese version of the interview is available at the SAMR’s website: www.samr.gov.cn/xw/zj/202001/t20200115_310507.html.
application or consent by the notifying parties; (2) supplementary submissions of documents and materials at the request of the authority; or (3) remedy discussions with the authority. This would tackle the problem that in the absence of the ‘stop-clock’ clause, the notifying parties can only withdraw and refile the case when the statutory review period is running out.

II CARTELS

2019 was a relatively quiet year for cartel investigation both in terms of the number of penalty cases and the total amount of the penalties. The SAMR and local agencies concluded and published nine cartel cases in 2019. Compared with that of 2018 (14 cases), the number of cartel cases dropped slightly in 2019. The published penalty cases involved a variety of industries, such as building materials, food, automobiles and gas. However, the total amount of the penalties was 20.97 million yuan, and the average amount of fines imposed in each case by the SAMR was relatively low compared with that of previous years. This may be because the penalised companies were small or medium-sized enterprises and their turnover was low. The most significant case was the Chongqing Sintered Brick Manufacturer cartel case where the enterprises argued for the exemption under Article 15 of the AML, but the enforcement authority rejected their arguments. Also, trade associations remained one of the focuses in the antimonopoly law enforcement by the SAMR. Trade associations were involved in two out of the nine cartel cases.

i Significant cases

Chongqing Sintered Brick Manufacturer cartel case

On 9 August 2019, Chongqing Administration for Market Regulation (Chongqing AMR) published a decision fining six Chongqing sintered brick manufacturers and three individuals a total of 1,938,501 yuan and confiscating unlawful gains of a total of 1,931,291 yuan for entering into a horizontal monopoly agreement. This was a rare case where a cartel investigation involved natural persons.

According to the penalty decision, the involved companies and individuals colluded with each other and entered into a joint operation agreement orally in March 2014. The involved companies and individuals engaged in the following activities during the period from March 2014 to July 2018:

\[a\] coordination of the production schedule of the participating members, and provision of compensation to members who ease to produce the sintered brick products;

\[b\] establishment of a joint operation office;

\[c\] price fixing of sintered brick products; and

\[d\] allocation of sales of sintered brick products and distribution the profits among participating members.

Chongqing AMR identified two types of monopolistic behaviours in this case:

\[a\] fixing the lowest prices of sintered brick products; and

\[b\] restricting the product quantity though the way of reducing member’s production.

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10 The original Chinese penalty decision is available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/xzcf/201908/t20190821_306163.html.
The involved companies and individuals argued in the hearing held by Chongqing AMR that the suspension of production of some members was a response to implement the government’s ‘off-peak production’ and ‘environmental protection’ policies, which shall be regarded as an exception under Article 15 of the Anti-Monopoly Law. However, Chongqing AMR rejected this argument on the grounds that there were no objective factors such as economic downturns during the implementation of the monopoly, nor could it achieve the purpose of environmental protection. Therefore, Chongqing AMR concluded that the monopoly agreement reached by the involved companies and individuals shall not be entitled to exemption in accordance with Article 15 of the Anti-Monopoly Law.

Since the monopoly agreement lasted more than four years, severely disrupted the competition of the sintered brick sales market and had a great negative impact on the sintered bricks market in Chongqing, Chongqing AMR imposed fines equivalent to five per cent of each entities’ respective revenues for 2017.

It is notable that the involved companies and individuals defended themselves citing Article 15 of the Anti-monopoly Law. However, the defences were not accepted by the SAMR, and it might show that the SAMR takes a strict approach in application of Article 15 of the Anti-monopoly Law.

ii Trends, developments and strategies

In 2019, the SAMR and local agencies concluded nine cartel cases and none of them was a high-profile case. The number of cartel cases decreased slightly and the total amount of penalties was relatively low compared with previous year. However, in early 2019, the SAMR started an investigation on German carmakers including Daimler, Volkswagen and BMW with regard to their possible collusion in emission controls following the European Commission’s probe in September 2018. This shows that Chinese antitrust law enforcement agencies have been closely monitoring the cases investigated by other jurisdictions and may follow the suit from time to time.

iii Outlook

The key industries of cartel investigations in 2019 were focused on the construction and automobiles industries. In particular, four out of nine cases were related to the building materials industry. In addition to the above-mentioned Chongqing Sintered Brick Manufacturer cartel case, a number of concrete manufacturers (Quzhou Concrete Companies11 case, Yan’an Concrete Companies case12 and Yongji Concrete Companies case13) were also investigated and penalised, which signals the SAMR’s greater antitrust concerns on the building materials industry.

11 The original Chinese penalty decisions are available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/ xzcfl201905/c20190529_301526.html.
12 The original Chinese penalty decisions are available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/ xzcfl201908/c20190830_306396.html.
13 The original Chinese penalty decisions are available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/ xzcfl201910/c20191008_307206.html.
III ANTI-TRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

In 2019, the SAMR and local agencies concluded six abuse of dominance cases. Among these cases, two cases were terminated without any penalties due to the timely rectification of the investigated parties. This shows the importance of active rectification and cooperation during the investigation.

Furthermore, the antitrust agencies concluded and published four cases in relation to vertical restriction cases, and all of them related to resale price maintenance (RPM). However, among these cases, the Hydron Contact Lens RPM case14 was terminated and the Lenovo RPM case15 was suspended without any penalties. They were the first and the second vertical monopoly that were suspended or terminated. In these cases, although the parties had carried out the monopoly behaviour, they acknowledged their misconduct and provided remedial measures during the investigation. This shows that even in vertical restriction cases, as long as the parties can actively offer the remedial measures that can eliminate the adverse effects on competition, they may be exempted from penalty. In addition, in accordance with Article 50 of the Revised Draft, except those hardcore horizontal agreements, violators of other monopolistic behaviours including vertical restraints can apply for a suspension of investigation.

The most significant dominance case concluded in 2019 was the Eastman case. Eastman’s complex exclusive dealing model constituted abusive behaviour and attracted widespread attentions. This case set a new benchmark for, inter alia, the definition of exclusive dealing and refusal to deal. The antitrust enforcement agency also explored the new types of restrictive behaviours such as most-favoured-nation (MFN) clauses and loyalty discounts.

i Significant cases

Tianjin Water Supply: abuse of dominance

On 12 July 2019, the SAMR issued a penalty decision against Tianjin Water Supply Group Co, Ltd (Tianjin Water Supply) for the abuse of dominance in relation to its urban water supply services. Tianjin Water Supply was fined 7.4 million yuan.

The relevant market in this case was urban water supply services in the southern part of Tianjin City. Tianjin Water Supply was the only provider in the relevant market holding a 100 per cent market share. Tianjin Water Supply required local real estate developers to only use smart electric control cabinets and remote monitoring units manufactured by its subsidiary for the secondary water supply facilities. Secondary water supply facilities are essential to the provision of water for buildings. Tianjin Water Supply refused to supply water to the real estate developers that did not use the designated electric control cabinets and remote monitoring units. Due to unreasonable restrictive conditions imposed by Tianjin Water Supply, the real estate developers had no choice but to accept the instruction of Tianjin Water Supply.

According to the penalty decision, Tianjin Water Supply abused its dominance by imposing unreasonable conditions on transactions with the real estate developers and thus violated Article 17(5) of Anti-Monopoly Law. Considering the responsive cooperation,

14 The original Chinese terminal decision is available at the SAMR’s website: www.samr.gov.cn/fldj/zzgg/ xzcfl201905/t20190521_293971.html.
15 The original Chinese suspension decision is available at the SAMR’s website: www.samr.gov.cn/fldj/zzgg/ xzcfl201911/t20191115_308573.html.
proactive submission of relevant evidence materials by Tianjin Water Supply, the SAMR imposed a relatively lighter fine in this case, namely 7.4 million yuan, equivalent to 3 per cent of Tianjin Water Supply’s revenue.

The key industries of antitrust enforcement in 2019 were mainly in the industries that were closely related to the people’s daily life, especially water supply and gas supply. Tianjin Water Supply abuse of dominance case was a typical sample.

Eastman: abuse of dominance

On 16 April 2019, the Shanghai Administration for Market Regulation (the Shanghai AMR) issued a penalty of 24.38 million yuan on Eastman (China) Investment Management (Eastman) for its abuse of dominance. The Shanghai AMR states that Eastman abused its dominant position in the alcohol ester-12 coalescing agent market in mainland China, and unreasonably conducted exclusive dealing, thereby eliminating and restricting market competition.

To identify the dominant position of Eastman, the Shanghai AMR mainly considered Eastman’s market share in the relevant market, financial and technological conditions, competition constraints from competitors and customers’ reliance on the product and entrance barrier. Based on the above assessment, the Shanghai AMR held that Eastman had a dominant position in the alcohol ester-12 market in China.

According to the penalty decision, Eastman conducted the following wrongdoings:

\(a\) Eastman and its six direct distributors agreed on the minimum purchase quantity for each contract year in the next two to three years (the minimum purchase quantity term). According to the Shanghai AMR, the annual minimum purchase quantity stipulated in the above six contracts accounts for over 60 per cent of each of the direct distributors’ actual annual demand for alcohol ester-12, among which the minimum purchase quantity requirement of five distributors accounts for over 80 per cent of each of their annual demand.

\(b\) Eastman required its direct clients and distributors in the Chinese mainland market to sign a long-term take-or-pay clause in the relevant agreement. Under the take-or-pay clause, direct clients and distributors shall fulfil the minimum purchase requirement even if the minimum purchase quantity exceeds their actual demand. Nevertheless, its direct clients and distributors have to pay the full price of the minimum purchase requirement.

\(c\) Eastman signed and implemented exclusive agreements involving MFN clauses. The MFN clauses in this case refer to the global best price and regional sales discount given to the customer whose purchase reaches the agreed global summation ratio and agreed regional quantity. Unlike the typical MFN clause in the context of EU and US jurisdictions, which refers to the company with dominant position requiring the counterparty to offer the most preferential terms, the above-mentioned clause in this case is actually a type conditional rebate.

According to the Shanghai AMR, the combination of minimum purchase quantity term, take-or-pay clause and MFN clause enabled Eastman to conduct exclusive dealing, which imposed the lock-in effect on the market competition.

First, the minimum purchase quantity term in the take-or-pay agreement was based on the long-term cooperation relationship between Eastman and its customers. The agreed minimum purchase quantity accounted for most of the customers’ demand. The customers
would be likely to purchase alcohol ester-12 only from Eastman due to reasons such as switching cost, product compatibility and stability. In addition, the take-or-pay clause exerted more burdens for the customers’ liability for breach of contract, which enhanced the lock-in effect of the minimum purchase quantity term.

Second, the Shanghai AMR stated that the additional discount agreement based on the worldwide MFN treatment enabled Eastman to lock above 75 per cent of total market demand in mainland China. The other domestic competitors could not provide this discount and other preferential conditions, thus the customers were restricted to only deal with Eastman.

The Shanghai AMR stated that the concurrence of MFN clause and take-or-pay agreement imposed a lock-in effect on the market. The customers who were locked-in were all direct distributors with greater market shares. This prevented competitors from participating in the major market.

The Shanghai AMR held that Eastman abused its dominant position in the alcohol ester-12 coalescing agent market in mainland China, and unreasonably conducted exclusive dealing, thereby eliminating and restricting market competition. Therefore, Eastman was fined amounting to 5 per cent of its respective revenue in 2016. In this case, the SAMR establishes a precedent for the identification of exclusive dealing and refusal to deal, and it also challenges the legality of new type of restrictive behaviour such as the MFN clause (even it is not a typical MFN in the US and EU jurisdictions) and royalty rebates.

**Lenovo RPM**  
On 15 November 2019, the SAMR released the decision on suspending investigation against Lenovo (Beijing) Ltd. The investigation was launched by the former NDRC and concluded by Beijing Administration of Market Regulation (the Beijing AMR).

The investigation was launched based on third party’s complaint. The Beijing AMR found that between 2016 and 2017, Lenovo set the minimum resale prices of its authorised after-sales and maintenance service providers. During the investigation, Lenovo admitted its wrongdoings and the adverse impact on the competition. It immediately took measures to rectify and promised to adopt further actions to eliminate the anticompetitive effect. These rectified measures include suspending the alleged vertical restraints on resale prices and conducting compliance trainings for all employees. Since the requirement of Article 45 of the Anti-monopoly Law was met, the Beijing AMR suspended the investigation on Lenovo.

**Hydron**  
Unlike **Lenovo RPM**, the **Hydron** case was terminated without penalty. This case was launched by the former Shanghai Price Bureau on 2 November 2017. The Shanghai AMR made the termination decision on 24 April 2019, and the SAMR published the decision on 21 May 2019. Hydron Contact Lens Co, Ltd Shanghai Branch (Hydron) and Shanghai Horien Contact Lens Optics Co, Ltd (Horien) set minimum prices for online retail pharmacy. On 13 November 2017, Hydron and Horien applied for suspension of investigation and promised to adopt rectification remedies including self-checking, conducting business in

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16 The original Chinese penalty decisions are available at the SAMR’s website: http://samr.saic.gov.cn/gg/201901/t20190118_280436.html.

17 The original Chinese penalty decisions are available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/xzcf/201905/t20190521_293971.html.
compliance with the law and conducting legal training, Shanghai AMR issued the suspension decision on 16 March 2018. After the expiry of the inspection period, the Shanghai AMR decided to terminate the investigation because the involved companies fulfilled the commitments under the rectification remedies and there were no longer any anticompetitive effects on the relevant market.

**Toyota RPM** and **Ford PRM**

On 27 December 2019, the SAMR published the penalty decision against Toyota Motor (China) Investment Co, Ltd (Toyota). The former Jiangsu Price Bureau launched its investigation in December 2017, and the penalty decision was concluded by Jiangsu Administration for Market Regulation (the Jiangsu AMR) on 20 November 2019. Toyota fixed local distributors’ prices displayed on internet portals and set minimum resale prices for multiple Lexus models.

Toyota instructed its distributors in Jiangsu to offer same price quote for online inquiry and set minimum resale price for off-line sales of certain Lexus passenger cars. Toyota also specified discount policies and related monitoring and punishment measures. The distributors implemented the resale price stipulated by Toyota. Jiangsu AMR, therefore, concluded that Toyota reached and implemented an illegal vertical agreement.

Similarly, Changan Ford Motor Co, Ltd (Ford) was also penalised for engaging in the RPM monopoly by the SAMR according to a press release published on 5 June 2019 on the SAMR’s website; however, the penalty decision has not yet been published. Since 2013, Ford has restricted the distributors’ resale price by formulating a ‘price list’, reaching a ‘price self-discipline agreement’, and setting the lowest prices during the auto show and the lowest online prices in Chongqing.

It is worth noting that Toyota was fined for 87.6 million yuan, representing 2 per cent of its sales in 2016 in Jiangsu Province. The Jiangsu AMR considered Toyota’s active cooperate, acknowledgment of the misconduct and active rectification to give such a low penalty. The fine was not based on the total sales of Toyota in China; rather it was based on the regional sales. The penalty imposed on Ford is also based on the regional sales in Chongqing (i.e., 162.8 million yuan, representing 4 per cent of Ford’s previous year sales in Chongqing).

Article 46 of the Anti-monopoly Law does not specify whether the fine should be based on the total sales or the regional sales or sales of related product, so it is at discretion of the enforcement agencies. Even the Revised Draft does not provide any clarification in this regard.

**ii Trends, developments and strategies**

As in the past, antitrust law enforcement authorities have kept an eye on the automobile industry, in which vertical restraints are often conducted. Due to the large sales of car companies, the fine imposed on them is always large even if the penalty calculation was based on regional sales of these companies.

The SAMR has been more confident and professional when handling abusive cases. *Eastman* was the first influential abuse of dominance case published one year after the

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18 The original Chinese penalty decision is available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/xxcf/201912/t20191227_309552.html.

19 The press release is available at the SAMR’s website: www.samr.gov.cn/xw/zj/201906/t20190605_302109.html.
unification of China anti-monopoly law enforcement agencies into the SAMR, indicating the SAMR’s competition concern on chemical industry and similar anticompetitive conduct in other industries. The detailed analysis illustrated in this case indicates the competition authority’s competence and courage to investigate some of the most complicated and new types of monopoly behaviours.

### iii Outlook

RPM has been the focus of law enforcement agencies for years, especially in certain industries such as automobile and pharmaceutical. Compared to the previous consultation draft, the deletion of the ‘safe harbor’ clause in the Interim Provisions on Prohibition of Monopoly Agreements also shows that the SAMR is still cautious about vertical restrictions. We expect that RPM will remain to be the focus of law enforcement agencies in the future, and companies should remain vigilant.

In 2019, antitrust law enforcement agencies showed greater concerns in the fields that were closely related to people’s daily life. Most of the published cases were related to these fields, including public sector enterprises, pharmaceutical, automobiles, consumer goods, chemical, building materials and food, etc. The most prominent are enterprises of public utilities. There were five abuse of dominance cases involving industries of public utilities such as power supply, gas supply and water supply.

### IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Not applicable.

### V STATE AID

Not applicable.

### VI MERGER REVIEW

According to the data released on the SAMR’s website, the SAMR unconditionally approved 460 cases in 2019, slightly higher than the previous year (444 cases). The number of conditionally approved cases is relatively stable in 2019 (five cases) compared with the previous year (four cases). Four cases were approved with behavioural conditions, and the remaining one was approved with both structural and behavioural conditions. All of the five conditionally approved cases in 2019 were withdrawn and resubmitted before the expiry of the first statutory merger review period (i.e., 180 days). This shows that the SAMR is becoming more prudent in reviewing mega mergers which may raise competition concerns. Withdrawal of the filing also provides notifying parties with certain flexibility and more time to communicate with the SAMR. From the first submission of filing materials to the 20190216_288687.html.

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case being conditionally concluded, the review process for the above five cases lasted for a minimum of 263 days\textsuperscript{21} and a maximum of 562 days.\textsuperscript{22} There was no prohibition decision rendered by the SAMR in 2019.

As to simple cases, a total of 341 cases were concluded in 2019, accounting for 73.3 per cent of all cases. The proportion of simple cases decreased compared with that of 2018 (the number of simple cases accounted for around 81.53 per cent of total cases in 2018). On average, simple cases took 15 days to be concluded, which was slightly reduced from 16 days in 2018. And almost all of the simple cases were cleared within 30 days of formal acceptance by the SAMR. This demonstrates that simple case procedure plays an active role in enhancing the efficiency of concentration filing, particularly in the sense of reduction of reviewing time.

Furthermore, the SAMR continued its tough stance against non-filers. Compared with the number of non-filing cases in 2018 (13 cases), the SAMR strengthened its efforts on the investigation of non-filings in 2019. The SAMR published 16 penalty decisions against parties involved in the merger cases that failed to fulfil their notification obligations under the Anti-monopoly Law.

### Significant cases

#### Penalties on non-filers

Over the past years, the antitrust authorities have never loosened their supervision on non-filing cases. By the end of 2019, the SAMR had released 46 non-filing cases and imposed total fines of 16.1 million yuan on 68 undertakings. In 2019, the SAMR significantly strengthened its supervision of and penalties on non-filing parties. 16 cases were published, and 21 undertakings were punished with a total fine of 6.25 million yuan. The biggest fine issued was 400,000 yuan, while the smallest was 200,000 yuan. The SAMR initiates investigations on non-filing cases by means of its self-observation, third-party reporting, and voluntary reporting by notifiable parties.

It is notable that the SAMR has been going after non-filers even where their failure of notification occurred many years ago. Each of Pierburg and Xingfu Motorcycle was fined 350,000 yuan for their failure to notify a proposed joint venture before its establishment,\textsuperscript{23} while the joint venture was established in 2013. This case shows that the SAMR had no mercy on the non-filers that failed to fulfil their notification obligations long time ago.

Also, the SAMR investigated several non-filing cases involving minority equity investment in 2019. For instance, MBK Partners, LP (MBK) was fined 350,000 yuan for its failure to notify its acquisition of a 23.53 per cent stake in Shanghai Siyanli Industrial Co, Ltd. Furthermore, Dejin Enterprise was fined 300,000 yuan for its failure to notify its acquisition of a 29.99 per cent stake in Huitong Energy deal. Whether an acquisition of relatively small equity (e.g., less than 30 per cent equity) constitutes a change of control needs to be determined case by case. According to Article 23 of the Revised Draft, the ‘control’ refers to an undertaking’s rights or actual status to, directly or indirectly, individually or

\textsuperscript{21} II-VI’s acquisition of Finisar case, the announcement is available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/ftjpz/201909/z20190920_306948.html.

\textsuperscript{22} JV between DSM and Zhejiang Garden Biochemical case, the announcement is available at the SAMR’s website: http://gkml.samr.gov.cn/nsjg/flldj/201910/t20191018_307458.html.

\textsuperscript{23} The original Chinese penalty decision is available at the SAMR’s website: www.samr.gov.cn/flldj/tzgg/xzcf/201911/z20191114_308483.html.
jointly, exert or potentially exert a decisive influence on another undertaking’s production and operation activities or other major decisions. Given the remarkable increase of non-filing fines and the robust enforcement towards non-filings in recent years, undertakings should deliberately consider whether there is a change of control in each transaction.

At present, the maximum amount of fines imposed on non-filer is 500,000 yuan, which is obviously insufficient for deterring non-filer. In accordance with Article 55 of the Revised Draft,\(^\text{24}\) the proposed penalty will be up to 10 per cent of the non-filer’s annul sales in previous year. This adjustment will greatly increase the deterrence of illegal acts in relation to violation of merger filing regulations if the proposed change is adopted in the future.

**Novelis’ acquisition of Aleris\(^\text{25}\)**

On 12 December 2019, the SAMR conditionally approved the acquisition of Aleris by Novelis. Novelis is a leading producer of aluminium rolled products and the world’s largest recycler of aluminium. Aleris is a global leader in manufacturing and sales of aluminium rolled products.

In this case, the parties overlapped in two markets, namely interior aluminium auto-body sheets market and exterior aluminium auto-body sheets market. Since the relevant product markets’ competition structure in China was different from that in other jurisdictions, and the main foreign-invested operators all have local production in China, the relevant geographic market was defined as China.

Novelis was the largest player in the above-mentioned markets, and Aleris ranked third in both markets. After transaction, the market share of Novelis and Aleris would reach 70 to 75 per cent in the interior aluminium auto-body sheets market and 75 to 80 per cent in the exterior aluminium auto-body sheets market. Furthermore, the level of concentration would be highly increased. After transaction, there would be only four main competitors in the interior aluminium auto-body sheets market and two main competitors remaining in the exterior aluminium auto-body sheets market. Apart from that, the SAMR also assessed factors such as the elimination of competition restraint of Aleris on Novelis, the incentive of the merged entity to eliminate or restrict competition after the transaction, the entry barriers of the relevant markets, the recognition of downstream customers.

The SAMR approved the proposed concentration with both structural and behavioural conditions. Given that the relevant products that Aleris sold in China market were mainly exported from Europe, Aleris was required to divest its entire business relating to interior and exterior aluminium auto-body sheets in the European Economic Area. Also, the merged entity will be prohibited from supplying cold-rolled sheet to its business partners in order to maintain market competition.

In addition, it is worth noting that the proposed acquisition was initially filed for a review under the simplified procedure, and the SAMR accepted the case on 30 September 2018. Due to an objection raised by a third party during the public consultation period, the SAMR found that the proposed acquisition did not meet the standards for the simplified procedure and thus revoked the acceptance of the case and asked the notifying party to refile the case under the regular procedure. The notifying party resubmitted the case under regular procedure on

\(^{24}\) The original Chinese version is available at the SAMR’s website: www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html.

\(^{25}\) The announcement is available at the SAMR’s website: www.samr.gov.cn/flldj/ftjgg/ftjpz/201912/t20191220_309365.html.
1 November 2018, and the case was formally accepted on 13 December 2018. This back and forth process shows that the notifying party should choose the most appropriate procedure to file in order to avoid waste of time. The merger control review could be delayed for months if the SAMR revokes the case acceptance when the notified concentration does not meet the standards for the simplified procedure.

**Cargotec’s acquisition of TTS Group**

On 5 July 2019, the SAMR conditionally approved the acquisition of TTS Group by Cargotec. The acquirer of the transaction is MacGregor Group, a subsidiary of Cargotec. The MacGregor Group is principally engaged in the sales and service of products in marine transportation cargo handling. TTS Group is mainly engaged in the sales and service of hatch covers, ro-ro equipment for commercial vessels, ship cranes and winches, etc. The transaction was filed on 15 June 2018 and then the parties were required to provide supplemental material. The SAMR formally accepted the case on 26 July 2018 and decided to conduct further review on 22 August 2018. Before the expiry of the review period, the parties withdrew the filing on 11 January 2019. The SAMR accepted the refiling on 14 January 2019 and the review process was prolonged to 9 July 2019.

In this case, the parties had overlaps in several markets, e.g. hatch covers, ro-ro equipment for commercial vessels, ship cranes, winches and related after-sales services. The SAMR conditionally approved the proposed acquisition with behavioural remedies. The remedies included ensuring the independence of relevant businesses, maintaining the respective competition, not raising prices of related products in the Chinese market and not refusing or restricting supplies of the products to Chinese customers. In addition, in this case, the SAMR adopted the remedy of setting up ‘firewall guidance handbook + training’ proposed by the filing parties. The parties committed to create an internal firewall between their respective employees, separate their competition-sensitive information and workplaces, issue a detailed firewall guidance handbook and conduct training. Setting up internal firewall and the application of related remedies will improve the efficiency and feasibility of the implementation as well as the supervision of the behavioural remedies. Although these types of ‘hold separate’ and ‘setting up internal firewall’ measures have been adopted in previous behavioural remedy cases, this case provides guidance on the practical implementing details of the remedy measures.

The above-mentioned measures on the firewall management were proposed again in a subsequent case in 2019, namely II-VI’s acquisition of Finisar. In this case, the SAMR imposed behaviour conditions on the parties that they shall set up a firewall and supply the product in accordance with the FRAND principle. Particularly, the SAMR put forward the requirement of ‘firewall guidance handbook + training’ on the implementation of behavioural remedies.

**ii Trends, developments and strategies**

The SAMR has become more stringent and detail-oriented with respect to the analysis of relevant markets and the competition impact of the mergers.

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26 The announcement is available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/ftjpz/201907/ t20190712_303428.html.

27 The announcement is available at the SAMR’s website: www.samr.gov.cn/fldj/tzgg/ftjpz/201909/ t20190920_306948.html.
In the five cases that were conditionally approved in 2019, most of the conditions attached were only behavioural remedies. Different from the structural remedies, behavioural remedies have a high degree of flexibility, which can avoid excessive intervention of the antitrust agencies in concentration. However, it also requires more regulatory supervision post the mergers. Compared with EU and US antitrust enforcement agencies’ preference on structural remedies, Chinese antitrust enforcement agency seems more comfortable in imposing behavioural conditions to address the competition concerns.

iii  Outlook
It is expected that in 2020 the SAMR’s merger control enforcement will maintain its professionalism and stability. In addition, the large number of no-filing cases and the increased fines indicate that the SAMR is gradually strengthening its enforcement crackdown on non-filers. Furthermore, the proposed revision of the Anti-monopoly Law is expected to increase the penalties for non-filers. There is also a tendency that behavioural conditionals would be imposed more often than structural remedies in the future, while the cost of supervision of the implementation of behavioural remedies might be high.

VII  CONCLUSIONS
i  Pending cases and legislation
In May 2018, the SAMR raided the China offices of memory chip makers Micron, Samsung, and SK Hynix, all of them are major players in the market for dynamic random access memory. The raids were prompted by complaints from downstream Chinese companies that the three giants were engaged in price collusion among other unfair competition conducts. On 16 November 2018, the SAMR disclosed in its press conference that the SAMR has already received a significant amount of evidence from the three companies and the investigation is still ongoing.

According to the media reports, Chinese music-streaming service Tencent Music Entertainment has been investigated by the SAMR since early 2019. The alleged monopoly behaviour might be related to its potentially anticompetitive exclusive-licensing agreements with Universal Music Group, Sony Music Entertainment and Warner Music Group. It is one of the few Chinese internet companies that have been formally investigated. This case shows that antitrust enforcement is starting to target companies in digital sector.

As to the legislative work, proposed Laws, guidelines and regulations to be promulgated include:

- a revised draft of the Anti-monopoly Law;
- the Anti-monopoly Compliance Guidelines for Undertakings;
- the Interim Provisions for Merger Control Review; and

ii  Analysis
After 11 years of Anti-monopoly Law implementation, China’s antitrust enforcement agency has accumulated a wealth of experience, and China has become one of the most important antitrust jurisdictions in the world. In addition, due to the decentralisation of
law enforcement powers, local antitrust enforcement agencies are becoming more and more active in their investigations. Therefore, undertakings should pay more attention to the antitrust compliance work in their daily operations in response to more frequent and severe crack-down by local enforcement agencies as well as the SAMR.

Furthermore, in 2020, we expect more antitrust enforcement guidelines and regulations will be promulgated that will promote antimonopoly law enforcement and promote the establishment and development of a relatively mature and transparent antimonopoly legal framework.

In terms of merger control review, the SAMR is enhancing its crackdown on non-filers. In particular, the penalty on non-filing cases may increase significantly if the proposed revision of the Anti-Monopoly Law is adopted in the future. Enterprises should acknowledge the thresholds and criteria of merger filing in order to fulfil their obligations to avoid penalties and any adverse consequences of closing a transaction.
Chapter 6

COLOMBIA

Enrique Álvarez and Darío Cadena

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

The main antitrust enforcement authority in Colombia is the Superintendence of Industry and Commerce (SIC) under the supervision of the Ministry of Commerce, Industry and Tourism. Since Law 1,340 of 2009, SIC has been the sole authority in charge of implementing the standards of competition in all industries, except for the authorisation of the following operations, which remains in the hands of Aerocivil, the Colombian aeronautical authority: code-share agreements, joint operations, use of charter aircraft, and exchange and blocking of aircraft slots; and business integration or reorganisation processes of companies that are exclusively subject to the surveillance of the Financial Superintendence, which shall be subject to a decision by such Superintendence.2

SIC is responsible for enforcing competition law, as well as other regulations. To this end, it is organised into six divisions:3 Personal Data Protection, Competition Protection, Consumer Protection, Metrology, Industrial Property and Jurisdictional Matters. Within the Competition Protection Division, there are five working groups: protection of competition, an interdisciplinary group tasked with preventing collusion in public or private bids (created in 2012 due to the increase of cases regarding this matter), merger review, chambers of commerce, and the industries and economic studies group.

Since SIC has so many different divisions, resources have to be allocated among them. Owing to the recent enactment of regulations regarding data protection and the focus on collusive conducts in public procurement, SIC’s recent activity and resources have focused on implementing technological solutions and special prosecution teams in those areas.

ii Enforcement agenda

The main targets in the government’s agenda with regard to competition law enforcement over the past four years were:

a strengthening of competition in the Colombian markets;
b identifying regional competition problems and market deficiencies in the telecommunications markets;
c improving competition in the air travel markets;

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1 Enrique Álvarez is a partner and Darío Cadena is an associate at Lloreda Camacho & Co.
2 Article 6, Paragraph 1 of Article 8 and Article 9 of Law 1340 of 2009.
According to the WEF Global Competitiveness Report 2017–2018, the effectiveness of Colombia’s antitrust policy is ranked 71st out of 137 countries, a loss of two places compared to the 2016–2017 rankings. Despite this, it is important to note SIC was nominated in 2012 by Global Competition Review as one of the best competition authorities in the Americas, and currently holds a three-star rating.

SIC’s principal achievements during 2018 were as follows:

- an improvement in the human capital and the creation of a new task force that will prosecute bid rigging exclusively;
- the substantial increase of investigations into bid-rigging conduct in public procurement processes (investigations regarding such cases increased from an average of 1.8 investigations per year during the 2000–2010 period to 26 investigations per year since 2011);
- the substantial increase of sanctions on bid-rigging conduct in public procurement processes (SIC has found bid-rigging conduct in public procurement contracts involving an amount of US$50 million, and has imposed sanctions exceeding US$17 million). This should help to encourage more bidders and more competition in public procurement processes;
- SIC has created an application process for public entities to identify potential risks of bid rigging in public procurement processes;
- SIC publishes its decisions, which provides legal certainty for agents in the market, who may verify if their conduct is in line with the competition regulation, and improves the debate on competition;
- the material increase of fines imposed by SIC in competition and consumer protection areas (competition, consumer and personal data protection and Chambers of Commerce), which increased from US$3.6 million in 2009 to up to more than US$80 million in 2013;
- the adoption of a very strict position in accepting guarantees from investigated parties to terminate antitrust investigations (before the enactment of Law 1,340 of 2009, SIC agreed to terminate most investigations due to the offering of guarantees);5
- with the assistance of the Latin American Programme for the Protection of Competition and Consumers, training has been given to administrative litigation judges regarding, inter alia, antitrust law and economics, standards of evidence used by judges in other jurisdictions and the appropriate economic tests to evaluate antitrust practices;
- SIC has created a method to establish the amount of the fines for infractions of the competition regulation based on the standards set forth in Law 1,340 of 2009 and the best practices used by the European Commission; and
- SIC conducted several workshops and seminars attended by the business community, and officers of the agency visited several Colombian cities to promote awareness about the importance of competition and the role of SIC.6

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The competition advocacy programme is an instrument used worldwide to protect and promote market rivalry. It implies a series of activities conducted to review, revise and provide recommendations on regulatory projects. The main target is to examine the market’s impact on those activities, and identify legal provisions that may impose unnecessary or excessive costs.

SIC has the possibility of reviewing general scope regulatory projects of national-level public entities in order to examine the market’s impact on activities and identify legal provisions that may impose unnecessary or excessive costs, and to provide its non-mandatory opinion. Since the enactment of Law 1,340 of 2009, SIC has issued more than 174 opinions under the competition advocacy programme; government entities have applied the opinion of SIC in some cases, while in some others they have not.

However, SIC cannot review:

\begin{itemize}
\item a regulatory projects of public entities at a regional and municipal level;
\item b regulations already in force that may restrict competition;
\item c bills of laws; and
\item d contracts to be entered into by government entities.
\end{itemize}

SIC is also not encouraged to challenge, before an administrative court, regulations already in force issued by government entities that may conflict with competition laws, because in these cases, SIC would be challenging regulations issued by the same government of which it is a part.

According to the Private Competitiveness Council, the recommendations to enhance antitrust regulations in Colombia are as follows:

\begin{itemize}
\item a the Superintendent of Industry and Commerce should be appointed for a fixed term, and causes for removal from office should also be limited by law;
\item b the proceedings to determine whether an antitrust violation has occurred should be restructured so that the investigation phase is clearly separated from the adjudication phase;
\item c the possibility of creating a commission-like structure should be explored so that decisions are not made by the Superintendent alone or, alternatively, the advisory board currently assisting the Superintendent should be strengthened;
\item d ties with other governmental agencies should be strengthened, and intergovernmental collaboration memorandums should be executed to increase the effectiveness of the competition advocacy programme;
\item e SIC should conduct a complete review of the leniency programme framework to evaluate its effectiveness and propose changes to increase the number of applicants. The leniency programme should also be modified so that criminal prosecution is averted for applicants involved in collusion that affects public procurement;
\item f SIC should issue updated merger review and leniency guidelines; and
\item g SIC should increase the number of regulatory projects it reviews each year.\end{itemize}

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Several of these recommendations have already been addressed. For instance, the Superintendent of Industry and Commerce is now appointed for a period of four years that coincides with that of the President, and may only be removed with cause. SIC has also published and updated the merger review guidelines and the leniency rules.

II CARTELS

Cartels have been considered an antitrust offence since Law 159 of 1959 came into force; however, this regulation did not explicitly mention cartels, but ‘agreements with the purpose of, directly or indirectly, restricting the supply, distribution or consumption of raw materials, products, goods or services’. This regulation was modernised in 1992, when anticompetitive agreements were legally defined. Finally, in 2009, Law 1,340 was enacted (the Competition Law), stating that SIC is the only competition enforcement authority in Colombia (with the exceptions mentioned above), increasing fines on entities and the directors that participate in the conduct, and introducing a leniency programme that allows members of a cartel to blow the whistle in exchange for benefits during the investigation.

The following agreements between competitors are considered anticompetitive per se, when they have the purpose or effect of:

a. directly or indirectly fixing prices;

b. fixing discriminatory conditions in commercialisation against third parties;

c. market allocation among producers or distributors;

d. allocating production or supplying quotas;

e. allocating or limiting the supply of production inputs;

f. limiting technical developments;

g. mandatory bundling sales;

h. refraining from producing a good or service, or affecting its production levels;

i. bid-rigging or having the effect of distributing contract awards of competitions, or setting terms of the request for proposals (RFP) for both public and private processes; and

j. preventing third parties from accessing markets or marketing channels.8

Furthermore, Article 410a of the Colombian Criminal Code9 created a criminal offence of bid-rigging in public institution RFP processes, with sanctions of six to 12 years’ imprisonment, a fine of approximately US$65,000 to US$330,000 and disqualification from entering into contracts with state entities for eight years.

These provisions correlate with Article 101 of the Treaty on the Functioning of the European Union (TFEU), as it also enumerates the prohibited agreements that are considered in violation of free competition; however, Colombian law not only regulates restrictive agreements, it also regulates unilateral conducts as discussed in the next section.

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8 Added by Article 16 of Law 590 of 2000.
9 Law 599 of 2000 as amended by Law 1,474 of 2012.
i  Significant cases
Since 2016, SIC has issued several major decisions against cartels in the toilet paper, baby nappies and sugar markets. The decisions involving toilet paper and baby nappies producers are significant, as the investigations began through the leniency programme and mark the first time fines have been waived due to the collaboration received during the investigation proceedings.

In the Toilet Paper case, in which SIC found evidence of a price-fixing scheme, the agency levied fines against four companies and 21 individuals for a total of 185 billion Colombian pesos, while the fines against 12 sugar mills and 12 individuals that were found to have engaged in a scheme to allocate production quotas reached 260 billion Colombian pesos.

ii  Trends, developments and strategies
Since 1991, SIC has evolved significantly. During its early years, it generated its doctrine on cartels with the initial investigations, using EU and US jurisprudence as its main points of reference. Lately, SIC’s investigation abilities and techniques have evolved; it has developed its own doctrine in some cases, and is trying to profit from international best practices in others. With the enactment of the Competition Law, the leniency programmes were adopted, and Decree 2,896 was issued regulating leniency agreements in 2010. In 2014 and 2015, SIC announced that several investigations had begun after receiving evidence from leniency applicants. Based on the experience with the application of the leniency rules, the government issued in July 2015 a new comprehensive regulation of the leniency programme (Decree 1523).

The Competition Law provides for possible early termination of an investigation if the offender offers sufficient guarantees (structural or behavioural) to no longer harm its competitors or consumers.10 This alternative has proven to be very effective for the early termination of anticompetitive conduct investigations, and SIC has developed specific provisions to be included in the guarantees in order to allow a close follow-up of the offender’s conduct. However, the trend in the use of guarantees is that they have been decreasing to a point at which they are an exceptional mechanism.11 Indeed, in recent cases SIC has stated that, as a matter of public policy, guarantees will only be admitted in cases involving unilateral conducts.

Under the powers granted to SIC by the Competition Law, SIC may also initiate investigations and impose sanctions on companies that do not follow its instructions, or that obstruct investigations by not allowing inspections or not furnishing the required information.

iii  Outlook
After using, for the first time, the leniency programme to prosecute cartels, SIC determined that it was necessary to refine the rules governing leniency. Hence, in July 2015 the new set of rules for leniency were enacted. Although some issues that limited the application of the leniency programme were addressed, others – such as the elimination of the criminal

10 Law and Competition Policy in Colombia, 2009, OECD.
prosecution when collaborating with SIC – would require the amendment of Law 1,340. Of particular interest is the presumption included in the Leniency Decree by which, unless evidence to the contrary exists, every applicant is deemed not to be the instigator of the cartel, as instigators are not eligible for the leniency benefits. In 2016, SIC announced the creation of a task force to investigate and prosecute bid-rigging activity that will work closely with criminal prosecutors. Since its inception, this new task force has been involved in high-profile investigations, such as the Odebrecht case, and it has also uncovered collusive practices affecting public procurement at the national and local levels.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Colombian law not only regulates restrictive agreements, as mentioned in Section II, it also regulates the following unilateral conducts deemed contrary to free competition per se, even in the absence of dominance: violating advertising rules contained in the Consumer Protection Statute; influencing a company to raise the prices of its products or services, or to desist from their intention to reduce prices; and refusing to sell or provide services to a company or discriminating against it when it may be understood as retaliation for their pricing policy.

The Constitution upholds free competition on principle, and mandates the government to prevent the abuse of market power in the Colombian market. Based on this principle, the law defines the following as abusive conduct, per se, if the offender has market power:

a. the reduction of prices below costs to eliminate competitors or prevent their entry or expansion;

b. the application of discriminatory conditions to equivalent transactions, which put a consumer or supplier at a disadvantage compared with another consumer or provider under similar conditions;

c. conduct with the purpose or effect of subordinating the supply of a product to bundled sales;

d. the sale to a consumer under conditions different from those offered to another consumer when it is intended to reduce or eliminate competition in the market;

e. selling or servicing in any part of the country at a price different from that in another part of the country, when the purpose or effect of said practice is to reduce or eliminate competition in that part of the country (in this case, it will be considered abusive conduct only when the prices do not correspond to the cost structure of the transaction); and

f. obstructing or preventing third-party access to markets or marketing channels.

The above list correlates with Articles 101 and 102 TFEU. The scope of the limitations is very similar, as dominance is not prohibited by the competition laws in Colombia.

i  Significant cases

In 2013, SIC sanctioned Empresa de Energía de Boyacá (EBSA) in Resolution 3694 of 2013, confirmed by Resolution 12,237 of 2013. EBSA is an energy distribution and commercialisation public utilities company with private and public capital. SIC found that EBSA had market power in the commercialisation of energy services in several municipalities.

12 Law 1,480 of 2011.
of Boyacá and Santander (99.9 per cent of the market share), but that it did not have such a dominant position in the calibration of energy meters market. EBSA abused its dominant position\textsuperscript{13} in the commercialisation of the energy services market by subordinating the supply of its services to the acceptance of additional obligations independent of its business object,\textsuperscript{14} such as charging for the homologation of energy meters sold by third parties. This charge had two effects:

\begin{itemize}
  \item[a] to exclude or reduce the market of third-party competing calibrating laboratories, since the energy meters calibrated by such laboratories would cost more than the ones calibrated directly by EBSA; and
  \item[b] to exploit the market, since a higher price would have to be paid either by the third-party competitor energy meter sellers or by their users. SIC fined EBSA with the highest monetary sanction at the time (4.7 billion Colombian pesos), and its legal representative with a fine of approximately 47 million Colombian pesos.
\end{itemize}

In 2014, SIC fined the operator of the San Andres International Airport for charging gasoline providers unfair prices for access to the aeroplane platforms, due to an unreasonable increase in the tarmac access fee. This is the first time that unfair pricing has being prosecuted as a unilateral conduct. The fine was assessed at 6 billion Colombian pesos.

In 2015, SIC found that two rice mills that were part of the same business group had engaged in resale price maintenance practices by threatening to cut distributors whose prices violated the mills’ policies. The fines imposed exceeded 32 billion Colombian pesos.

In 2018, SIC launched an investigation against several companies for practices relating to their invoicing policies, which limited the ability of negotiating invoices in secondary markets. Most investigations were terminated when SIC accepted the guarantees offered by the companies under investigation to ensure that invoices would be freely negotiable.

\section*{ii Trends, developments and strategies}

SIC has considerably increased investigations, sanctions and fines of restrictive acts and abuse of dominance, as well as reducing the time frame of the investigations and decisions.\textsuperscript{15} It is also important to highlight that SIC does not have a general and objective rule to determine market power (i.e., there are no specific percentages for participation in the market to determine the existence of a dominant position) and market share is not considered to be the sole criterion of dominance. In addition, SIC is of the opinion that if abusive conduct is evident, there is no need for a thorough economic examination to assess whether said conduct produced any anticompetitive effects in the market or to its competitors.

\section*{iii Outlook}

It is likely that the recent enforcement trend will remain unchanged, meaning an increase in the number of investigations, and higher sanctions due to the enforcement of the sanctions under the Competition Act are expected. SIC has announced that it plans to actively prosecute

\textsuperscript{13} Regulated by Article 50 of Decree 2,153 of 1999.
\textsuperscript{14} Section 3 of Article 50 of Decree 2,153 of 1992.
\textsuperscript{15} National Competitiveness Report 2012 and 2012–2013.
false advertisements, which implies a violation of the advertising rules of the Consumer Statute can, therefore, also be prosecuted as a unilateral anticompetitive act if it significantly affects the market.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Article 4 of Law 1,340 of 2009 establishes that Law 155 of 1959, Decree 2,153 of 1992 and Law 1,340 of 2009 constitute the general competition framework for all industries. The law, however, sets forth that if any specific industry is regulated, said regulation will prevail over these general rules. In Colombia, regulations in the following specific industries represent major limitations to the general competition rules:

1. public utilities;
2. the energy sector;
3. communications (including telecommunications and postal services);
4. finance and insurance; and
5. air transportation.

Article 8 of this Law provides that SIC shall communicate any antitrust investigation to the regulators of the specific regulated industries. The latter may, upon consideration, deliver their technical opinion in relation to the matter brought to their attention, without prejudice to the possibility of intervening, *ex officio*, at any time in the respective proceeding. The opinions expressed by those regulators are not binding on SIC; however, if SIC decides not to follow the respective regulator’s opinion, it must explain the grounds for its decision.

In the communications industry, the Communications Regulation Commission (CRC) has been granted powers, first by Decree 2,870 of 2007 and later by Law 1,341 of 2009, to *ex ante* define relevant markets and regulate competition and dominance in the industry. Despite this, SIC remains the authority for the *ex post* enforcement of anticompetitive conduct to the general regime with respect to the telecommunications industry.

**i Significant cases**

In Resolution 53,403 of 2013, and Resolution 66,934 of 2013, which confirmed it, SIC ended its investigation and penalised Claro, finding that the company had abused its market power by obstructing or preventing third-party access to markets or marketing channels,16 and limited free competition17 in the mobile services market. Claro’s dominance in this market had previously been declared by the CRC in Resolution 2,058 of 2009. The CRC had also issued a regulation to allow mobile numbers’ portability to increase competition. Based on complaints from Claro’s users, accusations made by competitors, information provided by the CRC and the internal investigation process of SIC, Claro was considered to have violated the telecommunications regulations because it:

1. impeded its users from changing to another operator, since it refused to provide them with a personal identification number necessary for number portability;

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17 Article 1 of Law 155 of 1959.
sold locked mobile phones, which could only be used with Claro and not with other carriers; and

manipulated the number of new users migrating to Claro by encouraging its distributors (over which Claro had contractual influence) with a monetary incentive if the portability to Claro increased, for which Claro distributors made fictitious transfers of users from other operators to Claro, using false customers to increase its numbers of portability users.

SIC sanctioned Claro with a fine of 87.7 billion Colombian pesos, which at the time was the largest monetary sanction in Colombian history for a breach of the competition laws.

**ii  Trends, developments and strategies**

Regarding the telecommunications industry, it is important to mention that the CRC has *ex ante* powers to regulate and impose measures for the protection of free competition, while SIC has *ex post* powers to sanction antitrust violations.

In 2014, the Ministry of Information Technologies and Communications (MINTIC) granted licences to Claro, Movistar, Tigo, Avantel, DirecTV and the consortium ETB-Tigo to provide 4G network mobile services in a successful auction that raised approximately US$400 million for MINTIC’s social telecommunication programmes. UNE already held a licence for such services, granted by MINTIC.

In connection with the 4G services, MINTIC began an investigation against Movistar and Tigo for providing services without fulfilling the obligation of granting national roaming access to other operators. Avantel also filed an unfair competition lawsuit against Tigo, since it had not provided it with national roaming for rendering the service. Tigo filed a counter lawsuit against Avantel for unfair competition acts, claiming that the lawsuit initiated by Avantel only intended to prevent Tigo from beginning to render these services.

The debate with respect to competition in this industry will continue, and will be one of the most important debates regarding competition in Colombia.

**iii  Outlook**

The law has evolved from having multiple competition authorities, where the authorities of regulated industries decided all competition issues, to one sole *ex post* competition authority. This is a significant change, since the decision of the regulator on competition issues could be influenced by political concerns. Nevertheless, SIC is a governmental agency where political concerns may influence the enforcement agenda.

In the case of the telecommunications industry, the CRC, which is a collegiate body specialising in the industry, holds legal powers to *ex ante* define relevant markets and impose measures to protect competition in the industry, which now includes television markets.

**V  STATE AID**

Article 333 of the Constitution empowers the state to do whatever is necessary to prevent and avoid all kinds of interference with or restrictions on free competition. Hence, the state has an obligation to comply with this provision. However, this provision cannot be understood as an absolute prohibition on state aid. There are certain scenarios where state aid is considered to be necessary and lawful, such as:

- price stabilisation funds;
funds for agricultural development;
the establishment of minimum guaranteed prices;
regulation of internal markets for agricultural products;
chain agreements in the agricultural industry;
the safeguards regime;
special public utilities tariffs for the agricultural industry;
subsidised loans for the agricultural industry; and
state aid for commercialisation of agricultural products due to shortage of supplies.

In addition, whenever an external situation may affect or distort competition in the domestic markets, state intervention will be conducted by the government through the implementation of measures to compensate or regulate the market conditions to ensure fairness and competitiveness for domestic production.

Likewise, Article 1 of Law 155 of 1959 states that the government shall approve agreements that, although contrary to free competition, ensure the stability of an economic sector of general interest.

Colombia, as a Member State of the Andean Community of Nations (CAN), is also subject to state-aid regulation to prevent interstate market trading unfairness, such as Decision 283 of 1991 of the CAN.

i  Significant cases
In 2013, SIC opened an investigation against the several utilities companies owned by the district of Bogotá – UAESP, EAAB and Aguas Bogotá – and the companies’ most important directors, including the then Mayor of Bogotá, for alleged breaches of the general prohibition against agreements, practices, procedures and systems affecting free competition, and for preventing third parties from accessing markets or marketing channels, pursuant to Law 155 of 1959 and Decree 2,153 of 1992. The investigation began as an inquiry into the newly adopted waste management system in Bogotá and concluded with a decision in which SIC found that free competition had been impaired. SIC’s initial decision, rendered in April 2014, imposed total fines in excess of 80 billion Colombian pesos on both companies and individuals, and was confirmed on review in September 2014. The then mayor of Bogotá was personally fined 400 million Colombian pesos, while EAAB received a fine of 61 billion Colombian pesos for its role in thwarting competition by foreclosing entry into the market.

ii  Trends, developments and strategies
Several funds to stabilise prices of agricultural products remain operational, and are funded by the government, with no plans to terminate them or reduce their funding. Although policies to improve the competitiveness of agricultural producers have been implemented, their success has been limited.

iii  Outlook
Colombian legal regulation of state aid will evolve to ensure the proper management and control of state aid so that it does not end up in the wrong hands.

18 SIC Resolution 14,902 of 2013.
VI MERGER REVIEW

Law 1,340 of 2009 sets forth that a business integration occurs whenever there is an acquisition of shares or assets, a merger, spin-off, a joint creation of a company or a joint venture agreement between competitors, or any other type of legal agreement, in which, before the closing of the transaction, competition existed in at least one relevant market; and after the transaction, the parties involved act as a single unit in the relevant market and cease to compete.

Business integrations can take one of the following forms:

- **Horizontal integration**: when an integration takes place between companies that perform the same or similar economic activities (such as whenever integration occurs between competitors); or
- **Vertical integration**: when an integration takes place between companies that participate in the same economic process but at different stages of the value chain (such as when integration occurs between a manufacturer and its suppliers of raw materials or its distributors).

The relevant market is composed of the product market and the geographic market. The product market is composed of the products that directly compete and the substitute products that are considered by consumers as close-competing products. The geographic market is the smallest geographic area in which the parties involved, if acting as a single unit, may influence in a profitable manner the price, quality, variety, service, publicity, innovation and other conditions of competition of the market. The geographic market can be local, regional or national, and shall include national and imported products.

Transactions that constitute a business integration must be informed *ex ante* to SIC if they meet at least one of the following subjective thresholds and one of the following objective thresholds:

- **Subjective threshold**: the companies involved in the transaction develop the same economic activity (horizontal transactions), or are part of the same value chain (vertical transactions); and
- **Objective threshold**: the combined annual operating income of the companies involved is equal to or more than 60,000 current monthly minimum legal wages, or the total combined assets of the companies involved is equivalent to or more than 60,000 current monthly minimum legal wages, in the year prior to the transaction.

After the fulfilment of the above requirements has been assessed, the following may occur:

- **If none of the above-mentioned subjective and objective thresholds are met**, the business integration does not need to be reported to SIC.
- **However, if the business combination meets any of the above subjective and objective thresholds**, and the combined market share of the companies involved is less than 20 per cent of the relevant market, the transaction shall be deemed authorised by simply giving prior notice to SIC regarding the transaction. In this case, the information to be furnished to SIC is basically the parties involved, the legal form of the transaction (merger, acquisition of control, acquisition of shares or assets, etc.), the relevant market (product market and geographic market), the share participation in the relevant market and the methodology to calculate them.
If the business combination meets any of the above subjective and objective thresholds, and the combined market share of the companies involved equals or exceeds 20 per cent of the relevant market, prior authorisation must be requested from SIC, subject to the following rules:

- **pre-evaluation filing**: the parties interested in obtaining antitrust clearance must file a summary of the business integration and a pre-evaluation request before SIC;
- **review of the pre-evaluation filing**: SIC has 30 business days to determine whether the business combination is approved, without further information requirements, or whether a full review must be carried out; and
- **full evaluation filing (in-depth review)**: if SIC decides that a full review must be carried out, the involved parties must file all the information required for a complete study. After the complete filing is made, SIC has three months to decide if it approves or rejects the combination, or imposes conditions for its clearance. If antitrust clearance is not issued within the three months granted to SIC the transaction would be deemed as unconditionally authorised.

In a merger review, SIC may raise objections; raise no objections but impose certain conditions on the merger (either structural or behavioural); or raise no objections and no conditions.

The economic sanctions that SIC may impose in the case of a violation of antitrust provisions (cartels, restrictive agreements, dominance and merger review regulation) are as follows:

- **a** fines imposed on each company involved of up to 100,000 current monthly minimum legal wages, or a fine equivalent to 150 per cent of the profit derived from the conduct – whichever is higher; and
- **b** fines imposed on any manager, director or statutory auditor who facilitates, authorises, executes or tolerates conduct violating the rules on protection of competition of up to 2,000 current monthly minimum legal wages. In this case, it is expressly prohibited that the company, the parent company, subsidiary companies or associated companies with the same corporate group to which the manager, representative or statutory auditor belongs or belonged to, pay or guarantee the fine imposed on behalf of these individuals.

Additionally, in the case of merger review, and without prejudice to the imposition of the above-mentioned fines, SIC may order the reversal of a transaction for failure to properly report it, or for gun jumping, provided that it unduly restricts competition. Reversal of the transaction is also applicable to cases in which the transaction is closed after being blocked by SIC or when the conditions under which the operation had been approved are not fulfilled.

**Significant cases**

In 2013, the government began an auction process for its 57.5 per cent share in Isagen, an energy generation and retail public utilities company that also participates in the commercialisation of natural gas in the Colombian market. Grupo Argos, a potential bidder, participates in the same markets as Isagen. Empresa de Energía de Bogotá (EEB), another potential bidder, participates indirectly in the same market through its shareholding in Emgesa and Codensa. The energy market is regulated by the Energy and Gas Regulation Commission (CREG), which has established certain restrictions, including a maximum market share of 25 per cent.
for energy generating and retailing companies, and a maximum power output of 3,402MW for 2012. A merger review process filing was made by both Grupo Argos and EEB. SIC conditionally approved both acquisitions based on the following:

a. Grupo Argos: the merger would represent a total 3,459MW of participation in the energy generation market, which exceeded CREG’s limit. Thus, SIC imposed on Grupo Argos the obligation to divest assets related to the energy sector and to neutralise the market power after the merger;¹⁹ and

b. EEB: the merger would represent a 31.31 per cent share of the energy generation market, which exceeds SIC’s limit. SIC imposed conditions, inter alia, that EEB must divest its voting rights in the energy companies Emgesa and Codensa, and divest certain assets, especially in the thermal generation plant Transportadora de Gas Internacional.²⁰

In 2013, SIC raised no objections and imposed no conditions regarding the acquisition of 100 per cent of the outstanding shares in WP Roaming III by Syniverse Holdings, both global technology service providers for telecommunications companies that provide the following services:

a. GSM data clearing services;
b. finance and accounting business process outsourcing (F&A BPO); c. revenue assurance and fraud management;
d. peer-to-peer SMS messaging (P2P SMS); and e. business intelligence.

Neither company had a subsidiary in Colombia, or a distributor or assets in the country, since they do not require a local presence to render their services and to compete. The combined market share in Colombia for F&A BPO, revenue assurance and fraud management, business intelligence and P2P SMS was less than 10 per cent; thus, it raised no concerns for SIC. For GSM data clearing services, such share was 100 per cent, since the two companies were awarded contracts for rendering services for two years by the parent companies of the Colombian mobile network operators (MNOs). However, SIC considered that the business integration did not restrict competition since it was a highly competitive global market, subject to bidding processes on which the local MNOs had no influence, and on which there were no material barriers to entry.

ii Trends, developments and strategies

In 2019, 201 cases were submitted to SIC for merger review, which represents a slight increase in cases compared with the 165 filings of 2018. The figures recorded for 2013 regarding the amount of time SIC took to issue a decision once a filing is presented remained more or less the same for 2018, and are as follows:

a. prior notifications: 2.11 business days;
b. pre-evaluation filings (fast-track): one month and 17 days; and
c. full evaluation filings: three months and 10 days.

¹⁹ Resolution 525 of 2014. The most important data regarding the conditions in this Resolution are confidential and were not made public.
²⁰ Resolution 5,545 of 2014.
In 2015, SIC issued Resolution 10,930, in which it:

a. clarified certain issues, such as the definition of control;

b. outlined the events in which no merger review is required (e.g., events that do not fulfill the subjective and objective thresholds, business integrations among controlled parties\(^{21}\) or between parties of an entrepreneurial group);\(^{22}\)

c. outlined the criteria to determine the assets and income of the parties involved in a transaction that are to be taken into account in relation to the reporting thresholds. Specifically, it clarify the instances when foreign income should be included in the calculation; and

d. adjusted some of the documents that have to be filed to SIC for merger review.

iii Outlook

In December 2019, Congress authorised SIC to establish a filing fee for merger review proceedings. The value of the filing fee must follow the following criteria:

a. the fee should be proportional to the type of filing, hence the value of the fee will change in accordance with the type of filing;

b. the fee must be in line with the costs generally associated with each of the merger control proceedings; and

c. the interannual increases of the filing fee must not exceed the certified percentage of the increase of the cost of living index for median consumers, in the applicable year, determined by the National Statistical Administrative Department.

To date SIC has not defined the value of the filing fees.

VII CONCLUSIONS

i Pending cases and legislation

SIC has launched several formal inquiries of note in recently. Of special interest are the case involving the Colombian Football Federation and the alleged cartel for the resale of the national team tickets at higher prices. Also, SIC is responsible for the enforcement of price controls for medicines, and the decision by the government to include several more products under price control will likely lead to an increase of investigations.

In the last few years, SIC has proposed amending the competition law and, in particular, there have been discussions regarding possible reforms to the penalties’ provisions of the law. It is possible that a new push to stiffen sanctions will be discussed by Congress, although it is not a current priority in the legislative agenda.

ii Analysis

The most recent development in Colombian competition law was the authorisation granted to SIC by Congress to establish a filing fee for merger control proceedings. SIC will have to establish the fees to be charged using the criteria set forth in the law and this will likely happen in the first two quarters of 2020.

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\(^{21}\) Pursuant to Section 4 of Article 45 of Decree 2,153 of 1992.

\(^{22}\) Pursuant to Article 28 of Law 222 of 1995.
I OVERVIEW

The Cyprus Commission for the Protection of Competition (Commission) is the regulatory authority both for the purposes of the Law on the Protection of Competition of 2008 to 2014 (Competition Law), which regulates abuses of market power and prohibits any abuse of a dominant position by one or more enterprises in a market for a product or service, as well as for the purposes of merger control pursuant to the Law on the Control of Concentrations between Enterprises of 2014 (Concentrations Law). The Commission is a member of the European Competition Network, the European Competition Authorities Network and the International Competition Network.

It is within the Commission's competence, pursuant to the Competition Law, to examine complaints submitted by third parties, and also to initiate investigations on its own initiative:

a) into formal or informal restrictive agreements and practices that have as their object or effect the elimination, restriction or distortion of competition, and in particular agreements that:
   • fix, directly or indirectly, the purchase or selling prices or other trading conditions;
   • limit or control production, markets, technical development or investments;
   • divide markets or other resources of supply into geographical or other sectors;
   • apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
   • make the conclusion of contracts 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 subject matter of the contract;

b) of abuses by one or more undertakings of a dominant position, especially if:
   • they affect or may affect the direct or indirect fixing of unfair purchase or selling prices, or any other unfair (under the circumstances) trading conditions;
   • they limit production, distribution or technical development to the prejudice of consumers;
   • they apply dissimilar conditions to equivalent transactions, thereby placing certain undertakings at a competitive disadvantage; or

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Stephanos Mavrokefalos was a partner at L Papaphilippou & Co LLC at the time of writing. The chapter was accurate as at April 2018.
they make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject matter of such contracts;

c of abuses by one or more undertakings of a relationship of economic dependence where another undertaking, which is a client, supplier, producer, representative, distributor or commercial collaborator, stands at an economic disadvantage compared with that or those undertakings, and does not have an equal alternative solution. Such abuse of a relationship of economic dependence may consist of the imposition of unfair trading conditions, the application of discretionary treatment, or a sudden and inexcusable interruption of long-term trade relationships; and

d into a specific sector of the economy or in relation to specific types of agreements, if the course of commercial transactions or the inelasticity of prices or other conditions raise suspicions of possible restriction or distortion of competition.

The Commission does not have strict timetables for its investigations. Before issuing a decision, it requests that interested parties submit information and observations, and holds proceedings in the form of hearings. The Commission has the power to order interim measures during its investigation, such as requiring an enterprise to suspend a specific activity or agreement. The Commission’s decisions, which are subject to judicial review proceedings at the Administrative Court, are published in the Official Gazette as well as on the Commission’s official website.

The Commission’s work is assisted by a body of staff members (Commission’s Service) who are members of the Public Service. The competences of the Service are:

a to carry out the secretarial work of the Commission

b to maintain the Commission’s registers;

c to collect and examine the information necessary for the exercise of the Commission’s duties and powers;

d to introduce complaints and submit recommendations to the Commission;

e to make any necessary communications and publications; and

f to grant the Commission every possible facilitation to fulfil its competences and duties.

II CARTELS

The Commission issued only a few decisions regarding cartel behaviour in 2017:

a In January 2017, the Commission announced that, on the basis of a preliminary investigation by the Commission’s Service, it has decided to initiate infringement proceedings against the Association of Contractors for Mechanical and Electrical Works of Cyprus for possible prima facie infringement of Section 3(1)(b) of the Competition Law (concerted practices that limit or control production, markets, technical development or investments) for allegedly attempting to deter its members from participating in an open tender process commissioned by the Paphos Municipality for works on the municipal market. The investigation was concluded in 2017 and the Commission imposed a fine of €2,121.

b In May 2017, the Commission imposed fines (totalling €31,009,766) against JCC Payment Systems Limited, Bank of Cyprus Public Limited, USB Bank plc, Alpha Bank Cyprus Ltd, Commercial Bank of Cyprus Ltd, National Bank of Greece (Cyprus) Ltd
and Societe Generale Cyprus Ltd for breaches of Sections 3(1)(a) and 6(1)(a) and (b) of the Competition Law and of the corresponding Articles 101 and 102 of the TFEU in connection with:

• the participation of credit card issuing banks as shareholders in JCC (the acquirer) in the determination of interchange fees;
• agreements entered into between the acquirer and the banks that are not members in the capital of the acquirer for the determination of interchange fees;
• excessive pricing in credit card charges;
• excessive pricing in interchange fees; and
• abusive behaviour in limiting access to the issuance and processing of Amex cards.

The Commission also imposed specific restrictions in the internal operation of JCC enterprises, which is the main credit card acquirer in Cyprus.

In November 2017, the Commission announced the imposition of a total fine of €20,775,630 against ExxonMobil Cyprus Ltd, Hellenic Petroleum Cyprus Ltd, Petrolina Holdings (Public) Ltd and Lukoil Cyprus Ltd for violation of Section 3(1)(a) of the Competition Law in connection with their individual and separate agreements with petrol station operators for fixing prices in the retail market of unleaded petrol and diesel fuel during the period from 1 October 2004 to 22 December 2006.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The Commission did not issue any notable antitrust decisions in 2017, but it has announced the initiation of infringement proceedings as follows:

a The Commission announced that it initiated infringement proceedings against MTN Cyprus Ltd for possible infringement of Section 6(1)(b) of the Competition Law. The aforementioned undertaking holds a dominant position by way of its mobile telephony network, and has been accused by the complainant, Golden Telemedia Ltd, that it unlawfully blocked the access of its subscription-based clientele to the premium rate services offered by the complainant.

b The Commission announced that it initiated infringement proceedings against Henkel AG & Co KGaA and its subsidiary GPM Henkel Ltd for possible infringement of Section 6(1)(b) of the Competition Law and Article 102 of the TFEU. The aforementioned undertakings hold a dominant position in the market for heavy duty detergent cleaners and have been accused by the complainant, KAC Constantinides Trading Ltd, of imposing restrictive marketing practices for the importation and sale of Dixan products in Cyprus.

c The Commission announced that it initiated infringement proceedings against Hermes Airports Ltd for possible infringement of Section 6(1)(a) of the Competition Law. The aforementioned undertaking, as the operator of Larnaca International Airport, holds a dominant position in the market for the provision of administration services at Larnaca International Airport and in the market for the provision of valet parking areas within the airport so that other companies may offer their services. A Princess Airport Parking Ltd, C&A Stop and Fly Ltd and X Xanthos Airport Parking Services Ltd filed a complaint with the Commission that Hermes Airports Ltd employed certain practices and imposed abusive conditions on companies that wished to offer parking and valet parking services at the airport.
State aid is regulated by a separate and distinct legislative framework and a separate and distinct independent authority. Pursuant to the State Aid Control Laws of 2001 to 2009, the Council of Ministers of the Republic of Cyprus appoints the Commissioner for State Aid Control, who is competent and responsible mainly for the following:

- examining and issuing legally binding decisions on the compatibility of draft aid measures with state aid rules;
- carrying out a preliminary assessment and issuing reasoned opinions on the compatibility of all other draft aid measures with state aid rules;
- applying the provisions of Council Regulation No. 659/1999 and the implementation of provisions adopted by the European Commission according to Article 27 of the Regulation;
- monitoring the implementation and the final impact of all aid granted;
- collecting progress reports from all aid-granting authorities in order to monitor the implementation and the final impact of all aid granted;
- submitting to the European Commission all information required, including information regarding state aid granted in Cyprus;
- preparing and keeping an up-to-date inventory of all state aid schemes;
- observing national cumulative limits pursuant to Commission Regulation No. 1535/2007 and Commission Regulation No. 875/2007 for any period of three fiscal years;
- training all authorities granting aid and other parties involved on state aid matters;
- preparing and submitting to the President of Cyprus an annual report on his work with observations and suggestions, including a statistical analysis for the granting of state aid; and
- representing Cyprus in the EU Advisory Committee on State Aid as well as on any other committees and working groups dealing with the development or the implementation of state aid policy taking place in Cyprus or abroad.

The Office of the Commissioner for State Aid Control is staffed by eight people, of whom five are scientific staff members and three are administrative staff members.

The current Commissioner, Mr Theofanis Theofanous, was appointed in March 2015 for a six-year term. During 2017, the Commissioner for State Aid Control issued a couple of decisions regarding government programmes and schemes:

- A scheme providing financing by the Cultural Services of the Ministry of Education and Culture for the production of long and short films (fiction, documentaries, animation) with a budget of €3 million until 2021. The scheme aims to provide support to producers and scriptwriters based in Cyprus and the EU during all stages of production, including scriptwriting, preproduction, postproduction and distribution. Its aim is to encourage cultural diversity, creativity and the creation of new employment in the film industry.
- A scheme providing financing by the Cyprus Tourism Organisation for the enrichment and modernisation of tourism and the lengthening of the tourism season, with a budget of €16 million until 2020.
V  MERGER REVIEW

Pursuant to the Concentrations Law, the following events give rise to a concentration and trigger an obligation by the undertakings participating in a concentration to notify it to the Commission:

a  a merger of two or more previously independent undertakings;
b  one or more persons that already control one or more undertakings acquiring direct or indirect control of the whole or part of one or more other undertakings (this can be done through a purchase of securities or assets, by agreement or otherwise); or
c  the establishment of a joint venture that permanently carries out all the functions of an autonomous economic entity.

A concentration shall only be notifiable if the following cumulatively apply:

a  at least two of the participating undertakings each have a worldwide aggregate turnover in excess of €3.5 million;
b  at least two of the participants engage in commercial activities within Cyprus; and
c  at least €3.5 million of the worldwide aggregate turnover of all the participants relates to the provision of goods or the supply of services in Cyprus.

Notifications are mandatory, must be made in writing (by paying an administrative fee of €1,000) in Greek by way of a prescribed form (supporting documents may be filed in English), and must be submitted by one or more participants before putting the concentration into effect after either the signing of the relevant agreement, or the publication of the offer to purchase, exchange or acquire a participation that grants control of the undertaking.

The relevant transaction must be put into effect pending the outcome of the Commission’s investigation, but one or more of the participants can apply to the Commission for permission to complete the transaction before approval subject to any conditions that the Commission may impose. The Commission’s decision either to clear the concentration or to order a full investigation must be notified to the notifying party within one month of receipt of a complete notification. A Phase II full investigation by the Commission must be carried out (by also paying an administrative fee of €6,000) and a decision must be issued within four months of receipt of a complete notification. The Commission will clear the concentration only if it declares that the transaction is compatible with the conditions of the competitive market, and may also authorise the merger subject to conditions.

During 2017, the Commission received 40 notifications of concentrations and published 34 Phase I merger clearance decisions. Other notable decisions of the Commission are the following:

a  The Commission issued a clearance decision following a Phase II full investigation in the case of a joint venture company called VLPG Plant Ltd, which will undertake the administration and storage of LPG gas in Cyprus, where the participants were Hellenic Petroleum Cyprus Ltd, Petrolina Holdings (Public) Ltd, Synergas Cooperative Society and Intergaz Ltd. Following notification of the concentration, the Commission expressed doubts as to the compatibility of the concentration with the functioning of competition in the relevant market. As a result of negotiations between the Commission’s Service and the participating undertakings, the participants submitted a number of commitments that the Commission accepted, and it declared the concentration compatible with the
functioning of competition in the market subject to the commitments being valid for the whole time period that the joint venture company will be active. The commitments included, among others, the following:

• amendment of the shareholders’ agreement and articles of association of the new company;
• restriction of the directors of the founding companies to hold office in the new company;
• restrictions on the passing of confidential information from the directors of the new company to the directors of the founding company;
• the appointment of an independent trustee to verify that commitments are kept and to submit an annual report to the Commission confirming the implementation of the commitments;
• the implementation of competition compliance employee manuals within the new company;
• commitments that the new company will operate at arm’s length with the founding companies and with third parties; and
• the granting of access to essential services to new entrants in the market.

In 2016, the Commission had cleared a concentration notified by Eurogate International GmbH (Eurogate), Interorient Navigation Co Ltd (Interorient) and East Med Holdings SA (East Med) concerning the acquisition of the operation of the Container Terminal at the Limassol Port (the primary commercial port in Cyprus), which was previously operated by the Cyprus Ports Authority. Following up on information obtained by the Commission in 2017 during another investigation concerning proposed mergers regarding the acquisition of the operations of marine and other terminal services at the same port, the Commission decided to further investigate the issue regarding possible infringements of the law by Eurogate, Interorient and East Med (participants) during the notification of the concentration. The Commission was specifically concerned that the participants had not disclosed to the Commission complete and accurate information during the notification process. After hearing the arguments of the participants, the Commission (by majority decision: the chairperson dissented) held that the parties had not failed to provide information; nor was the information provided untrue or misleading, and it held that the information provided was given in good faith and honestly. As such, it decided that there had been no violation of the Concentrations Law.

In 2017, the Commission received a notification of a proposed concentration whereby VIP Turkey Enerji AS of Turkey (VIP Turkey) would acquire 100 per cent of the share capital of OMV Petrol Ofisi Holding AS (OMV). The concentration was notified to the Commission because VIP Turkey is a subsidiary of Vitol Holding BV of the Netherlands and part of the Vitol Group of companies, and both the Vitol Group and the OMV group operate within Cyprus. Vitol Group operates in Cyprus in the distribution of fuel oil for electricity production and asphalt for construction projects. OMV Group on the other hand is active in the distribution of lubricants in the geographical areas of Cyprus that are not controlled by the government, but that are rather controlled by Turkish troops following Turkey's invasion of the island in 1974, and its occupation since then of the northern part of the island. The Commission took the view that although the Concentrations Law applies to the entire territory of Cyprus, there is an objective obstacle for its application in those areas that are under Turkish occupation.
and that are not under the effective control of the government, so the evaluation by the Commission of the notified transaction is rendered impossible, and the Commission concluded that it was not possible to assess the notified concentration.

In 2014, the Commission cleared a concentration pursuant to which certain individuals sold to Delta (a Greek company that was a subsidiary of Vivartia) their shares in the company Mevgal of Greece, and by which Vivartia would acquire control of Mevgal. The Commission later discovered that Delta had sent misleading and incorrect information on the products that Vivartia sold in Cyprus, and in 2017 it imposed a fine on Delta totalling €37,000.

VI CONCLUSIONS

The Commission has long been preparing a comprehensive procedural regulation to govern all matters before it; however, the proposal is still under legislative review.

In 2017, the House of Representatives enacted the new Law on Certain Rules Governing Actions for Damages for Infringement of Competition Law of 2017, which was published on 21 July 2017. The new Law was passed for purposes of national transposition of, and harmonisation with, 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. The new Law introduces new rules with respect to, among others, the following:

- ensuring that any person who suffers loss due to violation of competition rules by any enterprise can take effective measures to claim and obtain redress at civil courts;
- obtaining documents and information in aid of legal proceedings;
- determining the liability of enterprises that are found to be in breach of competition rules as to the damage causes;
- determining the damages that can be awarded; and
- ensuring the finality of the decisions of the Commission.

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2 Law No. 113(I)/2017.
Chapter 8

FINLAND

Mikko Huimala, Helena Lamminen and Meri Vanhanen1

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

In competition matters, the primary public enforcement authority in Finland is the Finnish Competition and Consumer Authority (FCCA). The FCCA cannot impose administrative fines, but must make a fine proposal to the Market Court. The judgments of the Market Court can be appealed to the Supreme Administrative Court (SAC).

Finnish competition enforcement underwent some changes in the past year. The Competition Act2 entered into force on 1 November 2011, replacing the former Act on Competition Restrictions.3 A new amendment process began in 2015, and in May 2018, a Government Bill on amendments to the Competition Act4 was presented to Parliament. Parliament passed the Government Bill, and the amendments to the Competition Act entered into force on 17 June 2019.5 The key amendments concerned the calculation of deadlines in merger control, inspections carried out by the FCCA, FCCA’s right to obtain information and the exchange of information between authorities. In addition to the above, the competition neutrality provisions of the Competition Act are supplemented with an accounting separation obligation concerning municipalities, joint municipal authorities, the state and any entities under their control that engage in economic activities in a competitive situation. The accounting separation obligation entered into force on 1 January 2020.

ii Enforcement agenda

The FCCA’s new Director General Kirsi Leivo began her term in September 2018. The new Director General has publicly emphasised the importance of fighting cartels and the need for more severe sanctions.

The FCCA has announced that its objectives for the years 2017–2020 include continuing to focus on the detection of hardcore cartels. The FCCA will also emphasise effective merger control with the intention of preventing the emergence of harmful concentrations in advance. Furthermore, the FCCA will continue to implement its supervisory powers concerning public sector entities with regard to competitive neutrality issues. In addition, the FCCA

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2 948/2011.
3 480/1992 (annulled).
5 721/2019.
announced its aim to ensure an efficient start to the new task of supervising the legality of public procurement, which was assigned to it as of the beginning of 2017. Consequently, the FCCA opened an investigation in 86 public procurement matters in 2017 and in 101 matters in 2018. Statistics for 2019 have not been published as at the time of writing.

II CARTELS

Finland has had a leniency programme in place since 1 May 2004. The programme was updated in the Competition Act, which entered into force in November 2011, and is now laid out in Sections 14 to 17 of the Competition Act. The leniency programme is very similar to the European Competition Network model leniency programme. In 2016, the revised leniency guidelines issued in 2011 were replaced with new guidelines that take account of the new Antitrust Damages Act.

The FCCA received its first leniency case only minutes after the entry into force of the programme in 2004. However, after a spectacular start, there have been only a few leniency applications, which has clearly been a disappointment to the FCCA. The relatively small number of leniency cases is reflected in the number of the FCCA’s penalty payment proposals to the Market Court in cartel cases. In 2014, 2015, 2016, 2018 and 2019 the FCCA only brought one cartel case before the Market Court each year, while in 2013 and 2017 no cases were brought before the Market Court by the FCCA.

i Significant cases

FCCA’s penalty payment proposal to driving schools

On 21 November 2019, the FCCA submitted a proposal to the Market Court to impose a fine of around €300,000 in total on Uusimaa Driving School Association (the Association) and eight driving schools. According to FCCA, the Association and six driving schools on the Association’s board encouraged driving schools to raise their prices. The alleged infringement began in April 2014 and continued until October 2015. In addition, three driving schools allegedly infringed competition rules by agreeing on price increases from the beginning of 2013 to the autumn of 2014. The case is currently pending before the Market Court.

SAC increased the penalty payments in the Coach Company cartel

On 25 January 2016, the FCCA submitted a proposal to the Market Court to impose a fine of €38 million on seven coach companies, the Finnish Bus and Coach Association and Oy Matkahuolto Ab (Matkahuolto), a service and marketing company that promotes bus and coach services in Finland. The FCCA also ordered Matkahuolto to cease all anticompetitive measures to foreclose competing coach companies from the market.

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6 One of the most important aspects of this new task is the supervision of significant errors and omissions, such as illegal direct awards of contract.
7 Immunity from and reduction of fines in cartel cases: Guidelines on the application of the Competition Act, 2/2011.
8 Guidelines on immunity from and reduction of penalty payments in cartel cases: Guidelines on the application of the Competition Act (2016).
9 The application was made in the Raw Wood Procurement infringement case.
10 According to Government Bill 88/2010 (p. 23), there had been approximately 10 leniency applications by June 2010.
On 14 December 2017, the Market Court found the coach companies, the Finnish Bus and Coach Association and Matkahuolto guilty of restricting competition. However, the Market Court found that lobbying work, discussions and negotiations related thereto as well as measures concerning opposing the issuing of route licences did not constitute a prohibited restriction of competition. As a result, the fines imposed by the Market Court were significantly lower than those proposed by the FCCA, amounting to a total of €1.1 million. The decision of the Market Court was appealed to the SAC. On 20 August 2019 the SAC stated that the competition infringement was used to systematically impede and delay the opening of the bus market to competition and imposed penalty payments amounting to a total of €8.9 million, providing a substantial increase in the fines set by the Market Court.

ii Trends, developments and strategies

As discussed above, the fight against cartels continues to be one of the FCCA’s main priorities. The detection of cartels has been boosted by increasing cooperation between the competition authorities and the contracting entities responsible for public procurement. The FCCA has announced that it will bring all detected cartel infringements before the Market Court.\(^\text{11}\) Corresponding to EU rules, the fines may equal 10 per cent of the undertaking’s turnover at the most.\(^\text{12}\) The FCCA’s new Director General has publicly emphasised the need for a higher level of fines than what has been imposed by the courts in practice, arguing that higher fines would have a stronger deterrent effect, and welcomed the idea of criminalising cartel conduct in Finland.

In reviewing Finnish competition law during the past few years, it is clear that private enforcement has been a particularly active segment. In the Asphalt cartel case, the Helsinki District Court dismissed the damages claim of the Finnish state in its entirety, but awarded damages to a number of municipalities. While the claims of the state and of several municipalities were settled by the parties after the judgment of the Court of Appeal, a number of applications for leave to appeal were filed to the Supreme Court. The Supreme Court dismissed the majority of the applications, and granted limited leaves to appeal to one respondent and one claimant in September 2017. Some applications for leave to appeal were left in abeyance until final decisions are given in the matters in which leave to appeal was granted. The Supreme Court subsequently granted one respondent further leave to appeal in August 2018 and November 2018.

In December 2017, the Supreme Court made a reference for a preliminary ruling to the European Court of Justice regarding the question of economic succession in determining the parties liable for damages. In its preliminary ruling on March 2019, the ECJ ruled that Article 101 TFEU must be interpreted as meaning that where the infringing economic unit had been dissolved, a company acquiring the commercial activities of the dissolved company and continuing those activities may be held liable for the damage caused by the infringement. In addition, the ECJ stated that the concept of ‘undertaking’ cannot have two different dimensions when considering penalty payments and damages.\(^\text{13}\) In October 2019, the Supreme Court applied the principle of economic continuity accordingly as set

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\(^{11}\) FCCA press release, 20 February 2012.

