ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & GLEDHILL LLP
ANJARWALLA & KHANNA
ANJIE LAW FIRM
BAKER MCKENZIE LLP
BECCAR VARELA
CASTRÉN & SNEILLMAN ATTORNEYS LTD
CLEARY GOTTLIEB STEEN & HAMILTON LLP
CMS
DE BRAUW BLACKSTONE WESTBROEK NV
ELIG GÜRKAYNAK ATTORNEYS-AT-LAW
FATUR MENARD LAW FIRM
HOMBURGER AG
JONES DAY
KOIKE & KASHIWAGI LAW OFFICE
LEVY & SALOMÃO ADVOGADOS
P&A LAW OFFICES
SK CHAMBERS
SPASOV & BRATANOV LAWYERS’ PARTNERSHIP
VINGE
WOLF THEISS
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Each of the past few years’ editions of The Dominance and Monopolies Review has observed rapid development in abuse of dominance rules. If anything, the past year has seen more developments than ever before, including loud calls for an overhaul of antitrust rules to address perceived challenges raised by the digital economy.

Professor Carl Shapiro argues ‘we need to reinvigorate antitrust enforcement in the United States’. US presidential hopeful Elizabeth Warren claims that ‘competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere’. Nobel Prize economist Joseph Stiglitz contends that ‘current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace’.

Against this background, governments have commissioned several thoughtful reports on whether competition law should be reformed. These include, in the UK, a report entitled Competition in Digital Markets, by a committee chaired by Professor Jason Furman; in the EU, a report entitled Competition Policy in the Era of Digitisation, written by Professors Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye; and in Germany, a report entitled Modernising the Law on Abuse of Market Power, by Schweitzer and others. In parallel, greater regulation of the digital sector is already underway through, for example, the General Data Protection Regulation in Europe (which has triggered calls in the US to adopt a comparable framework); an EU platform-to-business regulation; and digital services taxes in France and the UK.

But even as these reports and regulations discuss and formulate new rules, the case law and decisional practice on abuse of dominance has continued to evolve as well. For example, in the EU, the courts reached notable decisions in MEO, Servier and Slovak Telekom, while the Commission continued its active enforcement in cases such as Google Android, Qualcomm and Google AdSense for Search. In the US, the Supreme Court reached its long-awaited decision in American Express, while the Californian District Court found that Qualcomm had violated antitrust laws in the landmark judgment of FTC v. Qualcomm. In Germany, the Federal Cartel Office identified a novel abuse concerning Facebook’s terms and conditions relating to its use of user data. And in China, Brazil, Japan, the UK and other countries, authorities and courts reached several notable decisions – and continue to pursue investigations – in the pharmaceutical sector.

The seventh edition of The Dominance and Monopolies Review provides a welcome overview for busy practitioners and businesses who need an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by a specialist local expert – summarises the abuse of dominance rules in a jurisdiction; provides a review of the regime’s enforcement activity in the past year; and sets
out a prediction for future developments. From those thoughtful contributions, we identify three themes in 2018 enforcement.

**Scrutiny of digital platforms**

Digital platforms continue to come under intense antitrust scrutiny. As discussed in the EU chapter, in the *Android* case, the Commission fined Google a record-breaking €4.34 billion for imposing allegedly illegal restrictions on Android device manufacturers. Finding Android dominant in a market that excludes Apple, the Commission claims that Google’s pre-installation of its search and browser apps prevents users accessing rival services and forecloses competition. The Commission kept up its focus on Google by also fining it €1.49 billion in a separate case relating to alleged exclusivity clauses in contracts with third-party websites (*AdSense for Search*).

Perhaps even more strikingly, in Germany, the Federal Cartel Office found that Facebook’s terms and conditions relating to its collection of user data constitute an exploitative abuse of dominance. Specifically, the Federal Cartel Office – relying on German law principles that a breach of fundamental rights can constitute an abuse of dominance – held that Facebook committed an abuse by combining data from different sources (such as WhatsApp, Instagram and Facebook) without satisfactory user consent. Contrary to some reports, the case was therefore not about the amount of data Facebook collected. Rather, it concerned whether it was lawful for Facebook to combine users’ Facebook profiles with data from, for example, WhatsApp without effective user consent.

Interestingly, Commissioner Margrethe Vestager has stated that the *Facebook* decision could not ‘serve as a template’ for EU action because the case ‘sits in the zone between competition law and privacy’. That reflects case law from the European Court of Justice in *Asnef* that ‘issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection’. Likewise, in its *Facebook/WhatsApp* decision, the Commission stated that ‘privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules’.

Several of the Policy Reports mentioned above recommend stricter regulation of online platforms, and establishing a set of ‘pro-competition’ *ex ante* rules (in line with calls made by economics professor Jean Tirole for ‘participative antitrust’). This may have some benefits over a reliance only on *ex post* enforcement. If designed in cooperation with stakeholders, such *ex ante* rules may enhance consumer welfare better than enforcement in individual cases. But there is a concern about proliferation of unharmonised initiatives in various jurisdictions: online platforms are typically active internationally. They must comply with rules in all countries where they are active, and have to take into account the combined effect of practice codes, platform regulation and reinforced competition enforcement. If they face a combination of policies to make it easier to find intra-platform dominance, impose stricter rules for unilateral conduct, reintroduce form-based abuse principles (or reverse the burden of proof, requiring defendants to prove absence of anticompetitive effects), eliminate a requirement to show consumer harm, show greater tolerance of over-enforcement and ‘false positives’ – all examples of policy recommendations – the cumulative effect may be stifling.

This concern is even more pressing when combined with procedural proposals to speed up proceedings and make appeals more difficult. While it makes sense to accelerate proceedings and – where appropriate – use interim measures more widely and wisely, this should not be at the expense of due process and the rule of law.
On the other side of the Atlantic, in terms of digital platforms, the past year was notable for the US Supreme Court’s decision in *Ohio v. American Express*. As discussed in the US chapter, that case will have significant implications for future monopolisation cases in multi-sided markets. The Supreme Court held that ‘anti-steering provisions’ in American Express’s contracts – which prohibit merchants from encouraging customers to use credit cards other than American Express by, for example, stating that the merchant prefers Visa or Mastercard – do not violate antitrust laws. Importantly, the Court held that competitive effects on both sides of the market need to be considered (merchants and cardholders) when assessing overall effects on competition: identifying a price rise on one side of the market is insufficient to prove anticompetitive effects – one needs to consider the overall effect on the platform as a whole. In this respect, the decision is consistent with the European Court of Justice’s *Cartes Bancaires* decision, which finds that it is always necessary to take into consideration interactions between ‘the two facets of a two-sided system’.

**Focus on pharmaceutical sector**

There is a continued focus on the pharmaceutical sector, through a variety of different cases covering both exploitative and exclusionary abuses. In the UK, for example, the Competition Appeal Tribunal (CAT) quashed the Competition and Market Authority’s (CMA) landmark 2016 decision to fine Pfizer and Flynn £90 million for charging excessive prices for phenytoin sodium tablets (an anti-epileptic drug), discussed in the UK chapter. The CMA had considered that overnight price increases of 2,600 per cent after the drug was de-branded were excessive and broke competition rules. The CAT found that the CMA applied the wrong legal test for identifying excessive prices. It failed to identify the appropriate economic value of the drug. It also wrongly ignored the price of comparable products, such as the price for phenytoin sodium capsules. Unsurprisingly, the CMA has expressed disappointment with the judgment and is appealing it before the Court of Appeal. The CMA has other excessive pricing cases in the pharmaceutical industry in the pipeline and the direction of those cases may turn on the outcome of the appeal proceedings. Given the increase in exploitative abuses in Europe – with cases at the EU Commission, Germany, France and Italy – there is keen interest in the appeal, and the EU Commission has applied to intervene.

There is enforcement activity in pharmaceuticals outside the sphere of excessive pricing. In its *Remicade* case, the CMA issued a notable no grounds for action decision after issuing a statement of objections, finding that Merck’s volume-based discount scheme was not likely to limit competition from biosimilar products. In *Servier*, by contrast, the EU General Court upheld much of the Commission’s findings that pay-for-delay agreements between Servier and generic manufacturers relating to its blockbuster drug perindopril constituted restrictions by object contrary to Article 101 of the Treaty on the Functioning of the European Union (TFEU). The judgment is noteworthy for abuse of dominance, however, for three main reasons:

- **a** The judgment – coming in at 1,968 detailed paragraphs – illustrates how the General Court is increasingly subjecting Commission decisions to extremely detailed and thorough judicial review.
- **b** The Court annulled the Article 102 of the TFEU part of the Commission’s decision due to errors in the market definition – one of the very few cases where the Commission has not prevailed on market definition at the court level.
- **c** When assessing the anticompetitive effects of the conduct, the Court held it would be ‘paradoxical’ to permit the Commission to limit its assessment to likely future effects in a situation where the alleged abusive conduct has been implemented and its actual effects can be observed. In this respect, the judgment is consistent with Mr Justice Roth’s observation in *Streetmap* that he would ‘find it difficult in practical terms to
reconcile a finding that conduct had no anticompetitive effect at all with a conclusion that it was nonetheless reasonably likely to have such an effect’.

**Standard-essential patents**

The third theme of 2018’s enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms, especially around Qualcomm’s licensing practices. In 2015, China’s National Development and Reform Commission fined Qualcomm US$975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission followed suit, fining Qualcomm US$854 million. In January 2018, the EU Commission fined Qualcomm €997 million for making significant payments to Apple on the condition that Apple would not buy baseband chipsets from rivals. And most recently, Judge Koh issued her decision in the *FTC v. Qualcomm* (discussed in the US chapter) finding that Qualcomm violated antitrust laws.

In the US case, the FTC alleged that Qualcomm would only supply its modem chips to mobile phone manufacturers that agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm even when using modem chips bought from Qualcomm’s rivals. The FTC claimed this ‘no licence, no chips’ policy imposed an anticompetitive tax on competing chips. In her opinion, Judge Koh reached several notable findings:

- **a** The ‘no licence, no chips’ policy is anticompetitive.
- **b** Qualcomm’s provision of incentive funds to manufacturers such as Apple constituted *de facto* exclusive deals that were also anticompetitive.
- **c** Qualcomm’s refusal to license its SEPs to other chip suppliers violates its FRAND commitments and is anticompetitive, too. The Court also found that Qualcomm’s refusal to license is tantamount to an anticompetitive refusal to deal because it was the termination of a prior, voluntary and profitable course of dealing.
- **d** Qualcomm’s royalties for its SEPs are unreasonably high. In particular, Qualcomm’s contributions to the standards do not justify its high rates and its SEPs do not drive handset value (and so taking a percentage of handset value is inappropriate).

Overall, the combined effect of these practices was to cause the exit of, or to foreclose, rival chip manufacturers, raise prices for chips, and to slow innovation. The judgment was scant comfort for the many competitors that have, in the meantime, left the modem market, but is important as a benchmark for licensing of SEPs for 5G and the internet of things. The proceedings were remarkable in that they led to an unusual juxtaposition between the US Department of Justice Antitrust Division (led by Makan Delrahim, a former lobbyist for Qualcomm who is recused from any case involving Qualcomm but who has clocked up a high number of speeches in favour of the SEP owners’ position) and the US Federal Trade Commission, which was deadlocked and thus allowed the legal proceedings to continue to judgment.

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

*Maurits Dolmans and Henry Mostyn*  
Cleary Gottlieb Steen & Hamilton LLP  
London  
June 2019
Chapter 1

ARGENTINA

Camila Corvalán

I INTRODUCTION

Antitrust legislation began in Argentina with the enforcement of Act No. 11,120, which was inspired by the provisions of the antitrust law in the United States. This Act was replaced by Act No. 12,906, which was in turn replaced by Act No. 22,262 in 1980.

The enforcement of Act No. 22,262 resulted in the establishment of the first antitrust agency of Argentina, the National Commission for the Defence of Competition (CNDC), which focuses on targeting and sanctioning anticompetitive conduct.2 Finally, on 25 August 1999, this Act was abrogated and replaced by Act No. 25,156, which was complemented by regulations regarding the procedures established in them.3 Some of the sections of Act 25,156 were modified in September 2014 under Act No. 26,993.

On 24 May 2018, a new Antitrust Law entered into force, Law No. 27,442 (the new Antitrust Law), which is the current law. On the same day, the new Antitrust Law was complemented by Decree No. 480/2018. This new Law has implemented substantial changes in the antitrust system, in both the analysis of anticompetitive conduct and merger control review. With this new Law, Argentina has moved forward as regards antitrust legislation.

Further to the aforementioned specific regulations, the Argentine Constitution promotes effective competition and efficiency among markets in Argentina and intends to protect consumers’ welfare.

Currently, and with the enactment of the new Antitrust Law, the authority that will enforce the new Antitrust Law and its complementary regulations is the National Competition Authority (ANAC). Further, the Anticompetitive Conducts Trial Secretariat, the Economic Concentrations Secretariat and the Antitrust Tribunal will operate within this new independent authority. However, until the ANAC is established, the enforcement of the new Antitrust Law is in the charge of the Secretariat of Domestic Trade, with the aid of the CNDC, currently led by its president, Esteban Greco.

Further, the CNDC is also still the agency that investigates both anticompetitive conduct and merger and acquisition procedures as a formal requirement of the Secretariat, which has full power to investigate and decide on the existence of anticompetitive conduct, either at the request of a party or ex officio,4 until the ANAC is created.5

1 Camila Corvalán is a senior associate at Beccar Varela.
2 Section 6 of Act No. 22,262.
4 Section 20 of the new Antitrust Law.
5 Section 80 of the new Antitrust Law.
The investigations of anticompetitive conduct or analyses of mergers and acquisitions made by the CNDC end with a non-binding recommendation to the Secretariat, which will make the final decision in the case, subject to analysis (this applies to both merger and acquisition reviews and investigation procedures). The decisions of the Secretariat may be appealed by parties to the judicial courts.

II YEAR IN REVIEW

In 2018, according to public sources,6 the antitrust authorities closed investigations in 21 anticompetitive cases. These 21 cases involved the analysis of claims and investigations of possible anticompetitive conduct (including but not limited to abuse of dominant position). As in 2017, the majority of the cases were closed because the antitrust authorities accepted the explanations given by the companies under investigation.

Notwithstanding the above, the antitrust authorities opened new investigations. In 2018, the antitrust authorities, through the CNDC, opened two market investigations.

Regarding the PRISMA case7 (in which the CNDC stated, as a result of an analysis regarding the credit card and electric payments markets, that the company has a dominant position in some sub markets), in 2017, the Secretariat approved the proposal filed by the company.

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

Further, in 2018, the Antitrust Authority imposed a fine of 42,732,771 Argentine pesos on Sociedad Argentina de Autores y Compositores de Música (SADAIC) for excessive pricing. The file was initiated as a result of a claim made by Federación Empresaria Hotelera Gastronómica, an Argentine entity that represents hotels and gastronomic activity, in relation to the tariffs that SADAIC applies to hotels for the reproduction of music through TV sets. The Federation alleged that SADAIC was imposing unilateral and arbitrary tariffs that were abusive (the tariffs were not calculated on the basis of real hotel rates and did not take hotel occupancy into consideration), and this was later proved by the CNDC. After a long analysis, the Antitrust Authority concluded that the prices fixed by SADAIC were abusive and so recommended that the Executive Power enact a new regulation establishing guidelines to fix prices based on the criteria of reasonableness, non-discrimination, transparency and equity.

6 www.argentina.gob.ar/defensadelacompetencia.
7 Prisma Medios de Pago, concerning a request for confidentiality in the main proceedings; ex officio investigation against Prisma Medios de Pago SA and its shareholders under the terms of Articles 1 and 2(a), (f), (g), (h), (j), (k) and (l) of Act No. 25,156 (1613), File No. s01: 0306673/2017.
III MARKET DEFINITION AND MARKET POWER

According to Argentine legislation and usual practices, the analysis of anticompetitive acts, conduct or behaviour follows a procedure in which, as a first issue, the definition of the scope of the relevant product and geographic market involved in the investigation is highlighted. Following this, the antitrust authorities focus mainly on the analysis of market power and market shares of the companies involved in the case. Further to the analysis of the market shares of the companies, the antitrust authorities also focus their attention on barriers to entry, efficiency gains, technological advantages, chains of commercialisation and market power, among other things.

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

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

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

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

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

9 Once current competitors are determined and identified on the demand side, the CNDC analyses a second aspect in its determination of the relevant market for the product associated with the probability of a new supplier entering the market in the short or medium term. This issue is known technically as ‘supply-side substitutability’. This probability of entrance to the market involves the following factors: that other players exist, possibly at an international level, that potentially have an interest in entering the market, if conditions are checked for this; and most important, the level of barriers to entry to the market.
IV ABUSE

i Overview

The new Antitrust Law applies to all behaviours that have effects in the Argentine territory. This means that the new Antitrust Law is applied not only to acts and behaviours that occur in the Argentine territory, but also to certain acts or behaviours that take place in other countries and that have effects on the Argentine market.

With the enforcement of the new Antitrust Law, certain practices are considered per se illegal; this is new in the Argentine antitrust system, taking into consideration that, before the enforcement of the new Antitrust Law, all anticompetitive conducts were analysed by the rule of reason criterion. These practices, which are considered per se illegal, must be deemed null and will not generate any kind of effect. Practices considered per se illegal are listed under Section 2 of the new Antitrust Law, as follows:

- fixing, directly or indirectly, the price of the purchase or sale of products or services;
- establishing obligations of manufacturing, distributing, buying or commercialising a limited amount of goods, or providing a limited number, volume or frequency of services;
- dividing, distributing or horizontally imposing areas, portions or segments of the markets, clients or supply sources; or
- establishing or coordinating submissions or abstentions in public tenders.

Section 1 of the new Antitrust Law establishes that acts or behaviours relating to the production or trading of goods and services that limit, restrict or distort competition or constitute abuse of a dominant position in a market in a way that may result in (potential or actual) damage to the general economic interest, are prohibited and shall be sanctioned pursuant to the rules of the Law.

Further, Section 3 of the new Antitrust Law provides a detailed list of anticompetitive conduct that could be considered unlawful by the competition authorities. The types of anticompetitive conduct that will be analysed by the rule of reason criterion are:

- fixing, agreeing or manipulating, directly or indirectly, the price for the sale or purchase of goods and services in the market, as well as exchanging information for the same purpose or to the same effect;
- establishing obligations to produce, process, distribute, purchase or commercialise only a restricted or limited quantity of goods, or rendering a restricted or limited number, volume or frequency of services;
- agreeing upon the limitation or control of the technical development or investments bound to the production or commercialisation of goods and services;
- preventing or precluding third parties from entering or staying in a market, or excluding them from a market, or rendering this difficult;
- regulating goods or services markets, by agreeing to limit or control research and technological development, the production of goods or the rendering of services, or rendering difficult the investments bound to the production or distribution of goods and services;
- subordinating the sale of an asset to the acquisition of another or to the use of a service, or subordinating the rendering of a service to the use of another or the acquisition of an asset;
g submitting a purchase or sale to the condition of not using, acquiring, selling or supplying goods or services produced, processed, distributed or commercialised by a third party;

h imposing discriminatory conditions to the acquisition or alienation of goods or services, with no reason grounded on commercial uses and customs;

i refusing, without justification, to meet specific orders for the purchase or sale of goods or services, made in the conditions standing in the market involved; or

j suspending the supply of a dominant monopoly service in a market to a user of public utilities or public interest service.

The two basic offences under Section 3 of the new Antitrust Law are the limitation, restriction or distortion of competition or access to the market, and the abuse of dominant position. To be illegal, the two offences must be able to cause damage to the ‘general economic interest’; this concept, while included in the new Antitrust Law, is not defined in the text of the Law, and has been interpreted, on several occasions, by courts and scholars in various ways. Currently, the undefined term ‘general economic interest’ is mostly likened to ‘consumer welfare’, which may be damaged if a conduct, act or behaviour has the potential to cause an increase in price or a reduction of the offer of the relevant product defined within the framework of an investigation.

Section 3 of the new Antitrust Law details 12 practices that are, to the extent that they fit in any event described in Section 1, anticompetitive. This list is not exhaustive; any conduct shall be considered anticompetitive when actions of Section 1 are involved.

Chapter 2, Section 5 of the new Antitrust Law is exclusively focused on dominant position. The definition of dominant position is stated in the new Antitrust Law as follows:

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

To establish the effective existence of dominant position, Section 6 details a number of circumstances that shall be taken into account at the moment of analysing the position:

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

b the existence of regulatory restrictions that limit access to products, the offer of products or demand in the markets involved; and

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

Dominant position is not forbidden by the new Antitrust Law – the prohibition is only focused on the abuse of such dominant position. The abuse of dominant position is a unilateral

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10 This concept was confirmed by the Supreme Court of Justice in In Re A Gas and Others v. AGIP Argentina SA and Others, concerning infringement of Act No. 22,262.

11 Section 5 of the new Antitrust Law.
conduct and, therefore, is not reliant on any kind of contract or agreement with competitors or third parties. According to the antitrust authorities, unilateral conduct ‘stumbles upon the difficulty of determining to what extent such conducts are part of a valid or competitive behaviour or constitute or result manoeuvres whose meaning is simply to create impediments to entry or reside of competitors in a market’. Further, in May 2019, the CNDC published a guide for the analysis of exploitative abuse of dominant position. The aim of the guide is to establish different guidelines for foreseeable decisions.

ii Exclusionary and exploitative abuse: price discrimination

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

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

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

In general terms, and considering the provisions established in Section 5 of the new Antitrust Law, a company is considered to have a dominant position when it is the only supplier of certain goods or services or when, as a consequence of the vertical or horizontal degree of integration, it is able to determine the economic feasibility of a competitor or participant on the market.

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

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

In practice, such criteria may be used as guidelines when determining what shares may enable a company to act independently from its competitors. Following the practical approach usually adopted by the EU Competition Commission, it is possible to argue that shares lower than 30 per cent do not normally imply a position of dominance, while shares higher than 50 per cent do.

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

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12 Secretary of Trade, CNDC, Clorox Argentina SA, concerning infringement of Act No. 25,156 (Case 1122).
As previously mentioned, there is no specific prohibition in the new Antitrust Law for having a position of dominance, just for the abuse of it. Therefore, companies that have a dominant position should avoid participating in what may be considered as abusive conduct. Such conduct may include, but is not limited to:

a. refusing to accept orders without objective reasons that justify such refusals;
b. selling at prices that are equal to or below cost;
c. imposing abusive contractual conditions;
d. lowering prices temporarily (predatory pricing);
e. applying temporary discounts or better conditions in specific areas with the aim of eliminating actual or potential competitors;
f. applying different prices or sales conditions in similar scenarios (price discrimination);

and
g. subordinating the purchase or the sale (or the purchase or sale under certain conditions) to the condition of not using, buying, selling or providing goods or services offered by a third party, or subordinating the purchase of goods or services to the purchase of other goods or services.

The most important case in Argentine competition history regarding the abuse of a dominant position involved exploitative conduct, specifically, price discrimination, in 2002.14

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

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

V REMEDIES AND SANCTIONS

i Sanctions

Penalties for anticompetitive conducts are detailed in Section 55 of the new Antitrust Law. Infringements of the new Antitrust Law regarding the abuse of a dominant position may result in harsh consequences for both the infringing company and its individual employees. Under the current legislation, penalties for infringing the new Antitrust Law are determined as follows: fines will increase to the higher of:

a. 30 per cent of the turnover of the business associated with the infringement in the previous fiscal year, multiplied by the number of years of the infringement (the latter with a cap of 30 per cent of the total Argentine consolidated turnover of the infringing parties in the previous fiscal year); or

b. twice the amount of the economic benefit caused by the infringement.

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In the event that both methods can be used, the method that achieves the higher amount for the fine will be used.

Further, if the foregoing criteria cannot be applied, fines will be imposed by the ANAC with a cap of 200 million unidades móviles. In the case of a repeat offence, offenders’ fines may be doubled. As well as the fine, the ANAC may require the immediate ceasing of the acts or conducts and, if considered necessary by the ANAC, the removal of offenders’ effects.

To determine the sanctions, the authorities take into account, among other things:

- the loss suffered by all the individuals and companies that have been affected by the unlawful activity;
- the benefit obtained by all the individuals and companies that were involved in the activity;
- the market positions of the companies involved in the investigation;
- the accounts of the companies involved in the investigation;
- the duration of the conduct subject to investigation;
- an estimation of the inflated prices generated by the conduct subject to investigation;
- the characteristics of the products involved and their contribution to the welfare of society; and
- the value of the products that are part of the investigation as well as the assets held by the individuals involved.

The CNDC has stated in a precedent that when sanctioning collusive conduct, penalties should be established for an amount that ‘may compensate society for the damage caused; and be superior to the benefits obtained by the companies involved in the case’. The logic behind the pecuniary fine is that the imposition and the amount of the fine act as disincentives for those considering engaging in anticompetitive conduct.

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

Further, the companies are liable for the acts of their employees (even those who are not in a managerial position) performed on their behalf, for their benefit or with their assistance. As a consequence of the aforementioned, directors, managers, administrators, receivers or members of a surveillance commission who contribute, encourage or permit an infringement are joint and severally liable regarding the imposition of the fine.

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

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

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15 The unidad móvil is a coefficient updated annually by the Argentine inflation index. The value of one unidad móvil is currently fixed at 26.40 Argentine pesos.

16 CNDC, Oficina anticorrupción, concerning an intervention request (Case 1142), 4 December 2015.
ii Behavioural remedies
As mentioned above, the antitrust authorities may enforce conditions aimed at neutralising the distorting aspects of competition or may ask a judge that the offending companies be dissolved, liquidated, deconcentrated or divided.

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

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

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

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

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

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

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

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

VII PRIVATE ENFORCEMENT
Regarding private enforcement, Section 62 of the new Antitrust Law provides that ‘any person damaged by anticompetitive practices may bring an action for damages in accordance with civil law before a judge having jurisdiction over the matter’.

Two relevant cases that involved claims for damages, and had previously been sanctioned by the CNDC, were initiated as a consequence of anticompetitive conduct. One was a cartel case and the other focused on an abuse of dominant position.
The first\textsuperscript{17} was rejected by the judge for lack of legitimacy. In the second case,\textsuperscript{18} the judge estimated that the damages amounted to 13,094,457 Argentine pesos plus the costs of the process.

The new Antitrust Law includes new provisions regarding private enforcement; the changes focus on establishing a more efficient and faster procedure. The parties in a case should file the claim once the administrative decision imposing a sanction is final. The administrative decision will be binding on the civil judge and the case will be heard under expedited procedural rules. Further, parties who have benefited from leniency applications will be exempted from civil liability. This last rule has the following exceptions: claims by defendants’ purchasers or their direct and indirect suppliers, and cases in which the defendants could not obtain complete redress of their claim from parties who have not benefited from leniency applications.

\textbf{VIII FUTURE DEVELOPMENTS}

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

\textsuperscript{17} Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía Industrial Argentina SA and others.

\textsuperscript{18} Asociación Protección Consumidores del Mercado Común del Sur v. Loma Negra Cía Industrial Argentina SA and others, Supreme Court of Justice Decision of 2 October 2015.
INTRODUCTION

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

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

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

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

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

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

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

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

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

- substantially damaging or eliminating a competitor;
- substantially damaging or eliminating competitors generally, a class of competitors or any particular competitor;
- preventing or deterring anyone from engaging in competitive conduct in any market.

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

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

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

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

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

II YEAR IN REVIEW

Understandably, in the past two years, the ACCC has been vocal in emphasising the focus of the amended Section 46 provision on the protection of the competitive process. On the same day that the amended law took effect, the ACCC issued interim guidelines as to the ACCC’s interpretation of the provision and its investigations into alleged conduct. In the period since the amendment, the ACCC has yet to bring proceedings under the new provision.

Indicative of the ACCC’s change of focus is its continued emphasis on its priorities regarding conduct that may contravene the new misuse of market power provisions among the regulator’s priorities for the year ahead.\(^8\) The only Section 46 case currently being considered is *ACCC v. Ramsay*.

In May 2017, the ACCC instituted proceedings against Ramsay Health Care Australia, the largest private hospital operator in the country. The ACCC has alleged that, in response to a group of surgeons planning to establish a competing private day surgery facility in a regional town, Ramsay threatened to impose restrictions on surgical consultants who operate in its hospitals in the region if they also conducted procedures at the proposed competing day surgery.\(^9\) Further, the ACCC alleges that this conduct resulted in the competing surgeons suspending their plans to establish a day surgery. The hearing commenced in early 2019.

On 19 October 2018, the High Court refused special leave to appeal the decision of the Federal Court in *Australian Competition and Consumer Commission v. Pfizer Australia Pty Ltd*.\(^10\)

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

\(a\) had substantial market power in the Australian market for the supply of atorvastatin to pharmacies;

\(b\) held that market share because the patent prevented any other party from supplying the product; and

\(c\) took steps to prohibit the loss of market share to generics, and took advantage of its market power with the substantive purpose of deterring or preventing other suppliers from engaging in competitive conduct.

At first instance, the court found that Pfizer possessed a substantial degree of market power, but it was not persuaded that the steps taken had the purpose of deterring or preventing...
competitive conduct. Relevantly, the court held that Pfizer’s conduct was pursued for the purposes of ensuring it remained competitive following the expiry of the patent. The court also found that there was a legitimate reason for each of the steps undertaken by Pfizer, rather than for the prescribed purpose in the provision of deterring or preventing competitive conduct.

On appeal, the Full Federal Court upheld the primary judge's decision finding that Pfizer did not have the requisite prohibited purpose for contravention of Section 46. Special leave to appeal to the High Court was dismissed on 19 October 2019.

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

Active competition authority cases
The active competition authority cases are set out in the following table.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
</tr>
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<tbody>
<tr>
<td>Healthcare</td>
<td>ACCC</td>
<td>Alleged misuse of market power and exclusive dealing in relation to restrictions alleged to have been imposed by Ramsay Health Care on surgical consultants who proposed working in competing hospitals</td>
<td>May 2017</td>
</tr>
</tbody>
</table>

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

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

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

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12 Safe is Safe Pty Ltd v. Royal National Agricultural and Industrial Association of Queensland [2016] FCA 770.
Owing to the input-intensive nature of the HMT analysis, the ACCC limits its inquiry in most cases to examining a list of product and geographic characteristics that tend to satisfy the test.¹⁴ This analysis consists of physical characteristics and portability, respectively, but also economic metrics such as cross-elasticity of demand.

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

ii Market power

Unlike most other jurisdictions, there are no statutory or court-based market-share presumptions. Proof of market power in Australia always needs to proceed on the basis of a full economic analysis. Market shares are helpful in identifying the degree of market power; however, a large market share does not necessarily mean that there is a substantial degree of market power in that corporation. Section 46(7) provides that more than one corporation may have a substantial degree of market power in a market. Australian courts place significant focus on the existence and scale of barriers to entry in determining to what extent an entity possesses market power.¹⁵ Courts have also placed weight on other evidence of related but distinct indications of market power,¹⁶ including:

a the ability of the firm to raise prices above the supply cost without rivals taking away customers in due time;
b the extent to which a corporation’s conduct in the market is constrained by that of competitors or potential competitors;
c the market share of the corporation (although not determinative by itself);¹⁷ and
d the existence of vertical integration.

In its interim guidelines for market power, the ACCC indicates that market power exists where a firm can only engage in the conduct in question absent competitive constraint. This freedom, the ACCC notes, can be assessed having regard to the factors indicated in Queensland Co-operative Milling Association Limited and Defiance Holdings Limited:¹⁸

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

¹⁴ ACCC’s Merger Guidelines.
¹⁷ A market share of 30 per cent has been referred to as indicative of market power in Boral Besser Masonry Ltd v. ACCC [2003] HCA 5; 215 CLR 374.
¹⁸ (1976) 8 ALR 481, 512.

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An important element of the analysis is determining whether market power is ‘substantial’ in nature. For market power to be substantial, courts have held that it needs to be ‘real and of substance rather than trivial or minimal’,19 or put another way, ‘large or weighty’ or ‘considerable, solid or big’.20

Courts have held that merely because a corporation is not profitable does not mean that it lacks market power.21 Financial power is also not evidence of market power.22

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

iii Purpose or likely effect of substantially lessening competition

Substantial market power

For the provision to apply, it is necessary to establish that a corporation has substantial market power. Such market power can be described to be ‘considerable’, ‘big’ or ‘not merely nominal’.23 The explanatory memorandum accompanying the bill introducing the concept in 1986 indicated that substantial was to be regarded as ‘large or weighty’ or ‘considerable, solid or big’.24

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

The ACCC, in its interim guidelines, has observed that ‘conduct substantially lessens competition when it interferes with the competitive process in a meaningful way by deferring, preventing or limiting competition. This can be done by raising barriers to entry or to entry into a market’.25 As noted elsewhere in this chapter, ‘substantial’ must be meaningful to the competitive process.26,27 The ACCC identifies at Paragraph 2.26 of its interim guidelines

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24 See also Eastern Express Pty Ltd v. General Newspaper Pty Ltd (1992) 106 ALB 297; 35 FCR 43; (1992) ATPR 4-16 at 63 (FCR).
26 ibid. at Paragraph 2.27.
that lessening competition means that the field of rivalry is diminished or lessened, or that the competitive process is compromised or impacted. The ACCC notes that the commercial rationale for the conduct will be relevant to the assessment.\(^\text{28}\)

### IV ABUSE

#### i Overview

The prohibition in Section 46 requires not only satisfaction of the elements of market power and engaging in conduct with the purpose or likely effect of substantially lessening competition. Section 46(4) provides the following non-exhaustive list of factors the court may consider to determine whether a corporation has taken advantage of market power:

- whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;
- whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
- whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market; and
- whether the conduct is otherwise related to the corporation's substantial degree of power in the market.

#### ii Purpose

The purpose element in Section 46(1) will be established where it can be shown merely that there is an intention to achieve a result,\(^\text{29}\) rather than the fulfilment of that intention.\(^\text{30}\) While courts have taken a range of approaches to determining purpose, including assessing conduct on a subjective basis,\(^\text{31}\) it appears likely that the position going forward is that, while there are subjective elements to assessing purpose, the ultimate test is objective.\(^\text{32}\) In the *Telstra Corporation* case, the Federal Court placed weight on the requirement, which provides that the court may find that a corporation's purpose where that purpose is ascertainable only by inference from the corporation's conduct or the conduct of any other person, or from other relevant circumstances. The Court took the approach that if, upon consideration of the nature and substance of the conduct, it can be said that the substantial purpose for that conduct was to substantially lessen competition, or if such a purpose can be inferred, it is not necessary to consider the subjective reasons for the conduct.\(^\text{33}\)

To contravene Section 46(1), the proscribed purpose need not be the sole purpose for the conduct, merely a substantial purpose.\(^\text{34}\) If the conduct was motivated by both a

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\(^{28}\) ibid. at Paragraph 2.27.

\(^{29}\) *Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd* (2001) 205 CLR 1; [2001] HCA 13, [31].


\(^{33}\) ibid. at [71].

\(^{34}\) CCA Section 4F.
legitimate purpose and purpose to substantially lessen competition, and both are substantial purposes, the corporation will have contravened Section 46(1). However, Section 46(1) will not be contravened where a corporation was motivated entirely by a legitimate purpose, or dual purposes where the purpose of substantially lessening competition was not substantial. For example, in Dowling v. Dalgety Australia Ltd, the respondents’ dominant purpose was to use their valuable asset without sharing it with a person who had no proprietary interest in it, and restricting competition was found to be a subsidiary purpose.

iii Exclusionary abuses

Predatory pricing

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

To establish predatory pricing, two questions will arise. First is assessing when will the price be sufficiently low to be regarded as predatory. The record is whether the prospect of recoupment is necessary. In relation to costs, the courts have yet to settle on the appropriate costs measure to establish predatory pricing. In Eastern Express Pty Ltd v. General Newspaper Pty Ltd, the court found that no specific category of pricing tends to imply a misuse of market power. Accordingly, it is not a contravention to supply goods or services below the relevant cost where such conduct places the corporation at risk of a contravention occurring when its pricing conduct is for the purpose or likely effect of substantially lessening competition. On the question of the recoupment, the Australian courts have not yet established that recoupment is necessary to establish a contravention. In Boral Besser Masonry Ltd v. ACCC, per Gleeson CJ and Callinan JJ, ‘While the possibility of recoupment is not legally essential to a finding of pricing behaviour in contravention of Section 46, it may be of factual impertinence’.

40 Now Boral Masonry Ltd.

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Accordingly, the ability to recoup may be an indication of market power, and if it in fact occurs and drives others from the market, it may have the effect of substantially lessening competition.

**Margin squeeze**

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

**Exclusive dealing**

The CCA specifically prohibits all corporations from, in trade or commerce, engaging in the practice of exclusive dealing where such conduct has the purpose, or would have the effect or likely effect, of substantially lessening competition.42

A refusal to supply may not substantially lessen competition if it does not alter the market structure by raising barriers to entry or reducing price competition, and is unlikely to substantially lessen competition if it is a refusal to supply one of a number of competing retailers in a generally competitive market.43

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

- supplies, or offers to supply, goods or services at a particular price, or at all, or gives or allows, or offers to give or allow, a discount, allowance, rebate or credit, on the condition that a person to whom a corporation supplies, or offers or proposes to supply, the goods or services (or a related corporation), will acquire goods or services directly or indirectly from another person (not being a related corporation);44 or
- refuses to supply goods or services at a particular price, or at all, or to give or allow a discount, allowance, rebate or credit, for the reason that a person (or a related corporation) has not acquired, or has not agreed to acquire, goods or services directly or indirectly from another person (not being a related corporation).45

Exclusive dealing conduct notified to the ACCC may be immunised unless the ACCC is of the opinion that the likely public benefit of the conduct will not outweigh the likely detriment.46

**Tying and bundling**

A tying scheme may fall within one of the exclusive dealing provisions discussed above if it has the purpose or likely effect of substantially lessening competition. If a corporation with

42 CCA Section 47(1).
44 CCA Section 47(6).
45 CCA Section 47(7).
46 CCA Section 93.
market power grants a discount on condition that a purchaser acquires other goods from it or a third party, such a tying or forcing arrangement may contravene Section 46(1) or Section 47(1) of the CCA.

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

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

Some refusals to supply or acquire goods or services for failure to comply with a requirement will contravene the exclusive dealing provisions in Section 47 of the CCA.

Refusal to license intellectual property rights can also attract Section 46(1) if the criteria are met.47

iv Discrimination
Price discrimination was specifically prohibited by the former statutory regime if it was likely to have the effect of substantially lessening competition. This provision was repealed in 1995 following a government report concluding that price discrimination generally enhances economic efficiency except in cases otherwise falling within Section 46.48 Price discrimination will only be prohibited if there is a misuse of market power where the purpose or likely effect of the conduct is the substantial lessening of competition in a relevant market. It will not constitute taking advantage of market power if it is justified by efficiency considerations.

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

v Exploitative abuses
Mere exploitation of market power by charging the maximum price the market will bear does not generally fall within Section 46(1), provided it does not take advantage of market power for a proscribed purpose such as to damage competitors.49 Different considerations

48 Repealed by the Competition Policy Reform Act 1995 (Cth) following recommendation of the 'Hilmer' Independent Committee of Inquiry, National Competition Policy (AGPS, Canberra, 1993) 79.
49 Pont Data Australia Pty Ltd v. ASX Operations Pty Ltd (1990) 21 FCR 385, 419.
may apply where a monopoly input supplier competes in a downstream market, and the high price charged has an exclusionary purpose and is associated with price discrimination or a price squeeze.

For example, BHP was held to have contravened Section 46(1) by offering to supply QWI with Y-bars at an ‘excessively high’ price, which would have made it impossible for QWI to compete with BHP in the downstream rural fencing products market.50

V REMEDIES AND SANCTIONS

i Sanctions

Section 76 of the CCA provides that a contravention of a provision of Part IV (‘restrictive trade practices’), including Section 46, can lead to pecuniary penalties of the largest of the following: A$10 million; where the court can determine the value of benefits that have been obtained that are reasonably attributable to the contravening act or omission, three times the total value of the benefits; or where the court cannot determine the value of benefits that have been obtained, 10 per cent of the annual turnover of the offender over the previous 12 months.51

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

In addition, a person who suffers loss or damage as a result of a contravention of Section 46 can recover the amount of the loss or damage against the offender.52

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

ii Behavioural remedies

The CCA also allows for the court to grant an injunction prohibiting a corporation from engaging in contravening conduct, or requiring a corporation to engage in particular conduct, where it is satisfied that the corporation has engaged in, or is proposing to engage in, conduct that constitutes or would constitute a contravention of the restrictive trade practices provisions.53 In addition to imposing fines and injunctions, the court can also make the following orders:

a a declaration in relation to the operation of Section 46;54

b non-punitive orders, being:

• community service orders;
• probation orders;
• orders for disclosure of information; or
• orders requiring the offender to publish an advertisement on the terms specified in the order;55

51 CCA Section 76(1A)(b).
52 CCA Section 82.
53 CCA Section 80(1)(a)(i).
54 CCA Section 163A(1)(a).
55 CCA Section 86C.
c an adverse publicity order in relation to a person who has been ordered to pay a fine for a contravention of Section 76;\textsuperscript{56} and

d a disqualification order preventing a person from managing corporations for a period the court considers appropriate.\textsuperscript{57}

The court may also make such orders as it thinks appropriate against the offender pursuant to Section 87 of the CCA if the court considers that the orders will compensate the person who made the application, or prevent or reduce the loss suffered, or likely to be suffered, by such a person.\textsuperscript{58} These orders may include:

\begin{itemize}
  \item a voiding a contract or certain provisions of a contract;
  \item b varying a contract;
  \item c refusing to enforce any or all of the provisions of a contract; or
  \item d an order directing the person who contravened Section 46 to:
    \begin{itemize}
      \item refund money;
      \item return property;
      \item pay the person who suffered loss the amount of the loss or repair; or
      \item provide services or parts for goods that had been supplied to the person who suffered the loss.\textsuperscript{59}
    \end{itemize}
\end{itemize}

iii Structural remedies

The CCA does not currently provide any structural remedies for contraventions of Section 46.\textsuperscript{60}

VI PROCEDURE

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

i Investigating and gathering evidence

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

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

ii Power to obtain information, documents and evidence

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

\textsuperscript{56} CCA Section 86D.
\textsuperscript{57} CCA Section 86E.
\textsuperscript{58} CCA Section 87(1).
\textsuperscript{59} CCA Section 87(2).
\textsuperscript{60} CCA Section 81.
to believe that a person is capable of doing so. Failure to comply with a notice is an offence punishable by a fine or imprisonment, and there is no privilege against self-incrimination. Legal professional privilege in respect of documents is preserved.

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

### iii Enforcement

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

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

### iv Undertakings

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

### v Court proceedings

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

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

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

### VII PRIVATE ENFORCEMENT

#### i Overview

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

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61 CCA Section 155(7).
62 See, for example, Australian Competition and Consumer Commission v. Ticketek Pty Ltd [2011] FCA 1489.
(in ‘piggy-back’ proceedings), private enforcement remains underutilised: of the five court decisions handed down in the past year that invoke Section 46, only two have resulted from private actions.\(^6^5\)

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

### ii Availability and remedies

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

Section 82 permits private litigants to seek damages for loss or damage suffered owing to the conduct of another party in contravention of Section 46.\(^6^6\) Section 80 also permits private litigants to seek an injunction restraining a party from engaging in certain conduct, or compelling a party to do a certain act or thing, so as to prevent or stop a breach of Section 46.\(^6^7\) Injunctive relief may be appropriate where a litigant wishes to prevent another party from initiating or continuing on a course of conduct, or to compel the other party to engage in some positive action (like in the case of a refusal to deal) in response to conduct that may amount to a misuse of market power.\(^6^8\)

### iii Calculation of damages

Courts are largely guided by general common law principles in assessing damages.\(^6^9\) To rely upon Section 82, the person must have suffered actual loss or damage (thus, potential damage is not sufficient).\(^7^0\) Secondly, there is a causal requirement that this loss or damage was sustained by the other party’s contravention. If it is found that such loss or damage has been incurred, then the court must quantify the loss, even if this requires a degree of

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\(^6^6\) CCA Section 82(1). Note that pecuniary penalties are available under Section 76 but are payable to the Commonwealth (so are not a private action remedy as such).

\(^6^7\) CCA Section 80(1).

\(^6^8\) Such as in the recent case of Ocean Dynamics Charter Pty Ltd v. Hamilton Island Enterprises Limited [2015] FCA 460 (www.austlii.edu.au/au/cases/cth/FCA/2015/460.html) in which the Federal Court granted an interlocutory injunction to restrain the respondent from preventing the applicant from using a marina (after the respondent decided not to renew a business licence agreement with the applicant). The applicant had a \textit{prima facie} case on the basis that the respondent’s refusal to deal constituted taking advantage of market power (the marina services market) for a proscribed purpose (either eliminating or substantially damaging the applicant in the luxury yacht market or deterring them from competitive conduct in that market) (at [8]).


\(^7^0\) Wardley Australia Ltd v. Western Australia (1992) 175 CLR 514, 526.
approximation or conjecture. Finally, in accordance with general principles governing damages, loss or damage under Section 82 encompasses economic or financial loss but may also extend to consequential loss that arises directly from the impugned conduct.71

iv Availability of collective actions

There are no competition law-specific collective actions, but collective actions to enforce the CCA are available under the general provision for commencement of representative proceedings.72 A collective action may be commenced only if seven or more persons have claims against the same person; the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and all the claims give rise to a substantial common issue of law or fact.

In relation to standing, a person who has a sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a collective action.73 Further, actions are subject to an opt-out regime, so that potential claimants who fall within a class definition will be members of that class unless they opt out, although it should be noted that in some cases, class definitions will be sufficiently narrow that they in effect require claimants to opt in (by defining members as those who have made arrangements with a certain funder or engaged a particular law firm).

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

v Interaction between government investigations and private enforcement

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

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

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

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

VIII FUTURE DEVELOPMENTS

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

The amended prohibition is intended to significantly increase the number of Section 46 cases taken on by the ACCC. It is also expected that there will be an increased number of private actions, given the simpler statutory construction of the provision. While there has yet to be a case brought under the new provision, because Section 46 is a stated ACCC enforcement priority for 2019, it is expected that, at the least, the ACCC will seek to test the parameters of the amended provision in the near future. In particular, the ACCC is focusing on conduct relating to the financial, agriculture, consumer electrical and white goods and commercial construction sectors.

It is also noteworthy that the ACCC’s chairman has unequivocally stated his intention to ensure that ‘penalties are sufficiently high to deter large companies from contravening the law’.74 He accepts that this tougher approach may well lead to fewer agreed settlements. All indications are that this new tough approach is likely to apply equally to future Section 46 cases.

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74 Rod Sims, ‘CCA compliance in interesting times’ (speech delivered at the Committee for Economic Development of Australia, Sydney, 24 February 2017).
Chapter 3

AUSTRIA

Bernt Elsner, Dieter Zandler and Vanessa Horaceck

I  INTRODUCTION

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

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

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

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

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

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1 Bernt Elsner and Dieter Zandler are partners and Vanessa Horaceck is an associate at CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH.
has published sector-specific notices on market dominance in the field of funeral services,\(^2\) motor vehicle distribution\(^3\) and on media cooperation between concert promoters and radio stations,\(^4\) as well as a notice on unfair trading practices in the supply chain.\(^5\)

No special rules apply to public sector or state-owned enterprises. Thus, Austrian antitrust law also applies to companies entirely or partially, directly or indirectly, owned by the state if these companies carry out an economic activity (functional approach).\(^6\) However, special rules apply to certain regulated industries, such as electricity, gas, telecommunications, post and railway, which are under the jurisdiction of industry-specific national regulatory authorities (e.g., the Telekom-Control Kommission, the Regulatory Authority for Broadcasting andTelecommunications, E-Control). In the course of the amendment of the KartG in 2013, the legislator intended to enact specific rules for energy supply companies in a dominant position. However, the parliament’s judicial committee in the review process rejected this proposal, as its legal implications were considered premature (apparently, the proposal faced heavy opposition from some Austrian federal states owning incumbent local electricity suppliers).\(^7\)

II YEAR IN REVIEW

Compared to the number of proceedings initiated by the FCA in previous years in the field of agreements and concerted practices restricting competition, public enforcement in the area of abuse of dominance has been very limited. This might also stem from the fact that in a number of recent cases the FCA has not been successful in arguing its case before the cartel courts; examples include the Taxi app case relating to exclusivity clauses,\(^8\) and more recently, the Liquid gas tank case relating to tying clauses.\(^9\) In both of these cases, the OGH did not follow the FCA’s arguments claiming an abuse of a dominant position. In the Flight ticket booking case, a private enforcement case initiated by an association of undertakings (professional association of travel agencies) against Lufthansa, the application of different prices on the Graz to Frankfurt route for flight bookings made in Austria and abroad was considered an unlawful price discrimination pursuant to Section 5, Paragraph 1, No. 3 KartG (applying different conditions for equivalent services) and Article 102 TFEU.\(^10\)

\(^2\) A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20zum%20Bestattungswesen.pdf (last accessed 15 April 2019).

\(^3\) A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20KFZ-Vertrieb.pdf (last accessed 15 April 2019).

\(^4\) A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/PDFs/Standpunkt%20-%20Medienkooperationen%20zwischen%20Konzertveranstaltern%20und%20H%C3%B6rfunk.pdf (last accessed 15 April 2019).

\(^5\) A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/BWB-Guidance_Fairness_in_business.pdf (last accessed 15 April 2019).

\(^6\) ECJ judgment of 23 April 1991, Case C-41/90, Höfner and Elser; judgment of 12 July 2012, Case C-138/11, Compass-Datenbank v. Republic of Austria; OGH 8 October 2015, 16 Ok 3/15z.

\(^7\) A German version of the judicial committee’s report is available at www.parlament.gv.at/PAKT/VHG/XXIV/I/I_02035/fname_277230.pdf, p. 3 (last accessed 15 April 2019).

\(^8\) OGH 27 June 2013, 16 Ok 7/12.

\(^9\) OGH 1 December 2015, 16 Ok 4/15z.

\(^10\) OGH 12 July 2018, 16 Ok 1/18k (16 Ok 2/18g), Fachverband Reisebüros v. Lufthansa – Flugticketbuchung.
Another recent case involved contracts on the supply of distribution data from pharmaceutical wholesalers to an information service provider in the healthcare sector, which contained a multi-supplier clause providing for reductions of the contractual remuneration in the event of the conclusion of a contract by the pharmaceutical wholesaler with a competitor of the information service provider. The contractual clause was contested by a competitor of the information service provider, and the OLG (in the interim relief proceedings) ordered the defendant to stop abusing its dominant position by applying multi-supplier clauses leading to a disproportionate reduction (in particular, a reduction of 40 per cent) of the contractual remuneration.

Other than that, the most recent published dominance case dates back to December 2015: in the Old-packaging recycling case, a competitor requested that another competitor be prohibited from abusing its dominant position by offering unprofitable prices for its services, for which the OGH confirmed the finding of an abuse of a dominant position by predatory pricing.

A case not directly relating to abuse of a dominant position under the KartG concerns a monopoly undertaking’s obligation to enter into a contract that was published very recently. In this decision, the OGH sets out the obligation of a subsidiary of a publicly owned company operating an airport with a taxi area (on private ground) to conclude a contract with taxi drivers who depend on access to this area for providing airport taxi services to their customers. The OGH’s ruling again confirms previous rulings that a monopolist’s refusal to contract or termination of a contract can only be based on justified reasons.

Another interesting Austrian case on a possible abuse of a dominant position, which has already kept the courts busy for more than eight years, relates to the newspaper boxes in front of and inside the Viennese underground stations offering the (free) Austrian yellow-press newspaper, Heute. The case was initiated by a competitor publishing another yellow-press newspaper, Österreich, also offered free of charge, which requested that the Viennese underground operator be prohibited from only allowing one (other) competing newspaper publisher to offer its newspaper (Heute) in front of and inside the Viennese underground stations free of charge. The competitor argued that such practice constitutes a violation of Section 5, Paragraph 1, No. 2 KartG (restricting offerings to the detriment of consumers), Section 5, Paragraph 1, No. 3 KartG (applying different conditions to equivalent services) and Article 102 TFEU. The OLG granted the request with regard to three specific underground stations but dismissed the remainder of the claim. Both parties appealed against this decision, and the OGH set aside the ruling and referred the case back to the OLG to further assess the exact market definition in order to assess the alleged dominant position of the Viennese underground station operator. In October 2018, the FCA reported that the parties have entered into a settlement pursuant to which the Viennese underground operator, inter alia, undertakes to not discriminate the publisher of Österreich against Heute or other competitors.

12 OGH 8 October 2015, 16 Ok 9/15g.
13 OGH 20 February 2018, 4 Ob 13/18t.
14 OGH 11 June 2015, 16 Ok 8/14h.
Owing to the small number of cases related to abuse of a dominant position, the table below lists the most important (fine) decisions in abuse of dominance cases before the Austrian cartel courts in recent years.

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

III MARKET DEFINITION AND MARKET POWER

i Market definition

The assessment of whether a company enjoys a dominant position is closely linked to the definition of the relevant product and geographic market. Before the Austrian courts, the market definition is an issue of fact when it comes to examining the objective delimitation criteria, and a legal question when it comes to choosing the methods to define a market.\(^{16}\)

When defining the relevant product market, the FCA and cartel courts follow the demand-side substitution concept, and thus analyse the substitutability of the goods or services from the demand-side perspective.\(^{17}\) However, in cases where the market position of a supplier or manufacturer is to be determined, it is also necessary to include the substitutability of the goods or services from the supply-side perspective (i.e., whether other suppliers or manufacturers are able and willing to adapt their product portfolio or production within a short time and without significant costs) when defining the relevant product market.

The small but significant and non-transitory increase in price test is often used when defining the relevant market. However, in accordance with the European Commission,\(^{18}\) the OGH takes the view that in cases of abuse of dominance, this test should be dealt with carefully, as the prices of a company holding a dominant position might already be above market level, with a further small price increase causing the demand-side to switch to a (false) substitute that could result in a too-broad market definition.\(^{19}\)

In accordance with EU law, the geographic market comprises the area in which the companies concerned compete, in which the conditions of competition are sufficiently homogeneous, and that can be distinguished from neighbouring areas because of appreciably different competitive conditions.\(^{20}\) Factors for determining the relevant geographic market

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17 See, for example, OGH 2 December 2013, 16 Ok 6/12.
18 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 19.
19 OGH 25 March 2009, 16 Ok 4/08.
20 Commission notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03), recital 8.
are thus the characteristics of the product (i.e., durability, limited transport capacity), the existence of market entry barriers or consumer preferences as well as significantly varying market shares of competitors in neighbouring areas. Thus, the geographic market is also defined through a substitutability test.

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

ii Dominance

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

Single dominance

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

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

When calculating market shares, the activities of all companies belonging to the same group active on the relevant market have to be taken into account. As an Austrian company particularity, the turnover of any non-controlling participations of at least 25 per cent may also have to be taken into account when it comes to market share calculation.21

Overall, the respective market share of a company (including its group companies) is still considered the most important factor in determining market power in case law. The OGH has classified a company having a 9522 and 6523 per cent market share as holding a dominant position. In cases of market shares below 60 per cent, particular consideration is given to the market position of the other competitors: that is, whether they have similar market shares, or whether one company is the only 'major' player with its competitors playing just a minor role in the market. In its assessment, the authorities and courts also take into account how market shares have developed to date and what is to be expected in the near future.

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

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


23 OGH 22 June 1999, 4 Ob 90/99k.
In addition to the general clause of Section 4, Paragraph 1 KartG, Austrian antitrust law foresees (rebuttable) market dominance presumption thresholds in Section 4, Paragraph 2 KartG in the case of a company holding a market share of:

- a at least 30 per cent;
- b more than 5 per cent, with only two other competitors being active in the same market; or
- c more than 5 per cent, with the company belonging to the four biggest companies in the market, which together hold a combined market share of at least 80 per cent.

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

In practice, the threshold of a 30 per cent market share receives a great deal of attention, in particular in merger control proceedings, while the other two presumptions so far have not gained any major practical importance, especially since the entry into force of the new presumptions for collective dominance (Section 4, Paragraph 2a KartG).

**Collective dominance**

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

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

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

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

**‘Relative’ dominance**

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

‘Relative’ market dominance exists if the respective business partner depends on a specific good or service (only) offered by a company taking into account possible alternative
Austria

sources of supply or demand. 24 So far, the Austrian courts have established ‘relative’ market dominance in cases of a (vertically integrated) film distributor in relation to its customers (i.e., independent film theatres). 25

Prohibition on granting dissimilar trading conditions for non-dominant companies

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

Note that while the title of the NahversorgungsG might suggest that it only applies to sectors relevant for local (food) supply (e.g., food retailers, supermarkets), the OGH has also applied its provisions to other economic sectors such as round timber 26 and running shoes. 27

IV  ABUSE

i  Overview

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

ii  Exclusionary abuses

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

With regard to predatory pricing, the Austrian Supreme Court followed the European Court of Justice (ECJ) rulings in AKZO, 28 Tetra Pak II 29 and Post Danmark, 30 according to which prices below the average variable costs are considered an indication of exclusionary conduct. It further held that in cases where prices are set above the average variable costs, but still below the overall costs, they are only considered abusive if it can be demonstrated that they are used to exclude competitors. 31

24 OGH 1 July 2002, 16 Ok 5/02.
27 OGH 26 June 2014, 16 Ok 12/13.
28 ECJ, 3 July 1991, Case C-62/86, Akzo.
30 ECJ, 27 March 2012, Case C-209/10, Post Danmark.
31 OGH 9 October 2000, 16 Ok 6/00.
By reference to the *Post Danmark* judgment, the Supreme Court confirmed the long run incremental cost method used in a case by a court-appointed expert to establish the existence of predatory pricing.32

Further, Section 5, Paragraph 1, No. 5 KartG (as Article 102 TFEU) specifically stipulates the abusive character of selling goods below cost. Based on the case law of the Austrian cartel courts, this provision only applies to the selling of goods below cost for a certain period and not to selling services.33 Moreover, Section 5, Paragraph 2 KartG stipulates that the dominant company may rebut an appearance of sales below cost or provide an objective justification (e.g., because the expiry date of the products is approaching).

To date, the OGH has not had to issue a material decision on a margin squeeze case. However, the OLG held in an *obiter dictum* in 2002 that a company with a dominant position is not obliged to set its prices at a level to guarantee its competitors commercial success. According to the OLG, this is also true for cases where competitors purchase an intermediate product from the dominant company.34 Once a question of material law related to margin squeeze conduct has reached the OGH, it will be seen whether it will uphold this rather sceptical approach by the OLG or will follow the ECJ’s case law.35

With regard to rebates, the OGH follows the ECJ’s distinction between generally admissible quantity rebates and generally inadmissible target and loyalty rebates.36 However, case law on exclusionary conduct stemming from inadmissible rebates is rather limited in Austria.

The OGH has dealt with a number of cases relating to the obligation to contract by dominant companies.37 For example, the OGH recently affirmed the obligation of the Austrian Federal Railways to allow its only private competitor, Westbahn, to participate in the Austrian Federal Railways electronic timetable information system.38

### iii Discrimination

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

A transaction is considered to be equivalent and requires equal treatment where the various contract partners are in the same position towards the supplier.39 With regard to

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32 OGH 8 October 2015, 16 Ok 9/15g.
33 OGH 16 December 2002, 16 Ok 10/02.
34 OLG 14 May 2002, 29 Kr 554, 555/00.
38 OGH 11 October 2012, 16 Ok 1/12.
39 OGH 10 March 2003, 16 Ok 1/03.
possible objective justifications, the OGH takes the view that, inter alia, different delivery terms, transportation costs or statutory frameworks in different countries can provide objective justifications for applying different conditions to equivalent transactions.40

iv Exploitative abuses (including excessive pricing)

The main statutory provision prohibiting exploitative abuses, including (but not limited to) excessive pricing is Section 5, Paragraph 1, No. 1 KartG. This provision was amended with the Cartel Amendment Act 2012, and changed from a wording that corresponded to Article 102, Letter a TFEU to an almost identical wording as Section 19, Paragraph 2, No. 2 of the German Act against Restraints of Competition. However, the case law relating to the former Section 5, Paragraph 1, No. 1 KartG may still be used for interpretation purposes.41

So far, there has been only one case before the OGH based on this amended provision. Therein the OGH, by referring to German case law,42 held that requesting excessive prices or other exploitative conditions from a contract partner is not limited to contract negotiations, but is also applicable to an ongoing contractual relationship when refusing to lower prices or allow changes to the contract.43 Moreover, it stipulated that only a significant price excess compared to the price that would have to be paid in a competitive environment falls under Section 5, Paragraph 1, No. 1 KartG.

V REMEDIES AND SANCTIONS

i Sanctions

The legal nature of fines imposed for antitrust violations under Austrian law is not clear. Austrian antitrust fines share some of the characteristics of criminal sanctions as well as of the sanctions under administrative criminal law, but are imposed by the cartel courts as civil courts, and not by the criminal courts or an administrative authority. The OGH considers them to have a hybrid nature having some similarities with criminal sanctions.44

According to Section 29 KartG, a fine requires an intentional or negligent violation of the antitrust law. Thus, when imposing a fine upon a company for abusing a dominant position, it is necessary to identify one or more individuals who have committed the infringement intently or negligently, and whose acts or omissions can be attributed to the company.45 However, similar to that found under EU competition law, the standard for proving an intentional or negligent infringement is not very high. In an abuse of dominance case, the FCA can request a cartel court to impose a fine of up to 10 per cent of the overall group turnover of the last business year.

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

40 OGH 9 June 2010, 16 Ok 1/10.
41 OGH 12 September 2007, 16 Ok 4/07.
42 BGH KVR 13/83, WuW/E BGH 2103.
43 OGH 16 September 2014, 16 Ok 13/13.
44 OGH 26 June 2006, 16 Ok 3/06; 12 September, 16 Ok 4/07.
45 OGH 5 December 2011, 16 Ok 2/11.
Fines are imposed on the undertaking normally being the company that committed the abuse. However, as under EU law, fines may also be imposed on a parent company in cases where a subsidiary did not act autonomously in the market but followed the instructions of the parent company (single-economic entity doctrine).\(^{46}\) In a vertical price-fixing case, the OGH already has used the EU law concept of parental liability to fine the company committing an infringement as well as its four direct and indirect controlling shareholders.\(^{47}\) Thus, it can be assumed that the Austrian cartel courts will follow the single-economic entity doctrine for calculating fines and attributing liability also in cases of fines for abuse of a dominant market position.

### ii Behavioural remedies

Section 26, Sentences 1 and 2 KartG allows the OLG to issue (proportionate) restraining orders to end an abusive behaviour. These orders require a prior request by the official parties to the cartel proceedings, that is, the FCA or the Federal Cartel Prosecutor (FCP), or by an interested company. Often such requests to end an abusive behaviour are combined with a request for an interim injunction according to Section 48, Paragraph 1 KartG.

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

### iii Structural remedies

In a proceeding requesting the ending of an abuse of dominance, the OLG may also order structural remedies (i.e., a change in the company structure). However, such structural measures may only be imposed if no other effective remedies are available, or if these alternatively effective remedies would result in a greater burden for the company (Section 26, Sentence 3 KartG). The OGH explicitly held that such structural remedies may only be imposed in particularly severe cases of an abuse of dominance, and are in any case subsidiary compared to all other available measures.\(^{48}\)

## VI PROCEDURE

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

### i Commencement of proceedings

Proceedings may be commenced by the official parties (i.e., the FCA or the FCP), in particular based on market investigations or more often on third-party complaints (i.e., consumer complaints).

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\(^{46}\) ECJ, 10 September 2009, Case C-97/08P, \textit{Akzo Nobel ao v. Commission}.  
\(^{47}\) OGH 8 October 2015, 16 Ok 2/15b (16 Ok8/15k).  
\(^{48}\) OGH 19 January 2009, 16 Ok 13/08.
associations, competitors, customers or suppliers). The FCA may send formal or informal information requests and questionnaires to the investigated undertaking and to third parties, or (subject to a court order) may also conduct surprise inspections or dawn raids to gain further evidence in connection with an alleged abusive conduct to copy or seize documents and electronic files.

Alternatively, parties claiming harm from an alleged abusive behaviour can directly commence proceedings in the cartel court (requesting that a certain behaviour is stopped or that it is determined that past behaviour was an abuse of dominance). In addition, in some cases parties may also claim that a certain behaviour was an illegal abuse of a dominant market position in a civil law proceeding before the ordinary courts. In particular, a violation of Section 5 KartG can also constitute a ‘breach of law’ within the meaning of Section 1 of the Austrian Federal Act Against Unfair Competition, which can be used as a basis for an action before the ordinary courts.

ii Right to be heard

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

In the event that the FCA plans to initiate proceedings before the cartel court following an investigation, it has to inform the (prospective) defendant about the results of its investigation and give the defendant the possibility to comment on them.\textsuperscript{49} In case the event that the FCA’s investigation does not give a reason for the commencement of proceedings before the cartel court, the defendant also has to be informed within a reasonable period.\textsuperscript{50}

iii Settlements

Informal settlements between the FCA and the (alleged) perpetrator before the commencement of proceedings before the cartel court make up the majority of antitrust fine cases in Austria. The FCA published a guidance paper on settlements in 2014.\textsuperscript{51} After the decision in a vertical price-fixing case in the retail sector that did not involve a settlement,\textsuperscript{52} where the OGH multiplied the fine initially imposed by the OLG by 10, the incentive for companies to settle fine cases has increased even further (at least in cases where it is likely that an infringement ultimately can be proved by the official parties).

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

\textsuperscript{49} Section 13, Paragraph 1 of the Act on the foundation of the Federal Competition Authority (Wettbewerbsgesetz).

\textsuperscript{50} Section 13, Paragraph 2 Wettbewerbsgesetz.

\textsuperscript{51} A German version of the notice is available at www.bwb.gv.at/fileadmin/user_upload/PDFs/BWB%20Standpunkt%20zu%20Settlements%20September%202014.pdf (last accessed 15 April 2019).

\textsuperscript{52} OGH 8 October 2015, 16 Ok 2/15b, 8/15k.
iv Appeal proceedings

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

VII PRIVATE ENFORCEMENT

Private antitrust litigation in Austria has substantially increased in recent years. To a large extent, such growth can be attributed to an increase of cartel court decisions imposing fines against cartel members based on intensified enforcement activity of the FCA and the FCP. The OGH, in several cases, has affirmed the possibility of claims for damages for directly damaged parties53 as well as for indirectly damaged parties,54 including cases where damages were allegedly caused by cartel outsiders (umbrella pricing).55

i Private right of action

With the Austrian Cartel and Competition Law Amendment Act 2017 implementing the EU Damages Directive,56 the Austrian private enforcement regime changed significantly. The provisions on the compensation of harm caused by infringements of the antitrust law (Section 37a to 37m KartG) entered into force retroactively as of 27 December 2016 (apart from the provision in Section 37m concerning the imposition of fines). Thus, the substantive provisions apply to harm incurred after 26 December 2016; for all damages arising before this date, the old regime has to be applied.

ii Collective actions

Austrian law does not provide for class actions as found in Anglo-American legal systems (neither on an opt-in nor an opt-out basis). Recently, Austrian-style ‘class actions’ have been brought before courts mainly by the Association for Consumer Protection (VKI) through individual consumers assigning their claims to the VKI, which then tries to combine these claims in a single court proceeding.57 However, courts have differed in their treatment by either treating them as separate single proceedings, by joinder of claimants, or by having one ‘test proceeding’ (while staying the other proceedings) that then serves a similar function to a ‘precedent’ for the other claims.58

53 OGH 26 May 2014, 8 Ob 81/13i.
54 OGH 2 August 2012, 4 Ob 46/12m.
55 OGH 29 October 2014, 7 Ob 121/14s.
iii Calculating damages

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

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

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

iv Interplay between government investigations and private litigation

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

VIII FUTURE DEVELOPMENTS

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

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

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

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

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1 Robbert Snelders is a partner and Nuna Van Belle and François-Guillaume de Lichtervelde are associates at Cleary Gottlieb Steen & Hamilton LLP.
3 ibid., p. 10.
5 Draft Bill on the Protection of Economic Competition, Comments on Articles, Chamber 51-2180/001, p. 36 (see discussion on Article 2, which became old Article 1 of the 2006 APEC).
Guidance Paper can also be used as a source of authority in the Belgian context,\footnote{Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJC 45/7 (Commission Guidance Paper).} at least as much as it can be relied upon in the EU context. In theory, the Belgian and EU rules on dominance are therefore perfectly aligned.\footnote{For an example of such alignment in the past, see Brussels Court of Appeal, 27 February 2014, Bureau d’Assurances Desert/AXA (Case 2013/AR/1783), Paragraph 6, as published in TBM/RCB, 2014/4, p. 353.}

In 2019, Belgium deviated from this approach and made use for the first time of the flexibility afforded by Article 3(2) of Regulation 1/2003, that is, of ‘adopting and applying on [its] territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings’.\footnote{Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJEC, 4 January 2003, L 1/1-1/25.} The Belgian federal parliament adopted a new legislation introducing, among other changes, the concept of ‘abuse of economic dependency’ in Book IV of the CEL, thereby allowing enforcement against non-dominant undertakings.\footnote{Law of 4 April 2019 amending the Code of Economic Law in relation to abuses of economic dependency, abusive clauses and unfair trade practices between undertakings (Belgian Official Gazette, 24 May 2019).} Article IV.2/1 of the CEL prohibits abuses of economic dependency and works in the same way as Article 102 of the TFEU; it provides a non-limitative list of abusive conducts, which is identical to its EU counterpart, save for the addition of ‘refusing a sale, a purchase or other transaction terms’. The BCA will be competent to investigate abuses of economic dependency under the same procedural rules as those applicable to abuses of dominance. The only difference with this regime concerns fines, which are capped at 2 per cent of yearly turnover, and penalty payments, which are limited to 2 per cent of daily turnover.\footnote{The provisions on abuse of economic dependency will enter into force on 1 June 2020.} As in dominance cases, a finding of abuse may give rise to follow-on damages claims, requests for cease-and-desist orders or actions for annulment of contracts.

The new provisions will cover unilateral practices that are compliant with Article IV.2 of the CEL. This regime therefore does away with the previously applicable theory of the ‘reflex effect’ of competition law on the law of unfair trade practices,\footnote{This theory was upheld by the Belgian Supreme Court in 2000 (see Belgian Supreme Court, 7 January 2000, Muliapharma/Louis Widmer, RCJB, 2001, p. 255).} which did not allow a commercial practice, implemented by a dominant company that is considered permissible under Article IV.2 of the CEL (and Article 102 of the TFEU), to constitute an unfair trade practice insofar as the essence of the plaintiff’s claim related to an impediment to the functioning of the free market resulting from that practice (save for a case of abuse of right). The Belgian regime for abuses of economic dependency is inspired by existing regulations in France, and follows the footsteps of several other Member States.\footnote{To date, Austria, Cyprus, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Romania and Spain have adopted rules on abuses of economic dependency.} To date, there have been limited applications of these provisions by competition authorities across the EU; most cases have concerned private enforcement before national courts. As for Belgium, while public
enforcement will be constrained by the limited resources of the BCA, the broad definition of the concept of economic dependency in the CEL suggests an increase in private litigation in the future.\textsuperscript{13}

Shortly following the adoption of the rules on abuse of economic dependency, the Belgian legislator passed a new law introducing important substantive and procedural changes to Book IV of the CEL.\textsuperscript{14} The main change concerns the basis for the calculation of the 10 per cent cap on the fines imposed for infringements of competition law (with the exception of abuses of economic dependency), which shifts from the national to the worldwide consolidated turnover,\textsuperscript{15} in line with the requirements of the ECN+ Directive 2019/1.\textsuperscript{16}

Belgian law does not contain specific provisions on unilateral practices applying to specific sectors of the economy, such as the energy or telecommunications sectors,\textsuperscript{17} and, as is the case at the EU level, competition rules apply to state-owned enterprises and undertakings benefiting from special rights ‘insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them’.\textsuperscript{18}

Finally, Belgian law has long been characterised by the same tensions that affected the enforcement of dominance rules at EU level, notably between a more formal and a more effects-based approach to the assessment of abusive practices. In practice, some differences could be observed as Belgian courts sometimes relied on somewhat formalistic reasoning and tended to interpret Article IV.2 of the CEL in the light of perceived ‘fairness’ requirements (i.e., without assessing the existence of (likely) anticompetitive effects or the actual incentives of dominant undertakings to engage in foreclosure strategies).\textsuperscript{19}

II YEAR IN REVIEW

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

\textsuperscript{13} Article I.6, 4° of the CEL defines ‘economic dependency’ as a ‘position of subjection of an undertaking towards one or more other undertakings characterised by the absence of a reasonable equivalent alternative, available within a reasonable period of time, and under reasonable conditions and costs, allowing this or each of these undertakings to impose obligations or conditions that cannot be obtained under normal market circumstances’.


\textsuperscript{15} ibid., Article IV.84, Paragraph 1, 2°.

\textsuperscript{16} Article 15(1) of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ, 14 January 2019.

\textsuperscript{17} As is the case at EU level, compliance with the applicable regulatory framework does not shelter dominant undertakings from the application of competition – including dominance – rules (see, for example, Competition Council, 10 December 2012, Decision 2012-P/K-32, \textit{Publimail, Link2Biz International and G3 Worldwide Belgium/bpost}, Paragraph 281). See also the presumption of discriminatory abuse of dominance provided for at Article 23 ter of the 1999 Electricity Act (Belgian Official Gazette, 11 May 1999).

\textsuperscript{18} Article IV.12 of the CEL.

\textsuperscript{19} See, for example, Antwerp Commercial Court, 17 July 2008, \textit{Base v. Belgacom} (Case A/07/6775).
Belgium

decisions). The decrease of abuse of dominance cases was also visible in 2018, although the high number of mergers approved through the simplified procedure dilute their share of the total number of BCA decisions.

i  BCA

In 2018, the BCA adopted one penalty payments decision for non-compliance with interim measures imposed in 2017 and two interim measures decisions.

On 13 April 2018, the College imposed penalty payments on the governing body for equestrian sports, the Fédération Equestre Internationale (FEI), and the organisers of a show-jumping competition series, the Global Competition Tour (GCT), for non-compliance with interim measures ordered in 2017 regarding the GCT’s invitation system, which the BCA found prima facie abusive. The College noted that, while neither defendants were in a position to amend the invitation rules unilaterally, they had the possibility of interpreting these rules in accordance with the objective of the decision. As discussed in subsection II.ii, the BCA decision ordering interim measures was annulled on 27 June 2018 by the Brussels Court of Appeal on grounds of inappropriate reasoning. On 28 September 2018, the BCA dismissed a new request for interim measures due to a lack of evidence of a risk of imminent, serious and irreparable harm to the applicants. The case on the merits is still ongoing.

On 3 September 2018, the College imposed interim measures on ABB Industrial Solutions BVBA (ABB), a producer of ‘smart’ electricity meter boxes, following a complaint lodged by its competitor Teco NV. In Belgium, electricity distribution is regulated at the regional level. Eandis (now Fluvius), the energy grid net operator in the Flemish region, set the mandatory standard type of electricity meter boxes to be installed and launched two public tenders for the boxes and the boxes’ lids, respectively. The exclusive right to fabricate and deliver lids was obtained by GE Industrial Solutions (GE), but after its acquisition it was passed on to ABB. ABB then charged a substantially higher price for the lids than the price offered to Eandis in GE’s tender bid, lowered its prices for electricity meter boxes, allowing it to squeeze the margin, and created uncertainties in supplies to other

20 As is explained in Section VI, the BCA is composed of two functionally distinct entities; namely, the College in charge of deciding cases and the Auditorate in charge of investigations.
21 College, 13 April 2018, Decision ABC-2018-V/M-11, Demande de mesures provisoires de Madame Lisa Nooren and Henk Nooren Handelsstal (FEI). In this case, a Belgian horse rider and her horse stable had complained about a memorandum of understanding (MoU) concluded by the defendants that reduced the share of participants selected based on rankings compared to non-sport related criteria (primarily on riders’ affiliation with a fee-paying team) from 70 per cent to 30 per cent. The College found that the MoU created a barrier to entry for riders who are not members of fee-paying teams and who could have aspired to participate based on their sporting merits, as well as an unjustified difference in treatment between GCT events and other FEI-accredited competitions. Therefore, the College decided to suspend the MoU insofar as it reduced the share of invitations based on the official ranking below 60 per cent until the case is decided on the merits.
22 On 7 August 2018, the Court also ordered three members of the College involved in adopting the annulled decision (including the president of the BCA) to recuse themselves from the College that would be responsible for taking a new decision in the same case. See subsection II.ii.
companies that were economically dependent on it for these lids. The College found it not manifestly unreasonable to assume prima facie that ABB abused its dominant position. The College required ABB to:

- apply a price reduction to lids (including a retroactive reduction on those already sold);
- impose a similar level of price reduction to its boxes or any other compound thereof;
- and

- commit to maintain a non-discriminatory supply policy.

The College also imposed the obligation of publishing part of its decision on ABB’s website and in one of Eandis’ newsletters. The case on the merits is still ongoing.

On 23 January 2019, the College imposed interim measures to ensure continuity of the FM broadcasts of the Flemish Radio and Television Broadcasting organisation, VRT, in the execution of its public service mission. VRT’s FM broadcasts are transmitted through masts. After a public tender, some of these masts were sold by VRT to NV Norkring Belgium along with a service level agreement (SLA) to ensure continuing use thereof for FM broadcasting. With the end of the SLA in sight, VRT made a public tender request for FM broadcasting services, which was not awarded to Norkring, but to BV Broadcast Technology and Development (Broadcast Partners). To provide VRT with FM transmission services, Broadcast Partners was dependent on Norkring’s masts, as there were no alternatives available. However, it was unable to enter into an agreement on reasonable terms with Norkring for the use of these masts. While VRT did not demonstrate that this was prima facie likely to constitute an abuse of dominance, the BCA held that the general economic interest of continuing the VRT’s public service mission to provide FM broadcasts was sufficiently large to conclude for a likely prima facie abuse of dominance if such continuity is not guaranteed. The BCA required Norkring to provide the transmission masts for FM transmissions under the same conditions that it offered in its tendering bid, until an agreement had been reached, or until the court ruled on the matter, and in any case, not after the decision on the merits of the case had been taken by the BCA. The case on the merits is still ongoing.

ii Courts

In 2018, the Belgian courts were more active than the BCA. The Brussels Commercial Court and the Belgian Supreme Court issued one judgment each and the Brussels Court of Appeal issued two judgments. One noteworthy development is that the recusation provisions of the CEL were applied for the first time.

On 12 April 2018, the Brussels Commercial Court ordered SABAM, the Belgian Association of Authors, Composers and Publishers, to cease and desist its pricing practices. Several festivals and the Federation of Flemish Music Festivals sued the collecting society claiming it abused its dominant position. SABAM significantly increased tariffs for concerts and music festivals without objective economic justifications (i.e., since 2017, it has raised tariffs for concerts and music festivals by 17 per cent and 37 per cent, respectively, depending on the size of festivals for services that remained the same in terms of nature and cost); determined prices on the basis of a festival’s total turnover (including turnover unrelated to music and therefore for services not provided); and used pricing methods unrelated to

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26 Brussels Commercial Court, 12 April 2018, Festival organisateurs/SABAM (Case A/17/02033).
actual use of music (while alternative methods of calculation\textsuperscript{27} that quantify use do not require additional costs). The Court concluded that SABAM had a \textit{de facto} monopoly in the collection and distribution of authors’ musical copyrights. Relying on European precedents on excessive pricing,\textsuperscript{28} the Court held that SABAM failed to justify its pricing practices as having a reasonable relation to the economic value of the product supplied. The Court further referred to a decision of the Brussels Court of Appeal\textsuperscript{29} on an abuse of dominance by copyright collecting societies in generating profit that they would not have been able to obtain in a competitive market context.

On 27 June 2018, the Brussels Court of Appeal annulled a 2017 BCA decision ordering interim measures in the \textit{FEI} case, on grounds of inappropriate reasoning.\textsuperscript{30} The decision was challenged by the Global Champions League (GCL) and Tops Trading Belgium (TTB), the organisers of the GCT, following penalty payments imposed by the BCA for non-compliance with interim measures (i.e., the suspension of a memorandum of understanding (MoU) concluded between the plaintiffs insofar as it reduced the share of invitations to the GCT based on official rankings to below 60 per cent).\textsuperscript{31} The Brussels Court of Appeal first recalled that, as part of its duty to give reasons, the College must indicate the facts underlying its decisions.\textsuperscript{32} The Court noted that, while the College explicitly dismissed the MoU from the case file due to its confidential nature, the decision nevertheless contained multiple references to the MoU, including in the preliminary assessment of the College, which resulted in the suspension of the MoU. The Court concluded that the decision contained internal contradictions and was therefore vitiated by a manifest lack of reasoning. As the BCA did not request the Court to use its full appellate jurisdiction and the MoU is not part of the file, the Court could neither rectify the College’s reasoning nor review the case on the merits and therefore annulled the decision.

On 7 August 2018, the Brussels Court of Appeal ordered three members of the College involved in the adoption of the annulled decision (including the president of the BCA) to recuse themselves from the College that would be responsible for reviewing the case.\textsuperscript{33} After the Brussels Court of Appeal annulled the aforementioned BCA decision in \textit{FEI}, the case returned to the College, sitting in the same composition of the College. GCL and TTB therefore decided to request the recusation of the College to the Auditorate on the basis of Article IV.32 of the CEL. According to this provision, members of the BCA can be challenged for the same reasons as those justifying the recusation of judicial judges under Article 828 of the Belgian Judicial Code. The president of the BCA and the two other assessors contended

\textsuperscript{27} In the context of claims of excessive pricing, the European Court of Justice has required that remunerations requested by dominant companies from their contractual counterparts have a reasonable relation to the economic value of the service provided. In \textit{STIM}, the Court considered alternative methods for the determination of the remuneration, allowing for a more precise calculation while achieving the same legitimate aim (\textit{in casu}, the protection of the interests of composers and music editors). See, C-52/07, \textit{STIM} [2008] ECR I-9275, Paragraphs 33 and 40.


\textsuperscript{29} Brussels Commercial Court, 4 March 2009, \textit{IRDI}, 2009, Paragraph 199.


\textsuperscript{31} See subsection II.i.

\textsuperscript{32} Article IV.64(6) of the CEL and Article 2 of the Law of 29 July 1991 concerning the formal motivation of administrative acts.

that, if a decision is annulled on procedural grounds, the administrative procedure can still be carried out by the College that adopted the annulled decision. They therefore refused to abstain, which led the case to be transferred to the Brussels Court of Appeal in application of Paragraph 6 of Article IV.32 of the CEL.

In its judgment, the Brussels Court of Appeal found that the criteria for recusation were satisfied and held that the physical persons who took the annulled decision cannot be part of the College that will adopt the new decision in the same case. The Court held that the new decision will necessarily be based on the same circumstances of fact and law as those underlying the annulled decision. A College sitting in the same composition would, in these circumstances, have an incentive to merely adjust its reasoning in a way that supports its original conclusions (in this case, that interim measures are justified) rather than starting over with an impartial assessment of the case. The Court therefore ordered the president of the BCA and the two assessors to abstain from sitting in the College that will examine the case in the future. The Court further held that the abstention of two French-speaking assessors is not likely to endanger the functioning of the College, which can be composed of a pool of 10 French-speaking assessors. This case is the first application of the recusation provisions of the CEL since its entry into force in 2013. The case on the merits is still ongoing.

On 22 November 2018, the Belgian Supreme Court upheld the Brussels Court of Appeal’s judgment. In its judgment, the Brussels Court of Appeal improperly applied the 

**ne bis in idem**

principle in *bpost* by disregarding whether the proceedings conducted by two distinct authorities could have complementary objectives. In 2011, the sectoral regulator, the Belgian Institute for Postal services and Telecommunications (BIPT), fined *bpost* for carrying out a discriminatory rebate scheme. In a separate decision in 2012, the BCA (then the Competition Council) found the scheme to be abusive because of its loyalty-inducing effect and fined *bpost* (after deducting the BIPT fine from the initial fine amount). On 10 March 2016, the Brussels Court of Appeal annulled the BCA’s decision, finding that the rebate system was not discriminatory. Although *bpost* was acquitted from the BIPT fine, the Brussels Court of Appeal annulled the BCA’s decision on 10 November 2016 for breach of the 

**ne bis in idem**

principle. The Court considered that the facts underlying the BCA’s decision had already been subject to scrutiny by the BIPT and the sanctions that both authorities could impose were of a criminal nature under the European Convention of Human Rights, so that the conditions for 

**ne bis in idem**

were met even though the two authorities operate under different legal regimes.

On 22 November 2018, the Belgian Supreme Court overturned the Brussels Court of Appeal judgment for having annulled the BCA decision based on insufficient legal grounds. The Court examined the 

**ne bis in idem**

principle in light of the recent case law of the European Court of Justice on the subject. First, it pointed to *Menci* and *Carlson Real Estate*, in which the European Court of Justice held that the 

**ne bis in idem**

principle may be limited for the purpose of protecting an objective of general interest and that, in such circumstances, a duplication of proceedings would still guarantee a satisfactory level of protection.

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34 Belgian Supreme Court, 22 November 2018, Belgian Competition Authority/bpost (Case C.17.0126.F/1).

35 *bpost* had applied a per-sender rebate model, whereby quantity rebates are based on the volume of mail supplied by senders. This model was found to discriminate against ‘consolidators’, which act as intermediaries by preparing, processing and transporting mail to *bpost*’s distribution points, as these were not considered as single senders.


37 Case C-524/15, *Menci* [2018], Paragraphs 40 and 44; and Case C-537/16, *Garlsson Real Estate and Others* [2018], Paragraphs 42 and 46.
Belgium

Belgian Supreme Court then referred to *Enzo Di Puma*, in which the European Court of Justice ruled that the protection conferred by the *ne bis in idem* principle also extends to situations in which a person is eventually acquitted, but can equally be limited for the purposes of achieving an objective of general interest.38 The Belgian Supreme Court concluded from these cases that the *ne bis in idem* principle is no obstacle to parallel proceedings if these have complementary objectives with regard to different aspects of the same conduct.39 By applying the *ne bis in idem* principle on the sole basis of the identity of facts, the Brussels Court of Appeal disregarded whether the proceedings before these two distinct authorities could have complementary objectives. The Belgian Supreme Court therefore overturned the judgment and referred the case back to the Brussels Court of Appeal. The procedure before the Brussels Court of Appeal is still pending.

Interestingly, the European Commission intervened in the challenge before the Belgian Supreme Court and is intervening in the procedure pending before the Brussels Court of Appeal. The European Commission frequently uses its *amicus curiae* prerogatives under Article 15 of Regulation 1/2003 to submit written observations to national courts, with a view to ensuring a consistent application of EU competition law.

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38 Joined Cases C-596/16 and C-597/16, *Enzo Di Puma* [2018], Paragraphs 39–42.
39 In this case, the BIPT and the BCA respectively applied sector-specific regulation and competition law to bpost’s rebate scheme.
III MARKET DEFINITION AND MARKET POWER

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

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

Decisions by the BCA and judgments by the Belgian courts typically describe, first of all, the contentious commercial practice, to ascertain the competitive environment affecting the supply and demand of the affected products or services. Then market definitions previously adopted at the European or Belgian level (but also by the competition authorities of neighbouring countries) are generally considered a useful, if not decisive, starting point. Potentially converging arguments of the parties involved are further likely to influence the market definition. It is also common to consider several possible definitions and to test whether the defendant can be deemed to hold a dominant position under any of them. If this is not the case, or is not such as to affect the outcome of the competitive analysis, it is also common practice to leave open the question of the exact definition of the relevant markets. Generally, even though somewhat dated, the Commission’s guidance on the definition of relevant markets is frequently relied upon before both the BCA and the Belgian courts, so that arguments relying on such guidance will often carry particular weight.

In line with practices at the EU level, the assessment of dominance requires consideration of various factors that, taken separately, are not necessarily determinative. Among these factors, considerable importance is given to market shares. Although the CEL does not provide for a market-share threshold above which an undertaking would be deemed dominant, the BCA has considered in the past that a market share exceeding 50 per cent

40 See, for example, Competition Council, 28 September 2010, Decision 2010-P/K-42-AUD, Freedom CVBA/InBev Belgium NV, Paragraph 75.
41 For example, in Base/Belgacom Mobile, the Competition Council found that, with regard to the geographical scope, all parties seemed to agree that the relevant market was the Belgian territory, and the Competition Council subsequently adopted such a decision (Competition Council, 26 May 2009, Decision 2009-P/K-10, Base/BMB, Paragraph 130).
42 Commission Notice on the definition of relevant market for the purposes of Community competition law [1997] OJC 372/5.
entailed a presumption of dominance. Likewise, a market share exceeding 40 per cent, while not decisive in itself, has been viewed as a very important indication of the existence of a dominant position. Conversely, the BCA has also proved that it is open to more sophisticated approaches whereby ‘a considerable market share is not automatically considered as equivalent to a dominant position’. Overall, Belgian practice recognises the need to assess the position of an allegedly dominant company in comparison with the position of its competitors and to consider in particular, as a proxy for the ability to circumvent competitive constraints and as evidence of a possibility to behave independently of competition: the differences in market shares; the evolution in time of market shares; the concentration index of the relevant markets; the existence of barriers to entry; the significance of potential competition; the existence of network effects; the vertically integrated structure of competing firms; competing firms’ respective economic and financial power; and the nature of the contentious practices. The BCA has also relied on earlier findings of dominance in its own decisions.

Finally, there are only a couple of precedents in which the BCA has had recourse to the concept of collective dominance. The main example to date is the 2014 decision dismissing a complaint brought against various film studios. The complaint against the studios involved digital screening fees paid by major record companies (the majors) to certain theatre owners.

44 See, for example, Auditorate, 26 March 2015, Decision ABC-2015-P/K-09-AUD, Lampiris/Electrabel, Paragraphs 101–118.
45 In Unie der Belgische Ambulancediensten/Belgische Rode Krui (Decision No. 2001-V/M-22), the BCA considered that a market share of above 40 per cent gives a ‘strong indication’ of dominance, whereas a market share below 30 per cent, in the absence of additional factors, is ‘not indicative’ of dominance. For a discussion relying on the Commission Dominance Paper, see also Decision No. BMA-2014-P/K-23-AUD of the Auditorate of 2 December 2014 in Case MEDE-P/K-11/0027, NV Handling CO/Sony Pictures, The Walt Disney Company (Benelux), Universal Pictures International Belgium, Twentieth Century Fox Film Belge and Warner Bros Studio Leavesden Limited. For a discussion by a Belgian court, see, e.g., Brussels Court of Appeal, Bureau d’Assurances Desert/AXA Belgium, 27 February 2014 (Case 2013/AR/1783), TBM/RCB, 2014/4, p. 352.
48 For example, the BCA has considered that a difference of 40 per cent between the market share of a dominant undertaking and its largest competitor constitutes in itself an indication of dominance (see Competition Council, 5 October 2007, Decision 2007-V/M-25-AUD, Merck Generics Belgium BVBA, Generics UK/Merck Sharp & Dohme BV and MSD Overseas Manufacturing Company, Paragraph 21).
49 In its decision of 26 March 2015 in Case CONC-P/K-09/0002, Lampiris/Electrabel, Paragraph 106, the Auditorate relied on a decision of the College of 18 July 2014, which had found Electrabel to be dominant on the wholesale electricity market, in Case CONC-I/O-09-0015, Electrabel/Wholesale Electricity Market (Decision ABC-2014-I/O-15).
50 Auditorate, 2 December 2014, Decision BMA-2014-P/K-23-AUD, NV Handling CO/Sony Pictures, The Walt Disney Company (Benelux), Universal Pictures International Belgium, Twentieth Century Fox Film Belge and Warner Bros Studio Leavesden Limited. In a recent case, the BCA closed an investigation into potential collective dominance by cargo handling companies at Brussels airport; see Auditorate, 17 February 2015, Decision BMA-2015-I/O-02-AUD, Cargo handling at Brussels National Airport. For a case mixing concerted practices and collective dominance considerations, see judgment of the Liège Court of Appeal of 5 February 2009 in AGIM/Oxycure, TBM/RCB, 2009/3, p. 60.
and ‘incubators’, but not to the complainant. The Auditorate summarily referred to the Sony/BMG criteria, which it found inapplicable to the case at hand and therefore rejected the allegation of collective dominance on the part of the majors. Moreover, the Auditorate noted that the European Commission had already investigated the substance of the companies’ contracts involving digital screening fees, and had closed its investigation after the contracts in question were amended.

IV ABUSE

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

Overview

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

51 Case C-413/06 P, Sony/BMG [2008], Paragraphs 122–124, summarised by the Auditorate in Paragraph 52 of the decision.
52 Ghent Court of Appeal, 1 October 2014, Ducati/DD Bikes (Case 2010/AR/3351).
53 See, for example, Brussels Court of Appeal, 3 November 2005, SABAM v. Productions & Marketing, TBM/RCB, 2006/4, p. 320.
54 See, for example, Competition Council, 26 May 2009, Decision 2009-P/K-10, Base/BMB, Paragraphs 190 and 275 et seq.
55 See, for example, Antwerp Commercial Court, 17 July 2008, Base v. Belgacom (Case A/07/6775).
ii Exclusionary abuses

Exclusionary pricing

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

This case is interesting in three respects:

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

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

c the BCA did not perform a cost analysis in this case, but focused on the materiality of the foreclosure effects.

As a general matter under Belgian law, temporary below-cost prices associated with the launch of a new product or the liquidation of stocks is not abusive.

With regard to margin squeeze, the BCA’s practice is generally in line with EU case law. The leading precedent on margin squeeze in Belgium is Base/Belgacom Mobile (BMB), in which the BCA established a margin squeeze on the basis of a comparison between the wholesale prices charged by BMB on the upstream market for call terminations on its network (as charged to competitors) and the retail prices charged by BMB on the downstream market for mobile telephony services to business customers. Considering that BMB is ‘a vertically integrated undertaking offering termination services on the upstream market and telephony services on the downstream market’ and that ‘termination services are an essential input for BMB’s competitors’, the BCA endeavoured to ‘verify whether BMB would be able to make a normal profit on its on-net calls if it had to bear the termination cost charged to its competitors’. Having found that this was not the case during the relevant period, it subsequently referred to EU case law to support the conclusion that ‘[a] margin squeeze may, by its very nature, restrict competition’.

In the Lampiris/Electrabel case, the BCA dismissed a margin squeeze allegation among other claims of price-related abuses of dominance by Electrabel. The BCA found no margin squeeze. Applying the ‘as-efficient competitor test’ on the basis of Electrabel’s long-term...
average incremental costs, the BCA found that Electrabel’s margins would have remained positive in the retail market even when paying the prices charged to customers in the wholesale market. The BCA further noted that during the relevant period, Lampiris’ prices had been equal to or lower than Electrabel’s prices, with positive margins, and that Lampiris had grown its market share.

**Exclusive dealing**

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

With regard to loyalty rebates (not tied to an exclusivity requirement), the BCA adopted an effects-based approach in Base/BMB, which also involved individualised conditional rebates in the form of free subscriptions, reimbursements proportionate to spending, a reduction on certain types of calls, or free calls and text messages. The BCA dismissed the existence of an abuse on the grounds that it was unclear how said rebates were ‘likely to have a real influence on the customer’s choice’; and how ‘the offers from the dominant undertaking on the one hand, and the competitors on the other hand’ compared with each other. In Algist Bruggeman, however, the BCA reviewed various loyalty-enhancing rebates and found that, because these rebates were aimed at enhancing the loyalty of distributors and bakers to exclude lower-priced competitors, and had no objective justification, they breached Article 102 TFEU and Article IV.2 of the CEL.

Volume rebates are generally unproblematic under Belgian law. The Brussels Court of Appeal has considered, for instance, that:

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63 Brussels Court of Appeal, 27 September 2013, Presstalis SAS (Case 2012/MR/5).
64 Competition Council, 26 May 2009, Decision 2009-P/K-10, Base/BMB.
65 ibid., Paragraphs 192–199.
the existence of a dominant position does not deprive such an undertaking of its right to grant volume-based rebates to its customers depending on the customer’s volume of purchases, if there are objective reasons to believe that the conferral of a financial benefit to certain customers is justified by the business volume realised by these customers and the economies of scale to which they give rise.  

**Leveraging**

Leveraging allegations have occasionally been made in Belgium.

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

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

Belgian case law does not contain recent discussions of the principles applicable to tying and bundling practices so that reference can be made to those developed at EU level.

**Refusal to deal**

The *Bofar* case, involving a company specialised in the export of pharmaceutical products, enabled the BCA to provide some guidance regarding refusal to deal practices. As is the case at the EU level, the starting point of the analysis is the basic free trade principle according to which ‘each undertaking, irrespective of whether or not it holds a dominant position, should have the right to choose its business partners’. Subsequently, the BCA appears to condition a finding of abuse on evidence of a clear intent to foreclose actual or potential competition; the strengthening of the company’s dominant position; and the absence of objective justification.

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70 In the *Cargo handling* case, the Auditorate closed an investigation (for lack of evidence) into practices that would have entailed a review of potential bundling practices by Aviapartner and Flightcare on the reserved market for airside freight handling and the downstream non-reserved market for landside freight handling services; see Auditorate, 17 February 2015, Decision BMA-2015-I/O-02-AUD, *Cargo handling at Brussels National Airport*.

In this case, the BCA dismissed the existence of an abusive refusal to deal, relying heavily on the Commission Guidance Paper and modelled its decision on the GlaxoSmithKline case law of the European Court of Justice.\(^2\)

While the principle according to which dominant players should remain free to choose their trading partners is well understood by the Belgian courts, exceptions to this principle are sometimes found on the basis of ad hoc tests that are applied quite flexibly. This is well illustrated by Ducati/DD Bikes, in which the Ghent’s Court of Appeal upheld a lower court judgment finding Ducati guilty of abusive refusal to supply spare parts and other repair equipment to a former dealer-repairer following the (otherwise lawful) termination of the dealership agreement.\(^3\) After finding that Ducati, through its official dealers, was dominant on a Ducati brand-specific market for maintenance and repair, it laid down its own test to appreciate the abusive character of the refusal to supply without any reference to EU or other precedent (which is very uncommon in Belgian case law) and dismissed, for example, free-riding arguments or the relevance of the fact that the repairer sold and serviced other brands of motorbikes. In addition, holding Ducati’s refusal to supply abusive, the Court imposed a number of obligations on Ducati aimed at ensuring that DD Bikes could effectively offer after-sales services for Ducati motorbikes in the future. This case should be understood in the context of long-term dealership agreements in Belgium, and testifies to a historical tendency on the part of Belgian courts to protect the interests of dealership holders.

Other practices

In Algist Bruggeman, the BCA found an abuse of dominance in denigrating practices against a competitor. The Auditorate found that Algist Bruggeman’s circulation of biased internal reports about a competitor’s product, aimed to create uncertainty about the microbiological aspects and quality of its competing yeast, and to discourage distributors or bakeries from supplying or using the product.\(^4\) Also in 2017, the BCA rejected Medicare Market’s request to interim measures, yet found that the Order of Pharmacists’ denigrating press campaign about Medicare-Market’s potential harm to the profession of pharmacists and to patients could \textit{prima facie} constitute an abusive practice.\(^5\)

At the EU level, concentrations are only reviewed under merger control rules and excluded from procedures for restrictive practices, pursuant to Article 21(1) of the Merger Regulation.\(^6\) In Belgium, the question of whether mergers and acquisitions that do not meet notification thresholds can be subject to review under Article IV.2 of the CEL (and, in fact, Article IV.1 of the CEL) is a long-standing one, which seems to receive a positive, if qualified, response. In 2006, the Brussels Court of Appeal held that a transaction that does not meet the Belgian notification thresholds may be reviewed under Articles 101 and 102 of the TFEU or Articles IV.1 and IV.2 of the CEL.\(^7\) In 2016, the BCA had the opportunity to address


\(^3\) Ghent Court of Appeal, 1 October 2014, \textit{Ducati/DD Bikes} (Case 2010/AR/3351).


\(^7\) Brussels Court of Appeal, 15 December 2006, \textit{Gabriella Rocco & Centro di Medicina Omeopatica Napoletano v. Dano-Invest and others} (Case 2006/ MR/1).
the question, after receiving a request for interim measures to suspend the non-notifiable acquisition of Brouwerij Bosteels by AB InBev. Alken-Maes contended that the acquisition constituted an abuse of AB InBev’s dominance. The BCA referred to the European Court of Justice’s *Continental Can* judgment and acknowledged that concentrations can lead to an abuse of dominance, but also noted the potential harm of interim measures against transactions. The BCA then held that an acquisition escaping merger control can be assessed from an abuse of dominance perspective if there are *prima facie* restrictions on competition, distinct from the effect of the concentration itself, which can be qualified *prima facie* as an abuse of dominance. This was not the case in the transaction at hand. The Brussels Court of Appeal upheld the BCA decision in 2017.

iii Discrimination

Price discrimination under Article IV.2(2) and (3) of the CEL generally requires evidence of a difference in treatment applied to equivalent transactions with the effect of causing a material competitive disadvantage. In *Lampiris/Electrabel*, the BCA considered that the services offered on the electricity wholesale market and on the retail market were not equivalent, and hence dismissed the discriminatory pricing claims. In *InBev*, the on-trade (catering) and off-trade (wholesalers and retailers) segments for the distribution of beers and beverages were considered as separate markets, thereby justifying differences in pricing. However, the BCA has not always adequately provided support for its decisions on price discrimination. In *bpost*, the BCA referred to a breach of equal treatment in relation to the grant of rebates without reaching a formal finding of discrimination, thereby creating uncertainty as to the applicable standards. The Brussels Court of Appeal annulled this decision on *ne bis in idem* grounds, and therefore did not review the finding of breach of equal treatment. As discussed in subsection II.ii, the Belgian Supreme Court overturned the appeal judgment in 2018, as the Brussels Court of Appeal had improperly applied the *ne bis in idem* principle. The case is now back with the Brussels Court of Appeal, which has to make a new assessment on the merits. Similarly, Belgian courts sometimes fail to inquire into the existence of an actual competitive disadvantage resulting from an allegedly discriminatory practice, in contradiction with the principles prevailing at the EU level since *Post Danmark*. In *SABAM*, for example, the Brussels Court of Appeal found that services offered to ‘major customers’ were equivalent.

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78 College, 21 November 2016, Decision BMA-2016-V/M-36.
79 ibid., Paragraph 77 et seq.
84 Brussels Court of Appeal, 10 November 2016, *bpost/Spring, LINK2BIZ International, Publimail*, in the presence of the BCA (Case 2013/MR/2).
85 Belgian Supreme Court, 22 November 2018, *Belgian Competition Authority/bpost* (Case C.17.0126.F/1).
86 ECJ, 27 March 2012, Case C-209/10, *Post Danmark*.
to those offered to other customers, and that the application of different prices was therefore discriminatory, without inquiring into the actual existence of a competitive disadvantage resulting from that difference of treatment on the downstream market.87

iv Exploitative abuses

It is well known that there is no clear standard to assess what is or makes a price ‘excessive’, and the comparative test proposed in some EU precedents leaves room for a significant margin of discretion. Excessive pricing claims are relatively frequent in Belgium but seldom established. In the 2014 Electrabel electricity wholesale market case, the BCA found the former incumbent electricity producer and supplier guilty of an abuse of dominance revolving around Electrabel’s tertiary production reserve policy,88 which was presented as an unjustified limitation of production.89 Relying on EU precedents, the BCA defined the relevant markets as the production and wholesale trade of electricity in Belgium, on the one hand, and the supply of the tertiary reserve in Belgium, on the other, and found that Electrabel held a dominant position on both. The BCA then narrowed the scope of the abuse to Electrabel’s marketing of reserve capacities by means of the application of an excessive margin scale (qualified as a form of ‘economic withholding’). Electrabel’s scale governing the release of reserve capacity implied the realisation of margins of 50 to 200 per cent above the average wholesale price per MWh achieved on the Belpex trading platform in 2008, which was found ‘excessively disproportionate compared to the marginal cost of production’.90

Similarly, in Festival organisers/SABAM, the Brussels Commercial Court concluded that SABAM’s tariffs for concerts and music festivals did not have a reasonable relation to the economic value of the product provided. The copyright collecting society SABAM had based its tariffs on the size of festivals (while this did not change the nature or cost of its services to provide licences), the festival’s total turnover (including turnover unrelated to music), and used pricing methods unrelated to actual use of music (while alternative methods of calculation that quantify use do not require additional costs).91 The Court dismissed SABAM’s argument that the tariffs were increased to match those in neighbouring countries.92

The BCA and the courts often dismiss excessive pricing claims. In Lampiris/Electrabel and NMBS/Electrabel, the BCA and the Brussels Court of Appeal both dismissed similar excessive pricing claims.93 Both found that Electrabel’s incorporation into its wholesale prices of the value of emission allowances obtained for free was economically justifiable, since the allowances could otherwise be traded. Beforehand, the leading precedent involved the allegedly excessive character of an increase in Electrabel’s natural gas prices.94 After comparing

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88 The management of reserve capacities on the Belpex electricity exchange, for the electricity wholesale market.
89 College, 18 July 2014, Decision ABC-2014-I/O-15, Electrabel/Wholesale Electricity Market. As part of its reasoning, the College also repeated that, as a matter of principle, competition law is applicable to practices otherwise regulated by sector-specific rules.
91 Brussels Court of Appeal, 12 April 2018, Festival organisers/SABAM (Case 2018/1712).
92 ibid., Paragraph 20.
93 Brussels Court of Appeal, 14 January 2015, NMBS/Electrabel (Case 2010/AR/3112), TBM/RCB, 2016/1, p. 33; and Auditorate, 26 March 2015, Decision ABC-2015-P/K-09-AUD, Lampiris/Electrabel (Case CONC-P/K-09/0002).
94 Competition Council, Decision 2008-I/O-41-AUD, Electrabel NV.
Electrabel’s prices with a number of competitive price benchmarks – for example, prices of alternative operators, regulated prices and prices applied in other EU Member States – the BCA was not able to reach a finding of infringement.

Moreover, loose findings of excessive prices are sometimes encountered in judgments of Belgian courts. This was the case in the AMP judgment, where the Brussels Court of Appeal 95 considered excessive an increase in AMP’s minimum distribution fee because of its lack of costs-based justification, as established by an expert report. Likewise, in Base/Belgacom, the Antwerp Commercial Court has held Belgacom guilty of charging excessive prices, as it failed to pass on to consumers a reduction in the mobile termination charges of competing operator Base, as mandated by the telecommunications regulator. By holding that prices ‘were higher than those that should normally be applied’, the Court essentially sanctioned Belgacom’s failure to comply with a regulatory decision and gave the concept of excessive pricing an interpretation driven by fairness considerations. 97

The CEL grants the BCA the power to issue interim orders in cases of ‘price or margin problems’, ‘abnormal evolution in prices’ or ‘structural market failures’ established by a report of the Price Observatory, with the aim of preventing serious, actual and irreparable harm to companies, consumers, or the general economic interest. 98 These orders, which can last for a maximum of six months, are adopted pursuant to summary proceedings during which parties are only heard orally and benefit from a mere five-day period for reviewing any submissions and supporting evidence. Orders are then notified to the Minister for Economic Affairs, who shall submit a plan to the government within six months proposing a ‘structural modification of the functioning of the market concerned’. 99 No such reports or orders have yet been issued. Thus, the scope of the causes of action, as well as the possible reach of these orders, remain largely unclear, and therefore are a source of concern for the business community. 100 This peculiar regime finds its origin in a frustration of political actors with the perceived limitations of dominance principles (notably with notions such as ‘excessive prices’) and of available remedies. 101

V REMEDIES AND SANCTIONS

Article IV.48(1) of the CEL entitles the BCA to find an infringement of the rules on dominance and to order the termination of the commercial practice in question. In turn, Article IV.70(1) of the CEL provides for the possibility of imposing a fine to sanction the

95 Brussels Court of Appeal, 29 May 2012, Standaard Boekhandel, Prodipresse, VFP and Buurtsuper v. AMP.
98 Articles V.3 to V.4 of the CEL.
99 Article V.6 of the CEL.
100 In a decision closing an investigation into alleged unfair prices (in light of available resources and priorities), the Auditorate mentioned that the Price Observatory may be better placed to investigate the price evolution identified by the complainant; see Decision No. BMA-2015-P/K-10-AUD of 31 March 2015, [x]/Omega Pharma (Case MEDE-P/K-02/0073), Paragraph 53.
101 Articles V.3–V.4 of the CEL.

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Abusive character thereof. As at the EU level, it was in a dominance case that the BCA imposed its highest individual penalty ever, of an amount of €66.3 million levied against Belgacom (now Proximus) in a margin-squeeze decision dated 26 May 2009.

Belgian remedial practice differs from that observed at the EU level in that, whereas this is extremely rare at the EU level, the BCA commonly adopts interim measures in the course of dominance proceedings.

i Sanctions

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

ii Behavioural remedies

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

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

102 See the €4.34 billion fine imposed in Case AT.40099, Google Android (18 July 2018).
103 Competition Council, Decision 2009-P/K-10, BASE/Belgacom & Belgacom Mobile.
107 Article IV.70(2) of the CEL.
108 Article IV.64(1) of the CEL.
submission of written briefs will be held within one month of the filing of a request for interim measures. The BCA will have to render its decision within one month of the oral hearing, with failure to do so amounting to a rejection of the request.