\(^{12}\) The highest cartel fines in Finland to date were imposed in the Asphalt case in 2009 (totalling €82.6 million). For example, the fines in the Raw Wood Procurement infringement case in 2009 amounted to €51 million in total.

\(^{13}\) Case C-724/17.
forth by the ECJ, concluding that the economic successors of cartel companies are liable for the damage caused by acquired companies involved in the cartel. The Supreme Court repealed the judgement and referred the case back to the Court of Appeal for evaluation of other prerequisites for liability and the amount of damages. Further, significant damages cases concerning an infringement involving the procurement of raw wood came to an end in January 2019, when the Supreme Court dismissed an application for leave to appeal by one of the claimants.

In June 2019, the SAC made a reference for a preliminary ruling to the ECJ in the power line cartel case. The Market Court had dismissed the FCCA’s penalty payment proposal in March 2016 on the grounds that it had been submitted after the five-year time limit. In order to decide whether the proposal had been made in a timely manner, the SAC shall first determine the duration of the cartel in a situation where a cartel participant has entered into a construction contract as agreed in the cartel with a player outside the cartel. The ECJ shall now decide the point in time when the infringement can be considered to have ended. The case is currently pending before the ECJ and the SAC.

iii Outlook

It seems clear that the FCCA will continue to focus on the investigation of hardcore cartels. Under the prioritising rule of Section 32 of the Competition Act, the FCCA does not need to conduct an in-depth investigation if an infringement is deemed unlikely at the outset or, irrespective of the infringement’s likelihood, if competition is considered effective on the whole.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Sections 5 and 7 of the Competition Act set out the prohibited restraints on competition and abuse of dominant positions respectively. The sections have been harmonised with Articles 101 and 102 TFEU.

The FCCA has made only a handful of penalty payment proposals to the Market Court in dominance cases. In most of the few cases brought to the Market Court, the level of fines has been modest. Typical Section 7 investigations of the FCCA have lasted a long time and have ended with the FCCA closing the case without further measures. The experiences have been equally frustrating to both the targeted undertaking and the complainant.

However, the FCCA has made one significant fine proposal in a dominance case to the Market Court in recent years. In December 2012, the FCCA proposed that the Market Court impose a fine of €70 million on Valio. The Market Court rendered its decision in the case in summer 2014. The decision of the Market Court became final when the SAC dismissed Valio’s appeal in December 2016. Arla lodged a damages claim of €58 million against Valio before the Helsinki District Court, but the parties settled the matter in September 2018. Other claims were also lodged but only two of them were not settled between the parties. In June 2019, the Helsinki District Court awarded damages to two milk producers’ cooperatives, Maitomaa and Maitokolmio. However, the damages awarded (totalling €8 million) were...
substantially lower than the ones claimed (totalling €27 million) as the cooperatives failed to fulfil their burden of proof regarding the amount of suffered damage. The judgments are final.

In 2019, the FCCA concluded five investigations regarding suspected restraints on competition. In one of the cases, it was question of horizontal cooperation with the purpose to exclude a competitor from the market. The FCCA ordered the undertakings involved to terminate the implementation of the agreement and enforced its order with a periodic penalty payment. The remaining four cases regarded suspected abuse of dominance with the conclusion that the FCCA did not find sufficient evidence of anticompetitive behaviour.

i Significant cases

Restraints on competition

FCCA ordered to terminate anticompetitive behaviour

In 2019, the FCCA held that the Finnish ice hockey league and 15 league teams had agreed to not hire any players from the team Jokerit during the season, infringing competition law as the league teams are mutually competing undertakings required to make their own independent decisions. The purpose of the practise was to exclude the competitor from the market by limiting production and using a collective boycott, starting in January 2014 and continuing up until the FCCA’s decision. The FCCA’s order to terminate the implementation of the agreement was enforced with a periodic penalty payment of €75,000 for each party involved in continuing the infringement.

SAC increased penalty payments on the Finnish Bakery Federation

On 20 August 2019 the SAC imposed a penalty payment of €30,000 on the Finnish Bakery Federation increasing the fine imposed by the Market Court. The SAC confirmed that the pricing recommendations issued by the trade association in question constituted a serious competition infringement lasting over three years. The Market Court had imposed a €15,000 penalty payment for prohibited price recommendations between 2007 and 2011 when the FCCA had proposed a penalty payment amounting to €40,000.

Abuse of dominance

In 2019, the FCCA closed four investigations regarding suspected abuse of dominance concluding that there was not sufficient evidence of anticompetitive behaviour. In one of the cases, the company involved changed its suspected market behaviour during the investigations.

In the banking sector, it was suspected that OP was abusing its dominant position by tying the non-life insurance services provided by the OP Group and the retail bank services provided by individual cooperative banks together through the OP bonus scheme.

In the railway freight transport market, it was suspected that VR Group was abusing its dominant position by imposing significantly higher prices on certain logistics services companies than it did on end clients buying logistics services. According to the FCCA’s decision, FCCA did not find sufficient evidence of anticompetitive behaviour and, secondly, VR changed its pricing during the investigation, and thus the FCCA came to a conclusion that there was no reason to continue investigations.
Also, the FCCA initiated an investigation regarding a refusal to deliver spare parts for reverse vending machines, but the case was not investigated further as competition in the relevant market was considered functional as a whole. In addition, an activity regarding a ticketing and payment system in bus services was investigated but closed as the FCCA found that there was no evidence of anticompetitive behaviour.

**Outlook**

As noted above, the Competition Act contains a provision on prioritisation of the FCCA’s activities. Even before the entry into force of the prioritisation provision in Section 32 of the Competition Act, the FCCA closed a majority of its dominance investigations without further measures noting, inter alia, that its role is not to solve individual contractual disputes between parties but to ensure the functioning of the market and healthy competition.\(^{15}\) Section 32 codifies the practice and grants the FCCA a right to remove cases that have only a minor impact on the economy more quickly.

The FCCA has applied the prioritisation provision regularly, and is expected to continue to do so in the future. As a result of the provision, the FCCA is able to focus on the more serious restraints on competition. This has had a positive effect on the processing times as well, as these have tended to be long. The FCCA has internally set a target that no case would be under investigation for longer than three years.\(^ {16}\)

**IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES**

Chapter 4a of the Competition Act entrusts the FCCA with a supervisory task to enhance competitive neutrality between public and private businesses. Pursuant to the Chapter, the FCCA has the power to intervene in the business activities of the municipalities, the joint municipal authorities and the state, as well as the entities over which they have control if the public sector entity is distorting the conditions for competition or preventing the establishment or development of competition on the market.

In May 2017, the FCCA published guidelines on market-based pricing to help public sector entities to assess the competitive neutrality of their own activities.\(^ {17}\) The guidelines describe the principles and measures of the FCCA in the supervision of pricing. According to the guidelines, the supervision consists of assessing both the setting of prices and the economic activity of the public sector entities.

So far, the FCCA has published 13 decisions concerning competitive neutrality, five of which were published in 2019.

**Significant cases**

In November 2019, the FCCA rendered a decision concerning the city of Kuopio. The FCCA had investigated the activities of the city in the fields of municipal engineering, food services, residential care, equipment maintenance and property and logistics services. The

\(^{15}\) See, for instance, decisions of the FCCA in *Liikennevakuutuskeskus* of 20 December 2012, record No. 130/14.00.00/2011, *Forca Oy* of 1 October 2012, record No. 452/14.00.00/2011, and *Alko Oy, Stella Wines Oy* of 19 March 2012, record No. 764/14.00.00/2011.

\(^ {16}\) FCCA strategy paper for 2015–2018, p. 3.

\(^{17}\) The FCCA’s Guidelines on Market-Based Pricing, 2017.
investigation revealed that the activities of Kuntateknikkalikelaitos Mestar, a municipal engineering undertaking belonging to the municipality, and Itä-Suomen Huoltopalvelut Liikelaitoskuntayhtymä Servica, a business-based joint municipal authority under Kuopio’s authority, violated the principle of competition neutrality. Due to the structure of these operators, they enjoyed unjustified competitive advantages, such as tax benefits, when providing services to customers other than the city of Kuopio. After discussions with the FCCA, the municipality decided to incorporate both business units. Servica’s activities were transferred to a limited liability company in January 2019, and Mestar will be incorporated in January 2021.

ii Outlook
The FCCA has announced that it will focus on developing the identification and surveillance of industries suffering from weak competition, and intervene with activities maintaining and enhancing passive competition and anticompetitive coordination within sectors where competition is weak. In October 2017, the FCCA announced that it is investigating certain companies operating in the social welfare and healthcare market. The inspections were carried out in August 2017 with the purpose of determining whether said companies had impeded competition when they participated in tender processes. In addition, in March 2017, the FCCA announced investigations regarding possible anticompetitive measures in the property management market. Both investigations are still ongoing. More recently, in June 2019, the FCCA announced that it is investigating possible anticompetitive conduct in the taxi market.

V STATE AID
There are no national rules on state aid, and the applicable rules are those laid down in Articles 107 to 109 TFEU. However, there are procedural rules concerning, inter alia, the recovery of unlawful state aid and the European Commission’s inspection powers, the duty to notify state aid to the Commission and certain exemptions from this duty (e.g., the de minimis rule and the general block exemption regulation).

Furthermore, the Act on the Openness and Obligation to Provide Information on Economic Activities Concerning Certain Undertakings that applies to companies carrying out services of general economic interest facilitates the Commission’s ability to monitor competition and state aid rules in Finland.18

The contact point for the Commission in state aid matters is the Ministry of Economic Affairs and Employment. The FCCA does not have a role concerning state aid.

i Significant cases
Illegal state aid awarded to Helsingin Bussiliikenne Oy
In June 2019, the European Commission concluded its investigations concerning alleged illegal state aid to Finnish bus transport company Helsingin Bussiliikenne Oy (HelB) and found that HelB had received €54.2 million of incompatible state aid from Finland. The

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European Commission opened its in-depth investigation in 2016 after receiving a complaint alleging that the conditions of loans granted to HelB by the Finnish authorities were not on market terms.

The investigation confirmed that private market creditors would not have granted the loans under the same terms and conditions (for instance, very low interest rates), notably considering the financial difficulties HelB was facing at the time when the loans were granted. Subsequently, the European Commission considered the loans to constitute state aid in breach of EU rules, and Finland was ordered to recover the aid from HelB. During the investigation, the assets and business operations of HelB were sold to one of its competitors. According to the Commission, as the new owner became the economic successor of HelB, it also became responsible for repaying the incompatible state aid.

ii Trends, developments and strategies
In general, practices concerning the application of EU state aid rules are gradually being formed, and national courts are increasingly applying state aid rules. For instance, the SAC has in recent years annulled several administrative court decisions partly due to the courts omitting to consider the applicability of the state aid rules, or to follow the relevant procedures in their decision-making. The cases concerned, inter alia, district heating, the sale of land and guarantees.19

iii Outlook
In June 2017, the Finnish Media Federation, an advocacy organisation for the Finnish media industry and printing companies, lodged a complaint to the European Commission claiming that the public funding of Yleisradio Oy’s (Yle) textual journalistic online content constitutes prohibited state aid. Yle is a national media company owned mostly by the state, and its operations are funded primarily through the Public Broadcasting Tax. According to the Finnish Media Federation, the provision of textual journalism online is not to be considered broadcasting under the Amsterdam Protocol and the Communication on public service broadcasting.20 Instead, the services in question should be evaluated under the EU services of general economic interest doctrine. The Finnish Media Federation argued that since a private supply of said services already existed in the Finnish market, there was no need to qualify textual journalistic online content as a service of general economic interest. In addition, the production of Yle’s wide textual journalistic online content leads to a disproportionate distortion of competition. The Commission’s investigation is currently pending.

VI MERGER REVIEW
The provisions on merger control were revised in the 2011 reform of the Competition Act with the purpose of bringing them further into line with EU rules. Most notably, the dominance test applied under the old rules was replaced by the significant impediment of

19 See, for instance, judgments of the Supreme Administrative Court of 1 July 2019, record No. 3086; 16 February 2018, record No. 673; 13 May 2015, record No. 1234; 23 January 2014, record No. 148; 30 November 2012, record No. 3326; 9 February 2012, record No. 192; 27.
effective competition test, which was introduced to enable the FCCA to shift the focus of its review more towards the competitive effects of mergers. A new amendment process began in 2015, as a result of which the calculation of deadlines in merger control changed and merger control timelines are now calculated in working days instead of months. The amendments entered into force on 17 June 2019.

Under the merger control provisions, a concentration shall be notified to the FCCA if the combined aggregate worldwide turnover of the parties exceeds €350 million; and the aggregate turnover of each of at least two of the parties accrued from Finland exceeds €20 million.

The rules concerning the calculation of the turnover correspond to a large extent with the provisions of the EU Merger Regulation.

Once a concentration has been notified to the FCCA, it has 23 working days to investigate and either clear the concentration (possibly with conditions) or to initiate a Phase II investigation. If a Phase II investigation is opened, the FCCA has an additional 69 working days (the Market Court may extend the deadline by a maximum of 46 working days) to approve the concentration with or without conditions, or to request the Market Court to prohibit it. If the FCCA requests such a prohibition, the Market Court must make its decision either to clear the concentration with or without conditions or prohibit it within three months.

The majority of notified concentrations are cleared in Phase I. In 2019, the FCCA issued approximately 33 merger decisions, and Phase II investigations were initiated in only three cases.

i Significant cases

**FCCA conditional approval in MB Funds/A-Katsastus**

In October 2019, the FCCA conditionally approved the acquisition of A-Katsastus Group (A-Katsastus) by MB Equity Fund V Ky (MB Funds). MB Funds is a private equity investment firm, the portfolio of which includes Protacon, a company that developed the Muster vehicle inspection software. A-Katsastus is a major operator in the vehicle inspection market.

The FCCA launched Phase II investigations in July 2019, based on the view that the acquisition may harm competition in the vehicle inspection market. The concentration, part of which A-Katsastus would become, possesses the Muster software that is widely used by vehicle inspection companies as the only alternative. As a result of the acquisition, A-Katsastus could also receive sensitive information on its competitors using the software, resulting in an impediment of effective competition.

However, the FCCA approved the acquisition subject to conditions. In order to eliminate the competition concerns, MB Funds and Protacon committed to offering the Muster software to the current and new customers with the current terms for 24 months from the FCCA’s decision.

**FCCA conditional approval in Caverion/Maintpartner**

In November 2019, the FCCA conditionally approved the acquisition of Maintpartner Group Oy (Maintpartner) by Caverion Industria Oy (Caverion). Caverion specialises in technical solutions for buildings and industrial operators, including technical maintenance services for industrial facilities. Maintpartner provides operation and maintenance services for companies operating in various industrial sectors.
The FCCA started Phase II investigations in June 2019. The deadline was later extended by the Market Court. According to the FCCA, the acquisition may substantially decrease competition in the total outsourcing of industrial maintenance services, noting that the market is already concentrated, the market shares of the parties are high, and the parties have competed for the same customers prior to the acquisition.

Even so, the FCCA approved the acquisition subject to conditions. In order to address the competition concerns, Caverion committed to selling some of its industrial maintenance service total outsourcing customerships to its competitors.

**FCCA proposal for prohibition in Kesko/Heinon Tukku**

In November 2019, the FCCA proposed the Market Court to prohibit the merger between Kesko Oyj (Kesko) and Heinon Tukku Oy (Heinon Tukku). Both companies operate in the wholesale trade of daily consumer goods and provide services for foodservice customers, such as restaurants, hotels, and catering businesses.

The FCCA opened Phase II investigations in June 2019, the deadline for which was later extended twice by the Market Court. According to the FCCA's view, the acquisition would lead to a dominant position with a market share of up to 60–70 per cent, which would impede the effective competition. The FCCA held that the remedies submitted by Kesko were inadequate to address the competition concerns related to the acquisition and proposed the Market Court for prohibition. Kesko has contested the FCCA’s views.

In February 2020, the merger was prohibited by the Market Court. The prohibition decision is the first ever to be adopted in Finland. Currently, it is still unknown whether the parties will appeal against the decision to the SAC.

**ii  Trends, developments and strategies**

The FCCA has itself noted that the need for reform of the Finnish merger control provisions should be investigated, including an assessment of whether the current turnover thresholds are still appropriate.\(^{21}\)

**iii  Outlook**

There has been a significant change in the length of review periods in merger control. Among other things, in 2017 and 2018 the FCCA requested the Market Court to extend the deadline of Phase II investigations in four cases. Before then, the practice had been highly exceptional. In 2019, extension to deadline was requested in two cases.

No major developments are expected to take place in Finnish merger control in the immediate future. The FCCA anticipates that there will be problematic transactions likely to have serious effects on competition.\(^{22}\)

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21  FCCA press release, 5 October 2018.
VII CONCLUSIONS

In reviewing Finnish competition law during the past few years, it is clear that private enforcement has been a particularly active segment. In addition to private enforcement, 2019 was a year for the preliminary rulings and for the merger control. Contrary to the busy merger year, including 33 decisions, the FCCA brought only one cartel case before the Market Court as it has done in previous years as well. The SAC increased fines issued by the Market Court in two cases.
I OVERVIEW

The French Competition Authority (FCA) is the administrative body in charge of enforcing European and domestic competition rules in France. In 2019, it issued 26 contentious decisions, of which 14 imposed fines amounting to an aggregate €630 million. This total amount shows a significant increase compared to previous years (€240 million in 2018, €498 million in 2017), although it still falls short of crossing the €1 billion mark reached in the record years of 2014 and 2015. Of the 14 decisions imposing fines this year:

a 10 sanctioned cartels and anticompetitive agreements, under Article L.420-1 of the French Commercial Code and/or Article 101 of the Treaty on the Functioning of the European Union (TFEU);
b one sanctioned an abuse of a dominant position, under Article L.420-2 of the French Commercial Code and Article 102 TFEU;
c two sanctioned unjustified exclusive imports rights to the French overseas territories, under Article L.420-2-1 of the French Commercial Code; and
d one sanctioned an obstruction to the conduct of inspections by the FCA, under Article L.464-2, V, 2 of the French Commercial Code.

As to its merger control attributions, the FCA issued 270 decisions in 2019, which included 269 decisions authorising the notified transaction and one decision reviewing commitments and injunctions in a previously cleared transaction.

2019 marked the 10-year anniversary of the FCA, created in March 2009 to replace the former Competition Council. The 2008 Law on Modernisation of the Economy which had set up the new institution entrusted it with the power to review mergers, a prerogative that previously lay with the Ministry of the Economy. It also vastly increased its investigative powers compared to those of the former Competition Council and allowed it to take up any competition issue for an opinion on its own initiative. On the occasion of this 10th anniversary, the FCA carried out an assessment of its impact on the French economy and evaluated that its action over 10 years had resulted in a total gain of nearly €14 billion, including €9.5 billion in avoided costs and €4.5 billion in fines collected.

2019 also saw new appointments at the FCA. Among others, Juliette Théry-Schultz was appointed Chief of the Legal Service, a specialist service directly reporting to the President.
of the Authority, and Jean-Pierre Bonthoux became Hearing Adviser, a mediator position created to assist companies and prevent or defuse difficulties in the exercise of their rights before the Authority.

In addition, the Board of the FCA welcomed several new members this year. The Board is the FCA’s body in charge of deliberating and adopting decisions, which are made collectively except where the President or a Vice President can rule alone. The Board is made up of 17 members, five of which (the President and four Vice Presidents) perform their functions on a full-time basis whereas the 12 others are non-permanent. In March, two new Vice Presidents and eight new non-permanent members were appointed, while three previous members were renewed.

In 2019, the FCA maintained a particular attention toward the digital economy, the audiovisual and media sector, agriculture, distribution and energy. The French overseas departments were also among the priority lines of action. Furthermore, the process of procedural reform and modernisation of the FCA continued, with a significant increase of its investigative powers and further changes to merger control proceedings.

These and other relevant developments of 2019 are discussed below.

II CARTELS

The enforcement of Articles L.420-1 of the French Commercial Code and 101 TFEU, which prohibit anticompetitive practices and cartels, is one of the prime missions of the FCA. In 2019, the Authority issued four decisions that could classify as cartels (even though the enforcer now rarely uses that terminology), fining a total of 13 undertakings for an aggregate amount of €479 million. This figure shows a significant increase compared to previous years (€205 million in 2018, €203 million in 2016). Tackling cartels remains one of the FCA’s priority when allocating resources, and the enforcer was also very active on the investigation front this year.

i Significant cases

The FCA handed down the biggest fines of the year in December, sanctioning a cartel between four issuers of employee restaurant vouchers for a total of €415 million. The meal voucher sector is highly concentrated, made up of four historical operators, while the remaining players hold less than 1.5 per cent of the market. The FCA found that two sets of practices had been implemented by these four operators, also involving the central office in charge of processing and settlement. First, the four issuers had exchanged confidential information relating to their respective market share on a monthly basis for five years, via the central office. Second, they had adopted various agreements in order to freeze the market, including a signed agreement prohibiting issuers from developing a payment platform to manage the processing of dematerialised vouchers.

Also in December, the FCA sanctioned six compote manufacturers for having agreed on prices and allocated customers, for a total fine of €58 million. The enforcer’s investigation was set off by a leniency application, followed by dawn raids. The Authority deemed that the practices at hand were especially serious, all the more so considering the very secret nature of

the cartel. The damage to the economy, which is the second component in the calculation of the fine after seriousness, was also significant. Quite remarkably, the FCA decided to raise a company’s fine by 65 per cent on the grounds that it belonged to a large group and that the value of sales taken into account in the calculation of its fine was, therefore, only a fraction of the group’s total resources. Though it is not rare for the FCA to apply this aggravating circumstance, such a high proportion is unusual. Regarding mitigating circumstances, a company had its fine reduced by 15 per cent for having disrupted the cartel and continuing to implement an aggressive commercial policy.

As for the courts, 2019 saw a new decision from the Paris Court of Appeal in the case of the flour cartels. Originally, the FCA issued a decision in 2012 by which it fined a Franco-German cartel on the one hand, and French millers for two anticompetitive agreements on the other. A first ruling from the Court of Appeal in 2014 upheld the FCA’s decision regarding the Franco-German cartel, but deemed that the anticompetitive nature of the agreements between French millers was not established. The case was then brought to the Court of Cassation (the French highest court for criminal and civil appeal), which issued its ruling in 2016. As to the Franco-German cartel, it quashed the appeal decision with regards to two companies specifically, establishing that the length of the involvement held against them was excessive compared to the limited amount of proof; as far as the domestic agreements were concerned, it quashed the appeal decision fully. The case was, therefore, sent back to the Paris Court of Appeal, which issued its decision in July 2019.6 The two companies involved in the Franco-German cartel appearing again before the Court had the duration of their infringement, and therefore their fine, drastically cut down, from €17 million to €5.7 million for the one, and €11.8 million to €334 000 for the other. As for the two French anticompetitive agreements, the Court confirmed the FCA’s decision (including aspects it had overruled in 2014, such as the damaging nature of the practices), but reduced fines for five companies by a total of €105.5 million, since the infringement was deemed less serious than the FCA had established. Inability to pay was also taken into account for some.

ii Trends, developments and strategies

Increased investigative powers

The PACTE bill from 22 May 2019 has given a new power to the enforcer, which will now be able to access data from electronic communications for the purpose of its investigations into potential anticompetitive practices. The FCA will have to request access to a newly created Connection Data Request Supervisor. If that request is granted, it will be able to access information such as the duration of a call or recipients’ numbers.

Severe sanctions over obstruction to dawn raids

The FCA has sanctioned an undertaking for obstructing the course of inspections being carried out on its premises.7 Two incidents were reported during the dawn raids, namely a breach of seals and a disruption of the functioning of electronic messaging systems while

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6 Paris Court of Appeal, 4 July 2019, No. 16/23609.
7 FCA, decision 19-D-09 of 22 May 2019.

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there were being searched. The FCA imposed a €900 000 fine. This is the second time the FCA has sanctioned an undertaking for obstructing dawn raids, the first being a €30 million fine in 2017.8

iii  Outlook

The FCA’s investigation services were particularly active this year, and some of the most notable probes made public in 2019 could lead to important cases in the years to come.9 Companies that had their premises raided by the FCA came from sectors such as luxury watch retail, services to nuclear installations, wine and spirits, crystal component distribution and VAT refund services. In addition, the FCA carried out dawn raids in the inter-island air passenger traffic sector in La Réunion and in the port service activities sector in Mayotte. Finally, the Austrian competition authority and the FCA jointly reported inspections in the automatic swimming pool cleaning equipment distribution sector.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The FCA’s antitrust enforcement activity, other than cartels, covers restrictive agreements under Articles L.420-1 of the French Commercial Code and/or 101 TFEU and abuse of dominance under Articles L.420-2 and/or 102. In addition, the FCA is also in charge of sanctioning unjustified exclusive imports in the French overseas territories.

i  Significant cases

In December, the FCA fined Google €150 million for abusing its dominant position in the online search advertising market.10 The Authority had started investigating Google’s dominance as early as 2015, following a complaint filed by a publisher after its Google Ads account had been suspended without notice. The enforcer rejected its request for urgent interim measures, but still continued its investigation into the merits of the case. It eventually found that Google Ads operating rules were applied under non-objective, non-transparent and discriminatory conditions. It especially noted that those rules lacked transparency and objectivity to the point that it was very difficult for advertisers to understand and follow them. Meanwhile, this opacity allowed Google to discretionarily change its interpretation of those rules when deciding whether a site was compliant or not. In addition to the fine, the FCA ordered Google to clarify the wording of Google Ads operating rules as well as the terms of the suspension procedure.

In a far-reaching decision dated 16 January 2020,11 the FCA established that a merger could not in itself constitute an abuse of a dominant position. In October 2016, TDF had completed the acquisition of Itas without prior clearance, since the transaction exceeded neither French nor European thresholds for mandatory notification. In November 2017, a competitor lodged a complaint to the FCA challenging the transaction by arguing it constituted an abuse of a dominant position by TDF. The complaint mainly relied on the famous Continental Can decision, in which the European Court of Justice had ruled that

8  FCA, decision 17-D-21 of 21 December 2017.
9  Such inspections of course do not pre-suppose the existence of a breach of competition rules, which the FCA can only establish after a full investigation into the merits of the case.
10  FCA, decision 19-D-26 of 19 December 2019.
‘the strengthening of the position of an undertaking may be an abuse and prohibited . . . if it has the effect of substantially fettering competition’. 12 However, the FCA noted that the Continental Can ruling had been decided before the creation of a regime of compulsory and prior control of mergers in 1989. The adoption of that new regime, which, in particular, allowed for transactions to be referred by domestic authorities to the European Commission even when they fell below the thresholds, rendered the application of the Continental Can case law obsolete. In the end, the FCA emphatically stated that the procedures applicable to concentrations and those applicable to anticompetitive practices were incompatible and irreconcilable. Since no abuse could thus be established, the procedure was closed. This clear distinction between merger control and the prohibition of anticompetitive practices as two distinct areas of a law provides much welcome legal certainty, although it surely will strengthen the FCA’s stance for the creation of an ex post merger control regime (see below).

In April 2019, the FCA dismissed a case investigating a potential abuse of dominance by TF1, in the form of discount and matching practices in the television advertising market. 13 The enforcer found that neither of these practices was established; however, beyond the outcome of the case, the decision is especially noteworthy because of the FCA’s renewed analysis of the television broadcasting and advertising markets. The last time the FCA had analysed TF1’s market position, it had established that the group was dominant on both broadcasting and TV advertising. In its latest decision, the enforcer acknowledged the significant and rapid evolution of competition dynamics in the sector, meaning that leading, historical broadcasters might become less likely to be systematically found to exercise dominance. In particular, market respondents echoed to the FCA that ‘powerful screens’ (advertising slots with an especially high number of viewers, such as advertising screen broadcast in prime time on TF1) were no longer an absolute necessity for advertisers.

Finally, the enforcer also issued two decisions fining companies for unjustified exclusive imports in the French overseas territories this year. 14 Although these exclusivity rights relate to antitrust, these decisions rely on a specific legal basis, distinct from Articles L.420-1 and L.420-2, that came into force with the Lurel Act in 2013. These were respectively the sixth and seventh decision sanctioning companies over exclusive agreements for the sale of consumer products in the country’s overseas territories since those provisions were created.

ii Trends, developments and strategies

Excessive pricing and non-pricing abuses

In 2018, the FCA issued a rare fine on the grounds of abusive pricing; 15 now the enforcer is thinking of applying that same theory of harm against a much broader range of practices. On the very day that the appeal against the FCA’s 2018 abusive pricing decision was being heard, President of the FCA Isabelle de Silva declared at a conference 16 that the notion of exploitative abuse could be used for other cases, other industries, but also to conditions other than prices, such as digital platforms’ terms of service. Though not new, the notion of exploitative abuse

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12 European Court of Justice, 21 February 1973, case 6/72.
14 FCA, decision 19-D-11 of 29 May 2019 and decision 19-D-20 of 8 October 2019.
15 FCA, decision 18-D-17 of 20 September 2018, made available in English by the FCA.
16 Fordham Competition Law Institute’s annual conference, as reported by the Global Competition Review (12 September 2019).
has long been somewhat set aside, but abusive pricing sparked renewed interest in recent years, at European level and in France. It remains to be seen whether that trend will keep as the Court of Appeal has since quashed the bulk of the FCA’s 2018 decision.17

Scrutiny over the retail sector: competition and beyond

French public authorities’ scrutiny over the retail sector spanned beyond the field of competition law this year, as the Minister for the Economy and State Secretary decided to bring grocery cooperative Leclerc to court, arguing that the group was guilty of abusive trading practices and should, therefore, be fined a total €117.3 million. In France, the retail sector is subject to increasingly intense scrutiny, under competition rules as well as specific provisions. As far as competition law goes, general rules prohibiting anticompetitive agreements and abuse of dominance apply, as well as merger control rules, with specific, lower notification thresholds for mergers in the retail sector and an additional procedure under which the FCA reviews joint purchasing agreements prior to their implementation, even though there are not analysed as mergers. Beyond competition law, retail agreements can also be assessed under provisions that prohibit unfair trading practices, as is the case in this ongoing matter.

iii Outlook

Antitrust and ‘structuring’ digital platforms

Introducing the notion of ‘structuring’ firms in merger control law is already being discussed in Parliament (see Section VI.iii), but the FCA went one step further, as it is now suggesting using that – yet to be defined – notion in the field of anticompetitive practices. In its contribution to the debate on competition policy published on 24 February 2020, the enforcer observed that some behaviours implemented by prominent digital operators (such as discrimination against competing products or services, foreclosure of related markets, use of data on a dominated market to impede access, hampering the interoperability between products or services, or multihoming) could not be caught under the current standard of abuse of dominance. It is thus exploring the adoption of a new regime to prevent and sanction anticompetitive behaviours by these operators, which would entail creating a legal definition of ‘structuring firms’ and submitting them to a specific set of enforceable obligations in terms of interoperability, non-discrimination and access to data.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Healthcare sector inquiry

In November 2017, the FCA opened an inquiry into the sector of medicinal products distribution and chemical pathology field. In its opinion published in April 2019, the FCA noted that the current legislative and regulatory framework throughout the medicinal products distribution chain was excessively restrictive, thereby hindering the modernisation of pharmacists, biomedical laboratories and intermediaries. To better foster modernisation,
the FCA recommended lessening constraints on the online sale of medicinal products, in order to allow French pharmacies to compete on a level playing field, as well as clarifying and easing the regulation on advertising in the sector.

Opinion on the audiovisual sector
The FCA published an extensive opinion on the state of competition in the audiovisual sector as faced by the upheaval of the digital revolution. It observed that the business models of traditional players were heavily challenged by the development of new platforms. Furthermore, the FCA stressed that the existing regulatory framework, once protective of the sector, had now become inadequate since it imposes asymmetrical constraints, weighing only on national incumbent operators. Among several other recommendations, the FCA called for an overhaul of the anti-concentration measures specifically designed for the audio-visual sector in 1986.

This opinion was a request from the national Assembly (one of the two houses of Parliament in France), in the context of a major reform of the audiovisual sector. The government’s draft bill for the reform has now been submitted to Parliament, and is expected to be discussed throughout spring 2020.

Competition in the French overseas territories
Following a 2018 request from the French government, the FCA issued an opinion on the competition dynamics of the importation and distribution of consumer goods in the French overseas departments. Consumer prices overseas remain significantly higher than those of mainland France, and this area has been one of the priority lines of action of the FCA for several years. The FCA welcomed positive developments since 2009, but observed that major discrepancies remained. It thus issued 20 recommendations in order to strengthen competition in the retail sector in these territories.

Trends, developments and strategies
Cross border cooperation on the digital sector
Further building on their close cooperation in this field, the German Bundeskartellamt and the FCA published a joint study on algorithms and competition on 6 November 2019. The two authorities examined the associated risks of collusion, with a particular focus on pricing algorithms. They also explored the practical challenges specific to the investigation of algorithms.

This particular project comes against the more general background of increased cooperation between competition authorities in the digital field, best exemplified this year by the Common Understanding on competition and the digital economy reached between the competition authorities of the G7 countries and the European Commission, presented on 18 July 2019.

20 See for instance the joint paper on data and its implication for competition law, dated 10 May 2016.
iii Outlook

Study on trade union and professional organisations

As a consequence of the adoption of the ECN+ Directive, the maximum fine that can be imposed on association of undertakings will now be aligned with the standard 10 per cent cap, instead of the former flat-rate €3 million. The FCA took up this opportunity to launch a thematic study on the application of competition rules to trade unions and professional bodies, noting that these organisations often play the role of facilitator in the development and implementation of anticompetitive practices.

Competition in Corsica

Following a request from the government, the FCA sent an extended delegation to Corsica to assess the competitive situation on the island, with a specific focus on key sectors such as fuel distribution, mass retail distribution, waste and maritime transport.

V STATE AID

State aid rules are enforced at the European level by the European Commission and the Court of Justice of the European Union. In 2019, the Commission made 32 decisions on measures implemented by France; 31 of them were decisions not to raise objections and one was a negative decision ordering recovery.

In this one negative decision, the European Commission found that the marketing agreements concluded between a local tourism organisation and Ryanair at the Montpellier airport constituted illegal, incompatible state aid.21 Under these agreements, the airline had been receiving payments for seven years in exchange for promoting Montpellier on its website. The Commission found that these agreements did not fulfil actual marketing needs of the tourism organisation, but rather only served as an incentive for the airline to maintain its operation at the local airport. Consequently, Ryanair must now return €8.5 million worth of illegal state aid. This case echoes numerous other European probes into aid granted to airlines in order to attract or maintain their aircraft capacities in certain airports, among which previous aid to Ryanair in the French airports of Nimes, Angouleme and Pau.

VI MERGER REVIEW

In 2019, the FCA issued 269 merger review decisions under Articles L.430-1 to L.430-10 of the French Commercial Code, which shows a significant increase of transactional activity compared to previous years (235 decisions in 2018, 236 in 2017 and 230 in 2016). All were Phase 1 clearance decisions, among which seven were granted subject to commitments and none subject to injunctions. In addition, the FCA also issued a decision reviewing commitments and injunctions relating to a transaction it had previously cleared.22

21 European Commission, 4 July 2018, SA.47867.
i Significant cases

Among the most noteworthy cases of the year, the FCA cleared the creation of the Salto platform, a joint venture between France Télévisions, TF1 and Métropole Télévision (M6) intended to offer free-to-air DTT channels and a range of on-demand video services.\(^{23}\) The transaction was initially notified to the European Commission. However, in view of its impact on the domestic market and of the FCA’s experience in the sector, the Commission, in agreement with the undertakings involved, decided to refer the case to the FCA pursuant to Article 4(4) of EU Regulation No 139/2004. Despite the size of the transaction and the various potential competition concerns (horizontal – both unilateral and coordinated, vertical and conglomerate), it was cleared within eight weeks in a Phase 1 decision subject to an extensive set of commitments.

One of the largest transactions of the year was the merger of D’Aucy and Triskalia, two agricultural cooperative groups with turnovers of €1.2 billion and €1.9 billion respectively.\(^{24}\) The FCA found that there were significant risks of anticompetitive effects in cereal, protein and oilseed crop collection, with combined market shares exceeding 70 per cent in certain collection areas, as well as in the retail distribution of gardening, DIY, landscaping and pet products since the market shares of the new entity reached 100 per cent in certain catchment areas. The parties still managed to secure a clearance in Phase 1, provided they implement a mix of commitments, both structural (divestitures) and behavioural (changes to their articles of association).

The FCA also cleared the creation of a joint undertaking between RATP and Keolis to operate the CDG Express, a future express connection between Paris and the CDG Airport.\(^{25}\) The FCA was able to rule out risks of price increase and quality deterioration in the public passenger transport markets thanks to the terms of the public service contract concluded with the state for the operation of the CDG Express, which included provisions on price and quality control. However, it identified a risk of coupled sales between CDG Express tickets and baggage transport and registration services. To alleviate that concern, the parties committed to entrusting the operation of baggage services to an independent partner, under a contract to be approved by the FCA.

In a rare instance of ‘fix-it-first’ commitments, the FCA cleared the acquisition of Alsa by Dr Oetker in January 2019.\(^{26}\) Both parties were active in various markets involving baking aids and desserts, and the new entity would have become a leader in the market of fabrication and marketing of dessert mixes to supermarkets and hypermarkets. Dr Oetker, therefore, agreed to exclusively licence one of its main brands for a duration of five years, to a buyer that was approved by the FCA with the clearance decision.

Incidentally, the FCA also reported having accepted an up-front buyer commitment for the very first time this year, in a transaction involving two operators of the food retail sector in French Guiana.\(^{27}\)

The FCA cleared the acquisition of OGC Nice by Ineos.\(^{28}\) As neither the FCA nor the European Commission had examined a transaction involving a professional football club.

\(^{24}\) FCA, decision 19-DCC-147 of 24 July 2019.
\(^{25}\) FCA, decision 19-DCC-76 of 26 April 2019.
\(^{27}\) FCA, decision 19-DCC-180 of 27 September 2019.
before, the Authority focused on identifying the markets relevant to the transaction and defined a new market for the transfer of professional players, which it found to be at least European or even international in scope. The case was also interesting from a procedural perspective, as the FCA granted a derogation from the suspensive effect in order to enable the recruitment of new players before the transaction was cleared – which the FCA's President announced over social media. These derogations are only granted in exceptional circumstances, most commonly when the transaction involves companies undergoing insolvency proceedings.

As for the courts, the *Fnac/Darty* saga continued to unfold this year as the parties took to the *Conseil d'Etat* (the French administrative Supreme Court) to seek the annulment of a €20 million sanction. The FCA had cleared the merger in 2016 provided that the new entity divest several stores. The buyer later found by the parties was not approved by the FCA and no other candidate was identified before the deadline, which resulted in a €20 million fine for non-compliance with parts of the commitments.\(^\text{29}\) This decision was the first decision specifically related to non-compliance with structural divestiture commitments. By a judgement dated 7 November 2019, the *Conseil d'Etat* confirmed the whole of the decision.\(^\text{30}\) In particular, the *Conseil d'Etat* found that the seriousness of such a failure to comply with commitments should be assessed with regard to the importance of those commitments within the remedy package at the time of the clearance decision. In other words, according to the *Conseil d'Etat*, the FCA was not required to carry out a new assessment of the competitive situation of the market at the time of the sanction decision and to prove that the failure to implement the commitments actually affected competition.

### ii  Trends, developments and strategies

**Towards a modern, simplified merger procedure**

The process of modernising and simplifying merger procedure continued in 2019. In April, a new decree on the simplification of the national merger control procedure significantly alleviated the load of information to be submitted to the FCA when notifying.\(^\text{31}\) In October, the FCA launched a new electronic procedure, allowing eligible transactions to be notified online.

**Franco-German call for reform of European merger control rules**

In the wake of the *Alstom/Siemens* prohibition,\(^\text{32}\) the French and German ministries for the economy published a joint manifesto for a European industrial policy fit for the 21st century.\(^\text{33}\) The text called out for a major overhaul of European competition rules, arguing that industrial policy considerations should be more adequately taken into account.

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\(^{29}\) FCA, decision 18-D-16 of 27 July 2018.

\(^{30}\) *Conseil d'Etat*, 7 November 2019, No. 424702.


\(^{32}\) European Commission, 6 February 2019, case M.8677.

iii Outlook

Upcoming decisions

As regards next year’s prospects, 26 operations were under review at the time of writing, 10 of which pertain to the food retail sector, four to automobile retail and three to the healthcare sector. Three in-depth (also known as Phase 2) investigations are currently ongoing.

New merger guidelines

In September, the FCA opened a public consultation on a draft version of its new merger guidelines. This overhaul of the guidelines aims at further alleviating the burden weighing on companies, most notably by extending the scope of the simplified procedure. The main substantial inputs are a new section dedicated to gun jumping, as well as developments on the control of remedy implementation. The consultation ended in November, and the final version of the new guidelines is expected for the first half of 2020.

Ex post control under discussion in France

Talks of creating an ex post merger control system further advanced in France over the course of 2019. Although the FCA had initially entertained the possibility of a new transaction value threshold, it ruled out this option in 2018. An ex post regime has since been considered as an alternative proposal, which led to extensive talks with other domestic agencies and a public consultation on the topic. In June 2019, the President of the FCA confirmed that the Authority had approached the executive with a proposal to introduce such an ex post mechanism, and that the matter was now in the hands of the government.34

Catching killer acquisitions

A draft bill currently under discussion in Parliament35 could create a new mechanism aimed at preventing killer acquisitions in Big Tech. Pursuant to the current version of the draft bill, the FCA could be empowered to draw up a list of ‘structuring firms’, taking into account a range of clues such as dominance, especially on multi-sided markets, extensive vertical integration, or access to essential data. Undertakings appearing on this list would be required to declare any concentration likely to affect the French market to the FCA, which would then have the ability to request a formal notification. In addition, the draft bill reverses the burden of proof during Phase 2 proceedings, as these structuring firms, when undergoing in-depth investigations, would now have to prove that the contemplated transaction is not likely to adversely affect competition.

VII CONCLUSIONS

On 9 January 2020, the FCA unveiled its priority lines of action for 2020. Digital challenges will remain one of the FCA’s core points of interest, with a particular focus on the impact of the digital revolution on financial activities. In addition, the FCA created a digital economy unit in January 2020. This new unit will be tasked with developing

34 Interview with Isabelle de Silva, President, French Autorité de la concurrence, The Antitrust Source, Volume 18, Issue 6, June 2019.
35 Draft bill No. 48 aimed at guarantying consumers’ freedom of choice in the cyberspace.
in-depth expertise on all things digital, with the aim of contributing to the FCA’s studies and sector-specific inquiries, providing support to the investigation units, and working with other domestic agencies as well as foreign competition authorities.

The retail sector is expected to remain a key point of focus for the FCA. Several decisions should soon be issued by the FCA after notification of new joint purchasing agreements. The enforcer has also announced a study to be carried out on new commercial retail strategies.

Finally, the FCA has announced that it wishes to further strengthen international cooperation, and in particular to turn the Common Understanding reached by G7 countries in July 2019 into a long-term partnership. This will involve a conference in Paris in the second half of 2020.
Chapter 10

GREECE

Emmanuel Dryllerakis and Cleomenis Yannikas¹

I OVERVIEW

Almost 10 years have elapsed since the reform of the Greek competition law through the introduction of Law 3959/2011. This was the first time since 1977 that the legislator opted not to modify the Law, but rather to introduce a new one. Essentially, the newer Law codified the old provisions, but also introduced some new provisions, taking case law into consideration, further harmonising it with EU law and introducing some new innovations.

The current Law has reduced the number of the members of the HCC from nine to eight, of which six are full-time appointees (the chair, the vice chair and four commissioners or, as per the terminology of the law, rapporteurs) and two are part-time members. The Law keeps the radical changes introduced in 2009 regarding the composition and operation of the HCC. Ever since its establishment in 1977 (before Greece joined the then European Economic Community), the HCC was made up of experts appointed by the supervising Ministry (originally the Ministry of Commerce, which subsequently was merged into the Ministry of Development) and a number of representatives from the business community, and even the General Confederation of Greek Workers, which had expertise in the field of competition, was close to the market and had an understanding of economics. The HCC was independent of the Ministry's Competition Service, which has operated under various names and forms since the establishment of Greece's competition regime. The only connection between the two bodies was that the chair of the HCC was also head of the Competition Service. Traditionally, the HCC has been considered as a tribunal while the Competition Service was the prosecutor, meaning that the chair’s dual role was problematic.

The Law kept the 2009 regime of Law 3784/2009, under which the rapporteurs and the chair form the majority of the HCC in plenary session, while also acting as the heads of the Competition Service; however, the Law states that the rapporteur in each case does not have a voting right. Individual rapporteurs are assigned cases by lot, carried out by the HCC in a plenary session. They express their position on a case in a report that they submit to the HCC, without the HCC being bound by it (although it is rather unlikely that the HCC will adopt a different position given that it is naturally the rapporteurs who have the best knowledge of the case, and thus it is more likely that their opinion may influence the other members than not). Under the previous regime (prior to 2009), the Competition Service issued recommendations to the HCC, which would then hear a case. The Law also introduced the specific post of vice chair. Both the chair and the vice chair are selected by Parliament’s Chamber of Presidents.

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The Law also provides for a five-year statute of limitations. Under the previous regime, the position of the HCC on this point had been vague, but nevertheless with the tendency that there was no statute of limitations, except for a fine (and not for the recognition of a violation). This led to rulings on violations that occurred more than 20 years ago. The current provision aligns Greek legislation with EU legislation and adopts the jurisprudence of the European courts.

Law 3784/2009 also introduced shorter time limits. In particular, statements of objections must now be submitted within 90 days of the assignment of a case. For concentrations, the time for issuing a decision is limited to 45 days from the date of notification of the concentration. Finally, the HCC has six months for the hearing of a case to take place and to issue a relevant decision. The HCC in its new form seems to be capable of meeting these deadlines.

Regarding the criteria for the calculation of fines (previously, severity and duration of a violation), the Law added a geographical dimension to the violation, its duration and the method of participation of the specific undertaking, and finally the financial benefit that the undertaking gained from the specific violation.

The Law has also tried to fill a gap in the liability of members of associations; if an association is found guilty of violating competition law, it is now expressly stated that, if the association cannot pay the fine, it must ask its members to finance the payment. If the members do not respond, then the members whose representatives participated in the violation are jointly and severally liable for the payment of the fine.

It is important to note that the Law provides for personal liability for individuals that are proven to have participated in preparatory actions, the organisation or commission of the violation, with fines ranging from €200,000 to €2 million; however, with the introduction of a minimum fine for individuals, there is no such provision for undertakings.

The Law has also modified and introduced various fines:

- for culpable violation of the obligation to notify a merger, the fine increased from a minimum of €15,000 to €30,000 for each notifying undertaking, and the cap has increased from 7 to 10 per cent of the annual turnover of the undertaking;
- for gun-jumping in mergers, the cap was reduced from 15 to 10 per cent of the annual turnover of the undertaking;
- in a case of non-compliance with a decision of the HCC, a fine of up to 10 per cent of the annual turnover of the undertaking was introduced; and
- in the case of repeated non-compliance with a decision, the fine was reduced to 10 per cent of the annual turnover of the undertaking (from 15 per cent).

For the first time, criminal liability (Article 44 of the Law) is attached to cartels (punishable by imprisonment of at least two years), regardless of whether there has been an effect on the market. Discussions have arisen as to whether this provision is unconstitutional, but it remains to be seen how it will be implemented by the HCC and the courts.

Finally, the Law introduced changes to the notification obligations. Under the Law’s provisions, the post-merger notification (Article 4a of Law 703/77) is abolished and there is no obligation to notify agreements that fall under Article 1 (in line with EU law). It should also be borne in mind that the power that the Ministers of Regional Development and of Finance had under the previous Law to approve a concentration that had been prohibited by the HCC has now been rescinded under the current Law.
The regulation for the functioning and operation of the HCC was issued by a Common Ministerial Decision dated 16 January 2013. The regulation aligns the procedural framework of the HCC to the current Law, and also inserts provisions deriving from the experience of the HCC. In addition, it defines the internal operational system and financial administration of the HCC, taking into consideration the rules of transparency and efficiency of its financial resources.

In general, Greek competition law transposes Articles 101 and 102 of Treaty on the Functioning of the European Union (TFEU). Although the HCC is the body with general competence to rule on competition law, special competence regarding telecommunications, as well as the postal services market, is granted to the Hellenic Telecommunications and Post Commission (EETT). The EETT may request the HCC’s assistance or even refer a case to it. Decisions issued by the HCC (or the EETT) are subject to appeal before the Athens Administrative Court of Appeal (with further appeal to the Council of State for errors of law).

The services of HCC consist of three offices reporting directly to the chair: the Office of the Chair, the Secretariat and the Directorate General for Competition (DG COMP). The DG COMP is responsible for the defence and legal support of actions taken by the HCC, both in and out of court, as well as for the judicial defence and legal support of the HCC’s members and staff. It is made up of four directorates and one autonomous department.

To date, the implementation by the HCC of the current Law has been successful, although there is room for improvement.

Prioritisation and resource allocation of enforcement authorities

In 2019, according to the latest data published by the HCC, 14 decisions were issued regarding concentrations (including two pending decisions for modification of remedies) and seven regarding Articles 1 and 2 of Law 3959/2011 (formerly Articles 1 and 2 of Law 703/77 and equivalent to Articles 101 and 102 TFEU). The HCC also published an opinion, requested by the Ministry of Economy and Development, on the conditions of function of the market for newspaper distribution in Greece, where the HCC identified several structural deficiencies and examines a number of remedial measures concerning a potential change of the legal form of the entities involved in newspaper distribution, the organisation of the various publishers in an association in order for them to acquire countervailing power compared to distribution, the provision of state aid to potential entrants to the newspaper distribution market, the compilation of a Code of Conduct and the establishment of a new regulatory authority that would supervise and ensure competitive conditions in the industry.

The ongoing crisis in the financial sector, and in the country in general, has led the HCC to prioritise sectors that are of interest to consumers, even though the competition regime is essentially meant to protect the mechanisms of the market while consumers are separately protected by special legislation and enforcement agencies. Political and public pressure has been brought to bear on the HCC to research consumer products and high prices.

The current scheme of commissioners and rapporteurs (introduced in 2009) has made the HCC more effective and efficient in handling cases.

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2 HCC opinion No. 39/2019.
ii Enforcement agenda

On 7 July 2011, the HCC issued a notice on enforcement priorities. According to this, the prioritisation of cases is generally based on the criterion of public interest. In this context, and according to the HCC, priority is given to ex officio investigations or complaints pertaining to:

a. hardcore restrictions (price fixing, market sharing, and sales or production restrictions) of national scope, especially in cases of horizontal agreements (cartels), particularly taking into account the market position of the undertakings involved, the structure of the relevant market and the estimated number of the affected consumers;

b. products and services of major importance to the Greek consumer where the anticompetitive practice under examination may have a significant impact on prices or the quality of the services (especially as compared with Member States of the European Union); and

c. anticompetitive practices with cumulative effect (i.e., practices applied by a large number of companies that are able to pass on the increased prices to intermediate undertakings or final consumers).

All of the above were more or less the same in a previous HCC Notice in 2010, but this time the HCC has also prioritised the review of relevant leniency applications, if all the criteria of the leniency programme are met; and compliance with the rulings of the Athens Administrative Court of Appeal and the Council of State (the Supreme Administrative Court) issued in appeal proceedings concerning prior decisions by or actions against the HCC.

As in the 2010 Notice, the HCC has also prioritised the adoption of exceptional regulatory measures in certain sectors of the economy according to the strict terms of Article 11 of Law 3959/2011 and, as stated by the HCC, provided that such measures are absolutely necessary, suitable and proportionate for the maintenance of effective competition.

The prioritisation of any particular case also depends, according to the HCC, on the authority’s resources, the possibility of proving an infringement, the necessity of providing guidance on novel issues of interest, as well as an assessment of whether the HCC is the best-placed body to act (particularly having regard to the jurisdiction of national courts to deal with cases of private interest).

On 24 May 2012, pursuant to Article 14(2) of the Competition Act, the HCC adopted an internal management tool in the form of a point system for the investigation of cases by the Directorate General. In particular, according to this decision, the Directorate General shall investigate pending cases according to their ranking on the basis of a point system, which essentially exemplifies and quantifies the priority criteria set out in the Notice on Enforcement Priorities.

On 24 September 2015, the HCC issued a second decision (published on 4 March 2016), on the quantification of the criteria for prioritisation of pending cases. The decision was issued so as to update a previous decision by providing more specific guidance based on the experience gained by the HCC in the three years that had passed since the issue of the first decision. The second decision was largely the same as the first one in terms of the general principles of prioritisation, but did, however, set a three-month time limit (from the

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3 The Competition Act (Law 3959/2011).
4 HCC decision No. 525/VI/2011.
5 HCC decision No. 616/2015.
filing of a complaint or the commencement of an *ex officio* investigation) within which a case must be ranked using the point system, whereas the previous decision set none. It also introduced a negative point system applicable in cases where the statute of limitations has expired and a fine may no longer be imposed, or where the facts of the case are such that the HCC may reasonably believe that the anticompetitive practices have ceased or altered in ways that mitigate the competition concerns.

On 21 November 2019, a new point system was established by virtue of HCC Decision 696/2019, which introduced a novel way of calculating the degree of priority of various cases, by correlating via a mathematical formula two, separately calculated, factors, namely the ‘impact’ of the case and the ‘economy of time and human resources’ needed to handle it. It is notable that, contrary to past practice, the new point system was introduced following a public consultation on the subject, which considered the respective views of consumer association, businesses and various stakeholders. Aside from taking into account factors that existed also in the previous point systems (such as, for example, whether a practice is hardcore, its geographic extent and the existence of novel legal issues), the new point system refines the notion of ‘public interest’ as a factor for prioritisation, and also assigns, for example, priority to cases deriving from complaints by consumer associations with which the HCC has concluded a memorandum of cooperation. Another novelty is the introduction of an ‘impending prescription factor’, which applies to cases that are nearing prescription and multiplies the final score, so that these cases achieve a higher priority ranking for investigation.

The point system aims at enhancing the efficiency of investigations, the focus being on important cases with increased estimated impact on the functioning of effective competition or overall systemic effect, or both, while promoting a more coherent and targeted policy of prioritising pending cases.

The point system is intended solely for internal use (such that the ranking of each individual case at the investigation phase is not made public, or notified to the complainant). Moreover, it provides for the possibility of rejecting complaints that get a low priority ranking according to the point system.

It should finally be noted that the HCC places fining undertakings that obstruct on-site inspections high on its agenda. In that regard, the HCC has also fined two undertakings for obstruction of on-site inspections in the past few years: Latomiki ATE and Latomiki AE. According to the decision, the above-mentioned undertakings deleted electronic files during the raid, and for this action the HCC fined them €72,000. This decision shows the determination of the HCC to protect its mechanism of dawn raids, and sends a clear message to the market.

II CARTELS

i Preliminary remarks

As previously stated, the general provisions contained in Article 101 TFEU have been introduced word-for-word into the Greek legal system (Article 1 of Law 3959/2011), and the HCC aims to follow the jurisprudence of the European Commission and the European courts in the case of cartels. Even though it has adopted a leniency policy, and declares itself open to considering any commitments to remedy the effects of cartels prior to discussing any case, in practice, the way the HCC deals with cartels has not changed. The leniency policy was only successfully applied for the first time in 2017, in a major cartel case involving more
than 40 companies in the constructions sector. That being said, the HCC has been making extensive use of the settlement mechanism in cartel cases, having issued six settlement decisions within just three years of its adoption.6

ii Penalties – leniency policy

In the case of an infringement of Article 1 of Law 3959/2011, fines of up to 10 per cent of the total turnover of the undertaking can be imposed by the HCC.7 The HCC has also adopted the practice of the European Commission according to which, in cases where the violation concerns a specific product or sector, a maximum fine of 30 per cent of the turnover for that sector applies, but this cannot exceed 10 per cent of the overall turnover provided for by law. There could also be criminal liability of the persons who initiated or participated in the formation and implementation of the cartel. In August 2011, the HCC adopted a leniency programme8 based on the European Commission’s programme providing for immunity or reduction of fines. In 2017, the programme was applied successfully9 for the first time in a major cartel case in the constructions sector (as analysed further below); however, that application, only one known application had ever been made,10 which was unsuccessful.

In addition, the parties can (according to Article 6, Paragraphs 5 and 6 and Article 8, Paragraph 8 of Law 3959/2011) offer binding commitments to remedy the effects of a cartel. If the HCC accepts these commitments, then the procedure comes to an end and no fines are imposed. Following one of the first cases, in 2008, when the HCC had accepted these commitments,11 the HCC is generally reluctant to accept commitments, using the argument that these cannot be accepted in hardcore (per se) violations. There have, however, been some more examples in the past few years where it was considered that commitments would be more efficient than ‘traditional’ enforcement and the imposition of fines.12 Indeed, the HCC’s priority should be to protect the mechanisms of the market rather than applying huge fines, which are counterproductive.

This year saw the HCC accept commitments by DIAGEO with respect to certain of its practices in the gin, whiskey and ready-to-drink alcoholic products, where DIAGEO allegedly holds a dominant position. The commitments concerned the lifting of ‘pouring’ and ‘marketing and visibility’ exclusivity clauses in agreements with on-site consumption points of sale.13 On the other hand, the HCC rejected commitments in the case of the incumbent newspaper distributor Argos; this concerned the unilateral (and allegedly abusive) imposition by Argos of a new commercial policy to newspaper publishers with disadvantageous terms for the latter, and carried – out an interim measures procedure instead to prevent the implementation of the policy and force negotiations between the interested parties.14

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7 Article 25, Paragraph 2(a) of Law 3959/2011.
8 HCC decision No. 526/VI/2011.
9 See also below, HCC decision No. 642/2017.
10 In the Milk cartel case, HCC decision No. 373/V/2007.
11 HCC decision No. 408/V/2008 regarding bank interchange fees (DIAS system).
12 See, e.g., HCC decision No. 538/VII/2012 of the HCC (regarding pay-TV platform NOVA).
13 HCC decision No. 698/2019.
14 HCC decision No. 687/2019.
Although the law provides that undertakings can be offered commitments after the assessment of a violation, the guidelines provide that these can also be offered at the beginning of the process; this constitutes a useful compromise, which avoids further use of time and resources while achieving a result similar to a consent decree.

iii Settlement procedure

On 18 July 2016, the HCC issued decision 628/2016 by which it formally established a settlement procedure for cartel infringements, thus further bringing its practice in line with that of the European Commission, which first introduced this procedure in 2008. Pursuant to the decision, companies may express their interest, in writing, to partake in the settlement procedure, either before the issuance of a statement of objections or after, within a maximum of 35 days prior to the date set for an oral hearing (in contrast to the European Commission, which will always carry out the procedure prior to the issuance of a statement of objections). The HCC meets in plenary session to approve or reject these expressions of interest, and if it approves them, proceeds to holding bilateral meetings with each implicated undertaking, wherein it sets out the facts of the case, the scope of the infringement and the extent of the participation of the undertaking concerned, the key evidence on which it bases its findings, as well as the range within which the fine can be expected to fall.

Following the conclusion of these meetings, which can be as few or as many as the HCC deems necessary in each case, an undertaking is then given a 30-day deadline within which to file its settlement submissions, by which it must unreservedly admit its participation in, and liability for, the cartel, accept the (maximum) range of the fine which may be imposed, and forgo the right to receive full access to the file and to an oral hearing before the HCC. The HCC then issues a proposal accepting or rejecting the settlement submissions and setting out the conclusions of the meetings and, if the undertaking concerned accepts this proposal, a settlement decision is issued officially by the HCC.

Prior to issuing a settlement decision, the HCC is neither bound nor limited by anything that took place during the procedure and maintains the right to terminate it. Upon so doing, the settlement submissions and proposal are wholly revoked and may not be used as evidence against the implicated undertaking by either the HCC or by the competent courts on appeal. Unlike the European Commission, which offers a 10 per cent reduction, the HCC offers a 15 per cent reduction of the fine for cases that successfully complete the settlement procedure. Viewed in light of the ongoing financial crisis in Greece, which has hit businesses especially hard, it is anticipated, and has been confirmed in practice, that this settlement tool will often be put to use.

In fact, the issue of this HCC decision essentially – and most likely, on purpose – coincided with the issue of a statement of objections for the largest case ever dealt with by the HCC, both in terms of the number of implicated undertakings (40) and the fines threatened (over €200 million). The statement of objections was issued following an ex officio investigation into tenders submitted, and respective contracts awarded, for public infrastructure works, which concluded that bid rigging took place on a significant scale, covering multiple projects and spanning the better part of 26 years. The settlement decision was eventually issued on 10 March 2017, and was followed by a standard hearing procedure for the undertakings that did not participate in the settlement.15

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15 HCC decision No. 642/2017.
Since then, the HCC has been making extensive use of the settlement procedure, by issuing another four settlement decisions in 2018 and 2019. The increase of the importance of the settlement procedure is apparent from that it is tested in most horizontal cases that the HCC has dealt with since its inception (although not all undertakings involved in those cases wished to settle).

iv Significant cases

Cartels

Enforcement against cartels in 2019 was increased compared to 2018, where cases of relatively lower importance had been examined. Following public announcements for simultaneous price increases, the HCC conducted its (biggest up-to-date) dawn raid to all major Greek banks on suspicions of price-fixing in ATM and other bank services charges. What is more, the HCC issued its decision\(^{16}\) for the non-settling companies involved in the constructions cartel case, the biggest case ever to be investigated by the Greek competition authority, by virtue of which it imposed fines totalling €27.2 million on charges of collusive tendering between several major construction companies (both Greek and foreign).

Electricians’ associations

The HCC announced on 23 September 2019 that it imposed fines, by application of the settlement procedure, totalling €145,010.96 to several electricians’ associations that imposed, mostly through provisions included in their respective charters and association decisions, fixed prices for the provision of various electricians’ services. The associations were also charged for coordinating the distribution of fees amongst their members and monitoring compliance of their members with these illegal practices.\(^{17}\) The case was the only one in 2019 where the settlement procedure was applied.

Another decision on the same case was issued for the non-settling Association of Contractors of Electricity Works in Attica, where the HCC found that the association imposed uniform charges for the rendering of electricians’ services to its members through charter provisions, and threatened sanctions albeit without imposing fines.\(^{18}\)

v Trends, developments and strategies

Overall, it appears that the HCC has taken a turn toward more pre-emptive action against cartels, by emphasising dawn raids and \textit{ex officio} investigations and by acting swiftly on complaints and news publications about price increases in specific sectors. It is awaited with great interest whether the dawn raid conducted against the major Greek banks will result to the issuing of a statement of objections for price-fixing charges.

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\(^{16}\) HCC decision 647/2017.
\(^{17}\) HCC decision No. 670/2018.
\(^{18}\) HCC decision No. 675/2018.
III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i  Significant cases

*Vertical agreements, restrictive franchise agreements and abuse of dominant position*

In 2019, antitrust and abuse of dominance enforcement continued, but at a slower pace compared to 2018, which had been a year of intense antitrust enforcement especially in the food sector. The HCC issued, in December 2019, decision 676/2018, by virtue of which it fined Friesland Campina €3,304,110 for RPM and non-compete clauses with its distributors; however, the HCC did not uphold the charges against Friesland for abuse of dominant position. Note that the same company was fined in 2018 for entering into a horizontal agreement with one of its wholesalers to prevent parallel participation in public tenders for the supply of milk.\(^{19}\)

What is more, 2019 was characterised by the application of the, up to now scarcely applied, interim measures procedure against allegedly abusive behaviours. The HCC imposed interim measures against Argos, the sole press distributor in Greece, to prevent it from unilaterally implementing a new commercial policy with newspaper publishers that allegedly included disadvantageous terms for the latter that were never subject to negotiations. Furthermore, the HCC imposed interim measures on Elmin Voxites for unilaterally reducing the supply of bauxite to the Mytilineos Group as a ‘threat’ to force the latter to accept more disadvantageous terms of supply. Elmin Voxites was ordered to continue the regular supply of bauxite to Mytilineos and to commence negotiations for the conclusion of a contract that would secure the regular operation of Mytilineos.

ii  Trends, developments and strategies

The, comparatively significant, application of the interim measures procedure demonstrates a tendency toward more preventive action against anticompetitive practices, which appears to be a part of a greater strategy of pre-emption applicable to cartel cases as well, as explained above. It also shows a tendency toward the protection of the public interest against imminent threats from anticompetitive practices, which is also reflected in the HCC’s new point system issued in 2019.

IV  SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The HCC, as per Article 11 of Law 3959/2011, may examine particular sectors of the Greek market, and if it ascertains that in that particular sector there is no effective competition, it can take any regulatory structural measure for the creation of effective competition conditions. To date, the HCC has only rarely applied this procedure; pursuant to the previous equivalent Article 5 of Law 703/77, in the case of oil companies in 2008, and later, pursuant to Article 11 of Law 3959/11, in the market of production, marketing, distribution and retail of fresh fruits and vegetables in 2013.

The HCC also has the power, under Article 40 of Law 3959/2011, to conduct an investigation into a particular sector of the economy or into types of agreements in certain sectors when it believes that there are indications (such as the level at which prices are set) of

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\(^{19}\) HCC decision No. 668/2018.
a potential restriction or distortion of competition. To this end, it has the power to request companies active in a particular sector to submit any information (including agreements with suppliers or buyers, company policies, etc.) it deems necessary and to conduct searches. It may then issue a report detailing its findings, or further investigate an undertaking if it uncovers potential anticompetitive practices.

In May 2016, the HCC commenced an investigation into the supermarket product retail sector, sending out questionnaires to both leading and smaller market players. Given the continuing consolidation in the supermarket sector over the past years, it is possible that the HCC is attempting to gauge the buying power of large supermarket chains, and whether they are exercising this power in order to promote particular brands that generate the most profit, thus foreclosing smaller competitors. In December 2019, the HCC announced that it would complete this sectoral inquiry the soonest possible within 2020, and that it would launch sectoral inquiries in January 2020 in the e-commerce and fintech sectors.20

V STATE AID

Under the Greek legal system, the HCC may not examine any cases of state aid to undertakings, as its competence is restricted to undertakings' behaviour. Any case involving aid by the state must be handled by the European Commission.

VI MERGER REVIEW

i Introduction

As per Law 3959/2011, only major concentrations fall under the jurisdiction of the HCC, which examines whether they significantly impede competition.

The HCC is exclusively competent to apply merger control provisions in all market sectors; however, for specific liberalised industries, such as telecoms and energy, there are separate national regulatory authorities (the EETT and RAE, respectively) that are also competent to apply competition rules, including merger control provisions, in cooperation with the HCC. Law 3959/11 (Article 24, Paragraph 2) specifies the terms of cooperation between the authorities, given that in most cases coordination is required.

A separate authority for the sea transportation industry, RATHE, was abolished in 2004. Competence for these cases now lies with the HCC, although Law 3260/2004 provides that an expert from the Ministry of Economy and Development must participate in the hearings and deliberations of the HCC as a non-voting member. Furthermore, a specialist authority for the ports sector, the Regulatory Authority for Ports (RAL), was established in 2016, which is competent to take regulatory measures concerning competition between ports and to cooperate with the HCC for the enforcement of competition rules; however, the new authority does not have any merger review competencies.

The HCC is also competent to handle mergers with a Community dimension that are referred to it by the European Commission, as per the provisions of EU Regulation No. 139/2004.

Pre-merger notification

Concentrations that fall under the definition of the new Law (Article 6) are subject to a pre-merger notification. If they are implemented prior to clearance by the HCC or contrary to a prohibition decided by the HCC, the undertakings concerned are subject to serious sanctions (i.e., a penalty and possible invalidity of the concentration). A penalty is also imposed for late notification, even if the parties have not yet implemented the concentration or if the concentration was finally approved.

Merger control is exercised when a concentration exceeds the following turnover thresholds: the combined aggregate worldwide turnover of all the undertakings concerned is at least €150 million; and cumulatively, the aggregate turnover of each of at least two of the undertakings concerned in the Greek market exceeds €15 million.

The above thresholds apply for all market sectors, except mass media, where special legislation (Law 3592/07) defines the respective thresholds as follows: the combined aggregate worldwide turnover of all the undertakings concerned is at least €50 million; and cumulatively, the aggregate turnover of each of at least two of the undertakings concerned in the Greek market exceeds €5 million.

Deadline for notification

While EU Regulation No. 139/2004 does not set any notification deadline, and while it is in the parties’ interest to move quickly to gain clearance and implement a merger, in Greece, notification must be made within 30 days of the entry into an agreement or the publication of an offer or an exchange, or the obligation from the undertaking to acquire participation, which secures the control of another undertaking. Parties to a concentration, which consists of a merger or the acquisition of joint control, shall notify the concentration jointly. In all other cases, the notification shall be effected by the person or undertaking acquiring control of the whole or part of one or more undertakings.

Definition of concentration

A concentration shall be deemed to arise where a change of control on a lasting basis results from the merger of two or more previously independent undertakings or parts thereof, or the acquisition of direct or indirect control of the whole or part of an undertaking, regardless of the way in which this acquisition is affected. Article 5 of Law 3959/11 follows the definitions of Regulation No. 139/2004.

Cases of a change of control (e.g., changing from joint to full control) also constitute concentrations to be notified once the above-mentioned thresholds are met.

Creation of a joint venture constitutes a concentration only if the new entity performs all the functions of an autonomous economic entity on a lasting basis. Otherwise, it would be a cooperative joint venture, falling under the scope of Article 1 of Law 3959/11 (Article 101 TFEU) and possibly qualifying for exemption.

Substantive test

Greek law, following the EU substantive test (SIEC), provides that a concentration is prohibited if it may lead to a significant impediment of competition in the whole or a substantial part of the Greek market, especially by creating or strengthening a dominant
position. Therefore, market share will be examined, although it is not the only decisive criterion. Within the framework of the test, the law itself specifies the basic criteria to be considered thereunder, including:

- structure of the relevant markets;
- actual or potential competition;
- barriers to entry;
- market position of the participating undertakings;
- available sources of supply and demand;
- consumers' interest; and
- efficiencies.

The above test applies in all market sectors, except mass media, where a special law (Law 3592/2007) provides for a dominance test. For the purposes of this Law, ‘dominance’ is translated into a market share of 25 to 35 per cent, depending on the individual case.

**Procedure**

**Notification form**

The content of notifications is defined by a decision of the HCC. The HCC has issued a new draft notification form (through Decision No. 558/VII/2013) and a separate form for submitting remedies (through Decision No. 524/VI/2011). The format of these templates generally follows the guidelines of the European Commission, with the purpose of making the minimum information that must be substantiated as part of the notification clear to the notifying parties. The notification form must be submitted in Greek, together with all supporting documents and a filing fee, currently set at €1,100. A summary of the notification must also be published in a daily financial newspaper, as well as on the HCC website, so that any third party (competitor, supplier, customer, customers’ association) may know of the transaction and express any comments or concerns to the HCC.

Filling in and submitting the notification form improperly means that the notification is incomplete, the deadline for the submission is not met and the deadline for the HCC to issue its decision will not commence. Depending on the extent of omission, it may even be considered as a failure to notify.

**Confidential information**

In January 2015, the HCC issued a ‘Notice on the Characterisation of Confidential Information and the Method for Submitting Non-Confidential Versions of Documents’ (Notice). The Notice aims at clarifying the distinction between the information that should be considered confidential and that which need not, and allowing parties to utilise this distinction to characterise their own documents and submit both confidential and non-confidential versions thereof to the HCC. A prime example is merger notifications, which under this system are now submitted in two versions: a confidential version, followed by a duly redacted (per the rules set out in the Notice) non-confidential version. That being said, this Notice applies to all submissions of confidential information, not only those that are concentration-related.

The Notice sets outs indicative examples of confidential information such as professional and business secrets, correspondence between public authorities and preparatory documents, and proceeds to explain the correct method of redacting such information. It also includes a requirement of justification, meaning that each piece of information that a
party deems confidential and redacts must be accompanied by a justification for this action. A lack of justification entails a presumption that the parties do not consider the information confidential and thus have no objection to its disclosure.

Given that the redacting exercise was previously carried out by the HCC, this new system purports to increase efficiency by significantly reducing the burden on administrative resources. Although the extent to which this aim will be achieved remains to be seen, this Notice is a further indication of the Commission’s readiness to streamline its administrative procedure, something which is undoubtedly also in the best interests of the parties involved.

**Two-phase examination**

Within one month from receipt of proper notification, the President of the HCC must issue an act to certify that the concentration concerned does not fall within the scope of Law 3959/2011.

If the concentration falls within the scope of the Law, the concentration may be examined in one or two phases, in line with the practice defined by EU Regulation No. 139/2004. Where the HCC finds that the notified concentration does not raise serious doubts as to its compatibility with the competition requirements of the relevant national markets, it issues a decision approving the concentration within a month from the date of notification (i.e., within the same period granted for verifying whether the concentration falls within or outside the scope of the law).

Where the HCC finds that the concentration raises serious doubts, its President issues a decision initiating Phase II proceedings, which decision is notified to the interested parties. This decision must be issued within a month from notification. Following this decision, the **rapporteur** prepares his or her recommendation within 45 days of the initiation of the Phase II proceedings, and the HCC must decide within 90 days to approve or prohibit the concentration. If the HCC fails to issue a decision within this 90-day period, the concentration is deemed approved. Both the 45 and 90-day deadlines start as of the initiation of the Phase II examination, rather than the notification date.

The first month following the notification is the most critical. Within this period, the following developments will (or may) occur: the concentration will be declared as not falling within the scope of the law; the concentration will be approved if it does not raise serious doubts that it will significantly impede competition; or a Phase II proceeding will be initiated (i.e., it is decided that a full investigation must take place).

The maximum time frame, provided that the notification is complete and no remedies have been submitted (see below), is one month plus 90 days (i.e., 118 to 121 days, depending on the length of the month).

**Modifications and remedies**

Within 20 days of the submission of the recommendation of the **rapporteur**, the parties have the right to propose remedies to remove serious doubts as to its compatibility with competition in the relevant market. Although the possibility of making modifications was introduced in 1995, the term ‘remedies’ was added by the new Law. The HCC may, in exceptional cases, accept a proposal of remedies after the expiration of the above deadline. In this case, the 90-day deadline may be extended by 15 days (105 days in total).
**Conditions**

The HCC may approve the notified concentration, attaching to its decision conditions and provisions to ensure the compliance of the participating undertakings with the commitments agreed to by them, with a view to rendering the concentration compatible with the provisions of the law requiring that the concentration must not raise serious doubts about its significant impact on competition in the national market or, in the case of a joint venture, that the joint venture operates as an autonomous unit.

The HCC may threaten the participating undertakings with fines if they fail to comply with the conditions and provisions contained in the framework of the remedies.

**Derogations**

A prohibition of a concentration implementation prior to its clearance does not prevent the concentration in certain cases:

a in the case of an acquisition of control following a public offer or other stock exchange transaction, provided that the relevant actions are notified in time (i.e., within 30 days on the date of the transaction) and the buyer does not exercise its voting rights related to the acquired titles, except (by special permission of the HCC) to maintain the value of its investment; and

b by special permission of the HCC, to avoid serious damage to one or more of the undertakings participating in the concentration or to a third party.

**Revocation**

In addition to the general rules of the administrative law regulating the revocation of legal or illegal administrative acts, the new Law contains special rules concerning decisions approving the implementation of a concentration. One provision allows revocation of an HCC decision based on inaccurate or misleading data. Revocation in cases where the participating undertakings in the concentration violate any condition or accepted remedy is specifically regulated, thereby allowing the HCC to take any measures to dissolve the concentration, restore prior conditions, split the merged enterprises, or order the sale of the acquired shares or assets. This arrangement also applies in the case of concentrations implemented without approval.

**Sanctions**

Apart from its authority to revoke any decision approving a concentration and to restore conditions in the relevant national market, the HCC may impose fines, the amount of which depends on the type of violation, as follows:

a at least €30,000 and up to 10 per cent of the aggregate turnover in cases of violation of the obligation of an undertaking to notify a concentration subject to prior notification in a timely manner, regardless of whether the failure was unintentional but rather due to mild negligence;

b at least €30,000 and up to 10 per cent of the aggregate turnover for the implementation of a concentration before approval is granted;

c up to 10 per cent of the aggregate turnover of all participating undertakings that do not comply with the undertaken remedies; or
d) up to 10 per cent of the aggregate turnover of all participating undertakings for failure to comply with the conditions of the HCC decision contained within the framework of the approved concentration.

In addition, the new Law provides for criminal sanctions, which are cumulative to the fines imposed by the HCC. Article 44 Section 1 provides for a fine ranging from €15,000 to €150,000 to be imposed by a criminal court on anyone who violates the provisions on merger control or does not comply with the relevant decisions of the HCC. The criminal character of an offence is eliminated for culprits or accomplices who notify the HCC, the Prosecutor or any other competent authority of the violation, and submit any evidence of the offence.

Statute of limitations
Article 42 of the new Law provides that any violations of the Law are subject to a five-year statute of limitations, which starts on the date the violation was committed. In the case of a continuous violation or a repeated violation, it starts on the date the offence ceased.

Contrary to EU Regulation No. 1/2003, which only refers clearly to the violation of Articles 101 and 102 TFEU, the above provision, providing for 'any violations of the law', appears to also cover infringements of Greek merger control provisions. Such provision on the limitation period is absent from EU Regulation No.139/2004, but is indirectly found in Regulation No. 2988/74 (Article 1), which remains applicable for any competition infringements other than those falling under Regulation No. 1/2003.

The main question is whether late notification, prior implementation, or both, of a merger would be considered to be a continuous violation. It must be noted that issues regarding a statute of limitations have not been tackled by the HCC in merger cases.

However, the general rule of the administrative law should apply, which does not allow for the revocation of an illegal act after the lapse of a reasonable time; a period of five years is considered to be such.

The statute of limitations is interrupted by any act of the HCC (or the EC) during the investigation of the violation or of the procedures related to the specific violation, including but not limited to written requests of the HCC or another authority to provide information, orders for audits (or dawn raids), assignment of the case to a rapporteur, or servicing of a statement of objections or of a recommendation report. The interruption starts from the date of communication of the relevant act to at least one of the undertakings participating in the violation, and applies to all participants. The deadline for completion of the statute of limitations is suspended during the time that the act or decision of the HCC in relation to the case is pending before the courts. In any case, the statute of limitations is completed upon the lapse of 10 years (i.e., double the basic period of prescription).

Strictly speaking, legally the statute of limitations is an institution of civil law, and refers to claims against a person. The term is not compatible with the public law terminology, where the authorities do not exercise any right but perform their duties in accordance with the law. Therefore, in terms of administrative law, we should rather refer to a peremptory deadline, following the lapse of which the HCC is deprived of its authority to act and enforce the specific provisions of the law.
Judicial protection

The enforceable decisions of the HCC are subject to appeal (application for annulment) directly to the Athens Appellate Administrative Court. In merger cases, an appeal would normally challenge a decision of the HCC that either prohibited a merger or fined the undertaking for an alleged violation of merger control provisions (e.g., late notification). However, there has been one case where a third party successfully challenged the approval of a merger in court.

The Court examines both the legality and the substance of a decision, which may be annulled in full or in part. This includes a reduction of fines (if any), which is not uncommon. In contrast, the annulment of decisions is not as common: in many cases, this is due to technicalities, because of the HCC’s inability to adhere strictly to the administrative procedural rules.

An appeal does not suspend payment of a fine, or the enforcement of other conditions or remedies imposed by the opposed decision. The Court may, however, suspend enforcement, in full or in part, conditionally or unconditionally, in extreme cases (e.g., in an unfounded decision or due to the inability of the undertakings to pay the fine). Regarding a provision strongly contested as being unconstitutionally limiting, the Court has the authority to reduce the fine by up to 80 per cent.

The decision of the Appellate Court is subject to appeal (cassation) before the Supreme Administrative Court for legal reasons only (i.e., incorrect application of the law, assuming as correct the factual basis accepted or the dictum not being supported by reasoned arguments). Exceptionally, the law also allows the suspension of a contested decision of the Appellate Court by the Supreme Administrative Court.

In the event that a decision of the HCC is totally annulled, a case may be re-examined by the HCC, which will rejudge the case based on the conditions prevailing in the market at the time of this re-examination. A new or supplementary notification will be required if the conditions of the market have changed or the data submitted needs to be updated (Article 8, Section 13). This is a new provision introduced by the current Law that increases the discretionary authority of the HCC, as the decision of the Court is based on different facts from those that will form the basis for the re-examination of the notification for a second time.

iii Significant cases

Recent HCC decisions on concentrations – overview of mergers and acquisitions (M&A) activity

The past year was characterised by significant M&A activity across several diverse sectors of the economy, despite the fact that Greece is still affected by the repercussions of the financial crisis and that it has a long way to go until financial recovery.
Energy
The HCC approved\(^{21}\) the acquisition of joint control of Volterra Likovouni SA and Volterra Energy Production SA by Dei Ananoeisimes SA (which is a part of the Public Power Corporation group) and Volterra SA. The concentration affected the market of production and supply of electric energy from renewable sources; however, no anticompetitive concerns were identified.