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

In the FEI case, the BCA ordered the FEI and equestrian competition organisers to suspend their MoU setting the participation rules for FEI-accredited events insofar as it reduced the share of invitations based on official rankings below 60 per cent until the adoption of a decision on the merit, and prohibited any points for the official FEI ranking from being granted as a result of GCT competitions so long as invitations for these events did not comply with the requested share. The BCA considered that the cumulative conditions to grant interim measures were fulfilled, namely that:

a the MoU prima facie constituted an infringement of competition rules, as FEI fully controls the access to the market by virtue of its General Regulations and the invitation system discriminates against riders who are not part of a fee-paying team; and

b there was a risk of serious and irreparable harm to the applicants, since the decrease in the invitations sent to riders on the basis of their ranking alone is likely to seriously affect the riders’ short-term interests and their careers.

As discussed in subsection II.ii, while the BCA imposed penalty payments in 2018 for non-compliance with the interim measures, the Brussels Court of Appeal eventually annulled the BCA’s decision later in the year on grounds of inappropriate reasoning. Interestingly, since the BCA did not request the Court to use its full appellate jurisdiction, the Court could neither rectify the College’s reasoning nor review the case on the merits (i.e., examine whether the BCA rightly concluded that interim measures were justified).

In the Telenet case, the BCA’s interim measures ordered Telenet and VV to either suspend the exclusivity clause in their agreement and offer the broadcasting rights to interested

109 Article IV.64(3) of the CEL.
110 Article IV.64(6) of the CEL.
112 College, 24 November 2015, Decision ABC-2015-V/M-68, Interim measures against FEI, pp. 29–31, upheld by the Brussels Court of Appeal, 28 April 2016 (Case 2015/MHR/1).
113 College, 20 December 2017, Decision ABC-2017-V/M-38, Interim measures against FEI, GCL and TTB.
115 Brussels Court of Appeal, 27 June 2018, GCL and TTB/Belgian Competition Authority (Case 2018/5782), Paragraph 38.
parties on reasonable and non-discriminatory terms and conditions, or to suspend the full exclusive agreement from the end of season 2015–2016 and reallocate the VV broadcasting rights, whether on an exclusive basis or not, under a transparent and non-discriminatory tender procedure.116

iii Structural remedies

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

VI PROCEDURE

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

In a nutshell, a single BCA composed of two functionally distinct entities, namely the College in charge of deciding cases and the Auditorate in charge of investigations, replaced the dual structure previously in place. The Auditorate carries out investigations either on an ex officio basis, upon a complaint, or at the request or injunction of the competent minister. Upon completion of its investigation, the Auditorate has a choice between closing a case and issuing a formal statement of objections to which parties are entitled to reply prior to the transmission of the case to the College for decision.117 That transmission occurs by means of the issuance of a non-binding draft decision reflecting the replies to the statement of objections.118 The College then hears the parties both in writing and orally before rendering its decision,119 which can then be appealed before the Brussels Court of Appeal. The procedure is controversial, however, primarily because it prevents parties from submitting new factual evidence before the College (unless the draft decision raises points that were not addressed in the statement of objections). Moreover, the CEL sets strict time limits for the submission of written briefs by the parties, namely one month to reply to the statement of objections, and two months to comment on the draft decision and review the case file.120 Complainants are entitled to appeal to the College any decision by the Auditorate dismissing their complaint and to review the evidence referred to in the Auditorate's decision. If the Auditorate acts upon their complaint, they may have access to a non-confidential version of the draft decision ‘if the College deems it necessary’.121 As a rule, they do not have access to the case file unless the President of the BCA decides otherwise, and then

117 Article IV.42(4) of the CEL.
118 Article IV.42(5) of the CEL.
119 Article IV.45(5) of the CEL.
120 These time limits can be extended if the president of the BCA ‘deems it necessary’. The CEL also provides for various deadlines applicable to the Auditorate and the College, but these are considered indicative. For example, the College is supposed to hold an oral hearing, at the latest, two months after the filing by the parties of their written comments on the draft decision, and to issue its decision within one month of the oral hearing (see Articles IV.42(5), IV.45(3),(4) and (6) of the CEL).
121 Article IV.45(1) of the CEL.
only to a reduced version of the file containing only the evidence referred to in the draft decision (i.e., not the entire case file).\textsuperscript{122} Upon request, complainants can be heard orally by the College.\textsuperscript{123}

The CEL provides for the possibility of closing cases by means of a commitment decision adopted by the College.\textsuperscript{124} Commitment decisions do not involve a formal finding of infringement, which implies that plaintiffs cannot solely rely on such decisions as establishing fault under Article 1382 of the Belgian Civil Code as the basis for a follow-on damages claim before Belgian courts. Whereas the Commission relies heavily on commitment procedures to deal with dominance cases, the BCA has adopted very few commitment decisions to date.\textsuperscript{125} Even though not formally a commitment decision, but a dismissal, the Immoweb case set a precedent in Belgium for \textit{de facto} commitment decisions at the level of the Auditorate. In 2015, the Auditorate opened an investigation into Immoweb’s use of most-favoured nation (MFN) clauses in its contracts concluded with software developers for real estate agencies. After a preliminary analysis, the Auditorate concluded that Immoweb, the operator behind Belgium’s most-frequented real estate website, was dominant on a national market for web portals dealing primarily in real estate, and that the MFN clauses prevented Immoweb’s competitors from negotiating more commercially favourable terms with software developers, which increased the barriers to entry. Immoweb committed unilaterally to terminate the clauses at issue and not to include such MFN clauses in contracts concluded in the following five years. On this basis, the Auditorate decided to close its investigation, essentially dismissing the case without coming to a final determination about any abuse of dominance under Article IV.2 of the CEL or Article 102 of the TFEU, and without issuing a formal commitment decision under Article IV.47 of the CEL.\textsuperscript{126}

In addition, the CEL contains formal and informal settlement procedures that are also applicable in dominance cases (i.e., not only in collusive cases). The formal settlement procedure can be initiated at any time prior to the issuance of a draft decision.\textsuperscript{127} If an allegedly dominant company indicates its willingness to engage in formal settlement discussions, the Auditorate will provide it with a summary of the objections and of the relevant pieces of evidence, as well as a range of possible fines. The company in question is then required to recognise its liability and to accept the fine estimate.\textsuperscript{128} On that basis, the Auditorate will then issue a draft settlement decision proposing a fine, on which it ‘may’ (in practice, ‘does’) apply a 10 per cent reduction. Similarly, it ‘may’ reflect in the proposed fine commitments to compensate third parties for any harm suffered. Upon acceptance of the proposed fine, the Auditorate then issues a final settlement decision, which cannot be appealed. As is the case at the EU level, settlement discussions can be interrupted at any time. Settlement discussions between the Auditorate and the relevant company are considered confidential. Uncertainty remains as to the rights of complainants and other interested parties

\textsuperscript{122} Article IV.45(2) of the CEL.  
\textsuperscript{123} Article IV.45(5) of the CEL.  
\textsuperscript{124} Article IV.49 of the CEL.  
\textsuperscript{125} The BCA has adopted commitment decisions in only two instances so far: see Competition Council, Decision 2005-I/O-52, \textit{NV Distri-One/BVBA Coca-Cola Enterprises Belgium}; and Competition Council Decision 2006-I/O-12, \textit{Banksys SA/FNUCM /Banksys SA; UNIZO/Banksys}. Both decisions ended seven-year investigations into alleged abusive conducts.  
\textsuperscript{126} Auditorate, 7 November 2016, Decision ABC-2016-I/O-31-AUD, \textit{Immoweb} (Case CONC-I/O-15/0002).  
\textsuperscript{127} Articles IV.51 to IV.57 of the CEL.  
\textsuperscript{128} See the BCA’s Fining Guidelines, Paragraphs 9 and 10.
in commitment and settlement procedures. The *National Lottery* case represents the first settlement decision adopted in a dominance case. The Auditorate applied the 10 per cent reduction after having already reduced the fine for mitigating circumstances based on the absence of a proven anticompetitive effect of the practices in question and the National Lottery’s full cooperation.

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

Generally, legal advice (and associated correspondence), as rendered by in-house counsel who are members of the Belgian Institute for Company Lawyers, benefits from a protection equivalent to legal privilege, and therefore cannot be seized by the BCA during inspections (or by any other public authority). However, Article IV.79(1) of the CEL unduly limits the effectiveness of that protection, for it allows parties to bring an appeal against the seizure of documents during inspections only after the issuance by the Auditorate of the statement of objections, and ‘only to the extent that the documents in question are invoked in support of the said objections’.

Decisions of the BCA may be appealed before the Brussels Court of Appeal, apart from settlement decisions that may not be appealed by the settling parties under Belgian law. The Court has shown willingness to rule against the BCA, in particular with respect to companies’ rights in the context of inspections.

A case in point is *Distripaints/Novelta*, where the Brussels Court of Appeal confirmed the BCA’s determination of ‘in-scope’ documents, but only after having requested the BCA to provide an expanded statement of reasons to justify the relevance of the documents it collected during its inspections.

Regarding interim measures, the Court annulled the BCA’s interim measures decision ordering the suspension of an MoU on grounds of inappropriate reasoning. The Court noted that, while the College explicitly dismissed the MoU from the case file due to its confidential nature, the decision nevertheless contained multiple references to the MoU.
including in the preliminary assessment of the College, which resulted in the suspension of the MoU. These internal contradictions vitiated the reasoning of the decision, which the Court therefore annulled.

Article IV.32 of the CEL provides that members of the BCA can be recused for the same reasons as those justifying the recusation of judicial judges under Article 828 of the Belgian Judicial Code. These provisions were applied in 2018 for the first time since the entry into force of the CEL in 2013. In FEI, the Brussels Court of Appeal ordered three members of the College (including the president of the BCA) involved in the adoption of the decision it annulled earlier in the same year to abstain from sitting in the College that would be responsible for reviewing the case.137 The president of the BCA and the two other assessors contended that, as the decision was annulled on procedural grounds, the administrative procedure could still be carried out by the College that adopted this decision.

The Brussels Court of Appeal, however, found that the criteria for recusation were satisfied in the case at hand. The Court held that the new decision would necessarily be based on the same circumstances of fact and law as those underlying the annulled decision; a College sitting in the same composition would therefore have an incentive to merely adjust its reasoning in a way that supports its original conclusions (i.e., that interim measures were justified) rather than starting over with an impartial assessment of the case. The Court therefore ordered the president of the BCA and the two assessors to abstain from sitting in the College that will examine the case in the future.

Finally, the CEL contains an antitrust blocking statute, subject to exceptions to be set forth by Royal Decree.138 The principle of the primacy of EU law makes that provision unenforceable against requests from the Commission or from the competition authorities of other EU Member States addressed pursuant to Regulation 1/2003.

VII PRIVATE ENFORCEMENT

As previously noted, claims for abuse of dominance are also brought before Belgian courts. One avenue for such claims involves reliance on the rules on unfair trade practices. It is settled case law that claimants alleging breaches of Article IV.2 of the CEL can also obtain redress pursuant to the CEL's Unfair Trade Practices provisions (replacing the previous Belgian Act on Unfair Trade Practices).139 The CEL, in particular, provides for a special and particularly effective procedure to obtain a cease-and-desist order at short notice from the president of the competent commercial court.140 The procedure constitutes a credible alternative to proceedings before the BCA in those cases where plaintiffs have sufficient elements at their disposal to discharge the applicable burden of proof (or can readily identify the relevant pieces of evidence and request their production in court). However, at present the Belgian Code of Civil Procedure does not contain discovery rules comparable to those existing in the United States or the United Kingdom. In BIT Marketing/SEB and Bierhalle Demeyer NV/

138 Article IV.13 of the CEL.
139 Further, infringements of Chapter IV of the CEL are considered to fall within the scope of the notion of ‘unfair trade practices’ pursuant to Article VI.104 of the CEL.
140 Article XVII.10 et seq of the CEL. That procedure is dealt with according to the rules applicable to interim proceedings but is not subject to the requirement of urgency.
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Duvel Moortgat, the claimants appealed judgments denying cease-and-desist orders. Their appeals were dismissed because the claimants had not provided sufficient evidence to find that either SEB and DM were dominant in their respective markets. 141

Damage claims can also be filed to obtain compensation for harm suffered as a result of an (alleged) abuse of dominant position, either on a stand-alone basis or as a follow-on action. 142 As the law currently stands, the CEL does not include a specific statutory basis for that purpose, so that general tort law principles apply and require plaintiffs to establish a fault imputable to the defendant, an injury suffered by the plaintiff, and a causal link between the fault and the injury. 143 In 2017, the Belgian legislator implemented the EU Damages Directive, and thereby provided a specific regime for damage claims based on Articles IV.1 and IV.2 of the CEL or Articles 101 and 102 of the TFEU, or on both. Whereas the Damages Directive provides for a presumption that cartels cause harm, it does not include such presumption for abuses of dominance. Under Belgian tort law, damages are awarded according to the restitutio in integrum principle, whereby the victim must be compensated for the entire harm suffered (i.e., to restore the status quo ante) but only the actual harm suffered. Hence, Belgian law allows for the recovery of any direct losses and profits forgone (including losses of business opportunities), but does not recognise treble or punitive damages. In spite of the lack of clear precedent in the antitrust field, commentators have commonly admitted that the passing-on defence can be invoked by defendants, a position that should be formalised in the implementation of the Damages Directive. Upon request, damage awards can also include (simple, not compound) interest from the date the injury occurred, and be complemented by a fixed (and relatively modest) indemnity of procedure supposed to cover attorneys’ fees and other costs and disbursements.

The Belgacom/Base & Mobistar case, discussed in the 2016 edition of this chapter, addressed the question of an undertaking’s fault in cases of abuse of dominance. 144 The former incumbent telecommunications operator, Belgacom, and mobile competitors Mobistar and Base had been involved in a long-running damages litigation for alleged pricing abuses. The abuses revolved around the different mobile termination rates charged by Belgacom depending on whether calls were initiated and terminated on its network (on-net) or initiated from other networks and terminated on its network (off-net). While the parties settled the litigation in October 2016, the Brussels Court of Appeal held before that Belgacom should have known, in light of established EU precedents, that its alleged practices would constitute breaches of Article 102 TFEU and therefore faults on its part (if they were confirmed by experts). With respect to the network effects in particular, the Court noted that the fact that the EU courts had not yet expressly decided on such practices did not mean that these could not amount to anticompetitive conduct. In particular, the Court held that the language

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142 As mentioned previously, commitment decisions do not involve a formal finding of infringement, which implies that plaintiffs cannot solely rely on such decisions as establishing fault under Article 1382 of the Belgian Civil Code as the basis for a follow-on damages claim before Belgian courts.

143 These principles are rooted in Article 1382 of the Belgian Civil Code. In theory, contractual liability can also be invoked to obtain damages or even the nullity of a contract, depending on the terms of the contract in question and the circumstances of the case.

144 Brussels Court of Appeal, 26 February 2015, Belgacom/Base & Mobistar (Case 2012/AR/1), TBM/RCB, 2016/3, 286.
of Article 102(a) TFEU, existing EU case law and decisions, and Commission guidance, made it reasonably predictable that an unjustified difference between the costs of on-net and off-net calls would not be defensible in courts.

In fact, but for a couple of unsuccessful cases, recent practice appears extremely limited, as only two cases have been reported since 2004 of damages awarded based on a finding of abuse of dominance. The first case was peculiar, for the abuse was found to arise from meritless actions brought by Kinepolis, an (allegedly dominant) operator of film theatres, to stop or delay the anticipated construction of a new theatre complex in the Liège region by rival UGC, as well as from the pre-emptive purchase of land constraining the development of such project. By a judgment of 17 June 2010, the Brussels Commercial Court awarded damages compensating UGC for the legal fees incurred as a result of Kinepolis’ abusive practices, as well as for the consultancy fees and costs associated with a bank guarantee contracted by UGC in association with its project. In contrast, the Court refused to consider the loss of operating income that would have resulted from the construction of the complex for it was deemed too speculative. Interestingly, the Court also clarified that damages claims can proceed (and do not have to be stayed) in spite of parallel proceedings pending before the BCA.147

The second case to date is Honda, where the Ghent Commercial Court addressed the question of the statute of limitations of actions for damages. In its 1999 decision (which became final in 2011, after multiple appeals), the BCA (then Competition Council) found that Honda had abusively imposed overly burdensome conditions on parallel importers for obtaining conformity certifications in Belgium; the parallel importers competed with Honda’s official authorised distributors. In 2006, several parallel importers of Honda motorcycles filed an action for damages against Honda. Honda argued that the plaintiffs’ claims were time-barred pursuant to Article 2262 bis of the Belgian Civil Code, which provides for a five-year limitation period for tort-based damages claims, in light of the 1999 BCA decision. The Court referred a request for a preliminary ruling to the Belgian Constitutional Court regarding the starting point of the limitation period for damages claims arising from breaches of competition law. In 2016, the Constitutional Court ruled that limitation periods of antitrust damages claims cannot expire before a final decision of the competition authority (or the end of the investigation by other means). In its judgment, the Ghent Commercial Court applied this principle, and held that the parallel importers’ damages claims were not time-barred because they were filed while the appeal against the BCA decision was still pending. The Court held that the harm, which stemmed from events dating back as far as 25 years, was practically impossible to quantify. The Court agreed with Honda that the plaintiffs could not bring forward sufficient evidence of the harm, but considered that not

145 Prohibiting ‘directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions’.
146 See, for example, Brussels Court of Appeal, 25 January 2005, Ann Prat Comm, p. 743; and Brussels Commercial Court, 15 November 2006, RG 8069/02.
149 Belgian Constitutional Court, 10 March 2016, Honda (Case 38/2016), TBH/RDC, 2016/8, p. 755.
granting damages would be contrary to the objectives pursued by the rules on the private
enforcement of competition law, and therefore assessed the harm _ex aequo et bono_ and granted
each plaintiff €20,000 in damages, plus interest accrued since 1997.

Finally, Belgian law permits plaintiffs to seek collective redress. Interestingly, the
Collective Actions Act provides that only consumers and other organisations satisfying
certain legal conditions, as well as the Federal Ombudsman for Consumers, are entitled to file
a claim on behalf of a group for collective recovery, and that they may do so only before the
Brussels courts.\textsuperscript{150} It is up to the court to decide whether to apply an opt-in or opt-out system.
Likewise, the court must systematically require the parties to first explore the possibility of
negotiating a settlement. It is only in the case of failure of such settlement that the court may
hear and decide on the merits of the damages claim.

**VIII FUTURE DEVELOPMENTS**

In its priority policy statement for 2018, the BCA identified among the priority areas for
enforcement, telecommunications, retail, services to consumers, public procurement,
pharmaceuticals and logistics (ports, and road, rail and water networks).\textsuperscript{151} These sectors were
substantially the same as in the BCAs 2017 policy statement and some of these are likely to
remain focus areas in 2019.

The new rules on abuse of economic dependency will now allow enforcement against
non-dominant undertakings, which is likely to increase litigation over the coming years. On
the other hand, the increase of the cap on fines for competition law infringements from an
undertaking’s national to its worldwide turnover is likely to increase deterrence in dominance
cases. While the BCA has indicated its support for measures to fight against abuses of market
power beyond Article 102 of the TFEU and Article IV.2 of the CEL, the BCA president has
stated that the enforcement of such new provisions would require additional staff. It will be
interesting to closely monitor administrative and case law developments to understand how
the concept of economic dependency will be applied in practice. One topic of particular
interest will be the concurrent application of the provisions on abuse of dominance and abuse
of economic dependency.

\textsuperscript{150} Articles XVII.35 to XVII.69 of the CEL.
\textsuperscript{151} BCA, Priority Policy for 2018, 6 April 2018.
Chapter 5

BRAZIL

Ana Paula Martinez

I INTRODUCTION

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

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

1 Ana Paula Martinez is a partner at Levy & Salomão Advogados. The author would like to thank Lucas Griebeler da Motta for conducting the research needed to update this chapter.
2 Brazil's antitrust system features both administrative and criminal enforcement. The administrative and criminal authorities have independent roles and powers, and may cooperate on a case-by-case basis. Private enforcement actions may also be initiated through the judicial courts by aggrieved competitors or damaged parties. At the criminal level, antitrust law and practice is governed mainly by Law No. 8,137/1990 (the Economic Crimes Law), as amended by Law No. 12,529/11 and Law No. 8,666/1993 (the Public Procurement Law).
3 On average, judicial courts confirm over 70 per cent of CADE's decisions.
The basic framework for abuse of dominance in Brazil is set out in Article 36 of the Competition Law. CADE has not yet issued a regulation under the new Competition Law covering unilateral conduct, and has been resorting to legislation issued under the previous regime and precedents. The Anglo-American concept of binding judicial precedent (i.e., stare decisis) is virtually non-existent in Brazil, which means that CADE’s commissioners are under no obligation to follow past decisions in future cases. Under CADE’s Internal Regulations, legal certainty is only achieved if CADE rules in the same way at least 10 times, after which a given statement is codified via the issuance of a binding statement. To date, CADE has issued nine binding statements, all related to merger review except one (Binding Statement No. 7), which provides that it is an antitrust infringement for a physicians’ cooperative holding a dominant position to prevent its affiliated physicians from being affiliated with other physicians’ cooperatives and health plans.

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

II YEAR IN REVIEW

In 2018, CADE adjudicated 25 administrative proceedings. Out of these, 13 were dismissed, while in 12 cases, CADE found an infringement in relation to at least one defendant. This represents a significant increase if compared with 2017, when 13 cases were adjudicated in total, out of which, nine resulted in a conviction. There has been an increasing number of settlements reached between defendants and CADE, totalling 60 proposals that resulted in settlements executed in 2018. In 2018, fines reached 627.26 million reais, and the settlement sums agreed with CADE achieved a new record of 1.327 billion reais. The increasing number of settlements and amounts imposed and collected may be explained by the fact that the authority has established a more predictable procedure for settling cases, and is devoting more resources to the prosecution of anticompetitive practices.

In 2018, cartels remained a priority for CADE, accounting for 20 out of the 25 investigations and infringements found. Other CADE decisions – whether to open, settle or dismiss a case, or recommend the conviction of defendants – included exclusionary practices, namely refusal to deal, price discrimination and the creation of difficulties for market players. To follow is a comprehensive list of 2018’s abuse of dominance cases, including settlements.

i Regulated industries

In 2018, CADE continued to be active in the review of alleged abuse of dominance practices in regulated industries, with a special focus on financial services, port services and natural gas.

Financial services

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

Following probes opened by CADE into the payment industry in March 2016, Itaú-Unibanco, a major financial institution, and its vertically integrated subsidiary, Rede, a dominant payment acquirer, agreed to cease conduct that may have led to exclusive-payment arrangements in Brazil.\(^5\) Through an agreement reached on 4 July 2018, the parties committed:

\(a\) to make available relevant information on the receivables portfolio of their clients to rival payment service providers hired by their clients, in order to facilitate the structuring of loan transactions and securitisation by small and medium-sized financial institutions;

\(b\) to refrain from locking-in their clients, allowing them to switch the custody of the receivables processed by Rede from its controlling shareholder, Itaú-Unibanco, to other non-integrated financial institutions;

\(c\) not to retaliate on clients that opt to shift from Itaú-Unibanco to another bank, maintaining the commercial relationship with Rede, or clients that choose to hold their accounts with Itaú-Unibanco, but process payments with other acquirers or processors;

\(d\) not to offer better commercial conditions to their clients, conditional on the acquisition of both services (tie-in of banking services and payment processing services); and

\(e\) to abstain from demanding their clients to meet minimum targets in terms of sales volume processed by Rede.\(^6\)

On 19 September 2018, Bradesco, Banco do Brasil and Cielo, the former two, leading financial institutions and the controlling entities of Cielo, another dominant payment acquirer in Brazil, entered into a similar agreement with CADE.\(^7\)

On 3 October 2018, B3 – Brasil, Bolsa, Balcão (B3), a financial market infrastructure company providing trading services in an exchange and over-the-counter environment, and CADE, reached an agreement by means of which B3 agreed to adopt certain practices to address refusal to deal concerns raised by Americas Clearing System and Americas Trading System Brazil (ACS/ATS).\(^8\) ACS/ATS were structuring another IT infrastructure provider to compete with B3 and allegedly required access to B3’s infrastructure to be able to compete.

**Port services**

On 8 August 2018, the Tribunal found that Rodrimar\(^9\) and Tecon Rio Grande,\(^10\) two logistics and vertically integrated storage companies, abused their dominant position within their influence area by charging competitors a fee to increase the costs of non-integrated competitors active in the storage of imported goods market. Rodrimar is a crane operator with activities at Santos seaport, the largest seaport in Brazil, operating under a monopoly regime. In its turn, Tecon Rio Grande has similar activities at Rio Grande seaport, the fourth largest in Brazil. Both companies are responsible for handling containers and loading and

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\(^5\) Administrative Inquiry No. 08700.001860/2016-51.
\(^6\) Cease-and-Desist Agreement No. 08700.003638/2018-54.
unloading cargo for the benefit of maritime freight companies. They are granted exclusive concession and license to perform such services, so all other players active in the same chain (ground transportation and storage stages, in particular) are dependent on them.

In line with the complaints of Marimex and Multi Armazéns, warehouses and direct competitors of Rodrimar and Tecon Rio Grande in the storage services market, CADE found that the imposition of custody fees and a fee called terminal handling charge 2 (THC2) on non-integrated competitors distorts competition once it creates favourable conditions for integrated storage providers belonging to Rodrimar’s and Tecon Rio Grande’s groups to provide logistics services at lower prices. In other words, if a shipowner or importer opts to use Rodrimar or Tecon Rio Grande as the sole provider of the whole portfolio of services in connection with cargo handling and storage, the custody fees and THC2 will not be charged.

The litigation also involved discussions on the application or not of the State Action Doctrine and the Pervasive Power Doctrine, as Brazil has a federal agency, the National Agency of Ports and Navigation (ANTAQ), with jurisdiction to monitor and oversee all players active in the port industry. However, the Tribunal took the view that there is no public policy exempting the port industry from CADE’s antitrust enforcement.

**Telecom and internet-related services**

On 9 June 2016, the Federal Public Prosecutor’s Office filed a complaint against the four major internet service providers in Brazil (Claro, Oi, Telefônica/Vivo, and TIM) due to alleged negative effects that had arisen from the practice of zero-rating – when an internet service provider applies a zero price to the data traffic associated with a particular app or website, or class of app or website, and the data do not count towards any data cap in place on the internet access service, which is very common in social media and music streaming apps.

According to the complaint, zero-rating practices would have the ability to distort competition among app and content providers, in the sense that all major internet service providers in Brazil only offer zero-rating for very popular apps, such as Facebook, Instagram, WhatsApp and Twitter: that is, by exempting consumers from the utilisation of some data packages, there would be incentives for the strengthening of the dominant position held by major content providers, to the detriment of small players and entrants, as consumers would be more inclined towards using free apps and content on their mobile phones.

On 31 August 2017, CADE dismissed the case as it found that there was no causal nexus between zero-rating and the success of the major apps and content providers; for example, the increase in the number of users of Facebook, Instagram, WhatsApp and Twitter, and the number of times these apps were accessed, was not dependent on zero-rating offers. Even if the investigated telecoms companies ceased all offers involving zero-rating, consumers would use the aforementioned social media apps to the same intensity. Additionally, by not charging for streaming associated with the popular apps, the practice would allow consumers to use their data packages to access less popular apps.

Another relevant case was initiated by a complaint filed by British Telecom (BT) in December 2015, against Claro, Oi and Telefônica, which collectively own most of the telecoms infrastructure in Brazil. In accordance with BT’s allegations, the defendants

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12 Administrative Inquiry No. 08700.004314/2016-71.
13 Administrative Inquiry No. 08700.011835/2015-02.
refused to deal with BT and, therefore, the complainant was deprived of competing on the merits in the context of a public bidding launched by the Brazilian Postal Services, Correios, with the aim of improving the networks and the interconnection among all local agencies of Correios. BT also alleged that Claro, Oi and Telefônica foreclosed the market and impeded competition because they formed a consortium, and through this, collectively abused their market power. CADE has been collecting evidence on the case since August 2017, when the investigation was made public.

**Natural gas**

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

Finally, on 29 March 2018, the DG dismissed a claim presented by Âmbar Energia, an operator of thermopower plants, against Petrobras, the supplier of most of the natural gas needed for the operation of a plant located near the border region of Brazil and Bolivia. Following a frustrated private negotiation between Âmbar and Petrobras, Âmbar presented a claim before CADE against Petrobras, requesting the opening of an antitrust investigation. At the beginning of the case, Âmbar alleged price discrimination against it by Petrobras, which supposedly supplied thermopower plants owned by Petrobras under more favourable commercial conditions. After signing a transitory natural gas supply agreement, Petrobras terminated such agreement due to the fact that the shareholders of Âmbar executed a plea bargain with the Brazilian Federal Prosecution Service, admitting corrupt practices in connection with the negotiation of the terms and conditions of the mentioned agreement, which prompted new allegations by Âmbar of a refusal to deal. The DG dismissed the case due to lack of evidence. Additionally, the DG acknowledged that Petrobras has the discretion to terminate agreements in cases of noncompliance with anticorruption policies.

### ii Mergers and remedies adopted by CADE to address concerns with unilateral effects

CADE has been actively reviewing mergers with vertical concerns in recent years – especially following the *AT&T/Time Warner* case in 2017 – imposing remedies to address antitrust concerns primarily raised by competitors. The participation of interested third parties in the design of merger control agreements is also a trend that should be highlighted.

In the global merger between Bayer and Monsanto, besides structural remedies resulting in the divestiture of some seed assets to BASF (cotton, soybean and herbicides), CADE imposed behavioural obligations in connection with the licensing of patent rights held by the parties, including provisions to guarantee isonomic access of rivals to new solutions and technologies developed by the parties, in particular those related to biotechnology enhancements designed for soybean and cotton. CADE also determined that the parties shall not require exclusivity

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16 Merger Case No. 08700.001097/2017-49.
from their distributors or practice tie-ins involving Bayer’s or Monsanto’s products. CADE and the parties signed a merger control agreement on 7 February 2018, and the transaction was cleared subject to conditions.

In the Itaú-Unibanco/XP Investimentos case, CADE analysed the acquisition, by Itaú-Unibanco (the largest financial institution in Brazil and Latin America), of 30 per cent of the voting shares of XP Investimentos, the major non-integrated investment firm in Brazil, which offers securities brokerage, investment advisory and insurance brokerage services. To close the deal, the parties offered the following non-discrimination commitments:

a XP Investimentos shall make available its online investment platform to non-integrated bond issuers and investment funds; and

b Itaú-Unibanco shall make available its financial products and solutions offered via XP Investimentos to competing platforms.

The transaction was conditionally cleared on 14 March 2018.

iii Digital markets: probes into Google’s behaviour and most-favoured nation clauses

Antitrust probes against Google

During the past few years, CADE has been investigating Google’s practices in digital markets through four different antitrust probes.

The first probe is the Brazilian case of Google Shopping, the same practice scrutinised by the European Commission, which imposed a fine of €2.42 billion for abusing dominance as a search engine by giving illegal advantage to its own comparison shopping service. The inquiry was initiated by a complaint filed by e-Commerce, owner of the comparison websites Buscapé and Bondfaro, on 20 December 2011. According to the complainant, Google, which operates a search engine website and a downstream-related product, its price comparison platform, has systematically placed its own price comparison service in prominent visual positions when a consumer enters a query into Google’s search engine. Apart from this practice, e-Commerce also accused Google of using an algorithm to manipulate the potential traffic that rival price comparison platforms could have, demoting the ability of consumers to find attractive results and offers via competitors, which were placed only on page four or five of Google’s search engine. After seven years analysing factual and economic evidence, on 19 November 2018, the DG issued an opinion recommending the Tribunal to close the probe without imposing any penalties. According to the DG, the Brazilian antitrust case is different from the European case, since the European Commission found substantial evidence on discrimination and negative impacts on the market arising from Google’s strategy. Following a market test conducted by the DG, the traffic experienced by non-integrated price comparison platforms mostly derived from Google search engine and such traffic has been increasing over the years. Additionally, no evidence was found on the usage of Panda Algorithm, the one supposedly used by Google within the European Economic Area to demote rival websites. At the time of writing, the case is pending final adjudication.

17 Merger Case No. 08700.004431/2017-16.
18 Based on the best publicly available information.
The second inquiry concerned Bing and Microsoft’s complaints that AdWords, an online platform owned by Google, responsible for the management and delivery of ads and marketing campaigns, was hindering the interoperability and ‘multi-homing’ of advertising campaigns between Google and Bing’s search engines.\(^2^1\) According to Bing and Microsoft, Google has created difficulties for providers of goods and services, as well as the advertising agencies used by those providers, to simultaneously launch ad campaigns for different search engines. As Google holds a majority in terms of the number of searches made, with an estimated market share greater than 80 per cent, most companies tend to prepare ad campaigns to be delivered to their prospective targets (i.e., users potentially interested in a given product or service – for instance, a car, a dress, a handset) only via Google, setting aside rival and small search engines. After Bing and Microsoft reached an agreement with Google to terminate all litigation involving the parties, the complainants dropped the case in Brazil, and the investigation was proceeded \textit{ex officio} by the DG. To assess the alleged anticompetitive behaviour of Google, the DG sent several requests for information (RFIs) to clients of Bing, advertising agencies and large companies, such as Coca-Cola, Citigroup, Heineken, Gol Airlines and Volkswagen. From the data gathered from market participants, on 11 May 2018, the DG issued an opinion recommending the dismissal of the investigation, once most of Bing’s clients and advertising agencies stated they did not find hardships in dealing with distinct platforms, but rather preferred to use Google owing to the possibility of a wider reach in terms of internet users. The DG also concluded that, with small adjustments, interoperability between platforms may work well. At the time of writing, the case is pending final adjudication.

The third probe, also filed by e-Commerce, involved complaints of illegal copy and content scraping (users’ reviews), by Google Shopping, from rival price comparison websites.\(^2^2\) Through this practice, Google allegedly removed recommendations and positive feedback of competitors posted by clients from its search engine, and ‘stole’ such recommendations and positive feedback, including them in Google Shopping pages. The DG recommended the case to be dismissed once:

\begin{itemize}
  \item[a] no evidence of harm to Brazilian customers was found;
  \item[b] there were no other competitors of e-Commerce or Google reporting the same practice of content scraping;
  \item[c] the practice was limited to very few situations because of a computer bug; and
  \item[d] Google has addressed the bug that caused the problems reported by e-Commerce.
\end{itemize}

At the time of writing, the case is pending final adjudication.

The last investigation originated from a complaint brought by Yelp, a search and advertising company, which alleged that, after Google launched a new service called Google Places, Google had abused its dominance in the search engine market to favour its integrated services to the detriment of non-integrated competitors.\(^2^3\) Yelp and Google Places have the main purpose of providing their users with further information on given places (such as public parks, restaurants, hotels, shops and shopping centres), including ratings, reviews and tips from clients, opening hours, capacity, prices, discounts and promotions. In accordance with the views of Yelp, prior to the establishment of Google Places, Yelp had more data

\(^{21}\) Administrative Proceeding No. 08700.005694/2013-19.
\(^{22}\) Administrative Proceeding No. 08700.009082/2013-03.
\(^{23}\) Administrative Inquiry No. 08700.003211/2016-94.
traffic and users because the Google search engine was functioning properly; that is, without the deployment of an algorithm used to sidestep the standard logic of the ranking process of the results of a query entered into the Google search engine. However, after the launch of Google Places, the Google search engine diverted traffic away from rival services, giving unfair prominence to its own services and putting Yelp and other rivals in unattractive positions to avoid access and clicks from users. At the time of writing, the case is still at a preliminary stage.

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

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

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

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

iv  **Antitrust and IP**

Finally, on 14 March 2018, the Tribunal issued one of CADE’s most anticipated rulings involving an investigation into car makers Fiat Chrysler, Ford and Volkswagen, which have been accused of abusing their intellectual property (IP) rights in the spare parts aftermarket by blocking independent makers from producing and selling certain spare parts.\(^{24}\) Even though in June 2016, the DG found that the conduct was illegal, recommending the imposition of a sanction, the majority of the Tribunal concluded that there was no abuse of IP rights, but only the exercise of exclusive rights granted by Brazilian IP law.

iii  **MARKET DEFINITION AND MARKET POWER**

Brazil’s Competition Law provides that a dominant position is presumed when ‘a company or group of companies’ controls 20 per cent of a relevant market. Article 36 further provides that CADE may change the 20 per cent threshold ‘for specific sectors of the economy’, although the agency has not formally done so to date. The 20 per cent threshold is relatively low compared with that in other jurisdictions, especially the United States and the European

\(^{24}\) Administrative Proceeding No. 08012.002673/2007-51.
Union. CADE has traditionally interpreted the expression ‘group of companies’ to encompass companies belonging to different economic groups that could jointly abuse power in a given market, even if no single member of the group holds market power on its own.

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

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

IV ABUSE

i Overview

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

a a limitation or restraint on, or, in any way, harm to, open competition or free enterprise;

b control over a relevant market of a certain good or service;

c an increase in profits on a discretionary basis; or

d engagement in market abuse.

Article 36 specifically excludes from potential violations, however, the achievement of market control by means of ‘competitive efficiency’.

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

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

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

Exclusionary pricing

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

Exclusive dealing

In recent years, CADE has investigated and imposed sanctions against numerous exclusive arrangements. Exclusive dealings and other contractual provisions can constitute violations of Article 36 of the Competition Law if they lead to the foreclosing of competitors from accessing the market. Most of the cases have involved Unimed, a physicians’ cooperative with operations in 75 per cent of the country. Unimed affiliates contract with local physicians and hospitals for the provision of healthcare services, and often such providers are prohibited from affiliating with any other health plan. CADE prohibited such exclusivity arrangements and imposed sanctions against Unimed in all cases where it held a high market share (usually around 50 per cent). CADE has sanctioned more than 70 of these cases – including a fine of 2.9 million reais imposed in 2013 against a Unimed cooperative in the south of Brazil, doubled for recidivism25 – and recently settled another 39 investigations on condition that Unimed terminated the exclusivity clauses. The most recent conviction concerned Unimed in the Missões region, in southern Brazil, where it was also imposing exclusivity arrangements.26

In February 2016, CADE also reached a settlement with Unimed Catanduva, which would only accredit companies as its service providers if they were controlled by physicians linked to the Unimed system, closing the investigation.27

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

dominance case: 352 million reais. AmBev challenged CADE’s decision before the judicial courts and, in July 2015, reached an agreement with CADE through which it agreed to pay 229.1 million reais and terminate the conduct.28,29

Another interesting case involving exclusive dealing concerns Unilever, owner of Kibon, one of the most famous brands of ice creams in Brazil.30 Following a complaint filed by competitor Della Vita, on 16 October 2019 the Tribunal found that some exclusive arrangements entered into by Unilever and strategic retailers – located in the states of São Paulo and Rio de Janeiro – violated antitrust laws. Initially, CADE opened a probe against Nestlé and Unilever, since there was preliminary evidence of the existence of agreements through which both companies demanded that some distributors and retailers should only purchase ice creams and related products from one supplier (that is, only from Nestlé or from Unilever). In addition, the ice cream manufacturers were supposedly imposing minimum volume of sales and exclusivities related to marketing campaigns on their clients. On the one hand, after further evidence was gathered, CADE concluded that Nestlé had no market power and only followed the commercial strategy adopted by the market leader Unilever, which at that time accounted for a market share higher than 50 per cent in certain regions of Brazil. On the other hand, after the DG performed market tests by sending RFIs to market participants (competitors, distributors, strategic clients, etc.), CADE found that, despite the fact Unilever did not insert explicit exclusivity clauses in its contracts, it offered significant discounts and bonuses based on the volume of products purchased from Unilever (a practice similar to that sanctioned by CADE in Tô Contigo, against AmBev). This practice resulted in market foreclosure by means of de facto exclusivity: five of Unilever’s competitors reported to CADE that they had difficulties in selling non-Nestlé and Kibon ice creams to well-placed retailers in São Paulo and Rio de Janeiro. In addition to this, CADE concluded that the strategy adopted by Unilever was quite successful, since 74.2 per cent of Unilever’s total turnover in the segment derived from distributors and retailers with exclusive arrangements. Unilever was sanctioned to pay 1 per cent of its gross sales in the relevant market affected by the practice.

28 Administrative Proceeding No. 08012003805/2004-10; defendant: Companhia de Bebidas das Américas – Ambev; adjudication date: 22 July 2009. The amount of the fine was equivalent to 2 per cent of the total turnover of the defendant in the year preceding the initiation of the investigations.

29 Another alleged exclusionary case involving AmBev concerned an alleged practice to raise rivals’ costs by introducing a proprietary reusable bottle in the market. Much of the beer sold in Brazil is packaged in reusable bottles. The bottles have a standard size (600ml), allowing all market players to coordinate their recycling (for reuse) programmes. AmBev introduced a 630ml proprietary bottle, which was physically very similar to the 600ml bottle, allegedly causing confusion in the recycling programme of rivals and raising costs for retailers that also offered AmBev’s competitors’ products. In November 2010, AmBev agreed to stop commercialising the 630ml bottle through a consent decree with CADE (Administrative Proceeding No. 08012.001238/2010-57).

**Tying and other leveraging practices**

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

- **a** dominance in the tying market;
- **b** the tying and the tied goods are two distinct products;
- **c** the tying practice is likely to have a market-distorting foreclosure effect; and
- **d** the tying practice does not generate overriding efficiencies.

In recent years, CADE dismissed two probes related to allegations of tying arrangements in World Cup events due to lack of evidence. In December 2014, the DG closed an inquiry aimed at investigating whether Match Services – a Swiss company chosen by FIFA to provide ‘hospitality’ services in the 2014 World Cup – tied the sale of rooms to game tickets and inflated the price of accommodation. In March 2015, the DG closed an inquiry into whether the Brazilian Soccer Confederacy and a tour operator tied the sales of tickets to packaged tours for the 2006 World Cup in Germany.

**Refusal to deal**

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

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

**Resale price maintenance**

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

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33 Administrative Proceeding No. 08012.008855/2003-11.
In January 2013, in a landmark abuse of dominance case, CADE sanctioned automobile parts manufacturer SKF for setting a minimum sales price. Pursuant to the decision, RPM will be deemed illegal unless defendants are able to prove efficiencies. An infringement will be found regardless of the duration of the practice (in this case, distributors followed orders for only seven months) and whether the distributors followed the minimum sales prices, as CADE considered such conduct to be per se illegal. Elaborating further, the reporting commissioner, Vinícius Marques de Carvalho, who later became CADE’s president, explicitly stated that a company having a low market share is not in itself sufficient reason for the authority to conclude that such conduct is legal. In its decision, the authority also notably disregarded the efficiency defence: in fact, there is no instance in CADE’s case law clearing an anticompetitive merger or dismissing an anticompetitive practice on the basis of efficiency arguments. CADE imposed a fine equivalent to 1 per cent of SKF’s total turnover in the year preceding the initiation of the investigation. This position, taken by the majority of the commissioners, departs from previous decisions issued by Brazilian authorities on RPM, and makes it very hard for companies holding a stake of at least 20 per cent of the market to justify the setting of minimum sales prices.

iii Discrimination

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

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

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

iv Exploitative abuses

Unfair trading practices may, in theory, be punished under Brazil’s Competition Law. The previous Law provided as an example of anticompetitive practice the charge of ‘abusive prices, or the unreasonable price increase of a product or service’. This example was excluded from the current Competition Law because CADE has traditionally taken the view that excessive pricing would only be considered an antitrust infringement if it had exclusionary purposes. In recent years, CADE has reviewed more than 60 cases dealing with alleged abusive pricing, most of them related to pharmaceuticals, and has dismissed all of the complaints.

35 Administrative Proceeding No. 08012.001271/2001-44; defendant: SKF do Brasil Ltda; adjudication date: 30 January 2013.
37 Administrative Proceeding No. 08012.005799/2003-54.
V  REMEDIES AND SANCTIONS

i  Sanctions

Brazil’s Competition Law applies to corporations, associations of corporations and individuals. For corporations, fines range between 0.1 and 20 per cent of the company’s or group of companies’ pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of an investigation. CADE Resolution No. 3/2012 broadly defines 144 ‘sectors of activity’ to be considered for the purposes of calculating the fine under Law No. 12,529/2011. In November 2016, CADE issued Resolution No. 18/2016, under which such ‘fields of activities’ may be further limited to ensure that a sanction will be proportionate to the specificities of the conduct. CADE may resort to the total turnover, whenever information on revenue derived from the relevant ‘sector of activity’ is unavailable. Moreover, the fine may be no less than the amount of harm resulting from the conduct. Fines imposed for recurring violations must be doubled. In practice, CADE has been imposing fines of up to 10 per cent of a company’s turnover in connection with abuse of dominance violations. On rare occasions (all related to cartel investigations), CADE has proceeded to calculate the harm resulting from the conduct.

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

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

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

ii  Behavioural remedies

At any stage of an investigation, CADE may adopt an interim order to preserve market conditions while a final decision on a case is pending. An interim order may be adopted only if the facts and applicable law establish a prima facie likelihood that an infringement will be found; and that, in the absence of the order, irreparable damage may be caused to the market. CADE has been adopting interim orders

38 The wording of the new provision lacks clarity and creates legal uncertainty regarding the scope of its application. CADE was expected to issue a regulation defining the criteria that would be applied to distinguish when fines would be imposed against a company, a group of companies or a conglomerate, but has not yet done so.
40 Article 87 of the Competition Law.
in connection with a significant number of solid abuse of dominance cases. The most recent was the interim measure ordered by CADE in April 2015 against the Gemini consortium, which was ordered to disclose the price of gas that it was supplied with.

Apart from fines, CADE may also:

- order publication of the decision in a major newspaper at the wrongdoer’s expense;
- prohibit the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years;\(^{41}\)
- include the wrongdoer’s name in the Brazilian Consumer Protection List;
- recommend that the tax authorities block the wrongdoer from obtaining tax benefits;
- recommend that the IP authorities grant compulsory licences of patents held by the wrongdoer; and
- prohibit an individual from exercising market activities on its behalf or representing companies for five years.\(^{42}\)

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

### iii Structural remedies

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

### VI Procedure

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

After an administrative investigation is initiated, the DG will analyse the defence arguments and continue with its own investigations, which may include requests for clarification, issuance of questionnaires to third parties, hearing of witnesses and even the conducting of inspections and dawn raids. Inspections do not depend upon court approval and are not generally used by the DG. As for dawn raids, as a rule, the courts allow the DG to seize both electronic and paper data. In 2009, a computer forensics unit was created by the Brazilian agencies for the purpose of analysing electronic information obtained in dawn raids.

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\(^{41}\) In 2012, CADE, for the first time, imposed this sanction in connection with an abuse of dominance case (see Administrative Proceeding No. 08012.001099/1999-71; defendants: Comepla Indústria e Comércio et al; adjudication date: 23 May 2012).

\(^{42}\) The idea behind this provision was to deal with situations in which CADE prohibited the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years. To avoid this penalty, the parties simply set up a new company and resumed activities in the same sector without being subject to the restrictions imposed by CADE’s decision.
and by other means. Over the past few years, the Brazilian authorities have served more than 300 search warrants (including for residential premises), mostly in connection with cartel investigations.

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

At the Tribunal, the case is assigned to a reporting commissioner. While the reporting commissioner reviews the case, CADE’s Attorney General may issue an opinion on it. The reporting commissioner may also request data, clarifications or documents from the defendant, any individuals or companies, public entities or agencies prior to issuing its opinion. After doing so, the case is brought to judgment before CADE’s full panel at a public hearing, where decisions will be reached by a majority vote. CADE may decide to dismiss the case if it finds no clear evidence of an antitrust violation, or impose fines or order the defendants to cease the conduct under investigation, or both. CADE decisions are subject to judicial enforcement if they are not complied with voluntarily.

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

Finally, Brazil has been increasing its cooperation with foreign antitrust agencies. In February 2009, SDE, Brazil’s former administrative antitrust investigative agency, and Brazil’s federal police launched the first simultaneous dawn raid in connection with an international cartel investigation together with the US Department of Justice and the European Commission. Brazil’s antitrust authorities have executed cooperation agreements with the US Department of Justice, the European Commission, Argentina, Canada, Chile, China, Colombia, Ecuador, France, Japan, Korea, Peru, Portugal and Russia, among others. CADE has in a number of instances requested the assistance of foreign authorities to conduct an investigation and, more recently, with the increasing number of dawn raids, foreign authorities have become interested in evidence seized in Brazil. However, in most of the cases, cooperation takes place in relation to cartel investigations rather than in abuse of dominance cases. CADE has also entered into cooperation agreements with the World Bank Group and the Inter-American Development Bank, allowing for the exchange of information and for consultations on matters of common interest.
Private antitrust enforcement in Brazil\(^{43}\) has been on the rise over the past five years. This may be due to reasons such as the global trend of antitrust authorities encouraging damage litigation by potential injured parties, the growing number of infringement decisions issued by Brazil’s antitrust agency, CADE and the increasing general awareness of competition law in Brazil.

Pursuant to Article 47 of Brazil’s Competition Law, victims of anticompetitive conduct may recover the losses they sustained as a result of a violation, apart from an order to cease the illegal conduct. A general provision in the Brazilian Civil Code also establishes that any party that causes losses to third parties shall indemnify those that suffer injuries (Article 927). Plaintiffs may seek compensation in the form of pecuniary damages (for actual damage and lost earnings) and moral damages. Under recent case law, companies are also entitled to compensation for moral damage, usually derived from losses related to their reputation in the market.\(^{44}\)

Apart from complaints based on contracts, a significant percentage of private actions are based on horizontal conduct in Brazil. As in other jurisdictions, both corporations and individuals may be sued individually (e.g., by competitors, suppliers, or direct or indirect purchasers) or collectively for antitrust violations, but the greatest majority of pending cases are against corporations. The pass-on defence is not applicable to misconduct against consumers;\(^{45}\) for other cases, there are no statutory provisions or case law issued to date.

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

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

The drafts are generally in line with international best practices, and reflect CADE’s efforts to strike a balance between the two goals. However, there is room for improvement

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\(^{44}\) Punitive damages are not expressly provided for in the Competition Law, but some plaintiffs have been awarded those as well.

\(^{45}\) See Brazil’s Consumer Protection Code, Article 25.
regarding some aspects of the draft resolution and of the Proposed Legislation, and in particular on the need for CADE to change the approach adopted in the Proposed Legislation regarding the triggering event for the statute of limitation for damage claims.

VIII FUTURE DEVELOPMENTS

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

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

It will be very interesting to follow future developments and see the interplay of those two undercurrents: it can be hoped that in the end they will balance out and we will have a CADE that is more proactive but still selective in the abuse of dominance arena. Guidelines on vertical restraints and recommended commercial practices for dominant firms would ensure legal certainty and allow more predictability for market players when designing their commercial practices.

Having said this, four out of the six CADE commissioners’ terms will expire in the second half of 2019. Any speculation on what would be the likely position of the Tribunal in dominance cases to be adjudicated in the near future is, therefore, difficult.
Chapter 6

BULGARIA

Kremena Yaneva-Ivanova and Georgi Spasov

I  INTRODUCTION

Bulgaria is a member of the European Union, and therefore, Article 102 of the Treaty on the Functioning of the European Union (TFEU) is directly applicable.

On a national level, the Competition Protection Act (CPA) contains provisions (in Articles 21 and 37a) prohibiting abuses of certain degrees of market power: dominant position and stronger bargaining position (i.e., relative market power), both applicable to all kinds of undertakings regardless of their ownership or industry sector.

Competition law in Bulgaria is publicly enforced by the Competition Protection Commission (CPC), which has adopted a multitude of secondary acts dealing with various procedural and statutory issues, such as assessment of market position, setting of fines, providing parties with access to files, protection of confidential information and review and approval of commitments offered by undertakings.

The CPA applies to undertakings entrusted by the state to provide services of general public interest, to the extent the performance of their public tasks is not impeded and competition is not affected to a significant degree (Article 2, Paragraph 1, item 3 of the CPA). The Energy Act contains a similar provision addressed to undertakings active in the transportation or distribution of electricity, heat energy or natural gas. These provisions, however, have little practical importance, since we are not aware of a case in which such an undertaking has been relieved of its responsibility for breaching the competition rules on such a ground. On the contrary, such companies have been sanctioned for abusing their dominance in many cases.2

II  YEAR IN REVIEW

In 2018, the CPC initiated only four new investigations of alleged abuse of dominant position (compared with nine proceedings commenced in 2017), as well as three investigations of alleged abuse of stronger bargaining position (compared with eight proceedings in 2017), most of which were initiated by client or competitor complaints.

1 Kremena Yaneva-Ivanova is a senior associate and Georgi Spasov is the managing partner at Spasov & Bratanov Lawyers’ Partnership.

2 See, for example, CPC Decision No. 1510, 21 December 2017; CPC Decision No. 1475, 14 December 2017; CPC Decision No. 1476, 14 December 2017.
Among the companies investigated in 2018 are Nikon Europe, an international company active in the retail of cameras, lenses and accessories and its local distributor, and Nova Broadcasting Group AD and its subsidiary Net Info AD, which are part of one of the largest media groups in Bulgaria, active in both the pay-tv and free-to-air television markets, as well as in print and online advertising and publishing.

Despite the lack of new investigations initiated in 2018, the energy sector has never stopped being in focus. In 2018, the CPC completed its investigation against Bulgartransgaz (a subsidiary of the state-owned company Bulgarian Energy Holding (BEH), operating the national gas transportation infrastructure) by finding no unfair clauses in their gas transportation and supply contracts; however, the CPC sent a statement of objection (SO) to another subsidiary of BEH that is active in the wholesale electricity market, National Electricity Company. Additionally, three fines imposed in 2017 on two Bulgarian subsidiaries of CEZ group, which is active in the distribution and supply of electricity at regulated prices, were upheld by the court upon appeal.

In a short period of time, the CPC completed its parallel investigations against two organisations, Profon and Musicauthor, for management of collective rights related to their attempts to update the applicable tariffs.

In the first case, the CPC, acting upon the complaint of BACCO, discharged the allegations for excessive pricing by Profon. Rather than investigating whether the prices in the new tariff were economically justified, the CPC merely stated that Profon had followed the statutory established procedures (i.e., Profon carried out negotiations and mediation with BACCO, and applied for approval of the tariff by the Minister of Culture, although such approval was not obtained during the investigation) and did not apply the tariff retroactively. Therefore, Profon's behaviour was not a demonstration of its dominant position and, therefore, was not anticompetitive.

In a similar dispute just one month later, acting upon a complaint by the public radio station Bulgarian National Radio (BNR), the CPC took the opposite approach. Musicauthor was investigated for termination of their agreement with BNR on a pre-agreed ground, followed by disagreement between the parties on the new tariff. Although this was again a dispute about prices, the CPC did not investigate it as such, but qualified the behaviour of Musicauthor as an anticompetitive refusal to supply, aimed at forcing the client to accept the new tariff (without exploring the justification of the prices in the new tariff).

These cases illustrate that the main issue lawyers face in antitrust enforcement is the inconsistency in the practice of the CPC, which results in unpredictability and lack of legal certainty.

Information about pending cases and imposed fines in 2018 is summarised below.