Insurance
The HCC cleared, by virtue of decision 677/2019, the acquisition of 100 per cent of the shares of AIG Hellas by the AIG Group. The HCC did not identify any competition concerns caused by the concentration in the insurance and reinsurance markets.

Online betting
On 31 October 2019, the HCC unconditionally cleared the acquisition of joint control of the Greek and Cypriot online betting business of the company GML Interactive Limited by OPAP SA, Deep Investments Ltd and Padian Ltd.\(^{22}\)

Banking
The HCC approved,\(^{23}\) without identifying any anticompetitive concerns, the acquisition of 97.08 per cent of IBG SA, 94.52 per cent of CPB Asset Management and 100 per cent of Laiki Factors & Forfaiters SA by Ireon Investments Ltd, which belong in the wider market for the offering of banking and financing services.

Railways
Following phase II proceedings, the HCC cleared (decision 680/2019) the acquisition of sole control of the railway carriage maintenance company EESSTY SA (ROSCO) by acquisition of the railway carriage maintenance company Rosco by the – now Italian-owned – railway service operator TrainOSE. The acquisition forms part of the greater saga of the privatisation of the Greek railway sector, a sector that has also passed strict scrutiny by the EC’s DG COMP for state aid allegations. The HCC found that both companies enjoy a super-dominant position in their respective markets of activity (i.e., rolling stock maintenance - ROSCO and passenger and freight railway transport – TrainOSE). However, the applicable legal framework, which is enforced by the Regulatory Authority for Railways, was found to secure equal access to these markets for all interested potential competitors and to prevent unfair treatment by imposing strict rules and threatening sanctions.

Media
On 20 February 2019,\(^{24}\) the HCC unconditionally approved the acquisition of joint control of Alpha Satellite TV SA, Alpha Radiofoniki SA and Alpha Radiofoniki Kronos SA, through holding company Nevine Holdings Limited, by Motor Oil Hellas SA, Alpha Media Group Limited and Dimitrios Kontominas. The HCC found that the concentration fell under

\(^{21}\) HCC decision No. 694/2019.
\(^{22}\) HCC press release of 31 October 2019.
\(^{23}\) HCC decision No. 678/2019.
\(^{24}\) HCC decision No. 679/2019.
both the Greek competition law, Law 3959/2011, and Law 3592/2007, which regulates concentrations in the mass media sector. However, the acquisition would lead to a market share less than 35 per cent, which is the threshold of Law 3592/2007, below which the concentration normally does not create competition concerns.

**Chemicals**

On 21 March 2019, the HCC approved the acquisition of 100 per cent of the chemical products company Dr D A Delis SS by Ravago Chemicals SA, which involved three submarkets in the chemical products sector. The concentration had both a horizontal and a vertical effect; however, both companies had very low market shares in the affected markets, and therefore no competition concerns were identified.

**Aluminium industry**

The HCC approved, by virtue of decision 682/2019, the acquisition of aluminium recycling company EPALME SA by the Mytilineos Group following Phase II proceedings, and imposed remedies. More specifically, the concentration was found to have significant vertical and unilateral effects, given that the company, post-concentration, would continue to enjoy an (almost) monopoly position in Greece for aluminium recycling services and would also be able to tie the sale of billets and the sale of aluminium recycling services. Therefore, the HCC approved the concentration, on condition that the company would refrain from tying the above activities and from imposing any exclusivity clauses to its customers.

**Automobile sector**

The HCC approved, without identifying any anticompetitive concerns, the acquisition of sole control of Eltrekka SA by Autohellas SA which is active in the market for spare parts for commercial vehicles.

Similarly, in the market for the import, distribution and marketing of commercial and professional vehicles and spare parts, the HCC also approved the acquisition of 100 per cent of OPEL Hellas by Georgios Siggelidis.  

**Hotel services**

In the hotel services sector, the HCC unconditionally cleared the acquisition by Blackstone Group of sole control of a series of hotels (located in various locations in Greece) belonging to the company Louis Hotels SA.

**Carton production**

In October 2019, the HCC approved unconditionally (decision 692/2019) the acquisition of sole control of Mediterranean Paper Single Member SA by Hartel ABEE, which concerned a number of submarkets in the carton production sector.

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25 HCC decision No. 681/2019.
26 HCC decision No. 686/2019.
27 HCC decision No. 691/2019.
28 HCC decision No. 699/2019.
Consumer electronics
The HCC unconditionally approved (decision 695/2019) the acquisition of Media Saturn Electronics Hellas SA and Media-Saturn Griechenland GmbH, by Olympia Group Ltd, which effectively led to the acquisition of the ‘Media Markt’ retail businesses operating in Greece.

Sea passenger transport
The HCC convened on 19 December 2019 to examine the compliance of Attica Group with the remedies imposed in the context of its acquisition of Hellenic Seaways, which led to an increase and consolidation of a dominant presence of the Group in the Greek sea passenger transport market. Attica Group had committed to facilitate the entry of competitors in ‘port pairs’ (which are connected with itineraries) where it is dominant, not to increase fares and to maintain the current frequency of itineraries. However, according to the HCC’s relevant statement of objections, Attica Group failed to increase itineraries for certain destinations (including ‘barren’ lines, i.e. itineraries that are infrequently serviced due to low demand).

Milk
The HCC convened on 22 November 2019 to evaluate the efficiency of the remedies imposed on major milk companies Delta and Mevgal following the acquisition of Mevgal by Delta and the Chatzakos family. The two companies had committed to purchase milk from milk producers at a minimum guaranteed price for two years following the concentration; the relevant statement of objections proposes the extension of this remedy for two more years due to ongoing competition concerns created because of the concentration.

Real estate
The HCC approved, without identifying any anti-competitive concerns, the merger (by absorption) between Grivalia Properties, a fund that owns and manages real estate in Greece, and Eurobank Ergasias SA.

VII CONCLUSIONS
The new structure of the HCC has generally been successful by being more efficient and expeditious, demonstrating a better knowledge of the competition conditions and taking advantage of its interaction with the Directorate General of the European Commission. It can be seen that the refinements introduced by the new competition law are gradually improving the overall operation of the HCC. It now remains to be seen how the new Directive 2019/1 will be transposed into Greek law and whether it will contribute even more to the efficiency of the HCC’s operation.
Chapter 11

INDIA

Rahul Singh, Anmol Awasthi and Ebaad Nawaz Khan

I OVERVIEW

The Competition Act, 2002 (CA) seeks to: (1) prevent practices that cause or are likely to cause an appreciable adverse effect on competition (AAEC) in India; (2) promote and sustain competition in markets; (3) protect consumer interests; and (4) ensure freedom of trade among market participants. Sections 3 (anticompetitive agreements) and 4 (abuse of dominant position) of the CA are the substantive provisions that lay down the enforcement regime in India. These provisions came into effect on 20 May 2009. Further, Sections 5 and 6 of the CA are the substantive provisions on regulation of combinations in India and came into effect on 1 June 2011. The Competition Commission of India (CCI), has also promulgated the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (the Combination Regulations), setting in place the principal framework for review of pre-merger notifications by the CCI. The Combination Regulations came into effect on 1 June 2011, and at the time of writing this chapter, these have been amended eight times with the most recent amendments enacted on 14 August 2019 and 30 October 2019.

The CCI has the primary jurisdiction (to the exclusion of civil courts) over matters that allege contravention of the provisions of the CA. Notably, the CA currently does not provide for withdrawal of complaints or inter se settlements between parties before a final adjudication on merits. Appeals from the CCI’s decision lies with the National Company Law Appellate Tribunal (NCLAT), which is a common tribunal to hear appeals related to corporate/company law, insolvency law and competition law issues. The Supreme Court of India (the Supreme Court) remains the apex court to hear all disputes including competition law appeals from the NCLAT.

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2 A ‘combination’ refers to an acquisition of shares, assets, control or voting rights, or a merger or an amalgamation where the assets and turnover of the transacting parties exceed certain prescribed financial thresholds (the Jurisdictional Thresholds) set out under Section 5 of the CA. The Jurisdictional Thresholds are discussed in detail in Section V of this chapter.

3 However, the central government in India (similar to a federal government), by notification, can exempt from the application of the CA: (1) any class of enterprises in the interest of security of the state or public interest; (2) any practice or agreement arising out of and in accordance with any obligation assumed by India under any treaty, agreement or convention with any other country or countries; and (3) any enterprise that performs a sovereign function on behalf of the central government or a state government, to the extent of their activities relatable to sovereign functions.

4 NCLAT replaced the former Competition Law Appellate Tribunal (COMPAT) by way of an amendment to the CA through the Finance Act, 2017 effective from 26 May 2017.
It is also possible to approach a High Court,\textsuperscript{5} invoking its writ jurisdiction to uphold constitutional guarantees, including issues relating to due process and principles of natural justice. The CCI does not have any statutory power to review (its own orders), or contempt powers that Indian courts usually have. The NCLAT, however, has both review and contempt powers.\textsuperscript{6}

Section 3 of the CA deals with anticompetitive horizontal and vertical agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services. These agreements may be oral or written. Sections 3(1) and 3(2) of the CA prohibit these agreements and declare them void if they cause or are likely to cause an AAEC within India. However, agreements entered into to restrain any infringement or to impose reasonable conditions necessary to protect statute-conferring intellectual property rights (IPRs) (such as IPRs conferred under Copyright Act, 1957, Patents Act, 1970, and Trademarks Act, 1999) are exempted from competition scrutiny under Section 3 of the CA.

Contrary to Section 3, which requires establishing an ‘agreement’, thereby necessitating involvement of more than one enterprise or person or an association of enterprises or persons, Section 4 deals with the unilateral conduct of a ‘dominant’ enterprise. Once it has been established that an enterprise is dominant in a relevant market in India, the dominance would be considered to have been abused if the enterprise was engaged in certain exploitative or exclusionary conduct.

Finally, Section 6(1) of the CA prohibits combinations that may cause or are likely to cause an AAEC in India, and Section 6(2) requires that a combination (unless exempted)\textsuperscript{7} must be mandatorily notified to the CCI before consummation. It is important to note that India does not recognise the concept of voluntary notification of combinations. Therefore, if the Jurisdictional Thresholds are not met, no notice can be filed with the CCI.

Notably, the CA only provides for civil consequences for a contravention of its provisions. There are no criminal sanctions under the CA.\textsuperscript{8} Section 27 lays down the general penalties and sanctions for contravention of Sections 3 and 4 of the CA. These include: (1) cease-and-desist orders; (2) modification of agreements; and (3) monetary penalty up to 10 per cent of the average ‘relevant turnover’ of the contravening enterprise for the previous three financial years. For of cartels, the penalty on each cartel participant can extend up to three times its profits or 10 per cent of its average relevant turnover for each year of continuance of the cartel agreement, whichever is higher.

In the landmark ruling of the Supreme Court in \textit{Excel Crop Care Ltd. v. Competition Commission of India & Anr},\textsuperscript{9} the Supreme Court observed that the penalty for anticompetitive practices found to be in contravention of the CA should be based on the ‘relevant turnover’ relating to the infringing product or service and not on the total turnover, particularly for

\textsuperscript{5} Each state of India has a constitutional court called a High Court. Some of which have territorial jurisdiction over more than one state (e.g., Gauhati High Court has jurisdiction over the states of Assam, Arunachal Pradesh, Sikkim and Nagaland; Bombay High Court has jurisdiction over the states of Maharashtra, Goa, and the union territories of Daman and Diu).

\textsuperscript{6} Sections 53O and Section 53U, CA.

\textsuperscript{7} The exemptions are provided in Schedule I to the Combination Regulations and by way of the various notifications issued by the Ministry of Corporate Affairs (MCA) from time to time.

\textsuperscript{8} In cases of repeated non-compliance with orders passed by the CCI, the Chief Metropolitan Magistrate of Delhi, upon an application filed by the CCI before it, may order imprisonment against a defaulter for a term of up to three years or a fine of up to 250 million rupees, or both.

\textsuperscript{9} (2017) 8 SCC 47.
multi-product companies. This essentially implies that where cartel contraventions arise from products or services, then the penalty should be calculated based on the profit or turnover based on the same products or services. The Supreme Court noted that imposing a penalty based on relevant turnover allows for proportionality in punishment handed to the violators, which equally functions as a deterrent.

In addition to contravention of the CA by enterprises, Section 48 of the CA also empowers the CCI to impose monetary penalties on individuals who: (1) at the time of commission of the contravention, were in charge of and responsible for the conduct of the business (such as key managerial personnel and directors); and (2) are found to have actively participated in the contravention by consent, connivance or neglect (such as a director, manager, secretary or other officer of the company). In its decisional practice, the CCI has consistently scrutinised individual conduct and has imposed penalties to the tune of 10 per cent of the average income of these individuals for the previous three financial years. More importantly, if the fine imposed on the individual is greater than 1,000 rupees, the individual also faces disqualification from appointment as a managing or whole-time director or manager of an Indian company, per Schedule V to the Companies Act, 2013.

At the time of writing this chapter, the CCI has not promulgated any fining guidelines, preferring to allow the law to develop on how fines are computed. There are no decided factors that the CCI is required to consider while calculating fines. However, as discussed in detail in Section II, the Competition Law Review Committee (CLRC) has recommended the issuance of fining guidelines by the CCI to ensure transparency and faster decision-making.

i  Prioritisation and resource allocation of enforcement authorities

Due to the legacy of welfare state model, the CCI has conducted suo motu (or ‘own initiative’) investigations in sectors that affect the ‘common (wo)man’, such as sugar, agriculture, chemicals and domestic cooking gas. Further, the CCI has conducted investigations in important sectors of the economy (cement, steel, tyres, civil aviation, real estate, insurance, pharmaceuticals, etc.). The CCI has also particularly focused on public procurement, which accounts for more than 26 per cent of India’s gross domestic product. According to the secretary of the MCA (the ministry responsible for administration of the CCI), competitive procurement in India could result in cost savings to the extent of around 20 to 30 per cent, which would ultimately have a long-term impact on the economy.10 This, among other reasons, seems to have driven the CCI to focus on public procurement cases.

ii  Enforcement agenda

The marked focus of the CCI in enforcement in the past year has been on digital economy. The CCI ordered a second investigation against Google LLC for the alleged abuse of its dominant position in various relevant markets including the market for licensing smart mobile operating systems, and also directed investigations against domestic technology start-ups, MakeMyTrip India Private Limited and Oravel Stays Private Limited.

On the leniency front, continuing with the trend of 2018, the CCI disposed-off two additional matters involving leniency applications under Section 46 of the CA read with the Competition Commission of India (Lesser Penalty) Regulations, 2009 (LPR). An application

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under Section 46 of the CA read with the LPR contains a voluntary disclosure of a cartel with evidence. In return, an applicant under Section 46 of the CA is afforded the opportunity of being granted a reduced penalty (similar to the leniency policy of the European Commission). Notably, the CCI granted a 100 per cent waiver of penalty in both cases.

II CARTELS

Section 3(3) of the CA deals with practices, decisions and agreements among enterprises, persons, associations of persons or associations of enterprises, engaged in identical or similar trade of goods (i.e., horizontal agreements) including cartels. The term ‘cartel’ has been defined to include an association of producers, sellers, distributors, traders or service providers who, by agreement among themselves, limit, control or attempt to control the production, distribution, sale or price of, or trade in, goods or the provision of services.12

Horizontal agreements that directly or indirectly determine purchase or sale prices, limit or control production, supply, markets, technical development, investment or provision of services, share the market or source of production or provision of services or lead to rigging of bids or collusive bidding are presumed to cause AAEC and are, therefore, prohibited. However, this presumption of AAEC is rebuttable, and respondents can defend themselves by following the principles laid down in the Indian Evidence Act, 1872 relating to rebuttable presumptions. This proposition is strengthened by the operation of Section 36(1) of the CA, which clearly provides that the legislative intent is to ensure that the CCI abides by the principles of natural justice and due process, while inquiring into allegations of contravention of any provision of the CA.

Joint venture agreements between actual or potential competitors that increase efficiencies in production, supply, distribution, storage of goods or provision of services are exempted from competition scrutiny under Section 3(3) of the CA.

In relation to cartels, the Supreme Court in *Competition Commission of India v. Co-Ordination Committee of Artist and Technicians of West Bengal Film and Television Industry*13 had made certain observations which seemed to indicate that it was necessary for the CCI to define the relevant market in all cases including cartels. However, by way of a clarificatory order dated 7 May 2018, the Supreme Court clarified that delineation of the ‘relevant market’ is not a mandatory precondition for making assessment of an alleged contravention under Section 3(3) of the CA. Defining the relevant market may only be necessary when the presumption of AAEC is being rebutted in terms of Section 19(3) of the CA.

The CCI has extraterritorial jurisdiction. This means that anticompetitive practices, including cartels outside India, are also amenable to the CCI’s jurisdiction by the application

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11 An ‘enterprise’ under Section 2(h) of the CA has been defined as a person or a department of the government, engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether the unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the government relatable to the sovereign functions of the government including all activities carried on by the departments of the central government dealing with atomic energy, currency, defence and space.

12 Section 2(c), CA.

of the ‘effects doctrine’. The CA enables the CCI to enter into international cooperation arrangements or memorandums of understanding (MOUs) with the prior approval of the central government with overseas competition agencies, so that each authority may share experiences in their respective jurisdictions and raise the enforcement bar across the globe for the benefit of consumers. To date, the CCI has entered into MOUs with the Russian Anti-Monopoly Authority, the United States Department of Justice and the Federal Trade Commission, the Australian Competition and Consumer Commission, the European Commission, CADE (the Brazilian Antitrust Authority), the National Development and Reform Commission (Chinese regulator) and the Canadian Competition Bureau. The CCI has cooperated and exchanged relevant information by invoking these MOUs during its examination of several global mergers.

In the context of cartels, like the US and EU, the CA has a leniency programme. As briefly discussed above, an enterprise or an individual willing to avail itself of the benefit of the leniency programme needs to make an application to the CCI under Section 46 of the CA read with the LPR. Certain amendments to the LPR were notified on 22 August 2017 (the Amended LPR), which bring clarity to the existing leniency regime in India and provide incentives for companies and individuals to proactively assist in cartel enforcement. Prior to submission of the investigation report by the Office of the Director General (DG) to the CCI, any member of a cartel or an individual who has been involved in the cartel on behalf of the enterprise may file an application to the CCI under Section 46 of the CA read with the LPR. The basic condition for the success of an application is that the party claiming such relief must be a party to the cartel and must provide full, true, vital disclosures and continue to cooperate with the CCI. The CCI may grant a fine reduction of up to 100 per cent to the first applicant, up to 50 per cent to the second applicant and up to 30 per cent to the third applicant and subsequent applicants.

The Amended LPR provides important clarifications; for instance, it clarifies that there is no limit to the number of applicants that can approach the CCI (so long as an applicant can provide ‘significant added value’ to the investigation) and individuals who have been involved in the cartel on behalf of an enterprise can also apply for lesser penalty as stand-alone applicants. Apart from the above, the Amended LPR bring in some other important changes. As per the Amended LPR, there is a possibility of a reduction in penalty of up to 100 per cent both before and after the forming of the prima facie opinion by the CCI and now the names of the individuals who have been involved in the cartel need to be mentioned in the application. It is important to bear in mind that while an applicant under Section 46 of the CA may benefit from reduced penalties, the risk relating to the payment of compensation claims (which arises with the passing of the CCI’s order) still remains.

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14 Section 32, CA.
15 Proviso to Section 18, CA.
16 Section 46, CA.
17 Clause 4, LPR.
i Significant cases

The Second Zinc Carbon Dry Cell Batteries\(^{18}\) case arose out of an application filed by Panasonic Corporation Japan under Section 46 of the CA read with the LPR, disclosing an 'ancillary' (the primary cartel being the one in the First Zinc Carbon Dry Cell Batteries\(^{19}\) case of 2018) and 'bi-lateral' cartel between its subsidiary Panasonic Energy India Co Limited (Panasonic) and Geep Industries (India) Private Limited (Geep). Panasonic was a contract manufacturer of Geep and had entered into a product supply agreement containing a clause that obliged Geep to maintain prices agreed between Panasonic and Geep and not to take any steps detrimental to Panasonic’s market interests. The CCI found the clause to be presumptively anticompetitive. The CCI granted a 100 per cent reduction in the penalty for Panasonic for providing information and evidence that helped the CCI in forming a prima facie opinion and in establishing a contravention.

The Electric Power Steering case\(^ {20}\) also arose out of an application under Section 46 of the Act read with the LPR filed by NSK Limited Japan (NSK). JTEKT Corporation Japan (JTEKT) also filed an application under Section 46 before the CCI, but NSK was the first to approach the CCI. After an analysis of evidence, the CCI found that NSK and JTEKT, and their Indian subsidiaries Rane NSK Steering Systems Limited (RNSS) and JTEKT Sona Automotive India Limited (JSAI), respectively, indulged in cartelisation in the Electric Power Steering systems market from at least 2005 to 25 July 2011, by directly or indirectly determining prices, allocating markets, coordinating bid responses and manipulating the bidding process of certain automobile original equipment manufacturers (OEMs). The CCI in this case found contravention of the provisions of Sections 3(3)(a), 3(3)(c), 3(3)(d) read with Section 3(1) of the CA. The CCI granted a 100 per cent reduction in penalty to NSK and RNSS for vital disclosures by submitting evidence of a cartel, which enabled the CCI to form a prima facie opinion about the existence of a cartel and also full, genuine and continuous cooperation throughout the investigation. For JTEKT and JSAI, the reduction in penalty allowed was 50 per cent. The CCI granted a 50 per cent reduction of penalty on the ground that JTEKT and JSAI provided ‘significant added value’ and genuine, full, continual and expeditious cooperation.

The Tree Census case\(^ {21}\) arose out of a complaint filed by a charitable trust working for public cause against three companies involved in the business of software design consultancy and implementation services. The informant alleged that the three companies had predetermined a tender floated by the Pune Municipal Corporation (PMC) for selection of an agency to carry out a geo-enabled tree census. The DG conducted a thorough investigation pursuant to a direction of the CCI and relied on evidence such as bid documents, call detail records of concerned persons, internet protocol addresses of computers from which bid documents were uploaded, emails and statements of key officials and WhatsApp communications between key persons. The CCI relying on the evidence collected by the DG found that there was a tacit understanding between SAAR IT Resources Private Limited (OP-1) and CADD Systems and Services Private Limited (OP-2) as well as between OP-1 and Pentacle Consultants (I) Private Limited (OP-3), pursuant to which OP-2 and OP-3

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18 Suo Motu Case No. 03 of 2017: In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India.
19 Suo Motu Case No. 02 of 2016: In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India.
20 Suo Motu Case No. 07 (01) of 2014: In Re: Cartelisation in the supply of Electric Power Steering Systems.
21 Case No. 12 of 2017: Nagrik Chetna Manch v. SAAR IT Resources Private Limited & Others.
merely acted as proxy bidders or cover bidders for OP-1. In view of the CCI, the lack of proper scrutiny by PMC ensured that OP-2 and OP-3 could qualify in the technical round and benefit OP-1, to get the tender. If OP-2 and OP-3 were not eligible bidders, then the tendering process itself would have failed with there being no participants other than OP-1, which would have remained the lone bidder. The CCI in reaching these conclusions, inter alia, relied upon similarities in bid documentation, call detail records and screenshots of messages of the opposite parties. The CCI imposed penalty in this case at the rate of 10 per cent of the average relevant turnover for the past three financial years.

On 24 February 2012, the CCI penalised 48 cylinder manufacturers for collusive bidding in tenders for procurement of 14.2 kilogram LPG cylinder containers by Indian Oil Corporation Limited (IOCL). The CCI had found that the cylinder manufacturers were in contravention of the provisions of Section 3(3) read with Section 3(1) of the CA. The cylinder manufacturers had appealed the decision of the CCI before the former appellate body, the COMPAT, but the COMPAT upheld the findings of contravention on merits. The Supreme Court on 1 October 2018 set aside the aforementioned finding of contravention by the CCI and the COMPAT primarily on the grounds: (1) that the procurer (i.e., the IOCL) had control over negotiation of final prices of cylinders and (2) that a possible explanation for quoting similar price was not the meeting of minds but market conditions leading to the situation of oligopsony that prevailed because of limited buyers and influence of buyers in the fixing of prices.

The Supreme Court noted that the appellants had satisfactorily demonstrated that the price parallelism during the bidding process was attributable to the oligopsonistic nature of the market thereby rebutting any presumption of anticompetitive agreement amongst the bidders. The Supreme Court also found that pursuant to the appellants having established that the identity in prices was a result of the market’s oligopsonistic nature, the burden and onus to disprove this finding shifted back on to the CCI. Since the CCI had failed to prove that the price parallelism was not a result of the nature of the market, no finding of contravention could be sustained.

The judgment of the Supreme Court clarifies that in markets involving unique characteristics, for instance, where a large or dominant state-owned enterprise operates as a buyer and a limited number of smaller market players operate as sellers, the CCI must prove that coordinated behaviour, such as price parallelism, is not a result of the oligopsonistic nature of the market. This is a welcome clarification, specifically in the Indian scenario where antitrust investigations often involve unique market conditions, wherein tenders are floated by large state-owned enterprises at regular intervals in markets with limited sellers.

Recently, in LPG Cylinder cases decided in August and November 2019, the CCI applied the Supreme Court’s ruling in the Rajasthan Cylinders case and exonerated several LPG cylinder manufacturers in cases where DG had found contravention of the provisions of the CA. The CCI observed that although similar prices were quoted by

22 Suo Motu Case No. 03 of 2011: In Re: Suo moto case against LPG cylinder manufacturers.
23 Rajasthan Cylinders and Containers Limited v. Union of India and Others, (Civil Appeal No. 3546 of 2014).
24 Suo Motu Case No. 01 of 2014: In Re: Alleged cartelisation in supply of LPG Cylinders procured through tenders by Hindustan Petroleum Corporation Ltd. (HPCL) v. Allampally Brothers Ltd. & Others.
26 Rajasthan Cylinders and Containers Limited v. Union of India and Others, (Civil Appeal No. 3546 of 2014).
cylinder manufacturers, the same was a result of prevailing monopsony/oligopsony in the market and not cartelisation. While in the November 2019 case, the CCI has not found any contravention, in the August 2019 case, the CCI has found several cylinder manufacturers to be in contravention of the provisions of the CA, but this finding is in relation to alleged boycott of a bid and not for quotation of similar or identical prices.

ii Trends, developments and strategies

As stated above, the CCI in 2019 disposed-off two more matters involving applications under Section 46 of the CA read with the LPR and granted a 100 per cent waiver of penalty to the first applicant in both the cases. This is a welcome trend as it would encourage more firms to voluntarily disclose collusive conduct to the CCI, which is the most pernicious form of anticompetitive behaviour. The past year also witnessed the Supreme Court providing an important clarification on behaviour of firms in peculiar market conditions that could be misinterpreted as collusive conduct. This clarification came as a big relief for several cylinder manufacturers; even the CCI adopted the binding precedent of the Supreme Court.27 The NCLAT is still overburdened with cases arising out of the Insolvency and Bankruptcy Code, 2016 and various other company cases, which are typically handled as high priority. Accordingly, there were only a few final decisions of the NCLAT from the first statutory appeal allowed under the CA.

iii Outlook

In September 2018, the MCA constituted the CLRC to recommend necessary changes in the competition laws of India. The CLRC submitted its key recommendations to the central government in August 2019, including several recommendations in relation to the enforcement regime. Some of these recommendations are mentioned below:

a introduction of settlement and commitment mechanisms for enforcement cases under the CA;
b issuance of penalty guidelines; and
c introduction of a dedicated and specialist bench in the NCLAT for hearing appeals under the CA.

These recommendations will be key to making antitrust enforcement more robust in India.

III ANTI TRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Section 3(4) of the CA deals with agreements between entities operating at different levels of a supply chain in different markets (i.e., vertical agreements). These include:

a tie-in arrangement: any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
b exclusive supply agreement: any agreement restricting in any manner the purchaser in course of his or her trade from acquiring or otherwise dealing in any goods other than those of the seller or of any other person;

27 Suo Motu Case No. 01 of 2014: In Re: Alleged cartelisation in supply of LPG Cylinders procured through tenders by Hindustan Petroleum Corporation Ltd. (HPCL) v. Allampally Brothers Ltd. & Others.
exclusive distribution agreement: any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods; refusal to deal: any agreement that restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought; and resale price maintenance: any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.28

Unlike horizontal agreements, there is no presumption of AAEC for vertical agreements under the CA. The onus is upon the CCI to prove AAEC based on an assessment of the factors provided under Section 19(3) of the CA (discussed in the ensuing paragraph). The CCI is guided by the ‘rule of reason’ test. As such, vertical agreements are prohibited and void under the CA only if it is established that these agreements cause or are likely to cause an AAEC within India and the enterprise imposing them holds sufficient market power in the relevant market.

The AAEC test is the substantive test to ascertain contravention of the CA. It is a subjective test comprising an analysis of both anti-competitive and pro-competitive factors. These factors are set out below:
creation of barriers to new entrants in the market; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market; accruing benefits to consumers; improving the production or distribution of goods or the provision of services; and promoting technical, scientific and economic development by means of production or distribution of goods or the provision of services.29

The first three factors relate to anticompetitive effects arising out of the agreements in question and the defendant would be running a potential risk if the agreement in question is causing or is likely to cause the listed effects. On the other hand, the remaining three factors relate to generation of pro-competitive effects by the agreement in question and may provide a safe harbour to a party alleged to be in breach. In the Auto Parts case,30 the CCI has held that whether an agreement restricts the competitive process is always an analysis of the balance between the positive and the negative factors listed above.

Notably, the treatment of vertical agreements under the CA is unique since practices such as tie-in arrangements and refusal to deal fall within the purview of abuse of dominant position in more mature jurisdictions such as the EU. Further, resale price maintenance, which is a hardcore restriction in the EU, is tested under the rule of reason approach in India.

As for unilateral conduct, the now repealed Monopolistic and Restrictive Trade Practices Act, 1969 viewed large enterprises negatively. The CA does not prohibit an enterprise for holding a dominant position. However, it prohibits abuse of dominant position. The CA lists

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28 Section 3(4)(a)–(e), CA.
29 Section 19(3), CA.
30 Case No. 03/ of 2011: Shamsher Kataria v. Honda Siel Cars India Ltd & Ors.
13 factors for the assessment of an entity’s alleged ‘dominant position’ within the ‘relevant market’. The relevant market test includes the examination of statutory factors related to the relevant product market and relevant geographical market tests. The CA provides several factors for assessing the relevant product market and geographical market, and the CCI must examine each of the factors, as the case may be, to ascertain whether the dominant enterprise could affect the relevant market.

A dominant position has been explained in the CA as a position of strength enjoyed by an enterprise in the relevant market, in India, that enables it to operate independently of competitive forces prevailing in relevant market or affect its competitors or consumers or the relevant market in its favour. As mentioned above, the CA only prohibits an ‘abuse of a dominant position’. Section 4(2) of the CA prescribes the following as abuse:

a directly or indirectly imposing unfair or discriminatory conditions in the purchase or sale of goods and services or prices in the purchase or sale (including predatory pricing) of goods or services;

b limiting or restricting production of goods or the provision of services or market therefor or technical or scientific development relating to goods or services to the detriment of customers;

c indulging in a practice or practices resulting in the denial of market access in any manner;

d making conclusion of contracts subject to acceptance by other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts; and

e using a dominant position in one relevant market to enter into, or protect, another relevant market.

It is generally believed (but not yet decided) that the above list is meant to be exhaustive, rather than illustrative.

i Significant cases

The year 2019 saw increased scrutiny of unilateral actions especially with the CCI commencing various important investigations, all of which are undergoing investigation by the DG at the time of writing this chapter.

After holding Google LLC and Google India Private Limited (jointly, Google) liable for abuse of dominant position in 2018, the CCI on 16 April 2019 ordered another investigation against Google. This case arose out of an allegation of Google’s abuse of dominant position by engaging in different kinds of anticompetitive practices, either in the market in which it was dominant or in separate markets, with the aim of cementing Google’s dominant position in online general web search services and online video hosting platform (through YouTube). In its preliminary analysis, the CCI defined three relevant markets, namely (1) the market for licensable smart mobile device operating systems in India; (2) the market for app stores for android mobile operating systems; and (3) the online general web search service market, and found that Google was dominant in all the three markets. It is pertinent to mention that

31 Section 19(4), CA.
32 Section 19(5), (6) and (7) read with Section 2(t), (s) (t), CA.
33 Section 4(2) (a) to (e), CA.
34 Case No. 39 of 2018: Mr. Umar Javeed & Others v. Google LLC & Others.
while the CCI formally defined only three relevant markets, it noted that each application, such as online video hosting platforms, browsers, maps and music software, constituted a separate relevant market.

As regards Google’s abusive conduct, the CCI found that Google’s licensing agreements with android device manufacturers were conditional on the signing of two additional agreements that prima facie, among other things: (1) disincentivised the development and sale of non-Android devices; (2) allowed Google to leverage its dominance in one market to protect another market; and (3) amounted to a tie-in arrangement. Google argued that licensing was not conditional on the additional agreements; however, the CCI opined that the additional agreements were \textit{de facto} compulsory because if manufacturers did not sign them, they could not install must-have applications, such as Google Play, which directly impacted the commercial saleability of their devices. The CCI has now ordered a detailed investigation in the matter.

In the \textit{ONGC} case,\textsuperscript{35} the informant, a representative body of various ship owners, alleged that Oil and Natural Gas Corporation of India (ONGC), by way of imposition of unfair and onerous terms and conditions through a charter hire agreement had abused its dominant position in contravention of Section 4(2)(a)(i) of the CA. ONGC, in order to undertake oil and natural gas exploration and production activities used to seek support services from offshore oilfield services providers (member companies of the informant) pursuant to a competitive bidding process. One such service used by ONGC was charter-hire of offshore support vessels (OSV). The informant alleged that because of its dominant position, ONGC had inserted one-sided terms in the charter hire agreement for OSV. The CCI defined the relevant market as the ‘market for charter hire of OSVs in the Indian Exclusive Economic Zone (EEZ)’. The CCI limited the relevant geographic market to Indian EEZ having regard to factors such as trade barriers and national procurement policies.

The CCI also found ONGC to be in a dominant position in the said relevant market because of factors such as high market share (82 per cent) and ONGC being the largest buyer of OSV services. Importantly, the CCI noted that while high market share is only one of the guiding factors in determination of a dominant position, yet, it is a ‘potent screening test’. The CCI in this case did not find contravention of provisions of the CA but in holding so, it laid down an important principle. The CCI held that mere existence of an unfair condition on a consumer may constitute contravention of the CA but in a business-to-business (B2B) transaction, it was essential to undertake a fairness or reasonability test, and mere existence of the same is not sufficient to find contravention. In CCI’s view in B2B transactions it needs to be examined how the impugned condition affects the trading partners of the dominant enterprise as well as whether there is any legitimate and objective necessity for the same.

The year 2019 also saw the automotive sector’s continuous scrutiny under the CA for vertical restrictions. The CCI continued its trend of investigating allegations of resale price maintenance disguised under the garb of discount policies in the automotive dealership industry in India. The CCI ordered an investigation against Maruti Suzuki India Limited (MSIL), an automotive manufacturer in India based on an anonymous complaint.\textsuperscript{36} The complaint alleged that MSIL penalised dealers who provided additional discounts to

\textsuperscript{35} Case No. 01 of 2018: \textit{Indian National Shipowners’ Association (INSA) v. Oil and Natural Gas Corporation Limited (ONGC)}.

\textsuperscript{36} Suo Motu Case No. 01 of 2019: \textit{In re: Alleged anti-competitive conduct by Maruti Suzuki India Limited in implementing discount control policy vii-à-vii dealers}. 

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customers over and above what was recommended by MSIL. It was also alleged that the entire mechanism of controlling dealer discounts was enforced by MSIL through mystery shopping audits whereby, fake customers would pay surprise visits to inquire into dealer discounts at various stores and would report any additional discounts offered by the dealers to MSIL. In turn, MSIL would show cause the concerned dealer through email and in the absence of any credible justification, the dealer was directed to pay the penalty by way of cheque deposits to a specified account.

The hallmark of this order rests in the approach adopted by the CCI to arrive at its prima facie finding. Incidentally, the dealership agreements were silent on the discount control mechanism and allowed dealers the discretion to set discounts at will. MSIL cited various clauses of the dealership agreement to show lack of authority on its part to impose penalty for providing higher discounts. It also highlighted its efforts to encourage dealers to provide additional discounts instead, by contributing to the schemes floated by the dealers. However, the CCI disregarded the dealership agreement and deep dived into the actual on-field conduct of MSIL. Accordingly, despite the dealership agreements allowing MSIL’s dealers to provide additional discounts, the CCI focused on the substance or actual practice by assessing whether additional discounts were in fact permitted by MSIL without any restraints or penal measures. The order shows that the CCI appears to have now upped its ante by predating its findings on actual conduct of enterprises rather than being simply swayed by formal agreements. While the final fate of this order remains to be seen, it is clear that the auto-space will continue to be on the CCI’s radar of priority sectors.

The number of complaints relating to restrictive practices in the e-commerce or digital sector have also increased. The *Snapdeal* case involved allegations of resale price maintenance against Kaff Appliances (India) Private Limited (Kaff). A complaint was filed with the CCI by Jasper Infotech Private Limited alleging resale price maintenance restrictions on its online marketplace website, www.snapdeal.com (Snapdeal). Snapdeal argued that it had displayed products of Kaff at discounted prices on its website and aggrieved by the discounted pricing, Kaff uploaded a ‘caution notice’ on its own website stating that Snapdeal is selling its products without authorisation; and that Kaff would not honour warranties on products purchased through Snapdeal. The CCI observed that Kaff did not implement resale price maintenance in its distribution network. In relation to the caution notice, the CCI opined that the said caution-notice by Kaff indicated its genuine concern regarding sale of counterfeit goods. Taking cues from EC’s decisional practice, the CCI emphasised that the right of a manufacturer to choose the most efficient channel should not be interfered with unless it leads to anticompetitive effects. Accordingly, the CCI did not find Kaff’s conduct in contravention of the CA.

In a significant development at the appellate level, the Supreme Court upheld a judgment of the former COMPAT ordering an investigation against online ride-hailing app company, Uber India Systems Private Limited (Uber) for abuse of dominant position. This case arose out of a complaint filed by Meru Travels Solutions Private Limited against Uber before the CCI alleging that Uber had abused its dominance by alluding to predatory pricing and imposing unfair conditions. The CCI did not find a prima facie contravention, but this decision was reversed by the COMPAT. The COMPAT opined that it was a fit case to order a thorough investigation. However, Uber approached the Supreme Court for setting aside the judgment of the COMPAT, but the Supreme Court upheld the COMPAT’s decision. The

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37 Case No. 61 of 2014: *In Re: Jasper Infotech Private Limited v. KAFF Appliances (India) Pvt. Ltd.*
Supreme Court found that Uber was losing 204 rupees per trip in respect of every trip made by the cars of the Uber fleet owners. The Supreme Court was of the view that the incurred losses could not be economically and commercially justified and were indicative of Uber’s intent to eliminate competition in the market.

ii Trends, developments and strategies

Given the pace of growth of online trade and e-commerce in India, in April 2019, the CCI commenced a market study on India’s e-commerce sector to better understand its functioning and implications on competition. This study was undertaken under the competition advocacy provisions of the CA.38 The CCI published its interim findings on 30 August 2019 focusing on the markets for pan-India provision of goods and services including: (1) groceries; (2) mobiles; (3) hotels; and (4) food. On 8 January 2020, the CCI published its final report (the E-commerce Report). The key issues identified by the CCI in the E-commerce Report are as follows:

a platform neutrality: Online platforms make use of algorithms to influence search rankings. They also play a dual role of marketplace and sellers and have unfettered access to data on prices of competing products, consumer preferences, etc. This results in diminution of transparency on the online platform and distort the competitive landscape in favour of private labels owned by online platforms and preferred sellers;

b unfair business contract terms: Superior bargaining position of the online platforms allows them to unilaterally and arbitrarily increase the commission charged from the service providers. Other arbitrary terms include tying and bundling of services (such as, use of an online platform’s delivery fleet in the online food aggregators’ sector) and data-masking of data related to seller’s own products and services by the online marketplace;

c pricing: Deep discounting policies by online platforms increase the burden on the service providers and force them to set unviable rates that cut into their profits in the long run. The CCI acknowledged that while deep discounts aid customer onboarding, it may be imposed only when aligned with rational business practices;

d exclusivity agreements: Exclusivity agreements between certain platforms and service providers (online food and hotel booking sectors) which raises the risk of market access restrictions for competing market players; and

e platform price parity clause: Parity clauses imposed by online marketplaces require that sellers don’t offer better prices on other marketplace platforms or on their own website, or both. These clauses were identified as being market distortive due to their ability to disincentivise platforms to compete, increase coordination between platforms and raise barriers to entry.

38 Section 49, CA.
iii Outlook

Given the boom of e-commerce and digital markets, the Indian competition law landscape is likely to adapt its policies to meet the dynamic developments in commercial transactions. Notably, the E-commerce Report highlights the need for this adaptation and advocates online marketplaces taking certain voluntary measures in relation to, inter-alia: (1) search-ranking, (2) data collection policies; and (3) discounting practices. These measures are aimed at decreasing market distortion owing to the imbalance in bargaining power and information asymmetry in the e-commerce sector.

Additionally, the Indian automobiles and auto components sector is also on the CCI’s radar. The fact that the CCI took action against MSIL for alleged contravention of the CA purely based on an anonymous email complaint, is testament to the fact that the CCI is unlikely to gloss over the appointment of mystery shoppers or external agencies to monitor the prices and discounts offered by car dealers. This hardened approach of the CCI follows from earlier actions against Honda Motorcycle and Scooter India Private Ltd\(^{39}\) and Hyundai Motors India Limited\(^{40}\) for the imposition of similar vertical restrictions.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The CA provides for a mechanism of cooperation between the CCI and other Indian sectoral regulators to coordinate their enforcement actions through a process of consultations on various matters.\(^{41}\)

In an interesting development towards the end of 2018, the Supreme Court settled the law on the role of the CCI in the telecoms sector, which has its own specialist regulator called the Telecom Regulatory Authority of India (TRAI) under the Telecom Regulatory Authority of India Act, 1997 (the TRAI Act). In the Telecom Operators case,\(^{42}\) the Supreme Court upheld a judgment of the High Court of Bombay quashing the CCI’s prima facie order of investigation against Bharti Airtel Limited, Vodafone India Limited, Idea Cellular Limited (collectively, Incumbent Dominant Operators or IDOs) and the Cellular Operators Association of India (COAI). The prima facie order was on the basis that the IDOs did not provide interconnection points to Reliance Jio Infocomm Limited (RJIL), as a result of a cartel. The Supreme Court noted that while the CCI had exclusive jurisdiction to adjudicate upon issues governed by the CA, it also held that the issue of denial of points of interconnection was a technical issue pending before the TRAI and that the TRAI was the more appropriate authority and best suited to consider these issues. The Supreme Court also held that the CA was a special statute and if there is anticompetitive conduct, then it is within the exclusive domain of the CCI to examine and rule upon it. Even if the TRAI finds anticompetitive conduct, its powers would be limited to the action under the TRAI Act alone. Thus, the jurisdiction of the CCI was not barred, but simply pushed to a later

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39 Case No. 17 of 2017: Vishal Pande v. Honda Motorcycle and Scooter India Private Ltd.
41 Sections 21 and 21A, CA.
stage. The aftermath of this decision was seen in the NSE case,\textsuperscript{43} where the CCI dismissed the information after noting that another regulator, namely the Securities Exchange Board of India, was considering similar issues.

In 2019, the High Court of Bombay in \textit{Star India Private Limited v. Competition Commission of India and Others},\textsuperscript{44} used the principle iterated in the Supreme Court’s ruling in \textit{Telecom Operators} case to set aside another prima facie investigation order of the CCI against media broadcasters, Star India Private Limited and Sony Pictures Network India Private Limited. The case concerned, inter alia, refusal to deal with Noida Software Technology Park Limited. In this case, while an investigation was ordered by the CCI, the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) also had jurisdiction over the same issue under the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004 and was also seized of the matter. In the view of the High Court, unless the necessary ‘jurisdictional facts’ were adjudicated by the TDSAT, the CCI could not pass an order commencing its own investigation.

\section*{V \hspace{1em} MERGER REVIEW}

The Indian merger control regime is a mandatory regime; and accordingly, CCI approval must be obtained if the Jurisdictional Thresholds are met and the transaction is unable to benefit from the safe harbours set out in the Combination Regulations and in the notifications issued by the MCA from time to time. Further, the Indian regime is also suspensory in nature. As a result, a ‘combination’ cannot be consummated (entirely, or in part) without obtaining the CCI’s prior approval (except for green channel notifications discussed below). Where a combination is implemented without obtaining the CCI’s prior approval, the CCI can (and does) levy a penalty\textsuperscript{45} and may even declare the transaction to be void. As noted in Section I, there is no concept of a voluntary notification to the CCI (i.e., if the Jurisdictional Thresholds are not met, no notification can be filed with the CCI).

As described above in Section I, Sections 5 and 6 of the CA are the substantive merger control provisions that state which transactions are considered ‘combinations’ and prescribe the Jurisdictional Thresholds. As such, any direct or indirect acquisition of shares, voting rights, assets or control over the management or affairs of an enterprise, mergers (including court-approved mergers), and amalgamations\textsuperscript{46} are required to be notified to the CCI if the transactions exceed the Jurisdictional Thresholds and cannot make use of the safe harbours. The Jurisdictional Thresholds involve an analysis of the worldwide and Indian assets and turnover of both: (1) the directly transacting parties (the parties test); and (2) the acquiring group and the target (the group test), as shown in the tables below.

\begin{table}
\end{table}

\textsuperscript{43} Case No. 47 of 2018: \textit{In Re: Jitech Maheshwari And National Stock Exchange of India Limited}.
\textsuperscript{44} \textit{Star India Private Limited v. Competition Commission of India and Others} (Writ Petition No. 9175 of 2018, High Court of Bombay).
\textsuperscript{45} Section 43A, CA.
\textsuperscript{46} Section 5, CA.
Mergers, acquisitions and amalgamations involving small targets are exempted from notification requirements. On 27 March 2017, the MCA has prescribed a *de minimis* exemption, whereby a transaction is not required to be notified to the CCI if the target either has value of assets of less than 3.5 billion rupees in India or turnover of less than 10 billion rupees in India. The *de minimis* exemption is currently available until 28 March 2022, unless otherwise extended. Apart from the *de minimis* exemption, the MCA has introduced a series of exemptions from merger control notification obligations under Section 5 and Section 6 of the CA. These include, combinations involving (1) central public sector enterprises and their subsidiaries operating in the oil and gas sectors under the relevant regulations for a period of five years from 22 November 2017; (2) reconstitution, transfer, and amalgamation of nationalised banks under the relevant banking regulations for a period of 10 years from 30 August 2017; and (3) regional rural banks notified by the Central Government for a period of five years from 10 August 2017.

In addition, Schedule I to the Combination Regulations also provide certain safe harbours from notification obligation. These are of a qualitatively different nature and concern combinations which are ‘ordinarily not likely to cause an AAEC in India’.

Merger notifications can be made in Form I or Form II. It is recommended, but not required, that notification should be made in Form II when the parties’ businesses overlap horizontally or vertically in any relevant market and their combined market share in the horizontal market exceeds 15 per cent, or if their individual or combined market shares in the vertical market exceeds 25 per cent.47 Form II requires more extensive information as compared to Form I. The merger filing fee has been recently revised for the second time since the regime came into effect.48 The revised filing fee for Form I notification is 2 million rupees and the filing fee for a Form II notification is 6.5 million rupees.

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Merger notification can be filed with the CCI at any time after the execution of the trigger document (i.e., execution of binding transaction documents or any other document conveying an agreement to acquire control, shares, voting rights and assets in acquisitions,
India

and approval of the parties’ board of directors in mergers). Further, in acquisitions, the onus to file the merger notification is on the acquiring entity whereas, in a merger or amalgamation, the onus to file is on both parties. The parties can also withdraw and refile notifications.

A notified transaction cannot be consummated (in part or in entirety) until the CCI approval is received or 210 calendar days (excluding clock stops) have passed from the date of notification, whichever is earlier. Non-filing of a ‘combination’ and implementing the transaction before CCI approval (i.e., gun jumping) can attract a monetary penalty of the higher of 1 per cent of the combined assets or turnover of the parties to the combination. Further, where a transaction is not notified at all, the CCI has a ‘look-back’ provision to initiate an inquiry within the period of one year from the date of consummation of the transaction.

The CCI has 30 working days from the date of filing the merger notification to form a prima facie opinion on whether the proposed combination results in an AAEC in the relevant markets in India. This is akin to what is called a Phase I review in other jurisdictions. The time taken by the parties to respond to CCI’s requests for additional information is excluded from the 30 working day period (i.e., a ‘clock stop’). If the CCI forms a prima facie opinion that a proposed combination does not (or is not likely to) cause an AAEC in India, it issues a formal order approving the proposed combination.

However, if the CCI is unable to form such an opinion, it issues a notice to the parties seeking their views on why a detailed investigation to examine the competitive effects should not be initiated. If the parties are successful in addressing the CCI’s concerns (by voluntarily offering structural or behavioural remedies, if required), the CCI does not initiate a formal Phase II inquiry and approves the transaction. However, if the CCI is not satisfied, it initiates a formal Phase II investigation.

The CLRC had also made certain recommendations to streamline the merger control regime in India with international best practices, to further improve the ease of doing business in India, and to further ease the approval process for mergers and acquisitions in India. One recommendation was introduction of a green channel notification mechanism for combinations that are unlikely to result in any AAEC to avoid delay in merger implementation. The 2019 amendment to the Combination Regulations, which came into effect on 15 August 2019, have now introduced a green channel mechanism that can be optionally utilised by parties to certain types of transactions set out in the newly added Schedule III to the Combination Regulations.

The green channel route is an automatic and fast-paced approval channel and is available to the parties that do not have any horizontal, vertical or complementary overlaps. While determining overlaps, Schedule III of the Combination Regulations requires parties to self-assess and consider all plausible alternative relevant market definitions. The overlaps also need to be evaluated vis-à-vis: (1) the parties themselves; (2) all the group entities for all the parties; (3) all entities where the parties directly or indirectly hold shares; and (4) all entities where the parties directly or indirectly exercise control. Upon receipt of an acknowledgment of a notification filed under the green channel, the transaction will be deemed approved by the CCI and can be consummated by the parties on the same day without waiting for the statutory period of 210 days to expire.

49 Section 43A, CA.
50 Proviso to Section 20(1) of the CA.
The 2019 amendment have also restructured the format of Form I by adding certain additional items. It now requires details of: (1) interconnected transactions; (2) rights acquired by the parties to the combination; (3) foreign investment as a result of the combination; (4) information on complementary business activities between the parties, etc.; (5) market-facing data (such as, market size, shares) for the past three years as against the earlier practice of the past one year; (6) all plausible alternative relevant markets (including explanations for accepting or rejecting a specific definition); and (7) any proceedings before the CCI or other competition authorities to which the parties are or were a part of in the past five years.

In addition to the green channel proposal, the CLRC in line with EC’s decisional practice has also recommended dilution of the standstill obligation for public bids, hostile takeovers and open market purchases. Currently, given the suspensory nature of the regime, a ‘combination’ cannot be consummated until prior approval from the CCI is received. This is equally applicable to minority acquisition of listed shares on the stock exchange, including potential hostile acquisitions, where the execution and completion are instantaneous. Even arrangements that enable the purchaser to surrender beneficial rights including voting rights and place the purchased shares in an escrow pending CCI approval have not passed muster with the CCI in the past. For example, companies like Thomas Cook (India) Limited, Zuari Agro Chemicals Limited and Deepak Fertilisers Petrochemicals Corporation Limited have faced significant penalties for carrying out market transactions without prior CCI approval.

To address this issue, the CLRC recommended that parties to these transactions may be allowed to purchase securities in the open market provided they surrender the beneficial rights attached to the securities and deposit the securities in an escrow account until CCI approval is received. To this effect, the CCI has proposed further amendments to the Combination Regulations whereby parties will be allowed to approach the CCI for approval after the open market purchase provided that the beneficial rights (voting or economic) attached to the shares are kept in abeyance until approval and the target entity is not influenced. Other noteworthy recommendations of the CLRC relating to merger control include:

a. the introduction of ‘material influence’ standard to determine control along with subordinate legislation to provide guidance: Currently, the definition of ‘control’ in CA does not indicate the rights that may amount to control. The CCI’s decisional practice has used the standard of ability to exercise ‘decisive influence’ as well as ‘material influence’ to determine control (such as, shareholding, special rights, and board representation);

b. introduction of deal-value threshold for merger notification, including objectively quantifiable standards for computation of the value as well as a local nexus criterion. This would ensure that only those transactions that have a significant economic link to India are caught by the threshold;

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51 Thomas Cook (India) Limited/Sterling Holiday Resorts (India) Limited (Combination Registration No. C-2014/02/153), Order under Section 43A of CA. The CCI findings were upheld by the Supreme Court in Competition Commission of India v. Thomas Cook (India) Limited and Ors., (2018) 6 SCC 549.

52 Zuari Agro Chemicals Limited and Another/Mangalore Chemicals and Fertilizers Limited (Combination Registration No. C-2014/06/181), Order under Section 43A of CA.

53 SCM Solifert Limited/Mangalore Chemicals and Fertilisers Limited (Combination Registration No. C-2014/05/175), Order under Section 43A, CA. The CCI findings were upheld by the Supreme Court in SCM Solifert Limited v. Competition Commission of India, (2018) 6 SCC 631.
that equal opportunities should be given to CCI and the notifying parties for proposing remedies at various stages of the merger assessment process, with the ultimate decision to reject all proposals with the CCI. It is also recommended that the CCI must undertake the process of market testing of remedies in appropriate cases and that the process of market testing must be robust;

codification of all permissible time exclusions from the 210-day review timeline for assessment of mergers since the timeline is sacrosanct. The 210-day timeline must commence once the parties have provided all information to CCI; and

streaming of exemptions to Section 5 of the CA.

i Significant cases

The year 2019 saw the clearance of several mergers, important from an international as well as domestic jurisdiction perspective.

For instance, in L&T/Schneider,54 the CCI conducted its eighth Phase II investigation and granted conditional approval to the India leg of the global transaction involving Larsen & Toubro Limited (L&T), Schneider Electric India Private Limited (SEIPL) and MacRitchie Investments Pte Limited (MacRitchie). The proposed transaction envisaged the consolidation of the two closest competitors in the low voltage (LV) switchgear industry in India, namely L&T and SEIPL. The CCI assessed the proposed transaction at the product level and the cluster/portfolio level and narrowed down 15 product markets that were highly concentrated with combined market shares of more than 30 per cent. At the cluster level, six products were identified where the combined market shares of the parties were in the range of 55 to 60 per cent. The CCI formed a prima facie opinion that the transaction would likely cause an AAEC in the overall market for LV switch gears in India and conducted a Phase II investigation. The parties offered the CCI a remedy package consisting of several behavioural commitments. Notably, while negotiating the remedy package, the CCI observed that ‘white labelling’ was an industry practice in the LV switchgear market, and many manufacturers entered into brand label agreements with third-party manufacturers to complete their product portfolio. The CCI also observed that the EC in its decisional practice had recognised white labelling as an effective alternative to divestment of high market share products in the LV switchgear industry.

The CCI ultimately accepted the remedy package offered by the parties, which included SEIPL’s commitment to strengthen the existing third-party LV switchgear manufacturers by offering them white-labelling product manufacturing services for five products manufactured by L&T. The transaction assumes significance given that this order marks the first-of-its kind insofar as it mandates pure play behavioural remedies ranging between three to five years. Until now, in all its previous Phase II investigations, the CCI’s preferred remedy has been divestment or a combination of divestment coupled with certain behavioural commitments.

In L&T/Mindtree,56 the CCI approved the acquisition of 66.15 per cent of the total equity shareholding of Mindtree Limited (Mindtree) by Larsen & Toubro Limited (L&T). The CCI observed that both L&T and Mindtree (Parties), are engaged in the provision of IT and IT-enabled services. The CCI left the definition of the relevant market open in the

54 Larsen & Toubro Limited and MacRitchie Investments Pte. Limited/Schneider Electric India Private Limited (Combination Registration No. C-2018/07/586).
55 Case No. M.8678: ABB/General Electric Industrial Solutions.
56 Larsen & Toubro Limited/Mindtree Limited (Combination Registration No. C-2019/03/652).
absence of competitive concerns in any of the possible alternative relevant markets. This transaction is considered to be the first hostile takeover to receive CCI approval. Deals with similar structures involving secondary purchases and a block deal on the market have been fined in the past for closing the stock market purchase pre-CCI approval.

Similarly, in the IHH/Fortis case, the CCI approved the acquisition of Fortis Healthcare Limited (FHL) by Northern TK Venture Pte Limited (NTK). NTK belongs to the IHH Health Care Berhad (IHH) group, which is a global provider of integrated healthcare services. NTK had submitted that the hospitals operated or owned by FHL and itself were active in the market for ‘private tertiary hospitals’ and provided primary, secondary, tertiary and quaternary services. The CCI assessed market power and observed that the parties would face significant competitive pressure from, inter alia, Apollo Hospitals, Narayana Health, Manipal Hospitals. However, the CCI voiced certain concerns regarding Apollo Gleneagles Hospital, a joint venture (JV) that was entered into by a subsidiary of IHH, Gleneagles Development Pte Limited (GDPL) and Apollo Hospitals. The CCI expressed concern that FHL, Apollo Hospitals and GDPL were competitors in the field of healthcare and that the JV could act as a platform to facilitate collusion. In order to alleviate the concerns of the CCI, NTK gave voluntary commitments, which would ensure that the JV and the entity created post transaction would operate as ‘separate, independent and competitive businesses’. These included ensuring no common directors were appointed by IHH or GDPL on the board of the JV or the entity created post transaction; no sharing of ‘commercially sensitive information’ and such other commitments to prevent information sharing. The commitments were accepted by the CCI and the transaction stood approved.

The CCI also cleared Saudi Arabian Oil Company’s (Saudi Aramco’s) proposed acquisition of 70 per cent shareholding in Saudi Basic Industries Corporation (SABIC). The CCI identified several overlapping products sold by the parties. However, owing to the low incremental market share that would be gained by Saudi Aramco from SABIC and the presence of competitors such as Reliance Industries Limited, DowDuPont, Mitsui & Co Ltd, Gas Authority of India Limited and IOCL, the CCI concluded that there will likely be no adverse effect on competition. Regarding the potential for vertical relationships, the CCI noted that other vertically integrated companies, such as Reliance Petroleum Limited, IOCL and Mangalore Refinery and Petrochemicals Limited, exist in the market and, accordingly, approved the combination as it was unlikely to cause any competitive concerns.

Trends, developments and strategies

The CCI has continued to reform the merger control regulations since 2011. The introduction of a green channel mechanism is certainly laudable to further bolster the ease of doing business in India. This will permit the CCI to prioritise its resources. However, there are also uncertainties surrounding its structure. For example, the newly introduced Schedule III requires parties to ensure that there are no horizontal, vertical or complementary overlaps in all plausible alternative market definitions. The incorporation of this expression has far reaching ramifications and makes an overlap assessment highly onerous in application. Complementary activity is a newly introduced expression, and there is no guidance on the

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58 Saudi Arabian Oil Company/Saudi Basic Industries Corporation (Combination Registration No. C-2019/09/683).
import or interpretation of complementary activities. This again places a heavy burden on parties to determine what constitutes complementary activity and may require the parties to effectively seek the CCI’s views through informal consultations, on a case-by-case basis. Further, given the onus imposed on the parties, even assessing suitable horizontal and vertical overlaps to the CCI’s satisfaction may turn out to be challenging.

The 2019 amendment also does not specify the actions that will follow if the merger notification filed under green channel route is declared *void ab initio*, for example, whether another notification would be required and how the CCI would assess the transaction. The CCI has further streamlined the structure of Form I based on its learnings over the years. However, the burden on the parties to choose and justify their choice of relevant market definition is increased. This intent extends to the heavy data-gathering exercise for market information, which is now required for the preceding three years, regardless of the extent of overlaps.

Additionally, the CCI also cleared its eighth transaction which underwent a Phase II investigation. This was also the first transaction in which the CCI accepted modifications to the transaction in the form of pure-play behavioural remedies, and did not require any structural remedy (divestment) to be carried out, in order to reduce the anticompetitive impact of the transaction.

### iii Outlook

As mentioned above, the 2019 amendment to the Combination Regulations have far reaching ramifications. This amendment seeks to bring about a major shift in the existing merger control landscape in India. The green channel mechanism has been introduced to further streamline the approval process for M&A and is in line with the central government’s policy of ease of doing business in India. However, the uncertainties surrounding the structure of the green channel mechanism may render the process onerous.

As regards the amendments to the Combination Regulations in the last year, the CCI is also expected to provide the much-needed guidance and clarifications on the gaps created by these amendments.

### VI CONCLUSIONS

The CLRC recommendations as well as the amendments to Combination Regulations took centre stage in 2019, instilling optimism and confidence not only in the Indian competition law regime but also in the business environment in India. The CLRC’s recommendations are aligned with the central government’s larger policy initiative of enhancing ease of doing business in India. Therefore, it is not surprising to find that the central government has been very quick to take note of the CLRC’s recommendations. In 2020, one can expect implementation of other CLRC recommendations.

In enforcement, as mentioned earlier, the focus of the CCI has been on the digital economy. In 2019, the CCI initiated some high-stakes investigations, and 2020 may hold answers to the antitrust woes of giant tech companies and e-commerce platforms. On the leniency front, while the number of cases involving leniency applications came down, the CCI instilled confidence in the regime by granting 100 per cent waiver of penalty in the two applications decided in 2019.
As regards the merger control regime, the central government and the CCI have significantly streamlined the regime by introducing the green channel notification route and through a series of amendments to the Combination Regulations. But that is not all; the CCI clearly believes in streamlining the regime through its decisional practice as well. The CCI maintains the reputation of granting swift approvals – with an average time of 45 to 60 days. The CCI remains open to remedies and learning from foreign jurisdictions.
Chapter 12

INDONESIA

HMBC Rikrik Rizkiyana, Farid Fauzi Nasution and Vovo Iswanto

I OVERVIEW

Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (the Indonesian Competition Law (ICL)) is the primary legislation regulating business competition in Indonesia. Besides being the basis for the prohibition of anticompetitive agreements and conducts, the ICL is also the basis for the establishment of the Indonesia Competition Commission (or Komisi Pengawas Persaingan Usaha (KPPU)). As the only authority responsible for the enforcement of the ICL, the KPPU may initiate investigations and examinations as well as issue decisions and impose administrative sanctions for any violation of the ICL.

Since its establishment in 2000, the KPPU has actively enforced the ICL and conducted investigations and examinations in various industries. Up to 2019, the KPPU has issued 339 decisions regarding alleged violation of the ICL. Among those, 242 decisions were related to bid-rigging.

Based on the information provided on the KPPU’s website, the KPPU mostly resolved cases that are related to bid rigging and merger notification in 2019. Out of the 32 resolved cases, 12 cases relate to failure to notify any notifiable transactions to the KPPU and 18 cases relate to bid-rigging practice. The increased scrutiny by the KPPU on alleged notification failure in 2019 is quite apparent when the number of merger-related cases resolved in 2019 is compared with the number of cases resolved from 2010–2018. This trend is actually expected considering in 2018 the KPPU set an agenda to review transactions completed from 2010 (when the Indonesian Merger Control Rules came into force) in order to identify any that should have been notified but were not.

II CARTELS

The prohibition under the ICL covers several forms of cartel behaviour, including price-fixing, production arrangements, market allocation, boycotts, bid-rigging and other horizontal arrangements that may restrict competition or harm consumers.

The prohibition of cartels, as well as other stipulations under the ICL, applies to an undertaking, which is defined as any individual or business enterprise, whether incorporated or otherwise, established and domiciled or conducting activities within the territory of the

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1 HMBC Rikrik Rizkiyana, Farid Fauzi Nasution are partners, co-heads of competition practice group, Vovo Iswanto is an Of Counsel at Assegaf Hamzah and Partners.

2 The authors’ own calculation based on the KPPU’s website.
Republic of Indonesia, whether individually or jointly through agreement, in the form of various operations in the economic sector. Although the KPPU has included individuals as reported parties in several cases, there is some debate over whether the ICL applies to individuals.

Violation of the ICL is subject to several forms of administrative sanctions. Should the KPPU conclude that a violation has occurred, it has the power to:

- annul the anticompetitive agreement;
- award compensatory damages incurred as a result of anticompetitive conduct; and
- impose a fine in the amount of 1 billion rupiah up to 25 billion rupiah.

Even though the ICL also stipulates criminal sanctions in the form of imprisonment and criminal fines, these sanctions are only applicable when an undertaking has obstructed the investigation or examination carried by the KPPU or did not comply with a legally binding KPPU decision. The enforcement of criminal sanctions is under the jurisdiction of the National Police, since the KPPU is only authorised to impose administrative sanctions. To date there has been no published official guideline on how to perform criminal sanction procedure.

There is no stipulation regarding formal leniency programmes, an ‘immunity plus’ policy, ‘plea bargains’ or other forms of binding settlement, or programmes aimed at detecting cartels under the current ICL. The KPPU in its decision might consider the cooperation offered by the reported party as a mitigating factor in determining the imposed fine.

There have been discussions and attempts to implement a leniency programme through amendments of the ICL. Based on the latest draft of the amendment that is available to the public, the KPPU will have the authority to grant a reduction in the fine to undertakings that admit and report certain anticompetitive agreements. The details regarding the procedure for such leniency programme are still unclear, since the latest draft only stipulates that further provision on the leniency programme will be stipulated in a KPPU Regulation.

i Significant cases

Bid-rigging is the most common cartel practice investigated and examined by the KPPU in 2019. Out of the 19 decisions on alleged cartel practice, 18 of them are related to bid-rigging. The only non-bid rigging cartel decision in 2019 is the KPPU Decision No. 09/KPPU-I/2018 relating to alleged cartel practice in the importation and supply of food-grade industrial salt (the Salt case).

The investigation in the Salt case was launched at the KPPU’s initiative, in which the KPPU’s investigators accused seven salt importers: (1) PT Garindo Sejahtera Abadi; (2) PT Susanti Megah; (3) PT Niaga Garam Cemerlang; (4) PT Unichem Candi Indonesia; (5) PT Cheetam Garam Indonesia; (6) PT Budiono Madura Bangun Persada; and (7) PT Sumatraco Langgeng Makmur, of allocating the quota for food-grade industrial salt importation and restricting the supply in the market. In the investigation report, the KPPU’s investigators stated that since March 2015, consumers in the food and beverages industry have had difficulty obtaining the supply of imported food-grade industrial salt for their production. This led to the price increase for imported salt in 2015–2016. According to the KPPU’s investigators, such shortage was unreasonable since their calculation showed that the remaining stock of imported food-grade industrial salt at the end of 2014 was sufficient to meet the demand at the beginning of 2015.
In its decision, the KPPU’s Commissions Assembly provided its analysis on the movement of the price for salt in 2015 from each reported party. Based on this analysis, the KPPU’s Commissions Assembly concluded that there was an increase in the price from several reported parties. However, the price increase was below 10 per cent, which is deemed by the KPPU’s Commissioners Assembly as the inflation rate for two years. Hence, the price increase was deemed insignificant and tolerable. Based on this, the KPPU’s Commissions Assembly declared that there was no significant increase in the price for food-grade industrial salt. Considering the alleged cartel practice unfounded, the KPPU’s Commissions Assembly then declared all reported parties are not guilty of the cartel allegation.

The used of inflation rate as a reference in assessing price increase can be considered ground-breaking since such approach has never been used by the KPPU before. However, in the Salt Case, it is unclear what data was referred by the KPPU’s Commission Assembly to come up with such inflation rate, as official data from the Central Bureau of Statistics suggested that the year-on-year inflation rate for 2015 and 2016 are 3.35 per cent and 3.02 per cent, respectively.3

ii Trends, developments and strategies

Based on the information on the KPPU’s website, there is only one cartel case currently undergoing the examination stage. The case involves two of the biggest airlines groups in Indonesia, namely Garuda Indonesia and Lion Air Groups. The KPPU’s investigator accused those two airlines of fixing the ticket price for domestic flights.

In August 2019 in several media releases, the KPPU has hinted a possible investigation into the fintech industry. The KPPU suspected that there might be an alleged cartel practice to fix the interest for online peer-to-peer lending through the Indonesian Joint Funding Fintech Association. However, there is no additional information provided by the KPPU relating to this matter.

iii Outlook

In several media releases, the KPPU has acknowledged the strategic nature and rapid growth of the fintech industry. The Financial Services Authority (OJK) has also acknowledged the business model of fintech lending that is prone to cartel practice. At the time of the writing of this publication, the KPPU has not released its work plan for 2020. However, based on informal discussion with the KPPU, the fintech industry will be one of the industries to be monitored closely by the KPPU in the year ahead.

Further, in the following years, we may also see the long-awaited enactment of the amendment to the ICL. Even though many have estimated this enactment to take place in 2019, it is understandable that this target was not met considering the changes in the House of Representative following the General Election in mid-2019. Based on the previous draft, the enactment of the amendment will bring significant changes to cartel enforcement by the KPPU through the introduction of the leniency programme, which is expected to provide an efficient tool for the KPPU in detecting cartels and is in line with competition

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law enforcement best practices in other jurisdictions. The leniency programme will be a very attractive option for undertakings that are involved in an anticompetitive agreement, considering the amendment will likely introduce higher fines compared to the current ICL.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Vertical restraint provisions are regulated in Chapter 3 and Chapter 4 of the ICL. In addition to the above, the KPPU has issued several regulations serving as guidelines for interpreting provisions under the ICL.

The ICL stipulates the following specific prohibitions on to vertical restraints:

- Resale price maintenance: any agreement with distributors or other undertakings obliging distributors to refrain from reselling or resupplying goods or services below the set minimum price, creating an unfair business competition;
- Vertical integration: any agreements between businesses at different levels of the production chain with the intention of one business controlling the production of the other business’s products, in which the latter’s products are used as the part or parts of inputs for the former business;
- Exclusive distribution agreement: any agreement requiring distributors to only supply or not supply such goods or services to certain parties or in particular places;
- Tying arrangement: any agreement requiring customers who purchase one product or service to purchase another different product or service (the tied product or service);
- Discount or rebate: any agreement offering certain prices or lower prices on goods or services that requires customers to purchase other goods or services from suppliers or not to purchase suppliers’ competing goods or services; and
- Market control: any agreement requiring suppliers to engage in discriminatory practices against certain undertakings.

There are no industry-specific provisions or rules applicable under the ICL in general or even more specifically for provisions related to prohibitions of vertical restraint.

When assessing vertical restraint under the ICL, the KPPU should undertake an analysis of whether all the elements of the related ICL article have been fulfilled. The KPPU should know the facts concerning the vertical restraint rationale and also the implications of the agreement for all affected parties. Further, the KPPU should stress its analysis of market structure and whether a dominant undertaking has the ability to abuse its market power. The KPPU may also consider whether there are any restrictions on an undertaking’s strategy that forecloses access for potential entrants into upstream and downstream markets. Vertical restraint provisions under the ICL adopt the rule of reason approach, which means in order to declare a violation of such articles, the vertical restraint must be proved by (1) the emergence of a negative impact on the market and (2) the motive and economic benefits gained by the undertaking in doing such restraint.

Significant cases

Since the enactment of the ICL, the KPPU has rarely initiated an investigation for cases related to vertical restraint prohibitions. In 2019, there is only one decision related to abuse of dominance, namely KPPU Decision No. 15/KPPU-L/2018 concerning container loading and unloading services in the L. Say Maumere Port (the Container case). In the Container case, PT Pelabuhan Indonesia III (PELINDO III), as the operator of the L. Say Maumere Port,
was accused of requiring container shipping companies to stack their containers in the L. Say Maumere Port and to use the service provided by PELINDO III, including PELINDO III’s trucks, for loading and unloading the containers.

In its decision, the KPPU’s Commissioners Assembly declared PELINDO III guilty of the allegation and imposed fine in the amount of 4.2 billion rupiah. The KPPU’s Commissioners Assembly also ordered PELINDO III to cease the mandatory container stacking policy. Following this decision, PELINDO III filed an appeal to the Surabaya District Court, and later on the Surabaya District Court annulled the KPPU’s decision.

ii  Trends, developments and strategies
As there is only one decision relating to vertical restraint prohibition in 2019, there have been no significant developments on the enforcement of the provisions by the KPPU.

iii  Outlook
With the rise of digital business in Indonesia, we can expect more enforcement of the provisions by the KPPU towards companies in digital markets.

For vertical restraint prohibitions, one of the challenges of enforcement would be defining the relevant market. Since vertical restraint prohibitions are closely related to abuse of dominance conduct, the challenges in this respect also include the determination of the market shares in order to accurately conclude the relevant parties’ dominance in the market.

IV  SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES
In 2017, the KPPU published a report regarding digital economies issues in Indonesia. The report was made as part of the Technical Cooperation Agreement with the Australia Indonesia Partnership for Economic Governance (AIPEG) to promote effective competition policy. The KPPU also conducted some consultations with several stakeholders that have an interest in Indonesia’s digital economy, such as the Indonesian Ministry of Trade and the OJK, among others.

The report explains that digital technology is quite disruptive and is transforming the traditional markets and business models. In this era, the relevant stakeholders, such as the government as well as the competition authorities, should be able to protect and empower consumers in a complex and rapidly developing online environment. However, at the same time, the government should be able to maintain the growth of the economy and business, including the growth of digital technology-related businesses.4

Furthermore, the report explains that most of the challenges faced by the government involve the competition between the traditional and digital services providers. Since the governing regulations related to the digital business operations are not similar to the traditional ones, the traditional service providers often face an uneven playing field in the market.

The report also describes that the regulation of digital services is considered challenging as regulators must determine whether there is a basis for regulation; whether the regulation will restrict the market entry; and whether the regulation is practical and enforceable. If

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4 See http://eng.kppu.go.id/report/.
regulation is too strict, it can hamper innovation and increase costs, as well as restrict the growth of the Indonesian economy in the future. From a competition perspective, the issue that arises is whether the entry barriers can prevent the competition, and whether they are natural or induced (e.g., by anticompetitive practices or exclusive licences). As such, any regulatory framework on digital technology aspects must be flexible in order to keep pace with and benefit from technological advances. The new framework should also be able to reduce the entry barriers while at the same time maintaining consumer protection and the certainty of rules.\textsuperscript{5}

Further, the report also recommends that to underpin the digital economy and enhance trust from the consumers, a coherent data framework is required. Any data protection must be flexible to further enable innovation. The economic and social benefits of data flows, including increased market access, investment, innovation, development and growth, as well as increased productivity, are best realised when there are no data residency restrictions.\textsuperscript{6}

V STATE AID

Under the current regime, there is no specific provision under the ICL regarding state aid. The KPPU currently does not have any focus on state aid control; therefore, state aid control is not applicable in Indonesia.

VI MERGER REVIEW

Pending the long-awaited amendment of the ICL and in response to the urgency from the KPPU to oversee non-share-based transactions that may raise anticompetitive concerns, the KPPU recently published KPPU Regulation No. 3 of 2019 on Assessment of Merger or Consolidation of Business Entities or Share Acquisition of Companies that could Result in Monopolistic Practices and/or Unfair Business Competition (the 2019 Merger Guidelines). The 2019 Merger Guidelines came into effect on 3 October 2019 and supersede the previous 2013 Merger Guidelines. Any notification that has been registered by the KPPU and has not been stipulated prior to the 2019 Merger Guidelines came into force will be processed based on the previous 2013 Merger Guidelines.

The most notable feature under the 2019 Merger Guidelines is the mandatory notification of asset acquisitions to the KPPU. This means that after escaping scrutiny by the KPPU, asset acquisition is finally receiving the same treatment as share acquisition.

The Indonesian merger control regime adopts a mandatory post-merger notification system whereby all mergers that satisfy the statutory threshold and certain criteria shall be notified to the KPPU within 30 working days of the transaction becoming legally effective.\textsuperscript{7}

\textsuperscript{6} See the Digital Economy in Indonesia Report.
\textsuperscript{7} See Indonesian Government Regulation No. 57 of 2010 on Merger or Consolidation of Business Entities and Acquisition of Shares that may result in Monopolistic and/or Unfair Business Competition Practices (GR No. 57/2010), Article 5(1).
Under the 2019 Merger Guidelines, the KPPU outlines four transactions that are subject to the Indonesian merger control rules: mergers, consolidation, share acquisition and asset acquisition (hereinafter collectively referred to as ‘mergers’).

In general, the criteria for notifiable mergers under Indonesian merger control are as follows:

- the transaction satisfies the statutory threshold. The above notification thresholds also apply to asset-based transactions. However, the calculation of asset threshold in asset-based transactions is calculated based on the worldwide value of the assets of (1) the buyer group; plus (2) the value of the purchased assets as stated in the target’s financial statements. If the number (2) above is not available, the KPPU will look at the value of the transaction. The thresholds are:
  - the combined sales value in Indonesia of the merging parties (buyer and target) exceeds 5 trillion rupiah; or
  - the combined worldwide assets value of the merging parties (buyer and target) exceeds 2.5 trillion rupiah. If both of the merging parties are banks, the combined asset value must exceed 20 trillion rupiah. If only one of the merging parties is a bank, it must adhere to the asset value threshold of 2.5 trillion rupiah;

- the transaction is performed by and between non-affiliated parties;

- the transaction results in a change of control; and

- specifically for an asset-based transaction, the transaction can trigger a notification if:
  - the assets are not sold under an ordinary sales activity; and
  - it increases the acquirer’s market share or integrate vertically with the business activities of the acquirer or its group company.

For foreign mergers, there is one additional criterion that needs to be satisfied: a local nexus (i.e., all or one of the parties to the transaction has any business activities in or make sales to Indonesia).

### Significant cases

Since the enactment of the regulation of Indonesian merger control in 2010, the KPPU has never issued any opinion with objections. An opinion will be issued only if there is any alleged potential of anticompetitive impact resulting from the merger. To date, the KPPU has only issued no objection opinions with or without remedies. Based on publicly available opinions, to date the KPPU has issued around nine no objection opinions with remedies. One of the recent high-profile conditional no objection opinions is the acquisition of shares of Vinythai Public Company Ltd (Vinythai) by Asahi Glass Company Ltd (Asahi). Asahi is a Japanese company that engages in the production of glass, electronic chemicals and ceramics.

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8 See GR No.57/2010, Article 1.
9 See GR No.57/2010, Article 5(2).
10 See the KPPU Regulation No. 3 of 2019 on Assessment of Merger or Consolidation of Business Entities or Share Acquisition of Companies that could Result in Monopolistic and/or Unfair Business Competition Practices (Merger Guidelines 2019).
11 See Merger Guidelines 2019.
12 See Merger Guidelines 2019.
13 See Merger Guidelines 2019.
Meanwhile Vinythai as the target company is domiciled in Thailand and engages in the manufacture of polyvinyl chloride (PVC) and epichlorohydrin, which are mostly used in the plastic industries.

In its assessment, the KPPU only focused on one type of PVC product sold by Vinythai in Indonesia, namely suspension PVC (S-PVC). S-PVC is used for the production of pipes, film and sheets, floors, bottles, cables and other things. In its opinion, the KPPU found that one of Asahi’s subsidiaries in Indonesia was the market leader in PVC, with a market share of more than 50 per cent. This resulted in a significant increase in the Hirschman-Herfindahl Index (HHI) for this transaction particularly on the S-PVC market. The KPPU then continued the assessment on this transaction to Phase II (comprehensive assessment) as the HHI was higher than 1,800.14

Based on KPPU’s Phase II assessment, there was a significant structural barrier for the S-PVC market in Indonesia. The KPPU also found that based on upward pricing pressure (UPP) analysis, this transaction could put significant pressure on the domestic price of S-PVC. The result from the efficiency test also showed that the potential efficiency of this transaction may not lead to a price decrease to one of the merging party.

Considering the above analysis, the KPPU decided to issue a no objection opinion towards this transaction with the following conditions:

- Asahi should report their production, sales and price of S-PVC in Indonesia to the KPPU on a quarterly basis for the next three years; and
- Vinythai should report its export and price of S-PVC to Indonesia on a quarterly basis for the next three years.

The above conditions were imposed by the KPPU on the merging parties to prevent the acquisition from resulting in anticompetitive effects.

In addition, to date there have been at least 28 decisions issued by the KPPU related to the failure to notify mergers. Among these 28 cases, the KPPU imposed penalties on 26 transactions. As for the remaining two cases, the KPPU decided that the merging parties in those transactions were not proven guilty for the failure to notify allegation.

One of the significant cases on merger control enforcement in 2018 that were not proven guilty is the decision of the late notification of PT Erajaya Swasembada, Tbk (Erajaya), an Indonesian company engaged in the mobile phone import industry. Erajaya was alleged to have notified its acquisition of PT Axioo International Indonesia (Axioo), an Indonesian company in the mobile phone manufacturing industry, 145 working days late. Even though Erajaya was found to have notified the transaction late, the KPPU did not impose any sanction on Erajaya, considering that its acquisition over Axioo was conducted in order to comply with the requirement under the Ministry of Trade Regulation which obliges mobile phone distributors to have a manufacturing facility in Indonesia.