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3 Case No. CPC/69/2018.
4 Case No. CPC/480/2018.
5 Decision No. 15629, 13 December 2018 and Decision No. 13130, 29 October 2018, of the Supreme Administrative Court’s three-member panel. Decision No. 13130 has recently been confirmed by the Court’s five-member panel upon appeal under Administrative Case No. 470/2019. Decision No. 15629 is currently being appealed before the Court’s five-member panel, under Administrative Case No. 1320/2019.
6 A non-profit association of cable and satellite operators.
7 A collective management organisation of related rights in music.
8 The decision was signed with the disagreement by the deputy chairman of the CPC.
Investigations of abuse of dominance pending at the CPC

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electronics and digital cameras</td>
<td>CPC</td>
<td>Prohibited agreements or abuse of dominance, or both, unspecified³</td>
<td>January 2018</td>
</tr>
<tr>
<td>Media</td>
<td>CPC</td>
<td>Prohibited agreements or abuse of dominance, or both, unspecified</td>
<td>June 2018</td>
</tr>
<tr>
<td>IT services</td>
<td>CPC</td>
<td>Abuse of dominance, unspecified</td>
<td>July 2018</td>
</tr>
<tr>
<td>Energy</td>
<td>CPC</td>
<td>Abuse of dominance, unspecified</td>
<td>March 2016</td>
</tr>
<tr>
<td>Energy</td>
<td>CPC</td>
<td>Imposing unfair trading conditions on the producers of renewable energy in the balancing market by members of the balancing group of the dominant company, NEK (NEK unilaterally changed the hourly production schedules submitted by the producers, which resulted in additional imbalance costs for them). SO issued</td>
<td>February 2015</td>
</tr>
</tbody>
</table>

CPC decisions in the past year with imposed fines for abuse of dominance

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Imposed fine</th>
</tr>
</thead>
</table>
| Providing rights for radio broadcasting of music and literary works by a collective management organisation | CPC                     | Refusal to supply (termination of the agreement with BNR, aimed at forcing the radio station to accept different trading conditions, particularly higher fees payable to the collective management organisation) | 56,678 leva    

III MARKET DEFINITION AND MARKET POWER

In terms of market definition, the CPC follows its methodology on assessment of the market position, and defines the product and geographical market by analysing the interchangeability on the supply and demand sides. In bTV v. Nova,¹⁰ the main tool used for this purpose was questionnaires addressed to clients of the investigated undertaking. The CPC also acknowledges the small but significant non-transitory increase in prices test, and in BACCO v. Electricity Distribution Networks Operators,¹¹ the division of two services into separate markets was justified by the difference in the price (in addition to other factors).

Language-related markets (such as media) are traditionally considered as national. In the energy sector, market definition often follows the scope of the licence. Useful guidance may also be found in the market analysis, which the CPC issued following its sector inquiries. However, the market definition accepted by the CPC in one case is not legally binding in subsequent cases dealing with the same service or product.¹²

Article 20 of the CPA lists the factors considered by the CPC in the assessment of whether a company holds a dominant position as follows:

9 Unlike other competition authorities, the CPC does not have a practice of announcing the particular allegations subject to investigation. It only publishes information about the parties or investigated companies and the provisions alleged to have been infringed.

10 Case No. CPC/712/2011.


12 CPC Decision No. 313, 7 March 2019, containing a market analysis of the fuels markets adopted following a sector inquiry is the most recent example of its inconsistent approach to market definition. In this analysis, the CPC defines the retail markets of different types of fuel as regional within the boundaries of a 10-minute drive within city areas and a minimum of a 20-minute drive in rural areas, while, in a commitments decision adopted in 2017 following a cartel investigation, the same markets were defined as national. See CPC Decision No. 318, 28 March 2017, Section IV.1.2. The CPC’s view on the geographic dimensions of the retail markets were objected to by the investigated undertakings.

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A company is dominant if, owing to any or all of these factors, it is independent from its competitors, suppliers and clients and therefore able to impede competition in the market.

Market share is a primary indicator, even though there is no statutory threshold for dominance. According to the CPC’s practice, such finding is unlikely if the market share is below 40 per cent. Market shares are assessed in the light of the particulars of the relevant market. For this purpose, the CPC explores the market structure and the degree and effectiveness of competitive pressure exercised on the undertaking by its competitors, suppliers and clients. The importance of the market share is higher in markets with significant barriers to entry. However, in bTV v. Nova, even a market share of above 60 per cent was not considered as enough evidence for dominance in an oligopolistic market with high entry barriers because of the strong competitive pressure exerted between the two main market players. On the contrary, in Techem, Techem was found dominant in the individual measurement and allocation of heating energy market even with a market share of less than 50 per cent because of its market share combined with vertical integration, economies of scope and the incompatibility of its installed measurement devices with competitors. In Swissport v. Sofia Airport, the court disagreed with the CPC that Sofia Airport was not dominant in the market of ground-handling services, considering its high market share (above 50 per cent) and the ability to cross-subsidise the ground-handling operations from other sources of revenues owing to its monopoly position of an airport operator.

The CPA explicitly states that the dominant position may be occupied by more than one undertaking; however, the concept of ‘joint’ or ‘collective’ dominance has not yet been developed in practice.

The majority of cases of established abuses of dominance concern companies in a monopolistic or almost monopolistic position owing to exclusive licences for providing certain services in a given area (e.g., in the energy sector) or operating essential facilities (such as the majority of utilities, including ownership of a bus station) or natural monopolies (e.g., collective management organisations). This trend can be explained by the difficulties encountered in proving a dominant position in a market where some competition still exists, which can only be overcome by a high-profile economic analysis.

For the purpose of establishing a stronger bargaining position, the CPC explores the structure of the relevant market and the particular commercial relationship:

a the degree of dependency between the parties thereto;

b the nature and the difference in scale of their business; and

c the existence of alternative trading partners, sources of supply, distribution channels and clients.

14 CPC Decision No. 870, 4 November 2015, under Case No. CPC/626/2014.
15 Decision No. 3304, 23 March 2016, under Administrative Case No. 1906/2016, of the Supreme Administrative Court’s five-member panel.
The concept of relative market power is relatively new\textsuperscript{16} and is particularly important for companies operating in oligopolistic markets with few strong competitors, where none is individually dominant, but each can exert some market power towards clients or suppliers.\textsuperscript{17} Therefore, the prohibition of abuse of stronger bargaining position is more relevant for vertical relationships than for horizontal relationships.

In \textit{A1},\textsuperscript{18} the CPC found the leading mobile telecommunications operator in Bulgaria (one of three) to be in a stronger position than Handy Bulgaria, an independent distributor of its services. In \textit{Cable Operators v. bTV and Nova},\textsuperscript{19} Nova and bTV\textsuperscript{20} were both found to be in stronger positions towards four regional cable operators distributing their TV channels.\textsuperscript{21} However, in \textit{Piero 97},\textsuperscript{22} such position was rejected for bTV towards its client and major advertising agency, Piero 97. In another case, the company operating the Kaufland\textsuperscript{23} chain of hypermarkets was found relatively dominant towards one of its suppliers.\textsuperscript{24}

\section*{IV ABUSE}

\subsection*{i Overview}

The CPC and Bulgarian courts have acknowledged that it is the abuse and not the dominant position itself that is prohibited.\textsuperscript{25}

Abuse of dominance is defined as unilateral behaviour of a dominant undertaking that may prevent, restrict or impede competition in a relevant market, as well as affect consumer interest. In order to establish abuse, the CPC is required to prove the existence of:

\begin{enumerate}
\item an undertaking;
\item the dominant position of such undertaking in a relevant market;
\end{enumerate}

\textsuperscript{16} Introduced through supplements to the CPA in 2015.
\textsuperscript{17} In \textit{bTV v. Nova}, the CPC found that the relevant market was highly competitive, regardless of its oligopolistic nature (close to duopoly). Owing to the strong competition between the market players with the highest market share, individual dominance was denied and therefore the concept of abuse of stronger bargaining position appears to be a more appropriate approach in challenging the behaviour of these companies.
\textsuperscript{18} Case No. CPC/653/2018.
\textsuperscript{19} Case No. CPC/610/2016.
\textsuperscript{20} bTV Media Group and Nova Broadcasting Group are leading media groups in Bulgaria with the most-viewed TV channels and a joint market share exceeding 90 per cent in some markets.
\textsuperscript{21} The CPC decision has been partially reversed by the first-instance court upon appeal because the CPC’s assessment of the TV operators’ market positions was based on irrelevant data (the audience share and ratings of the TV channels’ advertising market, rather than of their content distribution market, were used as performance indicators). Further, the CPC failed to consider the strong competition between the TV operators, with each being an alternative source of supply to the other towards the cable operators. See Decision No. 3810, 15 March 2019 of the Supreme Administrative Court’s three-member panel (non-final).
\textsuperscript{22} Case No. CPC/126/2017.
\textsuperscript{23} Case No. CPC/378/2016.
\textsuperscript{24} The CPC decision has been reversed by the court upon appeal owing to procedural defects, including the failure of the CPC to prove the alleged difficulties for the supplier to switch to alternative trading partners among Kaufland’s competitors. See Court Decision No. 4572, 27 March 2019 of the Supreme Administrative Court’s three-member panel (non-final).
\textsuperscript{25} Decision No. 6985, 5 June 2017, under Administrative Case No. 2659/2017 of the Supreme Administrative Court’s five-member panel.

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c unilateral behaviour; and

d actual or potential anticompetitive effect of the behaviour also affecting consumer interest.

Article 21 of the CPA mirrors Article 102 of the TFEU to a great extent, by listing the most common forms of abuse, which is non-exhaustive:\footnote{Decision No. 15629, 13 December 2018, under Administrative Case No. 1262/2018 of the Supreme Administrative Court’s three-member panel; Decision No. 1082, 29 January 2015, under Administrative Case No. 4734/2014 of the Supreme Administrative Court’s three-member panel.}

\begin{itemize}
\item[a] the direct or indirect imposition of purchase or selling prices or other unfair trading conditions;
\item[b] the limitation of the production, trade or technical development to the detriment of consumers;
\item[c] the application of different conditions to certain clients for equivalent transactions, thereby placing them at a competitive disadvantage;
\item[d] concluding contracts subject to acceptance by the other party of supplementary obligations or to the conclusion of additional contracts that, by their nature or according to common commercial usage, have no connection with the object of the main contract or with its performance; and
\item[e] the unjustified refusal to supply goods or to provide services to actual or potential customers in order to impede their economic activity.
\end{itemize}

The CPC’s understanding of ‘unilateral’ behaviour is somewhat flexible. In Bulgartransgaz,\footnote{Case No. CPC/1082/2017.} the CPC took the view that the contracts for gas transportation and supply were not unilaterally imposed by the dominant company because the draft contracts were published on its website and the clients were provided with the opportunity to provide comments on them. This was sufficient for the CPC to reject the allegations against Bulgartransgaz, regardless of the fact that not all proposals for changes were accepted and included in the individual contracts. The CPC justified the refusal of the dominant company to accept some of the proposals with the need for the dominant company to ensure equal treatment of all clients, restricting its ability to include different terms and conditions in the contracts with different clients. In previous cases, the CPC qualified contracts in a unified form (often as general terms and conditions), drafted by the dominant party, as unilaterally imposed.\footnote{Case No. CPC/305/554/2013.}

In CEZ group,\footnote{CPC Decision No. 641, 14 May 2014.} the CPC qualified the behaviour of the exchange of information between companies within the same economic group as unilateral.

Even if the behaviour meets all the criteria for abuse, it cannot be prohibited if the dominant company provides ‘objective justification’.\footnote{Hoffmann La Roche.} However, the CPC and courts do not have a consistent understanding of the meaning of this notion. The CPC relies on the objective concept in order to reject the relevance of the subjective
intentions behind the behaviour,\textsuperscript{30} while the court refers to it\textsuperscript{31} in the context of the requirement for a link between the behaviour of the dominant undertaking and the negative impact on competition and consumers to exist.\textsuperscript{32}

The CPC does not make a clear difference between a restriction of competition by-object and an effects-based approach in its practice, and has applied the as-efficient-competitor test (AEC test) only once – in a case relating to fidelity rebates\textsuperscript{33} and, in general, tends to follow a stricter form-based approach without a developed coherent theory of harm and with less economic evidence.

In order to qualify certain behaviour as abusive, the CPC is not required to prove an actual negative effect on competition; rather, it is sufficient to establish a potential for competition to be distorted.\textsuperscript{34}

Abuse of a stronger bargaining position is defined as acting in bad faith (i.e., without objective economic justification) to the detriment of the interests of the weaker party and consumers. The CPA\textsuperscript{35} gives examples closely resembling some of the forms of abuse of dominance:

- an unjustified refusal to supply;
- the imposition of unreasonably burdensome or discriminatory conditions; and
- an unjustified termination of business relations.

**ii Exclusionary abuses**

The CPC defines exclusionary abuse as unilateral behaviour aimed at distorting effective market competition by executing competitive foreclosure, creating barriers to entry in order to limit potential competition or to limit competitors’ expansion, or imposing competitive constraint on the dominant company.\textsuperscript{36}

The CPC has little practice in predatory pricing, which can be attributed to the existence of a similar prohibition in Chapter VII of the CPA on unfair competition, which is applicable to all undertakings, regardless of the degree of their market power. Under Bulgarian law, selling below cost can be a violation of the prohibition of abuse of dominance and a special form of unfair competition, at the same time. In investigating unfair competition, the CPC is not required to prove a dominant position and therefore it is used by competitors as a shortcut to making a complaint.\textsuperscript{37}

\textsuperscript{30} CPC Decision No. 399, 12 May 2015; CPC Decision No. 1576, 20 November 2013; CPC Decision No. 506, 8 May 2013.

\textsuperscript{31} Judgment of the Court, 13 February 1979.

\textsuperscript{32} Decision No. 6985, 5 June 2017, under Administrative Case No. 2659/2017 of the Supreme Administrative Court’s five-member panel; Decision No. 10524, 12 October 2015, under Administrative Case No. 9059/2015 of the Supreme Administrative Court’s five-member panel.

\textsuperscript{33} Case No. CPC/712/2011.

\textsuperscript{34} CPC Decision No. 1133, 22 December 2016; CPC Decision No. 1475, 14 December 2017.

\textsuperscript{35} Article 37a, Paragraph 1 of the CPA.

\textsuperscript{36} CPC Decision No. 425, 19 May 2015.

\textsuperscript{37} In 2018, the CPC imposed two fines for unfair competition on companies selling below cost.
One of the very few cases in this area is regarding the alleged predatory pricing of the ground-handling services of Sofia Airport EAD, which started in 2012 following a complaint by the company’s competitor, Swissport Bulgaria. The case is currently pending in court for a second time.

Despite the lack of recent precedents, the CPC acknowledges ‘margin squeeze’ as one of the possible forms of pricing abuse through the imposition of high prices. However, the CPC generally tends to address the issue of high prices as exploitative excessive pricing rather than as an exclusionary abuse.

In the past decade, the CPC faced fidelity rebates in two cases without finding infringements. In *bTV v. Nova*, the CPC sent an SO to bTV, a leading national free-to-air TV operator, for applying retroactive rebates to its TV advertising clients in consideration for a guarantee of a 100 per cent share of their TV advertising budget (a form of exclusive dealing). In this case, the CPC applied the AEC test for the first time, in order to prove that bTV’s behaviour could foreclose a competitor as efficient as the dominant company. Eventually, the CPC changed its view on bTV’s market position because of the oligopolistic structure of the market, and therefore found no abuse.

Liberalisation of the energy markets at retail level was the focus of a landmark antitrust case initiated in 2013 and completed in 2017. The CPC sanctioned the local companies of the CEZ and EVN groups for applying a strategy aimed at leveraging their market position as incumbents of the regulated market to the competitive retail market, which has freely negotiated pricing. The on-going liberalisation of the energy markets allows clients to switch from the regulated to the free market by replacing their public supplier with a trader. Once the client enters the free market, it can choose its supplier from almost 90 licensed retailers. Both CEZ and EVN were present in the regulated and free electricity markets. According to the CPC, both groups discriminated traders outside the group by refusing them access to historical data about clients’ hourly consumption, which the groups had collected during their operations on the regulated market, and which was at the disposal of the traders within the group. Further, it was alleged that the groups also applied various practices aimed at preventing clients from switching to the free market or at least delaying such a process. The CPC did not apply the doctrine of the single economic entity, and, owing to the difference in the geographic dimensions of the markets (the free market was national, while the regulated market was limited to the licensed area), failed to prove dominance of the groups’ traders operating in the broader market. Therefore, it sanctioned only the

38 Case No. CPC/1074/2012 (first review), Case No. CPC/145/2016 (second review).
39 In the first appeal, the court disagreed with the CPC on the lack of dominance and referred the case back to the CPC with mandatory instructions. The CPC conducted a second investigation and arrived at the same conclusion. The complainant, Swissport Bulgaria, appealed the second decision of the CPC. The three-member panel of the Supreme Administrative Court, acting as a first instance, ruled that the CPC failed to comply with the mandatory instructions of the court given in the first review of the case. The CPC was bound to accept that Sofia Airport was dominant and was not entitled to reassess its market position. See Decision No. 15884/2017, 19 December 2018, under Administrative Case No. 7087/2017 of the Supreme Administrative Court’s three-member panel, appealed before the Court’s five-member panel.
40 CPC Decision No. 450, 27 May 2015.
41 See footnote 10.
42 Case No. CPC/305/554/2013.
43 According to this doctrine, all companies that belong to the same economic group can be considered as a single ‘undertaking’ for purposes of the application of Article 102 TFEU.
incumbents – the network operators, CEZ Razpredelenie Bulgaria AD (CEZ group) and EVN Bulgaria Elektrorazpredelenie EAD (EVN group), and the companies supplying electricity at a regulated price, CEZ Electro Bulgaria AD (CEZ group) and EVN Bulgaria Elektrosnabdyavane EAD (EVN group), which were found liable for an abuse benefiting related traders\textsuperscript{44} and, therefore, reaffirming the understanding that the abuse may take place in a market different from the market in which competition is affected. However, the theory of harm in this case was not completely consistent: the companies were sanctioned for applying a strategy aimed at keeping their clients in the regulated market, and, at the same time, benefitting the traders within the group operating in the free market (the two aims excluding each other).

Against the background of the pending investigation, in 2016, the CPC began another investigation\textsuperscript{45} into the same companies on the basis of similar allegations but related to a later period of time. Both investigations were run in parallel and finished with contradictory decisions.\textsuperscript{46}

\section*{iii Discrimination}

The provision of Article 21(c) of the CPA explicitly lists discrimination (i.e., applying dissimilar terms to equivalent transactions) as a possible form of abuse of dominance. Similarly, Article 37a, Paragraph 1 of the CPA provides that imposition of discriminatory conditions on the weaker party can be an abuse of stronger bargaining position. The practice shows that the CPC tends to apply this rule too broadly, encompassing not only transactions with companies that are competitors, placing some of them at a competitive disadvantage, but also contracts with end consumers,\textsuperscript{47} as well as various forms of factual behaviour.\textsuperscript{48}

\section*{iv Exploitative abuses}

Exploitative abuses remain the most common type of abuse in the practice of the CPC, even though sometimes the difference between exclusionary and exploitative abuse is not obvious. In \textit{Vik Dobrich v. Energo-Pro},\textsuperscript{49} the CPC sanctioned the electricity supplier Energo-Pro Sales for termination of supplies to one of its business customers – a water-supply and sewage

\begin{itemize}
  \item Each investigated group included companies operating on different markets: operation of the distribution network at low and medium voltage, supply of electricity at regulated prices and supply of electricity at freely negotiated prices.
  \item Case No. CPC/319/2016.
  \item Several months after the CPC issued its infringement decisions for the period covered by its first investigation (namely, CPC Decisions Nos. 1475 and 1476, 21 December 2017), the second investigation was closed without finding an abuse (CPC Decision No. 1299, 15 November 2018).
  \item CPC Decision No. 870, 4 November 2015. The CPC sanctioned Techem for applying different terms of service and rates of its fees to customers residing in different cities within the territory of Bulgaria.
  \item By CPC Decision No. 399, 12 May 2015 (reversed by the court upon appeal), the CPC sanctioned the Bulgarian telecommunication incumbent BTC for discriminatory treatment of a client by taking factual measures for resolving a dispute (i.e., termination of a contract), which have not been applied to clients in similar positions in previous disputes. By CPC Decisions Nos. 1475 and 1476, 21 December 2017, the energy incumbents from CEZ and EVN groups were sanctioned for discriminating independent traders outside the group by refusing to provide them access to certain data that were at the disposal of traders within the groups. See subsection IV.i.
  \item CPC Decision No. 506, 8 May 2013.
\end{itemize}
company, ViK Dobrich.\textsuperscript{50} Regardless of the fact the case appeared as a classic example of ‘refusal to supply’ conduct, the CPC analysed the behaviour of the dominant company within the framework of an exploitative abuse given the absence of competition in the downstream market (water supply within a given territory) that might be affected (ViK Dobrich was a monopolist in that market).

In another case, the CPC sanctioned an electricity distribution network operator (being an essential facility) for delaying a client’s access to its network and consequently to the downstream market, delaying the production of energy from renewables. The CPC mostly qualified the behaviour of the dominant company (i.e., impeding the access to the network) as an imposition of unfair trading conditions (a kind of exploitative abuse) rather than as constructive refusal to supply. According to the CPC, the network operator exploited its monopoly in order to achieve non-justified financial benefits by transferring expenses, which they would normally bear, to the clients. The CPC went further by stating that such behaviour may also prevent potential competitors from entering the market as an indirect result and, therefore, may also have exclusionary effects.\textsuperscript{51}

Recently, the CPC approved commitments offered by the local heating company Toplofikatziya Sofia to address allegations of imposing unfair trading conditions regarding the connection of clients to its heating network.\textsuperscript{52} The contractual clauses alleged to be unfair required the clients to construct the facilities necessary to connect to the network at their own cost and thereafter to allow the heating company to use such facilities for free for the purpose of providing its service. Once the ownership of the connection facilities was transferred to the heating company, the latter compensated the clients for by delivering heating energy of the same value to them. Such set-off mechanism was not acceptable to the construction companies, which were not able to benefit from the free heating energy delivered to the inhabitants of the completed buildings.

In the past five years, the CPC has sanctioned several companies for excessive pricing:

\begin{itemize}
\item[a] a cemetery’s sole provider of funeral services;\textsuperscript{53}
\item[b] the owner and exclusive operator of a bus station;\textsuperscript{54} and
\item[c] three operators of electricity distribution networks.\textsuperscript{55}
\end{itemize}

Aurubis Bulgaria, a local subsidiary of the world leader in copper recycling, was also investigated for excessive pricing in the production and wholesale of sulphuric acid market; however, after considering the objections against the SO, the CPC expanded the geographic market and could not, therefore, prove a dominant position.\textsuperscript{56}

The approach of the CPC depends on the particular product or service in question. Investigating bus station services, the CPC analysed whether the pricing factors applied by the owner of the bus station (transport scheme and time of service) were relevant for the costs of the service. With regards to the rental price of energy distribution network pylons,

\textsuperscript{51} CPC Decision No. 1510, 21 December 2017.
\textsuperscript{52} CPC Decision No. 158, 31 January 2019.
\textsuperscript{53} CPC Decision No. 1511, 21 December 2017.
\textsuperscript{54} CPC Decision No. 1133, 22 December 2016.
\textsuperscript{55} CPC Decisions Nos. 449, 450 and 451, all 27 May 2015, reversed by the court upon appeal. See also footnote 48.
\textsuperscript{56} CPC Decision No. 443, 8 June 2016.
the CPC investigated whether the costs for maintenance and service of the pylons were fully accounted as costs for the regulated service and, as such, were covered by network charges or appropriately allocated between various activities (regulated and non-regulated services). In all cases concerning excessive pricing, the accounting of the investigated undertaking is of great importance because this is necessary in proving the particular costs included in the price of a product or service and the relevance of those costs. The lack of objective pricing methodology or using irrelevant pricing factors by themselves may lead to a finding of infringement.

Relying on the common understanding that the competition authorities should not act as price regulators, the CPC often orders undertakings to terminate the infringement without specific remedies or further guidelines on how to comply. This creates significant uncertainty and difficulty in achieving post-decisional compliance. Sanctioned companies asked for clarification of the reasons underlying such CPC decisions, but these were not provided. While the sanctioned companies were waiting for the CPC to provide the requested clarifications, the court reversed the infringement decisions.

V REMEDIES AND SANCTIONS

The CPC is entitled to impose sanctions, as well as behavioural and structural remedies. The undertakings can also offer commitments, at an earlier stage (within the deadline for submission of response to the allegations in the SO). As a general rule, sanctions are imposed on the undertakings that committed the abuse and, in exceptional cases, on individuals.

i Sanctions

The CPC has adopted a methodology on setting fines, which categorises infringements by gravity, into three groups: light, medium and heavy, taking into account factors such as type (exploitative or exclusionary), coverage (national, regional or local) and effect (capable to foreclose the market or exclude competitors, or both).

The base amount of the fine is calculated as a percentage of net revenue from sales of the affected products or services generated during the last year of participation in the infringement, in the following range.

<table>
<thead>
<tr>
<th>Gravity of infringement</th>
<th>Abuse of dominance</th>
<th>Abuse of stronger position</th>
</tr>
</thead>
<tbody>
<tr>
<td>Light</td>
<td>Up to 5 per cent</td>
<td>Up to 2 per cent</td>
</tr>
<tr>
<td>Medium</td>
<td>Up to 8 per cent</td>
<td>Up to 5 per cent</td>
</tr>
<tr>
<td>Heavy</td>
<td>Up to 10 per cent</td>
<td>Up to 10 per cent</td>
</tr>
</tbody>
</table>

In abuse of dominance cases, the base amount is multiplied by the number of the years of duration of the infringement. The fine can be further increased or decreased by 10 per cent in the case of aggravating or mitigating circumstances and increased by another 25 per cent if the infringement is under Article 102 of the TFEU. In any event, the fine cannot exceed 10 per cent of the annual turnover of the undertaking for the preceding financial year (including all products and services).
Sanctions for abuse of stronger bargaining position are calculated on the basis of the total revenue from the sales of the relevant product or service instead of on the revenue from the particular client on whom the abuse has been committed.57

ii  Behavioural and structural remedies

Remedies and interim measures are more a theoretical option in Bulgaria. In practice, the sole remedy regularly applied by the CPC is ordering the undertaking to end the infringement.

VI  PROCEDURE

The CPC can initiate investigations on its own initiative; however, the majority of cases are triggered by complaints by clients or competitors. Investigations are not limited in time. Most cases are completed within two to three years; however, some cases have been of longer duration.58 The CPC follows different procedures depending on whether it is investigating abuse of dominance or abuse of stronger bargaining position.

i  Common features of both procedures

The CPC has the power to conduct dawn raids in business premises and of motor vehicles, during which it can take all kinds of evidence, such as documents, emails, databases, including those that are not directly related to the subject of investigation.59 Legal privilege is not respected for in-house lawyers.

During the investigation, the CPC sends requests for information and evidence to the relevant authorities (sector regulators) or companies (e.g., clients and competitors), including the undertaking being investigated and the complainant (as the case may be). Any addressee is obliged to respond because the failure to cooperate (including by providing incorrect, incomplete or misleading information) may entail a fine of up to 1 per cent of their total annual turnover for the preceding financial year. Persons providing information to the CPC have the right to protect their business secrets.

The CPC does not tend to exercise its powers to impose interim measures, but is entitled to impose daily fines in order to stimulate undertakings’ compliance. Such fines vary depending on the case, and may reach 5 per cent of the preceding year’s average daily turnover.

Decisions in most cases are issued shortly after the hearing and can be appealed by the affected parties before the administrative courts in two instances. Following changes in the Administrative Procedural Code, effective since 1 January 2019, appeals against CPC decisions are reviewed by a court of first instance with no previous experience of competition cases.

ii  Specifics of the investigation for abuse of dominance

Before imposing a sanction, the CPC is required to issue an SO expressing its preliminary findings and to provide the undertaking with an opportunity to defend. Investigated undertakings are entitled to respond in a time period, set by CPC, which cannot be less than 30 days, and can also opt for a hearing at an open session. An SO does not prejudice the

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57 This rule operates in a particularly confusing way when the abuse has been committed towards a supplier but the fine is calculated on the basis of the revenues from clients.
58 Case No. CPC/305/554/2013; Case No. CPC/121/2015 (pending).
59 Dawn raids are subject to the prior approval of the administrative court.
proceedings and the CPC can decide that the company was not dominant or that abuse was not committed. Parties have access to the file during the whole period of response to the SO. During the same period, undertakings can offer commitments, save for heavy infringements, and such proposal does not prejudice the right to object to the SO.

The CPC may approve the commitments through a decision, which is silent on the issue of whether there was an infringement. The proposed commitments are consulted within the parties to the proceedings only (and not publicly). Once approved, commitments become binding on the undertakings, which must comply under the threat of a sanction. Noncompliance, reported by a third party or established ex officio, may also result in resuming the investigation.

Unlike other jurisdictions, in Bulgaria, closing investigation with commitments is still more an exception than a rule.60

iii Specifics of the investigation for abuse of stronger position

In investigations into abuse of stronger position, no SO is issued and the investigated company receives a copy of the complaint (if any). Parties have access to the file after being summoned for the hearing, which is a mandatory step that usually takes place one week in advance of the hearing.

VII PRIVATE ENFORCEMENT

Private enforcement in Bulgaria is still an underdeveloped area regardless of the implementation of the EU Damages Directive61 through amendments to the CPA,62 effective since the beginning of 2018. Even before the amendments, parties were entitled to claim damages in follow-on cases; however, the relevant court practice is very limited63 and mainly includes discontinued cases owing to the lack of the CPC’s final decision on the abuse.64

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60 Between 2010 and 2018, the CPC approved commitments in eight cases, while 35 investigations finished with sanctions.


62 A new Chapter 15 has been included in the CPA.

63 Public sources advise of one successful claim, brought against the operator of the electricity distribution network in north-east Bulgaria, Electrodistribution North, which refused to supply electricity to a factory because of unpaid network charges and electricity price by the previous owner. The CPC sanctioned the network operator for abuse of dominance in the form of unjustified refusal to supply. On the basis of this decision, the claimant was awarded with compensation for loss of profit resulting from the impossibility to conclude a lease agreement for the factory and to generate revenues. It was proved that the owner of the factory was in negotiations with a third party and signing of the agreement was obstructed by the lack of electricity. See Court Decision No. 156, 23 October 2015 of the Varna Court of Appeal.

64 In one of these cases, an energy producer claimed damages (loss of profit) resulting from alleged abuse of dominance in the form of undue restrictions on its production imposed by Electrodistribution North. The court of first instance upheld the claim, while the court of appeal reversed its decision and discontinued the proceedings on the ground that, at that time the CPC’s decision establishing the abuse was being appealed at the Supreme Administrative Court, and thus was not final. This was consistent practice of the courts based on the mandatory interpretation of the Supreme Court of Cassation that the CPC is the sole authority entitled to establish infringements of competition law. After the implementation of the EU Damages Directive, this practice shall no longer be relevant.
Under Bulgarian law, any person affected by a competition infringement is entitled to full compensation encompassing the actual damages suffered and loss of profit plus statutory default interest calculated from the date the harm occurred. Bulgarian law does not allow claims for punitive damages, neither does it take possible fines imposed by competition authorities into account.

Article 105(4) of the CPA provides that the CPC’s decisions regarding infringement are binding on the courts and the infringer, and thus facilitates follow-on claims where claimants only need to prove damages. The court may consult the CPC regarding the calculation of damages and is entitled to award compensation even if the precise amount of such damages is not established.65

Special rules regarding access to evidence, pass-on defence and joint and several liability apply to claims based on abuse of dominance. Obstructing other parties’ access to evidence may entail fines66 that are significantly higher than those applicable in the ordinary civil litigation.

Claims for compensation are reviewed by the civil courts, while decisions of the CPA are appealed before the administrative courts. This is another obstacle in stand-alone claims: civil judges have no experience in establishing competition law infringement.

VIII FUTURE DEVELOPMENTS

It is yet to be seen how the change in competent courts reviewing appeals against CPC decisions will affect the quality of judicial control.

The Supreme Administrative Court is expected to finally rule on the CEZ appeal of cassation against the CPC decision imposing a total fine of 2,193,540 leva on two of its Bulgarian companies for obstructing the liberalisation of the Bulgarian energy market. Given the wide range of affected parties, follow-on claims for damages can be expected.

On its own initiative, the CPC is conducting sector inquiries into the banking and energy markets, which are very likely to be completed in 2019 and, depending on the findings, may give rise to new antitrust investigations (as has been seen in previous cases).

Energy, fuel and media will continue to be among the markets with the highest potential for antitrust intervention.

65 According to Article 162 of the Civil Procedural Code, if the ground of the claim is proved, but the value is not, the court is entitled to set the amount to be awarded at its own discretion or by hearing an expert opinion.

66 Fines vary from 500 leva to 50,000 leva (for individuals) and from 5,000 leva to 500,000 leva (for companies).
I INTRODUCTION

Abuse of dominance is one of the foundational provisions of Canadian competition law under the Competition Act (Act),\(^2\) alongside cartels, mergers, vertical distribution practices and misleading advertising. Originally a criminal provision, abuse of dominance has been an administratively reviewable civil matter since 1986. However, it was significantly strengthened by 2009 amendments that introduced the potential for large administrative monetary penalties (AMPs).\(^3\) Combined with increased enforcement by the Canadian Competition Bureau (Bureau), abuse of dominance has taken on a higher level of practical importance and potential risk for firms active in the Canadian marketplace.

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

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

To provide guidance in this area, the Bureau has issued Enforcement Guidelines (Guidelines)\(^4\) describing its approach to the interpretation of the statutory provisions in light of case law. The Guidelines were last updated in March 2019, and explicitly supersede policy statements and several earlier guidelines, including the prior 2001 and 2012 versions.

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


of the Guidelines, as well as detailed enforcement guidelines on predatory pricing,\(^5\) guidelines specific to the telecommunications and grocery sectors, and draft guidelines specific to the airline industry.\(^6\)

The Guidelines do not have the force of law and are not binding on the Tribunal, Canadian courts or even the Bureau.\(^7\) The Guidelines also emphasise that the Bureau’s enforcement approach will ‘depend on the particular circumstances of the matter in question’, and on the discretion of the Tribunal and Canadian courts in contested cases.\(^8\) In practice, abuse of dominance in Canada turns significantly on fact-specific analysis and risk assessment. Firms that are likely to be, or to become, dominant may be subject to a higher level of potential scrutiny and exposure of their business activities if they do not adapt accordingly.

II YEAR IN REVIEW

Key recent developments indicate that, increasingly, the Bureau and Canadian courts have considered possible abuses of dominance by firms that do not compete directly in the relevant market. In August 2018, the Supreme Court of Canada dismissed a leave application by the Toronto Real Estate Board (TREB), effectively confirming that the abuse of dominance provisions can apply on the basis that TREB controls (even if it does not compete in) the market for residential real estate services in the Toronto metropolitan area. In another high-profile case initiated in 2016, the Bureau has alleged that the Vancouver Airport Authority (VAA) imposed restrictions that decrease competition among in-flight catering companies at Vancouver International Airport. In its submissions to the Competition Tribunal, the Bureau specifically argued that the abuse of dominance provisions apply to persons that do not compete in the relevant market or markets, however they may be defined.

The latest version of the Bureau’s Guidelines, released in March 2019, picks up on the implications of these cases, and also introduces a number of other significant updates to the previous version. In the same month, the Bureau released a revised version of its guidance on the interface of intellectual property (IP) and competition law, which reflects, inter alia, another outcome of TREB (see subsection II.iv).

Active enforcement has continued in a range of other cases. The Bureau has commenced an investigation into a national airline’s low-cost carrier division, alleging that its below-cost fares amounted to predatory pricing. In January 2018, the Bureau settled a case with a software development company regarding certain restrictive business practices in markets relating to the supply of ‘all-inclusive travel packages’.

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\(^5\) The former predatory pricing guidelines also addressed the Bureau’s approach to predatory pricing under Section 50 of the Act, which was repealed in 2009 together with the Act’s former criminal prohibition against price discrimination.

\(^6\) Competition Bureau, Enforcement Guidelines on the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) (July 2001); Predatory Pricing Enforcement Guidelines (July 2008); Information Bulletin on the Abuse of Dominance Provisions as Applied to the Telecommunications Industry (June 2008); the Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Grocery Sector (November 2002); and Draft Enforcement Guidelines on Abuse of Dominance in the Airline Industry (February 2001).

\(^7\) A binding written opinion on the applicability of Section 79 may be requested from the Bureau for a fee pursuant to Section 124.1 of the Act, but in practice this is infrequently used.

\(^8\) Guidelines, Preface.
Other recent investigations focused on:

- a large grocery retailer’s dealings with its suppliers;
- online search and search advertising practices;
- a smartphone manufacturer’s agreements with Canadian wireless carriers;
- restrictive clauses in contracts between TMX Group Limited and investment dealers;
- brand-name drug manufacturers’ attempts to restrict access to samples needed to prove bioequivalency of generic products; and
- the possible implications of a biologic drug manufacturer’s relationships with hospitals, insurers, infusion clinics and patients on biosimilar firms’ ability to compete.

A theme underlying several recent developments is the increasing relevance of innovative markets, including, notably, in the pharmaceutical sector and the digital economy. Not only does recent enforcement suggest that abuse cases in innovative industries are becoming increasingly common, but the Bureau has flagged its interest in these areas in its updated Guidelines and other commentaries and statements. For example, in addition to the revised IP Enforcement Guidelines (IPEGs) and a number of statements focused on competition in the pharmaceuticals sector, the Bureau highlighted the digital economy and innovative markets in the release of its policy report titled ‘Big data and innovation: key themes for competition policy in Canada’ in 2018. Even in closing recent investigations, the Bureau has commented that it will continue to actively monitor these areas. This was the case, for example, following its inquiry into online search and advertising, and recent cases involving the competitive relationships between manufacturers of branded and generic drugs as well as biologic and biosimilar drugs.

Finally, in addition to these developments, which are discussed in further detail below, in March 2019, a new Commissioner of Competition was appointed for a five-year term.

### i. TREB decision

On 23 August 2018, the Supreme Court of Canada rejected TREB’s application for leave to appeal a Federal Court of Appeal decision of 1 December 2017, bringing an end to a long-running case involving the Canadian real estate industry.

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9. (19 February 2018) www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04342.html. See also the Bureau’s 2017–2018 Annual Plan, the focus of which is ‘Competition is key – Creating the conditions for innovation’ (18 May 2017): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04241.html. In its position statement regarding the recent investigation into online search and advertising practices (see the table under subsection II.v), the Bureau also flagged that the digital economy, ‘including the increasing competitive significance of data, will continue to play a crucial role for Canadian businesses and consumers. Robust competition policy and enforcement in this sector will nurture a competitive and innovative Canadian marketplace.’

10. In the online search and advertising case, the Bureau stated that it will be ‘closely following’ the subject’s conduct and ‘actively monitoring’ the digital marketplace. See subsection II.iv for further background on the pharmaceutical investigations and subsection II.v for a full summary of recent cases.

11. Toronto Real Estate Board v. Commissioner of Competition, 23 August 2018, case 37932, dismissing application for leave to appeal 2017 FCA 236. The TREB case followed an earlier, successful challenge against the Canadian Real Estate Association (CREA) arising from allegations that CREA and its members had used their control of the MLS and related trademarks to impose exclusionary restrictions that inhibited or prevented fee-for-service, flat-fee and other ‘reduced service’ models from effectively competing in the residential real estate services market. The CREA case was resolved by way of a consent agreement filed with
The Bureau had sought to prohibit restrictions on TREB members’ provision of direct access to multiple listing service (MLS) information, such as sales inventory, selling price and broker compensation, arguing that they prevented the introduction of internet-based services, such as ‘virtual office websites’ through which such information could be made available at low cost. In an unusually short decision in April 2013, the Tribunal initially determined that the Bureau’s application did not meet the requirements of Section 79(1)(b) of the Act, on the basis that TREB does not compete with its members. However, on appeal, the Federal Court of Appeal in 2014 held that the abuse of dominance provisions could apply on the basis that TREB controls the market for residential real estate services in the Toronto metropolitan area despite not technically competing in that market, and referred the matter back to the Tribunal for reconsideration.

Following the rehearing, the Tribunal followed the Court of Appeal’s 2014 decision and ruled in April 2016 that an abuse of dominance was established, and the Federal Court of Appeal upheld that ruling in its decision in December 2017. More specifically, in its ruling upon reconsideration, the Tribunal found that TREB substantially or completely controlled the supply of MLS-based residential real estate brokerage services in the Toronto metropolitan area, owing to its control over the MLS, a key input for competitors in the market. The Tribunal also held that TREB had engaged in (and continued to engage in) a practice of anticompetitive acts for the purpose of Section 79, and that the restrictions imposed by TREB had and would continue to substantially prevent competition in the supply of residential real estate brokerage services. This reduction in non-price competition, according to the Tribunal, included ‘a considerable adverse impact on innovation, quality and the range of residential real estate brokerage services that likely would be offered’ in the area absent such restrictions.

The result in the TREB case provides a significant clarification to the application of Section 79(1)(b), which, as discussed in Section IV, requires that a dominant firm or firms have engaged in ‘a practice of anticompetitive acts’. In the leading case interpreting this requirement, Canada Pipe, the Court of Appeal had appeared to hold that the dominant firm must be a competitor of the firm or firms targeted by the practice, and the Tribunal in its original decision in 2013 followed this line of reasoning. Considering the Court of Appeal’s

12 Real estate boards and associations in other Canadian jurisdictions and the United States typically allow their members access to, and use of, their MLS information to provide internet-based services.
13 CT-2011-003: www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347. The Tribunal determined that based on its finding under Section 79(1)(b), the application would necessarily also fail the other statutory tests under Sections 79(1)(a) and 79(1)(c). The Tribunal noted in obiter that a case could potentially be brought instead under the civil horizontal agreement provisions in Section 90.1 of the Act.
14 Among other considerations, the Tribunal in its April 2016 decision found that the restrictions substantially reduced the degree of non-price competition in the supply of MLS-based residential real estate brokerage services, relative to the degree that otherwise would likely exist.
15 Canada (Commissioner of Competition) v. Canada Pipe Co, 2006 FCA 233 (Federal Court of Appeal). As leave to appeal the Court of Appeal’s decision to the Supreme Court of Canada was denied, the Court of Appeal decision is a binding precedent.
16 In the initial decision, the Tribunal pointed in part to the Court of Appeal’s observation in Canada Pipe that eight of the nine examples of anticompetitive acts enumerated in Section 78 of the Act describe harms
explicit rejection of that interpretation, and the ultimate outcome of the case, TREB arguably can be regarded as a landmark in Canadian abuse of dominance analysis. Its influence is already apparent in the subsequent VAA case, as well as in the latest version of the Guidelines.

ii  VAA

On 29 September 2016, the Bureau filed a notice of application against the VAA, which is responsible for the management and operation of Vancouver International Airport, including granting physical access to the airport. The case involves restrictions imposed by the VAA that, according to the Bureau, decrease competition at the airport among in-flight catering companies that prepare meals for flight passengers and crew, and also provide related galley-handling services. Specifically, the Bureau has alleged that while airlines that operate at the airport want greater choice of suppliers and that there are new suppliers willing to meet this demand, the VAA denies new suppliers access to the airport. According to the Bureau, the VAA has abused its dominant position ‘by excluding and denying the benefits of competition’ to the in-flight catering marketplace at the airport and has ‘no legitimate explanation to justify the substantial prevention or lessening of competition that has resulted in higher prices, dampened innovation and lower service quality’.17

Similar to TREB, the case against the VAA involves alleged abuse of dominance in a market in which the VAA technically is not a direct competitor. For the purpose of the dominance test, the Bureau’s case is premised on an argument that the VAA substantially or completely controls both the market for airport access for the supply of galley handling and, by extension, the market for the actual supply of galley handling at the airport. In response, the VAA submitted that it does not have any competitive interest in, or substantially or completely control the latter market, and that the case represents an attempt to ‘extend the reach of Section 79 well beyond what was articulated’ in TREB. Following a Federal Court of Appeal decision in February 2018 holding that the Bureau can no longer invoke ‘public interest’ privilege on a class-wide basis,18 and further proceedings, the Commissioner and the VAA submitted their closing arguments in November 2018. The Tribunal is expected to issue its ruling in 2019.

iii  Updated Guidelines

In March 2019, the Bureau issued a new version of its Guidelines, which is significantly more detailed than the previous version and includes several important updates.
In general, the Guidelines also carve out considerable discretion for the Bureau to assess elements of abuse of dominance, including in its definition of the relevant market or markets, as well as its determination of what constitutes substantial market power and an ability to ‘control’ a market.

First, in keeping with the TREB outcome, the Guidelines now specifically address the possibility that firms may ‘substantially or completely control’ markets in which they do not necessarily compete. Second, with respect to market power, the Guidelines now omit an informal safe harbour market share threshold of 35 per cent, which had been included in prior versions, retaining only a 50 per cent market share benchmark as a guideline for determining whether or not a firm’s conduct will ‘generally’ prompt further examination. At the same time, the Guidelines contain additional commentary on the relevance of ‘the ability to exclude’ in assessing market power. Finally, the Guidelines expand upon the range of ways in which the relevant market may be defined. In particular, they emphasise the possibility that the Bureau may identify more than one product or geographic market. Further, they now specifically contemplate that either or both sides of a ‘multi-sided platform’ may comprise the relevant product market or markets, and also how the ‘hypothetical monopolist test’ may apply in cases involving the provision of free services (as may be the case in circumstances involving such platforms).

These developments are further discussed in Sections III and IV.

iv Updated IPEGs and ongoing focus on pharmaceuticals

In the same month that the updated Guidelines were released, the Bureau released its updated IPEGs.19 The revised guidance reflects another outcome of the TREB case, namely the Tribunal’s rejection of TREB’s argument that the information of which the use and dissemination it sought to restrict was protected by copyright and therefore subject to an exemption under the abuse of dominance provisions.20 Additionally, the 2019 version reflects updates to the Canadian Patented Medicines (Notice of Compliance) regulations.

More generally, the IPEGs reflect the Bureau’s ongoing focus on pharmaceuticals, with specific commentary on potential abuse of dominance through industry-specific conduct, such as ‘product switching’ (or ‘product hopping’) and patent litigation settlements. Other enforcement and policy developments in the pharmaceutical sector include the closure of an investigation into alleged product switching by a supplier of certain pharmaceutical drugs in May 2014.21 Later that year, the Bureau also released a white paper discussing patent-related settlement agreements and the potential concerns associated with arrangements such as ‘pay-for-delay’ settlements under various provisions of the Act, including abuse of dominance.22 More recent public statements reiterate the Bureau’s interest in the intersection between IP and competition law.23

20 Specifically, Act, Subsection 79(5).
21 See the summary table in subsection II.v.
Finally, the Bureau has conducted several investigations in the pharmaceutical sector, including two inquiries that closed in late 2018 and early 2019, respectively. The first involved attempts by three brand name pharmaceutical manufacturers to restrict access to samples of drugs required to prove the bioequivalency of generic products. In closing the investigation, the Bureau acknowledged nonetheless that evidence it obtained supported the generic manufacturers’ position that they faced barriers impeding their access to the branded drugs. In its press release, the Bureau indicated that in some cases this was likely owing to the actions of brand manufacturers, and that such conduct may warrant further enforcement or advocacy action in the future. The second involved the possible predatory or exclusionary impact of a biologic drug manufacturer’s alleged conduct with regards to biosimilar firms. Here again, in its public statement regarding the closure of the investigation, the Bureau indicated that it maintains an active interest in this area, specifically commenting that it ‘will continue to monitor the evolving biologic and biosimilar industry’.

Summary of recent developments

The following table summarises significant recent decisions and developments.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Real estate</td>
<td>Bureau</td>
<td>Restriction by TREB of members’ access to multiple listing service information (sales inventory, selling price, broker compensation, etc.)</td>
<td>Initial application filed with the Tribunal in May 2011</td>
<td>Rehearing held in 2015. The Tribunal's April 2016 ruling that abuse of dominance was established (followed by issuance of an order in June) upheld by the Federal Court of Appeal on 1 December 2017; application for leave to appeal dismissed by the Supreme Court of Canada in August 2018</td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>Bureau</td>
<td>Alleged ‘product hopping’ by Alcon through intentional disruption of the supply of a branded prescription anti-allergy drug in order to limit or prevent meaningful competition from generic drug companies</td>
<td>Investigation commenced in November 2012</td>
<td>Closure of investigation announced in May 2014 following cessation of the alleged conduct</td>
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<tr>
<td>Residential water heating</td>
<td>Bureau</td>
<td>Alleged ‘aggressive retention tactics’ during customer calls by Reliance Comfort Limited Partnership and Direct Energy Marketing Limited, as well as other policies and procedures aimed at hindering switching to competitors</td>
<td>Initial applications filed with the Tribunal in December 2012</td>
<td>Consent agreement with Reliance Comfort Limited Partnership registered November 2014, including C$5 million penalty and C$500,000 investigation costs; Consent agreement with Direct Energy Marketing Limited registered October 2015, including a C$1 million penalty and commitment to implement a corporate compliance programme in the event of re-entry into the market; Commitments by EnerCare Inc not to continue Direct Energy’s alleged anticompetitive policies and practices obtained by the Bureau in November 2014 following the acquisition of Direct Energy by EnerCare</td>
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<td>Sector</td>
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<td>Insulin pumps for diabetic patients</td>
<td>Bureau</td>
<td>Imposition of warranty terms relating to use of Medtronic insulin pumps with non-Medtronic equipment, which allegedly limited competition and restricted consumer choice</td>
<td>Date investigation commenced not publicly disclosed but appeared to follow the acquisition by Medtronic Holdings Limited of Covidien plc, which was subject to a consent agreement registered on 26 November 2014</td>
<td>Agreement with Bureau to revise warranty terms announced March 2015</td>
</tr>
<tr>
<td>Digital economy – online search and search advertising</td>
<td>Bureau</td>
<td>Alleged conduct by an online search engine and advertiser intended to exclude or disadvantage competitors, including through imposition of conditions and demands on customers preventing rivals from competing</td>
<td>Investigation commenced in 2013</td>
<td>Discontinuation of investigation announced in April 2016 owing to insufficient evidence, subject to ongoing monitoring of the subject of the investigation and the digital economy more generally according to the Bureau's Position Statement</td>
</tr>
<tr>
<td>Grocery retail</td>
<td>Bureau</td>
<td>Investigation into pricing strategies and programmes of Canada’s largest grocery retailer in the context of its relationship with its suppliers, reflecting the Bureau’s focus on vertical agreements and arrangements that reference competitors, such as 'meet-or-release' and 'most-favoured nation' clauses</td>
<td>Investigation commenced March 2014</td>
<td>Discontinuation of investigation announced in November 2017 on the basis that the retailer no longer enforced certain policies and that there was insufficient evidence to conclude that the policies had lessened or prevented competition substantially</td>
</tr>
<tr>
<td>Smartphones</td>
<td>Bureau</td>
<td>Imposition of potentially anticompetitive obligations and restrictions regarding the sale and marketing of smartphones in agreements with Canadian wireless carriers</td>
<td>Investigation commenced after Bureau’s receipt of information on the matter in 2014</td>
<td>Discontinuation of investigation announced in January 2017 owing to insufficient evidence.</td>
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<thead>
<tr>
<th>Sector</th>
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<tbody>
<tr>
<td>Data aggregation — provision of indicative market data&lt;sup&gt;27&lt;/sup&gt;</td>
<td>Bureau</td>
<td>Imposition of contractual clauses in TMX Group’s standard form market data agreement with investment dealers, restricting the latter from sharing private market data with third parties; according to a complaint to the Bureau this hindered a potential competitor’s ability to develop an alternative consolidated data market product; the Bureau considered possible ‘prevention’ of competition under the third part of the abuse of dominance test</td>
<td>Investigation commenced after the Bureau’s receipt of a complaint in 2015</td>
<td>Discontinuation of investigation announced in November 2016 following the Bureau’s conclusion that it was unlikely that the complainant could have obtained sufficient volumes of private market data from investment dealers to develop a competitive product even absent the contractual arrangements</td>
</tr>
<tr>
<td>Galley handling at airports and airport access for the supply of galley handling</td>
<td>Bureau</td>
<td>Conduct by the VAA alleged to decrease competition among in-flight catering companies at Vancouver International Airport</td>
<td>Initial application filed with the Tribunal in September 2016</td>
<td>Closing arguments submitted to the Competition Tribunal in November 2018 following hearings, subject to the Tribunal’s ruling</td>
</tr>
<tr>
<td>Software geared towards the travel industry&lt;sup&gt;28&lt;/sup&gt;</td>
<td>Bureau</td>
<td>Restrictive practices by Softvoyage Inc in markets related to the supply of ‘all-inclusive travel packages’, specifically through the use of exclusivity clauses in contracts (including contracts with tour operators), giving rise to allegations of foreclosure of the relevant markets or otherwise making access difficult&lt;sup&gt;29&lt;/sup&gt;</td>
<td>Date investigation commenced not publicly disclosed</td>
<td>Consent agreement with Softvoyage registered in January 2018, including commitments to cease restrictive practices so as to address the Bureau’s concerns over possible barriers to entry</td>
</tr>
<tr>
<td>Pharmaceuticals&lt;sup&gt;30&lt;/sup&gt;</td>
<td>Bureau</td>
<td>Imposition of restrictions by brand name manufacturers on generic manufacturers’ access to samples of brand name drugs (required to prove bioequivalency of generic products)</td>
<td>Inquiry commenced in November 2016 following generics’ allegations of having been impeded access to branded drug samples through pharmaceutical wholesalers acting as intermediaries between manufacturers and downstream purchasers</td>
<td>Discontinuation of investigation announced in December 2018 owing to insufficient evidence</td>
</tr>
</tbody>
</table>


<sup>29</sup> According to the Bureau, the company is dominant in both the market for ‘content management’ and the market for ‘online distribution’ software. Specifically, it was alleged that after a majority of tour operators adopted Softvoyage’s content management software, the company used exclusivity clauses in its contracts requiring those tour operators to only use Softvoyage’s distribution software. According to the Bureau’s position statement, Softvoyage also prohibited tour operators from ‘extracting or using their own data managed in Softvoyage’s content management software’.