Thus far there is only one foreign transaction that has been sanctioned by the KPPU due to failure to notify, which is the share acquisition of Woongjin Chemical Co by Toray Advanced Material Korea Inc.

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In 2019, the KPPU imposed the highest fine ever in a failure to notify case in the amount of 12.6 billion rupiah on PT Matahari Pontianak Indah Mall for submitting the notification of the share acquisition of PT Indo Putra Khatulistiwa 240 working days past the deadline.

Thus far there is only one foreign transaction that has been sanctioned by the KPPU over failure to notify, namely the share acquisition of Woongjin Chemical Co by Toray Advanced Material Korea Inc. Both Toray Advanced Material Korea Inc and Woongjin Chemical Co had business activities and sales in Indonesia. Subsequently, their combined asset and sales value met the threshold and, therefore, the acquisition transaction triggered a notification obligation in Indonesia. The KPPU imposed a fine of 2 billion rupiah on Toray Advanced Material Korea Inc for submitting the notification of the share acquisition of Woongjin Chemical Co four working days past the deadline.

Currently, the KPPU is quite active in carrying out merger control investigations in Indonesia. During 2018, the KPPU issued eight decisions or half of the total number of all decisions on the failure to notify cases issued until that year. In 2019, such number was increased to 12. All of the issued decisions in 2018 and 2019 relate to domestic transactions.

### ii Trends, developments and strategies

In 2018, the KPPU received 50 notifications of mergers.\(^{15}\) There was a decrease in the number of mergers notified to the KPPU in 2019 compared with 2018, which amounted to 74 transactions.\(^{16}\) A similar decrease also occurred in 2018 where the KPPU saw a reduction of 17 per cent to the number of mergers notified in 2018 compared with 2017. According to the KPPU then, this might be for two reasons: the lack of awareness of the undertaking to submit the notification to the KPPU; and a significant decrease in the number of corporate actions, especially merger transactions.\(^{17}\)

Furthermore, there were no updates on the KPPU’s website regarding the 2019 notification list after 31 May 2019. During January–31 May 2019, all the notified transactions submitted to the KPPU are shares acquisitions transaction.\(^{18}\)

Based on the KPPU’s website, during January–31 May 2019, eight out of 50 notifications were foreign-to-foreign transactions. Japan and Singapore are listed as the top two countries that notified the most foreign-to-foreign transactions to the KPPU in 2019.\(^{19}\)

The KPPU has not issued any public opinion for mergers submitted in 2019. Therefore, the details of the mergers submitted in 2019 are not publicly available yet. In 2018, however, the most notified mergers related to the manufacturing industry (35.4 per cent), the energy sector (17 per cent) and the property sector (14 per cent). There were several mega transactions whose values exceeded 1,000 trillion rupiah notified to the KPPU in 2018, which, among others, include:

- the acquisition of PT Freeport Indonesia by PT Inalum;
- the merger between KWA Investment Co and Monsanto Company;

\(^{15}\) See www.kppu.go.id/id/merger-dan-akuisisi/publikasi-pemberitahuan/pemberitahuan-merger-2019/.
\(^{16}\) See www.kppu.go.id/id/merger-dan-akuisisi/publikasi-pemberitahuan/pemberitahuan-merger-2018/.
\(^{19}\) See www.kppu.go.id/id/merger-dan-akuisisi/publikasi-pemberitahuan/pemberitahuan-merger-2019/.
the acquisition of PT Bank Danamon, Tbk by MUFG Bank Ltd; and

the acquisition of TMF Orange Holding BV by Saphire Bidco BV.\textsuperscript{20}

iii Outlook

Based on the previous draft, one of the key points in the amendment of the ICL related to the merger control issue is the change from a mandatory post-merger notification to a pre-merger notification regime.\textsuperscript{21} However, the previous members of the House of Representatives have been replaced with new members following the general election in 2019. It is worth noting that the current members of the House of Representatives have included the amendment of the ICL into the agenda for the current term. Unfortunately, there is no further information on the timeline of the amendment and whether the current members will use the draft amendment of the ICL prepared by the previous member of the House of Representatives.

VII CONCLUSIONS

The KPPU focused more on merger control enforcement during 2018 and 2019. With the enactment of the new 2019 Merger Guidelines, we should be seeing an increase in the number of transactions reviewed by the KPPU as asset-based transactions are now subject to the notification to the KPPU. To the date of this publication, we found no publicly available information of asset transactions that have been notified to the KPPU. In the coming year, we can expect the KPPU to put more effort into cartel enforcement, particularly in industries that are closely related to the interest of the general public, such as food commodities and airlines, as well as industries that are strategic in nature and undergoing a rapid growth, such as the fintech industry.

Despite the unclear timeline of the amendment to the ICL, the KPPU will surely benefit from the amendment, both in its cartel and merger control enforcement. The implementation of the extraterritoriality principle through the amendment will provide the KPPU with the power to review and supervise cross-border agreements, activities, and transactions that potentially affect the Indonesian market. This may be necessary to address the developing competition issues entailing the rise of the digital economy that by nature are likely to involve markets in different jurisdictions.


Chapter 13

ITALY

Giuseppe Scassellati-Sforzolini, Marco D'Ostuni, Luciana Bellia, Michael Tagliavini and Francesco Trombetta

I  OVERVIEW

The Italian Competition Authority (ICA) enforces EU and national competition rules in Italy.

Each of the ICA's five directorates deals with mergers, abuses and restrictive practices in their assigned business sectors. The ICA also has advocacy powers. It reports to the parliament and the government on any laws, regulations and general administrative acts that give rise to competition concerns and are not justified by general interest considerations. The ICA is also entitled to challenge before the administrative court secondary legislation, acts and decisions of public administrations that it considers incompatible with competition law. Furthermore, the ICA is empowered to address abuses of economic dependence, unfair commercial practices and conflicts of interest of government officials. Finally, since 2012, the ICA also manages the system of legality rating, an indicator of companies' compliance with high standards of legality.  

Case teams in each directorate conduct the investigations, while the opening and final decisions, as well as the decisions to notify the statements of objections, are taken by a college of three members appointed by the presidents of the two branches of the parliament.

As confirmed by the Constitutional Court, the ICA is not an impartial judicial body. Its decisions are subject to judicial review by administrative courts (i.e., the Regional Administrative Tribunal (TAR) of Rome and, on second and final appeal, the Council of State).

In 2019, the ICA closed nine proceedings concerning restrictive agreements or practices, eight of which were closed with an infringement decision. Five cases of abuse of

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1 Giuseppe Scassellati-Sforzolini and Marco D’Ostuni are partners, Luciana Bellia is a senior attorney, Michael Tagliavini is a lawyer and Francesco Trombetta is a trainee lawyer at Cleary Gottlieb Steen & Hamilton LLP.
2 Undertakings that obtain a sufficient score of compliance can have easier access to public funding and bank credit.
3 Constitutional Court, judgment No. 13 of 31 January 2019.
4 A table summarizing the ICA's activities from 2011 to 2019 is available at https://www.agcm.it/dotcmsdoc/come-funziona/e27_file_2019.pdf
5 Case I805, Prezzi del cartone ondulato; case I806, Affidamento appalti per attività antincendio boschivo; case I808, Gara Consip FM4; case I814, Diritti internazionali; case I816, Gara SO.RE.SA. rifiuti sanitari regione Campania; case I821, Affidamenti vari di servizi di vigilanza privata; case I822, Consip/gara sicurezza e salute 4; case I803, Condotte restrittive del Consiglio Notarile di Milano (this has been the only decision issued by the ICA solely under Article 2 of the Italian Competition Act and not also under Article 101 TFEU); and case I831, Gare AMA servizio smaltimento rifiuti (no finding of an infringement).
dominance were investigated, two of which were found to infringe competition law, while one was closed with commitments. The ICA also closed 79 investigations concerning alleged unfair commercial practices, 60 of which were found to infringe consumer rights. Finally, regarding mergers, the ICA reviewed 65 transactions and opened six in-depth investigations.

II CARTELS

i Significant cases

The 2014 ICA decision that fined Novartis and Roche for an anticompetitive agreement was upheld by a final ruling of the Council of State

On 15 July 2019, the Council of State rejected Roche’s and Novartis’s appeals against the 2014 judgment of the TAR Lazio confirming the ICA 2014 decision, which imposed fines on the companies of around €180 million for an infringement of Article 101 TFEU. Roche and Novartis respectively supplied Lucentis and Avastin, two monoclonal antibodies developed by the company Genentech (a subsidiary of Roche). Lucentis was developed to cure age-related macular degeneration, while Avastin was dedicated to the treatment of colon cancer. Nonetheless, Italian medical practitioners had often been using ‘off-label’ doses of Avastin to treat macular degeneration as a substitute for the similar, but much more expensive, Lucentis. According to the ICA decision, Roche and Novartis colluded to create an artificial differentiation between the two drugs in their communications to the medicinal authorities and medical practitioners, in order to boost the sales of the most profitable drug, Lucentis.

The judgment of the Council of State focused on three main issues. First, the Court confirmed that the ICA was right in defining the relevant product market as comprising both drugs, irrespective of their marketing authorisation and therapeutic indications. Second, the judgment upheld the conclusion that an agreement to disseminate misleading information cannot be considered ancillary to a licensing agreement. Last, the parties did not provide alternative explanations that could offset the evidence the ICA brought showing that Roche and Novartis artificially differentiated the two products. Accordingly, the Council of State confirmed the TAR findings that such conduct amounted to a by object restriction of competition law, aimed at unlawfully partitioning the relevant market.

The ICA fines four operators and a facilitator for collusive behavior in the waste collection sector

On 30 January 2019, the ICA imposed a fine of almost €1.4 million on four operators and a facilitator for collusive behavior in the waste collection sector.

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6 Case A516, Gara affidamento servizi TPL Bolzano; and case A519, Affidamento diretto del servizio di trasporto pubblico ferroviario nel Veneto.
7 Case A505, Monte Titoli/servizi di post-trading.
8 Case C12258, Ascopiave/rami di azienda di Acegaapsang; case C12246, Fratelli Arena/rami di azienda di SMA – distribuzione Cambria-Roberto Abate; case C12231, BPER Banca/UNIPOL Banca; case C12247, BDC Italia-CONAD/AUCHAN; case C12245, F2I S.G.R./Persidera; and case C12207, Sky Italia/R2.
9 Council of State, judgment of 15 July 2019, Roche-Novartis (judgment No. 4990).
10 Case I760, Roche-Novartis/Farmaci Avastin e Lucentis.
11 Case I816, Gara SO.RE.SA. rifiuti sanitari Regione Campania.
The ICA found that four companies rigged a public tender for regional waste collection and disposal. According to the ICA, a third-party consulting firm facilitated collusion, coordinating the parties’ collusive behavior.

The ICA concluded that the companies’ conduct constituted a restriction by object, which warranted fining irrespective of any analysis of its actual effects on the market. The ICA imposed the highest possible fine provided by the Law\(^\text{12}\) (i.e., 10 per cent of each undertaking’s worldwide turnover in the last (entire) business year of the infringement).

In line with the EU case law relating to infringement facilitators,\(^\text{13}\) the ICA imposed a fine on the consultancy firm that coordinated the anticompetitive practice among the four operators, even if the firm was not competing in the same market as those operators.

**The ICA fines bid-rigging practices in facility maintenance services in Italy**

On 17 April 2019, the ICA found that 19 undertakings allegedly participated in a cartel affecting the ‘facility management’ tender procedure, the biggest public tender for cleaning and maintenance services for public offices ever launched in Italy (with a total value of approximately €2.7 billion).\(^\text{14}\)

The ICA found that the companies shared their respective bidding strategies for this tender and tried to allocate its eighteen lots among themselves. Indeed the participants to the tender submitted bids that never overlapped, according to a ‘chessboard’ pattern. The ICA found a restriction ‘by object’ of Article 101 TFEU and it issued a fine of €235 million in total. The leniency applicant benefited from a 50 per cent reduction in its fine.

This case is an example of successful cooperation between the ICA and the Italian public prosecutors. Indeed, the ICA’s decision relied on several pieces of evidence gathered by prosecutors in Rome and Milan, who had launched criminal investigations into the same conduct. The ICA also relied on the leniency application provided by one of the cartel members.

**The ICA fines participants in a cartel for the assignment of broadcasting rights for football matches in countries other than Italy**

On 24 April 2019, the ICA found that, from 2009 to 2015, the MP Silva Group, the IMG Group, and the B4 Capital Group coordinated their bids in the procedures for the assignment of broadcasting rights, in countries other than Italy (i.e., international rights). The broadcasting rights concerned football matches in tournaments organized by the Lega Nazionale Professionisti Serie A (the Italian football league).\(^\text{15}\)

According to the ICA, prior to the submission of the bids, the parties allocated the respective bids and agreed on sharing the revenues arising from the resale of TV rights. This conduct reduced the value of the broadcasting rights.

The ICA categorized the anticompetitive conduct as a restriction by object, and it fined the participants €67 million overall.

Similarly to *Gara Consip FM4*, the antitrust investigation included strong coordination between the Milan public prosecutor and the ICA.

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12 Law No. 287 of 10 October 1990, Article 15(1).
14 Case 1808, *Gara Consip FM4*.
15 Case 1814, *Diritti internazionali*. 

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On 16 March 2020, the TAR Lazio rejected the parties’ claim that the ICA had infringed their right of defense. The claim was based on the following: in a first statement of objections, the ICA contested two separate anticompetitive agreements, while after the replies to the statement of objections, it issued a second statement of objections, where it alleged that the same conduct was a single overall agreement. The TAR Lazio clarified that the ICA is not only allowed to change its allegations before imposing a fine, but that it can do so even without finding a new piece of evidence, through a mere reappraisal of the evidentiary elements that it had previously gathered. Moreover, according to the TAR Lazio, the parties’ claim could not be upheld given that the ICA had not infringed their right of defense, having issued a second statement of objections before the decision, to which the parties could reply.

Only for the appeals lodged by companies of the B4 Capital Group, the TAR Lazio partially upheld the plea of the applicants concerning the quantification of the fine. The TAR Lazio thus granted a 15 per cent reduction in the fine as the ICA should not have imposed an entry fee, whose purpose is to increase the deterrent effect of antitrust fines.

ii Trends, developments and strategies

The Council of State set aside a 2016 judgment concerning an unlawful concerted practice in the railways sector among suppliers of goods and electromechanical services

On 11 July 2019, the Council of State set aside a judgment issued by the TAR Lazio in 2016, which had annulled an ICA decision against Firema. The ICA had fined Firema for its participation, together with 12 other undertakings, in a cartel covering 24 tender procedures for the provision of electric components and maintenance services to the public railway operator Trenitalia.

The TAR Lazio agreed with Firema that the ICA was wrong in not extending the antitrust liability also to its parent company, which at the time of the infringement held its entire share capital. Indeed, according to the TAR Lazio, no evidence of involvement of the parent company in the concerted practice is required in case of conduct carried out by wholly owned subsidiaries. Furthermore, the TAR Lazio upheld Firema’s claim according to which, given that the undertaking had been admitted to extraordinary administration, the ICA could not have held the new administration liable for the conduct of the previous one. This extension could have been possible only in case of identity between the current and the previous management. This is the case when the members of the two managements are the same and pursue identical goals.

The Council of State reversed the ruling, and it assessed some important principles concerning the allocation of corporate liability for antitrust infringements.

First, the Council of State held that the TAR Lazio should not have annulled the ICA’s decision because the ICA did not extend Firema’s direct antitrust liability – whose liability was supported by strong evidence – also to its parent company. Indeed, the Council of State specified that the ICA was under no obligation to apply the parental liability presumption, which is intended to relieve the ICA’s burden of proof. Therefore, if the ICA decided not to rely on it, its decision could not be considered unlawful.

16 Council of State, judgment of 11 July 2019, Firema (judgment No. 4874).
17 TAR Lazio, judgment of 10 March 2016, Firema (judgment No. 3077).
18 Case I759, Forniture Trenitalia.
Second, the Council of State held that a formal change in the management of the company might not in itself be sufficient to discontinue the infringement of antitrust rules. Indeed, an actual change in the management is needed for this purpose and it does not take place when a new administration is formally appointed, but when the new management actually controls the activity of the undertaking. An actual change in the management did not occur in the case of Firema, given that the undertaking was still engaging – under the supervision and direction of the new administration – in the unlawful conduct found by the ICA. For these reasons, the Council of State set aside the judgment of the lower Court.

The ICA imposed fines of €287 million on the main manufacturers of corrugated cardboard sheets and boxes for two separate cartels

On 17 July 2019, the ICA imposed fines of over €287 million on 23 companies for two distinct cartels implemented in two vertically related markets, namely the upstream market for corrugated cardboard sheets (the Sheets Cartel) and the downstream market for corrugated cardboard boxes (the Boxes Cartel). The infringements also involved the trade association Gruppo Italiano Fabbricanti Cartone Ondulato (GIFCO).

The ICA found that the two infringements were separate, because they affected two different product markets, they involved different parties (although nine companies participated in both infringements), and had a different scope and internal functioning.

This decision covers certain important aspects of cartel enforcement, such as definition of the relevant market when two (or more) levels of the supply chain are affected by simultaneous cartels.

The ICA reaffirmed that undertakings that are part of a trade association must be particularly alert to the information exchanged during trade association meetings.

When calculating the fine, the ICA adopted a flexible approach and even departed from the explicit provisions of its own guidelines: companies that played a minor role in the infringements were granted a 20 per cent fine reduction, exceeding the 15 per cent cap provided for in the guidelines.

### iii Outlook

First of all, on 28 January 2020, the ICA closed with an infringement decision the investigation concerning alleged coordination in the commercial strategies of the four main telecommunications operators in Italy which, in the ICA’s view, agreed to coordinate their behavior with regard to repricing conduct in the context of the return to monthly billing. Moreover, in the coming months, the ICA will pursue several investigations launched in 2019. In 2019 an investigation was opened into four taxi companies in Naples concerning alleged collusion to prevent competing platforms from entering the market. The ICA will

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19 Case I805, *Prezzi del cartone ondulato*.
20 AGCM Resolution No. 25152 of 22 October 2014, *Guidelines on the method of setting pecuniary administrative fines pursuant to Article 15, paragraph 1, of Law No. 287/90, §34*.
21 Case I820, *Fatturazione mensile con rimodulazione tariffaria*.
22 Case I832, *Naples Radiotaxi*. In 2018, the ICA closed two investigations concerning similar practices in Rome and Milan (Cases I801A-I801B, *Rome and Milan Radiotaxi*).
also continue to focus on public tenders, with investigations into the public procurement of desktop PCs\textsuperscript{23} and the supply of water meters.\textsuperscript{24} Finally, the ICA has launched an investigation into an alleged cartel affecting the spent vehicle and industrial batteries recovery sector.

\section*{III \hspace{1cm} \textbf{ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE}}

\subsection*{i \hspace{1cm} Significant cases}

The TAR Lazio quashes two ICA decisions concerning an alleged parallel network of anticompetitive vertical agreements between taxi companies and drivers active in Rome and Milan

In a judgment of 29 April 2019, the TAR Lazio upheld\textsuperscript{25} the appeals of five taxi companies against the ICA’s decisions on alleged vertical restraints.\textsuperscript{26}

The ICA had found that the presence of non-compete obligations in the companies’ bylaws and contracts with affiliated drivers amounted to a vertical restriction. However, the ICA did not prove that taxi companies and drivers shared a ‘common interest’, which, in the TAR Lazio’s view, is a key element in the assessment of vertical agreements.

The TAR Lazio also pointed out some shortcomings in the ICA’s market definition. First, the ICA did not engage in any empirical analysis before concluding that services provided by taxi companies were substitutable with those offered by mobile apps. Moreover, the ICA did not take into due account that the market for taxi management services is characterised by a double source of demand, from both passengers and taxi drivers.

Finally, the ICA acknowledged that the agreements did not amount to by object restrictions of competition and failed to assess the actual anticompetitive effects on competition of the relevant contractual clauses.

The TAR Lazio found that the ICA’s decisions were inconsistent. This is because, on the one hand, the ICA found that taxi drivers participated in the infringement, while on the other hand they were also harmed by it. In this respect, the judgments of the TAR Lazio seem difficult to reconcile with a well-established principle of EU case-law, according to which a company that participated in an anticompetitive agreement might well be harmed by that same agreement too.\textsuperscript{27}

\begin{footnotesize}
\begin{enumerate}
\item Case I833, PCs public tender.
\item Case I835, Supply of water meters.
\item TAR Lazio, judgments of 29 April 2019, Radiotaxi 3570, Yellow Taxi, Samarcanda, Autoradiotaxi, Taxiblu and ICA (judgments No. 5358, 5359, 5417, 5418 and 5419).
\item Case I801A, Servizio di prenotazione del trasporto mediante taxi – Roma; and case I801B, Servizio di prenotazione del trasporto mediante taxi – Milano.
\end{enumerate}
\end{footnotesize}
The TAR Lazio reviews the ICA's decisions on alleged abuses of dominant position in the retail supply of electricity

On 17 October 2019, the TAR Lazio annulled the ICA's decisions that had fined Enel and Acea for abuse of dominant position in the local markets for retail electricity supply. The two undertakings are active both in the enhanced protection service (EPS, a regulated tariff regime reserved for domestic clients and small businesses) and in the supply of electricity at market prices (or 'deregulated market').

In the ICA's view, Enel and Acea leveraged their position in EPS to foreclose competitors active in the deregulated market. In particular, Enel and Acea collected EPS customers' consent to be contacted for commercial purposes, and then used the lists of these customers to advertise their services in the deregulated segment of the market. According to the ICA, the contested practices aimed at cross-selling deregulated services to Acea and Enel's EPS customers, in order to retain those customers after the imminent abolition of the EPS regime. The strategy would in turn foreclose electricity suppliers competing in the deregulated market with no customer base in the EPS segment.

With reference to Acea's appeal, the TAR Lazio overturned the ICA's assessment. The judges noted that Acea made no significant use of its lists of EPS customers in promoting its offering in the deregulated market. The ICA's reasoning was based on mere presumptions and did not adequately demonstrate the existence of a causal link between the conduct and the alleged infringement.

Regarding Enel's appeal, the TAR Lazio overturned the ICA's calculation of the fine, particularly with respect to the duration of the infringement and the quantification of the relevant turnover. However, the TAR Lazio rejected the grounds of appeal concerning the alleged abuse.

ii Trends, developments and strategies

ICA imposes symbolic fine on a railway operator for an abuse of dominance leading to an improvement in the network in terms of technological innovation

On 31 July 2019, the ICA closed its investigation into Ferrovie dello Stato SpA (FS), Rete Ferroviaria Italiana SpA (RFI) and Trenitalia SpA (Trenitalia) for an alleged abuse in the markets of rail infrastructure management and regional rail passenger transportation services in the Veneto region.

In the ICA's view, the parties leveraged their monopoly in the upstream market for the management, maintenance and development of the rail network to obtain from the Veneto region an exclusive contract for the downstream provision of regional rail services without any public tender.

28 Case A511, Enel/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica; and case A513 Acea/Condotte anticoncorrenziali nel mercato della vendita di energia elettrica.
30 In addition, Acea's commercial strategy was based on confidential information on competitors' positions obtained through its subsidiary active in the downstream market of electricity distribution.
31 Moreover, the ICA failed to explain how confidential information gathered by Acea in the distribution market could be used to retain customers in the upstream regulated market.
32 Case A519, Affidamento del servizio di trasporto pubblico ferroviario nel Veneto.
The ICA found out that the direct award was the result of RFI’s obligation to carry out an electrification of the network that RFI would not have otherwise carried out.

However, the ICA only imposed a symbolic fine of €1,000 on the parties because it concluded that the conduct would, ‘in any case, lead to an improvement in the network in terms of technological innovation’.

iii Outlook
In 2019, the ICA initiated proceedings for alleged infringements of Article 102 TFEU affecting the sectors of recycling of plastic packaging and pharmaceuticals. The ICA has also opened proceedings against Amazon for allegedly discriminating between sellers using Amazon’s own logistics services and those relying on third-party services.

Furthermore, the ICA is investigating Google for allegedly refusing to integrate certain apps into Android Auto (a function of Android smartphones allowing the use of apps on a vehicle’s embedded screen).

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES
i Significant cases
The ICA, the Italian Communications Authority and the Italian Data Protection Authority publish the final results of the market investigation into big data and issue a set of joint guidelines and policy recommendations.

On 10 February 2020, the ICA, the Italian Communications Authority and the Italian Data Protection Authority published the report containing the final results of the market investigation into the digital sector, and specifically on big data. On 2 July 2019, the authorities had issued guidelines and policy recommendations on the same matter (the Guidelines), which are now annexed to the Report.

The Report is the result of a sector inquiry jointly launched by the authorities in May 2017 and aimed at assessing the potential implications of a digital and data-driven economy in relation to privacy, data protection, competition and consumer protection.

The Report analyses the various competition issues that could arise from big data. First, the ICA investigated whether big data can be considered a barrier to entry in certain markets, or whether ownership of large amounts of data can result in the establishment of a dominant position. Second, the ICA explored the intersections between personal data (and data protection) and competition law. Finally, the Report analysed the different types of data-driven conduct that undertakings can put in place and the possible competition law concerns that can arise from them.

The Guidelines also recommend a reform of the current merger control system to ensure the effective review of concentrations in the digital sector. In particular, notification thresholds should not be based only on turnover, but should also take into account the transaction price. Also, the standard of review should be based on the risk of a significant...
impediment to the effective competition, and not just focus on the possible establishment of the strengthening of a dominant position. In particular, the ICA should be entitled to review acquisitions by major digital firms of innovative start-ups (i.e., ‘killer acquisitions’).

ii  Trends, developments and strategies
The ICA enforces national legislation on unfair practices. These are commercial, promotional and communication strategies that, while not amounting to antitrust infringements, result in an unfair prejudice to the consumers’ rights.

On 25 March 2019, the ICA imposed fines on DAZN for unfair commercial practices in the broadcasting of football matches. DAZN omitted to clearly disclose some technical limitations to the use of its streaming services on portable devices and had also provided misleading information on the automatic transition from the free trial period to the paid subscription.37

In the previous months, the ICA had already fined Sky Italia (Sky) for other alleged unfair commercial practices concerning the broadcasting of A series (the top Italian professional league competition for football clubs) matches.38

On 28 June 2019, the ICA imposed a fine of €2 million on Costa Crociere, an Italian cruise line. The company did not promptly inform the passengers of the possible cancellation of certain ports of call initially planned in Madagascar. The ICA emphasised the company’s duties to provide full, effective and prompt information to consumers to allow them to effectively exercise their rights pursuant to consumer protection laws.39

On 29 October 2019, the TAR Lazio upheld40 the appeals of airlines Ryanair and Wizz Air against the ICA’s decision fining them for applying an extra charge for the transport of one large cabin bag.41 The TAR Lazio concluded that the passengers’ right to take on board their personal belongings was not infringed by the airlines’ new policy, because one small cabin bag was still allowed on board free of charge.

iii  Outlook
On 3 May 2019, a new law entrusted the ICA with the supervision of the application of European Regulation No. 2018/302, aimed at preventing geo-blocking and other forms of discrimination based on the nationality, place of residence or place of establishment of the customers.42 This new competence will be exercised through the same investigative powers conferred upon the ICA for the enforcement of the national laws on unfair practices.

In 2019 the ICA opened two investigations concerning the alleged provision of misleading information. This confirms the ICA’s commitment to fine undertakings that provide misleading information to requests of the competition authority during the investigation, pursuant to Article 14(5) of the Italian antitrust legislation.43

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37 Case PS11233, Dazn-Pacchetti Calcio Serie A.
38 Case PS11232, Sky-Pacchetti Calcio Serie A.
39 Case PS11336, Costa Crociere-Pacchetto Madagascar.
40 TAR Lazio, judgments of 29 October 2016, Ryanair, Wizz Air and ICA (judgments No. 12455 and 12456).
41 Case PS11272 and PS11237, Modifica policy bagagli.
42 Law No. 37 of 3 May 2019.
43 Case A523B, Ticketonelcondotte escludenti nella prevendita di biglietti and case A523C, Ticketonelcondotte escludenti nella prevendita di biglietti-vivo concerti.
V  STATE AID

i  Significant cases

*The General Court annuls the Commission’s decision on the measure granted to Tercas*

On 19 March 2019, the General Court annulled the Commission decision issued at the end of the investigation in the Tercas case.45 Banca Tercas is an Italian bank which was placed under special administration in 2012 due to mismanagement practices identified by the Bank of Italy. In 2013, another Italian bank, Banca Popolare di Bari (BPB), stepped in to subscribe a capital increase in Banca Tercas.

The transaction was conditional upon the Fondo Interbancario di Tutela dei Depositi (FITD) providing a guarantee for Tercas’ deficit. The FITD is a consortium of Italian banks whose purpose is to provide help to its members facing financial difficulties.

In February 2015, the Commission started a formal investigation into FITD’s guarantee in favor of Tercas and concluded that this measure constituted State aid incompatible with the internal market. However, the decision was appealed by FITD, BPB and the Italian government, and eventually overturned by the General Court.

First, the Court noted that FITD’s decision to grant a guarantee to Tercas was not imputable to the State. FITD is a private company, and its board is appointed pursuant to its statutes and with no intervention of the Italian State. Although FITD has a specific mandate under Italian law to intervene in support of banks under certain circumstances, the guarantee in support of Tercas was FITD’s autonomous decision and was not granted in execution of that legal mandate. Finally, although the Bank of Italy eventually authorised the guarantee provided by FITD, it did not influence FITD’s initial decision to intervene in support of Tercas.

Second, the General Court found that the resources used by FITD to support Tercas did not belong to the Italian State, as these funds were provided by the private banks belonging to the FITD consortium.

The Commission’s appeal against this judgment is currently pending before the Court of Justice.

ii  Trends, developments and strategies

*The Court of Justice issued its preliminary ruling on the Italian case concerning the aid granted to Tirrenia di Navigazione SpA*

On 23 January 2019, the Court of Justice issued its preliminary ruling on the questions raised by the Italian Supreme Court of Cassation in the case concerning the unlawful state aid granted to Tirrenia di Navigazione SpA as public service compensation for the period 1976-1980.46

The ruling clarifies that the allocation of money to a public undertaking facing financial difficulties may be classified as state aid. The same is true for the transfer of the state’s shareholding in that undertaking to another public entity.

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44 General Court, joined cases T-98/16, T-196/16 and T-198/16, Tercas, judgment of 19 March 2019.
45 Case SA.39451, Tercas.
Furthermore, the Court of Justice provided some guidelines on the notion of existing aid\textsuperscript{47} and market liberalization. Indeed, it stated that subsidies granted before the date of liberalisation of the market concerned cannot be qualified as existing aid solely because, at the time of its granting, that market was not formally liberalised.

The Italian Court of Cassation is expected to issue its final judgment in this case in the coming months.

### iii  Outlook

In 2019, the European Commission opened only one new investigation in the State aid sector concerning Italy.\textsuperscript{48}

The Commission focused on the tax exemption granted by Member States to certain companies. In particular, this investigation concerns the Italian and Spanish laws exempting port authorities from the payment of corporate income tax.

In January 2019, the Commission invited Spain and Italy to change their legislation in order to comply with EU State aid rules.\textsuperscript{49} While Spain complied with the Commission’s request, the Italian authorities did not agree with the Commission’s assessment of the contested provisions. The Commission therefore opened an in-depth investigation into the Italian regime. However, if the Commission concludes that the Italian provisions are incompatible with EU State aid rules, it cannot order the Italian government to recover any aid already granted. This is because these provisions existed prior to the entry into force of the EU Treaty.

### VI  MERGER REVIEW

#### i  Significant cases

The ICA approves the acquisition of Persidera by F2i after the acceptance of the commitments

On 12 November 2019, the ICA approved the acquisition of Persidera, a network operator active in the market for digital terrestrial television, by F2i, a private equity firm.\textsuperscript{50}

The transaction consisted of the demerger of Persidera (formerly controlled by Telecom Italia) into two separate companies. MuxCo, the new company holding Persidera’s activities relating to the management of digital terrestrial frequencies, was directly acquired by F2i. NetCo, Persidera’s branch managing Persidera’s network infrastructure, was acquired by EI Towers, whose share capital is owned by F2i and Mediaset.

The ICA concluded that the acquisition of Persidera by F2i would have strengthened the dominant position of the merged entity both in the upstream market for television broadcasting networks and in the downstream markets of: (1) digital broadcasting; (2) free-to-air television; (3) pay-TV; and (4) advertising.

The ICA first noted that the transaction would result in significant concentration in the market of television broadcasting hosting services, where only two companies (EI Towers and RayWay) would be able to provide customers with the full range of network monitoring

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\textsuperscript{47} An existing aid is an aid which has been previously authorized by the Commission or by the Council, or a measure which became aid after its granting (i.e. due to changes in the market conditions).

\textsuperscript{48} Case SA.38399, \textit{Italian port tax exemption}.

\textsuperscript{49} Press Release of 8 January 2019, IP/19/241, \textit{State aid: Commission adopts two decisions recommending taxation of ports in Italy and Spain}.

\textsuperscript{50} Case C12245, F2I S.G.R./Persidera.
and maintenance services required for their operations. Given that EI Towers is vertically integrated, the ICA concluded that the transaction would also allow the merged entity to foreclose rivals in the downstream market for the provision of the transmission capacity to content providers.

The merger was approved subject to several remedies including, among others, EI Towers’ obligations to provide non-discriminatory access to its infrastructure, to provide its hosting services under equal and cost-oriented terms, and to prepare separate balance sheets for its vertically integrated activities.

ii Trends, developments and strategies

The TAR Lazio quashed the ICA’s decision imposing commitments on Sky after the withdrawal of the notification.

On 20 May 2019, the ICA issued its decision on the acquisition of the sole control of R2 Srl (R2) by Sky.51

Sky is a television operator active in the provision of pay-TV services, offered both via satellite and via digital terrestrial television (DTT). Mediaset Premium (MP) is an undertaking active in the market for the production of content, which is generally transmitted in the pay-TV market. MP wholly owns R2, a company that provides technical and administrative platform services for broadcasting by means of DTT.

In November 2018, Sky notified the ICA of its acquisition of sole control over R2. Since Italian law does not provide for the automatic suspension of a concentration pending antitrust review, the parties completed the transaction before the ICA’s clearance.

In February 2019, the ICA opened an in-depth investigation and, in March 2019, issued a statement of objections, where the ICA raised concerns that the concentration was capable of lessening competition in the market for retail pay-TV services.

Because of the concerns raised by the ICA, the parties withdrew the notification and tried to restore the previous competitive conditions. R2 was demerged from Sky and returned under the control of MP.

Nonetheless, the ICA took the view that the demerger did not fully restore the situation existing before the transaction. To effectively restore competition in the market, the ICA therefore imposed on Sky a set of behavioural remedies for the duration of three years. These remedies include an obligation to grant third parties access on a fair, reasonable, nondiscriminatory and cost-oriented basis to any new proprietary DTT platform that Sky may set up, as well as an obligation not to use information and assets acquired from R2 in connection with Sky’s pay-TV offers.

In its decision, the ICA adopted a broad definition of ‘concentration’: its assessment was not limited to the acquisition of R2 by Sky, but also covered a set of agreements signed in 2018 between Sky and MP. With these agreements, MP assigned to Sky some DTT transmission capacity for its pay-TV services and provided a license allowing Sky to include MP’s channels and TV shows in its pay-TV offerings via satellite, DTT and internet. According to the ICA, these contractual arrangements would have survived the abandonment of the notified transaction and had already had the effect of causing MP’s exit from the market and a significant increase in Sky’s customers.

51 Case C12207, Sky Italia/R2.
On 5 March 2020, the TAR Lazio annulled the ICA’s decision and, consequently, the measures imposed on Sky. The ruling is based both on procedural and substantive grounds. In referring to the procedural grounds of appeal, the TAR Lazio found that the ICA violated Sky’s right of defense, given that there was a substantial difference between the transaction to which the statement of objections was referring and the transaction on which the decision was based. As a result, Sky could not duly exercise its right of defense in full against the allegations on which the Decision is based. Moreover, the ICA was not under time constraints, as it could (and should) have opened new proceedings to raise the new objections on which the Decision is based. As regards the substantive grounds, the TAR Lazio upheld Sky’s pleas according to which – after R2 was demerged from Sky and returned under the control of MP – the ICA could not have found that there was a reportable concentration between Sky and MP. According to the TAR Lazio, the ICA proved neither that the DTT sub-licence granted Sky any exclusivity, nor that the individual agreements allegedly forming part of the overall transaction were linked by conditionality and that each of them had a concentrative nature.

The ICA authorises an acquisition in the gas sector with conditions

On 19 November 2019, the ICA cleared with conditions the acquisition of AcegasApsAmga by Ascopiave, both active in the operation of natural gas distribution networks. The ICA raised concerns that the transaction would lead to the creation of a dominant position in certain territorial districts thereby jeopardizing competitors’ chances of success in future tenders for the concession of distribution networks in the north-east of Italy.

In order to address the ICA’s concerns, Ascopiave submitted four sets of remedies. First, the successful tenderer, when different from Ascopiave, will enjoy a deferral of the payment of the portion of the incremental residual industrial value for a maximum period of eighteen months. Furthermore, the outgoing operator will have to allow the awarding participant to hire some of its employees in order to offset differences in the know-how between the incumbent operator and the new entrant. Third, Ascopiave will provide all the information at its only disposal needed by the other participants. Finally, the incumbent operator will have to sign a Transitional Service Agreement up to twelve months if requested by the awarded participant and on the conditions set by the Italian Regulatory Authority for Energy, Networks and Environment.

iii Outlook

On 23 March 2020, the ICA updated the filing thresholds for the Italian merger control regime, which remain extraordinarily high. Currently, a filing is not required unless (1) the aggregate Italian turnover of all involved undertakings exceeds €504 million and (2) the Italian turnover of each of at least two of those undertakings exceeds €31 million.

Since the two thresholds are cumulative—and the first threshold is very rarely met—the ICA’s ability to review proposed transactions continues to be very limited. Only 65 concentrations were notified in 2019, and the ICA carried out an in-depth review in just six cases. By comparison, more than 400 transactions a year were notified before 2013, when a filing was required for any transaction meeting either of the two turnover thresholds.

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52 TAR Lazio, judgment of 5 March 2019, Sky Italia and ICA (judgment No. 2932).
53 Case C12258, Ascopiave/rami di azienda di Acegasapsamga.
VII CONCLUSIONS

The ICA has continued to pursue its approach in terms of both advocacy and enforcement, particularly in regulated sectors. Its investigations remain focused on infringements affecting the public finances, such as bid-rigging in public tenders for waste management and railway sectors. Merger control is the area in which amendments continue to be most desirable, both in terms of filing thresholds and substantive test analysis (moving away from the dominance test to the significant impediment to effective competition test). Moreover, in line with EU rules, efficiencies should formally become part of the ICA’s assessment.

In line with the ICA guidelines on antitrust compliance, in 2019 the ICA has confirmed its willingness to provide a: (1) 5 per cent discount on the basic amount of the fine whenever the undertaking adopts an efficient compliance program after the beginning of the investigation but before the issuance of the statement of objections; (2) 10 per cent reduction in case of adoption of an inefficient program before the investigation when it is subsequently efficiently amended before the statement of objections; and (3) a 15 per cent reduction when the compliance program has been adopted before the investigation and it allowed an early discovery and termination of the infringement by the undertaking.

Finally, in 2019 the ICA has proved to be particularly careful in monitoring undertakings’ compliance with remedies and cease and desist orders, pursuant respectively to Articles 14-ter (2) and 15(2) of the Italian antitrust legislation.

54 ICA, Antitrust compliance guidelines of 25 September 2018, No. 27356.
55 See case I814, Diritti internazionali; and case I821, CONSPI/gara sicurezza e salute 4.
56 See case A511, Enel/condotte anticoncorrenziali nel mercato della vendita di energia elettrica, where the 10 per cent reduction was subsequently confirmed by the TAR Lazio, judgment of 17 October 2019, Enel (judgment No. 11958), § 11; case I808, Gara Consip FM4.
57 See case I805, Prezzi del cartone ondulato.
58 Case A378E, Federitalia/Federazione Italiana Sport Equestri, where the ICA found Federitalia to be in breach of the commitments that were made mandatory in 2011 in order to avoid an abuse of dominant position aimed at limiting participation in equestrian events and activities and their organization by other associations.
59 Case I792C, Gare Osigenoterapia e Ventiloterapia – inottemperanza; case A493B, Poste Italiane/prezzi recapito. In both the investigations the ICA did not find an infringement of the cease-and-desist order.
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Chapter 14

JAPAN

Junya Ae, Michio Suzuki, Ryo Yamaguchi and Lisa Nagao

I OVERVIEW

2019 was a busy year for the Japan Fair Trade Commission (JFTC).

Cartel enforcement under the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (AMA) continues to be a key priority for the agency, particularly against domestic price fixing cartels across various industry sectors.

Sector scrutiny including public utilities like energy and agriculture continued, though the standout actions were in connection with businesses operating in digital and data-driven markets. A number of IT firms were subject to JFTC enforcement for alleged unfair trade practices, including abuse of a superior bargaining position and restrictive conditions. Of particular note, a first commitment application was submitted by Rakuten and approved by the JFTC in connection with an investigation into alleged illegal MFN clauses imposed by online travel agencies in agreements with business partners.

Merger control enforcement remained relatively constant. The number of notifications stayed steady, including in respect of transactions involving foreign companies. Cases reviewed in Phase II continue to be limited, though remedies were imposed in multiple cases. There were a number of key policy changes however, including the release of the JFTC’s revised ‘Merger Review Guidelines’ and ‘Merger Review Procedure Policies’, which were both aimed at the adequate review of M&A transactions relating to the digital sector as well as other sectors.

Other noteworthy policy developments include amendments to the AMA to strengthen the JFTC’s enforcement power, including reform of leniency regimes, which passed the Diet last year. At the same time attorney–client privilege limited to cartel investigations was determined to be introduced under the JFTC regulations and guidelines. As part of the Japanese government’s trans-agency efforts to promote competition/innovation in digital markets, the JFTC conducted multiple market inquiries and issued Guidelines on Abuse of a Superior Bargaining Position in Digital Platforms.

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II CARTELS

Cartels and bid-rigging, still amongst the JFTC’s top priorities, are prohibited by the AMA under the category of ‘Unreasonable Restraint of Trade’.

The JFTC may issue a cease and desist order or a surcharge payment order, or both, by way of administrative sanctions for violations of the AMA, including the violation of ‘Unreasonable Restraint of Trade’. Cease and desist orders aim to stop illegal acts, restore an appropriate competitive environment, and prevent a recurrence of such violations of the AMA by ordering the relevant party or parties to cease the actions in question and to take preventive measures. In addition to cease and desist orders, surcharges may be imposed in cases involving cartels and bid-rigging.

In 2019, the JFTC issued cease and desist orders for seven cartel cases. The total amount of surcharges imposed was approximately ¥69.3 billion, significantly higher compared to aggregate penalties in recent years (¥2.2 billion in 2018 and ¥7.5 billion in 2017). This is partly due to the record-breaking surcharge imposed in the asphalt cartel case, discussed further below.

The JFTC has a policy to seek criminal penalties in cases that: (1) it considers serious, having a widespread impact on consumer welfare; and (2) involve firms or industries that are repeat offenders, or who have not complied with administrative measures issued by the JFTC. The JFTC did not file any criminal charges in 2019. Court procedure continues for Taisei Corporation and Kajima Corporation with regard to the JFTC’s 2018 criminal accusation for bid-rigging in the magnetic-levitation train project.

In 2019, cease and desist and surcharge payment orders in cartel and bid-rigging cases were issued only for conduct related to domestic markets. The authority, however, maintains a close relationship with competition agencies in other jurisdictions in respect of international cartels.

i Significant cases

Cartel by Manufacturers of Asphalt Mixture

On 30 July 2019, the JFTC imposed a record-breaking surcharge totalling ¥39.9 billion against eight manufacturers of asphalt mixture.

Nine Japanese manufacturers of asphalt mixtures – Maeda Road Construction Co, Ltd., Taisei Rotec Co, Ltd., Kajima Road Co, Ltd., Obayashi Road Corporation, Seikitokyo Kogyo, Gaernt and Toa Road Corporation, The Nippon Road Co, Ltd., and Nippo Corporation (the Nine Manufacturers) – had held nine-company meetings (the Nine-Company Meetings) to exchange information regarding trends in prices of petroleum asphalt and material for asphalt mixture, as well as regarding plans to raise prices. According to the JFTC’s findings, by March 2011, the Nine Manufacturers had agreed to collude to raise prices. The conduct by the Nine Manufacturers had affected reconstruction work after the great earthquake of March 2011.

Based on the agreement, the Nine Manufacturers discussed whether to further raise prices and, if they were raising prices, when and how much the raise will be. The Nine Manufacturers then instructed factory managers to negotiate the price raise based on this


consensus. The branch offices and the factory managers of the Nine Manufacturers in each region confirmed the content of the consensus among each other and exchanged information regarding the price raise, while making adjustments depending on the situation in each region. To further assure the effectiveness of the agreement, the Nine Manufacturers: (1) disclosed to each other their production volumes to check if no member was increasing sales volume and selling at a low price; (2) visited factories that had not yet implemented the price raise for further instructions; and (3) chose not to record the minutes of the Nine-Company Meetings or marked some of the related documents as ‘Done/for disposal’ to prevent the agreement from being discovered.

Since the total production volume of the Nine Manufacturers exceeded 50 per cent of the total domestic production volume of asphalt mixture, the JFTC had no trouble concluding that competition in the market was restricted and that the agreement constituted an ‘Unreasonable Restraint of Trade’ (i.e., cartel) under the AMA.

Nippo Corporation was exempted from surcharges under the leniency system. The Nippon Road Co, Ltd. was granted a 50 per cent reduction in surcharges, and Maeda Road Construction Co, Ltd., Seikitokyu Kogyo and Gaear were granted a 30 per cent reduction. With the exception of Nippo Corporation and Nippon Road Co, Ltd., cease and desist orders were issued to the manufacturers since they did not cease their illegal behaviours at their own initiative.

This decision by the JFTC on the amount of surcharge in this case is said to have been affected by the revisions made to the AMA in June 2019. Under the amended AMA, repeat offenders will not be imposed with an increased surcharge if they cease illegal behaviour before an order is issued by the JFTC. The Nine Manufacturers could have been issued a surcharge 1.5 times higher, had the bill not been passed by the National Diet one month prior to the JFTC’s order.

**Cartel by manufacturers of Cornstarch for Corrugated Paper**

In September 2019, the JFTC hearing court handed down a decision denying the surcharge order against Kato Kagaku Co, Ltd (Kato Kagaku) and dismissing claims by Oji Cornstarch Co, Ltd and J-Oils Mills, Inc (together with Kato Kagaku, the ‘Respondents’) in relation to the orders made by the JFTC against the Respondents in July 2013.

The Respondents and three other companies were found to have taken part in a cartel to fix the price of cornstarch for corrugated paper in the Japanese market in accordance with corn prices on the Chicago Board of Trade (CBOT). The JFTC imposed a surcharge of ¥69 million on Oji Cornstarch Co, Ltd., ¥54.3 million on J-Oils Mills and ¥41.2 million on Kato Kagaku.

The decision by the JFTC hearing court to deny the surcharge order against Kato Kagaku was made for several reasons. Kato Kagaku was not present in the meeting where the price-fixing agreement was made. Although there were some others who were not also present at the meeting, there was insufficient evidence that Kato Kagaku expressed its intention to participate in the cartel: an employee of Kato Kagaku had responded ‘We won’t hold you back’ when informed of the agreement to fix prices after the meeting took place. While Kato Kagaku did raise prices at the same time as the members of the cartel, the JFTC hearing court found that Kato Kagaku may not have acknowledged the agreement, since it had, among other things, negotiated for a different increase in price.
Trends, developments and strategies

Overview of amendments to the AMA

The surcharge system in Japan, introduced in 1977 as an administrative sanction, aims to prevent violations of the AMA by imposing financial penalties for violations. While it has been amended several times since its introduction, increasing globalisation and complexity of business structures have led the JFTC to conduct a further review of the current surcharge system.

In 2016, the JFTC established a Study Group on the AMA with the objective of re-evaluating and addressing issues with the surcharge system, which issued its report7 in April 2017. The inflexibility of surcharge calculation methods and the lack of sufficient incentives for businesses to cooperate in JFTC investigations were flagged as the main problems. By 2018, following a public consultation in mid 2017 on the issues raised in the report, the JFTC had begun to prepare a proposed bill to amend the AMA. The submission of the bill was however postponed after the governing political party, the Liberal Democratic Party (LDP), sought further discussions on the introduction of attorney–client privilege, a concept not previously recognised in Japanese law.

On 19 June 2019, the National Diet passed the bill amending the AMA.8 The bill included the revised leniency programme based on the level of a company’s cooperation with the JFTC’s investigations as well as a revised surcharge calculation method. In addition to these amendments, the new attorney–client privilege will be introduced under the JFTC regulations and guidelines.

Outlook

Revised leniency programme/surcharge system and introduction of attorney–client privilege

Under the new surcharge system, a company can be exempted from multiplied surcharge due to recidivism if it ceases its illegal behaviour before the JFTC issues an order.

In accordance with the new leniency programme, the JFTC will have discretion to increase the reduction of surcharge amounts by up to 40 per cent (20 per cent for applicants after the commencement of investigation), depending on the level of the company’s cooperation with JFTC’s investigation in addition to the base rate. The base rate of reduction has changed from 50 per cent to 20 per cent for applicants second in line, and from 30 per cent to 10 per cent for those third to fifth in line. Applicants beyond sixth in line who currently have no incentive to apply for leniency will also be able to apply for the 5 per cent reduction as the base rate after the enforcement of the amendment. The immunity granted to the first applicant prior to the initial investigation is unchanged. The amendment in relation to the new leniency programme is expected to be enforced by the end of 2020.

The newly established attorney–client privilege will apply to administrative investigation procedures against ‘Unreasonable Restraint of Trade’ (i.e., cartels and bid-rigging). Documents containing communication between a company and its external attorney (in some cases, a qualified in-house lawyer) regarding legal opinions on cartel or bid-rigging conduct cannot be

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accessed by JFTC’s investigators. However, documents that existed before consultation with
the attorney or preliminary documents explaining the facts to be provided to the attorney
would be excluded from privilege. The details of procedures and scope of communications
between a company and its attorney covered by the privilege will be determined in JFTC
guidelines, which are expected to be published in the summer of 2020.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The JFTC took notable enforcement action in a number of non-cartel cases, namely those
involving unfair trade practices, such as resale price maintenance (RPM) as well as abuse of
superior bargaining position, particularly in the IT and digital sectors.

With regard to RPM, the JFTC issued cease and desist orders in July 2019 to two
manufacturers of baby products, including baby strollers, car seats, and carriers. One
manufacturer requested that retailers sell their products at the recommended resale price
(RRP), or it would otherwise cease product supply to non-compliant retailers. The other
supplied only to the retailers who agreed to sell them at a price indicated by the manufacturer.
Both sets of conduct were deemed as RPM, a violation of the AMA, which enables the JFTC
to issue a cease and desist order for the first violation. If the RPM conduct is repeated by the
same company within 10 years, a surcharge may be imposed, though the JFTC has yet to do
so with respect of RPM.

The JFTC has expressed strong concerns about major companies in the IT sector, as
well as online platforms’ activities. Investigations in this sector included probes into the use of
parity clauses and MFNs by Rakuten, Expedia and Booking.com, as well as alleged conduct
by Amazon on suspicion of infringing the AMA by abusing a superior bargaining position.

i Significant cases

Commitments accepted from Rakuten in respect of certain MFN and parity clauses

The JFTC’s investigation into online travel booking company, Rakuten, was the first Japanese
case closed under the Commitment Procedures, which were introduced in December 2018
under the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

In April 2019, the JFTC raided Rakuten, Expedia and Booking.com on the suspicion
that these online travel booking companies have imposed anticompetitive MFN clauses in
their contracts with accommodation operators such as hotels and the JFTC’s investigations
against these three companies started. After Rakuten proposed commitments to resolve
antitrust issues subjected to the JFTC’s investigation, the JFTC approved Rakuten’s proposed
commitment plan to resolve its concerns and concluded the investigation against the
company.10

The commitments proposed by Rakuten included the elimination of the alleged
anticompetitive clauses and the cessation of imposing such restrictions for three years.

October/191025.html).
Having accepted the commitment plan, the JFTC did not determine whether the MFN clauses imposed by Rakuten was an infringement of the AMA and accordingly no sanctions, including cease and desist orders, were imposed on Rakuten.

The investigations against Expedia and Booking.com remain ongoing.

**Decision regarding Qualcomm's 3G licences**

Competition authorities in several jurisdictions, including the US and China, has found some of Qualcomm's licensing practices to be anticompetitive. In Japan, the JFTC reached a different conclusion.

The JFTC issued a cease and desist order to the US-based semiconductor and telecommunications equipment manufacturer back in September 2009, for anticompetitive licence agreements with Japanese mobile phone manufacturers in relation to the 3G telecommunication standard. Specifically, the JFTC decided that the royalty-free licensing clause and non-assertion of patent provision (NAP) were deemed as restrictive conditions,11 which is a type of unfair trade practice prohibited by the AMA. Qualcomm challenged the JFTC’s decision and the JFTC hearing court revoked a previous decision in March 2019.

The hearing court ruled that the clauses regarding royalty-free licensing and NAP were considered a form of cross licensing, which was legal in principle. It also concluded that the JFTC investigators did not show sufficient evidence to prove that the alleged clauses would hamper fair competition.

**ii Trends, developments and strategies**

**Framework for assessing competition issues arising from business alliances**

Business alliances are widely utilised as a means of business strategy to address various issues including business efficiency and innovation by realising prompt business operation and cost saving. Recently, business alliances have been implemented not only between competitors or trade partners, but also among companies in different sectors or industries, for example between an automotive manufacturer and a telecommunication company.

The Study Group on Business Alliances, established by the JFTC’s Competition Policy Research Centre (CPRC), issued a report in July 201912 compiling the authority's past statements on business alliances13 and presenting a general framework for competition assessment of the market effects from these joint activities based on recent JFTC practices. The report acknowledges that business alliances generally have pro-competitive effects and at the same time may also raise competition issues in a relevant market. Specific issues on each of seven types of business alliances (i.e., business alliances regarding production, sales, purchasing, logistics, R&D, technological and standardisation) are addressed respectively in the report.

In addition, the report addresses such specific issues as data accumulation and sharing in respect of data-related business alliances. Though the report raises no new theories of

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11 With regard to ‘restrictive conditions as unfair trade practices’, the JFTC may issue a cease and desist order for this type of unfair trade practice, but it cannot impose surcharges.


13 The JFTC had indicated its views in relation to business alliances in several guidelines, including guidance on merger review, joint R&D and intellectual property or consultation cases announced on its website.
harm, this comprehensive document is a helpful resource for companies that collaborate on activities like production, sales, marketing, purchasing, logistics and R&D, whether privately with competitors/trade partners or on an industry or cross-sector basis.

iii Outlook

Regulatory developments affecting digital markets

Close scrutiny of this sector is likely to continue in 2020. To facilitate competition and innovation in line with rapid changes in digital markets and implement competition policy effectively in this sector, the Japanese government commenced discussions around digital market regulation. In accordance with this government initiative, the JFTC conducted a survey in 2019 on digital platform trade practices (i.e., business-to-business transactions on online retail platforms and app stores), the results of which form the basis for the preparation of new law in relation to platform businesses. The JFTC has also addressed issues specific to digital markets in its recently published Guidelines on Abuse of a Superior Bargaining Position in Digital Platform Businesses as well as Merger Review Guidelines and Merger Review Procedure Policies (discussed further below).

Bill for the Act on Enhancement of Transparency and Fairness of Specified Digital Platforms

Based on the survey on digital platform trade practices, the JFTC came out with a report in October 2019 highlighting various issues affecting platform operators and their users, including: (1) unilateral changes to contractual terms and conditions; (2) lack of transparency for refusing transactions and in the use of transaction data; and (3) unfair treatment of customer complaints. To address these issues, the Japanese government has been considering legislation to ensure that digital platforms are operated in a fair and transparent manner. A direction of the Digital Platformer Transaction Transparency Bill was disclosed and submitted for a public consultation process in December 2019. Based on the results, a bill for the Act on Enhancement of Transparency and Fairness of Specified Digital Platforms was approved by the Cabinet on 18 February 2020 and is scheduled to be submitted to the ongoing ordinary session of the Diet in 2020. According to the Bill, only a limited number of digital platforms called ‘Specified DPFs’ will be subjected to regulation due to the heightened necessity of ensuring that these platforms are operated with transparency and fairness. More concretely, only large-scale online mall operators and app stores will be initially defined as specified DPFs, based on certain criteria, such as the total amount of sales and the number of users. Specified DPFs will be required to disclose the terms and conditions of their contracts with users and to provide prior notice of revisions to these terms and conditions. They will also be required to take other measures, including the establishment of procedures and administrative organs in accordance with the policies promulgated by the relevant ministry. Specified DPFs will also be required to submit to the ministry regular reports on the status of their implementation of the above measures, which it will then use to review and assess conduct.

Guidelines on Abuse of a Superior Bargaining Position in Digital Platform Businesses

Consumers provide personal data to digital platform operators when using operators’ services. Concern has been mounting that both the means by which digital platform operators obtain consumer data and the manner in which they use it constitute abuses of the operators’ superior bargaining positions under the AMA.

Abuse of a superior bargaining position under the AMA has traditionally been found only in B-to-B transactions and it had been unclear whether this type of conduct is prohibited in B-to-C transactions.

The JFTC considered whether problematic conduct by digital platform operators vis-à-vis consumers constituted abuse of a superior bargaining position. After a public consultation process, it announced the Guidelines on Abuse of a Superior Bargaining Position in Digital Platform Businesses in December 2019.15

According to the Guidelines, where a consumer has no choice but to accept terms and conditions offered by a digital platform operator that are disadvantageous to the consumer, the digital platform operator is considered to occupy a superior bargaining position. More specifically, a digital platform operator will be found to occupy a superior bargaining position where: (1) no alternative platform that provides a service equivalent to the operator’s is available; (2) it is difficult for consumers to terminate use of a service provided by the operator; or (3) the operator has some discretion to unilaterally determine the terms and conditions of transactions, including the price, quality, and quantity of goods or services. Further, the Guidelines specify certain types of abusive conduct in terms of unjustifiable acquisition and unjustifiable use of personal information, including: (1) acquiring personal information without notifying consumers of the purpose of its use; (2) acquiring personal information against consumers’ wishes that exceeds the scope necessary to achieve the purpose of its use; and (3) using personal information without taking necessary and appropriate precautions to ensure its safe management.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Credit card market

Cashless payments are encouraged by the Japanese government, and the amount of payments using credit cards continue to increase. The JFTC recently conducted a survey on the credit card market to consider competition law issues arising out of business practices in this sector. A questionnaire was sent to five international credit card brands (i.e., payment network operators, such as VISA, Mastercard and American Express), more than 200 card issuers and 2000 merchants, some of whom were interviewed by the JFTC. An online survey was also conducted with 2,000 customers. After the year-long survey, the JFTC published its report in March 2019,16 which focused on transactions between payment network operators and credit card companies that are card issuers or acquirers.

The JFTC found that some payment network operators are likely to be in a superior bargaining position over credit card companies. The result of the survey showed that over 70 per cent of the credit card companies that responded to the survey gained 60 per cent of their transaction value from transactions with a particular payment network operator, and over 80 per cent of them considered it would be difficult or impracticable to change the payment network operators. Based on these circumstances, the JFTC considers that the credit card companies would be unable to avoid accepting disadvantageous requests from payment network operators because the termination of the contract with a particular payment network operator may lead to significant problems for the credit card companies' business.

Given this finding, the report identified the potential violations of the AMA as abuse of superior bargaining position in relation to unilateral revision of contract contents and bearing of expenses involved with the mandatory embedding of contactless payment chips. Other unfair trade practices considered to be potential violations were discussed in the context of prohibitions against embedding multiple contactless payment chips, most favoured nation clauses, dynamic currency conversion services and interchange fees.

This survey is considered as the one of the JFTC’s actions concerning platform operators. The JFTC will continue to monitor the anticompetitive practices in this sector, and major payment network operators in particularly should deal cautiously with credit card companies in Japan to avoid antitrust scrutiny.

ii  Trends, developments and strategies
The JFTC continues close scrutiny in digital markets as mentioned above. Currently, the JFTC is conducting several surveys and market research operations in relation to the digital market, including the digital advertising market.

iii  Outlook
In addition to digital markets, the JFTC is also monitoring other sectors that it has concerns about and will conduct any survey or market research on these sectors if necessary.

V  MERGER REVIEW
The number of merger filings with the JFTC has been relatively stable with a slight increase as compared to the immediately preceding year. From April 2018 to March 2019 (FY 2019), the JFTC accepted 321 notifications, of which 315 were cleared in Phase I (including 240 with early termination), two were brought into Phase II and four were voluntarily withdrawn by the parties. From the standpoint of competitive landscape between the parties, 179 involved horizontal overlaps and 129 involved vertical relationships.

Effective use of pre-notification consultation with the JFTC has been one of the keys to the high rate of Phase I clearance. Parties may benefit from informal discussion with the authority during the pre-notification phase, which often extends to substantive competition issues. Sometimes the parties discuss and agree on remedies with an aim to obtain conditional clearance during Phase I.

The JFTC has also been keen to employ economic analysis in complex cases. Out of 13 decisions published by the authority as notable ones during FY 2019, four involved the use of economic analysis.
i Significant cases

Takeda Pharmaceutical’s acquisition of Shire

The JFTC unconditionally cleared Takeda Pharmaceutical’s acquisition of Shire upon careful scrutiny of the parties’ actual and potential horizontal overlaps.

Following the recent practice, the authority defined the relevant product markets in accordance with ATC level 3 and 4 categories, and especially focused on intestinal anti-inflammatory agents (A7E) with distinction of intestinal aminosalicylate products (A7E1) and intestinal corticosteroid products (A7E2). Distinction was also made between existing low molecular pharmaceuticals and new biopharmaceuticals in view of the difference in medicinal properties and functional mechanism.

For the existing low molecular pharmaceuticals, Takeda competes with a third party to which Shire grants licence of the overlapping product. The JFTC did not recognise it as horizontal overlap because the acquisition would not change competitive landscape as the licence agreement would survive. For the new biopharmaceuticals, the authority scrutinised the parties’ potential horizontal overlap, which was concluded as not problematic on the grounds that (1) Shire’s product has been developed for the US and European markets but not for Japan, hence the overlap is less obvious; and (2) there exist a number of competing products, which are under development and would likely create competitive pressure to the parties.

M3’s acquisition of Nihon Ultmarc

The JFTC concluded, on 24 October 2019, that M3’s acquisition of Nihon Ultmarc would not substantially restrain competition on the condition that the parties implement the proposed remedies. While the filing thresholds were not met, the authority raised concerns and reviewed the transaction that was closed on 1 April 2019.

M3, the acquirer, operates online platforms that provide information on pharmaceuticals to doctors (Pharmaceuticals Information Platform), while Nihon Ultmarc, the target, provides a database of medical institutions and healthcare professionals (Medical Information Database). The latter service constitutes essential input of the former service, and the parties may provide both services in a bundled manner. In view of these vertical and conglomerate relationships, as well as the parties’ position in the relevant markets (i.e., both are No. 1 players and no comparable competitor exists), the JFTC raised concerns and sought the following remedies: (1) the parties will not refuse to provide Medical Information Database service to their competitors, and will not provide these services under discriminatory conditions; (2) Nihon Ultmarc will not disclose the confidential information of its customers (i.e., M3’s competitors) to M3; (3) the parties will refrain from tying these services; and (4) the parties will make annual reporting to the authority for the period of five years.

ii Trends, developments and strategies

Amendment to the guidelines

On 17 December 2019, the JFTC published the amendment to the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (the Merger Review Guidelines) and the Policies Concerning Procedures of Review of Business Combination (the Merger Review Procedure Policies).

The amendment primarily focuses on the effective review of M&As that involve digital markets. In context of market definition, for example, the amended Merger Review
Guidelines gives consideration to the characteristics of digital services such as: (1) multisided markets where a platform serves as intermediary of multiple customer segments and generates strong network effects; (2) quality-oriented competitions (as compared to price-oriented); and (3) sub-segment of services by reference to functions, sound/video qualities, communication speed, security level, etc. Assessment of anticompetitive effect should also be adjusted to address R&D overlaps, multisided markets, network effects, importance of data in digital services.

Amendment to the Merger Review Procedure Policies includes introduction of the value-based threshold that triggers voluntary consultation. Under this new rule, parties to a transaction valued at more than ¥40 billion are recommended to consult with the authority if it is likely to affect domestic customers (e.g., target either has domestic locations, business operations targeting domestic customers or domestic turnover exceeding ¥100 million).

**Exemption for regional banks and bus operators**

With the expected decrease of Japanese population and other economic circumstances as backgrounds, M&As are considered important and effective options for regional players to survive but their relatively high market share in specific regions may lead the transactions to the JFTC’s in-depth review.

In order to facilitate this momentum, on 3 March 2020 the Cabinet adopted the bill that exempts mergers and joint operations between regional banks and bus operators from the merger control regulation, on the conditions that (1) the parties would be difficult to survive without the proposed merger or joint operation; and (2) there is no concern that the parties would unreasonably increase the interest rates or prices.

Competent regulatory authority and the JFTC will jointly review the eligibility for the exemption, and also monitor the parties’ behaviours post-transaction. The exemption will last for 10 years from the effective date.

**Outlook**

With the amended Merger Review Guidelines and Merger Review Procedure Policies, the JFTC is expected to make thorough assessment on the growing number of M&As that involve digital markets. The Japanese government expects that the Diet will enact the proposed exemption for regional banks and bus operators during the current ordinary session, and put it into force by the end of 2020.

**VI CONCLUSIONS**

Under the leadership of Commissioner Kazuyuki Sugimoto and his successor, the focus on cartel and merger control enforcement and on various industry sectors is expected to continue in 2020. In particular, the JFTC has expanded its budget and capacity to strengthen enforcement in digital markets.

The JFTC is also expected to issue further key reports and statements of new policy. In relation to rule-making around digital platforms, the JFTC will likely increase enforcement in this area under new proposed legislation concerning the transparency and improvements in fairness for digital platform operators that will be submitted to the Diet.

Implementation of the reformed leniency regime and newly introduced attorney–client privilege system will be designed later this year, details of which should be closely monitored.
Chapter 15

MEXICO

Luis Gerardo García Santos Coy, Carlos Mena-Labarthe and Sara Gutiérrez Ruiz de Chávez

I OVERVIEW

Antitrust enforcement is a relatively young and constantly evolving field in Mexico. Although the 1857 and 1917 Federal Constitutions already included provisions against monopolies, it was not until 1993 when the first Federal Economic Competition Law entered into force and an authority was created, embracing internationally accepted antitrust concepts and tools, such as: merger control, per se prohibition of cartel behaviour, and a rule of reason type of approach for abuse of dominance.

It was not long, however, before it became evident that the powers invested in the former competition agency were insufficient. Initial attempts to address this problem were rounded up by a major constitutional amendment taking place in 2013. As a result, the constitutional framework was updated and better adapted to fit actual competition enforcement needs through the creation of a constitutionally autonomous enforcer, the Federal Economic Competition Commission (COFECE) holding jurisdiction over all economic markets except for the broadcasting and telecoms sectors in which competition enforcement is entrusted to another autonomous regulator, the Federal Telecommunications Institute (IFT).

Accordingly, in 2014 a new Federal Economic Competition Law was enacted. This new Law embraced the already available traditional tools with certain additions and updates, complemented with ‘incremental tools’, such as the power to conduct market investigations with remedial action.

While competition enforcement is one of the scopes (albeit an important one) that the IFT needs to cover, COFECE has a constitutional mandate to procure the application of the Law in all other economic areas, subject of course to resources constraints, calling for efficient prioritisation.

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1 Luis Gerardo García Santos Coy and Carlos Mena-Labarthe are partners, and Sara Gutiérrez Ruiz de Chávez is a counsel at Creel, García-Cuéllar, Aiza y Enríquez.
2 The 1992 Law was subject to different amendments, the most significant ones in 2006 (mainly increasing fines and including additional conduct in the abuse of dominance catalogue) and 2011 (again increasing fines as well as investigative tools and powers).
4 Competition enforcement accounted for a maximum of 3.2 per cent of matters resolved by the IFT, pursuant to IFT (2019) First, Second and Third Quarterly Reports of Activities 2019, about 20 per cent more than the preceding year.
5 COFECE’s assigned budget for 2020 accounts for 38 per cent of IFT’s assigned budget (slightly below to the preceding year). Budget for Federation Expenses for the Fiscal Years 2019 and 2020.
Within this context, and pursuant to COFECE’s Strategic Plan for 2018–2021,6 enforcement efforts are focused in markets likely to produce the highest impact in terms of economic growth and welfare, considering six indicators: contribution to economic growth – pursuant to market size and growth rate; generalised consumption; impact in related or downstream markets (e.g., intermediate goods and services or inputs); harm to the lower-income population; regulated sectors; and markets prone to anticompetitive behaviour.7

Pursuant to these indicators, COFECE has been targeting the financial, agrifood, energy, transport and health sectors, along with public procurement, for enforcement in the 2018–2021 term. Many of the relevant cases and advocacy efforts that will be further addressed below are indeed consistent with this criterion. As for the year 2019, after a somewhat complicated beginning, starting with the agencies challenging the Public Officers Remuneration Law,8 it appears that the regulators managed to stay reasonably apart from political discussion. Consistently, COFECE has secured a beneficial alliance with the Ministry of the Public Administration (the Federal Controllership), allowing for mutual trainings and information exchange.9

In terms of regulation, COFECE efforts during 2019 focused on clarifications or changes to the merger regime, mainly a switch to a mandatory digital process. Another relevant addition to the competition framework was the adoption of regulations related to client–attorney privilege protection in the context of antitrust investigations. The IFT, in turn, issued guidance applicable to market condition investigations and commitments for early termination of abuse of dominance and unlawful concentration cases.

A very relevant feature in the preceding year is the interest both regulators have shown in the digital economy. COFECE (2019)10 specifically flags the digital and network markets as relevant challenges in the future ahead, while the IFT is contesting to gain jurisdiction over merger review in digital platforms.11 A general concern is that favouring the IFT’s jurisdiction in this matter would appear to grant the telecom regulator an ascendance over a new market.

II CARTELS

Consistent with international practice, in Mexico, agreements among competitors that reduce or soften competition will be considered illegal per se and penalised as an absolute monopolistic practice. One particularity of the Mexican system is that firms and individuals can incur an infringement without reaching an actual agreement, since the mere exchange of information between competitors with an anticompetitive impact is forbidden per se and may be criminally sanctioned.

8 Which ordered generalised salary cuts for all public employees, including COFECE officers.
11 File CCA 4/2019. The decision to this matter is to be issued by the First Federal Specialized Court in Economic Competition, Telecom and Broadcasting in (early) 2020.
While not every interaction among competitors will update this infringement, an absolute monopolistic practice will take place in the face of hardcore collusion (i.e., agreements and information exchanges with the object or effect to fix or manipulate prices or their components; restrict output or input; allocate markets; or rig bids).

Note that violations may arise either by object or effect, implying that the enforcer will not need to prove actual market effects to ground an infringement. Absolute monopolistic practices are, by law, null and void.12 Administrative fines for firms involved in cartel conduct can reach up to 10 per cent of the wrongdoer’s annual accruable income. Firms can also be subject to private litigation claims (including collective actions) to recover damages or losses arising from conduct updating an infringement declared by the enforcer.

Furthermore, individuals executing the practice on behalf of a company will be personally liable and subject to both criminal and administrative penalties, including fines of up to US$922,29313 five-year debarment, and five to 10 years’ criminal imprisonment. Facilitators (whether companies or individuals) can also be fined up to US$830,064.

While commitments and remedies are not legally available to settle cartel cases, as of 2006 the Law introduced a leniency programme. The benefit is available for first and also for subsequent applicants, all of which will be required to acknowledge – and terminate – their participation in the collusive agreement (or information exchange) and provide enough evidence to ground or strengthen the agency’s case. In exchange, applicants will be released from criminal liability and administrative penalties will be reduced proportionally to the marker.

To keep this benefit, the applicant is bound to maintain full and continuous cooperation with the agency throughout the proceeding; failure to meet the cooperation standard will lead to COFECE withdrawing the leniency benefits.14 COFECE has, contestably, revoked several leniency agreements based on failing to cooperate.

### Significant cases

During 2019, COFECE resolved six cartel cases in the following markets:

a. the tortilla market.15 COFECE found that tortilla producers agreed to sell tortillas at an overcharge price; while fine amounts are not significant (approximately US$119,492) agri-food cases fall within the priority scope defined by COFECE in its Strategic Plan 2018–2021.

b. air transportation passenger services.16 COFECE considered the involved airlines set base prices for air transportation services between 2008 and 2010, affecting over 100 national routes and 3.5 million travellers; aggregated fines amounted to US$4.68 million.

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12 Still, the enforcer is empowered to order the parties to cease or correct any actions related to the practice and to restore competition, if applicable.
13 All exchange rates in this document were calculated at 18.84 pesos per US dollar. Fines were calculated based on the 2020 reference unit UMA.
the public procurement of dental brushes for the health sector. Alleged bid-rigging in the market led to three companies being fined an aggregated amount of US$960,396 for rigging health department bids.

Regarding the investigation for alleged price fixing, COFECE Plenary decided to close this file without declaring an infringement, based on the consideration that the charged companies were part of the same economic group and not effectively acting in the market as competitors. It however, recommended a change in public bid design to boost competition.

The following are recent important court precedents on this subject:

a) Supreme and Specialised Court’s non-binding decisions on leniency. The Supreme Court analysed the leniency obligation as the need to cooperate totally, without obstacles or interruptions of any kind. The Specialized Court furthered by clarifying this will not restrict the applicant's right to put forward defences during the proceeding.

b) Specialised Court’s non-binding decision on applicable jurisdiction. The Court clarified that cartel conduct taking place outside of Mexico, but having an impact in Mexican markets, will be subject to antitrust enforcement in Mexico.

c) Specialised Court’s non-binding decision on per se rule interpretation in cartel cases. This confirms that the per se rule (applicable to cartel behaviour assessment) implies that arguments related to conduct rationality or justifications will be dismissed.

ii) Trends, developments and strategies

The fight against cartels remains a priority for COFECE. For many years, the leniency programme has acted as a cornerstone for cartel enforcement in Mexico. The boom of the early years, however, appears to be fading. In past years, leniency applications have been declining at approximately -38 per cent annually. While this might just be consistent with international trends, questionable revocations of the leniency benefit could have played a role by reducing the programme certainty. Acknowledging this as a relevant issue, during 2019

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17 COFECE File IO-005-2016.
18 COFECE File DE-23-2017. File IO-004-2015 (production and marketing of egg) was also closed by the plenary, due to lack of evidence to ground an infringement.
19 First Chamber of the Supreme Court. A.R. 106/2018 and First Specialised Court A.R. 60/2017. Note that assessment was made in the context of the previous Law, but criteria – although not binding – are indicative also regarding cases handled with the new Law, recapturing the same concept.
20 First Collegiate Court Specialised in Competition, Broadcasting and Telecom Matters A.R. 60/2017. For simplicity, in what follows these Collegiate Courts will be referred to only as Specialised Court(s).
22 Unfortunately, updated statistics are not available. However, by 2016 about 16 per cent of all ex officio investigations in cartel cases had been triggered by leniency. COFECE (2016), 10 years since the implementation of the Federal Economic Competition Commission’s Leniency Program: what has been its impact: https://www.cofece.mx/wp-content/uploads/2017/11/Impacto10AnosProgramaInmunidad.pdf.
23 Pursuant to COFECE (2019) COFECE in numbers 2018: www.cofece.mx/wp-content/uploads/2019/03/CFCN2018_v270319.pdf, leniency applications dropped from 26 in 2016 to 15 in 2017 and 10 in 2018; complete figures for 2019 are not public yet, but according to COFECE (2019) COFECE Model. A Perspective of Institutional Structuring, as of June 2019 only 3 applications had been reported, indicating this trend is likely to present again for 2019.
COFECE engaged in a public consultation process to draft new and additional regulations to the leniency programme, which in fact were recently voted and approved. These, however, had not been published nor entered into force by the closing of February 2020.

According to COFECE’s 2018–2021 Strategic Plan, the agency continues to aim to promote leniency applications as a cornerstone of cartel enforcement.

As for criminal prosecution, during 2019 COFECE lodged a second referral, again with regard to cartel behaviour in the health sector.

iii Outlook

In 2020 COFECE’s investigative authority is likely to follow up and possibly conclude some of the three cartel investigation cases announced in the past year, namely marketing of gasoline and diesel, renewal and upkeep of technology and systems for highways and corn starch, along with other previously published and still ongoing investigations in liquefied petroleum gas, public procurement of iron, highway maintenance, production and marketing of sugar and recruitment of professional soccer players.

Once the investigation is completed, the Investigative Authority will assess whether to close the file or to formally charge alleged wrongdoers with a probable infringement, to proceed to a second – trial-like – phase to be resolved by the Plenary. Cartel investigations at the second-level stage during the upcoming year include:

a. alleged price fixing in the production of tortilla in Chiapas;

b. alleged price fixing in the supply of gasoline and diesel in Baja California;

c. alleged price fixing and market allocation in the production distribution and marketing of medicines;

d. the brokerage of debt securities where price fixing or output restriction is alleged;

e. alleged bid-rigging in the provision of laboratory studies and blood banks to the public health sector.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Consistently with international trends and best practices, the Law provides for a catalogue of vertical restrictions and abuse of dominance situations that, under specific market circumstances, may raise anticompetitive concerns, namely:

a. vertical non-compete agreements;

b. resale price maintenance and imposition of resale conditions;

c. tied sales;

29 COFECE File IO-001-2016.
30 COFECE File IO-006-2016.
31 COFECE File DE-011-2016.
The Law acknowledges that conduct falling within any of the above descriptions may cause both positive and negative effects in the marketplace. As a result, relative monopolistic practices will only be illegal if (1) parties hold – joint or individual – substantial market power; (2) the object or effect of the conduct is foreclosing or blocking third-party access to the relevant or related markets or creating exclusive advantages; and (3) efficiencies arising from the conduct are not enough to counterweigh possible market harm, to the benefit of the competition process and creating overall consumer welfare.

In the presence of all three of these conditions, the practice will be illegal and may be fined with up to 8 per cent of the wrongdoer’s annual accruable income. As is the case in absolute monopolistic practices, the agency will order the practice to cease while the affected parties may recover damages or losses through private litigation. Individuals acting on behalf of the dominant firm or facilitating the conduct may also be subject to civil fines and disablement, although not to criminal liability, which is reserved for cartel conduct.

Conversely to cartel cases, settlements for relative monopolistic practice cases are available and a relatively common path to terminate an investigation. Applicants must show commitment to cease the investigated practice and restore the competition process. If offered remedies are viable and effective, the agency will either waive or reduce the fine. This process, however, will not exclude private enforcement by affected parties. While no case was terminated through commitments during 2019, in the past few years COFECE has been increasingly investigating and penalising breaches to ongoing commitments. As is mentioned below, courts have been also active in analysing and interpreting the matter.

### Significant cases

During the past year COFECE concluded two relative monopolistic cases:

1. an investigation on refusal to sell in the credit information market. The dominant agent was fined US$1.46 million for refusing to provide access to basic credit information as obliged by the applicable laws thereby blocking market access to a competitor;\(^{34}\) and
2. an investigation on refusal to provide ground transportation passenger services to and from Cancun International Airport. COFECE considered that the airport operator

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\(^{32}\) Allocation among competitors would update an absolute monopolistic practice.

\(^{33}\) The action consisting in reducing rivals’ margin by increasing the cost of an essential input, while lowering the price of the downstream good.

\(^{34}\) COFECE File DE-016-2015.
restricted taxi options between 2010 and 2018 (at least) causing an estimated 8 per cent overcharge for users; the airport operator was ordered to allow access to all parties holding the corresponding permit and fined US$3.85 million.\textsuperscript{35}

Dealing with court precedents, very interesting decisions were issued in relation to commitments. First, the courts decided that commitments cannot waive legal rights or actions or will be invalid.\textsuperscript{36} Regarding commitment breach, the court decided that commitments are different in nature, whether substantive (i.e., those related directly with correcting the conduct that raised antitrust concern) or formal (i.e., those that allow monitoring of substantive commitments); breaches should be consistently differentiated and fined accordingly.\textsuperscript{37}

The IFT, in turn, closed a number of files related to abuses of dominant position that were not upheld, including the investigation against Telcel, for alleged predatory pricing, discrimination and margin squeeze in the market of fixed public lines;\textsuperscript{38} and the investigation for alleged tied sales, exclusivities and predation in marketing services in the broadcasting television market.\textsuperscript{39}

\textbf{ii Trends, developments and strategies}

Pursuant to COFECE’s 2018–2021 Strategic Plan, COFECE plans to achieve effective law enforcement by promoting founded claims and referring to market intelligence and screening to directly detect anticompetitive practices.\textsuperscript{40}

In practice, COFECE holds a significantly high standard to process a claim. During 2017, a total of 38 claims were dismissed. Pursuant to COFECE’s official figures, the numbers are not improving; during 2018; another 39 claims are reported as dismissed, and by the end of the third trimester, the number had already reached 37.\textsuperscript{41} COFECE should revise its own standards for dismissing claims to be able to improve enforcement results and meet its goal to promote claims.

\textbf{iii Outlook}

COFECE has announced new investigations in the markets of accounting affiliation services, liquid gas petroleum and ground transportation services to and from the Mexico City International Airport.\textsuperscript{42}

\begin{itemize}
  \item \textsuperscript{35} COFECE Files DE-008-2016.
  \item \textsuperscript{36} Second Specialised Court A.R 10/2015
  \item \textsuperscript{37} First Specialised Court A.R 173/2017
  \item \textsuperscript{38} IFT File AI/DE-003-2016.
  \item \textsuperscript{39} IFT File AI/IO-002-2016.
  \item \textsuperscript{40} Strategic Plan for 2018–2021, COFECE, Mexico City.
  \item \textsuperscript{41} COFECE (2019) COFECE in numbers 2018 and COFECE (2018) COFECE in numbers 2017: https://www.cofece.mx/wp-content/uploads/2018/06/LCN_COFECEenNumeros_APPpdf#pdf. Note that public information does not show the type of infringement that was covered by these claims and thus, unprocessed claims could relate to either absolute, relative monopolistic practices or unlawful concentrations.
\end{itemize}
COFECE will of course, also continue focusing on two previously launched and still ongoing investigations in e-commerce platforms, marketing, storage and transportation of oil and related markets.\(^{43}\)

In terms of charged vertical infringements, the COFECE Plenary will be dealing with the investigation on refusal to sell in the wholesale salt market.

**IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES**

As anticipated in Section I, the 2013 and 2014 structural changes to the competition framework led to the provision of incremental tools for competition enforcement, including the power to conduct market investigations.

While many jurisdictions (Mexico included) allow for advocacy tools, such as market studies, to generally assess market conditions in a given industry, market investigations in Mexico resemble the UK tool in the sense that the competition enforcer will be entitled not only to assess competition in the investigated market and locate the sources of the competition problem but also to impose remedies.

These powers allow COFECE not only to assess competition conditions in each market but also to detect and correct the conditions leading to these problems – such as barriers to competition or essential input access restrictions, whether structural, regulatory or behavioural.

This tool is intended for markets in which anticompetitive conditions arise from a series of factors that would not easily be captured through traditional competition enforcement tools, calling for overall correction.

At least eight market investigations have been initiated to date, most of which relate in some way to anticompetitive regulation or public actions. Success rate, however, is not encouraging with three closed investigations due to a lack of evidence, three pending and only two files resolved with actual remedies tackling effective competition problems.\(^{44}\)

In terms of regulated markets, COFECE has additional preventive powers, for example, to revise and authorise *ex ante* participation in certain bids or procurement processes, mainly in regulated sectors. Of course, one of the main topics connecting competition and regulation is carried out in the telecoms arena, by the IFT.

**Significant cases**

Major developments in market investigation cases include:

- the investigation into aeroplane fuel. COFECE opening this file implies it suspects an absence of effective competition conditions and the need for corrective measures to restore the competition process;\(^{45}\)

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\(^{43}\) COFECE files IO-004-2016 (milk) and DE-040-2016 (laboratory tests and certifications in the rubber industry) were not further pursued by the Investigative Authority due to lack of evidence of an infringement.

\(^{44}\) As noted below, effects on one of these, however, were significantly restricted by the courts.

the investigation into card payment systems. This ongoing investigation has caught the attention of practitioners since, due to the investigated market, the final impact could be very relevant;\textsuperscript{46} and

the preliminary decision indicating the existence of regulatory barriers to competition in the supply of raw milk to the dairy industry in Chihuahua. The file is still being processed and might be resolved in the upcoming year by the Plenary, which will revise the Investigative Authority suggestions along with the arguments put forward by the affected parties, to assess whether definite correction (in this case a recommendation to the local Congress to change legal provisions) is in order.\textsuperscript{47}

At the judiciary level, the first relevant decisions regarding market investigation proceedings were issued in 2019. Specifically, the Supreme Court decided it is the sector regulator and not COFECE, which holds ‘primary jurisdiction’ over a regulated market. This means that COFECE can only recommend the adoption of measures but cannot supersede the original regulatory authority of the executive branch by directly indicating how to regulate. This has a definite impact in the strength and reach of this tool when it comes to regulated markets and will certainly be a landmark resolution for future cases.\textsuperscript{48}

\textbf{ii Trends, developments and strategies}

As anticipated, COFECE has, for some time now, focused heavily on preventing and correcting anticompetitive impacts arising from government actions. In addition to market investigation tools, COFECE has made use of its advocacy tools to raise awareness on how uneven public policy may deeply affect market structures.

In this regard, COFECE has analysed and publicly discussed the competitive impact of some laws and drafts (e.g., the Tabasco Procurement Law, the Draft Transparency of Financial Services Law, Ports Law and INFONAVIT regulations) including recommendations aimed at protecting or enhancing competition. In particular, during 2019 COFECE issued antitrust opinions against regulation that would endanger the (competitively desirable) vertical independence in the Federal Electricity Commission.

These advocacy tools have produced practical effects, for example, the elimination of ASA exclusive rights for the supply of fuel for planes in Mexican airports. They also signal the markets that have a particular relevance or interest for COFECE.

\textbf{iii Outlook}

In the upcoming months, COFECE may focus significantly on its recently launched market study research on the retail food and beverage market. This is an ambitious project that will provide relevant insight for several industries and could lead to further action in terms of enforcement.

\textsuperscript{46} COFECE File IEBC-005-2018.
\textsuperscript{48} First Specialised Court A.R. 142/2018.
V STATE AID

In contrast with what happens in other jurisdictions, in Mexico competition law does not include specific provisions or processes for the competition agencies to challenge state aid from an antitrust perspective, implying no significant cases, trends, strategies or others can be identified.

Note, however, this does not mean governmental actions or decisions (whether federal, state or local) will be excluded from competition principles. On the one hand, competition agencies could deal with these through advocacy tools (market studies and non-binding opinions) and, whenever possible, through market investigations. In addition, and as noted in our Introduction, competition principles flow directly from the Federal Constitution, which directly protects free competition and free entry as a fundamental right; this opens the door for independent constitutional processes (e.g., amparo actions) to be evaluated whenever a state decision fails to honor these principles.

VI MERGER REVIEW

The merger control regime in Mexico is structured based on ex ante review of relevant transactions. The Law sets forth specific economic thresholds to determine which transactions will require mandatory notification and approval before closing.

The process will start by filing a notification of concentration; the agency is empowered to request basic and additional information before the staff submits its recommendation to the Plenary, who may reject, authorise or impose remedies to the transaction. Once a concentration has been approved, it cannot be challenged again for its competitive effects in the marketplace, except if approved based on false information. Note that the only available means to challenge a decision made under the Law is a constitutional amparo trial, which based on expected timings is usually not used for these purposes.49

Ex ante assessment, however, will not cover all merger control enforcement needs, as transactions lying below the notification thresholds may also raise anticompetitive concerns that need to be addressed.50 Additionally, since the Mexican regime is suspensory, there may also be gun-jumping cases – whether involving firms that notified in time but did not wait for clearance, or companies simply not filing at all. These infringements will be addressed by ex post enforcement, usually involving fines that can reach 8 per cent of the parties’ annual accruable income in case of unlawful concentrations, or up to 5 per cent of such income as a penalty for closing before receiving clearance (for mandatory notice cases). Cases involving the latter have been increasingly common in recent years.

i Significant cases

In terms of ex ante tools, the most relevant transactions recently revised include:

a Walmart/Cornershop. This was the first digital platform case analysed by COFECE. To the surprise of international practitioners and agencies, the transaction was rejected

49 Explaining the absence of judicial precedents in the topic.
50 This is the reason why particularly complex cases may be voluntarily filed, to increase parties’ certainty even when economic thresholds are not triggered.
based on the arguments that Walmart may deny its competitors access to the platform, or that Walmart’s competitors may decide to leave the Cornershop app to avoid sharing their data with Walmart.\textsuperscript{51}

\textit{b} The Walt Disney Company/Twenty-First Century Fox. The parties filed notice before both COFECE and the IFT showing a new example\textsuperscript{52} of possible overlap between both agencies. COFECE unconditionally authorised the transaction with regard to film distribution for cinemas, home entertainment licensing (audio/video), non-digital music licensing; live entertainment and general licensing. The IFT granted a conditional approval of the transaction pursuant to risks associated with the provision and licensing of pay-TV in the sports and factual categories (including cultural, documentary and reality shows). The decision includes structural remedies consisting in the divestiture of the entire Fox Sports business, as well as behavioural measures for the factual category, including separate provision and licensing of Disney & Fox factual content for both pay and audio TV and internet.\textsuperscript{53}

\textit{c} Natura/Avon. This transaction involved the merger of two entities involved in the beauty and personal care industry that historically have participated in direct selling. The transaction was approved by COFECE after a thorough analysis of the position of the parties in the industry and the market dynamics.

In terms of \textit{ex post} merger control, COFECE closed two investigations for unlawful concentration (milk and marketing of gasoline and diesel markets) without pursuing charges in a trial-like phase. The IFT, in turn, decided to pursue an unlawful concentration case for a series of unauthorised broadcasting transfers.\textsuperscript{54}

In terms of penalties, most COFECE cases refer to failure to notify a concentration:

\textit{a} In Nestle/Lala, parties were fined an aggregated amount of US$420,519.

\textit{b} In BorgWarner/Remy Holdings International, parties were fined a total of US$155,074.

\textit{c} In Banco Ve por Mas/Bankaool, parties were fined US$80,138.

COFECE clarified the fine in the latter two was reduced based on the fact that the parties accepted their responsibility for not notifying the transaction.

Regarding court cases, the specialised courts have issued non-binding criteria stating that: (1) merger guidelines are not binding but COFECE may refer to them, as this adds to legal certainty; (2) legal thresholds set forth in the Law refer to different scenarios without being exclusive.\textsuperscript{55} More recently, a first instance court interpreted that, whenever a claim for unlawful concentration is filed while a merger notice is being processed, COFECE needs to reassess whether the facts that are the object of the claim are equal to those addressed in the merger notice, before dismissing the claim.\textsuperscript{56}

\textsuperscript{51} COFECE File USE/CNC-004/2016; COFECE File CNT-006-2017.\textsuperscript{\textdagger}


\textsuperscript{53} IFT File P/IFT/110319/122; COFECE File CNT-126-2018.

\textsuperscript{54} IFT File AI/IO-001-2016.

\textsuperscript{55} Second Specialised Court. A.R. 1/2017.

\textsuperscript{56} First Instance Specialised Court J.A. 121/2019; currently under appeal.
Trends, developments and strategies

Most regulatory efforts carried out in 2019 refer precisely to the merger framework. The regulatory provisions were changed to clarify how COFECE will carry out its obligation to notify the parties of detected antitrust concerns in a notified transaction and to clarify the proceeding to penalise failure to gain pre-merger clearance. In terms of efficiency, COFECE also updated its regulations for electronic submissions. As of January this year, all submissions must be made through digital means.

COFECE will be carrying out an assessment of ex ante impact during 2019. Enforcement and penalties arising from failure to notify or gain pre-merger clearance are becoming more common. Companies are advised to duly analyse competition thresholds in the jurisdiction to avoid unnecessary risk.

Moreover, one of the most relevant topics of the past year involves the IFT contesting jurisdiction over a digital platform merger. Even when arguments are not yet public, it seems the IFT believes that it holds jurisdiction over digital platforms which appears to be a too-wide scope for the regulator’s reach and would give the IFT clear ascendance over non-telecom and broadcasting sectors, where marketed through digital means. In clear tension with this, as anticipated, COFECE has consistently publicised interest in digital markets that are perceived as the future challenge for competition enforcement. In other words, both agencies have clear interest in gaining jurisdiction over the matter; consistently with international trends, both appear to regard digital markets as the future of competition enforcement and want to make sure they take part in this. The decision in this regard should be expected for early 2020.

Outlook

COFECE has been clear in its interpretation that merger control needs to be addressed in an ex ante manner, owing to the difficulties in restoring competition once a concentration has been completed. In this sense, we can expect to see COFECE further penalising any breaches to the obligation to secure clearance before closing.

VII CONCLUSIONS

As noted, competition enforcement in Mexico has evolved significantly and even when the agencies are becoming more sophisticated and aggressive in their enforcement efforts, the antitrust arena worldwide is encountering interesting challenges. Changes are obviously expected, either through policy, or amendment to legislation. The Law provides for tools of different scopes, nature and objectives to reach different enforcement needs.

Given recent budget cuts, enforcers are tending to be more strategic and careful with the use of their powers. Recent ex ante and ex post evaluations of their work as well as general studies of market conditions in Mexico are shedding more light on planning and strategic interventions.

Budget cuts can also create a problem in terms of specialisation and technical capability for the agencies, as very technical officers are leaving the regulators because of salary reductions in government.

In terms of COFECE, enforcement still appears to be highly focused on cartel conduct, although vertical restraints and market investigations are gradually getting more attention. In the merger control arena, COFECE has been showing a more aggressive approach to formal infringements (i.e., failure to obtain pre-merger clearance) as shown by recurrent fines.
COFECE has also become more technical in its analysis of mergers, using more sophisticated economic tools and taking more time in complex cases, but also trying to reduce time frames in less complex cases. The use of electronic notifications systems has also helped in the reduction of the time it takes from notification to final resolution. Massive requests for information in cases involving overlaps is becoming an unfortunate trend.

Despite the interest shown in preventing and correcting anticompetitive effects arising from regulation or governmental decisions, the available tools in the law are not quite effective. Strengthening COFECE’s powers or incorporating further processes in this regard would be desirable, especially now that judiciary interpretation has further restricted the agency’s powers in this matter.

Competition enforcement outside of the administrative arena (e.g., criminal prosecution and private litigation) this year showed some (although limited) development, with the second criminal referral. The civil arena has not shown significant developments except for the creation in 2018 of the Unitary Civil and Administrative Courts Specialised in Competition, Broadcasting and Telecom Matters for the First Circuit, for the attention of private litigation to recover damages caused by anticompetitive behaviour. With some important traditionally claimant firms setting their eyes in the Mexican market, this trend could be reversed very quickly.

Overall, competition enforcement is becoming more mature, increasingly dealing with more challenges and complex cases. This will likely allow for other competition areas to flourish and become effective complements for government action in this matter.

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Chapter 16

NIgeria

Oludare Senbore, Ayodeji Oyetunde, Temitope Sowunmi, Kareemat Ijaiya and Oluwatamilore Oluwalaiye

I OVERVIEW

On 30 January 2019, the President of the Federal Republic of Nigeria assented to the Federal Competition and Consumer Protection Act (the FCCP Act). Prior to the enactment of the FCCP Act, Nigeria had no comprehensive competition legislation that dealt with antitrust, abuse of dominant position and merger control issues. The regulation of merger control in Nigeria was historically subject to the regulatory oversight of the Securities and Exchange Commission (the SEC), being the apex regulator of the securities market in Nigeria while other competition law issues such as abuse of dominant position were regulated by sector-specific bodies. The FCCP Act has, however, repealed the provisions of the Investments and Securities Act on mergers and acquisitions as well as the Consumer Protection Council Act, and as the primary competition law legislation in Nigeria, it overrides any other legislation that purports to deal with competition law issues, the FCCP Act also has extraterritorial jurisdiction with respect to foreign mergers that have an impact on the Nigerian market.

As part of the reforms introduced by the FCCP Act, the Federal Competition and Consumer Protection Commission (the Commission) was established as Nigeria’s primary regulator of mergers (which now includes mergers and acquisitions), abuse of dominant position and antitrust matters and the protection of consumer rights.

While the establishment of a regulator charged with enforcing competition related issues in Nigeria is laudable, a key concern of industry players and the general public is the enforcement of the competition and antitrust provisions as this will require robust subsidiary legislation that will assist in the proper application and enforcement of the statute, adequate training and appointment of experienced and knowledgeable staff to manage the affairs of the Commission and enforce the provisions of the FCCP Act.

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1 Oludare Senbore and Ayodeji Oyetunde are partners and Temitope Sowunmi, Kareemat Ijaiya and Oluwatamilore Oluwalaiye are associates at Aluko & Oyebode.
3 Section 165.
5 The Investment and Securities Act regulates securities market in Nigeria.
7 Section 3.
II CARTELS

i Significant cases
At present there are currently no cases, disputes or matters arising from the cartel provisions of the FCCP Act.

ii Trends, developments and strategies
Under the FCCP Act, agreements, activities and conduct among undertakings that have the effect of preventing, restricting or distorting competition in any market are prohibited.

In particular, Section 59(1) of the FCCP Act provides that any agreement among undertakings or decisions of associations of undertakings that cause or are likely to result in the prevention, restriction or distortion of competition in any market shall be unlawful and void. The FCCP Act particularly prohibits the following activities, which may be considered as cartel behaviour amongst undertakings:

a the direct or indirect fixing of the purchase or selling price of goods or services;
b division of markets by allocating customers, suppliers, territories or specific types of goods or services;
c limiting or controlling the production or distribution of goods or services, markets, technical development or investment;
d engaging in collusive tendering; and making the conclusion of an agreement subject to acceptance by other parties of supplementary obligations which by their nature or according to commercial usage have no connection with the subject.8

Furthermore, the FCCP Act prohibits terms or agreements for the sale of goods or services where the purpose is to establish or provide for the establishment of minimum prices to be charged on the resale of goods or services.9

The Commission is empowered under the FCCP Act to make regulations, guidelines and notices relating to leniency programme.10

iii Outlook
The biggest challenge facing Nigerian regulations was the lack of clear statutory powers to investigate and prosecute potential price-fixing and cartel arrangements that might have existed in certain sectors of the Nigerian market. The enactment of the FCCP Act has now given the Commission the requisite powers as well as the requisite tools for it to establish an appropriate leniency programme as well as incentives and protection for the whistleblower. We look forward to when the Commission issues regulations that establish such programmes, rewards or protection.

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8 Section 59(2).
9 Section 65.
10 Section 163(2)(g).
III ANTI-TRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The provisions of the FCCP Act regulating restrictive agreements in Nigeria are similar to those provided for under Article 81 of the European Commission Treaty. As discussed in Section II, under the FCCP Act, undertakings are precluded from entering into agreements in relation to price-fixing, market-sharing and customer allocation, production limitation and distribution agreements by which suppliers impose prices of goods on resellers.

While the FCCP Act prohibits any restrictive agreement among undertaking that is likely to distort competition in any market, it exempts certain types of agreements from being construed as restrictive in line with international practices. Thus, under the FCCP Act, the following will not be construed as restrictive agreements:

a. combinations or activities of employees for the reasonable protection of employees (i.e., trade unions);
b. arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing minimum terms and conditions of employment;
c. activities of professional associations designed to develop or enforce standards of professional qualifications;
d. contract of service of or a contract for the provision of services in so far as it contains provisions by which a person, not being a body corporate, agrees to accept restrictions for work, whether as an employee or otherwise, in which that person may engage during or after the termination of the contract and this period shall not be more than two years;
e. contract for the sale of a business or shares in the capital of a body corporate carrying on business in so far as it contains a provision that is solely for the protection of the purchase in respect of the goodwill of the body corporate; or
f. any act done to give effect to a provision of a contract, or an arrangement referred to in items (a) to (f) above.  

A contravention of the provisions of the FCCP Act on restrictive agreements is a criminal offence, and any person or undertaking that commits such a breach will be liable upon conviction to:

a. in the case of an individual, to a term of imprisonment not exceeding five years, or to a fine not exceeding 5 million naira or both the fine and imprisonment; and
b. where the offence is committed by a corporate body, the company will be liable to a fine not exceeding 10 per cent of its turnover in the preceding business year. The directors will also be personally liable and subject to the penalties applicable to individuals.

Note that parties who have suffered losses as a result of such breaches may seek redress by lodging complaints with the Commission. The Commission may, if satisfied that the circumstances of the case so warrants, exercise any of the powers granted to it under the FCCP Act as it deems fit, including making interim orders mandating the cessation of the restrictive agreement pending the conclusion of the investigation. Prior to the enactment of the FCCP Act, the ability of parties to enforce or seek protection against an agreement that purported to restrain trade was premised on the principles of common law and the reasonability of the agreement. The courts considered factors such as the length of the

11 Section 68(1).
restraints and geographical limits, among others. The FCCP Act, however, now expressly prohibits all forms of agreements among undertakings creating a monopoly and stifling competition in Nigeria, save for certain express exemptions provided for under the FCCP Act. The implication of this is that Nigerian courts in deciding whether or not to enforce a restrictive agreement are to have recourse to the provisions of the FCCP Act, which now provides the circumstances where certain restrictive agreements should be upheld. Thus, while Nigerian courts may still consider the reasonability of a restrictive clause in an agreement in deciding whether to enforce the agreement, the provisions of the FCCP Act will serve as the first guide of the court in reaching a decision.

Abuse of Dominant Position in Nigeria

Abuse of dominant position occurs where an ‘undertaking enjoys a position of economic strength enabling it to prevent effective competition being maintained on the relevant market and having the power to behave to an appreciable extent independently of its competitors, customers and ultimately of the consumers’. The term ‘relevant market’ includes:

a the geographical boundaries that identify groups of sellers and buyers of goods or services within which competition is likely to be restrained;

b goods or services that are regulated as interchangeable or substitutable by the consumer by reason of their characteristics, prices and the intended uses; and

c suppliers to which consumers may turn to in the short term, if the abuse of dominance leads to a significant increase in price or to other detrimental effect upon the consumer.

The provision of the FCCP Act in relation to abuse of dominant position is essentially similar to what is provided for under Article 82 of the European Commission Treaty, although it appears to be more extensive with respect to the types of conduct that amount to an abuse of dominant position when compared with the examples provided for under the European Commission Treaty, which are essentially limited to imposition of unfair purchase or selling price, limitation of production and application of dissimilar conditions to equivalent transactions.

The FCCP Act prescribes acts that will be construed as an abuse of dominant position. These acts include: excessive pricing, predatory pricing, buying scarce supply of intermediate goods or resources required by a competitor, refusing to give a competitor access to essential facility when it is economically feasible to do so, requiring or inducing a supplier or customer not to deal with a competitor, refusing to supply scarce goods to a competitor when supplying the good is economically feasible, selling goods or services on condition that the buyer purchases separate goods or services or forcing a buyer to accept a condition unrelated to the object of a contract.

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12 Section 70(2).
13 Section 71.
14 A pricing may be considered as excessive where there is no economic justification for it.
15 Section 72(2)(d)(iv).
16 Section 72(2)(d)(v).
17 Section 72(2)(b).
18 Section 72(2)(d)(i).
19 Section 72(2)(d)(iii).
An undertaking that is found guilty of abusing its dominant position will be liable upon conviction to a fine not exceeding 10 per cent of its turnover in the preceding business year or to a higher percentage that the court may determine given the circumstances of each particular case. The FCCP Act also imposes a penalty on the directors of any undertaking found guilty of abusing dominant position within a market. To this end, directors of an undertaking found guilty of abuse of dominant position shall be required to pay a fine not exceeding 50 million naira or a term of imprisonment not exceeding three years.

### Significant cases

As at the date of publication of this chapter, there has been a dearth of reported cases or suit that have been brought either by the federal government or by a civil action pursuant to which an abuse of dominant position was sought to be punished or stopped or whereby a declaration that the agreement or business arrangement was deemed to be illegal or on the ground that it is anticompetitive.

However, in 2018, a civil suit was brought by the Attorney General of the Federation (AGF), pursuant to the provisions of the erstwhile Consumer Protection Council Act (CPC), against MultiChoice Nigeria (Nigeria’s largest digital satellite television company and a dominant player in the broadcasting sector). MultiChoice Nigeria was accused of allegedly increasing the monthly subscription fees excessively as a result of the dominant position it enjoyed in the market. The matter was brought before the Federal High Court, Abuja under the provisions of the erstwhile CPC Act.

The AGF sought a restraining order to restrain MultiChoice by itself, agents or representatives howsoever described, from continuing any increased subscription rates that were being charged to their customers.

Though the civil suit was successful and the restraining order was obtained, MultiChoice however proceeded with the price increase. Due to the fact that the CPC had no power to regulate competition related issues such as abuse of dominant position or to regulate monopolistic businesses or undertakings, the CPC and the court were limited to giving orders touching on the protection of the consumers rights. The MultiChoice case essentially stressed the need for the country to ensure that it had in place a comprehensive competition law policy to address issues like abuse of dominant position in the market.

### Trends, developments and strategies

The FCCP Act in line with international best practices recognised the need for contract of service to contain provisions that restricts an employee’s right to accept employment from other undertakings during or after the termination of the contract of service, provided the period stipulated in the contract of service does not exceed two years. Prior to the enactment of the FCCP Act, the enforceability of a contract of service containing restrictive clauses as regards the right of an employee was subject to the decision of the court.

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20 Section 74(1).
iii Outlook

The FCCP Act no doubt has introduced a much needed regime to the Nigerian market by ensuring that adequate antitrust provisions are in place to tackle issues related to predatory pricing, monopoly, restrictive agreements and other antitrust-related practices that are intended to stifle competition in the Nigerian market. It is left to be seen how the Commission will tackle issues arising from antitrust practices in the coming years.

We believe that there will be more activities within the Nigerian market, especially as it relates to enforcement of the FCCP Act, in view of the fact that there is now an existing competition law and an active Commission willing to enforce the provisions of the law.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

As at the date of publication, the Commission is yet to make any pronouncement or exercise its regulatory powers on among others, antitrust and cartel prohibition. In addition, of the sectoral regulators that had competition regulatory powers, none have to date exercised their powers.

ii Trends, developments and strategies

While Nigeria had no comprehensive competition law framework in place prior to 2019, a number of regulated sectors had competition law provisions embedded into their governing legislation or regulations. Thus, legislation such as the National Communication Commission Act 2003 and the Electric Power Sector Reform Act 2005 – and their provisions geared at prohibiting anticompetitive practices within their sector – ensured that the duty of enforcing these provisions was that of the relevant agency or commission regulating the sector. While the FCCP Act does not seek to do away with the existing sector-specific competition provisions or bar the relevant agency charged with regulatory oversight of the relevant sector from enforcing these provisions, the statute makes the existing sector-specific legislation subject to the provision of the FCCP Act, and gives the Commission concurrent jurisdiction with other governmental agencies in matters or conduct relating to competition or antitrust practices within their sectors. The Commission is required to negotiate agreements with relevant government agencies whose mandate includes enforcement of competition provision for the purpose of coordinating and harmonising the exercise of jurisdiction over competition matters within their sectors. The FCCP Act further provides that where it is alleged that an undertaking is in violation of any provision the FCCP Act, and such an undertaking demonstrates that it had taken this action based on an order of a regulatory agency possessing jurisdiction over the regulated industry, the Commission may, subject to the agreement reached with the regulatory agency, issue a cease-and-desist order prohibiting the undertaking concerned from further violation of the FCCP Act. Thus, pursuant to the provisions of the FCCP Act, the FCCP Act and indeed the Commission occupy a supreme position in matters relating to competition over and above sectorial competition law provisions.
iii Outlook

In view of the powers conferred on the Commission with respect to regulatory oversight on competition matters in Nigeria, it is expected that the Commission will collaborate with other regulators of specific industries to curb antitrust practices within the market. Where the Commission is able to effectively work with other sector regulators, the mandate of enforcing competition related issues within a sector should be seamless.

V STATE AID

i Significant cases

As at the date of publication of this chapter, there have been no decided cases on state aid by the Commission in Nigeria.

ii Trends, developments and strategies

The FCCP Act is silent with respect to the regulation of state aid in Nigeria. The Economic Community of West Africa State (ECOWAS) passed the Supplemental Act of 2008 (the ‘Supplemental Act’), which regulates state aid among regional states. The Supplemental Act applies to all agreements, practices, mergers and distortions caused by member states likely to have an effect on trade within ECOWAS. In view of the fact that Nigeria ratified the ECOWAS treaty in 1975, it is subject to the provisions of the Supplemental Act.

The Supplemental Act prohibits any aid granted by a member state or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain enterprises or the production of certain goods. The Supplemental Act further sets out activities that will be deemed compatible with the common market and other acts that may be deemed compatible with common markets.

Activities that will be deemed compatible with the common market and are not prohibited are:

a) aid having a social character, granted to individual consumers, provided that the aid is granted without discrimination related to the origin of the products concerned; and
b) aid to remedy the damage caused by natural disasters or exceptional occurrences.

Aid activities that may be considered as compatible with the common market are also provided for under the Supplemental Act; and they are:

a) aid to promote the socioeconomic development of areas of the Community where the standard of living is exceptionally low or in which there is serious underemployment;
b) aid to promote the execution of an important project of Community interest or to remedy a serious disturbance in the economy of a member state;

24 A/SA.1/06/08.
25 Nigeria is a member state of the ECOWAS.
26 Article 8 (1).
27 Article 8 (2).
aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; and

such other categories of aid as may be specified by a decision of the authority of heads of State and government on the recommendation of the council of ministers acting on a proposal from the ECOWAS competition authority.

In addition, the Agreement establishing the African Continental Free Trade Area (the Agreement) provides for competition policy among member states.

The Agreement recognises the ability of member states to grant state subsidies to domestic service suppliers in relation to their development programme. However, member states shall agree on a mechanism for information exchange and review of all subsidies granted to domestic service suppliers by a member state, and where a member state considers that it is adversely affected by the subsidy of another member state, the affected member state may request consultation, and the request shall be accorded sympathetic consideration.

It is pertinent to note that while the President has ratified the Agreement, it does not have the force of law in Nigeria. Pursuant to Section 12 of the Constitution of the Federal Republic of Nigeria, an international treaty or agreement entered into by Nigeria will not have automatic application in the country unless the treaty or agreement has been domesticated by an Act of the National Assembly.

Outlook

It is provided in the Supplemental Act, that its provisions shall enter into force upon its publication and the member states which are signatories shall undertake to commence implementation of its provisions on its entry into force. Also the Supplemental Act is annexed to ECOWAS treaty of which Nigeria is a signatory. Thus, in granting state aid to businesses and undertakings in Nigeria, the expectation is that the federal government, the state government and their agencies will ensure that they adhere to the provisions of the Supplemental Act and apply any state aid or grant in a manner that is fair, non-discriminatory and also promotes competition.

VI MERGER REVIEW

Prior to the enactment of the FCCP Act the SEC had the primary responsibility for merger control in Nigeria. The responsibility of the SEC in relation to merger control extended beyond the determination of the fairness of a merger in relation to the shareholders, but also to determining whether a proposed merger was likely to lessen competition in the market. Where the SEC was of the opinion that such a merger was likely to lessen competition in the market, it had the mandate of deciding whether or not to approve the merger based on certain consideration.

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28 Article 17 of the Agreement Establishing African Continental Free Trade Area.
30 Article 8(2).
In addition to the SEC, there were also a number of sectoral regulators that had responsibilities for merger control within their sectors, namely:

a. the Central Bank of Nigeria pursuant to the Banks and Other Financial Institutions Act\(^{31}\) and the Central Bank of Nigeria’s Guidelines and Incentives on Consolidation in the Banking Industry;

b. the Nigerian Communications Commission pursuant to the Nigerian Communications Act regulates mergers in the telecommunications sector;\(^{32}\)

c. the Nigerian Electric Regulation Commission pursuant to the Electric Power Sector Reform Act regulates mergers in the electricity sector;\(^{33}\)

d. the National Insurance Commission pursuant to the National Insurance Commission Act\(^{34}\) regulates merger in the insurance industry; and

e. the Minister of Petroleum through the department of Petroleum Resources pursuant to the Petroleum Act.\(^{35}\)

With the promulgation of the FCCP Act, the general responsibility for merger control is now vested in the Commission as the merger control provision of the ISA were deleted by the FCCP Act.

The FCCP Act is not clear whether the sectoral merger control provisions are still in force and if the approval of the sector regulators are still required for a merger or acquisition or what would happen if the Commission approves a merger and the sector regulator disapproves or vice versa. The collective view at the moment is that the sector regulators still have their merger control powers and that the approval of the Commission and the sector regulator would be required as may be applicable.

The definition of a ‘merger’ under the FCCP Act is much wider than the definition provided for under the ISA.\(^{36}\) The definition under the FCCP Act contemplates both mergers and acquisitions as it incorporates the factor of ‘control’.

Pursuant to the FCCP Act, a ‘merger’ is said to occur when one or more undertakings directly or indirectly acquire or establish control over the whole or part of the business of another undertaking.\(^{37}\) This may be achieved through:

a. the purchase or lease of the shares, interests or assets of the other undertaking;

b. the amalgamation or other combination with the other undertaking; and

c. a joint venture.

An undertaking exercises control over the business of an undertaking if it:

a. beneficially owns more than one half of the issued share capital or assets of the undertaking;

b. is entitled to cast a majority of votes that may be cast at a general meeting of the undertaking or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking;

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\(^{31}\) Banks and Other Financial Institutions Act Cap B3 LFN 2004.

\(^{32}\) Nigerian Communications Act, CAP N97, LFN 2004.

\(^{33}\) Electric Power Sector Reform Act, CAP E7, LFN 2010.


\(^{35}\) CAP P10 LFN 2014.

\(^{36}\) Section 119 of the ISA.

\(^{37}\) Section 92(1).
is able to appoint or to veto the appointment of a majority of the directors of the undertaking;

d is a holding company, and the undertaking is a subsidiary of that company as contemplated under the Companies and Allied Matters Act;

e in the case of an undertaking that a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

f has the ability to materially influence the policy of the undertaking in the manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to (a) to (f) above.

The FCCP Act categorises mergers into small and large mergers. Under the FCCP Act, a large merger will require the prior notification and subsequent approval of the Commission while parties to a small merger may notify the Commission voluntarily or where the Commission formally requests that they do so. The Commission issued a Notice of Threshold for Merger Notification38 pursuant to the FCCP Act that sets out circumstance when mergers shall be notifiable and calculation of annual turnover to determine threshold. This threshold is a general threshold that applies to all sectors and industries, but the Commission has indicated that it will issue guidelines that will provide industry or sector specific threshold.

In furtherance of its mandate, the Commission recently issued Guidelines on Process for Foreign-to-Foreign Mergers (the Guidelines). The Guidelines makes provision for the information required regarding the merging parties, supporting documentation to be provided and the applicable fees.

i Significant cases

Arguably, one of the biggest acquisition deal that has been executed under the FCCPC merger control regime is the US$330 million acquisition of Dangote Flour Mills Plc (DFM), Nigeria’s leading wheat milling company by Olam International (Olam) and Crown Flour Mills Limited. Olam is one of the world’s largest food and agribusiness companies, operating in over 70 countries around the world.

The acquisition, which was carried out through a scheme of arrangement, is part of Olam’s strategy to strengthen its portfolio by investing in businesses in countries where it has consistently performed at the top of the market. The transaction was reported under the FCCP Act regime.

With the acquisition, the entire 4,994,886,771 ordinary shares of 50 kobo each in DFM held by the scheme shareholders of the DFM was transferred to Crown Flour.

The transaction was reviewed and approved by the Commission after being satisfied that the acquisition will not substantially affect or lessen competition in the market. As at the date of this publication, there are no publicly reported decisions of the Commission, where it has decided that a proposed merger or acquisition would lead to a lessening of competition in the market or where it has approved a merger on the condition that part of the business undertaking or merging entities should be carved out or spun off.

38 Notice of Threshold for Merger Notification (S.1. No. 32 of 2019).
ii  **Trends, developments and strategies**

The Commission, in approving a merger, will determine whether or not the merger is likely to substantially prevent or lessen competition. In making this determination, the Commission will assess the strength of competition based on the following:

- the actual and potential level of competition in the market;
- the ease of entry into the market, including tariff and regulatory barriers;
- the level and trends of concentration, and history of collusion in the market;
- the degree of countervailing power in the market;
- the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- the nature and extent of vertical integration in the market;
- whether the business or part of the business of a party to the proposed merger has failed or is likely to fail;
- whether the proposed merger will result in the removal of an effective competitor; and
- whether the merger is justified on the grounds of public interest.

The provision of the FCCP Act of merger control and what the Commission should consider in determining whether or not to approve a merger transaction is similar to the provision of EU Merger regulations and the South African competition law.

iii  **Outlook**

The FCCP Act fosters healthy competition among businesses while providing for adequate protection of customer and small businesses in the Nigerian market. By this, the FCCP Act has introduced significant changes to mergers and acquisition regime in Nigeria and with effective implementation shall have the potential of stimulating economic growth.

Recently, there is a trend of mergers and acquisition going on in the fintech space. Experts have long seen mergers and acquisitions as the most feasible way that fintech companies in Nigeria and Africa can compete with established traditional financial institutions and big tech companies looking to invest in fintech in Nigeria.

Mergers and acquisitions are vital for Nigeria’s fintech space to align with global strategy. The Commission must be mindful to ensure that no merger deal with anticompetitive element cuts through.

The enactment of the FCCP Act was a good start towards achieving the ultimate objective of the FCCP Act. However, the Commission needs to be mindful of the fintech space when issuing its guidelines as fintech has become one of Africa’s and start-up acquisitions destinations by investors.

The Commission is also expected to issue extensive merger guideline that will cover all lapses under the previous regime. It is also expected that the recent regulatory changes and recent display of commitment to improve the business environment will likely cause increase in number merger transaction in the business landscape.

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39  Section 94(2) of the FCCP Act.
40  Section 94(4) of the FCCP Act.
VII CONCLUSIONS

The FCCP Act is a step in the right direction as it would in the long run create a level playing field in the Nigerian marketplace, and ensure prices and businesses are competitive.

The establishment of the Commission is a positive change to the country’s competition and antitrust regime, and the effective implementation of the FCCP Act will foster a dynamic economy by creating a business environment for healthy competition across various sectors.

Generally, competition is an inevitable event in the industry as it plays a vital role in putting the economy and participants therein in check. As such, unregulated competition in the market affects the market, and if the market is a thriving market like the Nigerian market, the effect will be significant.
Chapter 17

NORWAY

Odd Stemsrud

I  OVERVIEW

i  Statutory provisions and public enforcers

The main statutory provisions in Norway are enshrined in the Competition Act of 2004 (CA). The substantive provisions of the CA mirror Articles 101 and 102 TFEU and Articles 53 and 54 EEA Agreement by, first, prohibiting cartels and anticompetitive agreements, and secondly, abuse of a dominant position. Norway is not a member of the European Union, but it is party to the EEA Agreement. Thus, Norway has implemented the EU and EEA competition rules and internal market rules, and has a state aid regime similar to that of EU Member States (Article 61 EEA Agreement mirrors Article 107 TFEU).

The main public enforcer of the CA is the Norwegian Competition Authority (NCA). Decisions adopted by the NCA can be appealed to the Competition Appeals Tribunal prior to being brought before the Norwegian appellate courts. The NCA is not a formal member of the European Competition Network, although having informal points of contact.

The public enforcers of the provisions of the EEA Agreement are, in addition to the NCA, the European Commission and the EFTA Surveillance Authority (ESA). ESA is particularly important in relation to enforcement of the state aid provisions and Article 59 EEA Agreement (the award of special or exclusive rights – mirroring Article 106 TFEU). Decisions adopted by ESA can be challenged before the EFTA Court. Due to the case allocation rules of the EEA Agreement, ESA does not deal with merger cases or cartel cases affecting EU Member States.

ii  NCA enforcement: 2019 overview and 2020 outlook

In 2019, the NCA adopted three substantive final decisions, all three being merger cases. One of the decisions was the NCA’s first ever decision relating to a non-controlling minority shareholding. On general enforcement, the NCA increased its surveillance of the Norwegian groceries sector, inter alia, by carrying out a dawn raid and issuing a sector report.
According to the Norwegian government’s policy instructions in the 2020 budget letter, the NCAs 2020 enforcement focus will particularly target competition in the grocery sector. The reason is that the Norwegian grocery sector is allocated between a few large chains. Moreover, due to the Norwegian customs regime for foodstuffs, it has proven challenging for foreign grocery chains to penetrate the Norwegian market. This focus on the groceries sector is continued from 2018 throughout 2019, and the NCA carried out dawn raids in this sector both in 2018 and 2019.

**ESA enforcement: 2018 overview**

The EFTA Surveillance Authority (ESA) adopted nine final state aid decisions related to Norway in 2019; five ‘no objection’ decisions and four ‘no aid’ decisions – with no decisions in 2019 on unlawful aid. The number of aid measures reviewed by ESA has drastically decreased since the entering into force of the GBER with 44 GBER information sheets related to Norway submitted in 2019, concerning 33 cases. With regard to enforcement priorities, it should be noted that Regulation 2015/1589, establishing a possibility to prioritise state aid complaint cases, has yet to be incorporated into the EEA Agreement.

ESA adopted no competition law decisions and opened no proceedings in 2019. However, ESA is currently undertaking two major investigations:

- in parallel to the NCA, ESA has one major pending abuse of dominance case against Telenor in the telecoms sector pursuant to Article 54 EEA, and in this case ESA issued a supplementary statement of objections in June 2019; and
- ESA issued a statement of objections against Widerøe, a regional air carrier in Norway, for abusing its dominant position in 2018. This case is still pending.

ESA is in practical terms to some extent ‘a second NCA’ for Norway; that is, the EFTA and EEA States are Iceland and Liechtenstein, in addition to Norway. Thus, ESA’s focal point is often (markets in) Norway, in contrast to the European or global competition scope of the European Commission.

### Global public enforcement against Norwegian entities

On the global arena one Norway-linked case has stood out in recent years: the *Maritime Car Carrier* case. In this case, relating to the pure car truck carrier shipping sector, investigations have been opened in all major global jurisdictions, including the EU, the US and Japan. This case has reached its conclusions in most jurisdictions.

In 2019, a new global dossier surfaced – a global cartel case with alleged nexus in Norway: *The Farmed Atlantic Salmon* case against, inter alia, the Norwegian companies Mowi ASA, Grieg Seafood AS and SalMar ASA. Since salmon is not covered by the
EEA Agreement, the European Commission has no jurisdiction to carry out dawn raids in Norway; however, inspections were carried out at the companies’ EU-located units in Scotland and the Netherlands. In the wake of the EU investigations, court proceedings have also been initiated in the US, and the US Department of Justice opened criminal proceedings in November 2019.

iv Private enforcement

On the legislative side, Directive 2014/104/EU on antitrust damages actions has yet to be incorporated into the EEA Agreement and implemented into Norwegian law. This is due to institutional issues that are unlikely to be solved in the near future. However, existing general Norwegian law mirrors roughly the provisions of the Directive.

The key private enforcement case in 2019 was the Kristoffersen case. In this case, the world-renowned slalom skier Henrik Kristoffersen challenged the sporting community framework in relation to the scope of an athlete’s economic rights pursuant to EU and EEA law. The key novel issue is that the EFTA Court, in its judgment in case E-8/16 of 16 November 2018, acknowledged that a restriction on an athlete’s marketing rights is only lawful if that restriction pursues a legitimate aim, and such a legitimate aim can only be the principle of solidarity aiming at channelling economic means also to recruitment, education and children’s and recreational sports. The Oslo District court ruled in the sporting communities favour in a judgement of May 2019. The parties settled out of court prior to appeal.

In a case related to the global Trucks cartel, the Norwegian Supreme Court ruled on 27 November 2019 that an action for claims for damages related to an international cartel with effects in Norway can be brought forward in Norwegian courts. The decision is unsurprising. It remains, however, to be seen whether such actions in cartel cases touching on several jurisdictions will increase in Norway as most claimants – also Norwegian claimants – would usually prefer to argue a case in more claimant-friendly jurisdictions (regarding rules on evidence, quantification of damages, etc.).

II CARTELS

The substantive cartel provision in Section 10 of the CA mirrors Article 101 TFEU and Article 53 EEA Agreement, except for the criterion related to effect on trade between EEA States. Thus, Section 10 CA prohibits agreements and concerted practices that have an anticompetitive object or actual or potential restrictive effect on competition. Judgments of the European Union Court of Justice (EUCJ) and the EFTA Court are directly relevant legal sources in the interpretation and application of the provision.

The leniency policy pursuant to the CA is similar to that of Regulation 1/2003 in the EU, including the possibility of obtaining a marker:

- the first applicant may be granted full immunity from administrative fines;
- the second company may be granted a 30 to 50 per cent reduction;
- the third company may be granted a 20 to 30 per cent reduction; and
- subsequent companies may be granted a reduction in fines of up to 20 per cent.

In contrast to the EEA Agreement provisions, cartel behaviour in breach of the CA can also trigger criminal sanctions, including fines and ultimately imprisonment of individuals, in theory of a duration of up to six years in aggravating circumstances. On the one hand,
criminal sanctions have yet to be applied in a cartel case in Norway, not to mention criminal sanctions against individuals. On the other, the NCA adopted specific guidelines in 2016 on criteria when they will consider reporting an individual offence to the Public Prosecution’s office, and the instructing ministry has requested the NCA to consider imposing criminal sanctions on individuals in future cases. The leniency programme is not available to individuals. However, it is possible to anonymously enquire at the NCA whether they will request criminal sanctions against individuals as a prejudgment decision.

There is a settlement procedure available pursuant to the CA mirroring that of Regulation 1/2003, possibly reducing an administrative fine by 10 per cent. The provision entered into force in 2016 and has yet to be applied.

i Significant cases
The NCA adopted no cartel decisions in 2019.

Verisure/Sector Alarm – statement of objections
The NCA issued a statement of objections in June 2019 against two home alarm companies. The NCA’s preliminary assessment was that the companies had cooperated by agreeing not to approach each other’s customers for the years 2011 to 2017. The NCA has indicated fines of 784 million kroner and 423 million kroner to Verisure and Sector Alarm, respectively. One of the parties, Sector Alarm, has already accepted the fine but has not admitted illegal collusion. A final decision is expected in 2020.

The only significant case reaching beyond Norway is the Farmed Atlantic Salmon case mentioned above. This case is being looked into by, inter alia, the European Commission and the US Department of Justice, albeit as publicly known not the NCA (recalling that the NCA still has jurisdiction since fisheries are not covered by the EEA Agreement).

Dawn raids
The NCA carried out cartel dawn raids in two cases in 2019, in total at five different companies.

One of the dossiers is related to the ongoing surveillance of the groceries sector. In this sector, the NCA carried out a dawn raid in Spring of 2018 – and this dawn raid was followed by a second raid in November 2019. The investigation relates to prices and rebates between producers and the (few) groceries chains. In the wake of the November 2019 dawn raid, the NCA published a report on purchasing conditions for the grocery chains, showing considerable price differences in the Norwegian groceries sector. The NCA collected price information from 16 suppliers in total, analysing prices of about 2,900 products. The report showed that several suppliers offer the grocery chains Rema 1000, Coop and Norgesgruppen different purchasing conditions. In some cases, some suppliers operate with price differences of more than 15 per cent on products they sell to the grocery chains. The Norwegian groceries sector is highly concentrated, but the NCA has not made the exact scope of their investigation public.

The other dawn raid in 2019 was related to alleged bid-rigging in the recycling sector. The NCA later closed this case, in October 2019.

In October 2019, the NCA stated that it opened an investigation of possible anticompetitive practices in the retail fuel market. The NCA has followed this market closely for several years. As part of its monitoring, the NCA has requested market players submit market data twice a year, including their prices, sales volumes and purchasing terms. The
initiation of the investigation was based on findings from the NCA’s market monitoring of this market. There is no publicly available information on any dawn raid relating to these investigations.

Neither the European Commission nor ESA carried out any cartel dawn raids in Norway in 2019. However, as mentioned, the European Commission carried out dawn raids in February 2019 against units located in the EU of Norwegian companies in the Farmed Atlantic Salmon case.

ii Trends and outlook

If one were to identify one sector during 2020 and beyond, it is the groceries sector. Apart from the investigations in this sector, the NCA has to a large degree allocated its limited enforcement resources to merger control.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Section 10 of the CA mirrors Article 101 TFEU and Article 53 EEA Agreement. Moreover, Section 11 of the CA mirrors Article 102 TFEU and Article 54 EEA Agreement. Thus, Section 11 CA prohibits a company’s unilateral abuse of a dominant position.2 Judgments of the EUCJ and the EFTA Court are directly relevant legal sources in the interpretation and application of the provisions.

Regarding public enforcement tools, the CA includes the possibility of commitment decisions mirroring that of Regulation 1/2003 in the EU.

i Significant cases

Four (ongoing or decided) cases merit mention.

NCA cases

Telenor abuse case – telecom

On 21 June 2018, the NCA adopted an abuse case (Article 54 EEA/Section 11 CA) decision to fine the Norwegian telecom incumbent Telenor 788 million Norwegian kroner.3 This is the highest competition law fine ever imposed by the NCA. The case relates, in essence, to an alleged abuse by Telenor of its dominant position by engaging in conduct that impeded the entry of a third mobile network in Norway. Norway has been one of very few countries in Europe with only two mobile operators with own nationwide mobile networks, with Telenor as the dominant player. Mobile operators without their own network have to rent access to either Telenor’s or Telia’s network. Due to the lack of effective competition, Norwegian authorities still regulate the Norwegian mobile wholesale market. Therefore, the development of a third mobile network was key to achieving increased competition in this market. In 2007, Network Norway started the construction of a third mobile network together with Tele2. During the rollout of the network, Network Norway bought access to Telenor’s network in the areas where the third mobile network did not yet have coverage. In 2010, Telenor changed the conditions in its network access agreement with Network Norway. It is

2 The provision also prohibits abuse of collective dominance as that concept is enshrined in EU and EEA competition law.
3 NCA decision V2018-20.
in this regard that the NCA has found that Telenor abused its dominant position. Through the new agreement Telenor reduced the cost for the actual use of Telenor’s network, but at the same time introduced a fee that increased with the number of Network Norway’s end users. This fee was a cost that Network Norway could not avoid by increasing the use of its own network. This reduced Network Norway’s incentives to continue the rollout of the third mobile network. The NCA decision was appealed by Telenor to the Competition Appeals Tribunal, which upheld the decision in a decision of 19 June 2019. This decision has been challenged at the courts, and the case is currently pending at the Gulating appellate court.

**Ringnes abuse case**

The NCA carried out a dawn raid at Ringnes, a brewery in the Carlsberg group, in 2017. No case information has been disclosed throughout 2018 and 2019. However, it has surfaced that the NCA has been concerned that agreements concluded by Ringnes with pubs and restaurants may have hindered other suppliers from selling beer to these pubs and restaurants, thereby weakening competition in the market in breach of Section 11 of the Competition Act prohibiting abuse of a dominant position. Ringnes proposed commitments, which were made public early 2020. According to the proposed commitments, Ringnes cannot require pubs and restaurants to buy all or a given minimum share of their requirements for beer from Ringnes. The proposed commitments also contain limitations on what kind of rebates Ringnes can include in its agreements. Finally, Ringnes must, if needed, surrender physical space in pubs and restaurants to beer from competitors. It is expected that the NCA will adopt a commitment decision based on the proposed commitments later in 2020, being the first ever commitment decision in an abuse case in Norway.

**ESA cases**

**Widerøe case – aviation**

On 2 May 2018 ESA adopted a statement of objections informing Widerøe’s Flyveselskap AS (Widerøe) of its preliminary conclusion that Widerøe may have abused a dominant position in Norway in breach of Article 54 EEA. Previously, airlines needed a specific satellite-based approach system to compete in public tender processes to service several Norwegian PSO routes. The system is called SCAT-1 and was installed at many regional airports in Norway for safety reasons. At the airports where this system was installed, PSO aircraft were required to have certain SCAT-1 receivers on board. Widerøe owns all of the available receivers. ESA’s preliminary view is that Widerøe infringed Article 54 EEA by refusing to supply the SCAT-1 receivers to possible competitors. Consequently, according to ESA, Widerøe appears to have been the only airline able to win a number of the PSO tenders. The case is still ongoing.

**Telenor abuse cases – telecom**

On 1 February 2016, ESA sent a statement of objections to Telenor. The case concerns Telenor’s conduct in three Norwegian markets: the market for wholesale mobile access and origination services, the market for mobile broadband services to residential customers and the market for mobile communications services to business customers. ESA takes the preliminary view that Telenor’s pricing of access and origination services at the wholesale level likely impeded competing offers in the market for mobile broadband services to residential customers. In the market for mobile communications services to business customers, ESA is concerned that
clauses in Telenor’s contracts have impeded competition by making it very difficult for its customers to switch provider and by making it overly expensive for competitors to capture customers from Telenor.

On 24 June 2019, ESA issued a supplementary statement of objections to Telenor. On grounds of priority, ESA is now focusing its investigative efforts on the margins available to competitors in mobile broadband services offered to private users. ESA discontinued the part of the investigation into breakage fees and clauses in Telenor’s contracts with business users. The case is still ongoing.

**Dawn raids**

Neither the NCA or ESA has published any information related to dawn raids in abuse cases in 2019.

**Trends and outlook**

In the 2018 Telenor case, the NCA has finally adopted a decision pursuant to Section 11 CA (abuse of dominance), a provision introduced into Norwegian law by the entering into force of the CA in 2004. Until the 2018 Telenor decision the NCA had not taken any abuse case decisions which were not later settled or quashed by the courts. (Two major cases that were settled or quashed are the S45 case of 2005 and the Tine case of 2011.) Thus, irrespective of the Telenor decision in 2018, it is safe to say that the enforcement of abuse of dominance cases by the NCA is low.

ESA has successfully enforced the similar provision of the EEA Agreement (Article 54) on several occasions, of particular note in the Posten case of 2010 (fines of approximately €11 million) and the Color Line case of 2013 (fines of approximately €19 million).

With regard to the application of Section 10 to vertical agreements, it could be noted that the NCA has not adopted any such decision after the entering into force of the CA in 2004.

**IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES**

**Market liberalisation**

The government’s efforts on liberalisation are aimed at particular two markets: rail passenger transport services and air navigation services.

**Rail passenger transport services**

The market pillar of the EU Fourth Railway Package will make it compulsory for EEA countries to open the market for domestic passenger services by December 2019, while competitive tendering for PSO will be obligatory in the majority of cases from December 2023. The government has already ‘unbundled’ train operations and infrastructure management, and has initiated the deregulation of the Norwegian market by way of placing various routes on tender through a phasing-in period from 2017 to 2022.
Air navigation services

The government has conveyed, although not particularly forcefully, that the markets for air navigation services will be liberalised. It has also stated that the incumbent service provider and owner of most of the airports in Norway, Avinor, may await the introduction of remote towers prior to placing the services on competitive tendering. Thus, it may take many years before the market is opened to other air navigation service providers.

ii Regulated industries

As in other EEA countries, as pursuant to EU and EEA secondary legislation, electronic communications (including telecoms), the power industry and the postal sector are subject to additional sector-specific competition rules. The enforcement of these provisions did not raise particularly noteworthy issues in 2019.

As applicable to the groceries sector, the Norwegian government proposed a new Act on Unfair Trading Practices in this sector in December 2019. The proposal includes provisions on (1) standards for best practice; (2) requirements for complete agreements in writing; (3) sharing of information; (4) protection of business secrets; (5) protection of legitimate expectations in relation to investments made; (6) delisting notices; and (7) the establishment of an enforcement authority. In parallel, the EU adopted a Directive on unfair trading practices in business-to-business relationships in the agricultural and food supply chain in April 2019. It is still to be decided whether the Directive is to be incorporated into the EEA Agreement (i.e., the agricultural sector is as such not part of the EEA Agreement but the Directive’s marketing rules for the food supply chain as relating to the retail and groceries level may be incorporated). If so, the (relevant parts of the) Directive will likely be implemented in Norway as a separate Chapter in the proposed Act on Unfair Trading practices or as a Regulation pursuant to the Act.

iii Trends and outlook

As previously mentioned, the NCA has a draconian focus, indeed as instructed by the government, on competition in the grocery sector. The background to this can be found in the fact that the Norwegian grocery sector is apportioned between a very few large chains with the attendant high risk of suboptimal competition. Moreover, due to the Norwegian customs regime for foodstuffs, it has proven challenging for foreign grocery chains to penetrate the Norwegian market. The NCA has, as mentioned, carried out two dawn raids in this sector, in April 2018 and November 2019, respectively.

V STATE AID

Although not part of the EU, Norway has a state aid regime similar to that of EU Member States (i.e., Article 61 EEA Agreement mirrors Article 107 TFEU). Thus, the EEA Agreement prohibits state aid in order to prevent distortions of competition and negative effects on trade.

The prohibition is, however, subject to exemptions, recognising that government intervention can be necessary to correct market failure and for other purposes. To benefit from these exemptions the government must, as a rule, notify aid measures to ESA for prior approval. Aid measures may be implemented without prior approval when they comply with the General Block Exemption Regulation (GBER) or other specific rules. The main piece of Norwegian legislation on state aid, in addition to the main parts of the EEA Agreement having been incorporated into Norwegian law, is the State Aid Act of 1992. All procedural
rules and the EEA block exemptions have been implemented into Norwegian law as part of the State Aid Act. Similar to the EU model, ESA may request that illegal and incompatible state aid is recovered from Norwegian beneficiaries. 

ESA has substantial resources enabling it to monitor the Norwegian market. Regarding ESA enforcement versus European Commission enforcement, there is, however, one key difference: Regulation No. 734/2013 has, for institutional reasons, yet to be incorporated into the EEA Agreement. Thus, ESA’s competences follow from the previous regulation, Regulation No. 659/99. The effects are, inter alia, that ESA cannot prioritise complaint cases in the same degree as the European Commission; nor can ESA request market information pursuant to the rules of Regulation No. 734/2013. That said, most cases are in any event notification cases that ESA has to handle within the applicable deadlines.

Moreover, a key observation from a factual perspective is that ESA is only monitoring Norway, Iceland and Liechtenstein, enabling ESA to allocate significant resources to the Norwegian market. In addition, Norway has a public affairs sector that in relative terms is much larger than that of most other countries.

With regard to private enforcement, national courts are empowered to enforce, inter alia, the state aid standstill provision and the block exemption provisions. However, private enforcement of the state aid framework has so far been limited in Norway.

i Significant cases

ESA adopted nine final state aid decisions related to Norway in 2019; five ‘no objection’ decisions and four ‘no aid’ decisions – with no decisions in 2019 on unlawful aid. The number of aid measures reviewed by ESA has drastically decreased since the entering into force of the GBER with 44 GBER information sheets relating to Norway submitted in 2019, relating to 33 cases. The main areas for state aid in Norway are regional aid, aid to promote and make environmentally friendly solutions competitive, aid to CO₂ capture technology related to oil and gas exploration, and aid to shipping in the form of a special tax regime. Two significant cases from 2019 are as follows.

Petroleum tax reimbursement case

Based on a complaint by Bellona, an environmental non-profit organisation, in 2018 and 2019 ESA looked into parts of the Norwegian petroleum tax scheme (i.e., the reimbursement system for exploration costs). Due to the extraordinary returns on production of petroleum resources, oil companies are subject to an additional special tax. In 2019, the ordinary company tax rate was 24 per cent and the special tax rate was 54 per cent, generating a marginal Norwegian petroleum tax rate of 78 per cent. The reimbursement system for exploration costs was introduced to reduce entry barriers and encourage economically viable exploration activity. Under the system, companies that are making a loss may choose between requesting an immediate refund of the tax value of exploration costs from the taxation authorities and carrying forward the losses to a later year when the company has a taxable income. If a company chooses the immediate payment option, the exploration costs cannot be deducted from income in later tax assessments. In a decision of 20 March 2019 (018/19/COL) ESA arrived at the conclusion that the measure is not selective. ESA found that the measure is available to all companies on an equal footing. According to EEA state aid rules, a measure that is not selective does not constitute state aid.
Public broadcasting: TV 2 state agreement

In September 2018, the Norwegian Ministry of Culture entered into an agreement with TV 2, giving the latter compensation for being a commercial public service broadcaster. In December 2018, ESA received a complaint from the media company Discovery that the agreement was in breach of the EEA state aid rules. According to the agreement, TV 2 shall broadcast daily news on its main channel, Norwegian-language children’s programmes on the weekends and invest in Norwegian film and drama. The aim is to ensure media pluralism, production of news outside of the Oslo area and an alternative to the public broadcaster NRK. TV 2 receives up to 135 million kroner a year for these services. There is a specific block exemption for state aid for services of general economic interest. Compensation for these services is considered to be compatible with the EEA Agreement and exempt from notification to ESA if it meets certain criteria and does not exceed the net costs including a reasonable profit, for performing the services. In a decision of 13 December 2019 (098/19/COL), ESA concluded that the agreement between TV 2 and the Ministry of Culture meets the criteria in the block exemption. The agreement is, therefore, block exempted and the complaint is rejected as unfounded.

ii Trends and outlook

With regard to enforcement priorities, Regulation 2015/1589, transferring a possibility on ESA to prioritise state aid cases, has yet to be incorporated into the EEA Agreement. However, ESA has in an unofficial capacity stated that it will, within the existing legal framework, not prioritise small cases not affecting competition in the marketplace to any appreciable degree: it will, inter alia, not prioritise complaint cases related to public sales of minor properties allegedly at below market price.

Another trend is the increased use of GBER block-exempted aid. The purpose of the GBER, introduced in 2014, is that only larger, more distortive and complex cases will remain subject to prior notification and detailed scrutiny by ESA. Within the scope of the GBER, the requirement is that larger aid awards are published on a publicly available website, and certain schemes require an evaluation plan under which ESA conducts monitoring exercises.

The focus of individually notified aid is on regional aid to Norway’s outermost regions, aid to support the shift from being an oil and gas-producing country, and aid to support environmentally friendly choices.

Many European countries provide aid to promote the use of renewable energy in households. In Norway, however, renewable energy already accounts for 99 per cent of the total electricity production (mostly hydropower: almost 50 per cent of Europe’s hydropower capacity is in Norway) Thus, this is not a focus of aid in Norway.

The agricultural sector is aid-intensive in Norway. This sector (as well as the fisheries sector) is, however, not covered by the EEA Agreement. Thus, agricultural aid in Norway is monitored only by national political control.

VI MERGER REVIEW

Section 18 et seq. of the CA requires that concentrations meeting certain thresholds are notified to the NCA. Thus, concentrations where the undertakings concerned have a combined annual turnover in Norway exceeding 1 billion kroner must be notified, unless only one of the undertakings concerned has an annual turnover in Norway exceeding 100 million kroner.
Since the CA entered into force in May 2004, the NCA has intervened in 50 cases, of which 16 concentrations have been prohibited.

The procedure pursuant to the CA reflects roughly the EU Merger Regulation, albeit with substantially shorter pre-notification discussions. The main features are as follows: Phase I lasts 25 working days. A standard standstill prohibition applies until approval. There is no deadline for notifying a concentration. Concentrations that are unlikely to affect competition may be notified by a short-form notification, with market share thresholds mirroring the DG COMP Short Form CO. The notion of a ‘concentration’ mirrors that of the EU Merger Regulation, and the same holds true for the substantive test: the significant impediment of effective competition test. The Competition Authority publishes a notice of all notified concentrations on its website.

During 2019, the NCA concluded in 111 cases and received 107 (new) merger notifications. Some 110 cases were approved in Phase I. Three cases triggered an intervention by way of approvals subject to conditions (two cases) and an outright prohibition (one case).

Although Norway is not an EU Member State, it is covered by the one-stop shop of a Form CO filing to the European Commission pursuant to the EUMR. Two key particularities are that turnover in Norway (EFTA) is not relevant for the assessment of the European Commission’s jurisdiction, and the European Commission’s jurisdiction only covers products and services covered by the EEA Agreement (Article 8). Thus, exceptions include, inter alia, agricultural products, which may require a separate filing in Norway if national jurisdictional thresholds are met. There are also additional EEA and EFTA particularities in relation to the referral procedures between the European Commission and the NCA.

i Significant cases

**Non-controlling minority shareholding: The Alarm case (Sector Alarm/Nokas) – conditions**

In March 2019, the NCA adopted its decision in Sector Alarm Group AS/Nokas AS – the NCA’s first ever decision related to a non-controlling minority shareholding. The case addressed home alarm markets in Norway. These markets are highly concentrated with mainly two players: Sector Alarm and Verisure (see also the SO in the 2019 cartel case between the same companies mentioned above). The contemplated transaction was based on Sector Alarm acquiring a 49.9 non-controlling stake in Nokas. Nokas could be perceived as a small ‘maverick’ for house alarms in Norway. The case was closed based on commitments related to a reduced ownership threshold of 25 per cent by Sector Alarm in Nokas and that Sector Alarm would not acquire the company Nokas Small Systems.

**IT services: The Tieto/Evry merger approved, subject to conditions**

The NCA announced 1 November 2019 that the merger between Tieto Oyj and Evry ASA, notified to the NCA on 15 September 2019, was approved subject to remedies. Both Tieto and Evry provides software and related IT services in Norway, with appreciable horizontal overlaps in the segment for e-case files and e-archives for the public sector. The parties proposed as a remedy that Evry’s activities in this segment would be divested to an independent suitable buyer prior to completion of the transaction. Against this background, the transaction was

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4 See, e.g., the decision in M.7015, Bain Capital/Altor/Ewos, Section 4 Paragraph 8.
5 NCA decision V2019-17 of 28 March 2019.
approved 35 days after notification. The company Karbon Invest AS was approved as a new owner of EVRY’s archives business in a separate NCA decision of 29 November 2019, and the standstill obligation on the merging parties was subsequently lifted.

**Offshore accommodation services: Prosafe’s acquisition of Floatel blocked**

On 28 October 2019, the NCA issued a decision prohibiting Prosafe SE’s acquisition of Floatel International Limited. According to the NCA, the contemplated transaction involved the two largest and closest competitors on the Norwegian market for offshore accommodation services: Prosafe and Floatel. Prosafe and Floatel are the only suppliers of modern semi-submersible accommodation units on the Norwegian continental shelf. Accommodation units offered by other suppliers on the Norwegian continental shelf are, in the opinion of the NCA, not fully comparable to those offered by the parties. Other suppliers are, therefore, not able to compete for all contracts. During the investigation, Prosafe proposed remedies with a view to remove the negative effects on competition that would result from the merger. However, the NCA’s assessment was that the remedies as proposed were not sufficient to eliminate the competition concerns identified. The decision has been appealed and is currently pending review at the Competition Appeals Tribunal.

**ii Trends and outlook**

The NCA has for many years focused on competition in local markets, which has led to a higher number of prohibition decisions than in comparable jurisdictions with a more neutral focus. The same focus has led the NCA to have one of the highest global ratios of prohibition decisions compared to the number of launched Phase II investigations. In 2019, one in three interventions was a prohibition decision.

Most of the NCA’s internal enforcement resources are allocated to merger control, with the effect that complex cases under Sections 10 and 11 (Articles 101 and 102 TFEU cases) are usually not subject to an in-depth investigation. One key exception is the NCA’s focus on the groceries sector.

**VII CONCLUSIONS**

The NCA’s 2020 enforcement focus will, as in 2019, particularly target competition in the grocery sector.

On merger control, the NCA has retained its focus on local markets, which likely will generate outright prohibition decisions in cases raising concerns. It remains to be seen whether the NCA’s approach will be endorsed by the Competition Appeals Tribunal.

The most noteworthy antitrust case globally is the *Atlantic Farmed Salmon* case, with a nexus in Norway and ongoing investigations by, inter alia, the European Commission and the US Department of Justice.

The most significant issue in relation to public enforcement of the state aid rules is the increased use of block-exempted aid pursuant to the GBER.

No major, material changes to the CA are expected in 2020.

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Chapter 18

POLAND

Anna Ląszczyk and Wojciech Podlasin

I OVERVIEW

Mr Tomasz Chróstny was appointed as the new President of the Office of Competition and Consumer Protection (OCCP) in January 2020 after the resignation of the former President – Mr Marek Niechcial. Before his appointment, Mr Chróstny was the Vice President of the OCCP and was responsible for consumer protection matters.

We observe that Polish antitrust enforcement has developed in 2019. The President of the OCCP conducted numerous dawn raids and instigated several antitrust proceedings. The antitrust enforcement activities reflect EU trends since vertical restraints and anticompetitive infringements in the online sector were under focus.

Since late June 2017, claiming damages for harm suffered as a result of a competition law infringement is supposed to be easier. The Antitrust Damages Directive has been finally transposed into Polish law, and the Polish Damages Act came into force on 27 June 2017. The objective of this Act is to facilitate the recovery of claims concerning legal presumptions, procedural facilitations and quantification of harm. The Act applies not only to cartel infringements but to all other infringements of competition law, including prohibited vertical agreements and abuse of a dominant position. Furthermore, it covers not only EU competition law infringements, but also infringements based solely on Polish competition law. The Private Enforcement Act introduces a number of solutions that should facilitate seeking compensation from competition law infringers through private enforcement. Nonetheless, despite the Act being in force since mid-2017, such cases remain relatively rare in Poland.

Another important development was the enactment of a new law aimed at limiting the use of contractual advantage and granting new powers to the OCCP. The Act on Countering Unfair Use of the Contractual Advantage in Trade of Agricultural and Food Product came into force on 12 July 2017. It lists examples of practices that may be considered as an unfair use of contractual advantage. These practices pertain to agricultural and food products and include, inter alia, unjustified contract termination, a unilateral right to withdraw from a contract and the unjustified extension of a payment term. Pursuant to this Act, the OCCP has the power to initiate proceedings in these cases ex officio, and in cases of infringement it is entitled to impose a fine of up to 3 per cent of annual turnover. Since the entry into force of the Act, the President of OCCP issued six decisions concerning unfair use of contractual advantage. Some other proceedings are still ongoing.

In 2019 as in past years, the OCCP focused on consumer protection, in particular in the banking and financial sectors. But we observe some developments in the antitrust

1 Anna Ląszczyk and Wojciech Podlasin are senior associates at Linklaters C Wiśniewski i Wspólnicy sp k.
enforcement exemplified by a substantial number of dawn raids and an increased interest in the vertical restraints, in particular resale price maintenance. As regards merger review, the vast majority of cases were closed in Phase I, which resulted in a reduction in the average length of proceedings. At the same time, we saw a steady number of merger cases decided in Phase II. In 2018 there were eight such decisions, as well as eight in 2019.

II CARTELS

As regards cartels, the OCCP continued to focus on bid-rigging. According to publicly available information, in 2019 the OCCP initiated 10 new proceedings concerning alleged bid-rigging. In 2019 the authority issued six decisions concerning local bid-rigging arrangements, and in five of them imposed fines on infringers. Besides bid-rigging decisions, no cartels matter was terminated in 2019. However, the OCCP instigated some new proceedings; therefore, its cartels enforcement pipeline seems to be promising.

i Significant cases

Since the 2017 OCCP’s decision concerning the cartel between producers of fibre board and particle board, there was no major cartel decision issued in 2019. The OCCP issued bid-rigging decisions concerning illegal arrangements in local tenders, concluded mostly between family members. However, some interesting large-scale proceedings are ongoing.

*Alleged market sharing by fitness clubs*

In June 2018, the OCCP instigated the antimonopoly proceedings against 16 companies operating fitness clubs and the company offering benefit packages for employees (including sports and recreation packages). The OCCP alleges that the companies entered into a market sharing agreement. Interestingly, the OCCP also instigated the proceedings against individuals since it found evidence confirming that the managers of six companies participated in the agreement. The proceedings are ongoing.2

*Alleged sharing of Warsaw market by energy providers*

The OCCP instigated proceedings against four providers of thermal energy in Warsaw and investigates whether the companies entered into market sharing, price-fixing and bid-rigging arrangements. Based on evidence, collected among other things during dawn raid, the authority alleges that the companies agreed between themselves to stop competing and focus on their basic core activities (i.e., energy production for one of the companies and sale of the energy for the other).3

*Alleged market sharing by truck dealers*

In April 2019, the OCCP instigated antimonopoly proceedings against dealers of DAF trucks. The OCCP considers that these companies entered into market sharing agreement. The proceedings were also instigated against the managers of the companies.4

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Trends, developments and strategies

The detection of the most harmful anticompetitive agreements is the declared objective of the OCCP. To facilitate this, the authority tries to encourage individuals and undertakings to inform it about identified irregularities. The OCCP introduced a whistle-blower system as well as published guidelines on how to submit a leniency application.

The Polish Damages Act entered into force in 2017. It facilitates bringing claims for damages for competition law infringements; thus, we may expect that those who suffered harm as a result of such anticompetitive conduct may be incentivised to bring their claims to court. Despite this legislative development, private enforcement cases remain rare in Poland.

Whistle-blower system

The Polish Competition Authority (PCA) launched the pilot whistle-blowing programme in April 2017 with the aim of increasing the detection of prohibited agreements between undertakings. This policy is aimed at allowing the OCCP to obtain information from anonymous individuals who have become aware of an illegal practice. Individuals are able to inform the authority through its dedicated telephone number or email address and provide evidence of competition-restricting practices. It follows from publicly available information that the authority has received numerous calls and emails informing about potential irregularities pertaining both to the competition and consumers laws. The OCCP is also working on legislative changes designed to ensure that the concept of a whistle-blower is incorporated into the provisions of Polish competition law on a permanent basis.

To increase the effectiveness of the whistle-blower system, the OCCP launched a new online platform for potential whistle-blowers in December 2019. It aims to simplify the provision of information to the authority and at the same time to protect the anonymity of a whistle-blower. The President of the OCCP receives numerous complaints, and some of them gave rise to the antitrust proceedings (e.g., an antimonopoly proceedings concerning resale price maintenance against printers’ manufacturer). Taking into consideration all the advantages of the online platform, it seems that it will be quite widely used by potential anonymous informants.

Implementation of the Damages Directive

The Polish Damages Act, implementing the EU Damages Directive, entered into force in 2017. the Act covers not only competition law infringements relating to the European market, but also those related solely to the national market, and consequently does not multiply the regimes for claiming damages for competition law infringements. The most important aspects of the Act aim at facilitating the recovery of claims concerning legal presumptions, procedural facilitations and quantification of harm.

The Act raises hopes as to the facilitation of compensation claims for competition law infringements. So far, bringing a successful compensation claim has been difficult due to the demanding tort law rules regarding evidence. The Act does not extend the powers of the OCCP, but intends to supplement the authority’s actions. Following its entry into force,
undertakings infringing competition law will face not only fines imposed by the OCCP, but also will be exposed to the risk of civil proceedings that could result in potentially substantial amounts of damages to be paid.

iii  Outlook

Given the declarations of the OCCP regarding increased cartel detection, we may expect that various means already implemented (for instance, the leniency plus and whistle-blower system) will bring some results in terms of antitrust enforcement in Poland. More activities in the area of antitrust is also a prerequisite for the development of private enforcement of the competition law. Some damages claim proceedings are ongoing; nevertheless, the implementation of the EU Damages Directive is expected to further increase the rate of these claims.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i  Significant cases

Given rather undeveloped OCCP’s case law below we also provide a description recently initiated proceeding.

Resale price maintenance in online sales of printers

In late December, the OCCP imposed fine of approximately 1.4 million zlotys on Brother, the manufacturer of printers and other electronic devices for imposing minimum resale prices on online resellers. The OCCP established that the company monitored retail prices and intervened in case of non-observance of minimum prices. The retailers also contributed to monitoring and informed the manufacturer about prices of their competitors. The manufacturer cooperated with the OCCP as it submitted leniency application and entered into settlement, therefore the initial level of fine was decreased by 40 per cent. The case is noteworthy for two reasons, first it was initiated as a result of a whistle-blower complaint, second the settlement procedure was applied for the first time.

Ongoing resale price maintenance proceedings

The PCA instigated several other proceedings concerning potential resale price maintenance. These include antimonopoly proceedings: (1) against Solgar, a Polish distributor of supplements;8 (2) producers and distributors of bicycles;9 (3) a Polish manufacturer of scooters;10 and (4) a manufacturer of nail polishes.11 In some of these proceedings, restrictions on resale prices concern online resellers. Interestingly, in case against Solgar, charges were brought also against managers.

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Trends, developments and strategies

As regards the enforcement of restrictive agreements, no substantial case law development was seen in 2019. Besides the proceedings described above and bid-rigging decisions mentioned earlier, the OCCP issued one decision concerning resale price maintenance in the online sector. Again, similarly as with cartels, the OCCP instigated numerous antimonopoly proceedings.

No decision on abuse of the dominant position was issued in 2019. But the President of the OCCP instigated proceedings against a leading online shopping platform in Poland – Allegro.12 It alleges that Allegro used the platform in a way favouring its own online shop. The proceedings are still ongoing.

Outlook

Given the ongoing proceedings concerning vertical restraints, it is expected that the OCCP will continue to focus on vertical restraints. Further, the substantial number of dawn raids conducted in 2019 shall be rationally expected to translate into a corresponding number of antimonopoly proceedings. These will be instigating not only against companies but also against individuals – managers. It follows from the numerous public speeches of the OCCP officials that the OCCP will always verify whether an individual by its acts or omission contributed to a company’s competition law infringement. So far the OCCP has used its competences to fine managers. However, given the number of ongoing proceedings in which charges were brought also against managers, one cannot exclude the possibility that the first decision imposing a fine on manager will be issued this year.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

In 2019, the OCCP published information concerning two market investigations, regarding the market for waste management in municipalities in 2014-201913 and press printers.14 Both reports reviewed the competitive structure of the respective markets.

Trends, developments and strategies

Given the OCCP’s policy of declared openness and transparency, guidelines on publishing results of market inquiries have been issued.15 In the guidelines, the authority announced that information on the results of all market inquiries will be published. The scope of the information presented to the public may vary, depending on the educational value of the results and the scope of business secrets of undertakings questioned in the course of an inquiry. While deciding on the scope of information, the OCCP should also take into account the efficiency of proceedings conducted by the authority in which the results of the market inquiries may be used.

ii Outlook
The OCCP continues to follow the approach to issue at least one report from market investigation each year. In the recent years the investigations have been oriented to consumer services, such as insurance, investment funds or pharmacies.

Given the increasing focus of both Polish and EU policymakers on the environmental and sustainability issues, the OCCP may focus on analysing market conditions within this segment of economy, in particular as the OCCP has already made a comprehensive survey of waste management services in Poland.

V STATE AID
The European Commission and EU courts adopted several rulings concerning state aid enforcement in Poland in 2019 that are worth noting.

In May 2019, the General Court quashed the Commission's decision from June 2017 declaring Polish tax measure for the retail sector a incompatible state aid. The General Court decided that the Commission incorrectly considered the tax as a selective measure. This is because, according to the General Court, the Commission established the incorrect reference system of taxation while it failed to establish differentiation between retail undertakings in a comparable legal and factual situation in the context of the redistributive objective set by Poland for tax measure used. As a result, the General Court concluded that the Commission's classification of the measure as state aid was proved to be erroneous. The Commission appealed the judgment to the Court of Justice of the European Union.

In December 2019, the Commission approved under EU State aid rules the Important Project of Common European Interest which also covered Poland. €240 million of state aid within this project is aimed to be granted for three Polish projects. Those projects concern all segments of the battery value chain. Apart from Poland, the programme covers six Member States – Belgium, Finland, France, Germany, Italy and Sweden.

Commission also approved regional aid worth €36 million for LG Chem's investment in electric vehicle factory in the Dolnoslaskie region. The assessment of the aid was performed on the basis of the Regional Aid Guidelines 2014–2020.

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VI MERGER REVIEW

i Significant cases

The OCCP issued four conditional decisions in 2019. These concerned acquisitions of petrol stations by BP Europa,\(^\text{22}\) of cinemas by Multikino’s,\(^\text{23}\) a subsidiary of Vue International and pharmacies by DOZ and Panathea.\(^\text{24}\)

In its conditional clearances the OCCP primary relied upon the structural commitments. In BP Europa/Arge, Multikino/Cinema 3D as well as Panathea/Dolnośląska Grupa Apteczna the OCCP ordered divestiture of certain assets on the local markets for relevant services. In turn, a mix of structural and behavioural commitments was adopted in the proceedings concerning Air Products’ acquisition of ACP Europe and Eurocylinder, which were subsidiaries of ACP that specialise in liquid carbon dioxide. The behavioural commitments consisted of Air Products obligation to maintain the prices of liquid CO\(_2\) unchanged in relation with three main customers of this product, until the end of relevant contracts. At the same time, the OCCP permitted the increase of its prices pursuant to the formula included in the commitments, if the prices of raw materials increased. During the proceedings, for the first time, the OCCP market-tested the commitment proposed by the notifying party.

As regards gun-jumping cases the OCCP continues to take the broad approach of the OCCP to assuming its jurisdiction in cases concerning acquisition of assets and parts of business of other undertakings. Such an approach is evidenced by the case of an acquisition of twelve stores by Dino Polska (owner of a supermarkets chain) from its franchisee.\(^\text{25}\) The transaction consisted of three steps: (1) purchase of real estate from the franchisee; (2) lease of stores to the franchisee; and (3) acquisition of remaining tangible and intangible assets from the franchisee. Dino Polska notified the transaction after implementing first two steps, however the OCCP found that the concentration was already implemented after the acquisition of real estate with a retail outlet. According to the OCCP, Dino Polska, as the owner of a supermarket chain, could easily adapt the retail outlet for the purpose of its business activity and continue the operation of the shop located in the outlet, in particular as it was previously operated under its brand by its franchisee. As a result, the OCCP imposed on Dino Polska a fine amounting to 100,000 zlotys.