### III  MARKET DEFINITION AND MARKET POWER

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

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

#### i  Market definition

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

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#### Table: Market Investigations

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<tr>
<th>Sector</th>
<th>Investigating authority</th>
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<th>Case opened</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pharmaceuticals</td>
<td>Bureau</td>
<td>Alleged conduct by a biologic drug manufacturer included supplying many hospitals with its biologic drug for 1 cent per vial; providing the biologic drug free to patients not eligible to receive reimbursement under an insurance plan; contractually requiring hospitals and private insurers to favour its biologic drug over biosimilars; and entering into exclusive contracts prohibiting third-party infusion clinics from using biosimilars to its drug</td>
<td>Inquiry commenced in 2018 according to Bureau Position Statement</td>
<td>Discontinuation of investigation announced in February 2019 owing to insufficient evidence; biologic and biosimilar industry subject to ongoing ‘monitoring’</td>
</tr>
<tr>
<td>Airlines</td>
<td>Bureau</td>
<td>Alleged predatory pricing (low-cost fares designed to force rivals out of the market) by a national airline’s low-cost carrier division</td>
<td>Late 2018; date investigation commenced not publicly disclosed</td>
<td>Ongoing</td>
</tr>
</tbody>
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32 As reported in the media; for example, CBC News, ‘Competition Bureau checks WestJet’s discount airline Swoop for predatory pricing’ (12 December 2018), online: www.cbc.ca/news/business/westjet-swoop-competition-bureau-1.4942490. In previous investigations relating to air passenger and cargo services in Northern Canada, the Bureau similarly considered, inter alia, possible predatory pricing practices under the abuse of dominance provisions. See Competition Bureau, Position Statement (22 August 2017): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04295.html.
33 Canada (Director of Investigation and Research, Competition Act) v. NutraSweet Co (1990), 32 CPR (3d) 1.
in price’ could be profitably imposed, beginning with the product of the firm in question and the area in which it operates, and expanding the relevant market to include other products or supplier locations likely to be substituted.34

This is generally consistent with the approach taken by the Bureau in defining markets for purposes of merger analysis.35 As in the case of mergers, market definition may depend significantly on the particular features of the product and geographical markets in question. A market need not be conclusively defined to find that a firm or firms exercise market power.36

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

- a consumer behaviour;
- b past product or location substitution;
- c product functional interchangeability;
- d unique product characteristics;
- e transportation costs and shipping patterns;
- f switching costs;
- g the role of distant sellers and foreign competition; and
- h past price correlation among substitute products.37

The 2019 Guidelines specifically contemplate how to apply the hypothetical monopolist test to ‘multi-sided’ platforms, where demand for one side depends on use of another, and indicate that the Bureau may define the product market either as one side of the platform or as including multiple sides, depending on the case. The updated Guidelines also consider the challenges that may arise in the application of this test where services are offered at a ‘zero-monetary price’ (e.g., to attract users to a multi-sided platform), and indicate that in such cases, the Bureau may focus on ‘qualitative indicators of substitutability’ rather than seeking to analyse whether a hypothetical monopolist would find it profit-maximising to decrease a relevant non-price dimension of competition by a small but substantial amount for a non-transitory period of time.

More generally, the updated Guidelines retain ample flexibility for the Bureau to define one or more product markets. For instance, the Bureau ‘may consider it appropriate to define markets in reference to particular types of purchasers in certain circumstances, such as where sellers engage in price discrimination between different sets of buyers’, or by referring to ‘a particular level of the supply chain’. Moreover, the Bureau ‘may consider it appropriate to analyse several different (or potentially different) product markets together for the purposes

34 The benchmark for ‘significant’ and ‘non-transitory’ is a 5 per cent increase in price, sustained over a one-year period. The relevant price is that which would exist in the absence of the anticompetitive acts (often not the current price). The ‘price’ can include not only the nominal price, but also qualitative factors, such as product quality, choice, service, support or innovation.
36 One distinction between the two approaches is the Bureau’s acknowledgment, in the abuse of dominance analysis, of a potential ‘overly broad product market definition’ if current prices – that is, price levels where market power has already been exercised – are taken into account (the ‘cellophane fallacy’). See Guidelines, Section 2.1.
37 Guidelines, Sections 1A and 1B.
of market definition’. This appears to reflect recent case law, such as Softvoyage, in which more than one relevant market was identified. Additionally, the Guidelines specifically contemplate the possibility of analysing several geographic markets together.

ii  Market power

The words ‘substantially or completely control’ in the context of the abuse of dominance provisions have been held by the Tribunal in TREB to contemplate a substantial degree of market power. Such market power confers ‘considerable latitude to determine or influence price or non-price dimensions of competition’ in a market, and may be reflected in the power to exclude. The Guidelines, as updated in 2019, take this approach, indicating that market power (the assessment of which takes into account both pre-existing market power and the market power derived from allegedly anticompetitive practices) may be reflected in the power to exclude; that is, an ability to restrict the output of other existing or potential market participants and ‘thereby profitably influence price’. Here again, the updated Guidelines reserve discretion for the Bureau, indicating that the assessment of whether a firm holds a substantial degree of market power may depend on ‘the body of relevant information and/or documents on the whole’ and noting that the ‘exact nature of the Bureau's analysis and the weight accorded to any particular piece of information or document will depend on the circumstances of the case’.

The Guidelines note that, while market power can be measured through direct factors such as high profit margins or ‘supracompetitive profitability or pricing’, these factors can present analytical issues and may be inconclusive. The more common analysis will therefore use indirect indicia of market power that suggest the extent to which a firm or firms will be constrained from implementing anticompetitive price increases, either owing to existing competition or likely competitive entry. Indirect indicia considered by the Bureau include the ‘structural characteristics’ of a market (such as market shares and barriers to entry) and the effects of anticompetitive acts and countervailing power from customers or suppliers.

Notably, in a clear nod to the outcome of the TREB case, the updated Guidelines expressly contemplate that a firm ‘that does not compete in a market may nonetheless substantially or completely control that market’. In such cases, the power to exclude competitors will often feature prominently in the Bureau’s analysis, whereas market shares or supracompetitive profits may not be as central. This update to the Bureau’s approach presumably is the reason for which the 2019 version of the Guidelines also de-emphasises a market share safe harbour, as discussed below.

iii  Market share

There is no statutory threshold for market share that will necessarily give rise to market power, nor a statutory safe harbour below which a firm will not be considered dominant. However, market share is ‘usually a necessary, but not sufficient’ condition of finding market power, and will ordinarily be considered together with other factors. Market share may be measured on the basis of revenues, unit sales, sales or production capacity or natural resource

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38  TREB, Tribunal's decision upon reconsideration (2016) at 173-175. See also NutraSweet, indicating that to substantially or completely control is synonymous with holding market power.
39  Guidelines, Section 1C.
40  Guidelines, Section 1C,
reserves, depending on which ‘best reflects the current and future competitive significance of competitors’.\textsuperscript{41} In addition to the actual share, the Bureau will consider the distribution of market share among a firm’s competitors, as well as market share fluctuations.

Although the Bureau has historically taken the position that a single firm market share below 35 per cent will be considered unlikely to give rise to a finding of market power, the 2019 Guidelines state only that a market share below 50 per cent will ‘generally only prompt further examination’ if it is believed that the anticompetitive conduct is likely to result in increased market share in a reasonable period.\textsuperscript{42} On the other hand, a single firm market share above 50 per cent (or a combined share above 65 per cent, in the case of joint dominance) will ‘generally prompt further examination’. In the Tele-Direct case, the Tribunal held that where market share is 80 per cent or greater, it will look for ‘extenuating circumstances’ and ‘generally, ease of entry’ to outweigh a \textit{prima facie} finding of market power.\textsuperscript{43} In practice, contested abuse of dominance cases both before and after Tele-Direct have involved market shares of 80 to 100 per cent, usually in highly concentrated markets.

\textbf{iv} \hspace{1em} \textbf{Barriers to entry; other factors}

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

- \textit{a} sunk investments (e.g., in equipment, infrastructure or research and development);
- \textit{b} regulatory barriers;
- \textit{c} whether the market is mature or depends on economies of scale or scope;
- \textit{d} network effects; and
- \textit{e} availability of scarce resources or inputs.

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

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

\textbf{v} \hspace{1em} \textbf{Joint dominance}

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

\textsuperscript{41} Guidelines, Section 1C.

\textsuperscript{42} Despite the removal of the 35 per cent threshold in the updated Guidelines, the 50 per cent threshold nonetheless remains generally consistent with the long-standing finding of the Tribunal in the \textit{Laidlaw} case that a market share below 50 per cent would not lead to a \textit{prima facie} finding of dominance. \textit{Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd} (1992), 40 CPR (3d) 289.

\textsuperscript{43} \textit{Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc} (1997), 73 CPR (3d) 1. Separately, in a case involving a sole supplier, the Tribunal presumed market power in the absence of ‘evidence that there [were] no barriers to entry’. \textit{Director of Investigation and Research v. D&B Companies of Canada Ltd} (1995), 64 CPR (3d) 216.
For purposes of the criminal conspiracy provisions of the Act, ‘conscious parallelism’, in itself, does not constitute an agreement, and the Bureau adopted this position in prior (2001) Abuse of Dominance Enforcement Guidelines, which also described factors that could be used to infer joint action in the civil context. The 2019 Guidelines simply state that ‘[s]imilar or parallel conduct by firms is insufficient’ to establish joint dominance, and offer no further insight into the extent of joint conduct – or maximum level of intra-group competition – required to find joint control of the market. The threshold test for joint dominance has never been considered by the Tribunal as, although the Bureau has commenced three significant joint dominance cases, all have settled prior to a contested hearing.\(^44\)

In addition to the application of the abuse of dominance provisions to joint dominance, since 2010 it has been possible to address coordinated conduct under Section 90.1, a civil provision that applies to agreements between competitors that substantially lessen or prevent competition.\(^45\)

vi Attempted monopolisation

In contrast to the US Sherman Act, attempted monopolisation is not caught by the abuse of dominance provisions in Canada. The existence of market power at the time anticompetitive conduct is engaged in is implicit in the formulation of the statutory test, and would prohibit an application to the Tribunal on the basis of anticipated market power. The 2019 Guidelines, moreover, no longer refer to the possibility that the Bureau may investigate the conduct of a firm that is expected to acquire market power as a result of the allegedly anticompetitive conduct ‘within a reasonable period of time’.\(^46\)

Nonetheless, the updated Guidelines suggest that the Bureau may contemplate, if not necessarily ‘attempted’ monopolisation, the possible acquisition of market power where none existed previously. For example, the Guidelines do refer to anticompetitive conduct that permits the exercise of ‘new or increased market power’.\(^47\) More generally, the post-TREB updates to the Guidelines (including, in particular, the Bureau’s consideration of dominance

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

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

46 This was expressly contemplated in the prior (2012) version of the Guidelines, Section 2.3.

47 Guidelines, Section 3 (describing conduct that ‘lessens’ competition). Elsewhere, the Guidelines refer to impugned practices causing ‘a materially greater degree of market power to exist than in the absence of the practice’, without specifying whether this would necessarily exclude an acquisition of new market power.
by firms that do not compete directly in the relevant market or markets, and of the ability to exclude, as well as the de-emphasising of market shares) suggest that the Bureau may apply a nuanced and potentially broad interpretation of monopolisation.

IV ABUSE

i Overview

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

Practice of anticompetitive acts

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

Whether an act will be considered ‘anticompetitive’ depends on the limiting principle of whether it has an intended negative effect on a competitor that is ‘predatory, exclusionary or disciplinary’.48 This does not necessarily require subjective intent, and the Tribunal has held that intent can be inferred from the reasonably foreseeable consequences of the conduct or the circumstances in which it is undertaken.49

Further to the ultimate result in the TREB case, the Guidelines, as updated in 2019, take the position that ‘certain acts not specifically directed at competitors could still be considered to have a predatory, exclusionary, disciplinary or some other anticompetitive purpose’.50 This interpretation would encompass ‘facilitating practices’ that do not themselves harm a competitor but permit coordination. It is broader than the interpretation that appeared to have been applied in the earlier Canada Pipe case, in which the requirement that an anticompetitive act be intended to harm a competitor was essential. The Tribunal’s initial decision in TREB also arguably foreclosed the broader interpretation. However, as discussed above, the Tribunal’s ruling upon reconsideration, as upheld by the Court of Appeal, leave open the possibility that a range of acts not specifically directed at one’s competitor may constitute ‘anticompetitive acts’, an approach that appears also to be reflected in the more recent proceedings against the VAA.

Where anticompetitive intent has been inferred, it is possible to rebut a presumption that the purpose of conduct is anticompetitive by establishing that the conduct had a valid business purpose or justification. In Canada Pipe, it was held that a business justification must have a ‘credible efficiency or pro-competitive rationale’ and be one that ‘relates to and

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48 Canada Pipe at 66.
49 NutraSweet.
50 Guidelines, Section 2B.
counterbalances the anticompetitive effects or subjective intent of the acts'. 51 However, the Guidelines take a broader view that a business justification, while not a defence, could be anything that provides an ‘alternative explanation for the overriding purpose of the conduct’. 52

A ‘practice’ of anticompetitive acts under the abuse provisions generally requires more than a single act, but could be met by a single act that has an ongoing or systemic effect or a ‘lasting impact’ in a market. 53 A practice may also consist of different forms of anticompetitive conduct, 54 not only repeated use of the same conduct, and can therefore in theory include otherwise innocuous conduct, if used in an anticompetitive manner in combination with other anticompetitive practices.

Substantial lessening or prevention of competition

An abuse of dominance will be subject to a remedy under the Act only if there is an actual or likely substantial lessening or prevention of competition. In principle, this test concerns competition rather than individual competitors. 55

The prevailing test was formulated in Canada Pipe, and recently affirmed in TREB, as well as in the context of the evaluation of mergers under the Act. 56 It is a ‘but for’ test that seeks to determine if it is likely that there would be substantially greater competition (past, present or future) in the absence of the impugned conduct.

As was the case prior to Canada Pipe, the test considers whether a practice contributes to the creation, preservation or enhancement of market power, which will be assessed in terms of whether there is substantial effect on market entry or expansion by new or existing competitors. However, in contrast to the test prior to Canada Pipe, it is a comparative, relative assessment, rather than a consideration of whether the absolute level of competition is substantial or sufficient. 57 The Guidelines indicate that the Bureau will also consider factors such as whether, but for the practice, monetary prices would be lower, product quality, service, innovation or choice would be greater, or switching between products or suppliers would be more frequent. 58 The prior (2012) version of the Guidelines listed similar factors but qualified them by describing the ‘but for’ scenarios as ‘substantially’ different, which may suggest that the 2019 Guidelines broaden the potential situations in which the Bureau may look into any given practice. 59

51 Canada Pipe at 73.
52 Guidelines, Section 2B(iv).
53 Guidelines, Section 2A.
54 NutraSweet.
55 The Act does, however, require that the analysis take into account whether an impugned practice results from a market participant’s ‘superior competitive performance’, which could be a legitimate cause of a relative decrease in competition (Section 79(4)).
56 Terriva Corporation v. Canada (Commissioner of Competition), 2015 SCC 3. In its decision of 22 January 2015, the Supreme Court of Canada considered whether, but for the merger, the acquired party would likely have entered the relevant market as a competitor.
57 Guidelines, Section 3. See also the Court of Appeal’s 2017 decision in TREB at 66.
58 Guidelines, Section 3.
59 Guidelines (2012 version), Section 4, indicating that the Bureau may consider ‘whether, in the absence of the practice of anticompetitive acts, consumer prices might be substantially lower; product quality, innovation, or choice might be substantially greater; or consumer switching between products or suppliers might be substantially more frequent’.
ii Exclusionary abuses

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

a margin squeezing by a vertically integrated supplier;
b acquisition by a supplier of a customer;
c pre-emption of scarce facilities or resources;
d adoption of non-compatible product specifications; and
e exclusive dealing.  

The Guidelines specify that the list above is non-exhaustive and also reference tying and bundling and activities that increase customer switching costs. Moreover, the 2019 Guidelines refer more generally to other activities that ‘increase a rival’s costs’, as was the case in the prior version, and add to this activities that may ‘reduce their revenues’.  

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

a meet-or-release and most-favoured nation clauses;
b rights of first refusal;
c automatic price increases;
d long-term contracts;
e negative option automatic renewal provisions;
f costs or penalties, such as liquidated damages or excessive fees to switch suppliers, return goods or otherwise terminate contracts early;
g the acquisition of competitors and inclusion of non-compete clauses in the acquisition agreements;
h various kinds of loyalty or fidelity rebates, including discounts and allowances in exchange for the use of the supplier’s logo and name;
i exclusive networks;
j market allocation;
k in the real estate services cases, the use of a database in a way that could be exclusionary; and
l in the airport case, denying new catering suppliers access to an airport.

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60 Act, Section 78(a), (b), (e), (j) and (h).
61 Guidelines, Section 3.2.1.
62 NutraSweet; D&B regarding most-favoured nation clauses.
63 Laidlaw.
64 id.
65 D&B.
66 Laidlaw.
67 Direct Energy and Reliance; Laidlaw; D&B; Waste Services.
68 Canada Pipe; Laidlaw.
69 Canada Pipe; NutraSweet.
70 NutraSweet.
71 Bank of Montreal.
72 AGT regarding allocation of national advertisers.
73 CREA; TREB.
74 VAA.
iii Discrimination

The Act formerly contained per se criminal prohibitions against price discrimination and predatory pricing. When price maintenance was decriminalised with the repeal of those provisions in 2009, it was acknowledged that this conduct would remain subject to review under the abuse of dominance provisions where the conditions of Section 79 were met.75

The Act enumerates several examples of discriminatory or predatory conduct, including freight equalisation, introducing fighting brands selectively and temporarily, buying up product to prevent price erosion, and selling articles below acquisition cost.76 Prior cases have also considered the intimidation of competitors and customers through spurious or threatened litigation,77 cross-subsidisation78 and predatory pricing generally.79

The Guidelines provide that in the context of predatory pricing conduct, the Bureau will assess whether the predatory price is sufficient to cover the average avoidable (i.e., variable) costs of providing a good or service, taking into account whether competitors could match the price without incurring a loss, and whether an allegedly predatory price is being offered to meet competition.80

iv Exploitative abuses

As discussed above, the 2019 Guidelines appear to take a broad and flexible approach to the interpretation of anticompetitive acts. In particular, they do not explicitly exclude excessive pricing or similar exploitative abuses. Nonetheless, in principle, the Act does not prohibit such practices, except to the extent that they have an exclusionary, disciplinary or predatory purpose and likely effect.

V REMEDIES AND SANCTIONS

i Sanctions

Since 2009, the Tribunal has had the discretion, in addition to ordering behavioural or structural remedies, to impose AMPs of up to C$10 million in the first instance or C$15 million for a ‘subsequent order’.81

Pursuant to the Act, the Tribunal is required to consider various factors in determining the amount of an AMP, including the affected sales, actual or anticipated profits, the dominant firm’s financial position, its history of compliance and ‘any other relevant factor’.82 An unpaid AMP is a debt owed to the Crown and recoverable in any court of competent jurisdiction.

Although the stated purpose of AMPs in the Act is compliance and not punishment,83 the constitutionality of AMPs has been challenged in other contexts on the basis that they

75 For example, see Competition Policy Review Panel, Compete to Win (27 June 2008) at 58: www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/h_00040.html.
76 Act, Section 78(c), (d), (f) and (i).
77 Laidlaw.
78 NutraSweet; Tele-Direct.
79 Commissioner of Competition v. Air Canada, 2003 Comp Trib 13; Tele-Direct.
80 Guidelines, Section 2B.
81 AMPs had previously been available in the domestic airline industry only.
82 Act, Section 79(3.2).
83 Act, Section 79(3.3).
are punitive and therefore warrant the same procedural protections as criminal penalties.\textsuperscript{84} To date, the water heater rental industry cases (\textit{Reliance} and \textit{Direct Energy}) are the only ones in which AMPs have been sought by the Bureau and ultimately imposed.\textsuperscript{85}

\textbf{ii \quad Behavioural remedies}

The most basic remedy under Section 79 is an order prohibiting the continuation of a practice of anticompetitive acts. In addition, or as an alternative, the Tribunal has broad discretion to make any other order required to restore competition, where a prohibition order alone is not likely to be sufficient to restore competition in the market.\textsuperscript{86} Both consent agreements and prohibition orders can theoretically be imposed for an indefinite period.\textsuperscript{87}

An interim order may be issued, on application by the Bureau on an \textit{ex parte} basis, where the Tribunal finds that injury to competition cannot be adequately remedied by a later order, or in certain other specific circumstances, is likely to occur in the absence of the order.\textsuperscript{88}

\textbf{iii \quad Structural remedies}

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

\textbf{VI \quad PROCEDURE}

The Monopolistic Practices Directorate of the Bureau’s Mergers and Monopolistic Practices Branch investigates potentially anticompetitive business practices, such as abuse of dominance and restrictive vertical trade practices, as well as certain types of anticompetitive agreements or arrangements.\textsuperscript{89}

Obtaining an order for a remedy under the abuse of dominance provisions in principle requires an application by the Commissioner of Competition to the Tribunal, a specialised competition court with judicial and lay members that hears and decides non-criminal matters under the Act.\textsuperscript{90} Cases before the Tribunal are subject to rules of procedural practice, which,

\begin{itemize}
\item \textsuperscript{84} Constitutional arguments challenging AMPs under the civil misleading advertising provisions of the Act, for which the same level of AMPs is available as for abuse of dominance, were made but effectively rejected in \textit{Canada (Competition Bureau) v. Chatr Wireless Inc}, 2013 ONSC 5315 (Ont Sup Ct): http://canlii.ca/t/g04cv.
\item \textsuperscript{85} \textit{Reliance} was not a fully contested case. The C$5 million penalty obtained by the Bureau was the result of a consent agreement.
\item \textsuperscript{86} Act, Section 79(2).
\item \textsuperscript{87} In contrast, criminal prohibition orders and orders regarding civil deceptive marketing practices are subject to a statutory maximum limitation period of 10 years.
\item \textsuperscript{88} Act, Section 103.3. Interim orders are issued for an initial term of 10 days but may be extended up to twice for 35 days each.
\item \textsuperscript{89} Following the internal restructuring within the Bureau that became formally effective on 1 April 2015, the Mergers and Monopolistic Practices Branch now combines the Mergers Directorate, responsible for merger review, and the Monopolistic Practices Directorate. The Mergers Directorate and Monopolistic Practices Directorate were formerly known as the Mergers Branch and Civil Matters Branch respectively. Separately, the Cartels and Deceptive Marketing Practices Branch is focused on cartels and deceptive business practices. Competition Bureau, ‘Competition Bureau restructures to maximise its contribution to a more effective marketplace’ (Announcement, 25 March 2015): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03897.html.
\item \textsuperscript{90} See www.ct-tc.gc.ca.
\end{itemize}
Canada

inter alia, provide for documentary, written and oral discovery on a relevance standard.\textsuperscript{91} Decisions of the Tribunal may be appealed to the Federal Court of Appeal, and ultimately to the Supreme Court of Canada. Courts may refer matters back to the Tribunal for redetermination.

However, it is increasingly common for alleged abuses of dominance to be investigated and initially challenged outside the formal Tribunal process with a view to seeking a negotiated resolution. Negotiated settlements are then recorded in a ‘consent agreement’, which is registered with the Tribunal and, once registered, carries the legal force of an order of the Tribunal.\textsuperscript{92} Firms that volunteer to make changes in their business practices are generally required to formalise these commitments in a consent agreement.\textsuperscript{93}

Consent agreements must be ‘based on terms that could be the subject of an order of the Tribunal’, but consent agreements filed with the Tribunal are not subject to its substantive oversight; nor are full details of the conduct leading to the agreement made public. Given the availability of consent agreements, abuse of dominance investigations often settle before reaching the contested hearing stage. On the other hand, this framework has been observed to be one in which respondents may ‘“dig in”, or at least protract settlement discussions, to avoid a restrictive consent agreement’.\textsuperscript{94}

The Act provides the Bureau with numerous tools to investigate alleged abuses of dominance, including the ability to obtain a judicial order under Section 11 of the Act to compel oral examination, document production or a written response to questions, where the Bureau believes grounds may exist for an order. Section 11 orders can extend to affiliates outside Canada of a Canadian corporation that is subject to the order, and can also be used to obtain information from third-party customers, suppliers and competitors. The Bureau has increasingly made use of this tool to compel production in recent enforcement activity, such as the inquiries involving Loblaw, the smartphone industry, the VAA and online search and advertising, and in several recent cases it has highlighted its reliance on third parties in particular.\textsuperscript{95} The Bureau can also obtain a warrant to enter and search premises and seize documents, or, in ‘exigent’ circumstances, exercise these rights without a warrant.\textsuperscript{96}

Various procedural limitations are set forth in statute. Applications for remedies must be brought to the Tribunal no later than three years after a practice has ceased.\textsuperscript{97} The Commissioner may not bring an application under both the abuse of dominance provisions

\begin{footnotesize}
\textsuperscript{92} Act, Section 105.
\textsuperscript{93} Guidelines, Section 1.
\textsuperscript{95} For instance, the online search and advertising matter, which was a complaint-driven inquiry, involved extensive consultations with industry and economic experts, and interviews with a range of market participants. Similarly, in the \textit{Softvoyage} case, the Bureau gathered information from multiple sources, including tour operators, travel agencies, industry associations, past and potential competitors and ‘businesses offering similar products and services in foreign markets’. The Bureau has indicated that in the inquiry involving biologic and biosimilar drugs (discontinuation announced in February 2019), it ‘interviewed key market participants, including pharmaceutical manufacturers, public and private insurers, hospitals, physicians, infusion clinic networks and trade associations, while also gathering relevant records from many of these parties’. In some cases, these communications may be conducted informally and voluntarily, as the Bureau does not always specify whether it relied on its formal powers under Section 11 in engaging third parties.
\textsuperscript{96} Act, Section 15.
\textsuperscript{97} Act, Section 79(6).
\end{footnotesize}
and either the criminal conspiracy provisions or the civil price maintenance, competitor collaboration or substantive merger provisions. However, the Bureau may, and often does, bring applications under both the abuse of dominance provisions and provisions relating to other vertical trade practices. Moreover, it is not uncommon for an investigation under the abuse provisions to immediately precede or follow the Bureau's examination of the same firm under other provisions. For instance, the Bureau's inquiry into certain practices of the grocery retailer Loblaw, based on potential abuse of dominance concerns, immediately followed its review of Loblaw's acquisition of a large pharmacy retailer (during which, according to the Bureau's statement, it uncovered evidence that certain of the grocery retailer's policies 'may have been implemented for an anticompetitive purpose'). In turn, an investigation into alleged price-fixing of bread products among Loblaw and other retailers appears to have immediately followed the abuse inquiry.

In practice, the Bureau also frequently collaborates with its international counterparts. For instance, it consulted with the US Federal Trade Commission and the European Commission in the course of its investigation into online search and advertising practices, and indicated that it would continue to closely follow international investigations into similar alleged conduct. The Bureau has similarly referenced communications with foreign counterparts in the recent smartphones inquiry.

VII PRIVATE ENFORCEMENT

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

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

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

However, Section 103.1 of the Act does allow private parties to apply for leave to bring applications before the Tribunal under the refusal to deal (Section 75), price maintenance (Section 76), and exclusive dealing, tied selling and market restriction (Section 77) provisions of the Act, where the underlying requirements of those sections are met. While the remedies available under those provisions do not include AMPs or damages, and while it is costly

98 Act, Sections 45 or 49, 76, 90.1 or 92 respectively.
99 These allegations are outlined in court documents relating to the inquiry concerning alleged activities of Canada Bread Company, Limited; Weston Foods (Canada) Incorporated; Loblaw Companies Limited; Wal-Mart Canada Corporation; Sobeys Incorporated; Metro Incorporated; Giant Tiger Stores Limited and other persons. The case has also been reported in the media. See, for example, CBC, 'Bakers, grocers met to reach deals on bread prices, competition watchdog alleges' (1 February 2018): www.cbc.ca/news/business/competition-bureau-bread-price-fixing-1.4512332.
100 Section 36 of the Act applies to breaches of the criminal provisions of the Act; a breach of an order of the Tribunal is a criminal offence.
101 For example, Chahda v. Bayer Inc (1998), 82 CPR (3d) 202 (Ont Gen Div). However, in an action against TREB, CREA and their directors and officers alleging in part that they had breached the terms of CREA's consent agreement, the Court of Appeal in refusing a motion to strike the statement of claim found that a reasonable cause of action was disclosed (Dale v. Toronto Real Estate Board, 2012 ONSC 512).
to bring an action, private litigants could in theory use Section 103.1 to prohibit certain conduct that might otherwise be pursued as an abuse of dominance, or to draw attention to related abuse of dominance concerns, providing private parties with a ‘back door’ method of privately challenging abuse of dominance.  

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

VIII FUTURE DEVELOPMENTS

The following expected developments are likely to be of particular relevance for the law of abuse of dominance in Canada in the coming year:

a. the outcome of the Bureau’s inquiry into low-cost airline pricing;

b. the Tribunal’s decision in the Bureau’s proceedings against the VAA;

c. further enforcement or commentary reflecting the outcome in TREB, in particular as it relates to firms that do not compete in markets in which they may be dominant and the ability to exclude competitors from the relevant market or markets in such circumstances;

d. continued focus on markets within the digital economy and innovative markets generally; and

e. continued attention on the pharmaceutical industry in particular, following the release of the updated IPEGs and recent investigations.

102 In several past refusal to deal leave applications, the plaintiffs alleged (or implied) that the defendant suppliers were dominant. See, for example, Barcode Systems Inc v. Symbol Technologies Canada ULC; Allan Morgan and Sons Ltd v. La-Z-Boy; Mrs O’s Pharmacy v. Pfizer; Paradise Pharmacy Inc v. Novartis; Broadview Pharmacy v. Wyeth; Nadeau Ferme Avicole Limitee/Nadeau Poultry Farm Limited v. Groupe Westco Inc and Groupe Dynaco; Cooperative Agroalimentaire and Volailles Acadia SEC and Volailles Acadia Inc/Acadia Poultry Inc; Canadian Standard Travel Agent Registry v. International Air Transport Association; and Swenson Inc v. Trader Corporation.
Chapter 8

CHINA

Zhan Hao, Song Ying and Stephanie Wu

I INTRODUCTION

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

- selling commodities at unfairly high prices or buying commodities at unfairly low prices;
- without justifiable reasons, selling commodities at prices below cost;
- without justifiable reasons, refusing to enter into transactions with their trading counterparts;
- without justifiable reasons, requiring trading counterparties to make transactions exclusively with themselves or with the undertakings designated by them;
- without justifiable reasons, conducting tie-in sales of commodities or imposing other unreasonable trading conditions on transactions;
- without justifiable reasons, applying differential prices and other transaction terms among trading counterparties on an equal footing; or
- other acts of abuse of dominant market positions confirmed as such by the AML enforcement authorities under the State Council.

In the past year, the antitrust enforcement powers that previously sat within three Chinese antitrust enforcers, the National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC) and the Ministry of Commerce of China (MOFCOM), have been consolidated into a single authority, the State Administration for Market Regulation (SAMR).

The SAMR has released several new regulations and drafts for comment. Because the regulations relating to abuse of market dominance have not been finalised, former provisions and guidelines in relation to enforcing Article 17 of the AML by the NDRC, SAIC and the Anti-Monopoly Commission of the State Council (AMC) will continue to be in force until the new rules come into effect.

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1 Zhan Hao is the managing partner and Song Ying and Stephanie Wu are partners at AnJie Law Firm.
II YEAR IN REVIEW

The institutional reform of the antitrust enforcement agencies was the biggest event in competition law enforcement in China in 2018. After the reform, the previous antitrust functions of MOFCOM, NDRC and SAIC were integrated into the newly established, powerful SAMR. In addition, private antitrust enforcement by the private sector is also noteworthy.

i Public enforcement

Investigation cases published by the SAMR, the former SAIC/NDRC and their local branches

In 2018, the SAMR and its local branches initiated 32 investigations into anticompetitive conduct and closed 15 of them, including five major abuse of market dominance cases. The most noteworthy cases are mentioned below.

Investigation into chlorpheniramine active pharmaceutical ingredients by the SAMR (completed)

On 30 December 2018, the SAMR imposed a fine of 8.4797 million yuan on Hunan Er-kang Pharmaceutical Management Co Ltd and 1.5573 million yuan on Henan Jiushi Pharmaceutical Co Ltd for abuse of market dominance in relation to chlorpheniramine active pharmaceutical ingredients (APIs). The two companies were accused of selling chlorpheniramine APIs at excessive prices, as well as engaging in unjustifiable refusal to trade and tying practices. For Hunan Er-kang, the SAMR imposed a fine equivalent to 8 per cent of its 2017 sales revenue, confiscated its illegal gains of 2.3947 million yuan and ordered it to terminate its anticompetitive practices; for Henan Jiushi, the SAMR imposed a fine equivalent to 4 per cent of its 2017 sales revenue and ordered it to terminate its anticompetitive practices.

Investigation into civilian blasting equipment by the former SAIC/SAMR (terminated)

On 29 December 2018, the SAMR announced that its Hubei branch terminated an investigation launched by the former SAIC into Hubei Lianxing Civilian Blasting Equipment Management Co Ltd in relation to the alleged abuse of market dominance (i.e., unjustifiable exclusive dealing in relation to civilian blasting equipment in the Hubei market). In accordance with Article 45 of the AML, Hubei Lianxing proposed their commitments to the SAMR, which subsequently suspended the investigation on 15 November 2018 and terminated it on 29 December 2018.

Investigation into power supply by the former SAIC/SAMR (terminated)

On 3 December 2018, the SAMR announced that its Jiangsu branch terminated an investigation launched by the former SAIC into Nanjing Lishui Branch of the State Grid Jiangsu Electric Power Co Ltd in relation to the alleged abuse of market dominance (i.e., unjustifiably imposing unreasonable trading conditions of power supply in the Nanjing grid).
Lishui District market). In accordance with Article 45 of the AML, State Grid Nanjing Lishui proposed their commitments to the SAIC, which subsequently suspended the investigation on 23 August 2018 and terminated it on 3 December 2018.

**Investigation into banking loans by the former SAIC/SAMR (terminated)**

On 10 August 2018, the SAMR announced that the former SAIC terminated an investigation into the Inner Mongolia Branch of Agricultural Bank of China in relation to the alleged abuse of market dominance (i.e., unjustifiably imposing unreasonable trading conditions with ‘must-buy’ personal accident insurance when providing loans for a poverty alleviation project). In accordance with Article 45 of the AML, Inner Mongolia Branch proposed their commitments to the SAIC, which subsequently suspended the investigation on 8 January 2018 and terminated it on 10 August 2018.

**Investigation into rolling cargo transportation by the former SAIC (completed)**

On 9 January 2018, the former SAIC imposed a fine of 977,400 yuan on Hubei Yinxingtuo Co Ltd for abuse of market dominance in relation to rolling cargo transportation (i.e., unjustifiably imposing different trading conditions when providing the relevant rolling cargo transportation services). The fine was equivalent to 6 per cent of Hubei Yinxingtuo’s 2016 sales revenue.

**Investigation into Microsoft by the former SAIC/SAMR (still pending)**

The investigation into Microsoft commenced in June 2014. In July 2014, the former SAIC conducted simultaneous large-scale dawn raids at four of Microsoft’s offices in Beijing, Shanghai, Guangzhou and Chengdu, with the cooperation of nearly 100 enforcement officers from nine SAIC branches. To date, the SAIC/SAMR has publicised only limited information about the case, including its ongoing status.

In summary, the major cases handled by the SAMR, the former SAIC/NDRC and their provincial branches in 2018 are listed below.

<table>
<thead>
<tr>
<th>Investigated party</th>
<th>Industry</th>
<th>Investigating authority</th>
<th>Monopoly Conduct</th>
<th>Case Initiated</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hunan Er-kang Pharmaceutical Management Co Ltd and Henan Jiushi Pharmaceutical Co Ltd</td>
<td>Pharmaceutical</td>
<td>SAMR</td>
<td>Selling products at excessive prices, unjustifiable refusal to trade and tying</td>
<td>2017</td>
<td>Completed</td>
</tr>
<tr>
<td>Hubei Lianxing Civilian Blasting Equipment Management Co Ltd</td>
<td>Civilian blasting equipment</td>
<td>Former SAIC/SAMR</td>
<td>Unjustifiably exclusive dealing</td>
<td>2013</td>
<td>Terminated</td>
</tr>
<tr>
<td>Nanjing Lishui Branch of the State Grid Jiangsu Electric Power Co Ltd</td>
<td>Power supply</td>
<td>Former SAIC/SAMR</td>
<td>Unjustifiably imposing unreasonable trading conditions</td>
<td>2017</td>
<td>Terminated</td>
</tr>
<tr>
<td>Inner Mongolia Branch of Agricultural Bank of China</td>
<td>Bank</td>
<td>Former SAIC/SAMR</td>
<td>Unjustifiably imposing unreasonable trading conditions</td>
<td>2016</td>
<td>Terminated</td>
</tr>
<tr>
<td>Hubei Yinxingtuo Co Ltd</td>
<td>Rolling cargo transportation</td>
<td>Former SAIC</td>
<td>Unjustifiably imposing different trading conditions</td>
<td>2017</td>
<td>Completed</td>
</tr>
<tr>
<td>Microsoft</td>
<td>Software</td>
<td>Former SAIC/SAMR</td>
<td>Bundling</td>
<td>2014</td>
<td>Pending</td>
</tr>
</tbody>
</table>

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6 [www.qichacha.com/postnews_941cf4b75ec48ea1b21b2f570ba1c7af.html](http://www.qichacha.com/postnews_941cf4b75ec48ea1b21b2f570ba1c7af.html).
ii Private enforcement

Pan Yao v. Shanghai International Commodity Auction Co Ltd (completed)\(^7\)

The plaintiff, Pan Yao, is a resident of Shanghai. Owing to the limited issuance of non-business vehicle licence plates in the city, Pan had to participate in a monthly auction conducted by the only auction house designated by the Shanghai municipal government, Shanghai International Commodity Auction Co Ltd. After a few failed attempts at the auction, Pan sued the auction house for abuse of market dominance. Specifically, Pan alleged that, as the only auction house at the monthly event, the defendant held a dominant position in the vehicle licence plate auction market and that the defendant abused the dominant position by charging an unfairly high commission.

After losing in the first-instance trial at Shanghai Intellectual Property Court, Pan appealed to Shanghai Higher Court, which affirmed the first-instance judgment in May 2017. Both courts began their analysis with Article 12 of the AML, which provides that ‘[f]or the purposes of this Law, undertakings include natural persons, legal persons and other organisations that engage in manufacturing or selling commodities or providing services. For the purposes of this Law, a relevant market consists of the range of the commodities for which, and the regions where, undertakings compete against each other during a given period of time for specific commodities or services.’

Accordingly, whether an undertaking holds a dominant market position depends on whether the undertaking provides commodities or services in the relevant market. That determination depends on whether the commodity or service provided by the undertaking is something that other undertakings can compete in. In this case, the defendant is entrusted by the Shanghai government to conduct the auction for non-business vehicle licence plates, which are not a commodity or service for the purposes of the AML. The auction is essentially a mechanism for allocating public resources, and the defendant is in fact performing an administrative function delegated by the Shanghai government. Therefore, there is no market that is to be regulated by the AML, and without a relevant market, the defendant cannot be said in any way to hold a dominant market position.

At the end of 2018, this case was listed by the Supreme People’s Court as a top 10 civil antitrust case since the enactment of the AML. The moral of the case is that, although the AML plays an increasingly important role in regulating socioeconomic activities, it has boundaries. Where the government exercises its power in managing public resources, it is not a market that the AML is designed to address, because government-regulated public resources are not commodities or services in a competitive market.

Xie Liansheng v. Xia Yingyu (completed)\(^8\)

Both the plaintiff and defendant in this case are individuals engaged in the business of selling Duomiqi brand rice cookies. The plaintiff alleged that, as a distributor, the defendant monopolised the Duomiqi brand rice cookies market in North East China and abused the


dominant position by either charging unfairly high prices to the plaintiff, a retailer, or by refusing to sell to the plaintiff. After losing the first and second-instance trials, the plaintiff petitioned the Supreme Court for a retrial.

The country’s highest court ruled that, based on the facts found by the lower courts and daily life experience, there were apparently other brand name rice cookies substitutable to and competing against the Duomiqi brand. These competing rice cookies should constitute the relevant market. Further, under the judicial interpretations issued by the Supreme People’s Court, for an abuse of dominance claim, the plaintiff must prove that the defendant holds a dominant market position and abused that position. However, the plaintiff in this case failed to carry that burden. In fact, he showed none of the factors prescribed under Article 18 of the AML for finding a dominant market position; that is by analysing:

a. the defendant’s market share in the relevant market, and the competition situation of the relevant market;
b. the defendant’s ability to control the sales markets or the raw materials purchasing markets;
c. the extent of reliance on the defendant by other undertakings; or
d. the degree of difficulty for other undertakings to enter the relevant market.

Accordingly, the Court rejected the plaintiff’s appeal in January 2018. This is one of two private antitrust cases that were appealed to the Supreme People’s Court for a retrial, which illustrates the point given in Section VII, that in private antitrust actions, the plaintiff is often at a disadvantage in collecting evidence, such as market data or illegal behaviour, to make a preliminary showing and shift the burden of proof to the defendant. If the plaintiff does not apply to the court for assistance in evidence collection or the court refuses to do so, it becomes very difficult for the plaintiff to move the case forward.

**Shenzhen Micro Source Code v. Tencent (completed)**

These two cases both involve Tencent, the giant technology company.

Shenzhen Micro Source Code is a company that sells software products online, primarily through Tencent’s WeChat Official Account (WeChat is a hugely popular social media platform in China, boasting a subscription of over 1 billion users, and WeChat Official Account is a marketing and promotional function derived from WeChat). Micro Source Code alleged that Tencent possessed a dominant position on the mobile instant messaging and social media market and abused the dominance by blocking Micro Source Code from using WeChat Official Accounts to sell its products. After an 18-month trial, the Shenzhen Intermediate Court dismissed the plaintiff’s claims in the first-instance judgment in August 2018.

The court first clarified that the relevant market should be defined based on the harm to competition caused by the conduct at issue. It is, therefore, necessary to identify the goods and services concerned with the conduct. This is particularly important for the internet

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9 (2017) Yue 03 Min Chu No. 250, http://wenshu.court.gov.cn/content/content?DocID=7e6daf7e-a490-47e8-b836-a9c400ce02df0&KeyWord=.
sector, because internet companies often develop derivative services (e.g., WeChat Official Account promotional function) from their basic service (e.g., WeChat instant messaging). Under this approach, the court defined the relevant market as the provision of marketing and promotional services through online platforms.

The court then held that the number of active WeChat users cannot reliably reflect the online platform’s market power because most internet users register with multiple competing platforms, and the plaintiff produced no evidence as to Tencent’s market power over the derivative Official Account service. Consequently, the court refused to find a dominant market position on the part of Tencent. It is unfortunate that the plaintiff did not draw on the economic theory of indirect network effect to prove that the large user base of WeChat increases the utility of the Official Account function and that Tencent could have leveraged its market power on one side of the platform to another side.

The court last held that for an antitrust refusal-to-deal claim to pass, the alleged conduct must have been for an anticompetitive purpose or have had an anticompetitive effect.

In Xu Shuqing v. Tencent, the plaintiff is a lawyer that made a series of memes to promote his legal service. After agreeing to Tencent’s terms of service that prohibit commercial promotions, Xu applied to WeChat Meme Platform to upload his memes. The application was rejected, and Xu brought an antitrust refusal-to-deal action against Tencent. The case went through first and second-instance trials in Guangdong Province, which both ruled against Xu, and was then appealed to the Supreme People’s Court for a retrial.

Similar to the Shenzhen Intermediate Court in Micro Source Code, the Supreme Court refused to give inappropriate weight to WeChat’s huge popularity in social media in defining the relevant market. Applying substitutability analysis, the Supreme Court found the relevant market to be broader than the WeChat meme service, but instead encompass the overall online meme service market.

The Court went on to specify the key element of the refusal-to-deal claim (i.e., whether the refusal has had a substantial effect of restricting or eliminating competition and has thereby harmed consumer welfare). As a general rule of thumb, excluding a single business operator would not result in substantial anticompetitive effect in most circumstances. In fact, contract disputes that have no apparent anticompetitive effect should be resolved under the contract law and not under the antitrust law. The Court dismissed the petition for retrial in September 2018.

It will, therefore, be increasingly difficult for individual businesses to seek remedies under the AML for contract disputes. As China’s antitrust law matures and the courts gain more experience with various types of competitive behaviour, the boundaries between antitrust and other disciplines of the law will become clearer and the courts will fill more gaps left by the AML in determining the key elements of specific antitrust claims.

Another moral of these two cases is that, although Tencent’s WeChat platform is immensely popular among internet users in China, leaving an impression of presumptive market dominance, the courts have not agreed with the laymen’s opinion. This is either because the plaintiffs have almost insurmountable hurdles in evidence production or because the disputes do not directly arise from the basic WeChat service, but from other derivative services. As new internet giants challenge Tencent’s market position, it remains to be seen whether China’s big tech will be found to have violated antitrust law.

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In summary, the most high-profile private enforcement actions between 2017 and 2019 (both completed and pending cases) are listed below.

<table>
<thead>
<tr>
<th>Plaintiff</th>
<th>Defendant</th>
<th>Sector</th>
<th>Courts</th>
<th>Type of conduct</th>
<th>Case opened</th>
<th>Status of proceedings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pan Yao (an individual)</td>
<td>Shanghai International Commodity Auction Co Ltd</td>
<td>Government service</td>
<td>Shanghai IP Court, Shanghai Higher Court</td>
<td>Abuse of dominance by charging unfairly high prices</td>
<td>2016</td>
<td>Plaintiff lost in first and second-instance trials</td>
</tr>
<tr>
<td>Xie Liansheng (an individual)</td>
<td>Xia Yingyu (an individual)</td>
<td>Food</td>
<td>Liaoning Higher Court, Supreme People's Court</td>
<td>Abuse of dominance by charging unfairly high prices and refusing to deal</td>
<td>2016</td>
<td>Plaintiff lost in first and second-instance trials. Supreme Court rejected petition for retrial</td>
</tr>
<tr>
<td>Shenzhen Micro Source Code Software Development Co Ltd</td>
<td>Tencent Technology (Shenzhen) Co Ltd, Shenzhen Tencent Computer Systems Co Ltd</td>
<td>Internet</td>
<td>Shenzhen Intermediate Court</td>
<td>Refusal to deal</td>
<td>2016</td>
<td>Plaintiff lost in first-instance trial</td>
</tr>
<tr>
<td>Xu Shuqing (an individual)</td>
<td>Tencent Technology (Shenzhen) Co Ltd, Shenzhen Tencent Computer Systems Co Ltd</td>
<td>Internet</td>
<td>Shenzhen Intermediate Court, Guangdong Higher Court, Supreme People's Court</td>
<td>Refusal to deal</td>
<td>2016</td>
<td>Plaintiff lost in first and second-instance trials. Supreme Court rejected petition for retrial</td>
</tr>
<tr>
<td>Jinjiang Ruitai Zipper Co Ltd</td>
<td>YKK Corporation, YKK (China) Investment Co Ltd, and others</td>
<td>Zipper manufacture</td>
<td>Fuzhou Intermediate Court</td>
<td>Abuse of dominance by charging unfairly high prices and refusing to deal</td>
<td>2017</td>
<td>Plaintiff withdrew the claims in September 2018</td>
</tr>
<tr>
<td>Yunnan Yingding Biological Energy Co Ltd</td>
<td>Sinopec</td>
<td>Bio-energy</td>
<td>Kunming Intermediate Court, Yunnan Higher Court</td>
<td>Refusal to deal</td>
<td>2014</td>
<td>The plaintiff petitioned the Supreme People's Court for a retrial, which has not yet made a ruling</td>
</tr>
<tr>
<td>Four Chinese rare earth companies</td>
<td>Hitachi Metals, Rare earth magnets</td>
<td>Ningbo Intermediate Court</td>
<td>Refusal to deal</td>
<td></td>
<td>2014</td>
<td>Pending</td>
</tr>
<tr>
<td>Apple</td>
<td>Iwncomm</td>
<td>Wireless communication</td>
<td>Beijing IP Court</td>
<td>Abuse of dominance in standard-essential patents</td>
<td>2016</td>
<td>Pending</td>
</tr>
<tr>
<td>Apple Electronics</td>
<td>Qualcomm</td>
<td>Baseband processor chip sets</td>
<td>Beijing IP Court</td>
<td>Refusal to license on fair, reasonable and non-discriminatory terms</td>
<td>2017</td>
<td>Pending</td>
</tr>
</tbody>
</table>
III RELEVANT MARKET DEFINITION AND MARKET POWER

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

i Relevant market definition

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

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

a evidence of switching to other products when the price or other factors of the product concerned are changed;
b the appearance, characteristics, quality, technical features and functionality of the product;
c price variance between products;
d the distribution channel; and
e other factors.

Article 9 of the Guidelines provides the following factors to be considered when defining the relevant geographical market from the demand side:

a evidence of turning to other regional products when the price or other factors of the product concerned are changed;
b the cost and characteristics of transportation;
c the region in which the majority of customers purchase the product in practice, and the regional distribution of major business operators’ products;
d trade barriers, such as tariffs, regulations and environmental and technical factors; and
e other factors.

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

ii Market dominance

Market dominance under the Chinese antitrust regime is defined in Article 18 of the AML and further clarified by the implementing rules. It refers to a market dominant position held by one or more undertakings that enable the undertakings to:

a control the price, volume or other trading terms\footnote{According to Article 17 of the Provisions of Anti-Price Monopoly, ‘other trading terms’ include the factors that can have substantial impact on a market, such as grade of commodity, payment terms, method of delivery, after-sales service, trading options or technical constraints.} in the relevant market; and
b block or affect the ability of other undertakings to enter the relevant market by impeding or delaying other undertakings’ entry into the market, or substantially increasing other undertakings’ entry costs, so that the competitors cannot compete effectively post-entry.
### iii Market share presumption

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

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

The preliminary evidence of market dominance can be rebutted by proof showing lack of sufficient market power despite high market share.\(^\text{13}\) In addition, under the preliminary evidence, if any of the undertakings has a market share of less than 10 per cent, this undertaking shall not be deemed to have a dominant position.\(^\text{14}\)

### iv Factors for assessment of dominance

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

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

### IV ABUSE

#### i Overview

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

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

As early as 2015, the enforcement priority of the SAIC gradually shifted from monopoly agreements to abuse of dominance. In particular, practices including excessive pricing, tying and discriminatory treatment by public utility companies have frequently come under antitrust scrutiny. In 2018, the enforcement agencies continue to challenge the pharmaceutical and

\(^{\text{13}}\) See Article 19 of the AML.
\(^{\text{14}}\) ibid.
public utility sectors; for example, in February 2018, the Hubei provincial branch of the SAIC (Hubei AIC) fined roll on/roll off (RORO) port operator Hubei Yinxingtuo Co Ltd for abusing its market dominance by discriminating against RORO shipping companies.

ii Exclusionary abuses

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

Concluded cases suggest that the enforcement agencies have an interest in exclusionary abuses. In December 2018, the SAMR imposed fines on Hunan Er-kang Pharmaceutical and Henan Jiutian Pharmaceutical for abuse of market dominance in relation to chlorpheniramine APIs. These two pharmaceutical firms allegedly engaged in unjustifiable refusal to trade, and bundling.

iii Discrimination

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

iv Exploitative abuses

‘Exploitative abuses’ means that a dominant undertaking abuses its position by exploiting its customers or suppliers; for example, by selling at an unfairly high price or buying products at unfairly low prices.

In the Chlorpheniramine API case, Hunan Er-kang Pharmaceutical was fined 8,479,400 yuan, equivalent to 8 per cent of the company’s 2017 sales revenue. The firm allegedly sold chlorpheniramine API at excessive prices and engaged in unjustifiable refusal to trade, as well as bundling.15 This demonstrates the antitrust enforcement agencies’ willingness and capacity to deal with exploitative abuse behaviour.

V REMEDIES AND SANCTIONS

i Sanctions

In accordance with Article 47 of the AML, an undertaking that has abused its dominant position may be fined between 1 and 10 per cent of its turnover in the preceding year. Additionally, the regulator may confiscate the illegal gains. Article 49 of the AML further states that when calculating the amount of the fine, the regulator shall consider factors such as the nature, gravity and duration of the illegal conduct. In 2016, the NDRC released draft guideline on fines,16 which further explain the key points regarding imposing fines and confiscation of illegal gains.

15 See footnote 2.
ii Behavioural remedies
Along with sanctions, Article 47 of the AML provides that the regulator may impose cease-and-desist orders to stop illegal abusive conduct, although there is no explicit legal basis regarding whether and how the regulator may impose such interim measures for abusive conduct. Previous cases provide little clarification in this regard, owing to their lack of transparency.

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

However, Article 45 of the AML does not delineate the scope of the commitment that the undertakings under investigation may make, so it remains to be seen whether a dominance investigation can be closed on the basis of structural commitments.

VI PROCEDURE
On 30 January 2019, the SAMR released a draft of the Rules on the Prohibition of the Abuse of Market Dominating Position Behaviours (the Draft Rules). The Draft Rules will replace the original regulations of the former SAIC and NDRC with regards to dominance, once they come into force.

The articles of the Draft Rules relating to substantive provisions, such as how to define the market dominance power and the behaviours of abuse, are mainly integrated with provisions of the SAIC’s Rules on the Prohibition of the Abuse of Market Dominance, the SAIC Regulation on Prohibition of Abuses of Intellectual Property Rights, the SAIC Provisions and Procedures on Investigation of Monopoly Agreements and Abuse of Dominant Market Position and the NDRC Regulations on Anti-Price Monopolies.

The Interim Provisions on Administrative Penalty Procedures for Market Administration (the Interim Provisions) came into effect on 1 April 2019, and these cover the common procedural provisions regarding administrative penalties issued by the SAMR. The Draft Rules provide special provisions on investigating abuse of dominance.

Therefore, at this transition stage before the Draft Rules come into force, some procedures that are not covered by the Interim Provisions shall comply with the old SAIC and NDRC regulations.

Considering the Interim Provisions and previous regulations that are currently effective, the stages of SAMR investigations are as follows:

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

b With regards to a specific investigation department, on 28 November 2018, the SAMR announced the Notice on Authorisation of Antitrust Enforcement. The Notice provides that the SAMR shall be responsible for, or authorise the relevant provincial market regulatory authorities to be responsible for, investigation and punishment of the following monopoly acts:
that have occurred across provinces, autonomous regions and centrally administered municipalities;
• that are complicated or have a significant impact nationwide; and
• that are deemed by the SAMR to be under its own jurisdiction. The provincial branches shall be responsible for enforcement against cases that have occurred within their administrative region. Further, commissioned by the SAMR, the provincial branches can conduct investigations in the name of the SAMR.

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

d Investigative measures include:
• conducting an inspection by entering business premises or another relevant place;
• interviewing business operators under investigation, interested parties or other relevant entities or individuals;
• checking and duplicating, inter alia, relevant documents, agreements, account books, business correspondence and electronic data for the business operators under investigation, interested parties or other relevant entities or individuals;
• registering the evidence for preservation in advance where there is a likelihood that the evidence may be destroyed or lost, or difficult to obtain later;
• seizing and detaining relevant evidence; and
• checking the bank accounts of the business operators under investigation.

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

f The authorities may issue punishment decisions when they consider that the undertaking concerned has violated Article 17 of the AML. The regulators should publish the decisions.

g If unsatisfied with a decision, the undertakings under investigation may apply for an administrative review or file an administrative lawsuit with a court for judicial review.

Neither the old regulations of the SAIC or NDRC nor the new interim provisions of the SAMR have clarified the statutory deadlines of investigation; therefore, some procedures may last for a relatively long time.