Broad approach to the notion of acquisition of a part of a business of another undertaking was confirmed by the Court of Competition and Consumer Protection (CCCP) which in October 2019 quashed the OCCP’s record-level (527,000 zlotys) fine\(^\text{26}\) for by acquiring business of another undertaking (i.e., Klementynka) without the required OCCP clearance. The evidence gathered indicated that Sezam (i.e., an entity that merged into Bać-Pol) had acquired the most important assets of Klementynka, such as key employees, contracts with key suppliers and customers, and goods designated for immediate shipment, which were Klementynka’s main business assets. The CCCP agreed with the OCCP on that Sezam indeed performed a business transaction that constituted concentration under the Polish law.

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However, at the same time the CCCP concluded that the OCCP erred in establishing the turnover relevant to verify the Polish notification thresholds, hence it was not able to confirm that the concentration was actually notifiable.

In spring 2019 the OCCP also launched an investigation to verify whether Agora, a Polish media conglomerate, did not fail to notify an acquisition of joint control over Eurozet, the owner of several Polish radio stations. In February 2019 Agora acquired, together with a Czech Investment fund SPS Ventures, Eurozet and as a result held 40 per cent of Eurozet’s shares (the remaining 60 per cent belong to SPS Ventures). The OCCP is verifying whether 40 per cent stake in Eurozet, together with certain accompanying rights could constitute control for Agora. At the same time, in November 2019 Agora notified to the OCCP the intent to acquire sole control over Eurozet.

The OCCP continues to investigate that Gazprom and five other companies on the allegation that they breached Polish competition law by financing the creation of Nord Stream 2 gas pipeline without obtaining prior merger clearance. In 2015, the companies notified the OCCP of their intention to create a joint venture responsible for designing, financing and constructing a pipeline in the Baltic Sea. The OCCP raised concerns with regard to this concentration in July 2016 on the grounds that it could lead to a significant impediment of competition concerning gas supply to Poland. The notifying parties withdrew the notification. In April 2017, the OCCP instigated preliminary proceedings to re-examine the case as it learned that former JV parents signed the contract to finance the construction of Nordstream. This, in the OCCP’s opinion, could constitute an attempt to circumvent the lack of consent to create a joint venture, given the similar objective of the JV and financing arrangements.

2019 also marked a record level fine related not only to the merger control proceedings, but also in infringements of competition law in general. In November 2019, Engie Energy, one of the companies which allegedly infringed the competition by allegedly implementing a notifiable without the required OCCP’s clearance, was fined with a penalty of €40 million for not providing information required by the OCCP. The OCCP came to a conclusion that the fact that the information Engie was requested to provide could have been crucial to the proceedings.

### ii Trends, developments and strategies

Significant amendments in 2015 introduced a number of significant changes to the Polish merger control system, including two-phase proceedings, revised rules on turnover calculation and amendments to procedural aspects related to remedies. It proved to have positive effects for business, in particular as it resulted in reducing the average length of proceedings before the OCCP. The average Phase I proceedings in 2019 lasted 33 days, and remained at a level comparable to that seen in 2017 and 2018, while the Phase II proceedings lasted on average 266 days what evidences a significant increase in comparison to 2018.

The OCCP issued a record 267 merger control decisions in 2019, 260 of which were Phase I decisions. We saw a steady number of complex merger cases in 2019. In eight cases, a decision was adopted after Phase II proceedings. A further seven cases are currently being investigated.

in Phase II.\textsuperscript{29} In the extended review proceedings, the OCCP continued to widely use its market-testing competencies aimed at verification of the relevant market definitions proposed by notifying parties or at obtaining views on the notified transaction from other stakeholders. The OCCP largely relies on the results of such tests. Market testing significantly increases the duration of Phase II proceedings, which on average last approximately nine months.

The OCCP is also widely using statements of objections (SOs), an institution that was introduced in the 2015 review. In 2019, an SO, whereby the OCCP informs the notifying party of its views regarding potential competition concerns resulting from a concentration, was issued in four proceedings.

There were no prohibitions issued by the OCCP in 2019. In concentrations where competition concerns arise, in 2019 the OCCP issued conditional decisions in four cases. No notifying party withdrew its notification in 2019.

After a quieter 2018, in 2019, the OCCP was more active in gun-jumping enforcement cases, issuing two fines for breach of the standstill obligation. In addition, one new proceeding was instigated in this regard. In 2018, we saw no fines for implementation of the concentration without the required OCCP clearance.

### iii  Outlook

It is not anticipated that there will be a major shift in the current merger control policy in 2020.

### VII  CONCLUSIONS

As seen in 2017, 2018 and 2019 also proved that consumer continued to be the OCCP’s enforcement priority. But, Polish antitrust enforcement has been developing: the OCCP often conducted dawn raids and instigated numerous antitrust proceedings. Following EU trends, the antitrust enforcement focused on vertical restraints and restriction of competition in the online environment. In contrast to the enforcement in the area of the anticompetitive agreements, in 2019 the OCCP has not issued any decision concerning abuse of dominant position. Considering the relative strength of the Polish mergers and acquisitions market, the OCCP was active in the field of merger review. The OCCP also paid increased attention to cases pertaining to closing concentrations before the required clearance.

\textsuperscript{29} As at 7 February 2020.
Chapter 19

PORTUGAL

Tânia Luísa Faria and Guilherme Neves Lima

I OVERVIEW

The Portuguese Competition Act, Law 19/2012 of 8 May (the Competition Act), which has been in force since 2012, modified the legal standards for the handling of complaints by the Portuguese Competition Authority (PCA), giving the PCA greater discretion to decide when to open an investigation based on certain criteria.

According to the Competition Act, the PCA will exercise its sanctioning powers whenever it is in the public interest to prosecute and punish an infringement of competition rules, taking into account the goals of its competition policy, the facts that are known to it, the severity of the alleged infringement, the probability of proving its existence and the scope of the investigation that is required.

To increase transparency, at the end of each year, the PCA publishes, on its website, its strategic priorities regarding competition policy for the following year.

The PCA recently issued its statement of priorities for 2020:

- a reinforce the PCA's ability to investigate and detect anticompetitive practices, namely cartels and other unlawful practices between competitors, ex officio;
- b empower the PCA in order to act against digital anticompetitive practices, namely cartels and other collusive practices;
- c stimulate innovation through the recommendation of measures that eliminate barriers and swift action against anticompetitive strategies;
- d intensify the PCA's strategy for public procurement through an awareness campaign;
- e potentiate a competitive economy through the diffusion of the PCA's recommendations and promoting their implementation;
- f be swift, rigorous and effective relating to merger control, as a means of contributing to the market's efficiency and dynamism;
- g work towards a continuous improvement of internal checks and balance mechanisms, with full respect of defence rights; and
- h improve the PCA's transparency through a better and easier access to its decision practice, judicial decisions, opinions and recommendations, available on its website.2

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2 Available at: www.concorrencia.pt/vPT/A_AdC/Instrumentos_de_gestao/Prioridades/Documents/Prioridades%20da%20Pol%C3%A9tica%20de%20Concorr%C3%A9ncia.pdf.
These strategic priorities combine the consolidation of internal proceedings, the strengthening of the role of the PCA as a voice to be heard in terms of legislative reforms, and the meeting of the international enforcement trends related to algorithms and artificial intelligence.

The PCA also aims to reinforce its enforcement powers within the context of the transposition of the Directive ECN+, Directive (EU) 2019/1. In this sense, the PCA submitted to public consultation its proposal of amendments to the Competition Act related to the referred transposition. The amendments currently under public consultation will impact relevant provisions of the Competition Act, such as: (1) terminological changes with concrete impacts on individual and companies’ rights; (2) amendments to provisions concerning the processing of anticompetitive complaints; (3) increased jurisdiction of the PCA concerning the scope of dawn raids and other investigatory powers; (4) power of the PCA to reclassify the confidentiality of the information provided by particulars; (5) amendments to procedural deadlines; and (6) amendments to the methodology to determine fines and other pecuniary sanctions.

Some of the proposed amendments seemed to be very debatable from a constitutional point of view and therefore it is expected that the referred proposal is subject to relevant amendments.

**Enforcement agenda**

The PCA’s statement of priorities for 2020 indicates that this authority will continue to focus on combating cartels and on continuing to promote *ex officio* investigations as an essential instrument to identify possible anticompetitive practices using instruments as cooperation protocols such as the one signed in 2018 with the Infarmed, the Portuguese pharma regulator3 and, in 2019, with the Tribunal da Concorrência, Regulação e Supervisão (TCRS) to guarantee the that the Tribunal’s library will have access to the PCA's library. 4

It will also continue to develop studies of certain sectors and to monitor public procurement procedures and trade associations.

## II CARTELS

Article 9 of the Competition Act prohibits agreements that restrict competition, including cartel agreements (i.e., agreements and concerted practices between competitors whose object or effect is the restriction of competition by, inter alia, directly or indirectly fixing sale or purchase prices or any other transaction conditions, by limiting or controlling production,
distribution or technical development or investments or by sharing markets (including bid-rigging), through import or export restrictions and through anticompetitive actions against other competitors).\(^5\)

The PCA is an independent entity responsible for the enforcement of competition law in Portugal and for conducting administrative infringement procedures under the Competition Act. The PCA’s decisions may be appealed to the Competition, Regulation and Supervision Court (appeals were previously heard by the Commercial Court of Lisbon).

In Portugal, cartels are administrative (not criminal) offences sanctioned with fines not exceeding 10 per cent of the offending undertaking’s turnover in Portugal in the year preceding the decision, even though criminal law principles apply to this type of infringement. Some argue that according to general rules subsidiarily applicable to administrative offences, when there is more than one infringement, the maximum fine may be twice the abstract maximum applicable to the most serious offence, which in a cartel would be 20 per cent of the turnover of the offending undertakings.\(^6\)

The members of the board of directors of the offending undertakings, as well as any individuals responsible for the management or supervision of the areas of activity in which there has been an administrative offence, when they know of, or it is their duty to know of, an infringement committed and they have not adopted appropriate measures to end the infringement immediately, are liable to be sanctioned under the Competition Act, unless they are subject to a more serious sanction under a different legal provision. The fine imposed on individuals cannot exceed 10 per cent of the individual’s annual income deriving from the exercise of their functions in the undertaking concerned.

As an ancillary sanction under Article 71 of the Competition Act, a ban of up to two years on the right to take part in tendering processes for public works contracts, public service concessions, the leasing or acquisition of moveable assets or the acquisition of services or procedures involving the award of licences or authorisations by public entities, may be imposed. The ban may be imposed in cases in which the practice leading to an administrative offence punishable by a fine occurred during or as a result of those processes.

Article 29 of the Competition Act establishes that the PCA may also impose behavioural or structural measures to end the prohibited practices or their effects.

Under the Competition Act, and as regulated by the PCA, undertakings or individuals connected to the cartel may apply for immunity for a reduction of the fine if they provide valuable information about the cartel.

The Competition Act also establishes the possibility of cases being settled, at the PCA’s discretion, before a decision is issued.\(^7\)

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5 See Article 75 of the Competition Act, as well as the PCA’s Informative Communication on the Portuguese leniency programme, available at www.concorrencia.pt/vPT/Noticias_Eventos/Comunicados/Documents/DR_NOTA%20INFORMATIVA_CLEMENCIA_PosPublReguDR_03_01-2013.pdf.


7 In other antitrust infringements, not connected to cartels, the PCA may decide to close an administrative procedure if it receives what it considers to be adequate remedy proposals from the undertakings. In that case, there will be no infringement under the Competition Act, but the undertakings must implement the remedies agreed with the PCA. The PCA may decide to reopen the procedure under certain circumstances within the next two years.
**Significant cases**

The PCA’s cartel cases have included the *Glucose Diagnostic Strips* case (decided in 2005), the *Salt* case (decided in 2006 and upheld by the Commercial Court of Lisbon in 2008), the *Flower Mills* case (decided in 2005, overturned by the Commercial Court of Lisbon and subject to a new decision of the PCA in 2009), the *Catering Services* case (which resulted from a leniency submission from a former director of one of the undertakings involved in the cartel) and the *Flexible Polyurethane Foam* case (decided in 2013).

In 2019, the PCA demonstrated its increasingly interest in prosecuting anticompetitive practices and unprecedented heavy sanctions were imposed. The largest fines in a horizontal case, to date, totalled €225 million and were imposed, in September of 2019, on 14 companies active in the banking sector. In this case, which does not correspond to a cartel but to a mere exchange of information, the PCA concluded that the defendants had, between 2002 and 2013, exchanged sensitive competitive information regarding the supply of retail banking credit products, such as mortgage, consumer and corporate loans.

This case also requires as additional mention, since the fines imposed have not followed a pattern, as the PCA has imposed fines that range from 0.18 per cent to 9.57 per cent of the offending undertaking’s turnover in Portugal in the year preceding the decision.

The second largest fines in a cartel case totalled €54 million and were also imposed in July 2019 on 5 insurance companies: Fidelidade, Lusitânia, Multicare, Seguradoras Unidas and Zurich Insurance. In this case, the PCA concluded that said companies had, between 2014 and 2017, acted in coordination, agreeing on prices and allocating clients in the market of workplace, health and car insurances to large corporations. This investigation started as a result of a leniency agreement with Seguradoras Unidas, which was granted an exemption of the fine under the leniency program. Fidelidade e Multicare (which are part of the Seguradora Unidas’ group) also settled the case, which resulted in the reduction of their fines in 50 per cent. Finally, the PCA also imposed sanction on individuals: three board members of Lusitânia, and one of Zurich, were fined amounts between €6,000 and €24,000.

In addition, in March of 2019 the PCA has opened three independent investigations related to a possible ‘hub-and-spoke’ cartel in the drink distribution market. In March, the statements of objections were issued, and the processes are still under review. According
to the PCA, there is evidence that major supermarket chains have used their commercial relationship with supplier to coordinate the retail prices of drinking products (such as beer, flavoured waters and soft drinks, among others). This could be the first time the PCA has sanctioned these types of practice.

In December 2019, the PCA published a note to the OECD providing an overview on issues involved in the analysis of hub-and-spoke cartel cases. The note highlighted as potential issues: (1) the analysis of hub-and-spoke evidence (e.g., retail price setting/alignment; control and monitoring of retail prices in the market; retail price deviation corrections; coercion or retaliation, or both); (2) the legal frame of the arrangement (horizontal v. vertical); (3) the identification of the instrument used to implement the anticompetitive practice (such as RPM); and (4) the intent and awareness of the involved undertakings. Nevertheless the challenges involved in the prosecution of this type of conduct, the PCA indicated that all the identified issues 'should not deter enforcement, but rather call for increased robustness of the analysis of the underlying evidence and theories of harm'.

The PCA also sanctioned a cartel involving undertakings operating in the printing and graphics sector. Several undertakings were fined for a price-fixing and market-sharing agreement concerning the market for application form paper after an investigation triggered by a leniency application. The fines totalled €1.798 million. In addition, three board members were fined €6,000 for being aware of the cartel and failing to take action to put an end to it.

In 2013, the PCA sanctioned a cartel in the market for polyurethane foam for comfort products. This case is very important, as the PCA's investigation was conducted in parallel with a cartel investigation in the same market by the Spanish Competition Authority. The investigation was triggered by a leniency request by an undertaking that received full immunity (as well as for its board members), and all the sanctioned undertakings and individuals benefited from substantial fine reductions in view of the settlement procedure. The PCA imposed fines amounting to €993,000 on two undertakings and to €7,000 on board members.

Furthermore, in the area of public procurement, the PCA has also sanctioned infringement almost since its incorporation.

In one of the first high profile investigations, the PCA has sanctioned a cartel involved in bid-rigging. It levied fines against Abbot, Bayer, Johnson & Johnson, Menarini and Roche in 2005 for bid rigging in several public offers presented in the context of tendering processes for the supply of glucose diagnostic strips. The Commercial Court of Lisbon (which previously had jurisdiction over appeals of PCA decisions) joined the case with another related to similar charges, and ordered the PCA to correct specific formal irregularities. The PCA issued a new decision, imposing fines of €13.5 million.

Subsequently, the PCA has sanctioned five undertakings for anticompetitive practices in public tenders for the supply and assembly of prefabricated dwellings that would be used to enable the normal course of school activities during the reconstruction of certain schools, under a governmental public works initiative named Parque Escolar. In this case, the
undertakings involved have waived their right to appeal against the PCA’s decision, in order to benefit from a 10 per cent reduction in their fines. Therefore, the fines imposed by the PCA upon the five undertakings amounted to €831,810.21

In 2018, the PCA sanctioned Sacyr and one of its directors for bid-rigging in a tender for the provision of maintenance services to railways.22 In addition, within the scope of this infraction, in 2019, the PCA has also sanctioned Mota-Engil23 and Futrifer24 and their respective director in charge of the conduct.

Although not related to cartel cases, there have been a number of cases involving recommendations and decisions issued by trade associations. In some cases, the infringements are similar to standard antitrust cases (e.g., price fixing). In most cases involving trade associations, the investigated behaviour nevertheless related to recommended practices, as well as maximum prices, which were understood by the undertakings to be mandatory.

For instance, the PCA fined the Association of Navigation Agents of Portugal for alleged price-fixing practices,25 and stated that the National Association of Freighters had issued a decision that, in the PCA’s view,26 constituted a collective refusal to deal with a specific terminal operator27 and in 2011, the National Association of Parking Lot Companies was fined nearly €2 million for its recommendation regarding pricing criteria in response to the introduction of new legislation on parking lots.28

In addition, the PCA has also fined the Portuguese Association of Driving Schools in the amount of €400,000 for alleged price-fixing practices. In this case, the president of the Association was also fined approximately €13,776, since the PCA concluded that he was aware and had allegedly been directly responsible for the adoption and effective execution of the anticompetitive practice.29

It should also be mentioned that, in 2017, the PCA closed, with commitments (after a public consultation period), two separate proceedings regarding statistical information systems within trade associations (the Portuguese Association of Specialised Credit and the Portuguese Association of Leasing, Factoring and Renting). The commitments offered by the two associations made significant changes to their respective systems, with regard to the historic nature of the information and the adequate scope of access to the relevant market data.30

Similarly, the PCA also closed with commitments an investigation of the Northern Bread and Cake Industries Association, following its President’s public allegations that the prices in bread would rise around 20 per cent. As a consequence, the PCA agreed to close the proceedings contingent on the compliance of some commitments by the Association, such as the emission of a public statement asserting the total independence of its associates in setting prices.31

21 PCA press release of 10 August 2015 (18/2015).
23 PCA press release of 12 April 2019 (05/2019).
25 Case PRC 2004/07.
26 Case PRC 2004/23.
30 PCA press release of 14 November 2017 (19/2017) and 21 December 2017 (21/2017).
31 PCA press release of 5 April 2019 (03/2019).
In July 2019, the PCA issued a statement of objection against two associations in the advertising sector.\(^{32}\) The object of this process is a rule set by these associations limiting the maximum number of participants in private tenders, with the aim of restricting competition between associates.

The PCA’s investigations into professional associations are also of interest. The PCA has fined several national professional associations, such as the Veterinarians Association, the Dentists Association, the Doctors Association and the Chartered Accountants Association, as a result of decisions that had an effect on their members’ pricing (including recommended and maximum prices considered mandatory by the members).\(^{33}\) More recently, the PCA opened proceedings against the Psychologists Association because of clauses in their code of conduct that allegedly had a restrictive effect on the functioning of the market. In order to address the PCA’s concerns, the Psychologists Association offered to amend its code of conduct accordingly and to make the alterations public.\(^{34}\) These commitments were later accepted and deemed mandatory by the PCA.\(^{35}\)

More recently, in June 2019, the PCA published a press release\(^{36}\) warning business associations to refrain from making public statements about prices of goods or services or other business conditions that may promote or facilitate the coordination of their associates behavior. The warning comes from the decision imposed on the Association of Bakery Industry (AIPAN), which included an obligation to clarify to their associates about the total freedom and autonomy in pricing, minimising the potential restrictive effects of a statement made by the AIPAN’s president on the price of bread.

\[\text{ii Trends, developments and strategies}\]

Under the previous legal framework in Portugal, antitrust decisions were not generally published on the PCA’s website, and current access to antitrust decisions is still very limited in cases with pending judicial appeals, even though the PCA has been making an effort to increase the scope of decisions available on its website. The PCA has also continued to publish the issuance of statements of objections and information regarding the carrying out of unannounced inspections, through press releases.

According to publicly available information, the sanctioning of antitrust conduct in Portugal has occurred, more frequently, with regard to restrictive practices within trade and professional associations, including price-fixing, and to bid-rigging cartels. Hence, in 2016 the PCA published an antitrust compliance guide for trade associations, aimed at better elucidating the associations and its members on which behaviours or decisions could present competition risks and should, therefore, be avoided.

In addition, the settlement mechanism established in the Competition Act has proven to be a very useful instrument for the PCA to investigate and prove cartel cases, as well as other antitrust infringements. The settlement procedure was used in the above-mentioned 2019 decisions in the railway and insurance sectors.

The PCA has also made it clear that the state must refrain from promoting arrangements between competitors, as addressed in the case concerning meetings promoted by the

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\(^{32}\) PCA press release of 22 July 2019 (14/2019).
\(^{34}\) PCA press release of 14 September 2016 (18/2016).
\(^{35}\) PCA press release of 15 November 2016 (23/2016).
government of the Azores with several milk producers in which commercial conditions might have been discussed. The PCA closed the case without imposing any sanctions, but recommended that the government of the Azores end the practice and refrain from acting in any way that could potentially facilitate collusive behaviour in the region.37

The PCA is also expected to issue its decisions in retail and wholesale of food and beverages, and advertising alleged restrictive practices. The separate closing of the cases for each individual participant, normally using settlement procedures, is currently the most common approach of the PCA to restrictive practices investigations.

Developments on the investigation concerning alleged market division on the telecommunications segment are also expected. In fact, according to the statement of objection issued by the PCA in December 2019, there is allegedly evidence that MEO – Serviços de Comunicações e Multimédia, SA e a NOWO – Communications, SA constituted a cartel to divide the market and to fix prices of mobile communication services, sold separately or in conjunction with fixed communications services. This investigation started as a result of a leniency application in 2018.

iii  Outlook

The PCA will continue to make cartel cases a priority for 2020. In particular, the PCA will prioritise the investigation of cartels with greater impact on consumers and cartels that impact contracts with the public power. The PCA will seek to continuously improve its internal investigative procedures, in order to make full use of the most appropriate tools for evidence collection and treatment, namely in a digital environment. Indeed, the PCA has affirmed that it will pay close attention to the eventual use of algorithms or artificial intelligence so that these cannot be a way of exempting responsibility. Following this trend, in 2019, the PCA published an analysis of digital ecosystem, big data and algorithms and sent a message that the companies should be liable for the use of algorithms in case it negatively impacts competition.

In 2019, as far as we are aware, the PCA carried out searches in the premises of private security companies,38 residue management companies39 and healthcare companies,40 and, therefore, we expect developments with regard to the investigations of restrictive practices in these sectors, in principle, in 2020.

The PCA will continue to promote its leniency policy as an essential instrument for cartel investigations. In fact, it was the leniency programme that gave rise to the above-mentioned investigation in the insurance sector.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

As previously indicated, the Competition Act prohibits agreements, concerted practices and trade association decisions, including cartels, whose object or effect is to restrict competition (Article 9 of the Competition Act). It also prohibits undertakings, in a position of dominance, from abusing their position (Article 12 of the Competition Act).

37 PCA press release of 24 June 2012.
38 PCA press release of 18 November 2019 (22/2019).
Abusive conduct includes imposing, directly or indirectly, unfair purchase or sale prices or other unfair trading conditions, limiting production, markets or technical development to the detriment of consumers, applying dissimilar conditions to equivalent transactions with trading parties, thereby placing them at a competitive disadvantage, making the execution of contracts 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 subject of the contracts, and refusing another undertaking access to a network or other essential facilities that it controls, when appropriate payment for access is offered, in a situation where the other undertaking cannot, therefore, in fact or in law, act as a competitor of the undertaking in a dominant position in the market, upstream or downstream, unless the dominant undertaking can demonstrate that, for operational or other reasons, this access cannot reasonably be provided.

The Portuguese legal framework on restrictive practices and the abuse of dominant positions is very similar to that applied at the EU level; however, the Competition Act also includes provisions on the abuse of a situation of economic dependence.\(^{41}\) An abuse of a situation of economic dependence may include any of the types of conduct previously mentioned and identified as potentially abusive under the abuse of dominance rules, as well as the full or partial rupture of an established commercial relationship, in view of past commercial relations, trade practices in the relevant market and contractual conditions.

i Significant cases

The major cases regarding the abuse of a dominant position involved Portugal Telecom (PT), the former telecommunications incumbent. In fact, PT was sanctioned for discriminatory pricing for allegedly offering more favourable prices, through special discounts, to operators from its group compared to competing retailers. It was also sanctioned for alleged margin-squeezing practices and for an alleged refusal to grant access to its underground conduit network, which the PCA considered to be an essential facility.\(^{42}\) The most significant sanction imposed amounted to approximately €53 million, although the appellate court considered the infringement to be time-barred.

In 2009, the PCA dismissed, subject to certain conditions, a case against the food undertaking Sugalidal on the basis that it had allegedly abused its dominant position in the market for purchasing tomatoes for processing by requiring its suppliers to use a specific variety of seed produced by a company of its group. Sugalidal undertook to remove the illegal clause from its contractual arrangements and to publicise the removal.\(^{43}\)

The PCA also sanctioned Sport TV, an undertaking active in the supply of premium sports content for television platforms, with a fine of €3.7 million for an alleged abuse of a dominant position consisting of applying discriminatory commercial conditions to several pay-per-view operators.\(^{44}\)

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\(^{41}\) An undertaking is considered to be in a situation of economic dependence with regard to another undertaking if it does not have an equivalent alternative to contracting with that undertaking (i.e., when the good or service at issue is provided by a limited number of undertakings and the undertaking would be unable to obtain identical conditions from other commercial partners within a reasonable period).


\(^{43}\) PCA press release of 15 October 2009.

\(^{44}\) PCA press release of 20 June 2013.
The PCA has also sanctioned a professional association for an abuse of a dominant position. In 2010, the Portuguese Chartered Accountants Association was fined for alleged restrictions imposed in the market for the training of certified accountants.

The National Association of Pharmacies and three other undertakings of the same group (Farminveste SGPS, Farminveste – Investimentos, Participações e Gestão, SA and HMR – Health Market Research, Lda) were also sanctioned with a fine amounting to €10.34 million for abuse of a dominant position in the markets for both pharmaceutical commercial data and market studies based on pharmaceutical commercial data. In 2016, this decision was upheld by the Competition, Regulation and Supervision Court; however, the amount of the fine has been reduced to €6.89 million.45

In 2018, curiously enough, the PCA closed an abuse of dominant position by the postal service incumbent CTT by means of the acceptance of certain commitments offered by this company. According to the public information, CTT has undertaken to, under certain conditions, offer access to its postal network to competitors.46

In connection with vertical restrictions, the PCA closed a procedure against Bayer regarding a clause in its standard contract with wholesalers, according to which wholesalers were allegedly obliged to carry Bayer products, exclusively, for five years.47 Bayer removed the clause from the contracts and proposed an amended contract to the PCA as a remedy. The PCA has also fined the dairy company Lactogal €341,098 for resale price maintenance practices (minimum price fixing) in the on-trade distribution market for dairy products, considering it a vertical agreement.48

The PCA sanctioned Petrogal, Galp Açores and Galp Madeira (all of which are part of the Galp Energia group and active in the liquefied petroleum gas sector) with fines amounting to €9.29 million for exclusive distribution agreements that allegedly restricted passive sales.49 This decision was upheld by the Competition, Regulation and Supervision Court (although the Court has reduced the fines to €4.1 million) and more recently by the Lisbon Court of Appeal, which confirmed the previous Court’s decision in full.50

In December 2018, after several years of investigation, the PCA closed its investigation on exclusive distribution agreements regarding certain TV sporting rights between pay-TV platforms and football clubs. These agreements had a duration of 10 years, and the pay-TV platforms at stake were shareholders of the main paid TV content channel in Portugal, Sport TV.51

During the course of 2019, the PCA imposed a fine of €48 million on EDP – Gestão da Produção de Energia, SA for abuse of a dominant position by means of the manipulation of the offer of the production infrastructures in order to obtain greater revenues.52 The investigation started in 2016, and the PCA concluded for the existence of anticompetitive practices as a result of the control of the offer of EDP’s teleregulation and second band

45 PCA press release of 31 December 2015 (31/2015) and of 20 October 2016 (20/2016).
50 PCA press release of 4 January 2016 (01/2016) and of 19 January 2017 (02/2017).
51 PRC/2016/02.
52 PCA press release of 18 September 2019 (19/2019).
services under the CMEC regime. According to the PCA, by deviating the offer under the CMEC regime to other channels, EDP caused a relevant negative impact on the Portuguese Electric National System and harmed consumers.

ii Trends, developments and strategies

The cases concerning PT’s abuse of its dominant position faced many judicial obstacles. In fact, the decision imposing a fine of €38 million against PT for refusing to provide competitors access to what the PCA considered an essential facility – PT’s underground conduit network – was overturned on appeal. The appellate court also considered the most significant sanction applied in this context – €53 million – to be time-barred.53

The PCA has also sanctioned undertakings for having provided false or misleading information, in the context of a request by the PCA for information. In the first case, the PCA imposed a fine of €150,000 on Peugeot Portugal.54 Then, the PCA imposed a fine of €100,000 on CP Carga,55 and, last, a fine of €150,000 on Ford.56 CP Carga, Peugeot Portugal and Ford appealed against the decision to the Competition, Regulation and Supervision Court, which upheld all the appeals.57

In 2015, the PCA addressed several vertical antitrust concerns in the automobile sector. For instance, in the case against Peugeot Automobiles, this undertaking offered commitments designed to address the PCA’s concerns about the alleged existence of a warranty extension agreement that prevented consumers from getting their cars repaired in independent garages. The published proposals were submitted to public consultation and were then accepted and deemed mandatory by the PCA.58 Similar commitments were offered by Ford Lusitana59 and SIVA (importer and distributor of the automobile manufacturers Audi, Volkswagen and Skoda).60 The commitments proposed were also accepted and deemed mandatory by the PCA.61

In 2016, the PCA opened proceedings against DIA Portugal (a supermarket chain) for alleged antitrust concerns arising from the company’s franchise system. In order to address the PCA’s concerns, DIA Portugal offered commitments designed to clarify that it did not impose minimum prices to its franchisees’ network.62 The commitments were later accepted and deemed mandatory by the PCA.63

Later in the year, the PCA also issued a statement of objections against the EDP Group and the SONAE Group, having fined the companies in 2017, with a global sanction amounting to €38.3 million for alleged anticompetitive market-allocation practices in 2012.64

56 PCA press release of 21 September 2015 (21/2015).
57 PCA press release of 16 December 2015 (29/2015), of 19 October 2016 (19/2016) and of 13 October 2017 (15/2017).
58 PCA press releases of 30 December 2015 (17/2014) and of 23 March 2015 (07/2015).
60 PCA press release of 2 December 2015 (28/2015).
61 PCA press releases of 18 September 2015 (20/2015) and of 23 February 2016 (05/2016).
63 PCA press release of 21 June 2016 (14/2016).
64 PCA press release of 4 August 2016 (16/2016) and of 5 May 2017 (05/2017).
The closing of the case regarding the exclusive distribution of football rights – with the PCA stating that this issue was better solved by means of an amendment to the existing framework, in order to centralise and auction these rights, similarly to what takes place in the UK and in Spain – may hint that the PCA will, in certain cases, be more focused on promoting legislative changes than on the alteration of particular contracts.

iii Outlook
For 2020, the PCA has established as one of its priorities the detection and investigation of anticompetitive practice involving dominance as a tool to stimulate innovation. Moreover, the PCA is expected to continue its transparency efforts to promote access to its decisions and the decisions of courts of appeal, and to disseminate accurate and complete information on competition rules.

Additionally, the PCA will continue to promote the adoption of commitments, whenever important procedural gains can be anticipated, even in cases of abuse of a dominant position.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES
The Competition Act applies to all areas of the economy, including regulated sectors. The PCA has been monitoring several sectors in recent years, and the PCA’s supervisory powers have been strengthened.

i Significant cases
So far, the most significant cases involving undertakings operating in regulated sectors were the three abuse of dominance cases brought against PT, discussed above. The existence of regulations in the telecommunications sector did not impede the application of competition rules.

The PCA has conducted sector-wide investigations and released reports on several markets over the years, including studies on consumer mobility within the retail banking market, on the liquid fuel and bottled gas retail markets, on electronic communications, on relations between large food retailers and their suppliers, and on fintech operators, digital operators, transport operators, liberal professions and ports.65

ii Trends, developments and strategies
The PCA will continue to conduct market studies and surveys in various sectors of the economy in order to better identify possible anticompetitive conduct. As previously mentioned, the PCA will focus primarily on controlling possible concerted practices in public procurement.

During 2015, the PCA closely monitored the port sector and, as a result of a market study on the sector, it submitted to public consultation some recommendations to enhance

competition. In 2016, the PCA set out as priorities the monitoring of the telecommunications and gas sectors and it issued some recommendations for the activity of passenger transport in chauffeur-driven light-duty vehicles.

In 2017, the PCA issued a report on the industry of liquefied petroleum gas in Portugal and a sectoral inquiry on the market for the supply of natural gas to industrial consumers. In both documents the PCA identified some alleged competitive concerns (in the view of the Authority) and submitted recommendations on how to mitigate them with regulatory action.

In 2018, the PCA’s study on the port sector was released, also issuing recommendations for the liberalisation of the access to port-related professions and to the promotion of conditions of competition to the awarding of concessions. Also in 2018, the PCA published a paper on technological innovation in the financial sector.

iii Outlook

As indicated, the PCA’s supervisory powers have been strengthened by the Competition Act and include, apart from requiring information from undertakings or associations, the possibility of carrying out inspections and audits. These inspections and audits have proven to contribute to the detection of inefficiencies by the PCA in some markets and sectors, and will increasingly do so. Additionally, as was previously mentioned, the PCA has also set as one of its priorities for 2020 the implementation of measures for removal of the barriers created by legislation and by the practices of incumbents and to implement the recommendations issued in 2019 related to infrastructure sectors.

V STATE AID

Article 65 of the Competition Act establishes that aid provided by the state or any other public body may not restrict, distort or appreciably affect competition, in all or a substantial part of Portugal. The PCA may issue recommendations on any public assistance provided and monitor the implementation of those recommendations, for which purpose it may request information from any party. The recommendations are published on the PCA’s website.

The PCA’s powers in this matter are very limited, as the European Commission is the entity with jurisdiction to assess the compatibility of state aid with the European Union’s rules on state aid. In any case, the PCA follows the European Commission’s activities closely, having identified the monitoring of state aid matters as one of its international cooperation goals.

70 See the presentation of the chairman of the PCA’s board, available at: www.concorrencia.pt/vPT/Noticias_Eventos/Intervencoes_publicas/Documents/VFapresentação%20COFAP%2018%20fev%202015_VF.pdf.
Significant cases

One of the most important rulings on state aid involving Portugal was the European Court of Justice’s (ECJ) ruling on the appeal in the Azores case.\(^1\) The ECJ ruled on the application of territorial selectivity criteria in cases involving autonomous regions (such as the Azores region), and set the necessary conditions to be met for an autonomous region to be considered as the benchmark as opposed to the national territory as a whole.

We also highlight one of the most high-profile cases decided by the European Commission regarding state aid granted by Portugal, which involved assistance that the state gave to shipyards in Viana.\(^2\)

The Portuguese banking sector, in the past few years, has also been the subject of several state aid decisions. In 2014, the European Commission found that the resolution plan of the Portuguese bank Banco Espírito Santo (BES) was in line with EU state aid rules (the European Commission assessed the plan under its rules on state aid to banks in the context of the financial crisis and acknowledged that a disorderly resolution of BES could create a serious disturbance in the Portuguese market).\(^3\) In December 2015, following the Bank of Portugal’s decision to put the Portuguese bank Banif into resolution, the European Commission approved Portuguese plans to provide about €2.25 billion of state aid to cover the funding gap in the resolution of Banif, deeming that it was in line with EU state aid rules.\(^4\)

In 2017, the European Commission found that Portugal’s plans to strengthen the capital position of fully state-owned Caixa Geral de Depósitos (CGD) by €3.9 billion were in line with EU state aid rules,\(^5\) and, more recently, the European Commission approved the Portuguese restructuring plan and support for the sale of the bridge bank Novo Banco, completing the 2014 resolution of BES.\(^6\)

In 2018, the European Commission approved under EU state aid rules a Portuguese tonnage tax scheme, which, together with a scheme to support seafarers, will encourage ship registration in Europe and contribute to the competitiveness of maritime transport while preserving employment in the sector and promoting high environmental standards.\(^7\)

More recently, in 2019, the European Commission has also approved two state aid regimes. The first one, is related to the creation of a special regime of support for

\(^{1}\) Case C-88/03 Portugal v. Commission.
biomass-operated generators close to forests in Portugal, in order to promote cleaning of forests, reducing the risks of fire. The second one, is related to the creation of a subsidy system for the training of consultants for the agricultural and forestry sectors.

ii Trends, developments and strategies

The banking sector in Portugal has been particularly subject, in the past few years, to state aid procedures. Further to the above-mentioned resolution cases, in should be mentioned that the capitalisation programmes for Portuguese banks and the creation of the Portuguese Finance Development Institution have followed the applicable state aid rules as established in cooperation with the European Commission. Tax havens, including the Madeira Free Zone, have also been subject to the EU’s scrutiny.

iii Outlook

Apart from the financial sector, which may continue to be monitored, regional aid is going to be particularly relevant within the next few years. In 2014, the European Commission approved, under EU state aid rules, Portugal’s state aid plan for 2014–2020. These guidelines set out the conditions under which Member States can grant state aid to businesses for regional development purposes and are expected to foster growth and greater cohesion in the single market.

Under the aid map currently in force, regions accounting for 69.01 per cent of Portugal’s population will be eligible for regional investment aid at maximum aid intensities ranging from 25 per cent of the eligible costs of the relevant investment projects in mainland Portugal, over 35 per cent in Madeira, and up to 45 per cent in the Azores.

It is also possible that aid to projects related to innovation, the environment and energy may be more frequently given. For instance, in 2015, the European Commission found a Portuguese scheme aimed at promoting renewable energy technologies to be in line with EU state aid rules, in particular in view of its 2014 Guidelines on state aid for environmental protection and energy.

More recently, in 2016 the European Commission found Portuguese plans to support the purchase of low-emission buses for public infrastructure in urban areas to be in line with EU state aid rules — specifically, the European Commission deemed that the project’s contribution to EU environmental goals outweighed any potential distortion of competition.

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78 See the letter to the Member State available at https://ec.europa.eu/competition/state_aid/cases1/201921/780727_7807161_121_2.pdf
79 See the letter to the Member State available at https://ec.europa.eu/competition/state_aid/cases1/201913/780720_7807551_148_2.pdf
Also, it should be noted that the European Commission has opened an in-depth investigation to examine whether Portugal has applied the Madeira Free Zone regional aid scheme in conformity with the 2007 and 2013 Commission decisions approving it. In particular, the Commission has concerns that tax exemptions granted by Portugal to companies established in the Madeira Free Zone are not in line with the Commission decisions and EU state aid rules. \(^8^5\)

VI MERGER REVIEW

The PCA has exclusive jurisdiction to enforce the merger control rules established in the Competition Act. Only concentrations, as defined in Article 36 of the Competition Act, which meet one of the notification thresholds established in Article 37(1), are subject to merger control review. The basis of the concept of concentration lies in the notion of change of control on a lasting basis, and the definition of ‘control’ adopted in Article 36(3) of the Competition Act is similar to that used in the European Merger Control Regulation (i.e., the possibility of exercising decisive influence on an undertaking).

The Competition Act, unlike the EU Merger Regulation and the laws of most Member States (except for Spain), establishes alternative turnover and market share notification thresholds, even though a *de minimis* rule was introduced in 2012.

In brief, undertakings must notify a concentration if any of the following conditions are met:

- the combined aggregate turnover in Portugal of all the undertakings exceeds €100 million, provided that the individual turnover in Portugal of each of at least two of the undertakings concerned exceeds €5 million;
- the concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 50 per cent; or
- the concentration results in the acquisition, creation or increase of a market share in Portugal equal to or greater than 30 per cent and less than 50 per cent, provided that the individual turnover in Portugal of at least two of the undertakings concerned exceeds €5 million.

The time limit for the PCA to issue a decision is 30 business days for normal Phase I proceedings and 90 business days as from the initial notification for cases requiring in-depth investigations. These time limits can be suspended if additional information is requested from the parties and, in general, at the parties’ request or if commitments are offered, or if the parties are invited to comment on the PCA’s draft decision.

The PCA has also approved new filing forms, including, for the first time, a simplified form to be used in concentrations that, in view of certain parameters (e.g., no market overlap or limited joint market shares), will not raise competition concerns. \(^8^6\)

Since the enactment of the Competition Act currently in force, similarly to the EU Merger Regulation provisions, the parties no longer have a specific deadline to notify (unlike previously, where parties had seven business days to do so). The parties nevertheless are obliged to suspend the implementation of the concentration until the PCA has issued a

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\(^8^6\) PCA Regulation no. 60/2013.
clearance decision. Breach of this obligation entails a fine of no more than 10 per cent of the
turnover of the undertaking in breach. Pursuant to the Competition Act, any act or transaction
implementing the concentration prior to clearance from the PCA is unenforceable.

The most important exception to the referred standstill obligation is the possibility to
implement public takeover bids, provided that, in general, the acquirer does not exercise the
voting rights in the target entity until clearance is obtained.

The Competition Act now adopts the significant impediment of effective competition
(SIEC) test to assess concentrations instead of the dominance test that was previously used.

Merger control decisions are subject to judicial appeal and to a special administrative
appeal if the merger is blocked (although such an appeal would only be upheld if the benefits
to the national economy outweigh the disadvantages to competition resulting from the
prohibited merger).

**i Significant cases**

The PCA has extensive experience in merger cases, having reviewed and decided an average
of around 50 cases a year; it has issued only six prohibition decisions in merger control cases
since its incorporation in 2003, even though there were several notifications withdrawn by
the notifying parties in view of the obstacles posed by the Authority.87

In relation to these prohibitions, it is worth noting that the Minister of Economy,
further to a special administrative appeal provided for in the PCA’s articles of association,
overturned the PCA’s prohibition decision concerning a merger in the highway management
sector.88 One of the PCA’s prohibitions, in the media sector, was based on a binding negative
opinion issued by the media sector regulator (since this decision was binding under the
merger control framework).89

With regard to merger remedies the PCA’s Guidelines on Merger Remedies are in line
with EU law and practice. The PCA has also imposed structural and behavioural remedies on
several occasions. For instance, it imposed behavioural remedies in the concentration between
two Portuguese commercial airlines (TAP and PGA).90 The remedies in the clearance decision
included freeing up slots at Lisbon and Oporto Airports, limiting the number of flights
operated by the merged airlines on certain routes, and limitations on the prices charged.
In 2015, behavioural remedies were also imposed upon two concentrations (involving the
same acquiring undertaking, part of the EDP Group, which was previously the incumbent
supplier of electric energy in Portugal) in the market for the production of electric energy. In
both cases, the acquirer undertook to maximise the production of energy in order to avoid
any negative impact on the market, in particular, a potential increase in wholesale prices.91

Regarding structural remedies, the decision practice of the PCA is also noteworthy.
Remedies in two concentrations in the transportation sector included the divestment of
one of the parties’ operations in the inter-urban route where competition concerns were

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Prisa/Media Capital and case 4/2013 – Controlinveste*Zon Optimus*PT/Sport TV*Sportinveste*PPTV; case
9/2019 - Fidelidade SGOII/Saldeinveste*IMOFID.
89 Case 41/2009 – Ongoing/Prisa/Media Capital.
90 Case 57/2006 – TAP/PGA.
identified in the TRPN/Internorte case,92 and the approval of an up-front buyer solution in the Powervia/Laso*Auto-Laso*Probilog*Laso Ab case.93 More recently, in the Arena Atlântida/Pavilhão Atlântico*Atlântico case, a merger involving the acquisition of Pavilhão Atlântico (the main indoor arena in Lisbon), one of the shareholders of the acquiring undertaking committed to divest its shareholding in a ticketing services company, since the PCA had identified the referred shareholding as a vertical restraint to competition.94

In 2018, divestment remedies were also offered in the Rubis/Repsol GLP case in order to overcome the horizontal concerns identified by the PCA.95 It should be mentioned that, for the first time, the divestment in question was made through a 'fix it first' solution (i.e., with a suitable buyer already found and accepted by the PCA prior to the clearance decision).

In 2019, the PCA approved 39 transactions without conditions. In Grupo HPA Saúde/Hospital São Gonçalo de Lagos merger, the PCA adopted a clearance decision based on the failing firm defence.96 The PCA also started an investigation concerning the failure of timely notification of this merger, given that it was implemented in late 2017 and notified to the PCA only on 9 November 2018.

Although in 2019 the case Fidelidade SGOII/ Saldeinveste*IMOFID was withdrawn after a Phase II request.97 In the Grupo HPA Saúde/Hospital São Gonçalo de Lagos, the PCA also started a Phase II investigation98 and unconditionally cleared the transaction after reviewing the case for eight months.

In 2019, the PCA acknowledged in other four opportunities (MSC/ Terminal de Mercadorias; Restel/Hispasat; Bueotter/EGEO Circular; I-JET Aviation/Euroatlantic Airway) that the notification was not mandatory, given that the thresholds established in Article 37(1) were not met.

As regards the imposition of sanctions on undertakings that failed to file a concentration, early in 2013 the PCA imposed fines amounting to €149,278.79 for failure to notify a concentration in the pharmaceutical sector (this decision was appealed based on formal grounds and was reissued by the PCA in 2014).99 In 2017 the PCA imposed fines amounting to €38,500 for failure to notify a concentration in the dental clinics sector, following a settlement procedure.100

More recently in 2019, the PCA started an investigation against HCapital, SCA - SICAR for failing to notify the acquisition of control over Solzaima in 2016. The transaction was notified in February 2019 and approved without condition. After the approval, the PCA initiated a gun jumping investigation that can culminate in fines up to 10 per cent of the turnover of the offending undertaking in the year immediately preceding the final judgment issued by the PCA.101

94 Case 38/2012 – Arena Atlântida/Pavilhão Atlântico*Atlântico.
95 Case 37/2017 – RUBIS/Ativos Repsol.
100 PCA press release of 27 December 2017 (22/2017).
ii Trends, developments and strategies

The simplified filing form and pre-notification contacts have been increasingly used, enabling a swifter assessment and earlier decisions regarding uncomplicated matters. The PCA is expected to continue to promote the use of the simplified filing form, as well as pre-notification contacts in order to deliver swifter decisions and enhance transparency in the market, as confirmed by its statement of priorities for 2020. Also, gun jumping is one of the PCA’s priorities, head-to-head with the detection and investigation of cartels.

The PCA also seems to continue strengthening its demands in terms of remedies, demanding structural remedies in the most complicated cases of 2019.

iii Outlook

The PCA has also stated that one of its priorities for 2020 is still the implementation of more efficient and quicker merger control proceedings.

It seems that the PCA’s merger control decisions are being increasingly subject to judicial review. In 2015, the Portuguese Competition, Regulation and Supervision Court rejected, on the one hand, the appeal by Media, Zon Optimus and Portugal Telecom related to the PCA’s decision to initiate an in-depth investigation of this concentration and, on the other hand, these undertakings claim that the concentration had been tacitly approved. Also in 2015, this court confirmed the PCA’s decision in the Arena Atlântida/Pavilhão Atlântico*Atlântico case.

The PCA’s clearance, after an in-depth investigation, of the SUMA/EGF concentration (a merger decision related to a reprivatisation in the waste sector) is currently being disputed in the courts. So far, the Portuguese Competition, Regulation and Supervision Court has already rejected, in two separate proceedings, the adoption of interim measures to temporarily suspend the effects of the decision.

VII CONCLUSIONS

The PCA continues to actively pursue the goal of protecting and promoting competition in the Portuguese economy. It is becoming more dynamic, has been investing in its technical capacity, and is determined to contribute to a sound culture of competition policy in Portugal.

The PCA’s focus continues to be combating cartels and anticompetitive practices, being particularly vigilant within the context of trade associations, public tenders and of the up-and-coming digital economy. The PCA will also closely monitor recent mergers, in order to detect eventual gun-jumping cases.

Additionally, in 2020 the PCA is expected to promote advocacy activities, in order to enhance the transparency of its actions and raise awareness of the advantages of effective competition for the Portuguese economy, as well as strengthen its interventions in the reduction of legal or administrative barriers regarding entry into the market.
Chapter 20

SWEDEN

Peter Forsberg, Johan Holmquist and David Olander

I OVERVIEW

The current Swedish Competition Act (Competition Act)\(^2\) entered into force on 1 November 2008 and governs all types of actions that may distort competition. The Competition Act aims to incorporate EU competition law as far as possible. It is, therefore, interpreted in accordance with the case law of the Court of Justice of the European Union.

The Swedish Competition Authority (SCA) is the central administrative authority for enforcement of competition law in Sweden. It is entrusted with investigative powers and, to some extent, decision-making powers. Following an amendment to the Competition Act on 1 January 2018, the SCA can adopt decisions in merger control cases. In behavioural cases (i.e., anticompetitive agreements and abuses of dominant positions), the SCA rather acts as a prosecutor and will have to make its cases before a court. If the SCA can prove a violation, a court may impose a corporate fine of up to ten per cent of company turnover. For ‘hard core’ cartel conduct (price-fixing, bid-rigging, output restrictions and market sharing) a court may also impose a director disqualification for a period of three to 10 years. However, the SCA may itself impose an injunction to stop ongoing infringements.

As of 1 September 2016, a reorganisation of the court system was made effective, where the Market Court, formerly the highest competition court, ceased to exist. The reorganisation was intended to create a more unified and concentrated judicial system for competition cases. The Patent and Market Court (PMC), a division within the Stockholm District Court, is now the competition court of first instance. Its decisions and judgments can be appealed to the Patent and Market Court of Appeal (PMCA), a division within the Svea Court of Appeal in Stockholm. A leave to appeal is required if the PMCA is to hear a case. The PMCA is, in general, the court of last instance. However, in certain instances, the PMCA can grant leave for a judgment or decision to be appealed to the Supreme Court. If that were to happen, the Supreme Court would also need to grant a leave to appeal before the case could be heard.

II CARTELS

Chapter 2 of the Competition Act holds the substantive provisions relevant for cartels and other anticompetitive agreements. Chapter 2, Sections 1 and 2 are modelled on Article 101(1) and 101(3) of the Treaty on the Functioning of the European Union (TFEU). Section 1

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1 Peter Forsberg is a partner, and Johan Holmquist and David Olander are associates at Hannes Snellman Attorneys Ltd.
prohibits the cooperation between undertakings that has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Section 2 sets out the possible exemptions to the prohibition found in Section 1.

The Swedish leniency programme was amended in 2014 to better reflect the EU leniency system. The new leniency regime introduced a marker system whereby a company may apply for a marker and submit limited information about an ongoing infringement. The minimum requirement to obtain a marker is to submit information on the market affected by the infringement, the other companies involved and the nature of the infringement. To secure the marker, the company must submit a complete application within a specified period. If the company with the marker fails to submit the outstanding information, another company cannot jump the queue for immunity. In circumstances where either the company benefits from leniency or the individual has contributed and personally cooperated to a significant extent, the SCA may grant immunity from a director disqualification.

i Significant cases

Insurance services – reviewability of dawn raids

In April and June 2017, the SCA conducted a dawn raid against a number of insurance companies (Söderberg & Partners et al.) for suspected bid rigging in procurements of insurance services. This was done after a prior decision by the PMC allowing the raid. During the raid the SCA ‘mirrored’ several hard drives and, with the consent of the companies, brought and reviewed them at the premises of the SCA. However, when the SCA copied certain documents from the hard drives and included them in the case file, one company appealed the measure to copy the documents, arguing that the documents were outside the scope of the PMC’s dawn raid decision. After both the PMC and the PMCA had rejected the appeal, the Supreme Court heard the case. The Court stated that if a company contests the SCA’s right to review or copy certain material on the grounds that the measure is out of scope of the original dawn raid decision, the SCA must refer the dispute to the Swedish Enforcement Agency and request its assistance in order to review or copy the contested material. In this case, the SCA had not requested such assistance, which the Supreme Court found to be a violation of the company’s right to a fair trial under the European Convention on Human Rights. The Court stated, however, that the appropriate remedy for such a violation was economic compensation, rather than to create a new right of review before the PMC. The decisions of the lower courts were thus affirmed.

Data communications services in Gothenburg – bid rigging?

The SCA sued Telia, Sweden’s largest telecommunications operator, and GothNet, a local network operator in Gothenburg, and requested a total fine of 35 million kronor for having formed a bid-rigging cartel during a public procurement procedure by the City of Gothenburg in 2009. The SCA claimed that when the City of Gothenburg procured data communication services, Telia and GothNet agreed that Telia would refrain from submitting a tender in the procurement, even though GothNet and Telia were competitors. Subsequently winning the bid, GothNet contracted Telia as a subcontractor. The PMC ruled in favour of the SCAs claim and ordered each of the parties to pay 8 million kronor in fines. Telia appealed the

3 Supreme Court, decision of 30 November 2018 in case No. Ö 5652-17.
judgment, which was reversed by the PMCA. In its judgment from February 2018, the PMCA stated that the nature of the information provided by Telia to GothNet entailing that Telia would not be submitting a bid in the procurement was a concerted practice within the meaning of the competition rules. However, considering the economic and legal context of the procurement in which the coordination took place, the court held that the information exchange could not be regarded anticompetitive by object. Since there was not sufficient evidence of anticompetitive effects, the SCA’s claim was rejected.

**Moving companies – market sharing?**

The SCA sued three companies in the moving company sector, Alfa Quality Moving, NFB Transport Systems and ICM Kungsholms, for a total fine of 42 million kronor. The companies had in two merger transactions included non-compete clauses of five years, which, according to the SCA, were too far-reaching. The SCA claimed that the clauses constituted illegal market sharing agreements. However, the PMC held that the clauses were not anticompetitive by object and that the SCA had not shown any anticompetitive effects. The PMCA affirmed the judgment on appeal. The court pointed out that non-compete clauses may be necessary for the successful implementation of a merger transaction, since these clauses provide the buyer with a certain degree of security. The SCA had argued that the moving companies knowingly had exceeded the three-year period outlined in the Commission’s guiding notice on ancillary restraints. However, the PMCA found that the three-year period reflects the duration under which companies normally can assume to be protected under the Commission notice rather than the maximum duration allowed for a non-compete clause. Accordingly, the court did not hold the non-compete clauses to be anticompetitive by object. The PMCA further concluded that the SCA did not provide evidence of any anticompetitive effects.

**ii Trends, developments and strategies**

On average, the SCA conducts a handful of dawn raids per year, and it receives approximately five leniency applications per year, of which approximately half are summary applications. Sectors that have been investigated more recently include construction, electronic equipment, insurance and retail.

In December 2018, the SCA conducted a questionnaire survey of the level of corruption in the construction industry. Among the responding firms, 49 per cent believed that there were cartels in the industry, and 29 per cent of those believed that cartels operated on a regular basis.

**iii Outlook**

The fight against cartels is one of the main priorities of the SCA, and measures relating to the detection of cartels has increased, especially concerning bid-rigging cartels in public procurement procedures. There are several ongoing investigations at the SCA of companies suspected of having colluded at the bidding stage.

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4 PMCA, judgment of 13 February 2018 in case No. PMT 761-17.
5 PMCA, judgment of 29 November 2017 in case No. PMT 7498-16.
6 During the period 2010–2014.
In the past, the SCA has been successful in obtaining large fines in cartel cases against companies in, inter alia, the asphalt and petrol businesses. However, since the reorganisation of the competition court system in 2016, the SCA has so far lost all cases that have reached the PMCA. As a result, the SCA has indicated that it will take a more lax stance on litigation in the future. For instance, in November 2019, the SCA concluded an investigation of information exchange of production volumes in the asphalt sector, by accepting commitments from three competitors rather than taking the case to court. Indeed, the SCA has become more active in using alternative enforcement methods such as communication in media.

### III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Chapter 2, Section 1 of the Competition Act prohibits the cooperation between undertakings that has as its object or effect the prevention, restriction or distortion of competition in the market to an appreciable extent, whereas Chapter 2, Section 7 of the Competition Act sets out the prohibition against abuse of a dominant position. The provisions are modelled on Articles 101 and 102 TFEU.

#### i Significant cases

##### Stock exchange services – foreclosure of competitor

The SCA sued the operator of the Stockholm stock exchange, Nasdaq, for abuse of dominance and requested fines of 28 million kronor. The case revolved around a data centre provided by Verizon. Nasdaq leased one area in the data centre, and offered its customers, such as high frequency traders, the opportunity to rent space in the same area. The co-location with Nasdaq gave the customers a fast connection to Nasdaq's trading systems. The events were triggered when Burgundy, a Nasdaq competitor, publicly announced that it had entered into a deal with Verizon and intended to move into the same data centre as Nasdaq. In effect, Burgundy would become part of Nasdaq's co-location service without having to set up its own service. Nasdaq responded by putting pressure on Verizon, threatening to move to another data centre if Burgundy was allowed into the centre. The SCA did not argue that access to the data centre was essential. Instead, it relied on the concept of a 'naked restriction', claiming that Nasdaq's reaction to Burgundy's announcement had no other purpose than to restrict competition. The PMC, however, held that this was a normal exercise of contractual rights and competition on the merits and consequently rejected the SCA's claim. On appeal, the PMCA\(^8\) upheld the PMC's judgement. According to the PMCA, the investigation showed that the additional costs for Burgundy connected with having to establish itself in another data centre did not raise any barriers to entry or expansion for Burgundy.

##### Access to waste collection infrastructure

In February 2018, the SCA imposed an injunction on FTI, a waste management company, ordering it to withdraw a contract termination with its competitor, TMR. FTI allows packaging producers to fulfil their legal obligation by offering a service to collect and recycle packaging waste emanating from their products in exchange for a weight-based fee. FTI's waste collection is primarily based on a nationwide infrastructure of public waste containers. Since 2012, FTI had granted access to this infrastructure to TMR, which offered its services

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\(^8\) PMCA, judgment of 28 June 2019 in case No. PMT 1443-18.
in competition with FTI. In 2016, FTI terminated the access contract with TMR. Having investigated the case, the SCA found that the infrastructure of public waste containers constituted an essential facility and that FTI had abused its dominant position by refusing to deal with TMR. The PMC upheld the injunction on appeal.9 FTI has appealed the decision, and the case is pending before the PMCA.

**Tobacco coolers labelling system**

The SCA sued Swedish Match, a major supplier of *snus* (a moist tobacco product), for abuse of dominance. The SCA claimed that Swedish Match had foreclosed its competitors by implementing a uniform system for shelf labels in *snus* coolers that it had lent to retail stores. Although Swedish Match permitted sales of other suppliers in those coolers, the SCA argued that the labelling system restricted competitors from marketing their products in terms of price and brand, especially since the marketing of tobacco products in general is subject to significant legal restrictions. Swedish Match, on the other hand, had argued, inter alia, that its intention was to ensure that the labelling system complied with the strict marketing regulations relating to tobacco products. The PMC found that Swedish Match had abused its dominant position, and imposed fines of 38 million kronor. However, the PMCA reversed and ruled in favour of Swedish Match. In its judgment from June 2018,10 the PMCA held that the labelling system indeed was capable of foreclosing competitors by way of restricting their marketing possibilities. However, the court further held that such exclusionary behaviour by a dominant undertaking is objectively justified – a concept rarely accepted by the EU courts – when the purpose is to ensure compliance with tobacco marketing regulations.

**ii Trends, developments and strategies**

The SCA is continuing to investigate markets and sectors at risk of competition concerns. Certain sectors are more closely scrutinised by the SCA due to previous regulations that have created structural imbalances in the market (such as the pharmacies and telecommunications sectors). As abuse of dominance cases are difficult to prove, the SCA has formed a division specialised in such anticompetitive behaviours.

**iii Outlook**

In Sweden, many sectors have previously been characterised by a monopoly or few companies dominating the market. Many of these markets are now in the process of being, or have recently been, deregulated, which has often resulted in a market with non-existent, or low, competition. Therefore, the SCA has focused its efforts on these markets.

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9 PMC, decision of 21 January 2019 in case No. PMÄ 2741-18.
IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

**E-commerce and the sharing economy**

In 2017, the SCA analysed the Swedish e-commerce and sharing economy sectors, and concluded that the emergence of these industries has resulted in increased price transparency and price competition, which is beneficial for consumers. Swedish e-commerce companies are facing increased foreign competition, as this sector has grown significantly over the past few years. The technical development of a digital payment infrastructure has made it more secure for consumers to purchase products or services online. The SCA's investigation found that a large majority of the sales in the retail sector are still made in physical stores, although e-commerce constitutes a competitive restraint on the physical stores. The SCA also stressed that the increased digitalisation and technical improvement of the e-economy has resulted in new challenges for competition authorities to tackle, for instance that the higher degree of price transparency may facilitate price collusion. The SCA indicated that the increased digitalisation of companies' business models in the e-commerce and sharing economy sectors will require the SCA to implement more advanced and sophisticated investigation routines.

The investigation found that the sharing economy sector is largely based on digital platforms, which give rise to network effects. The services provided within the sharing economy increase the supply on the market, which results in lower prices and increased choice for consumers. A platform can decide to offer its services for a low price or without charging for its services at all, usually in exchange for user data, in order to expand more rapidly. A large number of users and collection of user data can give a platform a significant market power, due to, for instance, indirect networks effects, which its competitors may not be able to replicate. The SCA's investigation found that there is a risk that the current merger control regime does not cover concentrations between platform companies with low revenue but that have significant market power and the potential to impede or hinder the development of effective competition. The SCA has indicated that one solution could be to complement the current turnover thresholds with a 'size of transaction' system. However, the SCA already has the discretion to order a party to notify a concentration if particular grounds are at hand.

ii Trends, developments and strategies

The SCA may commence a market investigation either by itself or after a complaint. The sector investigation may result in an additional investigation of a specific undertaking or the provision of guidance to the undertakings concerned so that they can modify their behaviour in order to avoid an additional investigation.

iii Outlook

Similarly to the Commission, one of the SCA’s priorities concerns the development of the e-economy and sharing economy, and how the growth of these sectors will affect the competition authorities’ enforcement function as well as the risk of anticompetitive conduct.

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12 Chapter 4, Section 7 of the Competition Act.
The SCA has recognised that the authority’s investigation methods are challenged with the increased digitalisation of the economy as the competition rules need to be applied to digitalised (rather than offline) market conditions. It can be expected that the development of the e-economy and sharing economy will remain one of the SCA’s main priorities.

V STATE AID

There is no specific national legislation concerning state aid. However, procedural rules on the application of Articles 107–109 TFEU were adopted in 2013.13 In addition, the Local Government Act14 states that giving support and financial aid to individual businesses is forbidden. According to Chapter 2 Article 8 of the Local Government Act, municipalities and counties are allowed to implement measures to promote local business in general, but not to target their efforts towards a specific company.

The Swedish Transparency Act15 is based on the state aid rules, and requires reporting to the Commission of all publicly owned or financed operations reaching certain thresholds.

i Significant cases

State aid cases are not common in Swedish courts. In particular, the cases have concerned the sale of facilities from municipalities to private operators below market price. Sweden has also been under review by the Commission multiple times, as only the Commission can approve targeted state aid.

Sale of a property

The Supreme Administrative Court has on two occasions heard cases on state aid concerning the sale of public property. In the first case,16 the municipality of Karlskrona decided to sell a property to the construction company NCC for 5 million kronor, despite a higher bid from another interested buyer. The Court stated in its judgment that the municipality had failed to conduct an independent valuation of the property, and not considered the higher bid. The Court therefore concluded that the agreement entailed individually targeted support to NCC, and that the contract with NCC was in conflict with the Local Government Act.

However, in the second case,17 the Supreme Administrative Court concluded that there was no question of illegal state aid. Here, the City Council of Årjäng decided, through an exchange contract with a natural person, to transfer a property for 650,000 kronor and to acquire another property for 4.9 million kronor. An independent valuation was not conducted, and the sale of the property was not publicly announced. Shortly after the transaction, the municipality made an independent valuation of the properties through an independent valuation company. The first property was then valued at 600,000 kronor and the latter at 5.5 million kronor. The Court found that the municipality had not intended to directly support the acquiring company and that the transaction in itself did not constitute this support.

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13 Act (2013:388) on the Application of the European Union’s State Aid Rules.
16 Supreme Administrative Court 2010 ref 119.
17 Supreme Administrative Court 2010 ref 119 II.
The Commission approving Swedish state aid

In recent years, the Commission has on several occasions approved financial support for different infrastructure projects. For example, in 2013, the Commission authorised the municipality of Uppsala to co-finance a new multi-purpose arena. The Commission stated that the public financing was proportional to the objectives pursued. Furthermore, in 2014, the Commission approved a national aid scheme to regional airports. In 2016, the Commission also approved a state aid by the Swedish government to the operator of the two airports in Sundsvall and Skellefteå. Finally, in 2017, the Commission approved a state aid for a seaport infrastructure project in Piteå.

Trends, developments and strategies

The majority of previous state aid cases in Sweden have been related to municipalities selling property at significantly lower prices than market value. There has, however, been a decrease in the number of these cases in recent years.

The SCA has considered it unnecessary to submit a report to the Commission in accordance with the Transparency Act when the state or the municipalities do not control manufacturing undertakings with a turnover exceeding €40 million.

Outlook

Certain projects concerning infrastructure facilities in the more remote areas of Sweden are dependent on financial support and state aid. Those projects will depend heavily on authorisation from the Commission.

VI MERGER REVIEW

In 2019, the SCA reviewed 74 merger notifications. Four cases went to Phase II, of which two were unconditionally cleared. One concentration was prohibited by the SCA, but later abandoned by the parties, while the fourth case is currently pending.

A concentration meets the thresholds and needs to be notified to the SCA if the combined aggregate turnover in Sweden of all undertakings concerned exceeds 1 billion kronor, and each of at least two of the undertakings concerned has a turnover in Sweden exceeding 200 million kronor.

Where the first threshold of 1 billion kronor is met, but the second threshold is not, the SCA may order the concentration to be notified if the SCA finds particular grounds for doing so. These grounds may be met when an undertaking already holds a strong market position.

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and acquires a smaller or newly established undertaking. In these circumstances, the acquirer may also submit a voluntary notification. In general, the SCA encourages undertakings to make voluntary notifications of mergers.

i Significant cases

Cheese brands
In December 2018, three dairy producers (Arla Foods, Norrmejerier and Falköpings Mejeri) notified their intention to acquire the intellectual property licensing company Svensk Mjölk via a joint venture arrangement. Svensk Mjölk licenses several cheese brands to some 20 companies, including dairy producers, food wholesalers and retailers. After an initial market survey, the SCA opened an in-depth review in February 2019. The SCA found that the concentration would entail a collaboration on licensing terms, including pricing, sale terms and product design, in an already concentrated market with high entry barriers. The SCA also found that the JV’s ownership structure and profit distribution mechanisms would indirectly limit the incentive to increase production volumes. Against this background, the SCA concluded that the concentration could significantly reduce the competitive pressure between the parties and, in the absence of countervailing factors or efficiency gains, the SCA prohibited the concentration. The parties appealed the decision to the PMC, but later abandoned the concentration since, in a turn of events, an arbitration tribunal had declared Svensk Mjölk’s general meeting decision to merge null and void.

Metal supply
In July 2019, the SCA opened an in-depth review of Alumeco Sverige AB’s acquisition of Metallservice i Göteborg AB. The parties were active in the market for wholesale of standardised aluminium products and the market for manufacturing and direct sales of aluminium in Sweden. The SCA found that the parties’ combined market shares of 31 per cent did not give rise to anticompetitive concerns, as it was possible for competing wholesalers to import aluminium products from producers and wholesalers in Germany. The investigation also showed that Swedish end-customers had good opportunities to buy aluminium products directly from German producers and wholesalers. Consequently, the SCA cleared the concentration unconditionally.

Technical production services for TV productions
In June 2019, the SCA opened an in-depth review of NEP Sweden AB’s acquisition of HDR Sweden AB. The parties provided technical production services for TV productions through a wide range of services, including outside broadcast trucks and rental TV studios. The SCA found that the parties were the two largest suppliers of such services in Sweden and that NEP would get a significant market share and strengthen its market position while eliminating the competitive pressure from HDR. However, the investigation showed that a number of countervailing factors would mitigate the potential anticompetitive effects. For

22 SCA, case No. 661/2018.
instance, foreign suppliers were able to enter the Swedish market and constrain the merged entity. Ultimately, the SCA concluded that the concentration would not harm the effective competition and cleared it unconditionally.

Mobile payment solutions for parking

In October 2019, the SCA ordered EasyPark AB to notify its intention to acquire Inteleon Holding AB. After an initial investigation, the SCA could not rule out the risk that the concentration would significantly impede the effective competition as the concentration would reduce the competitive pressure between the two largest suppliers of mobile payment solutions for parking. Against this background, the SCA decided to open an in-depth review that is currently ongoing.

ii  Trends, developments and strategies

In comparison to previous years, the number of notifications to the SCA has increased steadily in Sweden and a majority of the notifications have been cleared in Phase I. In cases where there is an absence of vertical links and horizontal overlaps, the SCA often handles the matter with speed and a decision may be received significantly quicker than 25 working days.

Another topic of interest is that the Swedish merger control regime makes it possible for the SCA to request a transaction to be notified if there are particular reasons to so do, even if the turnover thresholds are not exceeded. In such circumstances, the acquirer may also decide to submit a notification voluntarily. The SCA has issued guidance that explains that a voluntary notification should be considered if the transaction can be expected to awaken fears and criticism among customers or competitors. The feature of voluntary notification is a mechanism particular to Swedish merger control.

In 2015, the SCA introduced further guidance for notifications and the assessment of concentrations. The purpose of the guidance is to improve awareness of the investigations of the SCA, contribute to greater predictability and ensure good conditions for cooperation between the parties and the SCA, contributing to a more efficient and effective investigation.

iii  Outlook

As of 1 January 2018, the Competition Act was amended to grant the SCA extended decision-making powers in merger control cases. One argument for the reform was to increase conformity with the merger control procedure of the Commission and in other Member States. However, the reform did not receive a uniformly positive response, and it has been argued that the safeguards surrounding the SCA’s decision-making process are not as well developed as, for example, the Commission’s. It remains to be seen how the reform will be implemented in practice.
VII  CONCLUSIONS

As of September 2016, a reorganisation of the court system was made effective. The reorganisation was intended to create a more unified and concentrated judicial system for competition cases. Since the inception of the new court system, the SCA has so far lost all cases that have reached the PMCA. As a result, the SCA has indicated that it will take a more relaxed stance on litigation in the future, and focus on rule of law issues in its decision-making procedure.
Chapter 21

TAIWAN

Stephen Wu, Rebecca Hsiao and Wei-Han Wu

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities
The Taiwan Fair Trade Commission (TFTC) is in charge of the enforcement of the Fair Trade Act of Taiwan, Republic of China (TFTA). The TFTA is the major competition legislation in Taiwan. It was promulgated on 4 February 1991 and became effective on 4 February 1992. On 22 January 2015, the Legislative Yuan approved the amendments to the TFTA. The amendments, which took effect on 6 February 2015, are tantamount to the most sweeping reform of the TFTA since it came into effect. The amendments cover a wide range of legal provisions under the TFTA, such as merger control, cartel enforcement, restrictive competition and unfair competition, which will have significant impact on companies’ business operations as well as their compliance guidelines.

The TFTA can be divided into two parts:

a restrictive business practices, which cover monopolies and the abuse of dominance, combination (merger control), concerted actions (cartel), fixing of resale prices and other restrictive business practices (such as boycotts, discriminatory treatment, solicitation of trading counterparts by improper means, tying and other restrictions imposed on trading counterparts’ business activities without due cause); and

b unfair trade practices, which cover counterfeiting, false advertisements, damage to business reputation, illegal multilevel sales, and other deceptive or obviously unfair conduct capable of affecting trading.

The TFTC has various functions, from policymaking and market surveys to law enforcement. The TFTC empowers the TFTC to:

a draft and formulate fair trade policies and regulations;

b review fair trade matters;

c conduct studies on particular markets or business activities and economic conditions;

d investigate and determine whether an enterprise\(^3\) has violated the TFTA; and

e handle any other matters related to fair trade practices.

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2 For those case precedents cited in this chapter, all provisions referred to are based on its original chapter numbers under the version of the TFTA at the time of the TFTC’s decision or ruling.

3 The term ‘enterprise’ means any company, sole proprietor, partnership, trade association, or any individual or association that sells products or services. All enterprises are subject to the TFTA.
The TFTC may, on its own initiative or upon complaint, investigate cases that involve unfair competition. In the investigation, the TFTC may:

a. ask the parties and any third party to give a statement;
b. ask relevant agencies, organisations, enterprises or individuals to submit books and records, documents, and any other necessary materials or exhibits; and
c. search or inspect the office, place of business or other locations of the relevant organisations or enterprises.

Any person who, without reasonable grounds, refuses an investigation or withholds evidence may face an administrative fine of NT$50,000 to NT$500,000. If the person remains uncooperative despite receiving another notice, the TFTC may continue to issue notices of investigation, and may impose additional fines of NT$100,000 to NT$1 million until the person cooperates with the TFTC.

As of 6 February 2012, the TFTC is no longer under the supervision of the Executive Yuan and is now an independent government body. The TFTC may, if it is satisfied that one or more enterprises have violated the TFTA, impose administrative sanctions against enterprises. In addition, the new TFTA recognises the TFTC as an independent agency with expertise and credibility to make decisions at the level of the executive system. Hence, enterprises punished by the TFTC may seek a remedy by filing a lawsuit against the TFTC with the administrative court directly without having to appeal against the TFTC’s decision with the Executive Yuan first. Civil and criminal liabilities for violation of the TFTA should be determined by the courts. Except for business libel, enterprises will face criminal liabilities only if they fail to cease the violation pursuant to the TFTC’s order.

ii Enforcement agenda

The TFTC’s goals are to promote free and fair competition and strong economic growth. It sets its priority objectives every four years. The TFTC’s priority objectives for the period from 2017 to 2020 are as follows:

a. to continue the aggressive enforcement of cartel regulations and to improve the effectiveness of the operation of antitrust funds;
b. to actively participate in the international community of competition law, expanding international and cross-border cooperation and building a foundation for mutual assistance on global cases;
c. to promote the concept of fair and efficient competition;
d. to establish industry-specific guidelines to facilitate enforcement and compliance; and
e. to actively investigate false or misleading advertisements and other unfair competition conduct to protect market order and consumer benefits.

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4 The government is mainly divided into five branches: the Legislative Yuan (the parliament), the Executive Yuan (the Cabinet), the Judicial Yuan, the Examination Yuan and the Control Yuan.
II CARTELS

i Definition
Cartels are regulated by the provisions governing concerted actions under the TFTA. A concerted action is the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services, or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to the goods and services, etc., and thereby to restrict each other's business activities. A concerted action is limited to a horizontal concerted action at the same production or marketing stage, or both, which would affect the market function of production, trade in goods, or supply and demand of services.

ii Significant cases
Record-breaking fine on power producers (2013)
The TFTC rendered a decision on 13 March 2013 penalising nine independent power producers (IPPs) that are members of the Association of IPPs. The TFTC found that, from August 2008 to October 2012, at Association meetings, these IPPs agreed en bloc to refuse to amend power purchase agreements with the Taiwan Power Company, and not to adjust the sale price of electricity even when there was a decline in electricity production costs.

The TFTC found that the IPPs' joint refusal could disrupt the functioning of the market, since each participating IPP could boost its profits by maintaining the current sale price when its electricity production costs decreased. Eventually, refusal to adjust the price would lead to a price hike for the public. The TFTC therefore found the joint refusal to be a material violation of the concerted action regulation. To penalise the nine IPPs for the concerted action, the TFTC invoked the newly amended punishment provision under the TFTA – the fine formula – in which the maximum fine imposed on a violating enterprise can be up to 10 per cent of its turnover during the previous fiscal year. By applying the fine formula, the total fine imposed in this case was NT$6.32 billion, which is the highest amount imposed in a single cartel case in the TFTC's enforcement history.

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5 Any other form of mutual understanding means a meeting of minds other than a contract or agreement, regardless of whether it is legally binding, which would in effect lead to joint actions. A resolution of an association's general meeting of members or board meeting of directors or supervisors to restrict the activities of its member enterprises will also be deemed a horizontal concerted action.

6 If any enterprise is found to have violated the cartel regulations under the TFTA, the TFTC may order it to discontinue the illegal conduct, or set a time limit for it to rectify the conduct or take any necessary corrective measure. The TFTC may further impose an administrative fine of between NT$100,000 and NT$50 million. If the perpetrating enterprise fails to discontinue or rectify its conduct or take any necessary measure as ordered, the TFTC may reissue its order and set another time limit, and may impose another administrative fine of between NT$200,000 and NT$100 million, until the enterprise has discontinued or rectified its illegal conduct or has taken such necessary corrective measure. Moreover, the latest amended TFTA provides that, in the case that the violation is deemed serious, the TFTC has the discretion to impose a fine of up to 10 per cent of the relevant enterprise's turnover in the previous fiscal year. If the perpetrating enterprise disobeys the TFTC's order and fails to cease or rectify such conduct, or take necessary corrective action within the given period, or engages in the same or similar violation after the TFTC order, the enterprise will face a criminal fine of up to NT$100 million, and the persons in charge will face a prison term of up to three years, a criminal fine of up to NT$100 million, or both.

7 TFTC decision letter dated 15 March 2013, Ref No. 102035.
The IPPs filed an administrative appeal against the TFTC’s decision with the Executive Yuan. Although the issue regarding whether the TFTC calculated the fines recklessly is still being disputed in the administrative appeal procedure, the substance of the case (i.e., whether the action of the IPPs amounted to a concerted action) was further contested in the administrative litigation process after the Executive Yuan made a decision upholding the TFTC’s second-time decision in September 2013. On 5 November 2014, the Taipei High Administrative Court (High Court) revoked the TFTC’s decision mainly because as no market exists in the subject case, the IPPs cannot be deemed as competitors with the capability of competing with each other in quantity or price. The High Court stated that the subject case should be simply a contractual dispute, rather than a competition law matter.

The TFTC appealed to the Supreme Administrative Court. In July 2015, the Supreme Administrative Court revoked the High Court’s judgment and remanded the case to the High Court on the basis that several issues, such as whether a relevant market exists, whether the IPPs reached a meeting of minds and whether the IPPs’ conduct affected the market function, require further clarification. The TFTC filed an appeal against the judgment of the Taipei High Administrative Court. Then, in September 2018, the Supreme Court revoked and remanded the case again to the Taipei High Administrative Court. To date, there is no final decision on this case.

This is the first case in which the fine formula has been adopted by the TFTC. As such, it is anticipated that the interpretation of whether a case should be considered as a material violation and how the 10 per cent turnover fine calculation formula should be calculated will be clarified in the subsequent administrative decision and court judgments. Furthermore, the TFTC has shown how heavy-handed it can be when the public’s interests are at stake; as such, enterprises that receive a high degree of public attention should exercise caution when interacting with their competitors.

Sanction on dairy products suppliers and convenience stores for price fixing (2011)

On 19 October 2011, the TFTC found that Wei-chuan, Uni-President and Kuang-chuan, three leading dairy product suppliers, had violated the prohibition against concerted action under the TFTA by increasing the prices of milk products at the same time and by the same amount, which affected competition in the domestic milk product market. Consequently, the TFTC imposed a fine of NT$12 million on Wei-chuan, NT$10 million on Uni-President and NT$8 million on Kuang-chuan.

According to the TFTC’s investigation, because of the increased cost of raw milk, milk product suppliers felt pressure to raise milk product prices. Nonetheless, the price hikes imposed by Wei-chuan, Uni-President and Kuang-chuan did not reflect their respective costs of purchasing raw milk. For example, the prices of all Wei-chuan’s, Uni-President’s and Kuang-chuan’s one-litre and two-litre milk products were raised by NT$6, regardless of their original prices. This situation ran counter to commercial practice, because Wei-chuan,

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8 In September 2013, the Executive Yuan ruled that the TFTC had calculated the fine recklessly. In particular, the fine formula came into effect in April 2012, and chronologically, the alleged concerted action straddled the new and old laws. Consequently, the Executive Yuan requested that the TFTC re-evaluate whether the old punishment provision, which capped the fine at NT$25 million for a first-time offence, should be considered when imposing fines on each IPP.

9 TFTC decision letter dated 25 October 2011, Ref No. 100204.

10 TFTC decision letter dated 9 November 2011, Ref No. 100220.
Uni-President and Kuang-chuan should have had different pricing structures. Consequently, the TFTC concluded that this price adjustment by Wei-chuan, Uni-President and Kuang-chuan was reached through a conspiracy among them. Since Wei-chuan, Uni-President and Kuang-chuan jointly hold more than an 80 per cent share in the Taiwanese milk market, this conspiracy jeopardised consumers’ interests.