VII PRIVATE ENFORCEMENT

The AML creates a private right of action against monopolistic conduct under Article 50, which provides that ‘[w]here the monopolistic conduct of an undertaking has caused losses to another person, it shall bear civil liabilities according to law’. The Supreme People’s Court further clarifies that ‘[w]here a plaintiff directly files a civil lawsuit with the people’s court or files a civil lawsuit with the people’s court after a decision of the anti-monopoly law enforcement authority affirming the existence of monopolistic conduct comes into force, if the lawsuit satisfies other conditions for lawsuit acceptance as prescribed by law, the people’s court shall accept the lawsuit’.

Among private actions, collective actions are available in China in the form of representative actions under Articles 53 and 54 of the Civil Procedure Law, which are similar to class actions in the United States. However, collective actions are not common either in antitrust disputes or in other causes of action. This is because the law has not provided clear
guidance as to some key issues in representative action, such as the elements of representative action, the type of applicable cases, the division of damages awarded and the appeals mechanism. Hence, no antitrust collective action has been brought in China yet.

In contrast, private actions brought by putative individual victims are commonly seen, although the prevailing rate for antitrust plaintiffs is still low relative to other types of civil actions. The reasons are either because the plaintiffs are not in a position to carry the burden of proof or because the real issue in dispute is not an antitrust claim and does not cause any antitrust injury, but, rather, is a regular contract or tort dispute that is outside the scope of antitrust law.

**VIII FUTURE DEVELOPMENTS**

As the dust starts to settle on the institutional reform on both the state level and lower government levels, it is expected that the new antitrust agency will begin to set its enforcement priorities and gradually form its own enforcement style.

In terms of legislation, according to an official of the SAMR, several antitrust guidelines relating to the leniency system, procedures of exemption, abuse of intellectual property rights and motor vehicle sector are to be published in 2019.

In terms of enforcement activities, in April 2019, the SAMR dawn-raided Ericsson for alleged violations relating to standard-essential patents. It is expected that the SAMR, as a consolidated antitrust enforcement agency, will continue to maintain a stable enforcement momentum, and yet in a more consistent manner than has previously been seen.
Chapter 9

CZECH REPUBLIC

Jaromír Pumr and Robert Pelíkán

I INTRODUCTION

Generally, Czech competition laws follow EU law in all substantive matters, while also setting out national procedures for enforcement. There are several layers of provisions, each carrying differing levels of force. At the base is constitutional law, followed by EU laws and international treaties, and finally domestic legislation. The Office for Protection of Competition (the Competition Authority) has issued several guidelines, known as ‘soft law’, on the application, procedures and enforcement of competition law. This chapter focuses on domestic law, with the influence of international law being highlighted where relevant.

Constitutional layer

Article 26, Paragraph 1 of the Czech Charter of Fundamental Rights and Freedoms establishes the right to engage in enterprise and pursue other economic activity, whereas Paragraph 2 of the same Article specifies that the exercise of certain professions or activities may be subject to special conditions or restricted by law. This Article is interpreted by the Czech Constitutional Court as an implicit obligation on the state to create and maintain the conditions for fair competition and a fair business environment. This Article is also the basis for the right of both individuals and legal entities to conduct business, although such activities may be restricted by law in certain cases. Competition law is considered to be one such way of restricting dominant businesses in pursuing their economic activities. Such restrictions and their application must be proportionate and rational and must have a legitimate goal, otherwise they will be deemed unconstitutional.

Domestic legislation

The fundamental law establishing the rules governing dominant market position and the abuse of that position is the Act on the Protection of Competition, which protects competition in the products and services (goods) market. This Act is modelled on Articles 101 and 102 of the Treaty on the Functioning of the European Union.

1 Jaromír Pumr is an associate and Robert Pelíkán is a partner at Wolf Theiss.
2 Constitutional Act No. 2/1993 Coll.
3 Judgment of the Constitutional Court of 8 October 2009, No. IV ÚS 27/09.
5 Act No. 143/2001 Coll.
Since 2016, Article 19a of the Act on the Protection of Competition prohibits public authorities from disrupting competition (unless such disruption is permitted or required by special laws). It can mainly be used in the case of discriminatory regulations or other measures adopted by municipal or regional authorities.\(^6\)

The Act on Compensation of Competition Law Damage\(^7\) incorporates the relevant EU directive into domestic law.\(^8\) This Act sets out the applicable procedures for private enforcement (see below).

The Act on Significant Market Power in the Sale of Agricultural and Food Products and its Abuse\(^9\) (the Act on Significant Market Power) targets certain kinds of abuses of market power in contractual relationships\(^10\) in place with the overseeing Competition Authority. Its purpose is to protect the weaker party to a contract (individual suppliers, or small or medium-sized enterprises) from systemic abuse from a retail market player with significant market purchasing power.

**Soft law**

The Competition Authority has published several Guidelines. The relevant Guidelines that remain applicable to date are as follows:

\(\begin{align*}
\text{a} & \quad \text{Notice on alternative solution of certain competition issues;} \\
\text{b} & \quad \text{Guidelines on determining fines for breaching the Act on Protection of Competition;} \\
\text{c} & \quad \text{Guidelines on applying the leniency programme in accordance with Article 22ba of the Act on the Protection of Competition; and} \\
\text{d} & \quad \text{Guidelines on applying the accelerated procedure in accordance with Article 22ba of the Act on the Protection of Competition.}
\end{align*}\)

Where possible, these guidelines follow the model set up by the European Commission.

**II YEAR IN REVIEW**

On average, the Competition Authority opens only one case of abuse of dominant position and two to three cases of abuses of significant market power per year.\(^11\) The cases decided in 2018 are shown in the table below.

\(^6\) The Competition Authority has already ruled on certain cases in this matter; for example, in 2018, in Case No. S0444/2016/VS-25120/2017, in which the city council of Děčín was found guilty of having removed competition in the lottery market and was fined US$25,000.

\(^7\) Act No. 262/2017 Coll.


\(^10\) For example, negotiation or enforcement of contractual terms that create a significant imbalance in the rights and obligations of the parties, as stipulated in Article 4, Paragraph 2(a).

\(^11\) The number of cases in 2018 is comparatively similar to the annual numbers in the 2015–2017 period; see Annual Report of the Competition Authority for the Year 2017 (www.uohs.cz/cs/informacni-centrum/vyrocní-zpravy.html).
The decision in the *Kaufland* case is interesting for two reasons. First, it is a prime example of a settlement procedure. Second, the case revolved around a system connected to the advertising company Markant, in that Kaufland forced its suppliers to take part in this system and to pay a fee for it. Despite this being the exact same system that Globus ČR, ks used for its suppliers, Kaufland reached a settlement based on its commitment to restoring competition, whereas Globus was fined US$8.25 million, a sum that the latter claims would lead it to become insolvent. Globus has appealed this decision, arguing that the decision made in the *Kaufland* case, and the practice of settlement, should be taken into account.

The most significant cases of both 2017 and 2018 concerned cartels, and both were in connection with public procurement processes in the field of construction. Unusually high fines were issued in both cases (US$13 million and US$70 million, respectively) and both decisions were later reversed by the courts. The main issue at stake was the dawn raids carried out by investigators allegedly in the form of ‘fishing expeditions’, where the stated scope of the investigation was wide-ranging. As a result, the Competition Authority seized a vast number of documents and data that pointed to a widespread bid-rigging ring of construction companies. The Supreme Administrative Court noted that this was in violation of the law and that the Competition Authority was required to have clearly stated its suspicion of this widespread ring if it were to lawfully conduct a dawn raid of that scope. The scope of any dawn raid must be proportionate to the reasoned suspicion that exists at the time of the raid. If the Competition Authority finds new evidence during a dawn raid that indicates that the initial scope of the raid should be extended, it must initiate new proceedings or expand the ongoing proceedings before carrying out another dawn raid with the extended scope.

Another key matter is a police investigation that started in March 2019, concerning Petr Rafaj, the Head of the Competition Authority, on suspicion of exerting undue influence in the investigations and decision-making of the Competition Authority. Although little is known on this for now, it sheds doubts on the fairness of the Competition Authority’s work in past years.

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12 In which more than 20 construction companies acted in concord as an organised structure of companies that were influencing tens of public procurement processes in relation to the maintenance and repair of public property. As it was later decided that there were two different organisational structures, this was separated into two cases.

13 Decision No. 3 As 157/2017-231.
III MARKET DEFINITION AND MARKET POWER

i Market definition

The definition of relevant market under the Act on the Protection of Competition is identical to that of EU law. In practice, the Competition Authority and courts follow the soft law of the EU Commission and EU case law. To determine the relevant market, the Competition Authority uses similar econometric and other markers as are used by the European Commission (e.g., small but significant and non-transitory increase in price, price elasticity and correlation tests); however, it tends to do so on a smaller scale and with a lower degree of expertise.

ii Market power

Market power is defined in Article 10 of the Act on the Protection of Competition, wherein dominant market position occurs where the market power of one or more competitors acting in concert enables them to behave to an appreciable extent independently of its customers and consumers.

Such market power is assessed based on the value of the volume supplied or purchased in the (relevant) goods market (market share) during the period under examination, as well as on other markers, including competitors’ economic and financial power, legal and other barriers to market entry, vertical integration, market structure and respective market shares.

Market share in the relevant market is the starting point for assessing market power. Once the market has been defined, the Competition Authority compares statistical data on the relevant competitors and may request internal data from them to assess the market structure and market share of the competitor or competitors in question. However, even where the market share of a competitor is above 75 per cent, the Competition Authority also usually analyses and evaluates other markers in order to provide the grounds for its final decision.

Relative dominance in the food industry

The Act on Significant Market Power was enacted in 2009 and revised in 2017. Any entity engaged in purchasing food products for their subsequent resale and that has significant market power is prohibited from abusing this power.

Decisions of the Competition Authority usually refer to the Commission Notice on the definition of relevant market for the purposes of Community competition law.

Such as legal barriers to market entry or positions of competitors. It is not unusual for the Competition Authority to ask a competitor for statements on the market structure and their positions, including when they are not party to the proceedings, or to conduct market research via questionnaires. This can also be seen in the landmark decision of the Competition Authority on the abuse of dominant position in which the Competition Authority used thorough analyses to define the market and assess the market share; File No. S162/2008/DP-4490/2010/820/DBr; similarly, as with Decision No. S0220/2006/DP-18887/2018/830/DKI in which the Competition Authority also took note of the vertical integration of the competitor even though the market share of the competitor was above 90 per cent. However, in most cases, the Competition Authority states that when the market power is greater than 75 per cent, it is not necessary for additional criteria to be evaluated.
Significant market power is defined as a position from which the purchaser\textsuperscript{16} can unjustifiably extract advantages from suppliers in relation to the purchase of food or in relation to the provision or receipt of services related to the sale and purchase of food. The main criteria for assessing this power are market structure, market-entry barriers and the financial power of the purchaser. Any purchaser acting on behalf of another purchaser is regarded as though they were a single purchaser.

Significant market power can be assumed to exist when the criteria set forth in the Act are met. Any purchaser or purchasing alliance whose annual turnover from the resale of food and the provision of related services in the Czech Republic is higher than approximately US$230 million is regarded as being a purchaser with significant market power.

The initial consequences of this were originally significant, as a purchaser could be considered to be in abuse of significant market power even where the suppliers in question had significantly higher market power (absolute conception).\textsuperscript{17} However, the Act was later revised in light of criticism, with significant market power and the abuse of that power now being assessed by the Competition Authority on the basis of the absolute conception of market power, with a corrective mechanism in place to ensure that a purchaser is not considered as having significant market power where the supplier has greater market power.\textsuperscript{18}

\section*{IV \ ABUSE}

Abuse of a dominant position is defined in Article 1, Paragraph 1(b) and Articles 10 and 11 of the Act on the Protection of Competition.

Abuse of a dominant position can be committed by one competitor or by several competitors acting in concert. Dominant position is defined as a market power that enables any competitor to behave to an appreciable extent independently of its customers and consumers. Dominant position must be proved and is presumed that, until proven otherwise, market share below 40 per cent rules out dominant position.

\subsection*{i Overview}

Abuse of dominant position falls under two distinct legislative instruments. The first is the Act on the Protection of Competition, which targets behaviour that has disrupted or could disrupt competition, regardless of whether this is engaged in collectively or individually. The second is the Act on Significant Market Power, which is applied in a slightly different way (see below).

\begin{footnotesize}
\textsuperscript{16} Article 2 of the Act on Significant Market Power defines the purchaser as an ‘entrepreneur or purchasing alliance if they purchase food for resale or receive or provide services relating to the purchase of food’. A person acting on behalf of another purchaser is also considered to be a purchaser.

\textsuperscript{17} Until 2017, this concept was disputed, with the Competition Authority upholding the absolute conception of significant market power. When the purchaser did have significant market power, it was banned from the actions stipulated in law notwithstanding its supplier’s market position.

\textsuperscript{18} This view was upheld by the Competition Authority in Case No. R0001/2018/TS-31480/2018/310, dated 31 October 2018, in which it explained the move to the updated conception. However, the Competition Authority will only apply this corrective measure upon the objection of the purchaser.
\end{footnotesize}
The Act on the Protection of Competition

The Act on the Protection of Competition follows the EU’s definition of abuse of dominant position, providing a general clause and six typical types of abuse.19

The Competition Authority relies heavily on the guidelines and case law of the European Union and cites them in most of its decisions, in which it also applies EU principles. While a per se approach may have been more common several years ago, today, the Competition Authority claims to embrace this effects-based approach.

Exclusionary abuses

Exclusionary pricing

With the exception of the above-mentioned landmark case Student Agency v. Asiana, very few cases20 have been initiated in relation to predatory pricing. In short, the Competition Authority takes a more holistic and effects-based approach to this behaviour and tries to assess its impact. In this respect, where a sales price is below the cost price, this alone is not sufficient to disrupt competition, rather the impact of the entire period in which these prices are maintained would also have to be measured. Predatory pricing can therefore be a legitimate tool in competition.

Czech case law on margin squeezes is still immature. However, a few investigations have been conducted by the Competition Authority in the field of telecommunications21 and energy.22 In these cases, the Competition Authority has cited the guidelines and case law of the European Union.

Exclusive dealing

In line with EU law, Czech domestic law deems that exclusive dealing and rebates may be anticompetitive where enforced by a dominant competitor. Anticompetitive exclusive dealing is rare. The most thorough decision can be found in relation to Telefónica Czech Republic.23 In this decision from 2004, which was finally confirmed by the Supreme Administrative Court in 2012, the Competition Authority provides clarification on the subject of rebates, and attempts to draw a distinction between permitted forms of quantity discounts as compared with unlawful rebates, in which it cites EU case law. The biggest issue encountered by the Competition Authority in relation to this case was that exclusive discounts were tied to the length of the contract and the length of the consumers’ future undertaking, whereas the actual volume of the services used by the consumer was disregarded. In this case, termination of the contract before a certain date was made particularly difficult.

19 The Act specifically mentions: leveraging, tying and bundling of services, discriminatory terms and conditions, refusal to deal, predatory pricing and denial of access to an essential facility.
20 Decision on the anticompetitive behaviour of a Czech train transporter consisting of predatory pricing proven to have been set in order to inhibit competition; Case No. UOHS-R 155/2008/01-5485/2009/310/MVr.
21 See, for example, Decision No. 2 As 357/2017-37.
22 Case No. UOHS-R63/2011/HS-8361/2012/320, in which a coal company was found not guilty of having abused a dominant position, including through pricing. This decision was later upheld by the Supreme Administrative Court; Decision No. 6 As 89/2015-51.
23 Telefónica was found to be in abuse of its dominant position by imposing rebates; Case No. 1/03-3250/03-0RP.
Refusal to deal

The Competition Authority has ruled on several cases where a dominant competitor has refused to deal with a consumer or suddenly terminated a contract to gain an advantage in a limited market. No rules have been established to regulate this issue and such cases are decided on a case-by-case basis. However, certain conclusions can be drawn. First, as has been confirmed in the courts, the Competition Authority must take into account both sides of the contract, primarily to assess their dependence on one another more thoroughly. Market power is used as a marker in these cases only sparingly. Similarly, when a transportation company that provides 100 per cent of the public transport in a city decides to terminate a contract owing to the city council having grossly breached its contract, it may do so, but must do so in a way that does not cause harm to the city or to consumers.

Another, quite distinct, issue is the essential facilities doctrine. The basic requirement for such cases was set in a 2001 decision of the High Court. Where this doctrine is invoked, the Competition Authority must prove that an essential facility exists. If it is proven to exist, then abuse of dominant position may occur both by refusing access to the facility or by setting burdensome barriers to its access. Moreover, the essential facilities doctrine may be invoked even if such facility is not a prerequisite for the existence and activity of the competitor, but where refusal of access to the facility makes it difficult for it to compete with a vertically integrated competitor.

Discrimination

Discrimination is a broad area characterised by different forms of behaviour that often overlap with the abuses described above. Unlike the practice of the EU, where discrimination in competition alone is not deemed to constitute an abuse of dominant position, the Competition Authority has tended to adopt a per se approach in its early cases, stating that, if a dominant competitor enforces discriminatory conditions that would be lawful if they were applied by a non-dominant competitor, but if this conduct causes harm to another competitor, then such conduct constitutes an abuse of dominant position.

If a competitor has a dominant position in a vertically integrated market, an abuse of dominant position may also exist where different conditions are placed on other competitors as compared with those placed on its own subsidiary. Similarly, in its decision made in the case involving RWE Supply & Trading CZ, a.s., the Competition Authority ruled that different contractual terms and conditions may be applied for a dominant competitor, provided that such differences do not bar consumers from competing with the dominant competitor’s concern in a downstream market.

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24 In Case No. 5 Afs 46/2012-69, Chemopetrol, a.s. v. Česká Rafinérská, a.s.
25 In particular, it must do so with sufficient advanced notice, as confirmed by a decision of the Regional Court of Brno, No. 62 Ca 42/2007-337.
27 For example, when a transportation company operates both buses and bus stations, as confirmed by the Supreme Administrative Court in Decision No. 8 Afs 48/2007-235.
30 File No. R15/2015/HS-24337/2015/310. This case is also interesting as the Regional Administrative Court and then the Supreme Administrative Court confirmed that the intra-enterprise doctrine cannot be used if a controlling competitor in the concern has contractually bound its subsidiaries to apply certain additional conditions while contracting distributors outside of the concern.
Also of interest is the ongoing case involving České dráhy, a.s.,\textsuperscript{31} in which the Supreme Administrative Court reversed a previous decision on the grounds of insufficient evidence. However, this highlighted the shift from a \textit{per se} approach to assessing abuses of dominant position, as per the standard set in the \textit{AKZO} decision,\textsuperscript{32} to a more holistic method whereby the Competition Authority employs an effects-based approach to the assessment of such cases, and explains why – in the case in question – the prices below cost were exclusionary for competitors and how they disrupted competition, which serve to exemplify this shift in approach.

\section*{Exploitative abuses}

The most important decision in this regard is the decision reached in the case involving Intergram,\textsuperscript{33} in which the Competition Authority elaborated on the issue of excessive pricing and how it should be assessed, in which it cited EU case law. Where it is not possible to compare the price against the consideration (the monopolist performs operations that are delegated to it by the state), then the Competition Authority shall compare similar pricing in other jurisdictions, assuming that the regulatory frameworks and practice of these jurisdictions are similar.

\section*{iii Abuse of significant market power in the food industry}

Since 2017, the legal framework and practice of the Competition Authority have provided for the absolute conception together with a corrective mechanism. Where a purchaser is assumed to have significant market power (see above) and the Competition Authority initiates proceedings against it, the purchaser can raise the objection in such proceedings that it cannot be considered to have significant market power with respect to other suppliers because, for instance, it is the weaker party in its relationship with them. The Competition Authority might then find that the purchaser holds and has abused significant market power in its relationship with some suppliers and not with others.

The types of conduct that constitute abuses of significant market power can be grouped into:

\begin{itemize}
\item[a] disproportionate contractual terms and conditions between the supplier and the purchaser, primarily with regard to pricing;\textsuperscript{34}
\item[b] the enforcement of pricing, provision of services or any other consideration not included in the contract between the parties;\textsuperscript{35}
\item[c] discrimination between suppliers for comparable goods without fair reason;
\item[d] auditing or control of the supplier; or
\item[e] disregard of the outcomes of inspections carried out by public authorities.
\end{itemize}

\textsuperscript{31} Case No. 62 Af 96/2014-1464.
\textsuperscript{32} Decision of the European Court of Justice No. SDEU C-62/86.
\textsuperscript{33} The proceedings were discontinued after Intergram appealed and the case was rescinded by the Head of the Competition Authority in Decision No. R003/2005. Intergram is a collective administrator of rights of performers and producers of audio and visual recordings.
\textsuperscript{34} For example, in its Decision No. S0161/2017-22390/2017/461/MNo, the Competition Authority ordered the COOP group to refrain from demanding a 2 per cent price reduction from its suppliers backed by the threat of reducing the amount of its purchased products by 30 per cent (leaked internal letter requesting this action). The COOP group has close to an 11 per cent market share.
\textsuperscript{35} For example, in the ongoing proceedings with Globus ČR, ks, the company demanded that its supplier purchase marketing services from Globus’ subsidiary.
Moreover, contracts between the purchaser and suppliers must meet special requirements relating to form, content and term, as stipulated in Article 3a of the Act on Significant Market Power.

V REMEDIES AND SANCTIONS

Breach of competition legislation may trigger both administrative and criminal liability. However, abuse of dominant position and abuse of significant market power are administrative offences only.

If a legal entity proves that it has made every effort that could be reasonably required of it to prevent any breach of the law, then it will not be held liable for such an offence.

i Sanctions

Each offence is described in the legislation referred to above. Generally, for disruption of competition, perpetrators are subject to fines of up to US$40,000 or 10 per cent of their net annual turnover, whereas for obstructing an investigation or proceedings, fines of up to US$15,000 or 1 per cent of net annual turnover can be handed down. The Competition Authority may mitigate or aggravate the fine, or may use any of the other instruments provided for in the Act on Liability for Administrative Offences or in the Guidelines on Determining Fines. Usually, the Competition Authority takes into account the annual turnover of the perpetrator in the relevant market, the duration of the abuse, the seriousness of the abuse and the behaviour of the perpetrator, and also checks whether the fine will be destructive for the perpetrator.

The Competition Authority is often criticised for handing down lenient fines and for not enforcing them sufficiently. The biggest fine issued to a cartel in the construction industry was US$70 million, although this was later rescinded by the courts. The highest fines range between US$4 million and US$14 million, and the average fine is close to US$1.5 million.

ii Behavioural remedies

Both the Act on the Protection of Competition and the Act on Significant Market Power provide the option for unlawful situations to be redressed outside of proceedings.

Both acts give the Competition Authority the power to impose measures of redress with the purpose of reinstating effective competition and to set a time limit for doing so. However, neither act explains these measures in detail and they are, for the present, not employed by the Competition Authority. Failure to comply with such a measure of redress would constitute an offence.

VI PROCEDURE

Generally, both the Act on the Protection of Competition and the Act on Significant Market Power contain a set of mainly specific substantive rules. Few of their provisions, however, contain specific procedural steps or instruments. Thus, they are not standalone legislative acts and the Code of Administrative Procedure must therefore be applied with certain modifications.

36 This Act is fully applicable to these proceedings with slight modifications; Act No. 183/2017 Coll.
The Competition Authority actively oversees competition and initiates investigations where necessary. Investigations and other proceedings can only be initiated at its sole discretion. As a government office, it is also required to receive, analyse and report the findings of third-party concerns; however, proceedings concerning abuses of dominant position and significant market power can only be brought ex officio.37

The Competition Authority has the authority to conduct investigations (including both dawn raids and requests for documents)38 before or after initiating proceedings. The only limitation placed on the Competition Authority in this respect is that any investigation conducted prior to initiating proceedings must be proportionate to the purpose of that investigation.39 The person under investigation can refuse to cooperate if the investigation extends beyond its stated scope and purpose,40 whereas after initiating proceedings, the Competition Authority can expand the investigation as regards the evidence gathered.41 Investigations may also be conducted on premises other than business premises after consent has been granted by the relevant court. A detailed record must be taken of all investigations conducted on premises.

The most recent case law has confirmed that a defence may be filed against investigations on business premises in the form of a suit against public authority interference42. The case law has also provided further clarification on the process for dawn raids (see Section II). In 2017, the Competition Authority issued its Information Paper summarising the procedure for dawn raids.43

Interim measures may be imposed where there is a concern that proper enforcement may be in jeopardy. However, such measures may only be imposed during official proceedings.44 There are no strict time limits applicable to the Competition Authority, and the general time limits set forth in the Code of Administrative Procedure apply. However, these can be extended subject to the complexity of the case in question and are not binding on the Competition Authority. Nevertheless, any unnecessary prolongation of these time limits is unlawful and can lead to compensation claims for damage arising from such extensions. On average, cases are decided in one to two years, while the longest cases can take up to 12 years when all legal remedies are employed.45

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37 The initiation of proceedings means that the Competition Authority serves notice on a person in accordance with law, usually in writing.
38 Investigations include requesting documents, investigating the business premises of the person under investigation and investigating non-business premises.
39 Based on the decision of the European Court of Human Rights in the Delta Pekárny, a.s. v. Czech Republic case, the Competition Authority was required to have reasonably specific evidence and reasons for conducting an investigation in the form of a dawn raid, as confirmed by case law; see, for instance, the decision of the Regional Administrative Court in Brno, No. 29 A 165/2016, highlighted by the Supreme Administrative Court.
40 Official request for information or notification of an in situ investigation.
41 In the Supreme Administrative Court Decision No. 5 Aps 4/2011-326, the Court stated that it is not the purpose of the preliminary investigation (before the initiation of proceedings) to gather information and evidence for a final decision on the matter.
42 See the decision of the Supreme Administrative Court in Case No. 5 Afs 7/2011. This possibility also exists following the revision of the Act on the Protection of Competition.
44 Interim measures may be imposed upon serving notice of the initiation of proceedings.
45 For example, Case No. ÚOHS-S0220/2006/DP-18887/2018/830/DKI.

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A settlement procedure is in place for both reducing fines and dropping proceedings. The Competition Authority will issue a statement of objection informing the perpetrator of the offence committed, the possible consequences of the offence, the probable amount of the fine and the main evidence. The perpetrator can then accept liability for the offence and assume commitments to restoring competition. If the Competition Authority accepts these commitments, it may drop the proceedings. The perpetrator can also reach settlement with the Competition Authority following a ruling on the offence. The fine can be dropped or reduced if the Competition Authority decides, upon the request of the perpetrator, that a lower fine would be sufficient for the offence committed. In all cases, the perpetrator must admit to having committed the offence.

Procedures are most often conducted in writing. Oral hearings can be arranged if they are necessary for the perpetrator to properly exercise its rights.

The decisions of the Competition Authority are subject to appeal. However, the second instance for such decisions is the Head of the Competition Authority. The decisions of the Head of Competition Authority can be appealed with the administrative courts, with the decisions of the administrative court subsequently subject to appeal with the Supreme Administrative Court, which is the court of final instance. Where a decision may have infringed constitutional rights (in particular, when an in situ investigation has been conducted unlawfully), a constitutional appeal can be filed with the constitutional court. Finally, where basic rights may have been breached unlawfully, the European Court of Human Rights may decide that such breach should be redressed. Generally, the prospect of successful appeal against a decision of the Competition Authority is relatively high.

VII PRIVATE ENFORCEMENT

In 2017, the Act on Compensation of Damage in the Area of Economic Competition integrated EU Directive 2014/104 on antitrust damages actions into domestic law.

The goal of the Act is to facilitate both follow-on and stand-alone actions for private enforcement of competition law, in case of both a breach of EU law and the antitrust laws of Member States.

Decisions of the Competition Authority handing down convictions serve as evidence in civil proceedings, with the conclusion of guilt held as indisputable. Damage must be proven by evidence. The Act entitles the plaintiff to demand access to the documentation of both the defendant and the Competition Authority. Both of these possibilities are limited, however, as the Competition Authority may refuse to provide documents if it deems that doing so would jeopardise the effective enforcement of competition law where such documents contain sensitive information or business secrets or where such access would not be proportionate to the scope of the plaintiff’s application.

The biggest novelty of the Act is the introduction of a type of discovery in Czech procedural law. To acquire documents from the defendant, the plaintiff must file an application demanding access to documentation. This application must provide sufficient facts and evidence from which to attest to the credibility of the plaintiff’s claim and right to damages. The court may then order the defendant to provide such documents or classes

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46 This occurred in 2014 in the landmark case of Delta Pekárny, a.s. v. Czech Republic, No 91/11.
47 Both the Act on Compensation of Damage in the Area of Economic Competition and the Act on the Protection of Competition regulate this process and the provision of documents in detail.
of documents that are necessary and proportionate to such claim. The respect of such an injunction is secured by high fines that can go up to 1 per cent of the turnover or approximately US$500,000. However, the plaintiff remains liable for any damage that may be incurred by such documents being handed over. The effectiveness and usability of these instruments is yet to be tested in the Czech Republic.

There are not yet any official statistics on the number of cases introduced under the new Act. Based on informal information, however, this is estimated to be about a dozen, mostly following on from EC decisions.

Collective actions cannot yet be brought in the Czech Republic.

VIII FUTURE DEVELOPMENTS

In early 2019, a police investigation concerning Petr Rafaj, who has been the Head of the Competition Authority with responsibility for the office’s policies since 2009, went public. The investigation concerns suspicions of the office exerting undue influence in the investigations and decision-making of the Competition Authority. Little is known on this for now, but it is generally supposed that if he is formally charged (which is not yet the case), he will have to step down from office and it is possible that a new Head of the Competition Authority will change the office’s policy, which is presently under criticism for failing to enforce competition law effectively, handing down lenient fines and mishandling procedures – in particular, its inability to ensure that dawn raids are conducted legally.

Another future possibility is that private enforcement will be combined with collective actions. At present, Czech law does not regulate for collective actions; however, a government Bill, containing opt-out class actions, is currently going through the legislative process. However, although the enactment of legislation on collective actions has long been called for in the Czech Republic, there is sizeable opposition to the Bill and its prospects remain unclear.
I INTRODUCTION

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

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

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

a) the entity engaged in the relevant conduct constitutes an ‘undertaking’;

b) the undertaking must hold a dominant position on a relevant market;

c) the conduct at issue must qualify as an abuse and restrict competition; and

d) the conduct must affect trade between Member States.

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1 Thomas Graf is a partner and Henry Mostyn is an associate at Cleary Gottlieb Steen & Hamilton LLP. The authors would like to thank Danielle Secher, an associate at Cleary Gottlieb Steen & Hamilton LLP, for her invaluable contribution.

2 With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty became Articles 101 and 102 TFEU. The two sets of provisions are, in substance, identical, and references in this paper to Article 102 TFEU should be understood as a reference to Article 82 of the EC Treaty.


4 Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (the Guidance Paper), OJ 2009 C 45/7.

5 The concept of ‘undertaking’ has been interpreted widely by the European courts. See Case C-41/90, Höfner and Elser v. Macrotun GmbH, judgment of 23 April 1991, EU:C:1991:161, Paragraph 21: ‘The concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.’
II YEAR IN REVIEW

2018 and the first half of 2019 was a relatively busy period for abuse of dominance in Europe. The Commission reached five infringement decisions, including issuing its highest ever fine, in the Google Android case. It closed two investigations via commitments (one concerning free flow of gas across borders in Central and Eastern Europe and one concerning cross-border flows of electricity between Germany and Denmark). And in April 2019, it published its final report on competition policy for the digital era. The report proposes to give the Commission greater powers to intervene in digital markets and to lower the standards the Commission would need to meet to exercise these powers.

In Google Android, the Commission fined Google €4.34 billion for imposing illegal restrictions on Android original equipment manufacturers (OEMs) via a series of agreements. The Commission maintains that Android is dominant in a market that excludes Apple. It claims that Google prevented preinstallation of rival search apps and browsers by OEMs on Android devices and this forecloses competition. Google has appealed the decision to the General Court. It argues that Android competes with Apple and that while the Commission’s case is based on the notion that Google restricts users from accessing rival apps, users can easily download and access apps.

In Google AdSense, the Commission fined Google €1.49 billion for imposing quasi-exclusive clauses in contracts with third-party websites that allegedly prevented rivals placing search ads on covered partner websites.

In AB InBev, the Commission fined AB InBev €200 million for restricting cross-border sales of beer, after reducing AB InBev’s fine to take account of its cooperation during the investigation. The Commission found that AB InBev abused its dominance on the Belgian beer market by hindering cheaper imports of its Jupiler beer from the Netherlands. AB InBev employed four different methods to achieve its strategy of restricting parallel trade, including altering the packaging to remove French language, limiting supply of Jupiler beer to wholesalers in the Netherlands, and conditioning sales to Belgian retailers on agreements to limit their imports.

In BEH gas, the Commission fined BEH €77 million for blocking access to natural gas infrastructure in Bulgaria. The Commission found that BEH refused to supply access to its gas infrastructure to other wholesale gas suppliers, foreclosing entry into the Bulgarian gas supply markets. Following the Gazprom commitments (see below), this decision marks another effort by the Commission to improve competition between gas suppliers and security of supply. BEH has appealed the decision to the General Court.

In Gazprom, Gazprom offered commitments to address the Commission’s concerns concerning the free flow of gas in Central and Eastern Europe. Gazprom’s commitments include removing restrictions on customers reselling gas across borders; facilitating gas flows

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6 Case AT. 40099, Google Android, Commission decision of 18 July 2018 (Google Android); Case AT. 40411, Google Search (AdSense), Commission decision of 20 March 2019 (Google Search (AdSense)); Case AT. 40134, AB InBev Beer Trade Restrictions, Commission decision of 13 May 2019 (AB InBev Beer Trade Restrictions); Case AT. 39849, BEH gas, Commission decision of 17 December 2018 (BEH gas); and Case AT.40220, Qualcomm (exclusivity payments), Commission decision of 24 January 2018 (the Qualcomm decision was covered in last year’s edition and is not discussed in this edition).

7 Case AT. 39816, Gazprom, Commission decision of 24 May 2018 (Gazprom); and Case AT. 40461, DE/DK Interconnector, Commission decision of 7 December 2018 (DE/DK Interconnector).

to and from isolated markets; introducing a structured process to ensure competitive gas prices, giving Gazprom customers a means of ensuring their gas price reflects the price level in competitive Western European gas markets; and a prohibition on using dominance in gas supply to gain advantages concerning gas infrastructure.

In DE/DK Interconnector, the German grid operator TenneT offered commitments to increase electricity trading capacity between Denmark and Germany. The Commission had concerns that TenneT limited capacity at the electricity interconnector between western Denmark and Germany, which may have discriminated against non-German electricity producers.

At the court level, 2018/19 was notable for the General Court’s judgments in the Servier cases. The Court annulled the abuse of dominance part of the Commission’s decision, finding that the Commission erred in defining the relevant market and therefore failed to show that Servier was dominant. The Court held that the fact that Servier adopted marketing plans to contrast its medicine with its rivals provided evidence that the two medicines competed in the same market. The judgment also contains an instructive discussion of anticompetitive effects under Article 101 TFEU: the Court found that it would be paradoxical to permit the Commission to limit its assessment to likely future events in a situation where the alleged restrictive conduct has been implemented and its actual effects observed.

In Slovak Telekom, the General Court partially annulled the Commission’s 2014 decision that fined Slovak Telekom for engaging in a margin squeeze and constructive refusal to supply broadband services in Slovakia. The Court found that Slovak Telekom had a regulatory duty to supply access and breached that duty by not supplying access to its rivals. However, while emphasising the importance of the as-efficient competitor test, the Court found that the Commission had not sufficiently proven the exclusionary effects of margin squeeze for a period of four months out of the 64-month infringement. This resulted in a marginal reduction in the fine.

In MEO, the Court of Justice found that, in the case of second-line discrimination, it is necessary for the competition authority to show a restriction of competition between customers. This goes beyond a mere competitive disadvantage – the discrimination must cause a reduction in competition by excluding as-efficient competitors. Moreover, because in second-line discrimination cases, the dominant firm has no obvious interest in discriminating and restricting competition between its customers, courts and authorities must exercise ‘particular care’ before finding an infringement. The existence of anticompetitive effects cannot be presumed.

10 Servier, Paragraphs 478 and 479.
III MARKET DEFINITION AND MARKET POWER

i Market definition

Market definition serves as an analytical framework to assess market power and competitive effects. A relevant market for the purpose of EU competition law circumscribes the sources of competitive constraint faced by companies under investigation. The Commission’s Market Definition Notice provides guidance on the Commission’s approach to market definition for all areas of EU competition law, including the application of Article 102 TFEU, as the Guidance Paper is silent on the topic. The relevant product market comprises all those products or services ‘which are regarded as interchangeable or substitutable by the consumer, by virtue of the products’ characteristics, their prices and their intended use’. This definition draws on the principles established by the Court of Justice in Michelin, holding that:

for the purposes of investigating the possibly dominant position of an undertaking on a given market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.

The Commission acknowledges that qualitative differences only allow it as a first step to limit the field of possible substitutes. Actual interchangeability is assessed by the hypothetical monopolist (SSNIP) test. This asks whether a hypothetical monopolist could profitably impose a 5 to 10 per cent permanent price increase over the candidate products without a sufficient number of consumers at the margin switching to other products to render the price increase unprofitable.

A number of EU court judgments have discussed basic principles of market definition in the context of Article 102 TFEU cases. Some of these cases are relatively old and remain

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13 Commission Notice on the definition of the relevant market for the purposes of community competition law (Market Definition Notice), OJ 1997 C 372/5, Paragraph 2.

14 Market Definition Notice, Paragraph 7. Either ‘demand-side substitutability’ (the ability of consumers to switch their consumption to alternative products in the case of a small change in relative price) or ‘supply-side substitutability’ (the ability of suppliers to switch production to the products under consideration and market them in the short term without incurring significant additional costs or risks in response to a small change in relative price) can provide effective competitive constraints, and when either is present the relevant market ought to be widened, although the Commission considers that ‘demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product’. See the Market Definition Notice, Paragraph 13. The same basic principles apply to geographic market definition (in geographic market definition, barriers to trade, such as language, import tariffs or regulatory features, may be specific additional considerations).

15 Case 322/81, Michelin, judgment of 9 November 1983, EU:C:1983:313 (Michelin), Paragraph 37.

16 Market Definition Notice, Paragraph 36.

17 Small but significant non-transitory increase in price.

18 Market Definition Notice, Paragraph 17.

19 For example, Case 672/73, Continental Can, judgment of 21 February 1973, EU:C:1973:22 (Continental Can); and Case 85/76, Hoffmann-La Roche, judgment of 13 February 1979, EU:C:1979:36 (Hoffmann-La Roche).
quite general. The Commission’s decisional practice and court case law in other areas of EU competition law, including merger control, provide additional insight that is also relevant for Article 102 TFEU cases.

ii Dominance

The application of Article 102 TFEU requires the company under investigation to have a high degree of market power that is referred to as ‘dominance’. The Court of Justice has described dominance as ‘a position of economic strength’ that provides a company with ‘the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers’.

Despite the ubiquitous nature of this dictum (it is cited in virtually every Article 102 TFEU decision and judgment), it provides limited guidance for companies to understand whether they hold a dominant position. It does not explain, for example, how ‘independently’ an undertaking must be able to behave or when the threshold of ‘appreciable extent’ is crossed. What is clear is that no single factor is determinative in assessing a company’s dominance.

The Guidance Paper equates the concept of competitive independence with the ability to profitably raise prices above the competitive level. Unlike in the context of merger control, where the question is whether the merged entity will prospectively gain power to raise prices, in Article 102 TFEU cases the question is whether the company under investigation already has such power. This does not require the Commission to show that the company could raise prices beyond the level that it currently charges (this is known as the ‘cellophane fallacy’). If the company has market power, it will already charge above the competitive level at the profit maximising point. Direct proof of dominance would therefore involve comparing the company’s prices with what is expected to be the competitive price level. Because determining the competitive price level as a review benchmark is hard, case law has developed indicators for the existence of dominance. The Guidance Paper classifies these broadly into criteria.

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20 For an example that engages in a detailed discussion of market definition principles in the pharmaceutical sector, see the judgment of the General Court in Case T-321/05, AstraZeneca, judgment of 1 July 2010, EU:T:2010:266; confirmed in Case C-457/10 P, AstraZeneca, judgment of 6 December 2012, EU:C:2012:770 (AstraZeneca).


23 Of course, no undertaking can literally act ‘independently’ of its customers: even a monopolist is constrained by the demand curve for its product, which is affected by extra-market constraints, and the reduction in demand from customers as price increases.


25 United Brands, Paragraph 66.

26 ibid., Paragraph 113.


relating to: constraints imposed by competitors (i.e., an assessment of market structure and market shares); constraints imposed by the threat of expansion and entry; and constraints imposed by the bargaining strength of customers.29

**Market shares**

In the *Akzo* judgment, the Court of Justice established a (rebuttable) market share presumption for dominance under which a company is assumed to be dominant if it holds a market share of 50 per cent or more in the relevant market.30 The rationale is that shares of sales indicate whether a company can ‘more easily pursue a pricing policy independent of competitive conditions’ and therefore is ‘able to control prices’.31 The Guidance Paper notes that dominance is ‘not likely if the undertaking’s market share is below 40 per cent.’32

That said, even above the 50 per cent threshold it is necessary to consider the particular nature and competitive dynamics of the relevant market when assessing market shares. For example, in bidding markets characterised by a limited number of large orders, temporary high shares do not indicate market power.33 Similarly, in markets subject to a high degree of innovation or where services are offered for free, market shares are not a proxy for market power, either.34

**Expansion and entry**

Any presumption of market power that might accompany a high market share is inapplicable in markets where competitors are able to meet rapidly the demand from customers who want to switch away from the firm with the largest share.35 In other words, lack of barriers to entry and expansion can prevent a dominant position if a company faces no current competitive constraints, but the existence of barriers will not create a dominant position if a company already faces competitive constraints. As recognised in the Guidance Paper, ‘an undertaking can be deterred from increasing prices if expansion or entry is likely, timely and sufficient’.36

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30 Case C-62/86, *Akzo Chemie*, judgment of 3 July 1991, EU:C:1991:286 (*AKZO*), Paragraph 60: ‘With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. That is the situation where there is a market share of 50 per cent such as that found to exist in this case.’
33 For this reason, the Guidance Paper notes that ‘the higher the market share and the longer the period over which it is held, the more likely it is that it constitutes an important preliminary indication of the existence of a dominant position’, Guidance Paper, Paragraph 15.
34 Thus, in *IBM/Telelogic*, the Commission held that market share data did not represent a ‘direct proxy for market power’ in markets characterised by competition on quality and innovation, in particular because ‘competitors who do not regularly upgrade their products, or who do not introduce new products meeting increasing customers’ requirements, will rapidly lose out’, Case COMP/M.4747, *IBM/Telelogic*, Commission decision of 5 March 2008, Paragraph 151. See also Case T-79/12, *Cisco Systems and Messagenet*, judgment of 11 December 2013, EU:T:2013:635 where the General Court confirmed that because of the high degree of innovation and the fact that services are provided for free (so that any attempt to increase prices ‘would encourage consumers to switch supplier’), market shares of 80 to 90 per cent were not indicative of market power.
35 *Hoffmann-La Roche*, Paragraph 41.
36 Guidance Paper, Paragraph 16.
In assessing this likelihood, the Commission considers barriers that prevent timely entry or expansion. These can take the forms of legal barriers (such as legislation conferring a statutory monopoly, or intellectual property rights), or barriers such as economies of scale or scope, technological advantages or network effects.

**Buyer power**

Customers with sufficient countervailing bargaining strength can prevent a company from exercising market power. Buyer power, however, may not negate dominance where a strong buyer can protect only itself, but not the entire market. Generally, exercising buyer power requires the buyer to have viable competitive alternatives to the dominant company, or the ability to develop such alternatives. Even a large buyer will have little or no power if it has no alternative supply options to which it can realistically turn. That said, in some instances, buyer power may also come from the buyer’s ability to retaliate against the seller. For example, in the case of patent licensing, a patent owner may be constrained by the patent portfolios of licensees if it is vulnerable to countersuits in the event of overcharging for its own patents.

In the case of a multi-product firm that serves the same buyers in different product markets, buyers may constrain the firm’s ability to charge supra-competitive prices in a dominant market by threatening to switch their purchases in non-dominant markets.

**IV ABUSE**

**i Overview**

Holding or acquiring a dominant position is not in itself unlawful under EU competition law. A dominant company only infringes Article 102 TFEU if it abuses its dominant position to restrict competition.

The classic formulation of an abuse is from *Hoffmann-La Roche*:

> The concept of an abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very

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38 See, for example, Case COMP/35.141, *Deutsche Post*, Commission decision of 20 March 2001.
39 *United Brands*, Paragraph 122. The extensive investments that a new entrant to the banana market would need to make were held to be ‘particular barriers to competitors entering the market’ since they generated ‘economies of scale from which newcomers to the market cannot derive any immediate benefit and . . . the costs of which are irrecoverable if the [entry] attempt fails’.
40 See, for example, *Hoffmann-La Roche*, Paragraph 48.
41 This refers to the phenomenon whereby a product or service becomes more valuable to each user when more people use it. See, for example, Case COMP/39.530, *Microsoft* (Tying), Commission decision of 16 December 2009, Paragraph 420.
44 See, for example, Case COMP/37.990, *Intel*, Commission decision of 13 May 2009, Paragraphs 886 and 889: ‘Throughout its argumentation on buyer power, Intel ignores the fundamental element in its relationship with OEMs, namely the fact that it is an unavoidable trading partner for them: OEMs depend on Intel for what is the most important single hardware component in their computers. As such, Intel is a must-stock brand.’
presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operator, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.\textsuperscript{45}

\section*{ii Exclusionary abuses}

An exclusionary abuse takes place if a dominant company forecloses competitors in an anticompetitive manner. Not every foreclosure of competitors is anticompetitive. It is a normal (and desirable) part of the competitive process that competitors that have less to offer to customers may leave the market. This has been recognised in the Guidance Paper, and has now been affirmed by the Court of Justice in \textit{Post Danmark I} and \textit{Intel}, where the Court stressed that ‘not every exclusionary effect is necessarily detrimental competition’ and that ‘it is in no way the purpose of Article 102 TFEU to... ensure that competitors less efficient than the undertaking with the dominant position should remain on the market’. To the contrary: ‘Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, inter alia, price, choice, quality or innovation.’\textsuperscript{46} The key task in an abuse analysis is therefore to distinguish between anticompetitive conduct and competition on the merits.

Article 102 TFEU lists a number of abusive practices, but these are not exhaustive: sui generis abuses can be identified in individual cases.\textsuperscript{47} The Guidance Paper discusses legal criteria for categories of exclusionary abuses that have been identified in past cases. These legal criteria serve as successive filters to distinguish between abusive behaviour and legitimate pro-competitive conduct.

Outside the abuse categories discussed in the Guidance Paper, conduct must be assessed based on general principles. New abuses cannot be postulated without limitation: if a type of conduct falls within an existing category of abuse (such as refusal to supply or tying), the legal conditions necessary to establish that abuse need to be satisfied.

The case law qualifies certain categories of conduct as ‘by nature’ abuses (e.g., discounts conditioned on exclusivity, as discussed below). The \textit{Intel} judgment brings important clarity to the treatment of these abuses: by nature, abuses remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive. This entails, in particular, an assessment of rivals’ efficiency, because competition law does not seek to protect inefficient rivals.\textsuperscript{48}

Outside the ‘by nature’ exceptions, a ‘fully fledged analysis of effects has to be performed’.\textsuperscript{49} This fully fledged analysis requires proving at least the following five elements:

\begin{itemize}
  \item the dominant company’s abusive conduct must hamper or eliminate rivals’ access to supplies or markets;\textsuperscript{50}
\end{itemize}

\textsuperscript{45} Hoffmann-La Roche, Paragraph 121.
\textsuperscript{47} See Continental Can, Paragraph 26. AstraZeneca, with its regulatory-type abuses, represents another example.
\textsuperscript{48} Intel, Paragraph 142.
\textsuperscript{49} ibid.
\textsuperscript{50} Guidance Paper, Paragraph 19.
the abusive conduct must cause the anticompetitive effects.\(^5\) Proving causation requires comparing prevailing competitive conditions with an appropriate counterfactual where the conduct does not occur;\(^5\)

c the anticompetitive effects must be reasonably likely.\(^5\) If conduct has been ongoing for some time without observable anticompetitive effects, that suggests the conduct is not likely to cause anticompetitive effects in the first place;\(^5\)

d anticompetitive foreclosure must be determined by reference to equally efficient competitors.\(^5\) Any possible foreclosure of competitors can only conceivably be anticompetitive if it is liable to exclude competitors that are at least as efficient as the dominant company;\(^5\) and

e the anticompetitive effects must be sufficiently significant to create or reinforce market power.\(^5\)

Even if a company abuses its dominance, it retains the possibility to justify its conduct – even for ‘by nature’ abuses (referred to as ‘objective justification’). To do so, the company must show that the conduct is either objectively necessary or produces efficiencies that outweigh restrictive effects on consumers.\(^5\) If a dominant company raises evidence of objective justification, it ‘falls to the Commission . . . to show that . . . the justification put forward cannot be accepted’.\(^5\)

These general principles are discussed in relation to various different types of abuse below.

**Predatory pricing**

Predatory pricing arises where a dominant company prices its products below costs such that even equally efficient competitors cannot viably remain on the market. In *Akzo*, the Court of Justice established a two-test rule for the assessment of predatory pricing conduct under

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56 Although the exclusion of equally efficient competitors is the usual litmus test for abusive conduct, in limited, specific circumstances, a finding of abuse is possible without relying on the test. In *Post Danmark II*, the Court of Justice held that the Commission’s Guidance Paper was a statement of the Commission’s priorities but was not binding on the Union’s courts. The Court found that, with respect to rebate schemes, there is no legal obligation that the effects of the scheme applied by a statutory monopoly must be measured against an as-efficient competitor (Paragraph 57). In cases where the extent of an undertaking’s dominance or where rigidities in the market’s structure precluded the entry of an as-efficient competitor, the test was ‘of no relevance’ (Paragraph 59).
59 *Microsoft*, Paragraph 688.

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Article 102 TFEU:60 pricing below average variable cost (AVC) is presumptively abusive;61 and pricing below average total cost (ATC) but above AVC is abusive if it is shown that this is part of a plan to eliminate a competitor.62 The principle set out in the Guidance Paper in assessing predatory pricing conduct is that of a profit sacrifice (i.e., the dominant company deliberately foregoes profits in the short term so as to foreclose competitors with a view to strengthening market power).63 There may be cases where alternative benchmarks, such as average incremental costs, are more appropriate, where, for example, an industry is characterised by high fixed costs and very low variable costs.64

Margin squeeze

A margin squeeze occurs when a vertically integrated company sells an input to its downstream competitors at a high price and at the same time prices its own downstream product at a low price such that its competitors are left with insufficient margin to compete viably in the downstream market. This is abusive in EU law when ‘the difference between the retail price charged by a dominant undertaking and the wholesale prices it charges its competitors for comparable services is negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market’.65 Margin-squeeze cases were originally viewed as instances of a constructive refusal to supply. The Court’s judgments in *TeliaSonera* and *Telefónica* have held that it is not necessary to establish the legal conditions for an abusive refusal to supply in such cases. These judgments treat margin-squeeze practices as akin to predatory pricing behaviour, particularly as they analyse the margin squeeze under Article 102(a) TFEU. To end the margin squeeze, the dominant company is not required to provide access to its facilities; it only needs to change the level of prices to remove the squeeze.

61 See *Akzo*, Paragraph 71: ‘A dominant undertaking has no interest in applying such prices except that of eliminating a competitor so as to enable it to subsequently raise its prices by taking advantage of its monopolist position.’
62 ibid., Paragraph 72: ‘Such practices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.’
63 See Guidance Paper, Paragraphs 64–66. The Guidance Paper in fact refers to cost benchmarks of average avoidable cost and long-run average incremental cost, but recognises that these are likely to be good proxies for AVC and ATC respectively. See Guidance Paper, Paragraphs 26 and 27.
64 See, for example, *Post Danmark I*, Paragraph 33. The Court of Justice in *Post Danmark I* (at Paragraphs 39 and 40) also appeared to suggest that proof of anticompetitive effects can substitute for proof of intent in the second *Akzo* scenario (i.e., where a dominant firm’s price is between AVC and ATC).
65 Case COMP/C-1/37.451, *Deutsche Telekom*, Commission decision of 21 May 2003, Paragraph 107, upheld on appeal by the General Court. Confirmed in Case C-52/09, *TeliaSonera*, judgment of 17 February 2011, EU:C:2011:83, Paragraphs 31–34; and Case C-295/12 P, *Telefónica*, judgment of 10 July 2014, ECLI:EU:C:2014:2062, Paragraph 75. A test for a margin squeeze formulated in the Guidance Paper at Paragraph 80 is as follows: ‘Finally, instead of refusing to supply, a dominant undertaking may charge a price for the product on the upstream market which, compared to the price it charges on the downstream market, does not allow even an equally efficient competitor to trade profitably in the downstream market on a lasting basis (a ‘margin squeeze’).’

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Exclusive dealing

The Guidance Paper describes exclusive dealing as an action by a dominant undertaking ‘to foreclose its competitors by hindering them from selling to customers through use of exclusive purchasing obligations or rebates’. Both Articles 101 TFEU and 102 TFEU can apply to exclusive dealing, although traditionally the approach under Article 101 TFEU has been more economic, while under Article 102 TFEU, exclusive dealing has historically been treated as presumptively unlawful. The *Intel* judgment clarifies that this presumption remains, but if firms submit evidence that the conduct is not capable of restricting competition, the Commission must then assess all the circumstances to determine whether the conduct is abusive.

Exclusive purchasing

An exclusive purchasing obligation requires a customer to purchase all or a large majority of its needs for a specific product from one supplier. The current approach of the Commission and the courts is to look closely at the actual or likely effects of a particular agreement on the relevant market and assess whether it harms consumers. Factors the Commission will take into account include the duration of the obligation, customers’ switching costs and whether the dominant undertaking is an unavoidable trading partner.

Exclusionary discounts

While the grant of discounts (also known as rebates) is generally pro-competitive, certain forms of discounts may constitute an abuse if applied by a dominant company. The concern is that the dominant company leverages its larger base of sales for calculating discounts in ways that preclude smaller (but equally efficient) competitors from competing for the contestable portion of a customer’s demand. While the discount remains above costs for the dominant company because it can spread the discount across a larger base of sales, smaller competitors would be forced to price below costs to match the discounts since they would have to amortise it over a smaller base.

The case law generally distinguishes between three categories of rebates:

- volume-based rebates that pay out based on the volume of a customer’s purchases: reflecting gains in efficiency and economies of scale, volume-based rebates are presumptively lawful.
- rebates conditioned on exclusivity, which require a customer to obtain all or most of its requirements from the dominant company in order to get the rebate, are presumptively

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66 In many cases, the block exemption regulation on vertical agreements will apply to exempt such agreements from Article 101 TFEU, provided that the supplier has a market share of no more than 30 per cent; the exclusive purchasing contract contains no hardcore restrictions; and the exclusivity lasts for less than five years. See Commission Regulation (EU) 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

67 See, for example, *Hoffmann-La Roche*. This approach was partially questioned in Case T-65/98, *Van den Bergh Foods*, judgment of 23 October 2003, EU:T:2003:281 (*Van den Bergh Foods*).

68 *Intel*.


70 Guidance Paper, Paragraph 36.

unlawful (Hoffmann-La Roche, Michelin, British Airways72 and Tomra).73 The Intel judgment clarifies that while exclusive dealing remains presumptively unlawful, if firms submit evidence that the conduct is not capable of restricting competition, the Commission must assess all the circumstances to decide whether the conduct is abusive; and

c fidelity-building rebates that possess a loyalty-building mechanism without being directly linked to exclusive or quasi-exclusive supply: these require an assessment of all the circumstances to determine whether the rebate is likely to foreclose equally efficient competitors.74 The relevant circumstances include:

- whether the rebates are individualised or standardised;
- the length of the reference period;
- the conditions of competition prevailing on the relevant market;
- the proportion of customers covered by the rebate; and
- whether a rebate is retroactive or incremental.75

Tying

Tying occurs when a supplier sells one product, the ‘tying product’, only together with another product, the ‘tied product’. The seminal case on tying involved Microsoft’s tying of its Windows operating system with its Windows Media Player.76 The Court found that Microsoft’s tying of Windows Media Player (a qualitatively inferior product) to Windows, the ubiquitous operating system, degraded the quality of the Windows operation system and foreclosed original equipment manufacturers as a distribution channel for rival media players. Rival means of distribution, notably internet downloads, were not viable because they were slow, difficult and prone to failure. The Commission, upheld by the General Court, identified five conditions for an abusive tying:

- the tying and tied goods are two separate products;
- the undertaking concerned is dominant in the tying product market;
- customers have no choice but to obtain both products together;
the tying forecloses competition; and 
there is no objective and proportionate justification for the tie. 77

A central element of a tying analysis is to establish whether two components constitute separate products or an integrated whole. In Microsoft, the General Court held that such an assessment must be based on ‘a series of factors’, including ‘the nature and technical features of the products concerned, the facts observed on the market, the history of the development of the products concerned and . . . commercial practice’. 78

A dominant company may achieve the same effect as tying by ostensibly offering a stand-alone version of the dominant tying product alongside a bundled version, but at a price that renders it commercially unrealistic for customers to take the stand-alone version. Past cases have condemned the grant of discounts on dominant products that are conditioned on customers also taking non-dominant products. 79 In the Guidance Paper, the Commission takes the position that such bundled discounts must be assessed by allocating the discounts fully to the price of the non-dominant ‘tied’ product. If that calculation results in a price below the dominant company’s long-run average incremental costs of supplying the ‘tied’ product, the discount is anticompetitive (unless rivals are able to replicate the bundle). 80

Refusal to deal

As a general rule, companies, including dominant companies, are free to decide whether to deal with a counterparty. As Advocate General Jacobs confirmed in Bronner, it is ‘generally pro-competitive and in the interest of consumers to allow a company to retain for its own use facilities which it has developed for the purpose of its business’. 81 A refusal by a dominant undertaking to supply its products can therefore amount to an abuse under Article 102 TFEU only in exceptional circumstances. According to established case law, the following general conditions must be met for a refusal to supply to be abusive: the requested input must be indispensable to compete viably; the refusal is likely to eliminate all competition in the downstream market; and there is no objective justification for the refusal. 82

The indispensability requirement is a high threshold: the input must be essential for a commercially viable business to compete on the downstream market. The test is whether there are ‘technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult’ to create alternatives, or to create them within a reasonable time frame. 83 If there are ‘less advantageous’ alternatives, that means the input is not indispensable.

77 See Case COMP/C-3/37.792, Microsoft, Commission decision of 24 March 2004, Paragraph 794. The Court of First Instance confirmed that the five conditions were ‘consistent both with Article 82 EC and with the case law’ and followed from ‘the very concept of bundling’. See Microsoft, Paragraph 859. See also Guidance Paper, Paragraphs 47–74.
78 See Microsoft, Paragraph 925.
79 See for example, Hoffmann-La Roche, Paragraphs 110 and 111; and Case COMP/37.859, Hays/La Poste Belge & Key Mail, Commission decision of 5 December 2001.
80 Guidance Paper, Paragraph 60.
For example, in Bronner, access to newspaper distributor Mediaprint’s delivery network was not indispensable because Bronner could have used kiosks, shops and post (even though these were less advantageous). Mediaprint’s refusal to grant access was, therefore, not abusive.

In its Google Shopping decision, the Commission appears to have imposed a duty on Google to grant rival comparison shopping services access to its search results pages, without establishing a duty to supply by reference to the Bronner criteria.84 Google has challenged this apparent change in the law in its pending appeal.85

If the refusal involves intellectual property rights (i.e., a refusal to license), it is moreover necessary to demonstrate that the refusal would prevent the emergence of a new product, or would hinder technical development and innovation more generally.86

iii Discrimination

Unlawful discrimination under Article 102(c) TFEU may arise if a dominant company applies different terms to different customers for equivalent transactions. However, such abusive ‘price discrimination’ requires proof that similar situations are being treated in a dissimilar manner without legitimate commercial reasons; and that some customers are placed at a ‘competitive disadvantage’ relative to other customers to such a degree that it creates a risk of foreclosing equally efficient competitors. In MEO, the Court of Justice confirmed that establishing a discrimination abuse under Article 102(c) TFEU requires the Commission to demonstrate – ‘having regard to the whole circumstances of the case’ – that the conduct leads to a distortion of competition.87

Not every different treatment is discriminatory. As a general matter, the EU courts have recognised that differences arising from individual negotiations of terms can be explained by legitimate commercial reasons.88 Other considerations that may be taken into account include, for example, whether the transactions involve similar products,89 costs90 or timing.91 Moreover, even if there is ‘discrimination’, the Court of Justice’s Post Danmark judgment has made clear that such discrimination is only abusive if it is liable to foreclose equally efficient

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84 Case AT.39740, Google Search (Shopping), Commission decision of 27 June 2017.
85 Case T-612/17, Google and Alphabet (2017/C 369/51).
87 MEO, Paragraph 27.
88 Michelin, Paragraph 90.
89 See, for example, Case COMP/38.096, Clearstream, Commission decision of 2 June 2004; Case T-301/04, Clearstream, judgment of 9 September 2009, EU:T:2009:317; and Case COMP/36.568, Scandlines Sverige, Commission decision of 23 July 2004 (Scandlines Sverige).
90 See, for example, Case 95/364/EC, Brussels National Airport, Commission decision of 28 June 1995.
91 See, for example, Case IV/28.841, ABG/Oil Companies, Commission decision of 19 April 1977.
companies. ‘Pure’ discrimination cases are quite rare. In past cases, discrimination-type concerns have typically been raised as an ‘added’ consideration in connection with abusive exclusionary pricing practices, such as retroactive volume rebates.

iv Exploitative abuses

Article 102(a) TFEU provides that an abuse may consist of ‘directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions’. The difficulty in determining a benchmark by which prices can be assessed as being unfair has led to a dearth of decisional practice on this issue, although the Commission and national authorities have begun to pursue more exploitative abuse cases. In **Scandlines Sverige**, the Commission set out what it considers the most appropriate methodology for assessing unfair prices. The questions to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive; and, if the answer to that is yes, then whether a price has been imposed that is either unfair in itself or when compared to the price of competing products.

In **AKKA-LAA**, the Court of Justice provided guidance on the conditions under which the imposition of high prices by a dominant firm might infringe Article 102(a) TFEU. The Court found that to identify unfair prices, comparisons with prices in neighbouring Member States may be appropriate, provided that the reference countries are selected ‘in accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis’. The Court also confirmed that excessive prices need to be significantly and persistently above the competitive level for there to be an exploitative abuse. Advocate General Wahl's opinion appeared to set a higher threshold, advising that:

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92 *Post Danmark I*, Paragraph 30: ‘The fact that the practice of a dominant undertaking may, like the pricing policy in issue in the main proceedings, be described as “price discrimination”, that is to say, charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse.’

93 See, for example, press release of 5 March 2014, ‘Commission fines Romanian Power Exchange OPCOM for discriminating against EU electricity traders’, IP/14/214. In that case, the Commission found that OPCOM had wrongfully discriminated against electricity traders from outside Romania by requiring them to have a Romanian VAT registration for accessing the spot electricity markets. Through this provision, OPCOM managed to impose a competitive disadvantage on electricity traders that were already registered for VAT in other EU Member States.

94 See, for example, *United Brands*, Paragraphs 248–268: the Court of Justice annulled the Commission’s decision that unfair prices had been charged for Chiquita bananas in Germany, Denmark and Benelux since the difference in prices between branded Chiquita bananas and non-branded bananas was not deemed to be excessive.

95 In May 2017, the Commission opened an investigation into whether Aspen Pharma committed an exploitative abuse by allegedly imposing sudden price increases for cancer medicine of up to several hundred per cent. See European Commission, ‘Antitrust: Commission opens formal investigation into Aspen Pharma’s pricing practices for cancer medicines’, 15 May 2017.

96 **Scandlines Sverige**, Paragraph 147.

97 Case C-177/16, **AKKA-LAA**, judgment of 14 September 2017, EU:C:2017:689, Paragraph 51 (**AKKA-LAA**).
in its practice, the Commission has been extremely reluctant to make use of that provision against (allegedly) high prices practiced by dominant undertakings. Rightly so, in my view. In particular, there is simply no need to apply that provision in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.98

V REMEDIES AND SANCTIONS

Regulation 1/2003 provides the mechanism by which the Commission sanctions infringements of Article 102 TFEU. The Commission is entitled to impose structural or behavioural remedies, interim measures, fines and periodic penalty payments.99 Alternatively, an undertaking can itself offer commitments to bring the infringement to an end, thereby avoiding a formal finding of an infringement and a fine.

i Sanctions

The Commission can impose a fine of up to 10 per cent of a company’s total turnover of the preceding business year for infringements of Article 102 TFEU. The Commission has set out in detail the methodology by which it sets fines, which will take into account, among other things, the nature, length and scope of the infringement; the value of sales of goods affected by the infringement; and whether there are aggravating or mitigating circumstances.100

Before 2004, the Commission had never imposed a fine for an infringement of Article 102 TFEU that exceeded 1 per cent of the turnover of the undertaking involved. In recent years, the Commission has shown a tendency to impose increasingly high fines for abusive conduct culminating in cases such as Google Shopping, where the Commission imposed a fine of €2.42 billion and Google Android, where it imposed a fine of €4.34 billion. Both decisions are under appeal.

Fines can be imposed for a failure to abide by interim measures or commitment decisions. In 2013, the Commission fined Microsoft €561 million for failing to comply with its browser choice screen commitments. The Commission is also entitled to impose procedural fines of up to 1 per cent of an undertaking’s annual turnover if an undertaking provides false answers or answers late to the Commission’s requests for information.101 Finally, the Commission is empowered to impose periodic penalty payments to compel companies to abide by remedies and commitments decisions.102

Firms can also win a reduction in the fine if they admit liability. In the 2016 ARA waste management decision, the Commission for first time employed the settlement mechanism

99 Articles 7, 8, 23 and 24 of Regulation 1/2003, respectively. Interim measures can only be imposed where there is a prima facie infringement of Article 102 TFEU; there is urgency due to the risks of serious and irreparable damage to competition; damage is considered ‘irreparable’; and the balancing exercise between the public interest and the harm caused weighs in favour of the interim measure.
100 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210, 1 September 2006.
101 Article 23(1) of Regulation 1/2003.
102 Article 24(1) of Regulation 1/2003. These can amount to 5 per cent of an undertaking’s average daily turnover.
traditionally used for cartel cases. ARA admitted liability for refusing to supply its rivals with access to its essential household waste management infrastructure in return for a 30 per cent fine reduction.103

ii Remedies

Remedies, whether imposed by the Commission or offered voluntarily by an undertaking as commitments, must fulfil certain objectives. They must bring the infringement to an end, be proportionate in both scope and duration, and not be easily circumvented.104

Where an infringement can be brought to end in different ways, the Commission cannot ‘impose . . . its own choice from among all the various potential courses of actions which are in conformity with the treaty’.105 This means that the Commission can only impose a specific behavioural remedy if it is ‘the only way of bringing the infringement to an end’.

**Behavioural remedies**

Considerations of expediency and proportionality mean that behavioural remedies are preferred in Article 102 TFEU cases.106 Structural remedies are only a means of last resort. Behavioural remedies may require the dominant undertaking either to engage in a positive action to bring the infringement to an end or to abstain from a certain type of conduct.107 Positive obligations have included the granting of a compulsory licence;108 raising prices above an exclusionary level;109 and other forms of compulsory dealing.110

Meanwhile, negative obligations have included unbundling products111 and bringing rebates conditioned on exclusivity to an end.112

**Structural remedies**

Structural remedies are used to rectify effects or abuses that have caused a change in the structure of the market. They will only be proportionate where ‘there is a substantial risk of a

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103 Case AT.39759, ARA foreclosure, Commission decision of 20 September 2016 (ARA foreclosure).
104 See Article 5(4) TFEU and Case C-441/07 P, Alrosa, judgment of 29 June 2010, EU:C:2010:377 (Alrosa), Paragraph 36; see also Commission Notice on Best Practices for the Conduct of Proceedings concerning Article 101 and 102 TFEU, Paragraph 115: the Commission has undertaken to verify ‘that the commitments address the identified competition concerns and that the commitments offered do not manifestly go beyond what is necessary to address these concerns’. The Court of Justice has confirmed that these principles apply both to remedies imposed under Article 7 and remedies voluntarily offered under Article 9. See Alrosa, Paragraph 36.
106 This is evident from the text of Article 7 of Regulation 1/2003: ‘Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective remedy would be more burdensome for the undertaking concerned than the structural remedy.’
110 See, for example, Magill: certain broadcasting companies were forced to make available their TV listings and to permit their reproduction subject to payment of reasonable royalties.
111 See, for example, Case COMP/34.579, MasterCard, Commission decision of 19 December 2007; and Case COMP/36.518, EuroCommerce, Commission decision of 19 December 2007.
lasting or repeated infringement that derives from the very structure of the undertaking. In ENI, the Commission identified concerns with regard to conduct by ENI that result from its ownership of strategic natural gas pipeline infrastructure. ENI offered to divest its stake in its international transport businesses and, as a result, the Commission held that ‘ENI will no longer be subject to the inherent conflict of interest it faced operating both as a transmission system operator and as a company active on the Italian wholesale market’. 115

VI PROCEDURE

The procedural rules for the conduct of Commission investigations are laid out in Regulation 1/2003 and the Commission's Implementing Regulation. In 2012, the Commission published a version of its internal manual of procedure, which provides additional guidance on the Commission's handling of competition law proceedings. A brief summary of the main procedural steps in a typical Article 102 TFEU investigation follows:

a The Commission can begin investigations both as a result of complaints by third parties or on its own initiative. Sector inquiries can also provide the impetus for investigations.

b The Commission's primary instrument of investigation is issuing requests for information. In the past few years, such requests have become increasingly detailed, and may involve the production of large quantities of data and internal documents. The Commission may oblige companies to respond to requests for information through the adoption of formal decisions that are subject to penalty payments.

c The Commission may conduct unannounced inspections, or ‘dawn raids’, at a company's premises to obtain documents and information, although such dawn raids are relatively rare in Article 102 cases. Documents that contain advice from external counsel are protected by legal professional privilege, while in-house counsel documents do not benefit from such protection.

d After considering the evidence, the Commission will decide whether to close proceedings, enter commitment discussions or issue a statement of objections (SO) to the company concerned.

e The addressee of the SO is entitled to review the Commission's file and respond to the SO in writing. The Commission will also grant the company in question an oral hearing, if requested.

f Following the defendant’s reply to the SO, and a possible oral hearing, the Commission will proceed to a decision (this may occur only after a number of supplementary SOs or letter of facts that seek to bolster the Commission's initial charges). An adverse decision can be appealed to the General Court on both points of fact and law, and from there to the Court of Justice on points of law only.

113 Recital 12 of Regulation 1/2003.
114 Case COMP/39.315, ENI, Commission decision of 29 September 2010.
115 ibid., Paragraph 89.
116 Commission Regulation EC No. 773/2004 of April 2004 on the conduct of proceedings pursuant to Articles 81 and 82 of the EC Treaty.
118 Privilege applies only to independent external counsel; advice given by in-house lawyers is excluded from the scope of legal professional privilege. See Case C-550/07 P, Akzo Nobel, judgment of 14 September 2010, EU:C:2010:512.

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Commission proceedings can be resolved through the offer of commitments. Negotiation of commitments can take place both prior to adoption of an SO or following an SO and response. If the Commission considers the offered commitments to be acceptable, it will subject them to a public market test and, if confirmed, make them binding through adoption of a decision under Article 9 of Regulation 1/2003. Commitment decisions involve no finding of infringement and entail no fines. Regulation 1/2003 also makes clear that commitments are not appropriate if the conduct at issue is not sufficiently serious to warrant a fine.

In addition, the Commission can settle cases with companies under investigation. This involves the company admitting liability in exchange for a fine reduction. Traditionally, this procedural mechanism has been limited to cartels, but in the ARA case, the Commission employed the settlement mechanism for the first time, rewarding ARA with a 30 per cent fine reduction in exchange for admitting liability.119

VII PRIVATE ENFORCEMENT

While public enforcement is the core of EU antitrust enforcement, actions brought by private claimants before national courts are an increasingly important complement to public enforcement activity.120 The Commission aims to encourage and facilitate such actions. To this end, it published a proposal for a Directive on private damages actions in 2013, which was signed into law on 26 November 2014121 together with a practical guide on quantifying harm resulting from competition infringements,122 and a recommendation for collective redress mechanisms in Member States.123 The Directive’s stated aim is to optimise the interaction between public and private enforcement of competition law; to minimise discrepancies between rules applicable to antitrust damages actions in Member States; and to ensure that victims of infringements of EU competition law can obtain full compensation for the harm they have suffered. Among other things, the Directive introduces rules on the

119 ARA foreclosure.
disclosure of evidence in such cases, as well as on the standing of indirect customers, the length of limitation periods, the joint and several liability of infringers, and the passing-on of damages as a possible defence.

VIII FUTURE DEVELOPMENTS

We identify the following trends to watch out for in the coming year.

In April 2019, the Commission published its report into competition in the digital era. The next year may see the Commission seek to grapple with some of the report’s proposals on how to apply competition law to the digital sector.

The Commission has increasingly shown a willingness to recognise parties’ cooperation in its antitrust investigations. The Commission reduced AB InBev’s fine for beer trade restrictions due to its voluntary cooperation, including its acknowledgment of the facts of the infringement and its proposal of a remedy. This follows other recent cases where the Commission applied leniency principles outside the cartels context. Following its decision in Guess, the Commission published a road map for leniency in non-cartel cases and the decision in AB InBev is an example of its application to cases under Article 102.

Commissioner Vestager’s term ends in September 2019. As of yet, it is unclear who will become the next Competition Commissioner or the extent to which the change in leadership will impact enforcement under Article 102.

The Commission and national authorities have several exploitative abuse cases in the pipeline. The pending UK Court of Appeal proceedings in Pfizer/Flynn (where the Commission is intervening) may provide some additional guidance on how to apply the excessive pricing test.

124 Case AT.40428, Guess, Commission decision of 17 December 2018.
I INTRODUCTION

The abuse of a dominant position is prohibited under Section 7 of the Competition Act. Furthermore, the concept of dominance is defined in Sections 4(2) and 4a of the Competition Act. The Finnish Competition and Consumer Authority (FCCA) has the authority to investigate competition matters. The FCCA may order a dominant undertaking to terminate an unlawful conduct or resolve a restriction through commitments. The decisions of the FCCA may be appealed to the Market Court and further to the Supreme Administrative Court. The Market Court has the authority to impose fines that have been proposed by the FCCA.

The enforcement procedure in abuse of dominance cases is set out in the Competition Act. The concepts of dominance and abuse thereof are, with minor exceptions, similar to those found in the EU competition rules. When an abuse of dominance may affect trade between EU Member States, the Finnish authorities must also apply the provisions of Article 102 of the Treaty on the Functioning of the European Union (TFEU) and the interpretation thereof. The FCCA may issue legally non-binding guidelines that are consistent with the guidelines and Block Exemption Regulations of the European Commission. To date, no specific guidelines on abuses of dominance have been issued by the FCCA; however, the guidelines on the assessment of the amount of fine and guidelines on prioritisation are relevant to abuse of dominance cases. In addition, the FCCA's brochure on the inspection of business premises is relevant also to abuse of dominance cases.

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1 Jussi Nieminen is a partner and Kiti Karvinen is a senior associate at Castrén & Snellman Attorneys Ltd.
2 948/2011 as amended. The Competition Act replaced the old Act on Competition Restrictions (480/1992, as amended). The provisions of the Act on Competition Restrictions apply to a large extent to violations that occurred prior to the entry into force of the Competition Act on 1 November 2011.
3 Regional state agencies also have limited powers to investigate competition matters and, by mandate of the FCCA, to take measures to promote competition in their region.
7 In addition, the FCCA has issued guidelines on leniency and guidelines on merger control.
8 Brochure on the inspection of business premises under Section 35 of the Competition Act (2017).
II YEAR IN REVIEW

Based on published data, the FCCA decided not to investigate or not to take an action in most of the abuse of dominance cases decided in 2018. Some cases were resolved after the companies in question had changed their behaviour during the FCCA’s investigation, and therefore the FCCA concluded that there was no reason to continue the investigation. These decisions indicate that the FCCA effectively uses its authority to prioritise matters and directs its resources to investigating the most harmful competition restrictions from a competition policy point of view.

In 2018, the FCCA made one commitment decision regarding the terms and conditions of the rightholder membership agreement of Finnish Composers’ Copyright Society Teosto (a non-profit collective management organisation that collects royalties on behalf of songwriters and composers in Finland). The FCCA expressed preliminary doubts on compatibility of the exclusivity clauses in Teosto’s rightholder membership agreement. The FCCA accepted the commitments offered by Teosto concerning a wider range of individual management copyright options for composers, lyricists and publishers, and resolved the case.9

The administrative courts did not adjudicate any cases related to abuse of dominance in 2018.

III MARKET DEFINITION AND MARKET POWER

The definitions of relevant product and geographical market correspond to the approach of the European Commission and the European court praxis. It is explicitly stated in legislative materials that the definition of markets is an economic-based factual matter that may be determined by, for example, conducting a market survey.10 Substitutability of demand is the most decisive factor in the determination of a relevant product market, but supply-side substitutability is also taken into consideration by the FCCA.

Dominant position is defined in Section 4(2) of the Competition Act as follows:

A dominant position shall be deemed to be held by one or more undertakings or association of undertakings who, either within the entire country or a given region, hold an exclusive right or other dominant position in a specified product market so as to significantly control the price level or terms of delivery of that product, or who, in some other corresponding manner, influence the competitive conditions on a given level of production or distribution.

Despite of the specific definition included in the Competition Act, the concept of dominance is interpreted consistently with EU competition law.11

However, there is an exception to the determination of dominance concerning the Finnish daily consumer goods market. According to Section 4a of the Act, grocery chains with a market share exceeding 30 per cent in the retailing of daily goods in Finland are considered to hold a dominant market position. The aim of the provision was to improve the functionality of competition on the highly concentrated Finnish retail trade market and to ensure that competitors are not excluded from the market. It is, however, explicitly

9 FCCA Decision No. 503/KKV14.00.00/2014, Säveltäjän Tehtävää Teosto ry.
stated that the objective is not to prevent competition on the merits, but to ensure that companies deal with suppliers and other market actors in a non-discriminatory manner.\textsuperscript{12}

The FCCA has publicly stated that the provision does not influence the application of the constituent elements of the abuse of dominance. Furthermore, the FCCA has emphasised that the prohibition of the abuse is only targeted at actions that can be distinguished from the competition on merits.\textsuperscript{13}

Two or more undertakings may hold a joint dominant position. In the Automatia case, the FCCA took the preliminary view that joint venture Automatia and its owner banks had joint dominance in the cash-dispensing market in Finland.\textsuperscript{14} The FCCA stated that to hold joint dominance, the companies must, in an economic sense, act as one economic entity on the market. The FCCA did not require the companies to act identically in every situation, but it was fundamental that they were able to act in a similar manner and to a reasonable extent independently from their competitors, customers and consumers. The FCCA’s view was also that the joint venture Automatia formed a structural and economic link between the owner banks, since they offered cash withdrawal services to their customers via Automatia. Despite the fact that they made the pricing decisions independently, as a result of this link, they had an incentive to price withdrawals made using auto-teller machines (ATMs) outside the Automatia network in a way that would encourage their customers to use Automatia’s ATMs. The case was closed with a commitment decision. In another more recent Automatia case, which concerned the real-time payment markets in Finland, the FCCA took a similar preliminary view. In its preliminary assessment, the FCCA stated that Automatia and its owner banks had a structural, economic and ownership-based link and a market position where they could influence the market in a harmful manner and abuse the market power of their joint venture without significantly or immediately losing market shares to competitors. However, this case was also closed with a commitment decision.\textsuperscript{15}

IV ABUSE

i Overview

The definition of abuse of dominance included in Section 7 of the Competition Act corresponds almost word for word to the wording of Article 102 of the TFEU. The interpretation of the abuse of dominance is also similar to the application of Article 102.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing refers to a pricing policy in which the dominant company prices its products below costs in the short term to foreclose existing or potential competitors from the market. In its assessment of predatory pricing, the FCCA has referred to the criteria set out in the European Court of Justice \textit{Akzo} judgment.\textsuperscript{16}

\textsuperscript{12} Government Proposal 197/2012, p. 20.
\textsuperscript{13} FCCA Newsletter 26 March 2014.
\textsuperscript{14} FCCA Decision No. 964/61/2007, Nordea Pankki Suomi Oyj, OP-Keskus cooperative and Sampo Pankki Oyj.
\textsuperscript{15} FCCA Decision No. 1469/14.00.00/2015, Automatia Pankkiautomaatit Oy.
\textsuperscript{16} Decision of the Supreme Administrative Court, KHO:2016:221, Valio Oy and Market Court Decision No. 458/12/KR and 36/13/KR, Valio Oy.
In Valio, the Supreme Administrative Court found that the Finnish dairy company Valio had abused its dominant position by engaging in predatory pricing in the fresh milk market. The Supreme Administrative Court upheld the Market Court’s decision to impose a €70 million fine on the company and found that Valio had abused its dominant position in the Finnish fresh milk market. A central issue in the case was the calculation of costs and, in particular, the treatment of the price of raw milk paid to the farmers. Valio is a cooperative owned by farmers, and it has undertaken to buy all the raw milk produced by its owners, and, therefore, the company disagreed with the view to consider the cost of raw milk as a variable cost. The Court, however, held that the relevant average fresh milk prices of Valio were below the company’s average variable costs between 1 March 2010 and 20 December 2012, and that application of such prices generally indicates predatory pricing.

Margin squeeze means that a vertically integrated company weakens the position of a competitor in the end-product market by overpricing an intermediary product. The Market Court has dealt with alleged margin squeeze in several cases concerning subscriber connections in the telecommunications market. In the Oulun Puhelin, Aina Group, Kymen Puhelin and TeliaSonera Finland cases, the Market Court imposed fines totalling €220,000 on the companies for the abuse of a dominant position. According to the Market Court and the FCCA, the companies held dominant positions in their respective geographical areas and abused their market positions by favouring their own service providers with regard to the rents they charged for subscriber connections. The price bias made it difficult for competitors to gain access to the market in consumer services provided over subscriber connections, such as broadband and business-to-business services.

The Lännen Puhelin case concerned margin squeeze and refusal to supply in the broadband services market. As regards the margin squeeze, the company offered end customers a broadband product based on a different network technology from that of its wholesale product available to competitors. The Supreme Administrative Court upheld the Market Court’s decision and considered that, because of the different cost structure of the two technologies, it was not possible to assess whether the company had engaged in margin squeeze. According to the FCCA’s report to the Market Court, the prices for the wholesale product had even exceeded the retail prices.

The FCCA has published a memorandum on its evaluation criteria concerning the abuse of dominance in the broadband market. In its memorandum, the FCCA takes the preliminary view that local telecoms operators have dominant positions in their traditional business areas in the markets of subscriber lines as well as the wholesale of broadband services. When assessing the margin between wholesale and retail pricing, the FCCA calculates a weighted average of the monthly gross margin of the asymmetric digital subscriber line (ADSL) connections. If this is negative, the FCCA takes the preliminary view that the pricing fulfils the criteria for an illegal margin squeeze.

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17 ibid.
19 Supreme Administrative Court Decision No. 2474/2/08 and Market Court Decision 260/04/KR, Lännen Puhelin Oy.
21 FCCA Memorandum 3 September 2009.
**Exclusive dealing**

In the *Abloy* case, the FCCA assessed, inter alia, whether the marketing support paid by the company to accredited dealers constituted an illegal retroactive target rebate. The FCCA took into consideration that, for about half of the dealers, the support amounted to approximately one-third of their operating income, and was thus highly important and loyalty enhancing. The FCCA considered that the marketing support was non-transparent and its grounds were unclear. According to the FCCA, this could have had exclusionary effects at least on some individual product groups. Following negotiations, the FCCA decided not to proceed with the case after the company voluntarily amended its discounting system on the basis of FCCA guidance.22

**Refusal to deal**

In *Lännen Puhelin*, the Supreme Administrative Court rejected the FCCA’s claim that the company had abused its dominant position by refusing to supply its wholesale ADSL broadband product to its competitors. The Court quoted the *Oscar Bronner*23 criteria and stated that it was necessary to assess whether the refusal to supply in fact removed all competition from the market. According to the decision, the fact that two competitors had managed to construct their own networks covering a significant area of Lännen Puhelin’s network coverage area proved that the refusal had not effectively removed competition.24

In the *SNOY* case, the Supreme Administrative Court generally upheld the Market Court’s decision and fined Suomen Numeropalvelu (the Finnish number service) €90,000 for refusal to supply in the wholesale market for telephone subscriber information. The company maintained the only nationwide database of telephone subscriber information in Finland and refused to deliver the information to its customer, which offered its services on the internet for free and without registration. Suomen Numeropalvelu justified its refusal by invoking data protection legislation, but this argument was not accepted by the Market Court.25

**iii Discrimination**

In the *Automatia* case, the FCCA considered that the three banks holding joint dominance in the cash distribution market engaged in discriminatory pricing. According to the FCCA, the price difference of withdrawals made from their joint venture’s ATMs and withdrawals made from other ATMs was higher than the difference in costs. The FCCA accepted the commitments offered by the banks, through which the companies undertook to price the cash withdrawals in a non-discriminatory manner.26

**iv Exploitative abuses**

There is quite a lot of old Finnish case law concerning excessive pricing, but the assessment in these cases has been somewhat formal, and it is expected that the FCCA will concentrate more on economic effects in its future assessments. This shift to a more economic approach can be seen in the district heating survey. The FCCA assessed the reasonableness of the

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23 Case C-7/97, *Oscar Bronner*.
24 Supreme Administrative Court Decision No. 2474/2/08, *Lännen Puhelin Oy*.
pricing of district heating companies in a large survey from 2009 to 2011. The FCCA closed its investigations by stating that the average price level of the district heating companies were high compared with the profitability and risk level of their business operations, but it considered that the threshold for intervention required by the Competition Act was not exceeded.27

V REMEDIES AND SANCTIONS

According to the Competition Act, the FCCA is entitled to impose behavioural remedies, determine commitments offered by the undertakings as binding, withdraw the benefit of a block exemption, issue interlocutory injunctions and impose periodic penalty payments. The Market Court has the authority to impose fines proposed by the FCCA for competition restrictions.

i Sanctions

The Market Court may impose a maximum fine of 10 per cent of the concerned undertaking’s turnover during the year in which the undertaking was last involved in the infringement. The fine will be imposed unless the conduct is deemed minor or the imposition of the fine is otherwise unjustified in respect of safeguarding competition. It is explicitly stated in the Competition Act that the fine may also be imposed on a company to which the business activity has been transferred. The Market Court shall impose the fine proposed by the FCCA.

In its Fining Guidelines, the FCCA states that the fine needs to generate a sufficient deterrent and general preventive effect.28 The amount of the fine is based on an overall assessment, and attention will be paid to the nature and extent, the degree of gravity and the duration of the infringement.

In Valio,29 the Supreme Administrative Court upheld the Market Court’s decision to impose a fine of €70 million on the company for its abuse of dominance. This is the highest fine imposed in dominance cases – and in all competition restriction cases in general – in Finland to date. In the assessment of the fine, the Supreme Administrative Court and Market Court took into account, inter alia, the object of Valio’s conduct, the notion that Valio’s conduct was not in line with the fundamental principles of the internal market and the fact that Valio has previously been the subject of an abuse of dominance decision that included the imposition of a fine on the company.

Furthermore, the FCCA and the Market Court may impose periodic penalty payments to enforce an order, condition, prohibition or obligation issued on the basis of the Competition Act. The Market Court has the authority to order a periodic penalty payment to be paid.

ii Behavioural remedies

If the FCCA considers conduct to amount to an abuse of dominance prohibited in the Competition Act or Article 102 of the TFEU, it may impose behavioural remedies. First, the FCCA can order the undertaking to terminate the prohibited conduct. This was done in the Valio case, where the FCCA ordered Valio to cease the alleged predatory pricing of

28 FCCA Fining Guidelines, p. 6.
29 Decision of the Supreme Administrative Court, KHO:2016:221, Valio Oy.
fresh milk and thus, in practice, raise its prices. The Market Court further obliged Valio in its interim decision\(^{30}\) to comply with the FCCA’s order. The FCCA may also oblige an undertaking to deliver a product to another undertaking on conditions similar to those that it offers others in a similar position. In addition, the FCCA is also entitled to give these orders as interim measures. Furthermore, the FCCA may issue an interlocutory injunction if the application of a competition restraint is deemed to require immediate cessation. After the interlocutory injunction, the FCCA must take a final decision or make a proposal to the Market Court within 60 days. Prior to issuing an interlocutory injunction, the FCCA must hear the undertaking.

iii Structural remedies

Unlike the Commission, the Finnish competition authorities do not have the authority to impose structural remedies (however, see Section VIII).

VI PROCEDURE

The FCCA is responsible for the investigation of competition restraints and the effects thereof as well as for initiating the necessary proceedings to eliminate the harmful market effects of the restraints. The FCCA can begin investigations as a result of complaints by third parties and on its own initiative. The FCCA can also conduct sector inquiries, and these may result in the initiation of further proceedings.

In addition to the FCCA, the regional state administrative agencies have the authority to investigate competitive conditions and competition restrictions. Upon the mandate of the FCCA, the agencies are also entitled to take other measures to promote competition within their respective regions.

The FCCA has the right to prioritise its tasks. According to Section 32 of the Competition Act, it shall not investigate a case in the following situations: it cannot be deemed likely that an infringement prohibited in Sections 5 or 7 (Articles 101 and 102 of the TFEU, respectively) of the Competition Act exists; competition in the relevant market may be considered functional as a whole, irrespective of the suspected infringement; and the complaint in the matter is manifestly unjustified.

The prioritisation of cases can also mean that the handling of a case with potential significance and likely anticompetitive objects or effects may be postponed if there are other ongoing investigations with even greater significance.\(^{31}\)

The FCCA must take the decision to not to investigate a matter without delay. In its Guidelines, the FCCA has set the following non-binding deadlines: one month for closing cases to which Article 32 is clearly applicable; four months for completing a preliminary survey according to which further actions can be determined; and six months for closing non-significant cases, and drafting of investigation plans and determining objective internal deadlines for cases that require further actions.\(^{32}\) Overall, the FCCA seeks to handle all competition cases within three years.\(^{33}\) To date, however, more extensive investigations have, in practice, required a longer process.

\(^{30}\) Market Court Decision No. 36/13/KR, Valio Oy.

\(^{31}\) FCCA’s Guidelines on prioritising the handling of competition restrictions, 4/2011, p. 9.


\(^{33}\) The FCCA’s operational and financial plan for 2017 to 2019.
The undertaking subject to the FCCA’s investigation is obliged to submit information to the FCCA or the relevant regional state administrative agency upon request. This obligation covers all documents and other information needed for the investigation of the content, purpose and impact of a restraint on competition and for clarifying the competitive conditions, as well as information necessary to enable the authority to determine whether the undertaking holds a dominant position. In practice, the FCCA usually sends an undertaking a request for information or arranges a meeting with the representatives of the undertaking to gather the information. Furthermore, the FCCA has the right to hear representatives of the undertaking in person if it is considered necessary for the investigation and the person may, for a justified reason, be suspected of having acted in the implementation of the restraint on competition.

The FCCA also gathers information by conducting inspections. These inspections may be announced, or they may be ‘dawn raid’ inspections. In addition to business premises, the FCCA has the right to inspect other premises (e.g., the homes of the management of the undertaking) if reasonable suspicion exists that bookkeeping or other documents relating to the business and the object of the investigation may be held there and if these documents may have relevance in proving a serious violation of Section 7 of the Competition Act or Article 102 of the TFEU. However, the FCCA must seek advance permission from the Market Court to conduct an inspection outside the business premises, and the Market Court may prohibit the inspection if it considers it arbitrary or excessive. Although unannounced inspections are usually conducted in cartel investigations, the FCCA has conducted several dawn raids in abuse of dominance investigations during recent years. The rights of the FCCA to carry out inspections of companies that have outsourced their information management to a third party were added to the Competition Act in 2015. After this amendment, the FCCA has had the right to request information directly from such third-party service providers at the expense of the company subject to inspection and regardless of location of the outsourced information. In 2017, the FCCA published a brochure on the inspection of business premises under Section 35 of the Competition Act.

The rights of defence of an undertaking subject to proceedings, including the right to be informed about an ongoing investigation, the right to receive information and the right to be heard, are set out in the Competition Act.

Prior to making a final decision or a proposal to the Market Court, the FCCA will issue a confidential draft decision to the undertaking under investigation. The undertaking has the right to respond to the draft decision, and it may request an informal meeting with the FCCA to present its opinion on the draft decision. A decision34 may be appealed to the Market Court and further to the Supreme Administrative Court. A decision of the Market Court concerning the imposition of fines may be appealed to the Supreme Administrative Court.

A case can also be resolved through a commitment decision. The FCCA may accept the commitments offered by an undertaking as binding if the commitments are such that the restrictive nature of the conduct can be eliminated. If an underlying fact significantly changes, the undertaking infringes the commitments, or the decision has been based on insufficient, false or misleading information, the FCCA may reinitiate proceedings.

34 A proposal to the Market Court to impose a fine is not considered an administrative decision of the FCCA.
VII PRIVATE ENFORCEMENT

The Finnish competition law regime is twofold: in addition to administrative enforcement, it contains rules for private enforcement according to which a private litigant can have an unlawful agreement declared null and void, and damage that occurred from the violation compensated.

Section 8 of the Competition Act provides that an unlawful agreement cannot be applied or implemented (i.e., the agreement or part thereof is null and void by law). The provision applies only inter partes and cannot be invoked by third parties.

Actions for damages based on an infringement of competition law are covered by the Act on Actions for Antitrust Damages, which entered into force on 26 December 2016. Section 2 of the Act provides the right for damages to anyone who has suffered damage from an infringement regardless of whether the relationship is contractual or non-contractual. The liability to compensate the damage is joint and several. Joint and several liability of immunity recipients and small and medium-sized enterprises is, however, limited.

Collective actions are available but only to a limited extent in disputes between consumers and undertakings under the Act on Class Actions. A class action can only be brought by the Consumer Ombudsman and, to date, the Consumer Ombudsman has not brought any class actions for competition law damages. In the pending Asphalt cartel and Raw wood cases, however, which involve numerous plaintiffs, practices that resemble those of collective actions have been adopted. In these cases, the court has joined the separate actions of each of the claimants to proceed together, thus entailing procedural and cost benefits.

An action for damages can be brought either as a stand-alone or a follow-on case in arbitration or in a general court. Except for the follow-on cases related to abuse of dominance that are currently pending before the general courts, there have not been many follow-on cases related to the abuse of dominance in Finland, and so far, all cases have been withdrawn; instead, abuse of dominance is more often invoked as grounds for action in contractual disputes. In general, a claimant’s burden of proof is easier to meet in a follow-on case than in a stand-alone case. As of 26 December 2016, a final administrative decision concerning an infringement of competition law has a binding effect on the civil court.

In Finland, only single damages can be awarded, and the damages law doctrine relies heavily on the principle of non-enrichment. Compensation covers both direct and indirect economic damage, inter alia, compensation of costs, price difference or lost profits. Compensation also includes interest; in practice, penal and return interest may form a significant part of the compensation.

The burden of proof is reversed with respect to cartels; a cartel is expected to have caused damage unless proven otherwise by the defendant. Unlike in cartel damages cases, there is no legal assumption of damage in Finland in cases concerning the abuse of dominance, and

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36 If the infringement occurred prior to 26 December 2016, the repealed Section 20 of the Competition Act or other applicable laws apply to the right for damages and liability thereof.


the claimant bears the burden of proof of damage. There is no single way of calculating the damage, but in recent case law related to cartel damages, competition economics and extensive economic evidence on the financial effects of the infringement have been utilised. The court has the power to assess the quantum of damage if the claimant has proven the damage suffered, but evidence of the amount cannot be presented or can be presented only with difficulty.

Furthermore, there must be a causal link between the harm suffered and the violation of the competition law. The claimant must prove that the damage has resulted from the competition law infringement, and not from the market conditions or general market structure. In addition, liability for damage also requires that the occurrence of the damage as a consequence of the violating act was foreseeable by the undertaking at the time the act was made. This means that there is no liability for indirect damage or consequential loss. Contributory negligence on the part of the injured party may also have a significant effect on the liability.

According to Chapter 21 of the Code of Judicial Procedure, the party that loses the case is liable for all reasonable costs incurred by the necessary measures of the opposing party.

According to Section 10 of the Act on Actions for Antitrust Damages, the right to claim compensation expires if the action has not been instituted within five years of the date when a claimant has become aware, or should have become aware, of the infringement, the damage and the party responsible. The five-year limitation period is, however, suspended for the duration of an investigation by the competition authorities, until one year has elapsed from the issuance of a binding decision, as well as for the duration of settlement negotiations. The right to damages is not, however, time-barred if proceedings are brought within one year of the issuance of a binding decision, or within 10 years of the day of infringement of the competition law or the end of a continued infringement.

VIII FUTURE DEVELOPMENTS

The FCCA has indicated that it will focus on removing structural restraints on competition, and on discriminating and binding practices aimed at foreclosing competitors from a market. The FCCA’s focus on exclusionary practices has already been seen in the recent case law of the FCCA where the authority has been most concerned with conduct involving margin squeeze, predatory pricing, refusals to deal and restrictive rebates.

The review of abuse of dominance cases is likely to give more weight to economic-based assessments in the future, which can already be seen in the OP Financial Group case resolved in February 2019. Between 2015 and 2018, the FCCA conducted an extensive economic and legal analysis related to OP Financial Group’s customer bonus scheme but found no evidence to support the alleged abuse of dominance.

39 See the judgment in Qvist v. John Crane Safematic, where the district court found the abuse of dominance but dismissed the claim because the claimant failed to prove the damage. The Appeal Court later overruled the judgment of the district court.


41 The operational and financial agreement for 2019 to 2022 between the Ministry of Employment and Economy and the FCCA, p. 2.

42 FCCA Decision No. 015/KKV14.00.00/2015, OP Financial Group.
The importance and effectiveness of private enforcement is expected to increase in Finland, both through the landmark judgments in the Asphalt cartel case and the Raw wood case, as well as through the recent Act on Actions for Antitrust Damages.

In March 2017, the Ministry of Employment and Economy published a report of the working group on reforming the Competition Act,43 and the government proposal relating to the first part of the reform was given in May 2018 and approved by the Parliament on 7 March 2019.44 As regards the abuse of dominance, the government proposal contains an additional ground for prioritisation of the FCCA’s cases. According to the government proposal, the FCCA could take into consideration the significance of a competitive restraint as a ground for prioritisation. Other amendments relate, inter alia, to the inspection powers of the FCCA and information exchange between certain authorities notwithstanding the confidentiality regulations. Some of the amendments proposed by the working group, such as the possibility of structural remedies as a consequence of an abuse of dominant position, were left out of this government proposal owing to the forthcoming legislative process of the directive to make national competition authorities more effective enforcers (ECN+ Directive) during 2019 to 2021.

The amendments of the Competition Act are expected to enter into force by the end of 2019.

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44 Government Proposal 68/2018, 24 May 2018. In April 2019, the ratification of the President of the Republic of Finland is pending.
I  INTRODUCTION

In addition to Article 102 of the Treaty on the Functioning of the European Union (TFEU), French law provides for specific rules applicable to dominant firms. Article L420-2 of the French Commercial Code provides for the prohibition of abuses of a dominant position, as well as abuses of economic dependence. A dominant position is characterised on a relevant market, whereas a situation of economic dependence is characterised with regards to a trading partner. Article L420-4 of the Commercial Code provides for a possible exemption from the prohibition of Article L420-2 when the practices at stake result from a regulation or if they have the effect of achieving economic progress – including creating and maintaining employment – while reserving for consumers a fair share of the resulting benefits and without allowing an undertaking to eliminate competition in respect of a substantial part of the products in question. The exemption is rarely applied in practice. Another relevant provision is Article L420-5 of the Commercial Code, which prohibits abusively low prices to consumers. Abusively low pricing, as defined by Article L420-5, can only be applied to products and services sold to final consumers, but may be found to exist even when the infringing company is not in a dominant position and the victim is not in a situation of economic dependence. Article L420-5 has only been applied in rare cases.

The French Competition Authority (FCA) has jurisdiction over abuses of dominance practices. As an independent administrative body, the FCA may investigate abuse of dominance cases and impose fines of up to 10 per cent of the infringing companies' worldwide turnover. The FCA has not issued formal guidance on the way in which it applies Article L420-2 of the Commercial Code. The European Commission's guidance on Article 102 TFEU (formerly Article 82 of the EC Treaty), however, provides useful indications as to how Article L420-2 is applied in France. French judges can also directly apply the relevant provisions of the Commercial Code concerning abuses of dominance, or abuse of economic dependence, in the context of civil or commercial litigation.
II YEAR IN REVIEW

In 2018, the FCA issued 10 decisions on the basis of Article L420-2 of the Commercial Code (and none on the basis of Article L420-5 of the Commercial Code). The FCA imposed fines in two cases, which amounted to a total of €204,000. None of these fines were the result of a settlement. The FCA also accepted commitments in one case. Four claims were rejected in 2018 at a preliminary stage owing to lack of supporting evidence, and the FCA dismissed three other cases following an investigation on the merits. The FCA did not grant any interim measures in 2018, but it has already done so in early 2019 in the Amadeus case. Overall, 2018 was quieter than 2017 where the FCA issued 19 decisions on the basis of Article L420-2 of the Commercial Code, among which, four led to fines of a total of €125.4 million being imposed.

The most noteworthy decisions in the past year are the following.

In Sanicorse, the FCA imposed a €199,000 fine on Sanicorse, the only infectious medical waste treatment company in Corsica, for having abused its dominant position through excessive price increases. Following a referral by the Minister of Economy, the

3 FCA Decisions No. 18-D-03 of 20 February 2018 regarding practices implemented in the sector of the distribution of termite traps with biocide in Réunion Island, French Antilles and French Guiana, which imposed a fine of €5,000 on Emeraude Environnement for abusing its dominant position (while also imposing fines of €5,000 on Emeraude, €60,000 on Dow Agrosciences and €5,000 on Carib Termite Control for violating the prohibition of exclusive import duties provided by Article L420-2-1 of the Commercial Code); and No. 18-D-17 of 20 September 2018 regarding practices implemented in the infectious medical waste management sector in Corsica, which imposed a €199,000 fine on Sanicorse (an appeal is pending before the Paris Court of Appeal).

4 FCA Decision No. 18-D-14 of 24 July 2018 relating to practices implemented in the marketing of satellite TV decoders sector.

5 FCA Decisions Nos. 18-D-03 of 20 February 2018 regarding practices implemented in the sector of maritime passenger crossing services between the mainland and the Island of Yeu; No. 18-D-10 of 27 June 2018 concerning practices implemented in the IT maintenance sector; and No. 18-D-11 of 4 July 2018 relating to practices implemented by EDF in the photovoltaic electricity sector.

6 FCA Decision No. 19-MC-01 of 31 January 2019 regarding a request for interim measures from Amadeus, partially annulled by the Paris Court of Appeal on 4 April 2019. Also, in 2019, see FCA Decisions Nos. 19-D-03 of 16 January 2019 regarding practices implemented in the cross-Channel transport of day-old chicks and 19-D-04 of 21 February 2019 regarding practices implemented in the field of online air ticket booking services, in which the FCA refused to impose interim measures, owing to lack of sufficient supporting evidence.

7 FCA Decisions No. 17-D-02 of 10 February 2017 concerning practices implemented in the competitive petanque balls sector, which imposed a €320,000 fine on Obut; No. 17-D-06 of 21 March 2017 concerning practices implemented in the gas and electricity supply sector, which imposed a €100 million fine on Engie; No. 17-D-13 of 27 July 2017 of 27 July 2017 concerning practices implemented in the funeral sector in the Ain department, which imposed a €80,000 fine on Comtet; and No. 17-D-25 of 20 December 2017 concerning practices implemented in the fentanyl transdermal patches sector, which imposed a €25 million fine on Janssen-Cilag and its parent company, Johnson & Johnson.

8 FCA Decision No. 18-D-17; see footnote 3.
FCA found that Sanicorse had abruptly, significantly and durably increased the waste disposal prices it charged hospitals and clinics in Corsica between 2011 and 2015 without any objective justification. Although the amount of the fine is relatively small, the FCA considered that the practices at stake were particularly serious. Sanicorse’s behaviour aimed at preventing the development of competition and impacted healthcare establishments that are legally obliged to manage infectious medical waste under strict conditions and that, for some of them, experienced financial difficulties. This is only the second time that the FCA has imposed a fine for an exploitative abuse of dominance through excessive prices. The FCA’s decision clearly follows the recent renewed interest of European competition authorities for excessive pricing.

In Satellite TV Decoders, the FCA closed the abuse of dominance proceedings opened against French pay-TV operator Groupe Canal Plus (GCP) following a complaint of a third-party satellite decoder manufacturer, by making commitments offered by GCP binding. Specifically, GCP committed to allow its subscribers to freely use third-party decoders in order to watch Canal+ programmes. Owing to piracy concerns, GCP had decided to terminate its ‘Canal Ready’ partnerships with third-party satellite decoder manufacturers. However, the FCA found that this decision was likely to exclude decoder manufacturers from the market and to deprive consumers from having the option to choose between different decoders. In light of these concerns, GCP essentially agreed to allow third-party decoder manufacturers to manufacture and distribute decoders compatible with its satellite programs, provided these decoders include a software access module called ‘myCanal’ (that users can download) designed, monitored and updated directly by GCP. The FCA notably considered that such commitments answered GCP’s piracy concerns while providing an alternative offer to GCP decoders.

In Vendée Sea Crossings, the FCA ended a 17-year abuse of dominance saga involving a public provider of sea transport services, the Régie départementale des passages d’eau de la Vendée (RDPEV). The RDPEV is a state-owned entity operating for the whole year as part of its public service mission maritime transport services between continental France and the Île d’Yeu in the Vendée region (western France) to the benefit of the local municipality, except during the peak summer season where it offers commercial transport services in competition with private operators. In 2004, the FCA rejected a complaint from a competitor that claimed that the RDPEV abused its dominant position by offering commercial transport services at predatory prices. However, the FCA’s decision was ultimately annulled by the Paris Court of Appeal in 2012 (after several proceedings before the French jurisdictions, including two rulings of the Paris Court of Appeal and two annulment decisions of the French Supreme Court), notably on the ground that the FCA did not correctly define the relevant costs.

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10 FCA Decision No. 18-D-14; see footnote 4.
11 FCA Decision No. 18-D-07; see footnote 6.
12 FCA Decision No. 04-D-79 of 23 December 2004, relating to practices implemented by the RDPEV.
13 In a first ruling of 28 June 2005, the Paris Court of Appeal dismissed the predatory pricing claim made by the same competitor, confirming, in particular, the scope of the relevant costs to be taken into account in determining the incremental costs (Paris Court of Appeal, 28 June 2005, Vedettes Vendéennes). The French Supreme Court, in June 2008, held, however, that the Court of Appeal should have examined whether the RDPEV could have avoided the costs linked with the operation of its summer fleet in order to carry out its public service mission (French Supreme Court, 17 June 2008, No.05-17.566). The case was thereby referred back to the Court of Appeal. Again in June 2009, the Court of Appeal confirmed the 2004 FCA decision by ruling that the RDPEV had not abused its dominant position since the traditional
to determine the existence of predatory prices (i.e., whether the common costs incurred for RDPEV’s public service mission should be taken into account). In 2018, following a new investigation, the FCA again rejected the predatory pricing allegations. After precisely defining incremental costs attributable to its commercial activity carried out during the peak summer season, the FCA found that the RDPEV’s profits resulting from this commercial activity actually exceeded its average incremental costs.

Finally, in IT Maintenance, the FCA rejected a third-party maintainer’s claim that IBM, HP and Oracle each abused their individual dominant position on the market for the sale of firmware updates by implementing a global strategy to exclude third-party maintainers from the downstream markets for the maintenance of server and storage systems by restricting access to firmware updates that are necessary for maintenance services. The FCA found that the complainant, Econocom, had failed to provide evidence of any abuse of market power for any of the possible commercial relationships corresponding to the sale of maintenance services. First, in all cases where the maintenance contracts are purchased alongside the server or storage system, the FCA found that the secondary maintenance market could not be distinguished from the primary hardware market and that any risk of abuse of dominance regarding maintenance had therefore to be excluded. Second, where customers purchase maintenance solutions for mature systems, the FCA noted that the access to firmware updates is rarely required – or not required at all – since the hardware and software are stabilised and manufacturers offer long-term maintenance contracts that enable customers to cover the entire life-time of the server or storage system from the moment of the purchase of the system. Third, where customers issue tender offers for multi-brand maintenance contracts, the FCA considered that server manufacturers effectively give access to their firmware updates – including to third-party maintainers, such as the complainant – and do not prevent competitors from bidding. Finally, the FCA acknowledged that manufacturers were under no obligation to supply firmware updates for free, and that it was legitimate for suppliers to monetise access to firmware updates given that such updates necessitate development costs and contain software innovation.

III MARKET DEFINITION AND MARKET POWER

Under French law, as under EU law, regulators and judges must typically start their analysis by defining the relevant markets where the alleged practices took place. They then analyse whether a situation of dominance (single or collective dominance) or of ‘economic dependence’ can be established in the relevant market before assessing the existence of an abuse.