The raw milk cost escalation led to another parallel-pricing case. Immediately after its milk decision, the TFTC concluded in a decision dated 2 November that four leading convenience stores, 7-Eleven, Family Mart, Hi-Life and OK, raised the prices of their freshly brewed coffee (with milk added) in the same week by the same increment. Without any justification for the simultaneous price adjustment, such conduct constitutes illegal concerted action, which is prohibited by Article 14 of the TFTA; thus, the TFTC imposed a fine of NT$16 million on 7-Eleven, NT$2.5 million on Family Mart, NT$1 million on Hi-Life and NT$500,000 on OK.

The TFTC indicated in the decision that the convenience store coffee market is highly concentrated where the combined market share of the four convenience stores exceeds 80 per cent. Therefore, any collusion among them would prejudice consumer interest and market competition. According to the TFTC’s investigation, these four stores offer 48 products that are variations of brewed coffee with added milk. Nevertheless, the prices for all these products were simultaneously raised by NT$5, regardless of being different in size, flavour and ingredients. Meanwhile, although the four convenience stores claimed that the price increase reflected the rise in raw milk cost, the TFTC viewed their price adjustment differently. Applying the same logic that it did in the milk decision, the TFTC explained that, since each convenience store has its own operational costs and management policy, increasing price by the same amount, at the same time and for the same product was impossible unless the convenience stores had colluded.

In both decisions, the TFTC pointed out that a concerted action can be proved not only by direct evidence such as a contract or agreement, but also by circumstantial evidence or empirical rules. In these cases, the three suppliers and four convenience stores’ uniform price increases without reasonable calculations as a justification could be considered as circumstantial evidence of their conspiracies.

After losing their appeal before the Executive Yuan, the dairy suppliers subsequently brought a lawsuit to contest the TFTC’s decision. The Taipei High Administrative Court sided with the TFTC. According to the Court’s judgment, since the determining factors of a price are myriad and should vary among suppliers, it is inconceivable that the price increase by the dairy suppliers would eventually be uniform, unless evidence suggests otherwise. The dairy suppliers lost their case because they failed to provide convincing evidence. On 12 June 2014, the Supreme Administrative Court rendered a judgment in favour of the TFTC’s decision on grounds that are almost the same as the view expressed by the High Court.

In addition, the four convenience stores in the coffee case filed a lawsuit against the TFTC’s decision after its unsuccessful appeal with the Executive Yuan. On 19 December 2012, the Taipei High Administrative Court ruled that the increase in the coffee price by each convenience store was merely to reflect the cost increase. Since it is common market practice to raise the coffee price by NT$5 each time, there was no evidence to support the TFTC’s allegation that the convenience stores coordinated with each other to determine the price increase. Instead, the price increase by NT$5 may have been merely a price leader or price follower or parallel pricing conduct, which is not illegal from an academic perspective. It was also doubtful whether the relevant market should be narrowly defined as a ‘convenience
store coffee market’, which is an oligopolistic market. Without a clear market definition, the TFTC was unable to confirm whether the alleged price increase, if due to an illegal conspiracy, could have any effect on the relevant market. Based on these reasons, the TFTC’s decision was revoked.

The TFTC appealed against the Taipei High Administrative Court’s judgment. The Supreme Administrative Court found that certain legal issues needed to be clarified further, and remanded the case to the Taipei High Administrative Court on 14 May 2013. On 5 December 2013, the Taipei High Administrative Court issued a remanded judgment that was in favour of the convenience stores and revoked the TFTC decision regarding the alleged illegal concerted action. The TFTC then appealed against the High Court’s second judgment. In its decision, dated 18 April 2014, the Supreme Administrative Court dismissed the TFTC’s appeal. As the Supreme Administrative Court’s ruling is final, the TFTC’s decision was revoked and the case is now over.

### iii  Trends, developments and strategies

**Circumstantial evidence**

In the past, the TFTC often had difficulty securing direct evidence to prove the existence of a cartel. To improve the TFTC’s enforcement effectiveness, the new TFTA permits the TFTC to presume the existence of an agreement on the basis of circumstantial evidence, such as market conditions, characteristics of the products or services involved, and profit and cost considerations, etc. By way of this amendment, the new law substantially shifts the burden of proof regarding the existence of an agreement among competitors from the TFTC to the enterprises that are investigated or penalised. Thus, in the future, for an enterprise under investigation, it is advisable to present evidence in a timely manner to prove that its business decision was made independently and reasonably to rule out any possibility of being viewed as participating in a price-fixing scheme due to parallel activities in the market.

**Leniency programme**

The 2011 amended TFTA introduced the leniency programme for cartel participants (Article 35) and imposed a higher fine for cartel violations (Article 40). Under the authorisation of the amended TFTA, the TFTC promulgated the regulations for the leniency programme in early 2012, which specify, inter alia, the requirements for leniency, the maximum number of cartel participants eligible for leniency, the fine reduction percentage, the required evidence and confidentiality treatment. The adoption of the leniency programme is expected to affect the enforcement of cartel regulations in Taiwan significantly.\(^{11}\)

Pursuant to the TFTA, the consequences of violating the cartel prohibitions under the leniency programme are as follows:

- For any violation of the prohibitions against concerted action, the TFTC may order the violating entity to cease and rectify its conduct or take necessary corrective action within the time prescribed in the order. In addition, it may impose upon such violating entity an administrative penalty of between NT$100,000 and NT$50 million, which can be doubled if the violating entity fails to cease and rectify the conduct or take any necessary corrective action after the lapse of the prescribed period.

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If the violation is deemed serious, the TFTC has the discretion to impose a fine of up to 10 per cent of the violating enterprise’s revenue of the previous fiscal year.

An enterprise violating the cartel prohibitions under the TFTA can be exempted from or be entitled to a reduction of the above fine if it meets one of the following requirements and the TFTC agrees in advance that the enterprise qualifies for the exemption or reduction:

- prior to the TFTC knowing about the unlawful cartel activities or commencing its ex officio investigation, the enterprise voluntarily reports in writing or orally to the TFTC the details of its unlawful cartel activities, provides key evidence and assists with the TFTC’s subsequent investigation;
- during the TFTC’s investigation, the enterprise provides specific evidence that helps prove unlawful cartel activities and assists with the TFTC’s subsequent investigation; or
- only a maximum of five companies can be eligible for a fine exemption or reduction in a single case: that is, the first applicant can qualify for a fine exemption, while the fine for the second to the fifth applicants can be reduced by 30 to 50 per cent, 20 to 30 per cent, 10 to 20 per cent, and 10 per cent or less respectively.

An enterprise that has coerced other enterprises to join or not to exit the cartel cannot be eligible for a fine exemption or reduction.

**The first application of the leniency programme: ODD**

In September 2012, the TFTC found that four optical disk drive (ODD) manufacturers – Toshiba-Samsung Storage Technology Korea Corporation (TSSTK), Hitachi-LG Data Storage Korea Inc (HLDSK), Philips & Lite-On Digital Solutions Corporation (PLDS) and Sony Optiarc Inc (SOI) – had conspired during the bidding process held by Hewlett-Packard Company (HP) and Dell Inc (Dell), and hence violated the cartel regulations under the TFTA. This case marks the first time that the TFTC dealt with a cartel through the leniency programme introduced into the TFTA at the end of 2011.

According to the TFTC, from September 2006 to September 2009 these four ODD manufacturers, during or before the bidding procedure held by HP and Dell, exchanged their bidding prices and expected bid ranking through e-mails, telephone calls and meetings. In addition, in several bidding cases they agreed on the final price and ranking in advance while exchanging other sensitive information such as capacity and amount of production among themselves. A market survey indicated that the four ODD manufacturers jointly occupied at least 75 per cent of the ODD market. Meanwhile, HP’s and Dell’s notebooks and desktops made up around 10 per cent of the Taiwanese relevant market. As 90 per cent or more of the disk drives used in HP’s and Dell’s notebooks and desktops were purchased through bidding processes, the four ODD manufacturers’ bid-rigging had certainly affected the supply and demand in the domestic ODD market. Therefore, the TFTC fined TSSTK, HLDSK, PLDS and SOI NT$25 million, NT$16 million, NT$8 million and NT$5 million, respectively.

The TFTC indicated that it started to investigate the case because some parties involved in the cartel pleaded guilty and settled the case with the US Department of Justice in November of the previous year. After the commencement of the TFTC’s investigation,

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12 TFTC decision announced on 24 September 2012. The full content of the decision letter has not been published due to the protection of the leniency applicant.
one manufacturer applied to the TFTC for leniency and provided all relevant evidence to the TFTC in accordance with the new leniency programme under the TFTA. Having fully cooperated with the TFTC, the leniency applicant was awarded a full exemption from the fine. The identity of the applicant is being kept confidential by the TFTC.

This case is notable because it represents the first time the TFTC concluded a case successfully with the help of a leniency applicant after the leniency programme came into effect. The case is also significant because it involved a global cartel, and the public record suggests that the TFTC sought assistance from competition authorities in the United States and the EU to conduct the investigation.

**The highest fine imposed on foreign enterprises for a cartel infringement: Capacitor**

On 9 December 2015, the TFTC imposed fines on seven aluminium capacitor companies (Nippon Chemi-Con Corporation (NCC), Hongkong Chemi-Con Limited (NCC HK), Taiwan Chemi-Con Corporation (NCC TW), Rubycon Corporation (Rubycon), Elna Co, Ltd (Elna), Sanyo Electric (Hong Kong) Ltd (Sanyo HK) and Nichicon (Hong Kong) Ltd (Nichicon HK)) and three tantalum capacitor companies (Nec Tokin Corporation (Nec Tokin), Vishay Polytech Co, Ltd (Vishay Polytec), and Matsuo Electric Co, Ltd (Matsuo)) for participating in meetings or bilateral communications to exchange sensitive business information such as prices, quantity, capacity and terms of trade to reach agreements, which was sufficient to affect the market function of capacitors in Taiwan.

The practices violated the cartel regulations under the TFTA. The TFTC, therefore, imposed administrative fines of NT$1.87 billion on NCC, NT$82.9 million on NCC HK, NT$293.8 million on NCC TW, NT$1.25 billion on Rubycon, NT$76.6 million on Elna, NT$842 million on Sanyo HK, NT$111.3 million on Nichicon HK, NT$1.22 billion on Nec Tokin, NT$31.2 million on Vishay Polytec and NT$24.3 million on Matsuo. The total amount of the fines was NT$5.79 billion. The TFTC indicated that the Japanese capacitor companies had convened several multilateral meetings and engaged in bilateral communications since the 1980s, and had exchanged sensitive business information to reach agreements. Products involved in this case include aluminium capacitors and tantalum capacitors. Seven aluminium capacitor companies (NCC, NCC HK, NCC TW, Rubycon, Elna, Sanyo HK and Nichicon HK) have been involved in this case, each to a different extent and duration. Starting from at least 2005 to January 2014 at the latest, the companies convened market study meetings, cost-up meetings and Hong Kong sales manager meetings in Japan and other countries, or conspired bilaterally via emails, telephones or gatherings to exchange sensitive business information. The three tantalum capacitor companies (Nec Tokin, Vishay Polytec and Matsuo) also exchanged sensitive business information in the market study meeting and conspired bilaterally via emails, telephones or gatherings to reach agreements.

The TFTC pointed out that aluminium capacitors are mainly used in larger electronic products, for example PCs, household appliances, home video games consoles and power supplies. Tantalum capacitors are mainly used in thin and small electronic products, such as notebooks, mobile phones and handheld games consoles. Domestic electronics companies largely rely on the companies involved in this case for the supply of capacitors. Even though there are a few aluminium capacitor companies in Taiwan, their scale is far smaller than that of the Japanese companies involved in this case.
of the Japanese capacitor companies. On the other hand, there are no domestic tantalum capacitor companies; all tantalum capacitors are fully imported. The total revenue for the companies involved in this case from their aluminium capacitors and tantalum capacitors was around NT$50 billion and NT$16 billion, respectively, during the term of their concerted action. NCC, Rubycon and Nichicon are the top three aluminium capacitor companies in the world. The tantalum capacitor companies involved in this case also have considerable global market shares. Hence, such conduct of the companies had a direct, substantial impact on the domestic markets with reasonably foreseeable effects.

The TFTC sees the Capacitor case as a successful outcome of its efforts in international enforcement cooperation with other competition authorities throughout the years. The TFTC had worked with competition authorities of the US, the EU and Singapore in its investigation of the subject case from the beginning. In addition to coordinating a synchronised investigation action on 28 March 2014, the TFTC also exchanged enforcement experiences with those agencies through telephone conferences and emails. The TFTC’s decision is the first among these competition agencies, and will be of great concern internationally as the case is still under investigation in the EU, the US, Japan, Korea, Singapore and China.

Meanwhile, the TFTC invoked the ‘10 per cent rule’ (i.e., for a serious concerted action, the fine can be up to 10 per cent of the violating enterprise’s revenue in the last fiscal year; see below for details) when determining the fines imposed on the capacitor manufacturers. This is the first case that the TFTC applied this fine formula to foreign enterprises and the one with the highest fines that the TFTC has imposed on foreign enterprises. It is noteworthy that the fines imposed by the TFTC can be up to 10 per cent of an enterprise’s ‘global revenues’ instead of 10 per cent of the revenues generated in Taiwan only.

**Facilitating practices theory**

The TFTC’s 2004 sanction on CPC and FPC, the two oligopolists in the petrol industry, for fixing gasoline prices is the first time that the TFTC decided a concerted action case involving facilitating practices, and is highly indicative of the TFTC’s future approach to such cases.14 Since then, enterprises may not use advance announcements to test their competitors’ attitude before making joint price rises. The decision sets a new precedent for the treatment of concerted actions, and may protect consumers’ interests by discouraging the widespread commercial practice of coordinated price rises. In its 2009 judgment, the Supreme Administrative Court upheld the TFTC’s finding that the price adjustments via prior information exchanges amounted to an unlawful coordinated action via a ‘form of mutual understanding’ prohibited under Articles 7 and 14 of the TFTA.

**iv Outlook**

**Compliance programme**

To assist Taiwanese enterprises establish internal compliance rules to curb their risk of violating antitrust laws of other countries, in December 2011 the TFTC published its Guidelines on Setting up Internal Antitrust Compliance Programme (Guidelines) and Antitrust Compliance-Dos and Don’ts (Principles of Conduct).

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14 TFTC decision letter dated 21 October 2004, Ref No. 093102.
According to the Guidelines, an enterprise should stipulate an antitrust compliance programme appropriate for its business strategies and corporate culture. The programme should cover at least the following measures to ensure compliance:

- Developing a corporate culture where legal compliance is essential;
- Stipulating policies and procedures that everyone should observe;
- Providing education or training programmes;
- Establishing audit, review and report mechanisms;
- Creating proper rewards and punishments; and
- Designating a means for contact or a consultant.

To allow each enterprise to grasp what is and is not permissible, the TFTC published the Principles of Conduct, including types of violation under the TFTA and antitrust laws of other jurisdictions. The Principles of Conduct lists dos and don’ts for concerted action (cartel), restrictions on resale price, monopoly and abuse of market power.

The Guidelines and Principles of Conduct are administrative directives with no binding legal effect; however, the TFTC encourages Taiwanese enterprises to take their own initiative and draft their own compliance programmes so as to lower their risk of violating the relevant laws. In addition, besides referring to the Guidelines and Principles of Conduct, each enterprise, while drafting such programmes, should take into consideration its corporate culture and industry characteristics.15

Furthermore, considering competition agencies in several countries have also encouraged their local enterprises to set up and implement a compliance programme of antitrust in recent years, and some Taiwanese enterprises might have their subsidiaries overseas or conduct business worldwide, the TFTC collected and organised antitrust information from over 10 countries in 2019 in order to put more efforts into assisting Taiwanese enterprises to establish their internal system of antitrust compliance and prevent any potential violation of antitrust regulations in foreign countries.16

**Fine calculation formula**

According to the TFTA, if the TFTC considers a concerted action to be serious, it may impose a fine of up to 10 per cent of the violating enterprise’s revenue of the previous fiscal year. The TFTC has published rules on the calculation of fines through the fine formula.17

Pursuant to the fine formula, a ‘serious’ concerted action is one that materially affects the competition status of the relevant market where the total amount of turnover of the relevant products or services during the period the cartel is active exceeds NT$100 million; or the total amount of gains derived from the cartel exceeds the maximum fine under the TFTA (i.e., NT$50 million).

In addition, the fine imposed on a serious cartel should be reached based on the ‘basic amount’ and ‘adjusting factors’, according to the fine formula. The basic amount refers to 30 per cent of the total amount of turnover of the relevant products or services during the period the cartel is active. Adjusting factors include aggravating factors such as being punished

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17 This fine formula can also be applied to serious violations of the monopoly regulations.
for violating cartel or monopoly regulations within the previous five years, and mitigating factors such as full cooperation during the TFTC’s investigation. As shown in the Capacitor case (see Section III.iii), the TFTC seems to hold the view that the 10 per cent cap should be based on the violating party’s ‘global’ revenues instead of Taiwanese sales only.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Definition

The TFTA defines a monopoly as a situation in which an enterprise faces no competition or has such a superior market power that it is able to exclude competition in a relevant market.\(^{18}\) Two or more enterprises as a whole will be deemed to have the status of a monopolistic enterprise if they do not in fact engage in price competition.

An enterprise meeting one of the following requirements may be deemed a monopolistic enterprise, provided, however, that an enterprise will not be deemed a monopolistic enterprise if its market share does not reach 10 per cent or its total sales in the preceding fiscal year are less than NT$1 billion:\(^{19}\) the market share of the enterprise in a relevant market reaches 50 per cent; the combined market share of two enterprises in a relevant market reaches two-thirds; and the combined market share of three enterprises in a relevant market reaches 75 per cent.

An enterprise not qualified under the above criteria or falling under the exception may still be deemed a monopolistic enterprise if the establishment of such enterprise or any of the goods or services supplied by such enterprise to a relevant market are subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded (Article 8 of the TFTA).

While the possession of monopoly power is not illegal per se, a monopolist is prohibited from abusing its dominant position in any of the following methods:

\(a\) using unfair means to exclude, directly or indirectly, other enterprises from entering the market or otherwise participating in competition;

\(b\) improperly determining, maintaining or changing the prices of goods or services;

\(c\) requiring a counterpart to the transaction to provide preferential treatment without proper cause; and

\(d\) engaging in any other abusing acts of its dominant market position (Article 9 of the TFTA).

ii Significant cases


Local CD-R manufacturers filed complaints with the TFTC in June 1999 against Koninklijke Philips Electronics NV (Philips), Sony Corporation (Sony) and Taiyo Yuden Co, Ltd (Taiyo Yuden) for an unlawful concerted action, abuse of their dominant power and tying of their technologies in joint licensing CD-R manufacturing technologies. In a decision dated

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18 In defining the relevant market, both the relevant products or services and the geographical markets will be taken into consideration.

19 The monopoly threshold may be amended in the wake of the new TFTA.

20 TFTC decision letter dated 20 January 2011, Ref No. 100012.
20 January 2001, the TFTC found that Philips, Sony and Taiyo Yuden had committed an unlawful concerted action and abuse of monopoly power, and fined them NT$8 million, NT$4 million and NT$2 million respectively. The three companies appealed to the Executive Yuan. In November 2001, the Executive Yuan overturned the TFTC’s decision and remanded the case to the TFTC. The TFTC made another decision on 25 April 2002, fining the three companies NT$8 million, NT$4 million and NT$2 million respectively for an unlawful concerted action and abuse of monopoly power. The Executive Yuan upheld the TFTC’s 2002 decision. The tree companies appealed to the Taipei High Administrative Court. In 2003, the Taipei High Administrative Court overturned the TFTC’s decision and ordered the TFTC to make a proper disposition upon further investigation. The TFTC appealed to the Supreme Administrative Court, but the appeal was dismissed by the Supreme Administrative Court in 2007. The TFTC applied for a retrial, but the application was dismissed by the Supreme Administrative Court in 2009.

The Taipei High Administrative Court overturned the TFTC’s 2002 decision, and the Supreme Administrative Court dismissed the TFTC’s appeal because the courts found that:

a. the three companies were not competitors, as their technologies were not substitutable in making CD-Rs, and hence their joint licensing did not constitute a concerted action; and

b. the three companies are monopolistic enterprises in the CD-R technology market and they abused monopoly power, but the fines imposed by the TFTC were improper because the three companies should not have been penalised for abuse of market power before 3 February 1999 as they were not the monopolistic enterprises defined under the TFTA at that time, and the amounts of the fines did not reflect the interest (i.e., the ratio of the royalties) received by the three companies.

In its decision dated 28 October 2009, the TFTC ruled that the three companies are monopolistic enterprises in the CD-R technology market, and that they abused monopoly power by improperly maintaining the formula to calculate the licence fees even when the market had drastically changed, refusing to provide important trade information on the licensed patent technologies and prohibiting their trading counterparts from contesting the validity of the patent – all of which are abuses of market power. Considering the Taipei High Administrative Court’s accusation of its previous improper assessment of the fines, the TFTC reduced the fines imposed on Philips, Sony, and Taiyo Yuden to NT$3.5 million, NT$1 million and NT$500,000 respectively. It stated that, while the Taipei High Administrative Court overturned the TFTC’s 2002 decision, the Taipei High Administrative Court and the Supreme Administrative Court upheld the TFTC’s findings that the three companies as a whole had the same status as a monopolistic enterprise by virtue of their joint licensing, and that they abused monopoly power. It further pointed out that from 1999 to 2001, when the CD-R market grew significantly and there was a substantial shift in market demand and supply, the three companies refused the licensees’ request to change the formula for the calculation of royalties. When the three companies negotiated the licence agreements with the licensees, they did not make full disclosure regarding the content, scope and term
of validity of the subject patent, and they also prohibited other enterprises from raising objections on the patent’s validity. The above-mentioned conduct violated the prohibitions on abuse of market power provisions under the TFTA.21

**Largest-ever fine on Qualcomm (2017)22**

At its commissioners’ meeting on 11 October 2017, the TFTC ruled that Qualcomm Incorporated (Qualcomm) has a monopolistic market position in the baseband chip markets of code-division multiple access, wideband code division multiple access, long-term evolution and other cellular communication standards, but that:

- it refuses to grant licences to competing chip companies;
- it requests that companies enter into restrictive clauses;
- it refuses to grant licences to enterprises that do not enter into licence agreements;
- it enters into exclusive rebate clauses with specific enterprises; and
- the conduct involved in its overall licensing model caused harm to competition in the baseband chip markets, which directly or indirectly prevents other enterprises from competing through unfair means that are in violation of Article 9.1 of the TFTA.

Therefore, a fine of NT$23.4 billion was imposed on Qualcomm. This is the largest fine ever imposed in the TFTC’s enforcement history.

The TFTC’s decision has sparked intense debate among the local industries and governmental agencies. In particular, Taiwan’s Ministry of Economic Affairs expressed its concern that the TFTC has punished a company that has always been a valuable partner for the Taiwanese communications and semiconductor industry, and believed that the TFTC should have considered Taiwan’s broader economic policy goals before handing down the heavy fine on the chipmaker. More rarely, out of a total of seven commissioners, three issued dissenting opinions criticising the decision, implying that the TFTC’s internal view on the subject matter is split.

Qualcomm filed an appeal against the TFTC’s decision with the Intellectual Property Court. On 9 August 2018, the TFTC and Qualcomm reached a litigation settlement whereby Qualcomm agreed to abide by and implement specific commitments relating to licensing cellular standard essential patents to the Taiwanese handset manufacturers, and thus lifted the TFTC’s antitrust concern on Qualcomm’s SEP licensing practices. In addition, Qualcomm agreed not to contest the fine instalment amounts already paid, totalling NT$2.73 billion, and committed to undertake commercial initiatives for investments in and collaborations with Taiwan over a five-year period.

The TFTC said that after comprehensive consideration, it reached the settlement with Qualcomm based on public welfare. This is the first time the TFTC has settled in litigation proceedings. As part of the settlement, Qualcomm need not pay the remainder of the fine that was initially imposed. The TFTC expects that this case would not only effectively

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21 In 2011, the TFTC reissued its decision, as per the order of the Supreme Administrative Court, but still ruled that the parties had abused their market power. Despite the subsequent appeal and administrative lawsuits, the TFTC’s 2011 decision was eventually upheld and confirmed by the Supreme Administrative Court in July 2013.

22 TFTC decision letter dated 20 October 2017, Ref No. 106094.
form a sound competition environment for the cellular communication industry but also bring a positive impact on the semiconductor, cellular communication and 5G technology development in Taiwan.

The settlement, however, has been criticised by many scholars, who are concerned that if the fine can be substituted by investment, the settlement conveys the message to the public that companies can engage in antitrust behaviour in Taiwan. In addition, the licensing commitments made by Qualcomm are very ambiguous, which may not solve the licensing problems. Finally, while most countries around the world are preventing companies from engaging in antitrust behaviour and have imposed significant fines on Qualcomm, Taiwan is on the opposite track.

With respect to the criticism, the TFTC responded that as the competent authority in charge of matters pertaining to antitrust law, it shall consider not only market competition but also economic situation that is affected. The TFTC entered into the settlement because the harm and impact to companies and industries in Taiwan due to the lengthy administrative litigation procedure may be hard to recover from, and because the commitment made by Qualcomm can achieve the purpose of imposing the significant fine and benefit companies and industries in Taiwan.

iii Trends, developments and strategies

On 5 February 1999, the requirement that monopolistic enterprises be announced by the TFTC was taken out of the TFTA. Since then, an enterprise will be deemed a monopolistic enterprise if it falls within the definition of monopolistic enterprises under Article 8 of the TFTA. Given the rapid pace of change in market and business models, competition law has been characterised by a high level of uncertainty, making the collection of evidence of violation a challenging task.

Administrative settlement

On 2 May 2002, the TFTC established a software market monopoly taskforce to investigate the perceived monopolistic dominance of Microsoft Taiwan Corporation (Microsoft) in the software market, unreasonable software pricing and inappropriate bundling of Microsoft Office software. On 3 October 2002, Microsoft requested an administrative settlement with the TFTC. At its commissioners’ meeting on 31 October 2002, the TFTC agreed in principle to Microsoft’s request for administrative settlement, and began the negotiation process. On 26 February 2003, Microsoft submitted a settlement offer to the TFTC on behalf of itself and the relevant affiliates. At its commissioners’ meeting on 27 February 2003, the TFTC decided that the settlement offer was in the public interest and agreed to sign an administrative settlement agreement with Microsoft.

The signing of this administrative settlement agreement was followed by a fall in software retail prices, improved after-sales service and a general enhancement of consumer welfare. The agreement also created opportunities for companies in the information and communications technology sector to utilise source code made available by Microsoft in new product development, and a licensing environment based on fair competition. It has been proven that the use of administrative settlement helps reduce wastage of administrative resources and avoid time-consuming lawsuits, encourages compliance with the TFTA by enterprises, and implements competition law and competition policy.
**Regulation on oligopolists**

In TFTC’s 2004 decision to penalise CPC and FPC for price fixing, a commissioner pointed out that as the two companies did not in fact engage in price competition, they as a whole may be deemed to have the status of a monopolistic enterprise and their concurrent increases in prices may constitute an abuse of monopoly power. However, monopoly power is exercised on a lasting or structural basis while a simple coordination of competitive conduct of competitors under a project may be analysed under the provisions on the prohibition of cartels. If the TFTC could not find a ‘normal market price’ based on economic analysis to prove any improper price change by the oligopolists, it could not prove whether they had abused monopoly power. Given the difficulty in proving an improper price change, the TFTC decided that the fixing of petrol prices by CPC and FPC was a concerted action involving facilitating practices.

**Increase of maximum fine**

Under the ‘TFTA and according to the fine formula, the maximum fine for monopolistic enterprises’ abuse of market power has increased from NT$50 million to 10 per cent of the violating enterprise’s revenues in the previous fiscal year. However, since the fine formula came into effect, it has not been applied to a monopoly case.

**iv Outlook**

According to the amendment bill to the TFTA, the chief revisions to the monopoly provisions are as follows:

1. Raising the threshold for not being a monopolistic enterprise: if the total sales in the preceding fiscal year of an enterprise are less than NT$2 billion, this enterprise shall not be deemed a monopolistic enterprise. The raised threshold is in keeping with economic growth in recent years; and

2. Revising the definition where two enterprises may be deemed as the monopolistic enterprise as a whole: two or more enterprises will be deemed one monopolistic enterprise if they do not in fact engage in competition with each other, and thus they as a whole have the same status as a monopolistic enterprise. In addition, since competition activities cover not only competition in price but also in other categories, the amended provision changed the wording from ‘price competition’ to ‘competition’.

Furthermore, in November 2018, the TFTC published the draft amendments to Articles 39, 41 and 47-1 of the TFTA. Among the amendments, the TFTC proposes a provision regarding ‘suspension of statute of limitations’ for anticompetitive matters, such as abuse of dominance and cartels. To be specific, the five-year statute of limitations period for the TFTC to penalise the violating party of an anticompetitive matter will be suspended upon the launch of investigation by the TFTC. According to the TFTC, the aforesaid amendment aims to tackle the situation whereby the TFTC often runs short on time to close a complicated case involving multiple foreign companies and voluminous evidence within the current five-year period. The draft amendments are still subject to review by the Executive Yuan and then need to pass the three rounds of reading by the Legislative Yuan. Thus, whether and when the amendment will come into effect is currently unknown at this time.
IV  SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i  Significant cases

**Blu-ray patent pool**\(^{23}\) (2011)

On 31 March 2011, the TFTC conditionally permitted a proposed combination for the joint operation of One-Blue by Hitachi, Panasonic, Philips, Samsung, Sony and Cyberlink.\(^{24}\) One-Blue will act as a licensing agent for the patent pool to license essential blue-ray disk (BD) patents for the manufacturing of backwards-compatible BD products. Upon the consummation of the combination, the participating parties will respectively acquire a one-sixth shareholding and then jointly operate One-Blue.

The relevant market of One-Blue is defined as ‘the domestic product market, technology market, and innovation market which are related to BD’. The basis for this broad definition is that the participating parties not only hold technologies for the manufacture of BD products but are also engaged in the manufacture of BD products.

Regarding competition analysis, the TFTC held that the proposed combination would not give rise to competition restraints due to the following arrangements in the applicable pool agreements:

\(a\)  only essential patents will be included in the patent pool and the essentiality of the patents will be determined by independent patent experts, according to the pool agreements;

\(b\)  the patent pool will be open to all patent holders, and thus it is not a closed pool, and all licensors of the patent pool are required to conduct individual licensing activities for any licensee requesting individual licences on a reasonable and non-discriminatory basis;

\(c\)  licensors are prohibited from disclosing their confidential information so as to ensure that the confidential information will not be exchanged between licensors, resulting in a conspiracy among pool members;

\(d\)  licensors cannot have access to licensees’ information provided for the application of per-batch licence before each shipment of product;

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\(^{23}\) TFTC decision letter dated 31 March 2011, Ref No. 100002.

\(^{24}\) Although combination should be deemed helpful to lower transaction costs for Taiwanese enterprises when applying for licences, to prevent the participating parties from stifling competition through the patent pool the TFTC attaches six necessary conditions to eliminate any disadvantages from possible competition restraints, and to ensure the overall economic benefit, as follows: (1) the participating parties should not engage in any concerted action by entering into any agreement restricting the quantities or prices of BD products or by exchanging important transaction information; (2) the participating parties and One-Blue should not restrict licensees’ scope of technology use, trading counterparts and product prices; (3) the participating parties and One-Blue should not forbid licensees from challenging the essentiality and validity of the licensed patents; (4) the participating parties and One-Blue should not forbid licensees from researching and developing, manufacturing, using and selling competing products or adopting competing technologies during the licence term or after expiration of the licence; (5) the participating parties and One-Blue should not refuse to provide licensees with the content, scope and term of the licensed patents; and (6) the participating parties are required to provide executed copies of the pool agreements for the TFTC’s review.
The scope for the grant-back provision is limited to essential patents, and the royalties paid under the applicable pool agreement will qualify for the royalty rate for the grant back of essential patents; and licensors are not prohibited from using competing technologies or developing competition standard or products.

The TFTC further explained that regarding BD technology, Taiwanese enterprises are in a position to adopt technologies that have been developed by others. If this combination were prohibited, Taiwanese BD products manufacturers would have to negotiate for licences with patent holders individually, and the transaction cost of individual negotiations and the accumulated royalties are expected to be higher than those involved in being granted licences through One-Blue. Therefore, licensing the essential BD patents through a patent pool is expected to make it easier for Taiwanese manufacturers to obtain licences for essential patents, lower the transaction cost and avoid the risk of infringement and litigation, which will promote competition among Taiwanese manufacturers, with consumers being the ultimate beneficiary.

On the other hand, since the participating parties are also engaged in the manufacturing and sales of BD products, the patent pool will increase the opportunity for third parties to use the licensors’ essential patents, which may stimulate competition in the downstream market. The licensors will not acquire sensitive information such as cost data, and will refrain from exchanging sensitive information among themselves, and thus upstream and downstream vertical competition will not be negatively affected.

In January 2013, the TFTC cleared another similar case with five conditions in which LG Electronics, Philips, Pioneer Corporation and Sony will jointly operate a DVD patent pool named One-Red.25 As the rationale adopted by the TFTC to analyse both One-Blue and One-Red cases is similar, it seems the TFTC may have set up reliable case precedents for patent holders intending to establish patent pools to follow and observe.

Merger of cable system operators26 (2010)

In a decision dated 29 October 2010, the TFTC conditionally permitted the proposed combination of Dafu Media Co Ltd (Dafu), Cheng Ting, Kbro and 12 cable system operators (SOs) controlled by Cheng Ting and Kbro. The case is noteworthy because the TFTC imposed a record-breaking 13 conditions for its clearance. Previously, the TFTC granted clearance in December 2009 for the combination between Taiwan Mobile Co Ltd (TWM) and Kbro with 10 conditions, although the transaction was not successfully concluded owing to other regulatory issues.

Kbro is a Taiwanese company that Carlyle has invested in, and Kbro itself has invested in 12 SOs. It provides general advertising services. The transaction involves Dafu’s acquisition of Kbro and the 12 SOs. While the parties are in different markets and there are no overlapping products, or upstream or downstream relations, the major shareholders of Dafu are the chair, vice chair and directors of TWM and Dafu’s affiliates. Since TWM is the second-largest mobile telephone and fixed-line telecoms service provider and has invested in four cable system operators, there will be a horizontal or vertical combination effect if Dafu and TWM jointly manage Dafu’s business. After considering the relevant market structure

25 TFTC decision letter dated 24 January 2013, Ref No. 102002.
26 TFTC’s decision letter dated 29 October 2012, Ref No.099004.
and competition, opinions from relevant industries, trends in technology development and the maintenance of market competition after the combination, the TFTC concluded that the overall economic benefit due to this transaction would outweigh the disadvantages of stifled competition. Consequently, it permitted the subject transaction subject to the following four conditions:

- preventing Dafu and its affiliates (collectively Dafu Group) from further combination with other SOs to abuse Dafu Group’s market power;
- preventing Dafu Group from further vertical combination with channel providers to abuse its market power;
- ensuring digitalisation of cable television and developments of digital convergence; and
- demanding information from Dafu Group to check its compliance with the conditions imposed by the TFTC.27

The TFTC gave clearance on the combination on the following 13 conditions: (1) Dafu Group cannot directly or indirectly acquire or own any shares in a Taiwan SO or its affiliates (other than those SOs in this proposed transaction); (2) no director, supervisor or manager of Dafu Group can simultaneously serve as a director, supervisor or manager in a Taiwan SO or its affiliates (other than those SOs in this proposed transaction); (3) Dafu Group cannot sell any shares in a company of the group to TWM group companies (including but not limited to TFN Media Co, Ltd and the SOs controlled by it, collectively TWM Group), or directly or indirectly acquire or own any shares in a TWM Group company; (4) no director, supervisor or manager of Dafu Group can simultaneously serve as a director, supervisor or manager in TWM Group, and vice versa; (5) Dafu Group cannot collocate headends, share trademarks or customer service, or jointly conduct any other business operation with other SOs not within Dafu Group; (6) Dafu Group cannot increase the number of analogue channels being produced or distributed by companies in its group; (7) Dafu Group cannot, jointly with other SOs or their affiliates, collectively procure programmes from channel providers, set the purchase price for the procurement, boycott channel providers or conduct any concerted actions as defined under the TFTA through any kind of agreements; (8) Dafu Group cannot jointly with other programme distributors sell programmes produced or distributed by Dafu Group or conduct any concerted actions as defined under the TFTA; (9) Dafu Group cannot, without reasonable grounds, refuse to license, or impose different licence fee schedules on or place conditions other than licence fees on other SOs, direct-to-home (DTH) operators, multimedia content transmission service operators, or other competing wired or wireless content transmission service providers for broadcast of channels produced or distributed by Dafu Group; nor can Dafu Group discriminate against them; (10) Dafu Group cannot, without reasonable grounds, grant licences at difference prices or on different transaction terms to other SOs, DTH operators, multimedia content transmission service operators, or other competing wired or wireless content transmission service providers for broadcast of channels produced or distributed by Dafu Group; (11) Dafu Group must actively (a) implement digitalisation of cable television and two-way network construction, (b) fulfil the Digital Convergence Plan announced by the Executive Yuan to popularise the digital cable television services, (c) obtain a licence from channel providers to broadcast through internet protocol television (IPTV) and reasonably relicense such rights to IPTV operators to ensure the fair competition among different platforms and (d) assist with the development of HD contents and channels, as well as the cultural creative industry; (12) Dafu must submit the following information to the TFTC for five years starting from the date of the combination: (a) names of the channels and copies of the distribution and agent agreements for the channels being produced or distributed by Dafu Group, (b) information related to pricing, licensing fees, discounts and licensees of such channels and (c) a report on how the combination benefits the general public and the overall economy; and (13) Dafu must submit from time to time within the five-year period any change of the chair of the board, directors, supervisors, managers or articles of incorporation of each Dafu Group company to the TFTC for its records.
ii Trends, developments and strategies

As society advances rapidly, there is a need to promulgate or amend rules that can serve as guidelines in regulating industries in which business models change often so as to protect the overall economy. To such end, the TFTC from time to time stipulates new guidelines for handling cases related to certain industries.

Guidelines for airlines

After Taiwan High-Speed Rail started to provide domestic transportation services, the TFTC revoked its Guidelines for Handling Civil Air Transportation Enterprises’ Merger Filings and Guidelines on Unendorsed Ticket Transfers between Airline Companies, and issued the Guidelines for Handling Merger and Concerted Action Cases of Domestic Civil Air Transportation Enterprises (2008 Guidelines) in 2008. The 2008 Guidelines are intended to enable the TFTC to effectively handle domestic civil air carriers’ merger filings and applications for concerted actions in order to maintain the orderly conduct of trade, uphold consumers’ interests and assure fair market competition, following the major changes in the competitive environment in Taiwan's domestic air transportation market. In 2015, the TFTC modified the Guidelines again, taking into account the facts that the market competition status has varied since the last amendment and the TFTA has undergone several revisions in recent years. The 2015 Guidelines mention the following points:

a market definition: the definition of markets will in principle be based on the ‘city pair’ as the smallest market unit. The following factors may also be considered depending on the circumstances of each case: the time and distance for transportation and the frequency of service of other air routes originating from areas close to the point of departure; the time and distance for transportation, and the frequency of service of air, rail, road and water transportation modes; and other factors relevant to the definition of domestic air transportation market; and

b market share: besides considering such information as the service volume, sales quantity, service value and sales value of an enterprise compared with the totals for the related markets, the market share of a domestic air carrier may also be calculated on the basis of market demand (cargo volume, the number of passengers carried by, or the turnover of, a specific domestic civil air carrier, expressed as a proportion of the total number of passengers carried by, or the total turnover of, all civil carriers in the relevant market) or market supply (cargo capacity, the number of seats made available by a specific domestic civil air carrier, expressed as a proportion of the total number of seats made available by all civil carriers in the relevant market).

Guidelines for 4C enterprises and financial industry

The TFTC has established the following guidelines for handling competition in different market sectors:

a TFTC Disposal Directions on Cable Television and Related Industry;

b TFTC Disposal Directions on Telecommunication Industry;

c TFTC Disposal Directions on the Business Practices Cross-Ownership and Joint Provision among 4C Enterprises (telecommunications, cable TV, computer network, and e-commerce);

d TFTC Disposal Directions on Electronic Marketplace; and

Outlook

Since people have heavily relied on large technology companies to provide them with a more convenient lifestyle in recent years, these companies have gained more and more influence on society and have also changed the market structure by using innovative methods to provide their services. Although these technology companies do bring many benefits to people’s lives and have diversified the possibility of human consumption patterns, people who want to enjoy novel services have to provide their personal data as an exchange. Therefore, these companies hold a significant amount of users’ data, which brings about market power. This ongoing phenomenon inevitably leads to the concerns regarding new competition issues and consumer protection. As a result, the TFTC has announced that it will put the digital economy as its regulatory priority and dedicate sources to analyse the potential competition issue arising therefrom. In summary, the TFTC aims to enhance its regulatory power over the aforementioned industries, starting with conducting research into their market structures. Through an in-depth analysis of the markets, the TFTC expects to learn more about the background as well as the general business models of the digital and platform economy to swiftly detect any unlawful conduct that could stifle competition. Meanwhile, on par with the international trend, the TFTC indicates that it will dedicate more resources to research or even investigate the monopoly issues in the digital platform sectors, especially for those tech giants who hold a large amount of consumer data, if any potential violation is found.

V MERGER REVIEW

i Significant cases

Combination between chip makers\(^{28}\) (2012)

At its 1 August 2012 commissioners’ meeting, the TFTC unconditionally cleared the proposed combination between MediaTek Inc (MediaTek) and Mstar Semiconductor Inc (Mstar).

The proposed combination entails the acquisition of at least 40 per cent and up to 48 per cent of the shares in Mstar by MediaTek through a public tender offer. Following the consummation of the tender offer, a post-closing merger will be further pursued in which MediaTek will be the existing company and Mstar will be the dissolved company.

According to the TFTC, MediaTek and Mstar overlap in the mobile chip market and TV/display control chips market, and thus the transaction should be defined as a horizontal combination. However, for the reasons listed below, the TFTC concluded that the proposed combination would not generate any anticompetitive effect on the Taiwanese relevant product markets:

a as most of the participating parties’ relevant products are exported for sale globally, the participating parties face intense competition from their worldwide competitors. Therefore, after the combination, even if any attempt is made to raise product prices arbitrarily, it would be constrained by market forces;

b the proposed combination is unlikely to result in any concerted action among the participating parties and their competitors. Furthermore, no material entry barrier

\(^{28}\) TFTC decision announced on 1 August 2012.
to the relevant markets exists; hence, Taiwanese and other multinational enterprises interested in the industry can enter the market any time, making the market even more competitive; and

c because there are already numerous enterprises in the relevant markets, when choosing business partners, the participating parties’ upstream and downstream counterparties have a wide pool to choose from. In fact, the participating parties’ transacting counterparties have considerable bargaining power. Consequently, the merged entity would not be able to abuse its market power after the combination.

The TFTC also indicated that the proposed combination did not have the potential of undermining competition and would instead fortify the Taiwanese TV/display control chip makers’ ability to compete with global enterprises.

Given the above, the TFTC found that the overall economic benefit from this transaction would outweigh the disadvantages of stifled competition. Consequently, it cleared the subject transaction under Paragraph 1, Article 12 of the TFTA.29

ii Trends, developments and strategies

Remedies

In September 2012, the TFTC updated the Directions (Guidelines) on Handling Merger Filings (Merger Guidelines) to include its official standards for remedies. According to the Merger Guidelines, the remedies the TFTC can impose as conditions are:

a measures affecting the structural aspect: the TFTC can order parties to take measures to dispose of the shares or assets in their holding, transfer part of their operations or remove personnel from certain positions; and

b measures affecting the behavioural aspect: the TFTC can order parties to continue to supply critical facilities or essential elements to businesses outside the merger, order the parties to license such businesses to use their intellectual property rights, and prohibit the parties from engaging in exclusive dealing, discriminatory treatment and tie-in sales.

Despite the foregoing, the TFTC still reserves the right to impose other types of remedy on a case-by-case basis. The Merger Guidelines also outline that the TFTC may seek parties’ opinions on the possible remedy before it makes its final decision.

International cooperation for merger reviews

No official documentation indicates that the TFTC has, to date, ever cooperated with foreign authorities while conducting the review of a combination notification. However, the TFTC has entered into certain cooperation agreements or memorandum with the following countries for the application of competition regulations: Hungary, Canada, Australia, New Zealand, France and Mongolia. Meanwhile, while reviewing a cross-border transaction, it is not uncommon for the TFTC to order the filing parties to report the current status in

29 The proposed combination of MediaTek and Mstar is also subject to the merger review processes of the authorities in several jurisdictions, including China’s Ministry of Commerce (Mofcom). The deal was eventually cleared by Mofcom with a substantial remedy package in August 2013, one year after the TFTC’s clearance.
other jurisdictions where a combination notification has also been made. Given the above, even without formal coordination, the TFTC still more or less consults agencies in other jurisdictions to make its decision on a merger filing.

iii Outlook

According to the TFTA, the main revisions to the merger control rules are as follows:

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

b Apart from holding shares through corporate entities, it is not uncommon for an enterprise’s business operations or the appointment of personnel to be under the control of certain individuals. It is also common for an enterprise to hold shares in another enterprise through natural persons or non-corporate entities. As the transactions of the above-mentioned shareholding structures may have the same effect as a combination under the TFTA, the new law stipulates that those natural persons or non-corporate entities that have a controlling share in a company should also be subject to the merger control rules, even though they are not corporate entities.

c The review period for a merger filing case has been revised from 30 days with a possible extension of an additional 30 days to a possible extension of an additional 60 days, as the original period may not be sufficient for the agency to thoroughly analyse a case that may have potential anticompetitive effects. Further, in May 2017, the above-mentioned review period has been revised from 30 days with a possible extension of an additional 60 days to 30 business days with a possible extension of an additional 60 business days. This amendment is to avoid a situation where the review period for major merger filing cases is unduly shortened due to successive national holidays. The amendment also precludes an acquirer in a hostile takeover from improperly fixing the review period by manipulating the filing schedule.

d It is noteworthy that the new TFTA follows the old law in implementing a dual filing threshold system. The TFTC’s proposal of removing the market share filing thresholds did not pass the Legislative Yuan’s final review.

VI CONCLUSIONS

The increasing prominence of the digital economy has had a significant impact on people’s economic activities and changed existing business models in recent years. Giant technology enterprises have collected large amounts of data from their consumers and used this data to provide innovative goods and services. Since people have grown dependent on the convenience given by these technology companies, the companies have penetrated people’s lives more than ever. This situation reversed the traditional notion of competition in many aspects. For instance, data might become a potential source of market power. Furthermore, the digital economy is characterised by network effect and economy of scale, which can render competition issues more complex. Therefore, the TFTC has not only committed to devote more efforts to the digital market but has also set the scrutiny of the digital economy as its key priority in 2019 so as to keep up with the international trend of further supervision.
of the behaviour of giant technology corporations. Since some changes are necessary to create a better competitive environment in Taiwan, we expect that the TFTC can revisit and recalibrate certain established concepts of competition laws to cope with emerging challenges that might be incurred by the digital sectors. All in all, we are looking forward to a sound and prosperous business environment in Taiwan in the future.
I OVERVIEW

i Brexit

Over three and a half years from the date of the UK’s Brexit referendum, the UK left the EU on 31 January 2020. In so doing, the UK entered into a ‘transition period’ under the auspices of the European Union (Withdrawal Agreement) Act 2020 (the Withdrawal Act). Under this transitional arrangement the EU competition law rules applicable in the UK will remain unchanged during the transition period. As such, the European Commission will still retain all of the competencies that it exercised whilst the UK was still an EU Member State. At the time of writing, the transition period is set to expire on the 31 December 2020.

Before the expiry of the transition period (the expiry date), negotiations will take place with the EU on the terms of the UK’s future relationship with the bloc. During these negotiations, the EU and the UK will seek to conclude a free trade agreement (FTA), the provisions of which are also expected to cover the application and enforcement of competition law post-expiry date. With respect to the parties’ priorities in those trade negotiations, both the UK and the EU published their negotiation mandates in February 2020. The EU has been clear that it expects the future partnership to prohibit anticompetitive agreements and abuse of dominant positions, contain a merger control regime, and implement rules on State aid as part of the ‘level playing field’ guarantees that the EU is seeking. The UK has acknowledged that any FTA should commit the parties to maintain effective competition laws but has been clear that in its view, this does not require legal or regulatory alignment with the EU.

In the meantime, the CMA has published guidance on its functions under the Withdrawal Agreement during the transition period (the CMA guidance). The CMA guidance also touches on the treatment of investigations into anticompetitive behavior initiated during the transition period that have not been concluded by the expiry date. In these instances, the CMA will not have the competence to open fresh investigations into suspected anticompetitive behaviour where the European Commission had opened an infringement investigation during the transition period – this competence will be retained by the European Commission even after the expiry date. With respect to any CMA investigations still open

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1 Marc Israel is a partner, Kate Kelliher is an associate and Ellen Campbell is a trainee at White & Case LLP.
on the expiry date, the CMA would retain the power to conclude its investigation but would cease to examine any EU elements of the behaviour at issue from that date. Likewise, mergers with an EU dimension remain within Commission competence during the transition period. This is also the case for merger investigations initiated by the Commission during the transition period, even if no final decision is taken by the expiry date. On state aid, similarly, the Commission retains its state aid competencies during the transition period, and state aid granted by the UK during the transition period remains subject to state aid rules.

Whatever the agreed terms framing the UK’s future relationship with the EU, they will need to be approved by the UK Parliament and the EU. If agreed terms cannot be reached by the expiry date, the UK has indicated its intentions to cease to operate within EU rules regardless. If this circumstance did arise, the EU prohibition on anticompetitive agreements (including cartels) under Article 101 of the Treaty on the Functioning of the European Union (TFEU), and the EU prohibition on abuse of dominance under Article 102 TFEU, would no longer be applicable in the UK. Therefore, anticompetitive behaviour in the UK would be subject to examination by the CMA (and sectoral regulators with these powers) under the Chapter I and Chapter II prohibitions in the Competition Act 1998 (CA98), which closely mirror EU provisions. However, were anticompetitive behaviour of this nature deemed to affect both trade within the UK and trade between the remaining 27 EU Member States, then it is possible that the same behaviour would be subject to concurrent investigations by the CMA and the European Commission (as well as by authorities in other jurisdictions).

In terms of merger control, if the transition period were to expire without an agreement, the CMA would no longer be prevented from investigating, under the Enterprise Act 2002 (EA02), a merger that has a Community dimension. Therefore mergers previously under the exclusive jurisdiction of the European Commission would also become reviewable in the UK. This means that certain mergers could be subject to simultaneous review by both the Commission and the CMA (as well as by authorities in other jurisdictions).

With respect to state aid, the UK has said little at the time of writing about how state aid rules would operate in the event that no FTA is concluded. However, a set of draft State Aid (EU Exit) Regulations 2019 (the State Aid Regulations) were laid before the UK Parliament in January 2019, and a draft CMA guidance document on state aid procedures was published for consultation in March 2019.6 Although both the draft Regulations and the related guidance were published in a different, no-deal Brexit context, they may be at least illustrative of the kind of approach the UK might pursue in the event that no FTA is concluded. The draft State Aid Regulations envisaged the creation of a UK state aid regime, that has been described as a ‘UK-wide subsidy control framework, the enforcement and supervision of which would be conducted by the CMA’.7 Public authorities would need to notify intended state aid to the CMA for approval. Any public authority would be entitled to notify. State aid that had already been approved by the Commission would remain valid but any notified UK state aid not yet approved by the Commission would instead need to be submitted to the CMA for review and approval. The procedures are broadly modelled on

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the current EU framework, with the CMA adopting the role of the Commission, with some
discrete differences. For example, the ability to conduct ‘dawn raids’ for state aid reasons is
envisaged, along with a maximum time limit of 18 months for formal investigations, neither
of which are features of the EU procedure.

Whatever form the UK’s relationship with the EU will take after the expiry date, the
CMA has been proactive in preparing for its role during the transition period. In particular,
the CMA has been contacting parties who are contemplating, or who have initiated, EU
merger notifications to ask for information about their mergers in anticipation of effects on
UK markets. The review process typically starts with a letter requesting information about
the deal, and the CMA may call the deal in for full review (or may decide that a review is
not warranted). The CMA has also been busy bolstering its resources and expertise to ensure
it has the staff to deal with its potential new mandate, not least in state aid, as an area of
competition law where it has not previously been very active.

ii UK competition law regime

The CA98 prohibits agreements or concerted practices that prevent, restrict or distort
competition (Chapter I prohibition) and abuse of a dominant position (Chapter II
prohibition), in each case within the UK. The EA02 contains the criminal cartel offence,
and the legal basis for UK merger review and market investigations. The CMA has primary
responsibility for public enforcement of competition law in the UK – both the Chapter I and
Chapter II prohibitions and, as it currently stands, Articles 101 and 102 TFEU – although
these provisions may also be enforced by private parties before the courts. Clearly, the CMA
will no longer be able to enforce Articles 101 and 102 TFEU once EU laws cease to apply in
the UK, but that will not affect the substantive provisions of the equivalent rules in the UK.
In addition, a number of sectoral regulators have concurrent powers to enforce the Chapter I
and Chapter II prohibitions and (currently) Articles 101 and 102 TFEU in the regulated
markets that they supervise.8

In terms of the prospective reform of the UK Competition law regime, Brexit poses
something of a sea change in the role of the CMA, as outlined above. Beyond Brexit, however,
the CMA Chair Lord Andrew Tyrie, also wrote a letter containing his proposals for reforms
to UK competition law in February 2019. The letter was sent in response to a request from
the Department for Business, Energy and Industrial Strategy (BEIS) asking for Lord Tyrie’s
views and it contains a broad spectrum of suggestions. The focus of those suggestions are
measures to deal with two main issues: the growth of the digital economy and the need to
restore consumer confidence in the market. In terms of consumer confidence, Lord Tyrie
suggests that the renewed focus on consumer interests could be derived from an overriding
statutory duty on the CMA and the courts to act in protection of consumer interests. Lord
Tyrie makes a range of proposals to bolster CMA enforcement powers, including increased

8 The Civil Aviation Authority (CAA) for airport operation and air traffic, Office of Communications
(Ofcom) for broadcasting, electronic communications, and postal services, Gas and Electricity Markets
Authority (Ofgem) for electricity and gas in Great Britain, Water Service Regulation Authority (Ofwat)
for water and sewerage services in England and Wales, National Health Services Improvement (NHSI) for
health services in England, the Office for Rail and Road (ORR) for rail services, the Financial Conduct
Authority (FCA) for financial services, the Payment Systems Regulator (PSR) for payment services, and the
Northern Ireland Authority for Utility Regulation (NIAUR) for electricity, gas, water and sewerage services
in Northern Ireland.
scope to use interim measures. Lord Tyrie also suggests an increase to the incentives for whistle-blowers and the extension of director disqualification powers to consumer law breaches as well as competition law breaches. One of the most radical of Lord Tyrie’s ideas is that the Competition Appeal Tribunal (CAT) should be limited to a judicial review-based standard of review of competition law cases, rather than a full merits hearing, in an effort to expedite the competition appeals process. The letter also contains a suggestion that once the CMA takes full competence for merger review in the UK after the transition period expiry date that the UK might move from a voluntary, non-suspensory system to a mandatory, suspensory regime for transactions of a certain size. The letter is ultimately a ‘wish list’ rather than a concrete set of legislative reform proposals, and Lord Tyrie acknowledges throughout that more assessment is necessary, but it does contain several suggestions of substance that BEIS is likely to engage with within the context of its ongoing competition reform mandate.

Separately, but in a similar vein, in July 2019, the government adopted its new ‘strategic steer’ for the CMA. This emphasised the CMA’s role in supporting industrial strategy and improving productivity, as well as preventing harm to consumers – a theme anticipated to influence many of the 2020 discussions around competition reform. Similarly, the manifesto of the current Conservative government, published during the 2019 election campaign, declared that the CMA would be given ‘enhanced powers to tackle consumer rip-offs and bad business practices’, although it did not elaborate further. In any event, it is fair to assume that in the context of both Brexit and the ongoing discussion about reform of the CMA’s role, substantial changes to its enforcement mandate and powers are to be expected.

iii Prioritisation and resource allocation of enforcement authorities

Prioritisation

One of the areas of prioritisation for the CMA in recent years has been increasing the level of its enforcement activity overall. In a February 2016 report, the UK National Audit Office criticised the CMA’s first couple of years for pursuing too few enforcement cases to a decision. It found resources were disproportionately used on market investigations, noting that UK competition authorities imposed only £65 million of competition enforcement fines between 2012 and 2014, compared with almost £1.4 billion imposed by their German counterparts. However, the CMA has increased its enforcement action. Between 2010 and 2015, the CMA (or its predecessor the Office of Fair Trading) opened an average of seven CA98 cases a year, but in 2016–2018 this rose to an average of 10. Factoring in the increased activity at the FCA, the direction of travel in the UK is very much towards increased enforcement. Going into 2020, the CMA had 22 open merger cases, 18 competition enforcement cases, seven consumer enforcement cases, one market investigation and one market study.

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Resource allocation

In terms of resource allocation, the CMA was allocated a budget (before depreciation) of £65.94 million. Under departmental spending rules in the UK, a maximum of £17.75 million of that budget can be spent on administration expenditure. Personnel costs represent approximately three-quarters of the CMA's budget. The CMA was allocated £20 million in the 2019/2020 financial year specifically to prepare for Brexit. The UK budget announcement, expected in March 2020 at time of writing, may also announce some further funding for the Brexit transition period. The CMA has also stated its intention to increase its presence in Scotland, increasing its headcount to around 30, allowing the office to both establish a talent base and prepare for Brexit. The CMA has also recruited additional personnel to handle the increased workload expected post-Brexit. In August 2019, the CMA also relocated its headquarters to new, larger offices in Canary Wharf in London.

Enforcement agenda and outlook

In terms of the CMA's enforcement agenda digital markets remains a top priority. The UK government commissioned an expert report to review and analyse competition in the digital economy. Published in March 2019, the recommendations in the Furman Review on unlocking digital competition, led directly to the establishment of the CMA's Data, Technology, and Analytics (DaTA) Unit in May 2019. The DaTA unit will add to the CMA's technological capacities for the work that it is doing in the digital space. The establishment of the DaTA Unit was also heralded in the CMA's Digital Markets Strategy, published in 2019.

The relationship between competition and regulation is also on the CMA's agenda, following the publication of its report: 'Regulation and Competition: a review of the evidence' in January 2020. The report reviews existing evidence around the impact of regulation on competition, and provides recommendations for policymakers on how to revise regulations in order to protect competition across markets. In line with the CMA recommendations in the report, it seems fair to assume that we can expect to see updated guidance on assessing the impact of regulation from the CMA in the near future. An overarching theme of the recommendations in the report is for regulators to look beyond price effects at other dimensions of competition, such as service quality and innovation, so as to capture dynamic competition concerns. The apparent focus on regulation that supports, rather than stifles innovation, will be a welcome sight for the digital markets that the CMA so often expresses intentions to regulate.

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18 See https://competitionandmarkets.blog.gov.uk/2019/05/28/the-cma-data-unit-were-growing/.
Aside from the CMA, 2019 also saw an uptake in competition enforcement by concurrent agencies that looks set to continue into 2020. One of the most active of these in recent years has been the Financial Conduct Authority (FCA), which issued its first formal decision under its competition law powers in February 2019.\(^{21}\) The FCA was also active with respect to its other powers, including the conduct of markets studies. In 2019 the FCA closed its market studies into investment platforms\(^{22}\) and mortgages,\(^{23}\) publishing its final reports in March 2019. Other concurrent regulators were also active, as detailed in the individual sections below, and in April 2019 the CMA published its fifth annual report on the concurrency arrangements in the UK.\(^{24}\) The report recognises the importance of ensuring the enforcement of competition rules in the regulated markets: ‘[s]ecuring competition benefits in the regulated sectors is particularly critical as not only do these sectors account for an estimated 25% of GDP, but almost every household and business in the UK relies on their services; from basic utilities like heat, light and water to financial services such as banking and insurance.’ Coupled with the apparent increasing willingness of the concurrent regulators to use their competition law enforcement powers, this could signal increasing enforcement activity in the regulated markets going forward.

## II CARTELS

Under the current UK regime, cartels are enforced by both civil and criminal means: corporate civil liability under the Chapter I prohibition contained in the CA98 or the criminal cartel offence for individuals under the EA02, or both. In many cartel cases, both investigations will proceed simultaneously.

### i Significant cases

**Residential estate agencies**

In December 2019, the CMA issued an infringement decision in relation to a price-fixing cartel for residential estate agency services in Berkshire.\(^{25}\) Cartel members were found to have set minimum levels of commission fees for the sale of residential properties. The cartel lasted almost seven years. The CMA issued fines totalling £605,519 to three of the four estate agencies. The fourth estate agency received immunity under the CMA’s leniency programme. This follows on from the 2018 decision on residential estate agency services in Burnham-on-Sea, wherein the CMA imposed fines of £307,084.\(^{26}\)

**Precast concrete drainage products**

In October 2019, the CMA fined three concrete drainage companies £36 million, having found that the three companies had participated in a cartel for the supply of precast concrete drainage products between 2006 and 2013.\(^{27}\) The cartel members were found to have agreed

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\(^{22}\) See www.fca.org.uk/publications/market-studies/ms17-1-investment-platforms-market-study.
\(^{23}\) See www.fca.org.uk/publication/market-studies/ms16-2-3-final-report.pdf.
\(^{25}\) See www.gov.uk/cma-cases/provision-of-residential-estate-agency-services.
\(^{26}\) See www.gov.uk/cma-cases/residential-estate-agency-services-suspected-anti-competitive-arrangement-s.
\(^{27}\) See www.gov.uk/cma-cases/supply-of-precast-concrete-drainage-products-civil-investigation.
to fix and coordinate prices and to share the market by allocating customers, and regularly exchanged competitively sensitive information. In addition, in April 2019 the CMA secured the disqualification of two former directors of one of the companies involved.\(^{28}\) The CMA commenced director disqualification against two further directors in January 2020. At the time of writing, these proceedings are ongoing.

**Design, construction and fit-out services**

In March 2019, the CMA sent a statement of objection to six groups active in the design, construction and fit-out services sector at the same time as they formally admitted to participating in cover bidding in competitive tenders and colluding on the prices they would bid for contracts, which affected 14 contracts between 2006 and 2017.\(^{29}\) In April 2019, the CMA imposed fines of £7 million on five companies, with the sixth benefiting from immunity. In July 2019, the CMA announced that it had secured competition disqualification undertakings from six former directors involved in the cartel. However, in October 2019, the High Court granted two individuals permission to continue to act as directors, subject to strict conditions and only on the particular circumstances of the case.

**Balmoral Tanks**

In 2017 the CAT upheld a decision fining Balmoral Tanks £130,000 for exchanging confidential information on prices and price intentions with competitors manufacturing galvanised steel tanks. The decision concerned a single meeting in July 2012 at which Balmoral was invited to join a long-running price-fixing cartel. Balmoral refused to take part in the cartel, but exchanged confidential information with competitors. The meeting had been covertly recorded by the CMA. The CAT confirmed that sharing information on a single occasion, even when refraining from joining others in price-fixing or market sharing, can constitute a breach of competition law. Balmoral subsequently challenged the CAT’s ruling in the Court of Appeal, but the CAT’s decision was upheld in its entirety in February 2019.\(^{30}\)

**ii Trends, developments and strategies**

As part of its commitment to drive greater enforcement, the CMA has made a concerted effort to raise awareness of competition law. In late 2018, the CMA launched a cartel awareness campaign to educate businesses about illegal practices and to encourage whistle blowing. Alongside this campaign the CMA released ICM research that showed that awareness of the prohibition on cartel-like behaviour amongst the surveyed companies was low.\(^{31}\) This campaign followed on from the CMA’s ‘Cracking Down on Cartels’ campaign, which promised anonymity and rewards of up to £100,000 for individuals reporting cartel activity.\(^{32}\) This campaign was followed by a 30 per cent rise in the number of tip-offs.\(^{33}\) In

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\(^{29}\) See www.gov.uk/cma-cases/design-construction-and-fit-out-services.

\(^{30}\) See www.gov.uk/cma-cases/investigation-into-the-supply-of-galvanised-steel-tanks-for-water-storage.


a May 2019 article in the Financial Times, it was reported that calls to the CMA’s cartels hotline rose 18 per cent in 2018 to 556, up from 471 the previous year.34 This is more than 2.5 times the number reported in 2014 when the CMA began operating.

In February 2020, the CMA launched a new ‘Cheating or Competing’ campaign targeting business cartels with a focus on issues like price-fixing, bid-rigging and market sharing.35 The campaign page features videos, short guides and case studies to explain what illegal cartels are to business operators. In the wake of the precast concrete drainage products and design, construction and fit-out services cases detailed above, the new campaign includes targeted advice for project directors and managers in the construction industry on avoiding collusion.36

There has also been a trend when sanctioning cartel activity for the CMA to look to disqualify directors in addition to the fine imposed on the company itself. The CMA now regularly considers whether such an action is appropriate once an infringement decision is adopted.

iii Outlook

Lord Tyrie’s letter noted that hard-core prosecutions are only a small part of the CMA’s overall enforcement work, meaning that the CMA does not maintain the scale of specialist expertise normally possessed by agencies with powers of prosecution. He suggested, therefore, that primary responsibility for cartel prosecutions might sit more naturally with an agency that routinely brings criminal prosecutions, such as the Serious Fraud Office. It remains to be seen whether that suggestion will gain any traction in the context of CMA reform.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

The prohibition in Chapter I of the CA98 captures a range of restrictive agreements, including cartels (see above) and those agreements (both vertical and horizontal) that do not constitute hard-core cartels but nevertheless damage competition. The most significant (non-cartel) cases from 2019 are outlined below.

i Significant cases

RPM cases

Ping

Although decided in 2018, it is still worth noting the CAT decision relating to retail price maintenance (RPM) in Ping Europe Limited v. Competition and Market Authority, not least because it was the first time that an online sales prohibition was examined by a UK court. The CMA fined Ping £1.45 million for banning two UK retailers from selling its golf clubs online. Ping appealed the CMA’s decision, but the CAT upheld the CMA’s finding that the ban was a restriction of competition ‘by object’ in September 2018 and imposed a revised fine

34 See www.ft.com/content/bd41277c-7d54-11e9-81d2-f785092ab560.
35 See https://cheatingorcompeting.campaign.gov.uk/.
of £1,25 million (having reduced the fine by £200,000). Ping appealed the CAT’s decision to the Court of Appeal. In January 2020 the Court of Appeal dismissed the appeal, again affirming the finding that Ping’s behaviour was a restriction of competition by object. Ping’s challenges to the level of its fine were also dismissed.

Casio

In August 2019, the CMA fined Casio Electronics Co Limited £3.7m in another significant RPM judgment related to online sales bans. The fine was ultimately reduced by 20 per cent because Casio admitted to breaking competition law and engaging in RPM. Casio had used software to make it easier to monitor the prices set by retailers, and had imposed sanctions on retailers who did not adhere to its pricing policy.

Fender Europe

On 22 January 2020, the CMA announced that Fender had been fined £4.5 million, the largest fine imposed in the UK for RPM. The CMA believes that between 2013 and 2018, Fender Europe operated a policy designed to restrict competitive online pricing, requiring guitars to be sold at or above a minimum price. In its statement of objections the CMA commented that '[i]t takes allegations of RPM very seriously because it removes one of the benefits of the internet of making it easier to quickly find a better price by shopping around. It stops online retailers from selling at the prices they want to, and this then leads to higher prices for consumers.' This follows similar cases against Casio, Illinois Tool Works Limited, Ultra Finishing Limited and the National Lighting Company Limited.

Other Chapter I and II CA 98 cases

Price comparison websites

The CMA also issued a statement of objections to ComparetheMarket in November 2018 alleging that the price comparison website had breached Chapter I and Article 101 TFEU. In particular, the CMA considered that the use of most favoured nation clauses by the price comparison site in contracts with home insurers could be stopping the home insurers from quoting lower price to the companies’ rivals and via other channels, causing customers to miss out on better home insurance deals. The case is a follow-on from the CMA's market study into digital comparison tools, concluded in September 2017. At the time of writing, a final decision is expected in Spring 2020.

37 The fine was reduced on grounds that the CMA had erred in treating director involvement as an ‘aggravating factor’.
41 See www.gov.uk/cma-cases/commercial-catering-sector-investigation-into-anti-competitive-practices.
Fludrocortisone acetate and nortriptyline

In October 2019, the CMA published its decision to accept binding commitments offered by pharmaceutical company Aspen to address competition concerns identified by the CMA arising from Aspen’s acquisition in October 2016 of a marketing authorisation for fludrocortisone acetate tablets in the UK. The CMA had suspected Aspen of illegally agreeing to pay two other pharmaceutical firms, Amilco and Tiofarma, to stay out of the UK market for this product. This would have left Aspen free to dictate its prices as the only supplier in the market. As part of the commitments package, Aspen agreed to an admission that it was party to an illegal, anticompetitive agreement and committed to make a payment of £8 million directly to the National Health Service (NHS), the first time a commitment has included an agreement to pay a third party (rather than just alter its behaviour or pay a fine, or both). This payment is to address the concerns that based on the conditions in the market, the NHS paid a higher price for supplies of fludrocortisone acetate tablets than would otherwise have been the case. The acceptance of these commitments ends the Chapter II CA98/Article 102 TFEU investigations. The other aspects of the investigation continue, however. Aspen has also agreed to pay a fine of £2,101,954. This fine will become payable if the CMA does indeed find that the law was broken in its final decision. In January 2020, Tiofarma also admitted its part in the illegal agreement and agreed to pay a fine of £186,000 if the CMA’s formal decision determines the agreement was illegal.

In March 2020, the CMA followed up its Aspen decision with fines of £3.4 million for competition law breaches with respect to the supply of nortriptyline, a drug used to relieve symptoms of depression. The CMA found that King Pharmaceuticals and Accord-UK (formerly Auden Mckenzie) had engaged in market sharing and collusion to fix quantities and prices for the drug. As a result King and Accord-UK were fined £75,573 and £1,882,238 respectively. Once again, the CMA extracted a commitment from the parties to pay £1 million to the NHS. The CMA also fined King, Lexon (UK) Ltd and Alissa Healthcare Research Ltd £1,470,868 for illegally sharing commercially sensitive information about prices, volumes of supply and Alissa’s plans to enter the market. King and Alissa both admitted to competition law breaches in these respects, which resulted in reduced fines. Lexon denied any wrongdoing. The CMA also secured a director disqualification of a director at King. The CMA is still considering whether other director disqualifications are merited.

Advanz

2019 also saw further progress made on the CMA's investigation into suspected Chapter II/Article 102 breaches with respect to the sale of liothyronine tablets. The CMA opened the investigation in 2016. In January 2019, it issued a supplementary statement of objections provisionally finding that Advanz had breached Chapter II and Article 102 TFEU with respect to its practices between January 2009 and July 2017. During this period the price paid by the NHS for liothyronine tablets rose from £15.15 to £258.19, an increase of 1,605 per cent, while production costs remained broadly stable. During that period, Advanz

46 See https://assets.publishing.service.gov.uk/media/5d94c607ed915d5540d5b093/Case_50455_-_Commitments_Decision.pdf.
was the only supplier of liothyronine tablets in the UK. The High Court rejected a judicial review application on procedural grounds from Advanz in July 2019, so a final decision is now expected in the fourth quarter of 2020.

Several other Chapter I and II cases remain ongoing at the start of 2020, including investigations into guitars and musical instruments and equipment,\(^{49}\) the private healthcare sector,\(^{50}\) the UK roofing materials sector,\(^{51}\) the supply of groundworks products to the construction industry, \(^{52}\) the financial services sector\(^{53}\) and in the supply of construction services.\(^{54}\)

**ii Trends, developments and strategies**

2019 saw the continued prominence of RPM enforcement on the CMA agenda with a particular focus, as the case law above demonstrates, on online pricing restrictions. This is very much in line with the CMA's focus in 2018 (in cases such as *Ping*). As such, we can expect that the application of competition law rules to online and digital markets will continue to be a high priority area for the CMA. In terms of sectoral focus, musical instruments and equipment remains a sector of interest for the CMA with four open cases still on the CMA books at the time of writing. 2019 also saw regulators other than the CMA stepping into the fray when it came to enforcement in this area. Ofcom concluded an investigation into operators in the parcel delivery sector in November 2019, finding that both Royal Mail and the Salegroup Limited had entered into an illegal agreement not to supply each other's customers.\(^{55}\) Ofcom has since opened another investigation into the parcel delivery and pick up sector, again with Royal Mail as one of the parties, this time looking at potential agreements establishing minimum prices and imposing online sales restrictions.\(^{56}\) At the time of writing, Ofcom’s investigation into the potential sharing of competitive information, including pricing information, in the electronic communication sector was also still ongoing.\(^{57}\) Other regulators pursuing investigations of alleged breaches of Chapters I and II of the CA98 this year have included Ofwat’s investigation of an alleged abuse of a dominant position by Thames Water\(^{58}\) and Ofgem’s continuing investigation into potential abuse of a dominant

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49 See www.gov.uk/cma-cases?case_type%5B%5D=ca98-and-civil-cartels&case_state%5B%5D=open &market_sector%5B%5D=recreation-and-leisure.
50 See www.gov.uk/cma-cases/privately-funded-healthcare-services.
51 See www.gov.uk/cma-cases/roofing-materials.
52 See www.gov.uk/cma-cases/provision-of-products-and-or-services-to-the-construction-industry-civil-
investigation
54 See www.gov.uk/cma-cases/supply-of-construction-services#case-information.
55 See www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/all-closed-cases/cw_01222.
56 See www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01251.
57 See www.ofcom.org.uk/about-ofcom/latest/bulletins/competition-bulletins/open-cases/cw_01241.
58 See www.ofwat.gov.uk/investigation-into-whether-thames-water-is-contravening-the-competition-
act-1998/.
position in the energy industry.\(^5\) Ofgem also closed both a Chapter I and a Chapter II enforcement case in the summer of 2019, having found competition infringements in both instances.\(^6\)

### iii Outlook

Key areas of interest for 2020 in terms of enforcement are likely to continue to be pharmaceuticals and the digital commerce sector. The CMA’s renewed focus on RPM also looks set to continue, particularly in the area of online sales restrictions, including in the outstanding musical instruments cases. Regulators other than the CMA are also becoming more comfortable with their enforcement powers, a trend that is likely to see increased focus on antitrust enforcement in regulated sectors.

### IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The CMA and concurrent regulators have wide powers to study and investigate markets that they consider may not be working properly, and to make recommendations and impose remedies to improve the operation of competition in those markets. Market studies and investigations are a particular feature of the UK system, with previous investigations being high profile and tending to focus on consumer-facing industries. Until the recent increase in enforcement activity, much of the competition regulators’ efforts were concentrated on these investigations.

#### i Significant cases

**Funeral Directors and crematoria services**

The CMA launched a market study into the funerals market in the UK in June 2018.\(^6\) Following an interim report and consultation on the market, a Phase II market investigation was launched in March 2019. The investigation will cover the supply of services by funeral directors at the point of need and crematoria services provided by both private suppliers and local authorities.\(^6\) According to the CMA’s administrative timetable, a provisional decision report is expected in April/May 2020, with a final statutory deadline of 27 September 2020.\(^6\)

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61 See www.gov.uk/cma-cases/funerals-market-study.

62 See https://assets.publishing.service.gov.uk/media/5ca7196ced915d0ae2104ad6/Funerals_issues_statement_final.pdf.

63 See https://assets.publishing.service.gov.uk/media/5ca7/55175274a0b11854da6/administrative_timetable_funerals_investigation.pdf.
**Statutory audit**

In October 2018, the CMA launched a market study into the statutory audit market.\(^{64}\) The CMA’s final report was published in April 2019, recommending that the auditing functions of each of the ‘Big 4’ accounting firms should be operationally split from their consulting operations.\(^{65}\) The final report also recommended mandatory joint audits, whereby smaller, ‘challenger’ firms would work alongside the Big 4’s auditors, and regulatory oversight of the audit committees that select audit companies. Lord Tyrie wrote to both the BEIS Secretary of State and the chair of the BEIS Select Committee to outline the CMA’s findings. BEIS subsequently launched a consultation on the CMA’s proposals in July 2019.\(^{66}\) The consultation closed in September 2019 and, at the time of writing, responses were still under review by BEIS. Whatever the outcome, however, it seems safe to assume that proposals for regulatory changes to the sector will be forthcoming in 2020.

**Investment consultancy and fiduciary management services**

In June 2017, the FCA published its final report on its asset management market study.\(^{67}\) Following on from that report, the FCA referred the supply and acquisition of investment consultancy services and fiduciary management services to institutional investors and managers to the CMA for a market investigation in September 2017. Having invited comments from, and held hearings with, interested parties the CMA has published eight working papers on the investigation to date. Its final report was published in December 2018.\(^{68}\) The report found that half of the main customers for these service providers, pension scheme trustees, were choosing their existing investment consultant to act as their fiduciary manager. The final report recommended a range of remedies to address this including requiring pension trustees to tender for fiduciary management services in some circumstances and requiring investment consultants to separate the marketing of their investment advice from their fiduciary management services. After a public consultation, the CMA published the Investment Consultancy and Fiduciary Management Order 2019 in June 2019.\(^{69}\) It requires that pension schemes seeking to use investment consultancy services to make decisions on how to invest 20 per cent or more of their scheme’s assets must run a competitive tender. The same threshold applies to trustees that have appointed a single fiduciary manager for 20 per cent or more of their scheme’s assets.\(^{70}\)

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\(^{64}\) See www.gov.uk/cma-cases/statutory-audit-market-study.

\(^{65}\) See www.gov.uk/cma-cases/statutory-audit-market-study.


\(^{68}\) See https://assets.publishing.service.gov.uk/media/5c0feca5740f0b60c8d6019a6/ICMI_Final_Report.pdf.

\(^{69}\) See https://assets.publishing.service.gov.uk/media/5c6df486e5274a0909eef8e/Order_investment_consultants.pdf.

Online platforms and digital marketing

As part of the CMA’s digital market strategy, the CMA launched a market study into online platforms and the digital advertising market in July 2019. The market study is focused on the assessment of three broad potential sources of harm to consumers including: (1) the extent to which online platforms might have market power in user-facing markets and potential impacts of that; (2) consumers’ ability and willingness to control how their data is used and collected by online platforms; and (3) whether competition in the digital advertising market might be distorted by any market power held by online platforms. An interim report was published in December 2019 wherein the CMA found that Google accounted for more than 90 per cent of all search advertising revenues in the UK (with revenues of around £6 billion) and that Facebook accounted for almost half of all display advertising revenues in the UK (around £2 billion). While the interim report acknowledges that ‘big is not necessarily bad’, the CMA agreed with the Furman Report findings that there is ‘strong argument’ for the development of a new regulatory regime. This could include rules governing the behaviour of online platforms and giving people greater control over their personal data. Some of the proposals in the interim report (on which the CMA was still consulting at the time of writing) include limiting Google’s ability to be the default search engine on devices and browsers, requiring Facebook to connect with rival social networking sites, measures to address the perceived lack of transparency in digital advertising, and requiring online platforms to allow users to opt out of sharing their personal data. The final report is expected by July 2020.

Scottish legal services

Following the publication of the Roberton Review, an independent review of the regulation of legal services in Scotland, the CMA announced in June 2019 that it would be undertaking research into certain aspects of the Scottish legal services market to support the Scottish government’s response to the Roberton Review. The work will examine whether there is evidence of a similar lack of competition in legal services in Scotland as was found in the CMA’s 2016 market study into the legal services market in England and Wales.

Super-complaint on the loyalty penalty

Although not technically a market investigation or market study, 2019 also saw the conclusion of the CMA’s review of loyalty penalties imposed by service providers in ‘essential markets’ (savings accounts, mortgages, household insurance, mobile and broadband). The super-complaint was received from Citizens Advice raising concerns that long-term customers were paying more for essential services (and so incurring a ‘loyalty penalty’). Super complaints are a mechanism under the EA02 that allows consumer bodies to make complaints to the CMA. Once it receives a super-complaint, the CMA has 90 days to make a public statement explaining how it proposes to deal with it.

72 See https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf.
73 See https://www2.gov.scot/About/Review/Regulation-Legal-Services.
75 See https://assets.publishing.service.gov.uk/media/5887374d40f0b6593700001a/legal-services-market-study-final-report.pdf.
In the loyalty penalty super-complaint the CMA published its public response in December 2018. It found that the loyalty penalty paid by consumers could be in the region of £4 billion annually. The CMA also identified that the most vulnerable in society, such as those on low incomes, people who struggle to use online services, or people with poor mental health who may avoid or fear change, could be amongst the most affected. The CMA also established a loyalty penalty working group in March 2019 to oversee the implementation of the reforms identified as necessary in their response. In response BEIS also published a letter commending the CMA recommendations. In a six-month progress update published in June 2019, the CMA explained that the super complaint had led directly to the CMA investigations into antivirus software (launched in December 2018) and in online console video games (launched in April 2019). Ofcom also launched a consultation on the treatment of easier switching for broadband and mobile customers, which, at the time of writing, is ongoing. The super complaint also prompted cooperation between the CMA and the FCA on its work on cash savings, home and motor insurance, and mortgages.

The CMA published an update in January 2020 setting out the progress that had been made in taking forward potential reforms in the sector. To that end, the update notes that Ofcom has introduced new rules on end of contract notifications and annual best tariff notifications for customers. It has also secured voluntary commitments from all of the major mobile providers (with the exception of Three) and from the UK’s largest broadband providers to better protect out-of-contract customers. A further update from Ofcom is expected in the Spring of 2020. The update also details the FCA’s efforts, including the ongoing consultation on potential remedies in the insurance, cash savings and mortgages arena. In terms of next steps, the update emphasises, however, that there is further work to be done and calls on regulators to focus on putting in place sufficiently strong remedies to address the problems that have been identified in their various investigations. The CMA is expected to publish a further update in July 2020.

ii Trends, developments and strategies

The draft 2020–2021 annual plan mentions that given the CMA’s current caseload, which is at a ‘record level’ and the prospect of the CMA’s expanded duties once the Brexit transition period expires, the CMA may well have ‘limited opportunities to launch many new discretionary projects over the coming year’. While market investigations therefore remain an important part of the CMA’s suite of powers, the extent to which the CMA has the time and resources to carry out investigations may well hinge on the outcome of the UK’s negotiations with the EU.

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78 See https://assets.publishing.service.gov.uk/media/5d08f9daed915d42ea95ddd4/Progress_update_June2019_31916_.pdf.
79 See https://assets.publishing.service.gov.uk/media/5c2sd4b540f62c54d7f7c1/Loyalty_penalty_update_20_Jan.pdf.
iii Outlook

The interim report findings in the online platforms and digital advertising survey indicate that the CMA’s focus on the digital market will remain strong through 2020, with new regulatory regimes already being consulted on at the time of writing.

V STATE AID

While at the time of writing, the CMA has no state aid review mandate, as outlined above, this is expected to change considerably after the expiry of the Brexit transition period. In terms of significant state aid cases this year, at the European level the UK was impacted considerably by the quashing of the European Commission’s state aid approval for the capacity mechanism for the electricity market in Great Britain, by both the General Court and the Court of Justice of the European Union. Following, the annulment of the UK’s state aid approval for the operation of the capacity market regime, the UK was forced to suspend payments to capacity providers in the UK. Total payments at the time were estimated to be around £1 billion. The Commission subsequently opened a formal investigation into the scheme and issued a new approval in October 2019.81 The delayed payments to capacity providers were settled in full on 20 January 2020.

VI MERGER REVIEW

The CMA carries out both Phase I and, if warranted, in-depth Phase II merger investigations in the UK. Save for a limited category of investigations (in which the government makes the final decision), decisions at Phase II are made by a panel independent from the case so as to avoid any ‘confirmation bias’. The UK regime is also unusual in that merger notifications are voluntary, but the CMA has the ability to investigate non-notified transactions (and, if found necessary, impose remedies in completed mergers), and it has an active Merger Intelligence Unit that monitors merger and acquisition activity for transactions that may raise competition concerns. At the beginning of 2020, the CMA had seven ongoing Phase II cases.

i Significant cases

Decisions

Sainsbury/Asda

In April 2019, the CMA blocked the proposed high profile merger between two of the UK’s largest supermarkets, Sainsbury’s and Asda, after an in-depth Phase II investigation.82 The CMA determined that the proposed merger would lead to a substantial lessening of competition across the UK and would result in increased prices and reduced quality of service for customers, such as fewer delivery options, when shopping online. The case had interesting procedural impacts for the CMA, as in January 2019 the CAT held that the CMA had treated the parties unfairly by not allowing them more time to respond to the nineteen working papers and annotated issues statement that the CMA sent between 9 November 2018 and 28 November 2018. The CMA had given the parties very limited extensions to submit

responses to the CMA's working papers. The CAT held that the deadlines given were insufficient and that the CMA should have given the parties more time. Interestingly, the CAT explicitly recognised that this problem could become more common once the CMA takes full competence over merger control in the UK (i.e., following the expiry of the Brexit transition period).

**Tobii AB/Smartbox**

In February 2019, the CMA for the first time ordered parties to a completed merger to reverse pre-closing integration. The CMA believed that this particular integration prejudiced its ability to assess the deal’s impact on competition in the UK. While the merger control regime in the UK remains voluntary, it does not prohibit the CMA taking this type of action or requiring pre-closing clearance. This is, however, the first time the CMA has issued an unwinding order during an ongoing merger investigation (the CMA referred the deal to an in-depth Phase II investigation in January 2019), and highlights that parties who integrate prior to closing run a very real risk of being subject to an unwinding order in complex merger reviews.

Tobii appealed the CMA's decision to the CAT, whose judgment was published on 10 January 2020. The CAT unanimously dismissed Tobii's grounds for challenging the CMA's decision, save for one aspect: Tobii succeeded in demonstrating that the CMA's finding that the merged company would have the ability and incentive to foreclose its rivals by increasing the wholesale price of particular relevant software, and thus harm competition, was not supported by sufficient evidence (but upheld the CMA's findings on horizontal unilateral effects). The CAT dismissed the parts of the CMA's decision that discussed this foreclosure ability and incentive. The CAT has now invited the parties to make additional submissions, addressing how its ruling impacts the merger between Tobii and Smartbox. Responses from the parties are expected a few weeks from the date of the judgment.

**Ecolab/Holchem**

In October 2019, the CMA issued its final report on Ecolab Inc's acquisition of the Holchem Group Limited. Ecolab is a US-based global supplier in water, hygiene and energy technologies, and Holchem is a UK-based manufacturer and supplier of cleaning chemicals and ancillary services primarily to industrial customers active in the food and beverage industry. The CMA concluded that the merger would result in a substantial lessening of competition due to concerns in the market for the supply of formulated cleaning chemicals to food and beverage customers in the UK. Following a Phase II investigation, the CMA found that the only possible and effective remedy would be to block the merger and to require Ecolab to sell Holchem. Ecolab has applied for a review of the CMA's decision. It states that the CMA's finding of a substantial lessening of competition is not supported by evidence.

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83 See https://assets.publishing.service.gov.uk/media/5c3353840fbb64032f1ef18/tobii_smartbox_unwinding_order.pdf.


Amazon/Deliveroo

In December 2019, the CMA referred the Amazon/Deliveroo merger to a Phase II investigation.86 Earlier in December, the CMA had found that the merger could result in a substantial lessening of competition within markets in the UK. In its Phase I investigation, the CMA had held that the deal could lead to higher prices and a worse service for customers ordering restaurant meals and convenience groceries for ‘ultra-fast’ home delivery. The CMA thus launched a Phase II investigation based on two key concerns. First, based on internal documents and interviews with senior personnel, the CMA had discovered that Amazon might have had intentions to re-enter the UK market for restaurant meal deliveries (even though it had only recently exited the UK market), if it had not invested in Deliveroo. Instead, without Amazon, the UK has just three major players in food delivery: Deliveroo, Just Eat and Uber Eats. Second, the CMA found that in the market for grocery delivery, Amazon and Deliveroo are rivals with ‘major expansion plans’ and that a merger could reduce competition. Neither company was able to offer remedies for the CMA’s concerns. The decision to investigate marks the CMA’s increased wariness over the reach of large-scale technology companies, and is perhaps not hugely surprising based on a general move towards tighter regulation in the online market generally. The CMA’s final report is expected in late May 2020.87

Interventions

The UK government, acting through the relevant Secretary of State, may review a transaction involving the acquisition of a UK business if a relevant merger situation is created.88 The Secretary of State can intervene in these transactions on specified public interest grounds, which are set out in Section 58 of the EA02. These include national security (e.g., defence sectors),89 cases relating to accurate news and free expression (e.g., newspapers),90 media plurality, media standards and broadcasting,91 and prudential regulation.92 If the relevant Secretary of State considers that one or more of these public interest grounds are met, and has ‘reasonable grounds’ to suspect that the transaction in question results in a relevant merger situation (or is informed as such by a competition regulator), then he or she can issue a PIN (public interest intervention notice).93 It should be noted that the Secretary of State also has the power to intervene in transactions on the basis of a consideration that is not specified, but that, in his or her opinion, ought to be.94 In these cases, the Secretary of State must present

87 See www.gov.uk/cma-cases/amazon-deliveroo-merger-inquiry#administrative-timetable.
88 The Secretary of State for Business, Energy and Industrial Strategy has the power to intervene in all public interest cases, except media mergers, in which the Secretary of State for Digital, Culture, Media and Sport can intervene.
89 Section 58(1)–(2) of the Act.
90 Section 58(2A) of the Act. Media plurality is defined as ‘the need for, to the extent that is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom or a part of the United Kingdom’. Sections 58(2B) and 58(2C)(a) of the Act.
91 Sections 58(2C)(b)–(c) of the Act.
92 This public interest ground reflects the need to maintain the stability of the UK financial system. To date, this public interest grounds has only been used once in relation to the merger between Lloyds TSB plc and HBOS in 2008. Section 58(2D) of the Act.
93 Under Section 42 of the EA02.
94 ibid.
an order for approval before both Houses of Parliament where such approvals must be given within 28 days.\footnote{Sections 42(7), 42(8)(b) and 124(7) EA02.} As such, the public interest grounds under which the UK government can intervene in a transaction that creates a relevant merger situation are relatively fluid and flexible, allowing the government to continually revise and alter its approach to these forms of investment in the UK.

**Daily Mail/i newspaper**

On 22 January 2020, the Secretary of State for Digital, Culture, Media and Sport issued a PIIN in relation to the completed acquisition by Daily Mail and General Trust (DMGT) of JPI Media Publications, owner of i newspaper, on media plurality grounds over concerns that the takeover will impact the ‘sufficient plurality of viewpoints’ in newspapers in the UK. At the time of writing, the CMA and Ofcom are both reviewing the transaction and have invited comments from third parties – the CMA is assessing whether a relevant merger situation has been created and Ofcom is assessing media public interest concerns. Both are to report back to the Secretary of State by 13 March 2020.

**Connect Bidco/Inmarsat**

In July 2019, BEIS intervened in a transaction between Connect Bidco Limited and Inmarsat plc on grounds of national security. Inmarsat operates satellites that manage critical government communications for the UK (and other countries), particularly in emergency services, naval operations, and border control. The CMA concluded that the transaction did not raise any competition issues. However, so far as national security was concerned, the parties offered undertakings to provide assurances that sensitive information will be protected and enhanced security controls will be in place to ensure the continued supply of key services used by the UK Ministry of Defence. The measures also included a high standard of physical security in relation to company processes and premises, system security in relation to IT processes, and personnel security in relation to employees and management. The Ministry of Defence will also be allowed to audit compliance with security measures. In October 2019, BEIS accepted the parties’ undertakings as appropriate to mitigate the national security risks.

**Advent International/Cobham**

In September 2019, BEIS issued another intervention notice on national security grounds in connection with Advent International Corporation’s proposed acquisition of Cobham Plc. Cobham is known for pioneering the technology that allows for the mid-air refuelling of planes, and also for manufacturing electronic warfare and communication systems for military vehicles. The CMA prepared a report on the transaction for BEIS, considering in particular the national security implications of the transaction. However, in December 2019, BEIS announced that the statutory undertakings from the parties were acceptable and that the acquisition would not be referred to the CMA for further assessment. Undertakings included strengthening existing security arrangements protecting sensitive operations and information and ensuring any new board structures will comply with national security requirements. Although Cobham is active in defence-related areas, the fact that BEIS reviewed a case concerning a US acquirer makes clear that even foreign direct investment transactions from the UK’s allies will be subject to public interest scrutiny.
**Gardner Aerospace/Impcross**

In December 2019, the Secretary of State issued an intervention notice on the grounds of national security in the merger between Gardner Aerospace Holdings Ltd and Impcross Ltd. Gardner Aerospace manufactures aerospace finished components, including machine and metal parts, and Impcross assembles parts for Civil and Defence aircrafts. In addition, an order was made by the Secretary of State pursuant to Paragraph 2(2) of Schedule 7 to the EA02 to prevent any actions that might raise national security concerns. For instance, the order prevents the completion of the transaction and the transfer of material or information between the parties while the CMA’s review is ongoing. The order was presented to the UK Parliament in December 2019, with government setting out the conditions of the Order in detail.96 Beyond what is needed to protection national security, the Secretary of State has confirmed that the order will not impede the companies when acting in the normal course of business.97

**ii Trends, developments and strategies**

Following changes implemented in June 2018 the government can now intervene in mergers in three key sectors if the annual UK turnover of the target is over £1 million (the threshold in all other sectors is £70 million) or if the target alone accounts for 25 per cent or more of purchases or sales of any goods or services in the UK (in all other sectors the parties have to overlap such that there is an increment leading to a combined share of supply of 25 per cent or more).98 These are: (1) the development or production of military or dual-use goods; (2) the design and maintenance of computing hardware; and (3) the development or production of quantum technology.

The government’s long-term objective is to reform more comprehensively its powers of scrutiny over investments that may pose a risk to national security.99 The intention is to implement this regime with a new piece of primary legislation. Under the proposed changes, notification will remain voluntary but parties will be encouraged to notify their transaction. Where parties choose not to notify, the government may still decide to ‘call in’ transactions that result in a ‘trigger event’. It is proposed that these trigger events will include the acquisition of more than 25 per cent of an entity’s shares or votes, significant influence or control over an entity, or further acquisitions of significant influence or control over an entity beyond these thresholds. Acquisitions of assets will also be covered, which is not always the case under the existing rules. The timescale for post-closing intervention in national security cases will be increased from four to six months after the details of the transaction are in the public domain.

The government has indicated that it will consider three factors when determining whether a trigger event could lead to a national security risk. These are ‘target risk’, whereby the entity or asset in question could be used to undermine national security; ‘trigger event risk’ whereby the acquisition itself gives someone the means to undermine national security; and ‘acquirer risk’, where the acquirer itself has the potential to use its control over the target to...

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undermine national security. While there is arguably now a tougher approach to transactions raising national security concerns as these deals are subject to more scrutiny, it is anticipated that the majority of these will be approved with some undertakings. As demonstrated by the case law above, to date there have been no prohibitions.

The government was originally expected to publish draft legislation in 2019, following its assessment of comments received as part of the current consultation process. However, like the delayed responses to the CMA’s proposed reforms, due to other government business (principally related to Brexit) no draft has yet been published and legislation is not expected until later this year at the earliest. Nevertheless, national security does still remain an ongoing interest and concern generally. In the Queen’s Speech in December 2019, reference was made to the government’s intention to introduce ‘national security and investment legislation’ to strengthen the government’s existing powers to scrutinise and intervene in business transactions (takeovers and mergers). In any event, the continued use of intervention notices in cases with perceived public interest implications is a very clear trend that is set to continue. Indeed, in December 2019, the Secretary of State also issued an intervention notice on the grounds of national security in relation to the anticipated acquisition of Mettis Aerospace Limited, a manufacturer of aircraft parts and components, by Aerostar, a Chinese fund. The CMA produced a report, submitted to the Secretary of State in February 2020. The report detailed merely that in the CMA’s view that no relevant merger situation had been created because the parties had since decided not to proceed with the transaction. Neither party has commented publicly on the reasons for abandoning the merger, but doubtless the intervention notice played at least some role in that decision. In any event, merging parties active in the affected spheres will need to be very aware of the prospect of Secretary of State intervention going forward.

### Outlook

The CMA is certainly engaging with the full breadth of its powers when it comes to exercising its jurisdiction in merger control cases, and that is a trend that is likely to continue. In its draft annual plan for 2020–2021, the CMA notes that it enters 2020–2021 with a high volume of ongoing casework, and an ‘unprecedented number of Phase II merger investigations’. Once the Brexit transition period expires, the CMA expects a significant increase in the number of merger investigations carried out after the expiry of the transition period given its expected, widened jurisdiction. The CMA is clearly not shirking that extended jurisdiction, evident from its decision in January 2020 to open an investigation into the proposed Takeaway.com/Just Eat merger, notwithstanding the fact that Takeaway.com exited the UK market in August 2016. While the precise reasons for seeking to investigate the proposed merger so late are unknown, the CMA stated that new information had come to light. The review will

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be focused on whether Takeaway.com would (absent the Just Eat transaction) have re-entered the UK market. While not yet known, it is possible the new information in the CMA’s possession came to light as part of its review of Amazon/Deliveroo which raises a similar concern so far as the CMA is concerned at this stage in the review.

In addition, the government anticipates that between five and 29 additional cases per year will be caught by the national security amendments introduced in June 2018 (see above). If the long-term changes are implemented as currently proposed this will materially increase the number of cases expected to be reviewed on national security grounds: BEIS has estimated 100 cases will be subject to detailed review of which around half are likely to be subject to some form of remedy. As has been demonstrated by the cases to date, no transaction has been blocked, but rather accepted provided certain undertakings are followed.\textsuperscript{105} In terms of potential reform, in June 2019 the CMA announced that it intends to revise and update the substantive Merger Assessment Guidelines to reflect the significant development of the digital markets since 2010 when the Guidelines were published.\textsuperscript{106} It is anticipated that in 2020, the CMA will be consulting on these proposed revisions.

\section*{VII \ CONCLUSIONS}

Although 2019 saw preparations for the UK’s departure from the EU (which formally occurred on 31 January 2020), at the time of writing there is still a considerable lack of clarity surrounding the situation post-transition period. Whether or not the government can agree a deal with the EU remains subject to negotiation. The CMA guidance has clarified the operation and function of competition law enforcement during the transition period and shortly thereafter, but ultimately the provisions of the FTA will govern competition law after the expiry date. Regardless of the outcome of the negotiations, it seems clear that the CMA’s jurisdiction and workload, particularly in merger control, competition enforcement, and state aid will only increase once the UK ceases trading as a member of the single market.


I OVERVIEW

In 2019, the Antitrust Division of the US Department of Justice (DOJ) and Federal Trade Commission (FTC) confirmed investigations of large technology platforms. The FTC is said to be leading investigations into Amazon and Facebook, and the DOJ is focusing on Google and Apple. State attorneys general are also conducting separate investigations into Google and Facebook. These investigations are pending and no enforcement actions have been announced, but leadership at each federal agency have said they are aiming to conclude the investigations sometime in the coming year.

While these investigations proceed, the agencies have continued to pursue a vigorous enforcement agenda. The DOJ announced several criminal cartel enforcement actions, including in the generic pharmaceuticals industry. The FTC also continued its civil enforcement activities against pharmaceutical companies for engaging in practices that allegedly delay the availability of generic drugs. Meanwhile, both the FTC and DOJ were active in investigating mergers. There were a number of matters settled with divestitures or conduct remedies, several deals that were abandoned in the face of regulatory challenges and several cases litigated before the courts and at the FTC. We discuss these matters in greater detail below.

There have been several notable recent policy developments. In July 2019, the Antitrust Division announced a new policy to incentivise corporate compliance: it revised the DOJ’s Justice Manual to permit the Antitrust Division to consider compliance at the charging stage in criminal antitrust investigations.2 Previously, the Justice Manual explained that the Antitrust Division’s policy was not to give credit ‘at the charging stage for a compliance program’, but that text has been deleted.3 Instead, corporate antitrust compliance programmes will now factor into prosecutors’ charging and sentencing decisions and may allow companies to qualify for deferred prosecution agreements or otherwise mitigate exposure, even when companies are not the first to self-report criminal conduct.4
In another announcement that gained considerable attention, on 10 January 2020, the DOJ and FTC issued draft vertical merger guidelines for public comment. The guidelines describe potential anticompetitive harms that may arise with vertical mergers – such as raising rivals’ costs, foreclosing rivals from access to an input, and providing a vertically-integrated firm with access to its rivals’ competitively sensitive business information – while recognising that they also ‘have the potential to create cognizable efficiencies that benefit competition and consumers’.

The DOJ has continued to file statements of interest and amicus briefs in cases in which it is not a party. For example, in March 2019, the DOJ filed a statement of interest in several cases in federal district court in Washington state setting forth its position on ‘the legal standards governing whether a plaintiff has stated a claim that a no-poach agreement in a commercial-franchise relationship violates federal antitrust law’. The DOJ also filed an amicus curiae brief in the Court of Appeals for the Ninth Circuit in the Federal Trade Commission’s case against Qualcomm Incorporated. In that case, the district court found for the FTC, and Qualcomm appealed. The DOJ’s brief sides with Qualcomm.

The agencies’ international activities also continued. In the spring, the International Competition Network (a group of national and multinational competition authorities) adopted a Framework on Competition Agency Procedures, and 62 agencies have signed on. According to the DOJ, ‘[t]his historic multilateral agreement recognizes fundamental principles of transparency and procedural fairness in antitrust enforcement and promotes review mechanisms to ensure that participating agencies abide by these norms’. The DOJ further wrote that:

> the framework identifies universal due process principles that are widely accepted across the globe, including commitments regarding non-discrimination; transparency and predictability; proper notice, access to information, meaningful and timely engagement, and opportunity to defend; timely resolution of proceedings; confidentiality protections; avoidance of conflicts of interest; access to counsel and privilege; written enforcement decisions and public access to decisions; and availability of independent review of enforcement decisions.

In September 2019, in a speech on the topic of international comity in antitrust enforcement, Assistant Attorney General for the Antitrust Division Makan Delrahim announced that he has ‘directed the Division to undertake a review of’ the January 2017 DOJ-FTC Antitrust

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7 Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, FTC v Qualcomm Incorporated, Case No. 19-16122 (9th Cir 30 August 2019).
10 Id.
Guidelines for International Enforcement and Cooperation.\textsuperscript{11} He said that the Guidelines ‘make clear our ongoing commitment to applying principles of comity to our own decision making’, but that ‘[w]e need to ensure . . . that comity is a two-way street. We cannot agree to subject American companies to unfair treatment under foreign laws in the name of comity and avoidance of conflict’.\textsuperscript{12} He went on to say: ‘Any application of comity has to take into account the particular enforcer, including any history of discrimination in favor of its own domestic companies or against foreign companies. We will not defer our own investigation unless we are certain that our foreign counterparts will conduct a full and fair investigation of their own’.\textsuperscript{13} Mr Delrahim also said: ‘we hope to further strengthen our invaluable relationships with our international colleagues, as we all pursue the common goal of protecting competition’.\textsuperscript{14}

\section{II CARTELS}

\subsection{Significant cases}

\textit{E-commerce}

The DOJ carried forward its prosecution of price-fixing conduct in e-commerce, particularly the customised promotional products industry. In January 2019, a federal grand jury in Houston indicted Taiwan-based G Nova corporation and its CEO for participating in a conspiracy to fix prices of insulated beverage containers, and the DOJ announced that it had filed criminal charges against Netbrands Media Corporation and two executives for their roles in a separate conspiracy to fix prices of wristbands, lanyards, temporary tattoos, and buttons sold in the United States.\textsuperscript{15} Netbrands and the executives all agreed to plead guilty or entered guilty pleas.\textsuperscript{16}

In April 2019, the owner and president of Gennex Media became the fifth individual to plead guilty in the DOJ’s ongoing promotional products investigation.\textsuperscript{17} According to the felony charges, the co-conspirators used social media platforms and encrypted messaging applications to reach and implement their agreement to fix the prices of customised promotional products sold online from as early as May 2014 until at least June 2016.\textsuperscript{18} In June 2019, Gennex was sentenced to pay a US$752,717 criminal fine, and its president was sentenced to eight months in custody, a US$20,000 criminal fine, and three years of

\begin{flushleft}
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{16} Id.
\textsuperscript{18} Id.
\end{flushleft}
supervised release.\textsuperscript{19} According to the DOJ, to date, ‘11 defendants have been charged in the investigation into the online customized promotional products industry. Of those defendants, five individuals and four companies have pleaded guilty’.\textsuperscript{20}

**Generic drugs**

As part of its ongoing investigation into anticompetitive conduct in the generic pharmaceutical industry, the DOJ charged Heritage Pharmaceuticals Inc in May 2019 with ‘conspiring with its competitors to fix prices, rig bids, and allocate customers’ for glyburide, a medicine used to treat diabetes.\textsuperscript{21} The one-count felony charge was filed in the US District Court for the Eastern District of Pennsylvania.\textsuperscript{22} The Antitrust Division entered into a deferred prosecution agreement with the company.\textsuperscript{23} Under the terms of the agreement, Heritage admitted that ‘it conspired to fix prices, rig bids, and allocate customers for glyburide’, and agreed to pay a US$225,000 criminal penalty and to cooperate with the ongoing criminal investigation.\textsuperscript{24} In return, the DOJ agreed to defer prosecuting Heritage for three years to ‘allow the company to comply with the agreement’s terms’.\textsuperscript{25} The agreement is subject to the court’s approval.\textsuperscript{26} According to the Antitrust Division, the deferred prosecution agreement was based on the individual facts and circumstances of the case, including ‘the company’s substantial and ongoing cooperation with the investigation’ such as ‘its disclosure of information regarding criminal antitrust violations involving drugs other than those identified in the criminal charge and the agreement’.\textsuperscript{27} In a separate civil resolution, Heritage ‘agreed to pay [US]$7.1 million to resolve allegations under the False Claims Act related to the price-fixing conspiracy’, including that ‘between 2012 and 2015, Heritage paid and received remuneration through arrangements on price, supply, and allocation of customers with other pharmaceutical manufacturers for certain generic drugs’.\textsuperscript{28}

In December 2019, the DOJ also charged Rising Pharmaceuticals Inc, a generic pharmaceutical company, for conspiring with a competitor for generic drugs and its executives to fix prices and allocate customers for Benazepril HCTZ, a treatment for hypertension.\textsuperscript{29} The Antitrust Division also entered into a deferred prosecution agreement with Rising, which admitted to price fixing and customer allocation, agreed that US$1,543,207 was ‘the appropriate amount of restitution’ owed ‘to victims of the charged conduct’ and ‘agreed to

\textsuperscript{20} Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id.
\textsuperscript{28} Id.
cooperate fully with the Antitrust Division’s ongoing criminal investigation’. 30 According to the DOJ, ‘[t]he agreement also requires Rising to pay a [US]$1.5 million penalty, reduced from . . . [US]$3.6 million under the US Sentencing Guidelines due to Rising’s financial condition and liquidation’. 31 In a separate civil resolution, Rising agreed to pay US$1.1 million in civil damages for its anticompetitive conduct, which reduced the criminal restitution to US$438,066. 32 The deferred prosecution agreement requires approval by the bankruptcy court before it is filed in district court. 33 The United States agreed to ‘defer prosecuting Rising for three years, or until its ongoing bankruptcy proceedings become final, whichever comes first’ . 34

Ocean shipping

The DOJ carried forward its investigation into the international roll-on, roll-off ocean shipping industry, which ships wheeled cargo, such as cars, that can be driven on and off a ship. In June 2019, a federal grand jury indictment from February 2018 was unsealed. The indictment charges two shipping executives at Höegh Autoliners AS with ‘participating in a long-running conspiracy to allocate certain customers and routes, rig bids, and fix prices for the sale of international ocean shipments of roll-on, roll-off cargo to and from the United States’. 35 The indictment alleges that at least between 2006 and 2012, the two executives ‘conspired with their competitors to allocate certain customers and routes for the shipment of cars and trucks’. 36 They also ‘agreed with competitors to fix, stabilize, and maintain rates charged to customers of international ocean shipping services’. 37 Including the unsealed charges, the DOJ stated that ‘13 executives ha[d] been charged in the investigation to date[:] [f]our have pleaded guilty and been sentenced to serve prison terms[,] [w]hile [o]thers remain international fugitives’. 38 Höegh itself has pleaded guilty and has been sentenced to pay a US$21 million fine. 39 Four other ‘companies have also pleaded guilty for their [involvement], resulting in total collective criminal fines of over US$255 million’.

Heir-location services firms

In July 2019, a Salt Lake City-based heir-location services provider pleaded guilty to allocating customers with another heir-location services firm, following an indictment filed in August 2016 in the US District Court for the District of Utah. 40 A central issue in the case was whether the per se rule or the rule of reason would apply in assessing the alleged

30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
36 Id.
37 Id.
38 Id.
39 Id.
anticompetitive conduct. Under the per se rule, certain types of restraints of trade are presumed categorically illegal. The Antitrust Division’s policy is, in general, to criminally investigate and prosecute cases involving only per se illegal conduct rather than conduct falling under the rule of reason, which requires more extensive analysis. In June 2017, the court ruled that the customer allocation alleged in the indictment would be tried under the rule of reason standard. After the Antitrust Division appealed, the Tenth Circuit held that it did not have jurisdiction to address the lower court’s order regarding the application of the rule of reason, but urged the district court to re-examine the issue. Upon the United States’ Motion to Reconsider, the district court found that the per se rule applied to the customer allocation agreement alleged in the indictment. Since it is DOJ policy to bring criminal antitrust cases only when the alleged conduct is per se illegal, had the court not reversed itself, it is unlikely that the DOJ would have continued to pursue a criminal conviction. The company and its president were sentenced on 23 January 2020 to fines of $1.5 million and $77,596.

Suspension assemblies in hard disk drives
In July 2019, NHK Spring Co Ltd, a Japanese manufacturer of suspension assemblies used in computer hard disk drives, agreed to plead guilty for its role in a global conspiracy to fix prices. Specifically, the felony charge alleged that NHK Spring agreed with co-conspirators to refrain from price competition, to allocate their respective market shares for the suspension assemblies and to exchange pricing information. Subject to court approval, NHK Spring agreed to pay a US$28.5 million criminal fine and to cooperate in the ongoing investigation. According to the DOJ, the investigation is ongoing.

Freight forwarding services
As part of its ongoing investigation into the international freight forwarding industry, the DOJ filed its first felony charge against a Louisiana-based freight forwarder in September 2019 in the US District Court for the Southern District of Florida. According to the DOJ,
‘Freight forwarders arrange for and manage the shipment of goods’. 53 According to court documents, the freight forwarder and its co-conspirators met to discuss and agree to fix prices ‘from September 2010 until at least March 2015’. 54 The freight forwarder agreed to plead guilty and to pay a $488,250 criminal fine, subject to court approval. 55 Two of the freight forwarder’s executives were sentenced in June 2019 to 18-month and 15-month terms of imprisonment for their involvement. 56 In October 2019, the DOJ filed its third individual felony charge against the owner of a different freight forwarding company based in Houston, for her role in the ‘nationwide conspiracy to fix prices for international freight forwarding services’. 57

Foreign exchange markets

The DOJ carried forward its long-running investigation into alleged collusion with respect to foreign currency exchange (FX). In November 2019, after a three-week trial, a jury convicted the former executive director at a major multinational bank of ‘conspiring to fix prices and rig bids in Central and Eastern European, Middle Eastern and African (CEEMEA) currencies, which were generally traded against the US dollar and the euro from at least October 2010 through at least January 2013’. 58

Packaged seafood

As part of the DOJ’s ongoing investigation into the market for packaged seafood, the former president and CEO of a packaged seafood company was convicted in December 2019 for his participation in fixing the prices of canned tuna, following a four-week trial in the US District for the Northern District of California. 59 The company itself pleaded guilty and was sentenced to pay a criminal fine of at least US$25 million. 60 In September 2019, another packaged seafood company was sentenced to pay a US$100 million criminal fine for its role in the conspiracy. 61 So far, ‘four individuals . . . have been charged in the investigation’, and ‘[t]he other three individuals pled guilty and testified [at the defendant’s] trial’. 62

Defence fuel supply contracts

In March 2019, two South Korean-based companies – Hyundai Oilbank Co Ltd and S-Oil Corporation – pleaded guilty to criminal charges, and agreed collectively to pay US$75 million in criminal fines, for their involvement in ‘a bid-rigging conspiracy that targeted contracts to supply fuel to the United States Army, Navy, Marine Corps, and Air Force bases in South

53 Id.
54 Id.
55 Id.
56 Id.
60 Id.
61 Id.
62 Id.
Korea’. The superseding indictment charges the two South Korean-based companies and seven individual defendants – ‘associates, managers, and executives of [the] companies’ – with efforts ‘to suppress and eliminate competition during the bidding process for . . . fuel supply contracts’ with the US Defense Department to supply fuel to US military bases throughout South Korea. The DOJ noted that the companies’ guilty pleas were the fourth and fifth resulting from ‘ongoing federal investigation into bid rigging, price fixing, and other anticompetitive conduct targeting US Defense Department fuel supply contracts in South Korea’. The Antitrust Division also filed a civil antitrust complaint against the same two companies, and at the same time filed proposed settlements amounting to a total of US$52 million. The litigation resulted from a whistle-blower action.

**Commercial flooring contractors**

In April 2019, the DOJ announced its first charge in its ‘ongoing investigation into bid rigging and price fixing by commercial flooring contractors’. According to the one-count felony charge, the former vice president of an unnamed Chicago-based contractor agreed with others to submit ‘complementary’ bids so that a designated company would win the bidding. The contractor allegedly engaged in this anticompetitive behaviour from ‘at least as early as 2009 until as late as June 22, 2017’. In August 2019, the DOJ announced its first charge brought against a corporation as part of its investigations into the conspiracy. The company agreed to pay a US$150,000 criminal fine and to cooperate in the Antitrust Division’s ongoing investigation.

**Insulation installation contracts**

The DOJ achieved its first convictions in its ongoing investigation into bid rigging by insulation installation contractors in 2019. According to court documents, the contractors conspired to rig bids on insulation installation contracts in Connecticut, New York and
Massachusetts.\textsuperscript{74} Assistant Attorney General Delrahim stated that the conspiracy was a ‘$45 million scheme’ to fix prices on insulation contracts, where the conspirators attempted to hide their conduct using ‘high-tech encryption apps [and] burner phones’.\textsuperscript{75}

**Online auctions for surplus government equipment**

In April 2019, the DOJ filed its first criminal charge in its ongoing investigation into bid rigging at ‘online public auctions of surplus government equipment’ conducted by the US General Services Administration (GSA).\textsuperscript{76} The ‘owner of a Texas company that purchases computers to resell and recycle’ pleaded guilty to a one-count felony charge.\textsuperscript{77} According to the charge, the company and its co-conspirators obtained the surplus government equipment by ‘agreeing which co-conspirators would submit bids for particular lots . . . and which co-conspirator would be designated to win a particular lot offered’ for auction by the GSA.\textsuperscript{78} A second individual located in Pennsylvania pleaded guilty for his involvement in the conspiracy in September 2019.\textsuperscript{79}

**Financial instruments**

Banca IMI Securities Corp and Industrial and Commercial Bank of China Financial Services LLC (ICBCFS), two New York broker-dealers, pleaded guilty in May and June 2019 respectively as part of the DOJ’s ongoing investigation into bid-rigging in the market for pre-release American Depository Receipts (ADRs).\textsuperscript{80} ADRs are created by US depository banks and represent foreign ordinary shares that can be traded in the United States.\textsuperscript{81} ADRs permit US investors to ‘gain exposure to . . . companies whose common stock is listed only on foreign stock exchanges’.\textsuperscript{82} At an ‘auction-style process’ for ‘pre-release ADRs’ of a US depository bank, the conspiring broker-dealers coordinated their bids for rates to borrow ADRs, resulting in ‘artificially suppressed rates’.\textsuperscript{83} Banca IMI and ICBCFS were sentenced

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\textsuperscript{75} Id.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
to pay criminal fines in excess of US$2 million and US$3 million respectively for their involvement. The former head of the securities lending desk at Banca IMI and a former vice president at ICBCFS also pleaded guilty for their involvement.

ii  Trends, developments and strategies

At the close of fiscal year 2019 (ending September 30), the Antitrust Division had 102 pending grand jury investigations, which Assistant Attorney General Delrahim stated was ‘the highest total since 2010’. We will watch to see how these investigations progress in the coming year.

iii  Outlook

Among other active investigations, the DOJ is set to continue its investigation and prosecution of companies and individuals involved in government procurement. Along with the FBI, the Defense Department, the US Postal Service, and the General Services Administration, the DOJ formed a new government Procurement Collusion Strike Force in November 2019.

According to Assistant Attorney General Delrahim’s announcement regarding the strike force, ‘more than one third of the Antitrust Division’s 100-plus open investigations relate to public procurement or otherwise involve the government being victimized by criminal conduct’.

While summarizing the Antitrust Division’s criminal enforcement for 2019 to the US Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights, Assistant Attorney General Delrahim noted several additional areas in which there would be ongoing investigation, including e-commerce, financial services, generic pharmaceuticals, and real estate foreclosure auctions. The DOJ also affirmed its interest in the labour market, stating that ‘criminal prosecution of naked no-poach and wage-fixing agreements remains a high priority for the Antitrust Division’. To date, there have been no charges announced in this area.

84  Id.
90  Press release, ‘Counsel to the Assistant Attorney General of the Antitrust Division Doha Mekki Testifies Before House Judiciary Committee on Antitrust and Economic Opportunity: Competition in Labor

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III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Pharmaceuticals cases

The FTC has continued its enforcement efforts in the pharmaceutical industry. In 2017, the Commission issued an administrative complaint against Impax Laboratories, Inc for allegedly entering into an agreement with Endo Pharmaceuticals Inc to inhibit generic competition for Endo’s Opana ER drug. In May 2018, an administrative law judge dismissed the FTC’s complaint against Impax, concluding that the FTC had failed to prove that the agreement between Impax and Endo violated the FTC Act. The administrative law judge found it unlikely that generic manufacturers would have been able to enter the market earlier absent the challenged agreement, and therefore the magnitude and extent of any anticompetitive harm was theoretical. The FTC’s complaint counsel filed a notice of appeal seeking a full review by the FTC. On 29 March 2019, the FTC announced that it reached a 5-0 decision reversing the administrative law judge and finding that Impax Laboratories violated Section 5 of the FTC Act. According to the Commission’s press release,

[the Commission found that Endo possessed market power in the market for branded and generic oxymorphone ER. The Commission found that Impax received a large and unjustified payment, which included: (1) a ‘No AG’ commitment, i.e., a promise from Endo not to launch an authorized generic during the 180-day exclusivity period that the Hatch-Waxman Act provides to the first generic filer; and (2) an additional credit that Endo would pay Impax in the event the market for Opana ER declined before Impax’s entry date].

Impax has sought review of the FTC’s order in the United States Court of Appeals for the Fifth Circuit.

In another pharmaceutical case, the United States Court of Appeals for the Third Circuit upheld a lower court’s finding that the FTC lacked authority to bring an action against Shire ViroPharma Inc in federal court. In February 2017, the FTC filed a complaint in the United States District Court for the District of Delaware alleging that the company illegally abused government processes to delay generic competition for Vancocin HCI capsules. According to the FTC’s complaint, between 2006 and 2012, ViroPharma made 43 ‘sham’ filings with the US Food and Drug Administration (FDA) and filed three lawsuits against the FDA to delay


94 Id.
the FDA’s approval of generic Vancocin capsules and to exclude competition. In September 2018, District Judge Richard Andrews dismissed the case, holding that the FTC lacked authority to bring the proceedings absent allegations that VioPharma’s conduct violated, or was about to violate, the law. In April 2018, the FTC appealed to the Third Circuit, and on 25 February 2019, the Third Circuit affirmed. In its opinion, the appeals court held that Section 13(b) of the FTC Act – which allows the FTC to seek injunctive relief in federal district court if it has ‘reason to believe’ that an entity ‘is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission’ – does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant ‘is’ committing or ‘is about to’ commit another violation, which, according to the court, the FTC’s complaint did not plausibly allege. Instead, the court wrote, ‘[i]f the FTC wants to recover for a past violation – where an entity “has been” violating the law – it must use Section 5(b) of the FTC Act and bring an administrative proceeding.’

The FTC also settled several pharmaceutical cases in 2019. Early last year, the FTC announced that it reached a settlement agreement that, if accepted by the courts in which the actions are pending, will resolve the FTC’s claims against generic pharmaceutical manufacturer Teva Pharmaceuticals Industries Ltd. The settlement calls for the entry of stipulated permanent injunctions with durations of ten years in three pending cases, which, according to the FTC, will prohibit Teva ‘from entering into a patent infringement settlement agreement that includes a reverse payment transferring value from the brand to the generic.’ This would include ‘prohibiting Teva from entering into the two most pernicious and common forms of reverse payments: (1) a side deal, in which the generic company receives compensation in the form of a business transaction entered at the same time as the patent litigation settlement; and (2) a no-AG commitment, in which a brand company agrees not to compete with an authorized generic version of a drug for a period of time.’

In July 2019, the FTC announced that Reckitt Benckiser agreed to pay US$50 million and made other commitments to settle ‘charges that it violated the antitrust laws through a deceptive scheme to thwart lower-priced generic competition to its branded drug Suboxone, . . . a prescription oral medication used to minimize withdrawal symptoms in patients recovering from opioid addiction’. According to the FTC’s press release, ‘before the generic versions of Suboxone tablets became available, Reckitt . . . developed a dissolvable oral film

98 Id.
100 Id.
101 Id.
version of Suboxone and worked to shift prescriptions to this patent-protected film. . . . Reckitt allegedly employed a ‘product hopping’ scheme where the company misrepresented that the film version of Suboxone was safer than Suboxone tablets because children are less likely to be accidentally exposed to the film product’. The FTC also alleged that ‘to buy more time to move patients to the film version of Suboxone, Reckitt . . . filed a citizen petition with the FDA reciting the same unsupported safety claims and requesting that the agency reject any generic tablet application’ in order ‘to delay the approval of generic competitors while the FDA reviewed it’.

**Dental products distribution**

In October, FTC Chief Administrative Law Judge D Michael Chappell found that Benco Dental Supply and Patterson Companies ‘conspired to refuse to offer discounted prices or otherwise compete for the business of buying groups and that such an agreement is a per se violation of Section 5 of the FTC Act’. Judge Chappell also found that ‘[t]he evidence fail[ed] to prove a conspiracy involving’ a third distributor, Henry Schein. As evidence of an agreement between Benco and Patterson, Judge Chappell cited, among other things, emails between the two companies ‘constitut[ing] evidence of exchanges of assurances and a confrontation about perceived cheating followed by reassurance’. Judge Chappell also cited ‘Patterson’s conduct following the . . . exchange of assurances, . . . effectively adopting a blanket policy of summarily refusing to deal with buying groups, without evaluation’. The decision became final as the parties did not appeal to the Commission.

**National Association for College Admission Counselling**

Late in 2019, the DOJ announced that it and the National Association for College Admission Counseling (NACAC) entered into a proposed consent decree pursuant to which the NACAC will ‘remove three anticompetitive rules from its Code of Ethics and Professional Practices’. The DOJ alleged that certain rules contained in the code ‘prevented, or severely limited, colleges from (1) directly recruiting transfer students from another college, (2) offering incentives of any kind to college applicants who applied via a process known as Early Decision, and (3) recruiting incoming college freshmen after May 1’. According to the DOJ, ‘[t]hese rules [were] drafted, voted on, and enforced by NACAC members’, which include ‘non-profit colleges and their admissions personnel, and high schools and their guidance counselors’. While noting that ‘[m]any of [the NACAC] rules appear to strengthen the market for college admissions’, the so-called ‘Recruiting Rules . . . were not reasonably necessary to achieve the otherwise market-enhancing rules contained in the [code], and furthermore had the effect of unlawfully restraining competition among NACAC’s college members, resulting in harm to college applicants and potential transfer students’. The consent decree is subject to approval by a federal district judge.

103 Initial Decision, In the Matter of Benco Dental Supply Co., et al., FTC Docket No. 9379 (15 October 2019).
**Paramount Decrees**

On 22 November 2019, the DOJ announced that after ‘a thorough review, including a 60-day public comment period’, it filed ‘a motion to terminate the Paramount Consent Decrees, which for over 70 years have regulated how certain movie studios distribute films to movie theatres’. According to the DOJ, the Paramount ‘decrees required the movie studios to separate their distribution operations from their exhibition businesses. They also banned various motion picture distribution practices, including block booking (bundling multiple films into one theatre license), circuit dealing (entering into one license that covered all theatres in a theatre circuit), resale price maintenance (setting minimum prices on movie tickets), and granting overbroad clearances (exclusive film licenses for specific geographic areas)’. In seeking to terminate the decrees, the DOJ observed that ‘[n]ew technology has created many different movie platforms that did not exist when the decrees were entered into, including cable and broadcast television, DVDs, and the Internet through movie streaming and download services’.

**ii  Trends, developments and strategies**

The agencies have continued their enforcement of civil anticompetitive conduct matters. In particular, developments in the past year continue to evince the FTC’s interest in the pharmaceutical industry. This, along with the DOJ’s activity detailed in the prior section, and ongoing litigation involving private plaintiffs and state attorneys general are all part of a larger trend in the United States of examining pharmaceutical pricing.

**iii  Outlook**

Generally, the FTC and DOJ can be expected to continue closely to monitor the pharmaceutical industry for potential anticompetitive conduct, and we will watch with interest to see how the appeals court rules on the pending appeal in the Impax case discussed above.

We will also watch to see how the DOJ’s motion to terminate the Paramount decrees is decided. The decrees at issue have shaped the film distribution industry for over 70 years. The DOJ’s review attracted numerous public comments and several oppositions have been filed with the court deciding the motion. This matter is perhaps the highest profile output to date of the DOJ’s ongoing judgment termination initiative. Beyond the Paramount decrees, we expect the DOJ to continue to evaluate other existing consent decrees and the agency may seek to terminate certain of these. Indeed, this decree review and termination initiative has been ongoing for a while, and, according to the DOJ, it involves a ‘review of nearly 1,300 legacy judgments’.

Finally, following recent comments by the Attorney General and Chairman of the Federal Trade Commission, in the coming year we may see significant developments in the agencies’ investigations of technology companies.

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106  Id.
IV MERGER REVIEW

2019 was another active year for the DOJ and FTC in merger review and enforcement. Both agencies investigated numerous proposed acquisitions and required divestitures and sued to enjoin several transactions. Perhaps most notably, the DOJ lost its bid to block AT&T’s acquisition of Time Warner when the United States Court of Appeals for the District of Columbia upheld the lower court’s denial of the government’s request to block the deal. Also of note is that the DOJ is allowing the T-Mobile-Sprint merger to proceed with divestitures, but a group of states has separately challenged that deal. The FTC won rulings against mergers in federal court and in Commission proceedings. In addition, both the DOJ and FTC settled several challenges with consent decrees.

i Significant cases

Litigated merger challenges

AT&T and Time Warner

On 20 November 2017, the DOJ filed suit to block AT&T’s acquisition of Time Warner. The DOJ alleged that AT&T, a video programming distributor, ‘would hinder its rivals by forcing them to pay hundreds of millions of dollars more per year for Time Warner’s networks, and it would use its increased power to slow the industry’s transition to new and exciting video distribution models that provide greater choice for consumers’.

AT&T and Time Warner argued that the proposed merger ‘is a procompetitive, pro-consumer response to an intensely competitive and rapidly changing video marketplace’; that ‘no competitor will be eliminated by this merger’; and that the ‘transaction is . . . a classical vertical deal, combining . . . content with . . . distribution platforms so that the merged company can compete more effectively against market-leading cable incumbents and insurgent tech giants’. On 12 June 2018, the judge hearing the case denied the DOJ’s request for an injunction. In his opinion, the district judge wrote that the government did not meet its burden of showing, among other things, that Time Warner would be able to increase its bargaining leverage in negotiations for the carriage of its networks on rival video distribution systems.

On 26 February 2019, the United States Court of Appeals for the District of Columbia Circuit held that the DOJ failed to show that the district court clearly erred in denying the government’s request for a permanent injunction to block the AT&T-Time Warner merger.

Ottobock and Freedom

On 6 May 2019, the FTC’s Chief Administrative Law Judge, D. Michael Chappell, released an initial decision in which he found that Ottobock’s consummated acquisition of Freedom violated Section 7 of the Clayton Act and ordered a complete divestiture. Both Ottobock and Freedom manufacture microprocessor prosthetic knees (MPK). Judge Chappell found that the Acquisition will significantly increase concentration in the relevant MPK market, which gives rise to a presumption that the Acquisition may substantially lessen competition. In addition, the evidence proves that Ottobock and Freedom are direct competitors in the MPK market.

110 Id. at 68-149.
111 US v. AT&T Inc., No. 18-5214 (DC Cir 28 February 2019).
market, and that this competition has enabled clinic customers to negotiate lower prices and has spurred MPK innovation. This is more than sufficient to meet Complaint Counsel’s prima facie burden to show that the Acquisition of Freedom by Ottobock, and the removal of Freedom as an independent competitor, may substantially lessen competition in the MPK market.\(^{112}\) Judge Chappell also found that Ottobock’s rebuttal arguments and defences were without merit, writing that ‘[t]he evidence fails to demonstrate that repositioning by competitors in the MPK market will be timely, likely or sufficient to prevent anticompetitive effects; that power buyers or limits on insurance reimbursement will constrain price increases in the MPK market; that Freedom at the time of the Acquisition was a failing (or flailing) company; . . . or that the Acquisition is justified by cognizable efficiencies’. Judge Chappell rejected a limited divestiture proposed by Ottobock, writing that Ottobock failed to establish that ‘divestiture of Freedom’s MPK-related assets will eliminate any likelihood of anticompetitive effects from the Acquisition’.

**T-Mobile and Sprint**

On 26 July 2019, the DOJ announced that it reached a proposed settlement relating to the T-Mobile-Sprint merger. The agreement requires, among other things, Sprint and T-Mobile to make divestitures to Dish Network. According to the DOJ’s press release, ‘T-Mobile and Sprint must divest Sprint’s prepaid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to Dish Network Corp, a Colorado-based satellite television provider. The proposed settlement also provides for the divestiture of certain spectrum assets to Dish. Additionally, T-Mobile and Sprint must make available to Dish at least 20,000 cell sites and hundreds of retail locations. T-Mobile must also provide Dish with robust access to the T-Mobile network for a period of seven years while Dish builds out its own 5G network’.\(^{113}\)

According to the DOJ’s allegations:

> without the divestiture, the proposed acquisition would eliminate competition between two of only four facilities-based suppliers of nationwide mobile wireless services. . . . T-Mobile and Sprint both operate mobile networks and offer nationwide coverage to consumers, and they are particularly close competitors to each other for the roughly 30% of retail subscribers who purchase prepaid mobile wireless service. The combination of T-Mobile and Sprint would eliminate head-to-head competition between the companies and threaten the benefits that customers have realized from that competition in the form of lower prices and better service.

The settlement is subject to approval by a federal judge. Arkansas, Colorado, Florida, Illinois, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, Pennsylvania, South Dakota, and Texas have joined in the proposed settlement.

Notable, however, is that a separate group of states – New York, California, Connecticut, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, Oregon, Virginia, and Wisconsin – and the District of Columbia brought a separate suit to block the merger. The bench trial in this case concluded in January 2020, and the judge ruled against the states.


Abandoned transactions

Illumina and Pacific Biosciences of California

On 17 December 2019, the FTC announced that it was seeking to block the acquisition of Pacific Biosciences of California (PacBio) by Illumina. The FTC alleged that ‘Illumina is seeking to unlawfully maintain its monopoly in the U.S. market for next-generation DNA sequencing (NGS) systems by extinguishing PacBio as a nascent competitive threat’, ‘the proposed acquisition is illegal because it may substantially lessen competition in the U.S. NGS market by eliminating current competition and preventing future competition between Illumina and PacBio’, and ‘the acquisition would harm competition by reducing the combined firm’s incentive to innovate and develop new products’.114 According to the FTC, Illumina’s systems use ‘short-read sequencing technology, which has been the predominant NGS technology in the United States for the last decade’, and PacBio’s systems use ‘long-read sequencing technology’.115 However, ‘PacBio has made significant technological advancements in recent years that have increased the accuracy and overall throughput of its systems, while lowering the cost’.116 As a result, the FTC said, ‘PacBio is a closer alternative to Illumina than ever before’.117 Customers have already switched some sequencing volume from Illumina to PacBio for certain use cases and applications, and PacBio is poised to take increasing sequencing volume from Illumina in the future’.118 On 3 January 2020, the parties announced that they are abandoning the deal.119

TreeHouse Foods and Post Holdings

On 19 December 2019, the FTC announced that it was seeking to block the acquisition of the ‘private label ready-to-eat cereal business’ of TreeHouse Foods by Post Holdings.120 According to the FTC, ‘Post and TreeHouse are two of only three significant manufacturers and distributors of private label ready-to-eat cereal in the United States. The acquisition would give Post more than a 60 percent share of an already highly concentrated market and eliminate the vigorous competition between them to serve grocers across the country’.121 The parties have since abandoned the deal.

115 Id.
116 Id.
117 Id.
118 Id.
121 Id.
Divestiture and conduct remedies

The DOJ required divestitures in several proposed mergers, including:

a Thales and Gemalto (divestiture of general purpose hardware security module business);\textsuperscript{122}

b Amcor and Bemis (divestiture of manufacturing facilities and other assets);\textsuperscript{123}

c Boston Scientific and BTG (divestiture of drug eluting bead and bland bead business);\textsuperscript{124}

and

d BB&T and SunTrust Banks (divestiture of bank branches).\textsuperscript{125}

The DOJ previously announced that it was requiring the divestiture of a prescription health insurance plan business in order for the merger of CVS Health Corporation and Aetna Inc to proceed.\textsuperscript{126} In accordance with standard procedure, the DOJ filed a complaint and proposed final judgment, pursuant to which CVS and Aetna divested Aetna's Medicare Part D prescription insurance plan business to WellCare Health Plans. The DOJ determined that, without the divestiture, the merger would have 'cause[d] anticompetitive effects, including increased prices, inferior customer service, and decreased innovation in sixteen Medicare Part D regions covering twenty-two states'.\textsuperscript{127} The US Tunney Act requires, among other things, that '[b]efore entering any consent judgment proposed by the United States . . . the court shall determine that the entry of such judgment is in the public interest'.\textsuperscript{128} Normally, this is a straightforward process. In December 2018, however, the judge in the case wrote that he was 'less convinced of the sufficiency of the Government's negotiated remedy than the Government is' and that 'neither [he], nor the public has had a chance to evaluate whether the proposed final judgment adequately remedies the harm alleged in the complaint, and more importantly perhaps, whether the complaint as drafted is actually in the public interest'.\textsuperscript{129} The judge then proceeded to hold a high-profile hearing in which he heard from several entities opposing the settlement. Ultimately, on 4 September 2019, the judge determined that the proposed final judgment in the CVS-Aetna merger case was in the public interest.\textsuperscript{130}

The FTC required divestitures in a number of deals, including:

a Fresenius and NxStage Medical (divestiture of bloodline tubing set business);\textsuperscript{131}


In addition, the FTC agreed to accept a proposed settlement allowing Staples’ acquisition of Essendant to proceed. Staples is an office supply reseller, and Essendant is a wholesaler that sells office supplies to Staples and competing resellers. According to the FTC, Staples ‘will establish a firewall separating Staples’ business-to-business [resale] operations from Essendant’s wholesale business . . . . This firewall will restrict Staples’ access to the commercially sensitive information of Essendant’s [reseller] customers’ (which allegedly compete with Staples for retail sales). In its complaint, the FTC identified ‘the sale and distribution of office products to midmarket business-to-business customers in local areas’ as the relevant market, and alleged that absent the firewall, ‘Staples would have access to Essendant’s reseller customers’ commercially sensitive business information, which could allow Staples to offer higher prices than it otherwise would when bidding against a reseller for an end customer’s business’. Under the settlement order, according to the FTC, ‘only those Staples employees who will be performing wholesale functions’ will have access to Essendant’s commercially sensitive reseller information. FTC Commissioners Chopra and Slaughter dissented from accepting the settlement, arguing that the transaction should have been blocked.

On 13 September 2019, the FTC announced that it is requiring NEXUS Gas Transmission and North Coast Gas Transmission to remove a non-compete clause from their sales agreement pursuant to which NEXUS will acquire North Coast’s Generation Pipeline entity, which ‘owns and operates a 23-mile [natural gas] pipeline in the Toledo, Ohio area’. According to the FTC, the ‘non-compete clause . . . [would] keep[] North Coast from competing to provide natural gas pipeline transportation, for three years after the acquisition closes, in parts of the Ohio counties of Lucas, Ottawa, and Wood’, where North Coast has another pipeline. The FTC said that ‘the Generation pipeline and the

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134 Press release, ‘FTC Requires Bristol-Myers Squibb Company and Celgene Corporation to Divest Psoriasis Drug Otezla as a Condition of Acquisition’, available at https://www.ftc.gov/news-events/press-releases/2019/11/ftc-requires-bristol-myers-squibb-company-celgene-corporation. The FTC described this as the largest [divestiture] that the FTC or the U.S. Department of Justice has ever required in a merger enforcement matter’. Id.


138 Id.
North Coast pipeline may be the best alternatives for some large industrial customers in the Toledo area who are located reasonably close to both pipelines. By prohibiting North Coast from competing with the Generation pipeline, the non-compete clause would harm customers who otherwise would benefit from that competition. The FTC alleges that the non-compete provision ‘is not reasonably limited in scope to protect a legitimate business interest’.

**ii  Trends, developments and strategies**

Merger enforcement remains robust and the agencies continue to focus on thorough investigation of the matters before them. Among the notable developments in merger enforcement in 2019 is the DOJ’s announcement that it agreed with the parties to a proposed acquisition to use binding arbitration ‘to resolve the dispositive issue’ of product market definition in the DOJ’s challenge to that acquisition. The Administrative Dispute Resolution Act of 1996 authorises the use of arbitration for such purposes, but this is the ‘first time the Antitrust Division is using this arbitration authority to resolve a matter’, according to the government’s press release. Assistant Attorney General for the Antitrust Division Makan Delrahim indicated that arbitration ‘is an important tool’ and that the Antitrust Division will use it again ‘in appropriate circumstances’. In a speech discussing arbitration, Mr Delrahim highlighted three key questions:

*First, what are the efficiency gains relative to the alternatives? The Division would be more likely to arbitrate if doing so could save significant time or taxpayer money while ensuring that competition and consumers are protected. Second, is the question the arbitrator will be asked to resolve clear and easily can be agreed upon? If not, then arbitration may not be the best use of our or the parties’ resources. Third, would arbitration result in a lost opportunity to create valuable legal precedent? This will depend on the facts of the particular case, but the effect could be mitigated depending on the transparency of the process and the arbitrator’s decision.*

We will watch with interest to see if the DOJ and deal parties avail themselves of arbitration to settle merger challenges in the future.

**iii  Outlook**

We expect the agencies to continue to devote substantial resources to merger investigations. We will watch with particular interest to see how the agencies address proposed mergers in the technology space. In May 2019, an FTC official (who has since left the agency) called on tech industry participants to alert the FTC to potential competitive issues when a tech company acquires a nascent competitor, as these acquisitions are often below the reporting threshold. The coming year may bring important insight into how agencies will evaluate deals involving the acquisition of nascent competitors.

139 Id.
140 Id.
142 Makan Delrahim, ‘Special, So Special’: Specialist Decision-Makers in, and the Efficient Disposition of, Antitrust Cases (9 September 2019).
V CONCLUSIONS

2019 was a busy year for the competition enforcement agencies in the United States, and we expect continued vigorous enforcement in the year ahead, when we may see results from the federal and state agencies’ technology industry investigations. Competition policy also may see some prominence in the 2020 presidential campaign, as a number of the candidates continue to speak out on these matters.
I  OVERVIEW

Fundamental considerations for understanding the Venezuelan economy

Prior to explaining and analysing the antitrust and free competition framework in Venezuela, it is of utmost importance to understand the current situation of the Venezuelan economy and the legal contrast between Venezuela’s National Constitution (NC) and its economic regulations.

The NC establishes certain rules, principles and rights to foster an economic system that allows for private initiative and free association, within a market directed to promote and protect free competition, guaranteeing access to goods and services by all citizens.\(^2\) In accordance with those constitutional parameters, the Executive Power, in subordination to the law, must regulate, organise and develop the economy in Venezuela.

Nevertheless, the economic legal regulations created in the past 21 years – basically through legislative delegation from the National Assembly (the Legislative Power) to the Executive Power – has changed the constitutional foundations of Venezuela’s economy, creating a new model that the former President and the current President have called ‘Socialism of the XXI Century’, where the market of goods and services is – practically – under the control of the government using following main methods: price fixation; foreign currency exchange control;\(^3\) confiscations of companies and properties; and regulation of the profit margin for goods and services.\(^4\)

As a consequence, this has brought about a significant reduction of free competition, since economic agents do not have enough room for manoeuvre, because the economic conditions have been reducing the number of productive companies as a result of a lack of raw materials, the inconvenience of access to foreign currency (thus reducing imports of any kind), and the absence of legal protection for both domestic and foreign companies, creating negative economic conditions where economic agents cannot assess the risks of new investments, keeping their cost structure to a minimum and putting all their effort into

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1  Alejandro Gallotti is a junior partner at LEGA Abogados.
2  See Articles 112, 113 and 114 of the NC.
3  Foreign Exchange Regime and Crimes Decree-Law.
4  Organic Law of Fair Prices.
preserving their business in a country where inflation (reaching 1,698,488.2 per cent in 2018\(^5\) and 7,374 per cent in 2019\(^6\)) and the devaluation of the bolivar has been reducing the purchasing power of producers, merchants, providers and consumers.

In May 2017, outside the constitutional parameters, Nicolas Maduro unilaterally called a National Constitutional Assembly (NCA) with the aim of changing the NC, the state and our legal framework.\(^7\) Nevertheless, since the formal establishment of the NCA in August 2017, we have been observing the creation of different types of decrees and laws such as the national budget law (an exclusive attribution of the Parliament), the Constitutional Law of Agreed Prices\(^8\) and more recently, in January 2020, a profound reform of the tax framework, including the organic tax code and the value added tax law,\(^9\) all this outside the parliament, the only competent authority to issue laws in these matters.\(^10\)

Another relevant economic decision has been the implementation of the currency called the *petro*, created in 2018 (without the authorisation of the National Assembly and outside the constitutional scenarios) but applied since 2019. The government indicates that the *petro* is a cryptocurrency, but it has been implemented with obscurantism; the government has not provided information and public access to the platform and algorithms used for its creation, and it is difficult to consider it a cryptocurrency because the government is the issuer and the value is also set by the government. At the time of writing, we do not have official information about foreign currency or cryptocurrency exchange operations with the *petro*, but the government is using it for public pension payments, and it is intended to demand the payment of some taxes with *petros*. The devaluation of the bolivar – the only legal currency in Venezuela – has been over 90 per cent in 2019.\(^11\)

Furthermore, Venezuela has been suffering a de facto economic dollarisation where around 50 per cent of transactions have been carried out in dollars and other foreign currencies in recent months.\(^12\)

All of these changes have been creating more confusion and economic uncertainty, a situation that, directly and indirectly, affects the economic market. 2020 is expected to be another difficult year: Venezuela is in an unprecedented political and humanitarian crisis, where the priority for economic agents is survival in the market and not competition, investments are the minimum necessary and all are waiting for the outcome of the political crisis.

In accordance with the above, we consider that the Venezuelan economy has a free competition regime from a constitutional and strictly formal point of view, but a controlled economy – through public entities – from a legal and material point of view. 2020 could bring

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\(^7\) See Articles 347 and 348 of the NC.

\(^8\) Extraordinary Official Gazette No. 6.342, dated 22 November 2017.


\(^10\) Articles 201 and following of the NC.


\(^12\) See https://www.reuters.com/article/us-venezuela-economy-idUSKBN1XR0RV (last accessed 1 February 2020).
some changes in the economic system as a consequence of dollarisation and what appears to be a lower state presence on economic activities since 2019, parliamentary elections at the end of 2020 and international pressure will surely have some impact on possible reforms. In these terms, we discuss the free competition regime in Venezuela.

ii The Antitrust Law and antitrust authorities

The legal regulation for free competition has been determined through Decree No. 1,415, which enacted the Antitrust Law. The purpose of the Law, as established in Article 1 thereof, is to promote, protect and regulate fair economic competition so as to ensure democratisation of productive economic activity with social equality, strengthen national sovereignty and foster endogenous and sustainable development, to satisfy social needs and build a fair, free, solidary and co-responsible society by means of the prohibition and sanctioning of monopolistic and oligopolistic behaviours, as well as abuse of dominant position, agreed-upon claims, economic concentration, and any other anticompetitive or fraudulent practices. Nevertheless, Article 3 states that the following are excluded from the application of the Law: grassroots organisations of popular power governed by the Organic Law of the Communal Economic System; public or mixed strategic companies; and national state-owned companies for the provision of public services.

The Antitrust Superintendency is the main authority in this regard. It is considered an administrative unit of the National Executive Power with budget autonomy but without legal personality (it is part of the state legal entity), and it has the power to investigate and enforce the Antitrust Law. In this sense, the Superintendency has the faculty to investigate whether there has been an infringement of the Antitrust Law, either by acting on a complaint or upon its own initiative. However, before reaching a decision, the Superintendency must rely on sufficient evidence upon which to base its conclusions.

In the resolution that brings a procedure to a conclusion, the Antitrust Superintendency shall resolve upon the existence or non-existence of prohibited practices under the Antitrust Law. In the event that the existence of prohibited practices is determined, the Antitrust Superintendency, in accordance with Article 38, may:

a order the cessation of the prohibited practices within a given time;
b impose certain conditions or obligations on the infringer;
c order the elimination of the effects of prohibited practices; and
d impose sanctions provided by the Antitrust Law.

The lack of payment of a fine or payments made after the deadline has expired for that purpose results in an obligation to pay default interest until clearance of the debt. The interest rate is calculated at 6 per cent over the average rediscount rate established by Banco Central de Venezuela during the delay period.

The Superintendency may impose on undertakings any behavioural or structural remedies that are proportionate to the gravity of the infringement committed.

Penalties start with the prohibition of the anticompetitive agreement and a fine that shall not exceed 10 per cent of the total turnover in the preceding business year.

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13 Special Official Gazette No. 6,151, dated 18 November 2014.
II CARTELS

As a general principle, the Antitrust Law establishes that ‘[c]onduct, practices, agreements, contracts or decisions that hinder, restrict, distort or limit economic competition are prohibited’ (Article 4).

In accordance with Article 9 of the Antitrust Law, agreements between undertakings, decisions of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition are prohibited, especially when:

a directly or indirectly fixing purchase or selling prices or any other trading conditions;
b limiting or controlling production, markets, technical development or investment;
c applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
d sharing markets, territorial areas, supply sectors or sources of supply between competitors; and
e making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of such contracts.

These regulations are considered by the Antitrust Law as ‘general obligations’ for every economic agent. Nevertheless, grassroots organisations, public or mixed strategic companies, and national state-owned companies for the provision of public services are excluded from the application of the Law (see Section I).

The aforementioned activities must be analysed in conjunction with the Organic Law of Fair Prices (OLFP), which is the main law governing economic activities in Venezuela, indicating the following, among others, as its purposes:

a economic order;
b protection of consumers and users;
c fair, equitable, productive and sovereign development of the national economy through the determination of fair prices for goods and services, considering the analysis of cost structures;
d the establishment of maximum profit; and

e the effective oversight of the economic and commercial activity in order to protect the income of citizens.

The administrative entity responsible for enforcing the OLFP is the National Superintendency for the Defence of Socioeconomic Rights (SUNDDE).

In this sense, the OLFP and its administrative provisions provide that the maximum profit margin of each member of the commercialisation chain cannot exceed 30 per cent in general (we mention, as an exception, importers, with a 20 per cent profit margin for their activities) of the cost structure of the good or service. The cost structure shall be calculated according to the methodology set by SUNDDE, especially in accordance with Administrative Provision No. 003, which indicates the valid elements that will be recognised as costs and as expenses. A second act that must be taken into consideration is Administrative

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14 In force since 23 January 2014, last reform on 8 November 2015 according to the Decree Law with Rank and Force of Law No. 2,092 published through the Extraordinary Official Gazette No. 6,202 of the same date.

15 Administrative Provision No. 070.
Provision No. 070, an administrative regulation of SUNDDE where the pricing criteria through the intermediation margin (MI) and the elements of price marking are established. It is important to note that given the hyperinflation and gradual dollarisation of the economy, Provision 070 is in disuse; however, it remains in force.

Following the above, in accordance with this price-fixing regulation and profit-margin regime, the Antitrust Law establishes some ‘exception rules’ when the President, heading the Council of Ministers, grants an exemption from the prohibitions contained in the Antitrust Law, when it is considered in the nation’s interest, in the following cases:

a. direct or indirect – individually or concerted – fixation of goods or services purchase or sale prices;

b. application of different conditions in trade relations for similar provisions or equivalent that may lead to inequalities in the competitive situation, especially if different from those conditions that would be demanded in the event a genuine competition concern exists in the market, except those cases of cash discounts, volume discounts, lower cost of money for the offering of reduced risk and other common advantages in business; and

c. having exclusive branches and franchises with prohibitions on trading with other products.

The established exemptions shall comply with – in a concurrent way – the following: contributing to the production, commercialisation and distribution of goods, provisions of services and foster technical and economic progress; and bringing benefits for consumers or users.

These ‘exceptions’ to the prohibitions of the Law can only be applied in particular circumstances, considering that the legal regime of fair prices and profit margins applies as a general rule to all economic activities.

In the event the existence of prohibited practices is determined, the Antitrust Superintendency will be able to:

a. order the cessation of the prohibited practices within a given time;

b. impose certain conditions or obligations on the infringer;

c. order the elimination of the effects of prohibited practices; and

d. impose sanctions.

In this sense, Article 49 of the Antitrust Law establishes the sanctions that could be applied in the event it discovers prohibited practices or conduct set out in Sections 1, 2 and 3 of Chapter II of the Law. Thus, if the Antitrust Superintendency determines the existence of prohibited practices, the economic agent shall be sanctioned with a fine of up to 10 per cent of the value of its annual gross revenues in the event of extenuating circumstances; the amount may be increased up to 20 per cent in the case of aggravating circumstances. In the event of recurrence of the prohibited practices, the fine will be increased to 40 per cent.

The calculation of the annual gross revenues referred to in this chapter will correspond to the fiscal year prior to the imposition of the fine.

Published in the Official Gazette No. 40,775 dated 27 October 2015 by the National Superintendency for the Defence of Socioeconomic Rights (SUNDDE).
i  Significant cases
Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

ii  Trends, developments and strategies
Even if cartels are prohibited and price fixing as a general rule is prohibited, in accordance with Administrative Provision No. 070 every producer, importer and service provider must mark the price of goods and services according to a mathematical formula, whereby the PMVP (the maximum sell price to the public (i.e., consumers)) divided by the PMVPI (maximum sell price for producers or importers) minus 1 and the result multiplied by 100 will give you the MI, which should not exceed 60. This implies a ‘price-fixing’ obligation despite the prohibition of Article 9 of the Antitrust Law. Nonetheless, given the hyperinflation and gradual dollarisation of the economy, Provision 070 is in disuse; however, it remains in force.

Additionally, the Constitutional Law of Agreed Prices gives the National Executive the possibility to determine the ‘priority’ character of some goods and services. In this sense, the prices of those priority products will be determined through an agreement between the economic agents and the National Executive. Nevertheless, this is a new regulation, and the procedure is not clear enough. We are waiting for administrative criteria and results in order to proceed with a proper analysis.

iii  Outlook
As a consequence of the controlled economic model imposed by the government, economic agents have been developing in a very restricted market, where the main issue is obtaining raw materials and foreign currency to maintain a business or an economic activity. Thus, even if the Antitrust Law is in force, it must coexist with the OLFP, which is the principal legal framework to regulate and control the economy in Venezuela, affecting economic agents and conditioning the circumstances surrounding the market for goods and services.

Considering the reduction of the market and government control, there are no trends in terms of cartels. However, it is worth noting that the hyperinflation and de facto dollarisation of the economy has at the moment represented a certain economic boom that is being targeted by the government through a tax reform that includes a special VAT for transactions made with foreign currencies and cryptocurrencies.

Similarly, operations with the petro are still in the implementation phase, which could have an impact on the economic activity of 2020.

Cooperation with the Antitrust Superintendency or any other public entity is a usual strategy in administrative procedures. In addition, the assistance of a public law or economic law specialist during the administrative procedure is highly recommended.

III  ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE
As discussed in Section II, the Antitrust Law prohibits as a general principle any type of conduct that hinders, restricts, distorts or limits economic competition, but also prohibits the actions or conduct of those who, not holding a right protected by the Law, seek to prevent or hinder the entry or stay of companies, products or services in all or part of the market (Article 5).

Additionally, it is forbidden for parties subject to the application of the Antitrust Law to exercise actions that restrict economic competition among them, and encourage others
not to accept the delivery of goods or the provision of services, to prevent their acquisition or provision, or not to sell raw materials or inputs or provide services to others. Consumers or users and their organisations will not be subject to these regulations (Article 6).

Article 7 of the Antitrust Law prohibits manipulative behaviours, considered as conduct tending to manipulate factors of production, distribution, commercialisation, technological development or investments to the detriment of economic competition.

Likewise, agreements or conventions that are held directly or through unions, associations, federations, cooperatives and other groups that are the subject of application of the Antitrust Law, and that restrict or hinder economic competition among its members, are prohibited.

Agreements or decisions taken in assemblies of the subjects of the application of the Law that restrict or hinder economic competition are null and void.

In accordance with Article 11 of the Antitrust Law, contracts between economic agents that establish prices and procurement conditions for the sale of goods and the provision of services to third parties that produce or may produce the effect of restricting, falsifying, limiting or hindering fair economic competition in the whole market or part of it are prohibited.

Article 12 of the Antitrust Law establishes that the abuse of a dominant position, in all or part of the domestic market, by any or several of those subject to the enforcement of the Law is prohibited, and in particular the following practices are prohibited:

a. the discriminatory imposition of pricing and other commercialisation or service conditions;
b. the unjustified limitation of production, distribution, or technical or technological development to the detriment of companies and consumers;
c. the unjustified refusal to meet the demand on the purchase of products or provision of services;
d. the application – in trade or service relations – of unequal conditions for equivalent provisions that place competitors in a disadvantaged position in comparison with others; and
e. the subordination of the execution of contracts to the acceptance of additional services that, by their nature or in compliance with trade usages, are unrelated to the purpose of said contracts.

In this sense, in order to determine what a dominant position is, one must analyse Article 13 of the Antitrust Law, which indicates that there is a dominant position when a determined economic activity is performed by a single person or group of persons associated with each other, from their capacity as purchaser to their capacity as provider of services, as well as in their capacity as user thereof; or where there exists more than one person destined for the execution of a certain type of activity, there is no actual competition among them.

When there is a dominant position, the persons who are in said position shall comply with the provisions of the Antitrust Law, to the extent that there are no different conditions established by the regulatory bodies that govern them, in conformity with what is provided in Article 113 of the NC.

In the event the existence of prohibited practices is determined, the Antitrust Superintendency will be able to proceed in accordance with Articles 38 and 49 of the Antitrust Law.
i Significant cases
Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

ii Trends, developments and strategies
The de facto dollarisation, the opening of small new businesses (specially in Caracas) and the distancing of the state over small and medium-scale trade could generate new economic trends, the year 2020 will clarify this expectation.

iii Outlook
The fiscal reforms issued in January 2020 and the deepening of dollarisation make us presume that we are facing possible new reforms in economic matters, in fact Nicolás Maduro has announced a possible privatization of the oil industry.17

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES
The Venezuelan framework presents a number of special regulations for certain industries. If an economic activity or industry has no special regulation, it will automatically be regulated by the OLPF (Article 2).

In this sense, special regulated activities include the following:

a insurance activity: the Superintendency of Insurance Activity;
b the banking sector: the Banking Superintendency;
c the oil industry: the Ministry of Oil and Energy and PDVSA;
d cement: the Venezuelan Corporation of Cement;
e the mining industry: the Ministry of Mining;
f electric power: the Ministry of Electric Power and CORPOELEC;
g telecommunications: the Ministry of Communications and CONATEL; and
h healthcare: the Ministry of Health and many public entities.

As a main principle, every economic activity will fall under the Antitrust Law framework except for those agents or undertakings within the cases established in Article 3 (see Section I.ii).

A lot of the special regulated industries are developed by public or mixed strategic companies or national state-owned companies. This is the case with companies involved in the oil industry. Moreover, the banking sector is considered by Article 8 of the Institutions of the Banking Sector Law as a public service, and the same legal situation applies for electricity, provision of domestic gas and many economic activities of public interest (telecommunications, construction, sale of food, medicines and some body care products, among others).

Economic concentration transactions of insurance, banking and telecommunications companies require prior authorisation from regulatory bodies.

Venezuela

i Significant cases
Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

ii Trends, developments and strategies
The high presence of state-owned companies and mixed strategic companies in practically every sector of Venezuelan industry is the most common scenario in regulated industries. Nonetheless, Nicolás Maduro is considering the privatisation of the oil industry, a situation that could imply an historical change in Venezuelan industry. There are not many details about this possible operation but, Maduro’s representatives have been discussing with Russian and European oil companies the possibility of taking over government-controlled oil properties and restructuring some debt of the state oil company Petroleos de Venezuela SA in exchange for assets.18

iii Outlook
Venezuela is suffering a significant political crisis right now, which could imply eventual economic changes in order to recover the economy. If the socialist government holds power during this year, we do not foresee significant changes in the local market in the near future.

V STATE AID
Venezuelan legislation does not regulate state aid provisions involving undertakings or regions in the jurisdiction. Nevertheless, there are some ‘mitigating circumstances’ that could be considered by the Antitrust Superintendency before determining legal or economic sanctions. In this sense, Article 52 of the Antitrust Law indicates that for the purpose of fixing the amount of sanctions, the following attenuating circumstances shall be taken into account:

a the performance of actions that put an end to the restriction of economic competition;
b the effective non-application of the prohibited behaviours set out in the Antitrust Law;
c the performance of actions tending to repair the damage caused; and
d active and effective collaboration with the Antitrust Superintendency in its administrative supervisory functions.

i Significant cases
Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

ii Trends, developments and strategies
Considering that the Venezuelan framework does not have ‘state aid’ dispositions, we have no major comments on this subject. Nevertheless, economic agents under investigation usually apply as a strategy cooperation with the Superintendency or any other action that allows them to mitigate the sanctioning risks.

Outlook

If Nicolás Maduro’s regime intends to recover Venezuelan industry and other regulated sectors, a series of legislative reforms and possible privatisations in various sectors previously nationalised or confiscated by the predecessor regime of Chávez Frías will be essential.

VI MERGER REVIEW

The Antitrust Law prohibits economic concentrations that may cause or enhance a dominant position in all or part of a market, or that may generate negative effects on competition, or democratisation of production, distribution or commercialisation of goods and services. Small and medium-sized enterprises, cooperatives and companies that form part of the communal economic system19 are exempt from this prohibition. The Law maintains the voluntary reporting status in cases of economic concentrations.

Economic concentration transactions of insurance, banking and telecommunications companies require prior authorisation from regulatory bodies.

i Significant cases

Since the entry into force of the Antitrust Law in November 2014, the Antitrust Superintendency has published no decisions as a result of administrative procedures or claims.

ii Trends, developments and strategies

The Guidelines for Economic Concentration Assessment (1999) will continue to be applied until the Antitrust Superintendency issues a regulation that includes a particular procedure.

A concentration is defined as a merger of previously independent undertakings; acquisition of sole control over another undertaking; or acquisition of joint control in a full function concentrative joint venture or existing undertaking.

The Antitrust Law defines ‘control’ as decisive influence over the activities of a company.

The revision of the threshold for economic concentrations transactions is the equivalent to 120,000 tax units (TU) (1 TU = 50 bolivars20). It is measured in terms of domestic business volume of the companies involved.

iii Outlook

Considering the fiscal reforms of the month of January 2020, the de facto dollarisation of the economy and the proposed privatisation of the oil sector, it is possible to expect new reforms and economic trends in 2020.

VII CONCLUSIONS

The government has been developing a controlled economy using different kinds of regulations and parameters. As explained above, the administrative units and public entities of the National Power have been determine in the past 20 years the priority products that may be imported and what raw materials should be supported with subsidised US dollars,

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19 An economic model that encourages domestic production in order to transition from the ‘Capitalist rentier state’ to the ‘Socialist economic productive system’.
using methods such as price fixation, foreign currency exchange control, confiscation of companies and properties, and regulation of the profit margins for goods and services, all of which are a hindrance to free competition.

Nonetheless, 2019 was an atypical year, where the government seems to have distanced itself from small and medium-scale economic activity, admitting de facto dollarisation in the economy, incorporating new forms of digital transaction such as the petro and starting the year 2020 with fiscal reforms and the possible privatisation of the oil sector, which creates the expectation of further reforms and changes in the economic sector during this year. However, legal uncertainty and opacity in front of public entities is something that so far does not seem to be changing, a situation that complicates the possibility of having a return to the free market.
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Ms Villela holds a master’s degree in commercial law from the Law School of the University of São Paulo, with an emphasis on competition law (2008), where she presented a dissertation on exclusive dealing and competition law; and a doctorate degree in commercial law from the Law School of the University of São Paulo, with an emphasis on competition law (2012), where she presented a thesis on abuse of dominance and distribution relations.

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Stephen Wu is the partner leading the competition law practice group at Lee and Li, and also the founding chair and an active member of the Competition Law Committee of the Taipei Bar Association. He has successfully represented domestic and international clients in handling numerous antitrust filing, cartel investigation and unfair competition cases. He has co-authored numerous articles and Taiwan chapters for many competition law publications and has been recognised as being among the world’s leading competition lawyers by Who’s Who Legal: Competition since 2012. He is also active in the public policy reform projects in diversified practice areas, such as knowledge-based economics, corporate governance, M&A transactions, telecommunications and media convergence, venture capital, limited partnerships, industrial holding companies and investors’ protection.

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