The predatory pricing test could not be applied to the allegedly infringing company because of its public service mission (Paris Court of Appeal, 9 June 2009, Vedettes Vendéennes). The French Supreme Court, in July 2010, overruled the Court of Appeal and held that the standard competition law test for predatory pricing should be applied in the present case since the RDPEV, alongside its public service mission, also carries out competitive activities (French Supreme Court, 13 July 2010, No.09-67.439). The Court of Appeal, to which the case was then referred, ultimately overturned the 2004 FCA decision (Paris Court of Appeal, 20 December 2012, Vedettes Vendéennes).

14 FCA Decision No. 18-D-10; see footnote 6.
Market definition

The FCA mostly relies on qualitative criteria, although it may also rely on an econometric analysis to define relevant markets. To assess demand-side substitutability, the FCA takes into account the nature and use of a product, the price differences between similar products, consumer preferences, the legal environment, the brand image of the products and the distribution channels. For instance, in Termite Traps, the FCA adopted a narrow market definition including termite traps soaked with a biocide called hexaflumuron in light of the specific characteristics of biocide termite traps compared with other chemical solutions (in terms of use, objective and impact on termites) and the fact that the active biocide substance hexaflumuron was the only authorised and effective product to fight termites in Réunion Island. If the data are available, the FCA may also use quantitative techniques such as cross-elasticity of demand to delineate product markets. The FCA recently recalled that complainants must bring forward sufficient elements as regards the proposed market definition to allow the FCA to assess the degree of substitutability between different types of products and services. In situations where there are complementary products (e.g., hardware and consumables or maintenance services), the FCA determines, based on a combination of qualitative and quantitative criteria, whether a single market exists for both or whether the products form distinct product markets. In Nespresso, the FCA defined a primary market for espresso pod coffee machines, and a distinct secondary market composed only of coffee capsules compatible with Nespresso coffee machines. The FCA found that espresso pod coffee machines and coffee capsules did not belong to the same product market because coffee machines and coffee capsules are not necessarily bought simultaneously or at the same shops, and are not manufactured and marketed by the same firms. In addition, a Nespresso internal document considered that the two products were separate. The FCA also found that the secondary market should be narrowly defined as only including coffee capsules compatible with Nespresso machines because users of Nespresso machines were not in a position to use any other kind of capsule. On the contrary, in Photocopiers, pursuant to the Pelikan v. Kyocera EU case law, the FCA refused to define a separate secondary market for the maintenance of photocopiers because, when buying photocopiers, purchasers also take into account the price of maintenance services. The FCA also found that the intense competition at the primary level and the short life cycle of photocopiers (three to five years) exerted a sufficient competitive constraint on the conditions of maintenance services at the secondary level. The FCA applied the same reasoning in IT Maintenance where it refused to identify a secondary maintenance market in all cases where maintenance contracts are purchased.

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15 FCA Decision No. 18-D-03; see footnote 3.
16 FCA Decisions Nos. 18-D-20 (see footnote 5) and 19-D-03 (see footnote 7).
17 FCA Decision No. 14-D-09 of 4 September 2014 concerning practices in the espresso coffee machines sector.
18 FCA Decision No. 16-D-29 of 19 December 2016 concerning practices implemented in the after-sales market of photocopiers.
19 European Commission, Case No. IV/34.330 of 22 September 1995. According to this case law, any dominant position on the secondary market for the sale of consumables or services of an operator active on the market for primary goods may be ruled out if adequate competition is shown to exist in the primary market and if the primary and secondary markets are closely associated in the eyes of customers at the time of their purchasing decision.
20 See footnote 14.
alongside a server or storage system, given that customers take into account maintenance conditions when purchasing a server or a storage system and the primary market for servers and storage systems is very competitive.

Supply-side substitutability also constitutes a relevant criterion for market definition. In *Mobile Telephony*,21 the FCA found that each operator held a monopoly in the wholesale market for the termination of voice calls on its own network because of, *inter alia*, the lack of supply-side substitutability, as only the terminating operator is capable of localising the recipient of the call. The Court of Appeal followed the same reasoning.22 In *Sanicorse*,23 the FCA distinguished waste collection services and waste disposal services as these two types of services are not provided by the same suppliers and are invoiced separately.

As regards the geographic dimension of the market, the FCA typically determines the area where the conditions of competition are homogeneous. The FCA also analyses, for example, the applicable legal framework, transportation costs, logistical constraints and the way tenders are structured to delineate geographic markets. In *Termiti Traps*,24 the insular nature of the department of Réunion Island led the FCA to limit the relevant market to that department alone. In *Sanicorse*,25 the FCA found that the infectious medical waste treatment market was limited to the Corsican territory, as transportation costs are high, Corsican healthcare establishments are legally required to manage infectious medical waste in Corsica and none of the waste management companies active in mainland France had participated in a call for tenders in Corsica. The FCA also uses a small but significant and non-transitory increase in price test approach (i.e., the relevant geographic market is defined as the area in which a company can use its market power or monopoly power to, for example, raise prices profitably without being constrained by other players located in other areas or from other product lines).26 In *Online Advertising*,27 the FCA also recalled that the existence of cultural and linguistic barriers can be taken into account to determine the geographic scope of a relevant market, and in that case, found that the search-related online advertising market had a national dimension.

### ii Single dominance

Dominance is achieved when a company can determine its pricing policy in the relevant market independently from its competitors and customers.28 The FCA typically considers that market shares above 50 per cent are a strong indicator of market power.

To establish single dominance, the FCA also examines the following criteria in addition to market shares:

- **a** the countervailing market power of competitors;
- **b** the intensity of competition on the market;
- **c** the existence of potential new entrants; and

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21 FCA Decision No. 12-D-24 of 13 December 2012 concerning practices in the mobile telephony sector.
23 See footnote 9.
24 See footnote 15.
25 See footnote 9.
27 FCA Decision No. 18-D-13; see footnote 5.
28 FCA Decision No. 04-D-48 of 14 October 2004 concerning practices implemented by France Telecom, SFR Cegetel and Bouygues Telecom.
the specific advantages of the leading firm (e.g., brands, organisation, better products or services).

In *Pet Food*, Royal Canin, which held a market share limited to 40 per cent, was considered to be a dominant player, because the second and third-largest competitors respectively held a 12 and 7 per cent market share; Royal Canin had a very good brand image bolstered by high advertising expenses and regular contact with prescribers; and the relevant market was characterised by high barriers to entry. In *Satellite TV Decoders*, the FCA considered that despite the recent evolutions of the distribution of linear and catch-up pay TV services that led to the deterioration of GCP’s market position over the years, GCP still held a market share of 70 to 80 per cent in value and of 50 to 60 per cent in volume, which is significantly higher than that of its competitors.

In *Termite Traps*, the FCA also essentially relied on Emeraude’s very high market share (more than 80 per cent) to find that the operator was dominant in the market for the distribution of termite traps with hexaflumuron biocide.

Finally, in *Sanicorse*, the FCA relied on evidence gathered during its investigation to conclude that Sanicorse held a *de facto* monopoly on the infectious medical waste treatment market in Corsica since 1997, and considered that the existence of significant barriers to entry (in particular, owing to the substantial investments necessary to comply with legal standards and to develop a logistic network adapted to the island) made potential entry by new operators difficult.

**iii Collective dominance**

Collective dominance may result from structural links between undertakings, whether capitalistic or contractual, from the market structure, or from both. In the absence of structural links, the FCA applies the cumulative *Airtours* criteria (i.e., oligopolistic market, significant market transparency, possibility to engage in retaliation and absence of countervailing power from the fringe players).

In *Saint-Pierre-et-Miquelon*, the FCA imposed a total fine of €381,400 on companies active in the aggregates market in the archipelago of Saint Pierre and Miquelon for anticompetitive agreement and abuse of a collective dominant position. In particular, the FCA found that four undertakings held a collective dominant position as:

- they together held a market share in excess of 80 per cent in the relevant markets;
- they had structural links through the operation of a common quarry and had adopted a common strategy;
- deviation would be unlikely given their historical links;
- entry barriers were high; and
- there were no alternative competitors.

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29 FCA Decision No. 05-D-32 of 22 June 2005 concerning practices in the pet food sector.
30 See footnote 10.
31 See footnote 15.
32 See footnote 9.
34 FCA Decision No. 12-D-06 of 26 January 2012 concerning practices implemented in the civil engineering sector in Saint-Pierre-et-Miquelon.
35 In addition to FCA Decision No. 12-D-06 (see footnote 34), see FCA Decisions Nos. 05-D-49 of 28 July 2005 concerning practices in the sector of hiring maintenance for postage machines; and
Although collective dominance cases are rare, the FCA's decisional practice shows that it tends to resort to collective dominance when it lacks evidence to support a claim of explicit collusion.

iv Economic dependence

Economic dependence is a specific infringement under French competition law, which has no equivalent in EU competition law. Pursuant to Article L420-2(2) of the Commercial Code, abuse of economic dependence of a customer or supplier is prohibited when it is likely to affect competition on the market. This provision was originally drafted to protect suppliers from large retail chains (i.e., supermarkets), but is rarely applied in practice.

According to established case law, economic dependence arises when a company is forced into a commercial relationship with another company because it cannot purchase substitutable products under similar terms and conditions, or sell its products to other customers. The FCA examines the following cumulative criteria:

- the commercial partner’s brand notoriety;
- the commercial partner's market share;
- the commercial partner's share in the turnover of the dependent company; and
- the possibility for the dependent company to find an alternative commercial partner.

In 2018, in *Take-away and Home Delivery of Pizzas I*, the FCA rejected, for lack of evidence, a complaint from franchised undertakings in the pizza sales sector, which claimed to be victims of an abuse of economic dependence by Domino's Pizza, after the latter acquired the franchisees' network, Pizza Sprint. The franchisees claimed that they were forced to switch from their previous network's brand to Domino's Pizza's one, which is allegedly less advantageous. The FCA found that economic dependence could not be established in practice, either at the individual level (for each franchisee) or at the collective level. Specifically, the FCA found that the franchisees had alternative solutions since they could either adopt the new brand or continue to operate under the original conditions until their contracts expired.

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36 The FCA also found in some circumstances that companies held a collective dominant position without finding any abuse (see, for instance, FCA Decisions No. 00-D-83 of 13 February 2001 concerning practices implemented during the 1998 Football World Cup, upheld by the Paris Court of Appeal on 30 October 2001 and by the French Supreme Court on 8 July 2003; No. 01-17.015; No. 06-D-02 of 20 February 2006 concerning practices in the roadworks sector for the manufacture of bituminous asphalt in the Ardennes department; and No. 06-D-18 of 28 June 2006 concerning practices implemented in the film advertising sector).

37 Paris Court of Appeal, 4 May 2004, *CNPA v. Honda Motor ea*. See also FCA Decisions No. 14-D-07 of 23 July 2014 on practices implemented in the distribution of brown goods, upheld by the Paris Court of Appeal on 3 December 2015; No. 10-D-08 of 3 March 2010 on practices implemented by Carrefour in the general food retail sector; No. 04-D-26 of 30 June 2004 on practices implemented by Champagne Ardenne, upheld by the Paris Court of Appeal on 25 January 2005 and by the French Supreme Court on 28 February 2006; No. 05-12.138; No. 02-D-77 of 27 December 2002 relating to a complaint from Daniel Grenin SA; and No. 01-D-49 of 31 August 2001 on a complaint and a request for interim measures from Concurrence against Sony.

38 FCA Decision No. 18-D-22; see footnote 5.
IV ABUSE

i Overview

Article L420-2 of the Commercial Code specifically mentions a number of abuses, including refusal to supply or deal, tying, or discriminatory practices. However, the list is not exhaustive.

The FCA can find that a company’s behaviour is abusive by object or by effect. In past cases, the FCA found that abusive conduct could be established even in the absence of an actual effect on the market. Attempts to abuse a dominant position may, thus, in certain cases also be challenged. In SNCM,

iii Exclusionary abuses

Predatory pricing

Predatory pricing is a pricing strategy whereby a dominant firm offers below-cost prices, thereby incurring losses or forgoing profits in the short term in order to eliminate actual or potential competition. The FCA relies on the EU Akzo test and considers that the following two situations create a presumption of predatory pricing:

a when the dominant company’s prices are lower than the average variable costs (unless a company can convincingly explain that its behaviour did not result from a predatory strategy aimed at eliminating competitors); or

b when the company’s prices are between average variable costs and average total costs, and there is clear and convincing evidence that its behaviour is part of a predatory strategy aimed at eliminating competitors.

French authorities use a slightly stricter, economics-based, test compared to the European Commission’s approach: in particular, the FCA has to show that there is a realistic possibility of the dominant player recouping its losses. This may explain why, to date, there has been no successful precedent of predatory pricing where the FCA imposed a fine. While

39 Paris Court of Appeal, 9 March 2010, SNCM.
40 See the European Union chapter.
41 In 2007, the FCA imposed a fine of €10 million on GSK for having applied predatory prices in relation to an injectable antibiotic called cefuroxime sodium sold by GSK under the name Zinnat in order to appear as an aggressive player and deter generic manufacturers from entering the market on which GSK held a dominant position through the sale of its injectable antiviral Zovirax (FCA Decision No. 07-D-09 of 14 March 2007 on practices implemented by GSK). However, this decision was annulled by the Paris Court of Appeal on the ground that the FCA had not established the necessary link between GSK’s behaviour on the non-dominated market for cefuroxime sodium and its dominant position on the injectable Zovirax market (Paris Court of Appeal, 8 April 2008, GSK). The French Supreme Court upheld the position of the Court of Appeal by noting that the assumption under which there is a link between the anticompetitive practice and the dominated market should not come into play when the prohibited practice is implemented.
predatory pricing concerns were raised by the FCA in several cases, the FCA’s investigations were ultimately closed, or generally ended with injunctions or commitments taken by the dominant undertaking to remedy those concerns. In SNCF, the FCA held that the French rail operator pursued price-based exclusionary practices for its freight services activity by full-trainload because SNCF’s prices, although higher than direct average variable costs, were lower than the costs that would be avoided over a three-year period if SNCF terminated its freight services activity by full-trainload. Although SNCF’s pricing policy was not considered predatory, as the losses incurred by SNCF were sustainable and predated the opening-up of the sector to competition, the FCA nevertheless considered that it was abusive. The Paris Court of Appeal, however, overturned this part of the decision, considering that charging prices superior to average variable costs but inferior to average total costs could only be considered abusive based on evidence that the dominant firm had made specific plans to exclude competitors from the market. The Court found that the FCA had not sufficiently established the existence of an exclusionary strategy. However, in a second judgment after the case was referred back by the Supreme Court, the Paris Court of Appeal ultimately confirmed SNCF’s abusive pricing policy, noting in particular that the FCA had applied a relevant cost test and had characterised an eviction strategy.

In Bottin Cartographes, following an opinion by the FCA, the Paris Court of Appeal dismissed a predatory pricing claim against Google. Bottin Cartographes, a competitor of Google in online mapping services, claimed that offering mapping services free of charge constituted an abusive predatory strategy. In its opinion, later confirmed by the Court, the FCA reaffirmed that for multi-product companies, the predation test to be conducted is a modified Akzo test, where only the incremental cost attributable to a given product should be taken into account (to the exclusion of common costs). In practice, average variable costs are to be replaced by average incremental costs, and average total costs by long-run average incremental costs. The FCA found that the relevant costs were the costs specifically associated with the allegedly abusive activity to the exclusion of common costs supported by Google in its capacity as a multi-service firm (in particular, the costs associated with the acquisition of a market other than the dominated market (French Supreme Court, 17 March 2009, No. 08-14.503).

In this case, the French Supreme Court recalled that there must be ‘particular circumstances’ establishing (a) that it was to strengthen its dominant position in a market that a company decided to implement a prohibited abusive practice in another market in which it has no dominant position; or (b) that the two concerned markets are so closely related that a company is placed in a situation comparable to that of holding a dominant position in the markets in question as a whole, which was not the case here.

See, in particular, FCA Decisions No. 17-D-16 of 7 September 2017 concerning practices implemented by Engie in the energy sector; No. 17-D-26 of 21 December 2017 concerning practices implemented in the collection and recycling of non-hazardous office waste; and No. 17-D-09 1 June 2017 concerning practices implemented by the National Institute of Preventive Archaeological Surveys in the preventive archaeology sector.

FCA Decision No. 12-D-25 of 18 December 2012 concerning practices implemented in the railway freight sector. A fine was imposed on SNCF but not in relation to the dominant company’s pricing practices.

Paris Court of Appeal, 6 November 2014, SNCF.


Paris Court of Appeal, 20 December 2018, SNCF. The Court, however, annulled one of the three injunctions ordered by the FCA upon the SNCF. An appeal is currently pending before the French Supreme Court.


of the underlying maps were not relevant because Google would bear them in any event for its search engine activity). Conversely, the FCA and later the Court confirmed that where a product is offered in different versions (one basic, free version, and one premium, paid-for version), the revenues to be taken into account are those associated with all versions of the product. On this basis, the FCA and the Court of Appeal found that Google’s revenues exceeded the total relevant costs, and even if Google’s revenues could have been exceptionally lower than the corresponding average total costs, there was no evidence of a predatory strategy. On this last point, the FCA and the Court emphasised that it would have been impossible for Google to recoup the potential losses, and as such no predatory strategy could be found.

More recently, in *Vendée Sea Crossings*, the FCA recalled that, when implementing the *Akzo* test, and save for exceptional circumstances, the costs to be taken into account are, in principle, those that are actually incurred by the dominant undertaking itself, not those incurred by potential or actual competitors of the dominant undertaking. Following the Paris Court of Appeal’s ruling of 2012, the FCA clearly identified incremental costs incurred by the RDPEV and compared the RDPEV’s profits resulting from its commercial activity during the peak summer season with its average incremental costs, which correspond to the costs that could have been avoided had the transporter not operated any competitive activity during the peak summer season (including, for example, salaries, fuel and other costs related to marketing services, but excluding the owner’s insurance premiums and the major repairs). The FCA concluded that the transporter’s profits resulting from its commercial activity during the peak summer season actually exceeded its incremental costs. In any event, the FCA noted that RDPEV’s pricing practice did not lead to any foreclosure effects on competitors, as one of its competitors was still active and had actually opened a new transport line since 2001, while the two other competitors exited the market almost 15 years after the practices at stake.

**Leveraging practices**

Leveraging practices consist of a dominant firm taking advantage of its superior market position in a ‘dominated’ market to expand its position in another related market.

In *PMU*, the FCA expressed concerns that the French legal monopolist for offline horse race betting leveraged its position to exclude competitors from the competitive market for online horse race betting. In particular, the FCA was concerned that by pooling together its online and offline bets, PMU could attract more bettors, discourage potential new entrants and, in time, drive competitors out of the market, since a greater pool of bets allows for more complex and diversified bets. The winnings on successful bets can also be significantly higher because there would be a greater pool of debts. The FCA accepted commitments from PMU to stop pooling its online and offline bets, and that online and offline activities would be kept separate. Although this could be interpreted as coming close to ‘an efficiency offence’, because horse racing bettors precisely look for the highest possible winnings (as in any lottery), the FCA justified its preliminary findings by stating that its decision was consistent with the public policy objective of limiting the risk of addiction to online betting.

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49 See footnote 11.
50 See, in this regard, Paris Court of Appeal, 12 October 2017, *Société TDF*.
51 Paris Court of Appeal, 20 December 2012, *Vedettes vendéennes*.
52 FCA Decision No. 14-D-04 of 25 February 2014 concerning certain practices in the online horse race betting sector.
In *Passenger Transport*, the FCA accepted the commitments offered by SNCF to prevent its subsidiary Keolis from leveraging SNCF’s monopoly in the railway passenger transport market into the competitive market for the urban transport of passengers (i.e., bus, metro, tram). More specifically, the FCA was concerned that Keolis could rely on its parent company’s railway expertise to submit bids that are not replicable by competitors for the supply of advice and technical assistance to urban transport operators. To alleviate the FCA’s concerns, SNCF committed, in particular, to the fact that only its subsidiaries that are fully independent from its railway passenger transport activities would respond to calls for tender regarding technical assistance to urban transport operators.

In *Engie*, the FCA found that Engie abused its dominant position by leveraging its position as the incumbent gas operator in order to obtain more contracts in the competitive gas and electricity markets. In particular, the FCA found that Engie used its historical customer database for regulated tariffs for gas to convert customers to market-based contracts for gas and electricity; used the business infrastructure and resources developed for its regulated tariff activity in order to offer new market-based contracts and win former customers back; and provided misleading sales arguments according to which Engie guaranteed a better security of gas supply than its competitors. The FCA considered that these practices were particularly harmful to competition as they were implemented at a time when the market was opening up to competition. Engie did not challenge the objections and settled the case against a €100 million fine.

In *Funeral Services in the Ain Department*, the FCA found that the funeral company Comtet, which was at the time running the only crematorium in Viriat, a town in the east of France, by virtue of a public service delegation agreement, had abused its dominant position by generating confusion about, on the one hand, its public service cremation mission, and, on the other, its funeral product and service supply activities for which it competes with other funeral operators. In particular, the FCA took the view that advertising materials used by Comtet to promote its commercial services while also referring to its role as the Viriat crematorium sole manager aimed at leading grieving families to believe that Comtet was the only provider in the Ain department able to organise funerals that included a cremation service.

**Margin squeeze**

Margin squeeze is a strategy whereby the dominant vertically integrated firm applies excessive prices on upstream products or services that make downstream customers’ or rivals’ activities unprofitable. French courts consider that margin squeezes restrict competition only if a potentially as-efficient competitor would be unable to enter the downstream market without incurring losses. Such restriction of competition may be presumed only when the products or services supplied to its competitors by the dominant firm are indispensable to enable them to compete on the downstream market.

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53 FCA Decision No. 15-D-05 of 15 April 2015 concerning certain practices in the passenger urban transport sector.
54 FCA Decision No. 17-D-06; see footnote 8.
55 FCA Decision No. 17-D-13; see footnote 8.
56 French Supreme Court, 3 March 2009, No. 08-14.435.
In *Eiffel Tower*,\(^{57}\) the FCA found that TDF had implemented a margin-squeeze strategy in the market for the renewal of the national occupancy contract for audiovisual and radio broadcast from the Eiffel Tower site. Among other practices, the FCA found that the offers made by TDF to alternative operators for hosting services (which were indispensable to compete on the downstream market for the broadcasting of radio programmes from the Eiffel Tower) constituted a margin squeeze that did not allow alternative operators as efficient as TDF to submit competitive offers for the operation of the Eiffel Tower facilities. The FCA imposed a fine of €660,000 on TDF on these grounds.

**Exclusivity clauses**

Exclusive dealings entered into by a dominant firm do not constitute a *per se* abuse under French law, provided that the dominant firm’s behaviour does not result in additional foreclosure of its competitors. To assess whether exclusivity clauses may restrict competition, the FCA examines the clauses’ scope and duration, the existence of a technical justification and the economic consideration granted to the customer.\(^{58}\)

In *Mobile Telephony Equipment*,\(^{59}\) the FCA was concerned about the duration (20 years) and the restrictive early termination terms of the agreements between mobile operators and TDF for the hosting of their antennae (in particular, early termination was possible only for very few sites each year), which created *de facto* exclusivity. To address these concerns, TDF offered commitments designed to allow mobile operators to obtain better conditions for the hosting of their antennae and in cases where they were to switch to alternative operators. TDF committed in particular to limit the duration of new hosting agreements to 10 years, to cap the penalties generated by early termination, and to increase the number of sites (or quota) for which early termination was possible.

In *Sugar Beet*,\(^{60}\) Saint-Louis Sucre claimed that Tereos, the number one sugar producer in the French market (and owner of the Beghin Say brand), abused its dominant position by entering into long-term exclusive contracts with sugar beet growers in the Picardy region, which represents about 40 per cent of French sugar beet production. The FCA found that the contractual terms offered by Tereos raised a number of concerns, especially in light of the opening up to competition of the French sugar procurement market following the abolition of sugar production quotas in October 2017:

\(a\) Tereos could potentially lock in all its growers until 2022 as it had introduced a five-year exclusivity commitment for producers willing to increase their beet production by 20 per cent, in addition to the 10-year commitment initially undertaken by Tereos’ growers to cover usual beet tonnage;

\(b\) the articles of association of Tereos’ cooperative did not expressly indicate that cooperative partners could supply part of their beet production to other sugar groups, such as Saint-Louis Sucre; and

\(^{57}\) FCA Decision No. 15-D-10 of 11 June 2015 concerning practices implemented by TDF on the Eiffel Tower site, upheld by the Paris Court of Appeal on 12 October 2017 (an appeal is pending before the French Supreme Court).

\(^{58}\) FCA Decision No. 08-D-16 of 3 July 2000 concerning practices in the ID photos sector.

\(^{59}\) FCA Decision No 15-D-09 of 4 June 2015 on practices implemented in the mobile telephony equipment sector.

\(^{60}\) FCA Decision No. 17-D-12 of 26 July 2017 on practices implemented in the sugar beet supply sector.
c Tereos had required cooperative partners that wished to leave the cooperative to give a 12-month notice period (instead of three months), making it even more difficult to switch to Tereos’ competitors.

In light of these concerns, Tereos offered a number of commitments that led the FCA to close its investigation.

**Loyalty rebates**

Under French law, loyalty rebates granted by a dominant firm may be considered abusive when a discount tends to remove or restrict a buyer’s freedom to choose its sources of supply absent a legitimate economic *quid pro quo*. The FCA considers that forward-looking quantitative rebates (as opposed to rebates based on historical sales) conditional upon individual orders, volumes or turnover as generally valid, because they tend to reflect efficiency gains and economies of scale. Other forms of loyalty rebates may be considered abusive.

In *DTT Broadcasting*, the FCA found that TDF had abused its dominant position by granting loyalty rebates to channel editors that hired TDF for a substantial share of their broadcasting sites. The FCA found that TDF generally granted rebates only if channel editors assigned TDF at least 70 per cent of their sites, which prevented other competitors from developing their activity, even though they also offered rebates to channel editors.

**Tying and bundling**

Tying and bundling consist of tying or bundling two distinct products that typically belong to two different markets, either by forcing consumers to buy the tied products together or by providing them an incentive to buy the products together. The FCA considers that tying by a dominant firm may be abusive if the following two conditions are met: the tying and tied products are distinct products; and the tying practice is likely to lead to anticompetitive foreclosure.

In *Golf Insurance*, the FCA expressed concerns with respect to the inclusion of insurance products – which are theoretically optional – in the licence delivered by the French Golf Federation. The FCA was particularly concerned that the French Golf Federation used its legal monopoly on the delivery of licences to foreclose its rivals from the golf insurance market through tied selling. To address these concerns, the French Golf Federation accepted giving commitments to prevent tying practices. In 2015, the FCA adopted another decision, finding that these commitments were no longer justified given the developments in the market.

61 FCA Decision No. 04-D-65 of 30 November 2004 concerning practices in the postal services sector. See also FCA Decision No. 05-D-32 (see footnote 29).
62 FCA Decision No. 16-D-11 of 6 June 2016 on practices implemented in the terrestrial television broadcasting sector. The Paris Court of Appeal reduced the amount of the fine on 21 December 2017, considering that the disparagement charge was not established (Paris Court of Appeal, 21 December 2017, *TDF*. An appeal is pending before the French Supreme Court).
63 FCA Decision No. 11-MC-01 of 12 May 2011 concerning practices in the delivery of parcels to collection points sector.
64 FCA Decision No. 12-D-29 of 21 December 2012 concerning practices in the the distribution of insurance products to golfers sector.
65 FCA Decision No. 15-D-16 of 27 November 2016 concerning the revision of the commitments of the French Federation of Golf.
In Nespresso, the FCA accepted commitments addressing its concerns that Nespresso needlessly modified its coffee machines in order to discourage consumers from buying its competitors’ coffee capsules, and falsely implied that only Nespresso coffee capsules were compatible with its own machines, so as to favour tied sales of its own capsules with its Nespresso machines and exclude its competitors’ capsules. Nespresso committed to inform competing manufacturers of Nespresso-compatible coffee capsules of future technical changes in Nespresso machines so that they have time to adapt their own production and their communication towards consumers. Nespresso also committed to stop commenting on its competitors’ capsules.

In Schneider Electric, the FCA was concerned that Schneider Electric had abused its dominant position by refusing to sell a significant number of spare parts necessary for the in-depth maintenance of its electric equipment to third-party maintenance providers unless they agreed to have Schneider Electric’s own employees perform the associated maintenance services. Schneider Electric argued before the FCA that this restriction aimed at ensuring the safety of property and people as well as at protecting its business model, in particular its brand image, know-how and the expertise of its technicians. However, the FCA found that Schneider Electric’s current policy was not necessary to achieve these objectives, as it was likely to constitute an unlawful tied sale by potentially preventing other maintenance providers from carrying out a full range of maintenance services on Schneider Electric’s high voltage and low voltage equipment, which respectively account for around 70 and 60 per cent of equipment sales in France. The FCA found that it was also likely to deprive customers of services that might be cheaper and of higher quality. Schneider Electric offered commitments to address the FCA’s concerns.

Refusal to deal

The concept of refusal to deal is regularly used by the FCA. It covers a broad range of practices, such as the refusal to grant access to an essential facility or network, the refusal to supply products to existing or new customers, and the refusal to license intellectual property rights. The FCA’s test is similar to the test adopted by the European Commission. Refusal to grant access to an essential facility is abusive if the following five conditions are met:

a. the facility belongs to a dominant firm;
b. access to the facility is necessary to compete in a related market;
c. competitors cannot duplicate the facility at reasonable costs;
d. the dominant firm unduly refuses access to the facility (or imposes unduly restrictive conditions); and

e. access to the facility is possible. 68

The same principles apply mutatis mutandis for refusal to supply a product or service. Concerning intellectual property rights, French courts consider that software may constitute an essential facility only if it is proved that the software is indispensable to operate on a market, and a competitor could not develop an alternative software under economically

66 FCA Decision No. 14-D-09; see footnote 17.
67 FCA Decision No. 17-D-21 of 9 November 2017 concerning practices implemented in the medium and low-voltage electrical distribution equipment maintenance sector.
68 FCA Decision No. 03-MC-04 concerning a request for interim measures filed by Messageries Lyonnaises de Presse.

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reasonable conditions (even if such economic conditions were less favourable than those under which the dominant undertaking operates). In practice, the following facilities have been considered essential under French law: transport facilities, the electricity network, the telephone network, and certain databases or software.

In **SNCF**,70 the FCA and the Paris Court of Appeal considered that SNCF abused its dominant position by restricting access to the railway infrastructure:

- delaying the release of information concerning access to freight yards, thereby preventing its competitors from accessing rail capacities essential to their business activity;
- retaining exclusive use of certain railway cars that are used for large tonnage transportation and constitute an essential part of the infrastructure; and
- pursuing a train path overbooking policy that prevented its rivals from participating in certain calls for tenders or honouring certain contracts.

In **Cegedim**,71 the FCA fined Cegedim, a company active both in the provision of healthcare databases and customer relation management (CRM) software for refusing access to its database of medical information to pharmaceutical laboratories that used the CRM software of one of its competitors, Euris. The FCA considered that Cegedim's database was not an essential facility because there were alternative, albeit inferior, rival databases. However, such a refusal to deal nevertheless amounted to an abuse of a dominant position, since Cegedim was found to discriminate against customers using Euris’ CRM software in order to foreclose Euris from the CRM market (the FCA pointed out that the practice had caused Euris to lose 70 per cent of its customers between 2008 and 2012). In 2015, the Paris Court of Appeal upheld the FCA’s decision and considered in particular that the practices implemented by Cegedim had unjustifiably disadvantaged Euris in terms of costs and reputation.72 The French Supreme Court validated the Court’s reasoning.73

**Termination of a contractual relationship**

The termination of on-going commercial relationships may also be sanctioned on the basis of Article L420-2 of the Commercial Code; in particular, in cases of sudden termination of an established commercial relationship, if it has an anticompetitive object or anticompetitive effects, whether actual or potential.74

In **Satellite TV Decoders**,75 the FCA expressed concerns about GCP’s decision to terminate its Canal Ready partnership with third-party decoder manufacturers. Up until July 2014, in order to receive GCP linear programs by satellite, consumers had to use one of the

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69 Paris Court of Appeal, 31 January 2006, NMPP.
70 FCA Decision No. 12-D-25, upheld by the Paris Court of Appeal on 6 November 2014; see footnote 43.
71 FCA Decision No. 14-D-06 of 8 July 2014 concerning practices in the medical information database sector, upheld by the Paris Court of Appeal on 24 September 2015 and by the French Supreme Court on 21 June 2017, No. 15-25.941.
72 Paris Court of Appeal, 24 September 2015, Cegedim.
73 French Supreme Court, 21 June 2017, No. 15-25.941.
74 FCA Decision No. 13-D-07 of 28 February 2013 concerning a complaint filed by E-Kanopi, upheld by the Paris Court of Appeal on 24 June 2014 and by the Supreme Court on 19 January 2016, No. 14-21.670. Absent the demonstration of an anticompetitive object or effect, the sudden termination of a commercial relationship may be sanctioned under commercial law on the basis of Article L442-1 II of the Commercial Code.
75 See footnote 10.

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decoders rented out by GCP or insert a card in a decoder that they could purchase from an authorised third-party decoder manufacturer that had concluded a Canal Ready partnership agreement with GCP (the card-only system). However, in July 2014, GCP decided to put an end to its card-only system and to terminate its Canal Ready partnership agreements owing to content piracy affecting third-party decoders. While the FCA noted that a company, even when it holds a dominant position, is free to modify its strategic model or its business plan as long as these changes do not have an anticompetitive object and can be justified by legitimate reasons, it also clearly stated that a rapid and sudden change can, in some circumstances, amount to an abuse of dominance, depending on the justification brought forward for this decision, the conditions in which it takes place and the effects such decision has on competitors or third parties. In this case, according to the FCA’s preliminary assessment, GCP’s plan necessarily led to the exclusion of third-party decoder manufacturers from the market and could deprive actual and potential consumers from having the option to purchase decoders that were potentially cheaper or offered different features. While taking into account GCP’s piracy concerns, the FCA therefore held that the termination of the card-only system had to be surrounded by appropriate measures to remedy the FCA’s concerns, which led GCP to offer commitments.

**Disparagement**

Under French law, disparagement consists of publicly discrediting an identified competitor or its identified products or services. The FCA considers that disparagement is distinct from criticism as it originates from an economic player seeking to benefit from an unjustified competitive advantage by discrediting its competitor or products, and may constitute an abuse of dominance (when disparagement originates from a dominant player).

In *Sanofi* and *Schering-Plough*, the FCA fined two pharmaceutical companies for disparagement that consisted of widely publicising differences between their originator drug (or the generic manufactured by the producer of the originator drug) and other generic drugs at the time of the entry of the generic drugs into the market. Irrespective of whether such differences were verified or not, the companies could not prove that they had therapeutic consequences. Although neither Sanofi nor Schering-Plough had explicitly presented generic drugs as being inferior, but only pointed at factual differences, the very fact of shedding doubts without scientific supporting evidence was found to be abusive by the FCA. Sanofi was fined €40.6 million and Schering-Plough was fined €15.3 million.

In *Janssen-Cilag*, the FCA imposed a fine of €25 million on Janssen-Cilag for having first prevented and then restricted the development of the generic versions of its Durogesic drug in France, following the expiry of the patent protection for fentanyl. In particular, the FCA found that Janssen-Cilag had submitted legally unfounded arguments to the National Agency for the Safety of Medicines and Health Products (AFSSAPS) aimed at casting doubts

76 FCA Decision No. 13-D-11 of 14 May 2013 concerning practices in the medicinal products sector, upheld by the Paris Court of Appeal on 18 December 2014 and by the French Supreme Court on 18 October 2016, No. 15.10-384.
77 FCA Decision No. 13-D-21 of 18 December 2013 regarding practices implemented in the French market for high-dosage buprenorphine sold in private practices, upheld by the Paris Court of Appeal on 26 March 2015 and by the French Supreme Court on 11 January 2017, No. 15-17.134.
78 FCA Decision No. 17-D-25; see footnote 8.
79 On 1 May 2012, the AFSSAPS became the ANSM.
on the innocuousness and effectiveness of the generic drug. This led the French authority to temporarily refuse to recognise the generic status of Ratiopharm’s fentanyl drug. The AFSSAPS ultimately granted generic status to Ratiopharm’s drug after a delay of more than a year, but added a warning to this authorisation, recommending careful medical supervision of some patients switching from one fentanyl drug to another. In addition, the FCA found that once the authorisation had been granted, Janssen-Cilag started a massive disparagement campaign of the generic drugs among health professionals, using different media and channels, with the aim of discrediting the generic drugs’ reputation by highlighting quantitative, qualitative and size differences from the Durogesic patch. The FCA also considered that Janssen-Cilag distorted the content of the warning issued by the AFSSAPS by providing an inaccurate and incomplete presentation of the risks associated with substitution. The FCA concluded that Janssen-Cilag’s practices constituted a single and continuous infringement that had significant foreclosure effects on competitors by delaying the arrival of generics, and then contributing to their low penetration rate, on a market already characterised by the reluctance of healthcare professionals to prescribe generics.

However, in 2018, the FCA recalled in *IT Maintenance* that commercial brochures and letters sent by server manufacturers to their customers, be they more or less aggressive, in order to put forward their main ‘selling points’ compared with third-party maintainers cannot be considered as a disparagement practice. The FCA noted that the same conclusion applies to confidential letters exchanged between a customer and its suppliers competing for a contract: at most, excessive statements contained in these confidential communications could amount to unfair business practices, not to an abuse of dominance.

**Most-favoured nation clauses**

In *Booking.com*, the FCA accepted commitments addressing its preliminary concerns that the most-favoured nation (MFN) clauses imposed by Booking.com could have exclusionary effects. MFN clauses prevented hotels from offering to rival reservation platforms or other distribution channels (including through their own sales channels) lower prices or better commercial conditions (i.e., availability, services) than to Booking.com. In particular, the FCA considered that these clauses could prevent smaller platforms and new entrants from gaining market shares by offering lower prices or better services to customers, including by offering lower commission rates to hotels.

**Exploitative abuses**

Exploitative abuses consist of a dominant firm imposing ‘unbalanced’ conditions on its trading partners, and, in particular, imposing excessively high prices. The imposition of high prices by a dominant undertaking might infringe Article L420-2 of the Commercial Code when prices charged are excessive because they have no reasonable relation to the economic value of the product or service supplied; in particular, where the difference between the costs actually incurred and the price actually charged is excessive and where the price imposed is either unfair in itself or when compared with competing products. Relying on EU case law,
the FCA recently recalled that if the price difference is significant and persistent, it will be indicative of an abuse. It is then for the dominant undertaking to show that its prices are fair by reference to objective factors.83

In 2009, the FCA fined Orange in the *Telecommunication in Overseas Départements* case.84 In this case, the FCA investigated the rates applied by Orange for connection services between Réunion Island and the mainland, and found that ‘there existed a clear disproportion between these rates and the value of the services’, which resulted in the imposition of excessive pricing on consumers (residential and professional), and hindered the development of the high-speed market on Réunion Island, and the development of Orange’s competitors.

More recently, in 2018, the FCA fined Sanicorse, the only infectious waste treatment company in Corsica, for having abused its dominant position by imposing excessively high price increases on healthcare establishments.85 While recalling that the role of competition authorities is to protect the competitive conditions that allow market players to freely determine market prices and not to be a price regulator, the FCA also noted that it can intervene to assess and sanction a pricing policy when a dominant company implements an exploitative strategy on captive clients, taking into consideration the market conditions and the economic and legal context in which this pricing policy takes place. The FCA found that Sanicorse implemented significant price increases for more than four years and without any prior notice. Sanicorse also threatened to terminate its contracts with healthcare establishments or refrain from bidding in tenders, leaving its customers with no choice but to accept its new pricing conditions. The average price imposed by Sanicorse increased by around 60 per cent over the period and some hospitals reported individual price increases of up to 194 per cent. The FCA found that such price increases could not be justified by Sanicorse’s increased costs and additional investments.

In *Petanque Balls*,86 the FCA imposed a fine of €320,000 on Obut for imposing resale prices on some of its distributors. The FCA considered that Obut was in a dominant position in the market for the production of petanque balls for competitions and abused its dominant position in the market for the distribution of petanque balls, in which Obut was also active, by imposing resale prices so as to reduce price competition with other retailers. In addition, Obut’s sales forces monitored compliance with the suggested list prices, and threatened distributors with delayed deliveries, blocked orders and delisting in cases of deviation. In its decision, the FCA noted that such practices are also prohibited under Article L420-1 of the Commercial Code, but decided to rely on Article L420-2 of the Commercial Code.

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83 FCA Decision No. 18-D-17 (see footnote 9), referring to CJEU, Case C-177/16, *Autortiesibu un Komunikācijas Konsultāciju Aģentūrā*, judgment of 14 September 2017. See also the European Union chapter.

84 FCA Decision No. 09-D-24 of 28 July 2009 concerning practices implemented in the telecommunications sector in overseas departments.

85 See footnote 9.

86 FCA Decision No. 17-D-02; see footnote 8.
iv Discrimination

Abusive discrimination basically consists of the application by a dominant company of dissimilar conditions to trading partners in equivalent transactions, thereby placing certain trading partners at a competitive disadvantage. The FCA considers that discriminatory practices may restrict competition when the dominant firm competes on the downstream market and discriminates against rivals (first-line discrimination); or the dominant firm is not active downstream but discriminates between its customers, thereby altering competition between them (secondary-line discrimination). While first-line discrimination is an exclusionary abuse, second-line discrimination is considered by the FCA as an exploitative abuse (although it results in the exclusion of a trading partner rather than in any exploitation by the dominant firm).

In Electronic Communications, the FCA found that Orange gave access to more comprehensive information regarding the operation of the copper local loop to its own commercial entities than to third-party operators. The FCA considered that the (first-line) discrimination in the access to information had artificially strengthened Orange’s dominant position, and affected third-party operators by making them appear less reactive and less informed than Orange.

In 2018, in Photovoltaic Electricity, the FCA dismissed a first-line discriminatory claim concerning favouritism practices carried out by EDF in favour of its subsidiaries (Enedis and RTE) that were likely to unduly foreclose downstream competitors. The core of the allegations was based on EDF’s discriminatory treatment with regard to the filing date of applications for connection to the photovoltaic electricity grid. Relying on the EU MEO precedent, the FCA pointed out that it is necessary, based on concrete market conditions, economic and legal context and having regard to the circumstances of the case, to demonstrate that the discriminatory conduct in question is likely to produce a competitive disadvantage through a distortion of competition among business partners. The FCA also recalled that setting a de minimis threshold in order to determine the existence of an abuse of dominance was not justified, but specified, however, that for discrimination to be likely to create a competitive disadvantage, it must affect the interests of the operator concerned. Therefore, in Photovoltaic Electricity, the FCA held that EDF’s behaviour, though it may

87 FCA Decisions No. 06-D-23 of 21 July 2006 concerning practices in the map editing and tourist information sector; No.o. 07-D-28 of 13 September 2008 concerning practices implemented by the Havre Port authority; and No. 09-D-02 of 20 January 2009 concerning practices in the press distribution sector.
88 FCA Decision No. 15-D-20 of 17 December 2015 concerning practices implemented in the telecommunications services sector.
89 FCA Decision No. 18-D-11; see footnote 6.
90 This discriminatory treatment included delays in the connection and commissioning of competitors’ production units, delaying strategies and backdating strategies for accepting technical and financial proposals necessary for connection to the grid, which allegedly benefited the production units proposed by EDF and its subsidiaries.
91 CJEU judgment, Case C-525/16, MEO – Serviços de Comunicações e Multimédia v. Autoridade de la Concorrência of 25 May 2018.
92 CJEU judgment, Case C-23/14, Post Danmark of 6 October 2015.
have caused an individual prejudice to Enedis and RTE’s business partners, did not tend, having regard to the circumstances of the case, to lead to a distortion of competition between undertakings on the downstream market.

In NavX, the FCA took a strict approach towards secondary-line discrimination, suggesting that dominant firms have an obligation to treat all of their customers equally, even when the dominant undertaking is not active in the downstream market. In particular, the FCA found that the rules defined by Google for the operation of its AdWords (now Google Ads) advertising platform should be applied to all advertisers in an ‘objective, transparent and non-discriminatory manner’, and that discriminatory treatments could be considered abusive. The FCA ultimately accepted commitments from Google to clarify certain rules applicable to advertisers; in particular, in respect of the conditions of suspension of their AdWords account.

V REMEDIES AND SANCTIONS

Article L464-2 of the Commercial Code provides that the FCA can impose fines on infringing undertakings of up to 10 per cent of the firms’ worldwide turnover. The FCA can also order undertakings to terminate anticompetitive practices within a specified time limit, impose remedies, or both. As an alternative to sanctions, the FCA may accept commitments offered by the dominant firms being investigated in response to the FCA’s competition concerns. In the event that an undertaking does not comply with the FCA’s decision to terminate anticompetitive practices or with the FCA’s orders, or does not implement their commitments, the FCA may impose penalty payments of up to 5 per cent of the undertaking’s average daily turnover.

i Sanctions

According to Article L464-2 of the Commercial Code, fines should be proportionate to:

a the gravity of the infringement;
b the importance of the damage to the economy;
c the group or company’s individual situation; and
d the possible recidivism.

In any event, fines cannot exceed 10 per cent of the highest consolidated worldwide turnover achieved since the fiscal year preceding the starting date of the anticompetitive practices.

In 2011, the FCA issued guidelines on the methods for determining fines. The basic amount of the fine is calculated as a proportion of the value of sales affected by the infringement, taking into consideration the gravity of the infringement and the damage to the economy. The proportion of the value of sales is between zero and 30 per cent. The basic amount of the fine is then adjusted taking into account the duration of the infringement, and the existence of aggravating circumstances (e.g., if the undertaking has a specific ability to

93 If backdating practices do not raise a competition problem, they may, however, fall within the jurisdiction of criminal, civil or administrative courts.
94 FCA Decisions Nos. 10-MC-01 of 30 June 2010 concerning the practices of Google in the online advertising sector and 10-D-30 of 28 October 2010 concerning the practices of Google in the online advertising sector.
influence) or mitigating circumstances (e.g., if the infringement was authorised or encouraged by public authorities). Other factors that might also be taken into account are the size and the economic power of the undertaking or its group, the fact that the undertaking is a single product company and recidivism.

With respect to repeat offenders, the French Supreme Court ruled in 2016 in the *SNCF* case\(^96\) that recidivism can be established even though the two infringements were implemented on two different markets.\(^97\) More recently, the Paris Court of Appeal confirmed a 2013 decision imposing a €13.5 million fine imposed on EDF,\(^98\) including a 25 per cent increase for reiteration.\(^99\) The FCA had found that EDF, as the incumbent electricity supplier, had unfairly favoured its subsidiary, EDF ENR, operating in the competitive market for photovoltaic solar power offered to individual customers; in particular, by making various resources available to its subsidiary that could not be replicated by competitors, notably for prospecting, promoting and marketing photovoltaic offers. The FCA had applied a 25 per cent fine increase for recidivism on EDF on the ground that EDF had been previously sanctioned in 2000 for abusive practices consisting of (a) bidding at very low prices in response to calls for tenders organised by municipalities, behaviour that then discouraged municipalities from maintaining any tendering process, EDF thereby being automatically attributed the market; and (b) concluding agreements with municipalities for an excessive period of time with termination clauses that made it more difficult to end the commercial relationship.\(^100\) On appeal, the Paris Court of Appeal held that recidivism was not established and reduced the amount of the fine by half.\(^101\) However, in 2017, the French Supreme Court quashed this analysis and referred the case back to the Paris Court of Appeal.\(^102\) In a new ruling in late 2018, the Paris Court of Appeal essentially found that the 25 per cent fine increase was justified and proportionate since:

\(a\) the two infringements that led to the FCA’s decisions of 2000 and 2013 were very similar both in terms of object and effects (in both cases, EDF restricted competition on markets related to the electricity supply market where it holds a dominant position owing to its former legal monopoly through methods falling outside the scope of competition on the merits);

\(b\) the practices sanctioned in the 2013 decision were neither unprecedented nor innovative and EDF was fully aware of applicable competition rules; and

\(c\) the seven-year period that had elapsed between the 2000 decision and the beginning of the new practices represented less than half of the 15-year period after which the FCA typically waives recidivism.\(^103\)

96 See footnote 43.
98 FCA Decision No. 13-D-20 of 17 December 2013 concerning the practices implemented by EDF in the photovoltaic solar power sector.
100 FCA Decision No. 00-D-47 of 22 November 2002 concerning the practices implemented by EDF and its subsidiary, Citelum, on the public lighting sector.
101 Paris Court of Appeal, 21 May 2015, *EDF*.
103 In its fining guidelines, the FCA indeed indicates that it will typically waive recidivism when a period of 15 years (or more) between the practices has elapsed (Paragraph 51).
Since the issuance of the FCA’s fining guidelines, fining decisions have been issued in 23 abuse of dominance cases:104

a St-Pierre-et-Miquelon;
b Mobile Telephony;
c SNCF;
d Ordre des Experts Comptables;
e Sanofi;
f Photovoltaic Solar Power;
g Schering-Plough;
h Amaury;
i Mobile Telephony at Réunion Island and Mayotte (residential customers);
j Cegedim;
k Antilles Dairy Products;
l Overseas DDT Deployment;
m Eiffel Tower;
n Mobile Telephony at Réunion Island and Mayotte (non-residential customers);
o Electronic Communications;
p DTT Broadcasting;
q Zinc;
r Pétanque Balls;
s Engie;
t Funeral Services in the Ain Department;
u Janssen-Cilag;
v Termite Traps; and
w Sanicorse.105

104 The FCA did not apply its fining guidelines in all cases (see for instance, FCA Decisions No. 15-D-20 (see footnote 88); No. 17-D-02 (see footnote 86); No. 17-D-06 (see footnote 54); No. 17-D-13 (see footnote 55); and No. 18-D-03 (see footnote 15).
105 FCA Decisions No. 12-D-06 (see footnote 34); No. 12-D-24 (see footnote 21); No. 12-D-25 (see footnote 43); No. 13-D-06 of 28 February 2013 on practices implemented in the sector of online transmission of tax and accounting data in EDI format to the tax administration, upheld by the Paris Court of Appeal on 26 February 2015 and by the French Supreme Court on 8 February 2017; No. 15-15,005; No. 13-D-11 (see footnote 76); No. 13-D-20 (see footnote 98); No. 13-D-21 (see footnote 77); No. 14-D-02 of 20 February 2014 concerning the practices implemented in the sports press sector, upheld by the Paris Court of Appeal on 15 May 2015 and by the French Supreme Court on 1 March 2017; No. 15-19,068; No. 14-D-05 of 13 June 2014 on practices implemented in the mobile telephony sector for residential customers in Réunion Island and Mayotte; No. 14-D-06 (see footnote 71); No. 14-D-08 of 24 July 2014 regarding practices implemented in the sector for the sale of fresh dairy products in the French West Indies (the Paris Court of Appeal reduced the amount of the fine on 24 September 2015); No. 15-D-01; No. 15-D-10 (see footnote 57); No. 15-D-17 of 30 November 2015 on practices implemented on the mobile telephony market for non-residential customers in Réunion Island and Mayotte; No. 15-D-20 (see footnote 88); No. 16-D-11 (see footnote 62); No. 16-D-14 of 23 June 2016 on practices implemented in the rolled zinc sector (the Paris Court of Appeal reduced the amount of the fine on 17 May 2018 and 5 July 2018 (an appeal is pending before the French Supreme Court)); No. 17-D-02 (see footnote 86); No. 17-D-06 (see footnote 54); No. 17-D-13 (see footnote 55); No. 17-D-25 (see footnote 78); No. 18-D-03 (see footnote 15); and No. 18-D-17 (see footnote 9).
In 2015, the FCA imposed a record-breaking fine of €350 million on Orange in the *Electronic Communications* case (after settlement). More recently, in *Sanicorse*, the FCA not only imposed a fine on Sanicorse but also ordered the infectious medical waste treatment company to publish, pursuant to the provisions of Article L464-2, Paragraph 5 of the Commercial Code, a summary of the FCA’s fining decision in the print and online editions of three newspapers so as to inform Sanicorse’s customers, and in particular healthcare establishments, of the infringement sanctioned by the FCA.

ii Behavioural remedies

The FCA can impose behavioural remedies either as an interim measure or as a sanction imposed in decisions on the merits.

Pursuant to Article L464-1 of the Commercial Code, the FCA may grant interim measures in the event that the reported practices cause serious and immediate damage to the general economy, the economy of a sector or the interests of either consumers or the complainant. Since 2010, interim measures have been granted in six abuse of dominance cases.

Pursuant to Article L464-2 of the Commercial Code, the FCA may also order undertakings to terminate anticompetitive practices within a specific time frame or impose behavioural remedies in addition to fines in its decision on the merits.

In *SNCF*, the FCA used behavioural remedies as an alternative to sanctions in relation to exclusionary pricing objections. The FCA ordered SNCF to:

* a. implement an analytical accounting system for its freight services activity by full-trainload separate from its wagon-load freight services activity, so as to clearly identify costs that are common to the two types of activities;
* b. prepare a report identifying the costs that could be avoided over a three-year period in the event that the SNCF were to abandon its freight services activity by full-trainload; and
* c. guarantee, within three years of the FCA’s decision, that prices offered to shippers for full-trainload freight services covered the average avoidable costs related to this activity over a three-year period.

The Paris Court of Appeal, however, annulled the third injunction in late 2018 as it found that such an injunction unduly interfered with SNCF’s power to determine its pricing policy.

In *Electronic Communications*, the FCA ordered Orange to provide competitors with equal access to the information it collects as the operator of the local loop, and to put an end to the loyalty and exclusivity policy subject to the investigation.

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106 See footnote 88.
107 See footnote 9.
108 FCA Decisions No. 10-MC-01 (see footnote 94); No. 11-MC-01 (see footnote 63); No. 14-MC-01 of 30 July 2014 concerning practices in the pay TV sector, partially quashed by Paris Court of Appeal on 9 October 2014; No. 14-MC-02 of 9 September 2014 in the gas and electricity sector, partially quashed by Paris Court of Appeal on 31 October 2014 (an appeal is pending before the French Supreme Court); No. 16-MC-01 of 2 May 2016 on a request for interim measures filed by Direct Energie, upheld by Paris Court of Appeal on 28 July 2016; and No. 19-MC-01 (see footnote 7).
109 See footnote 43.
110 See footnote 46.
111 See footnote 88.
In *Cegedim*,\textsuperscript{112} the FCA ordered Cegedim to stop any form of discrimination among its customers based on the CRM software they were using (i.e., Cegedim’s or competitors’ CRM software). Similarly, in *Funeral Services in the Ain Department*,\textsuperscript{113} the FCA ordered the funeral company Comtet to modify its pricing forms so as to clearly show the services that are covered by the public tariff.

### iii  Structural remedies

Pursuant to Article L430-9 of the Commercial Code, the FCA can order an undertaking or a group of undertakings that abused either their dominant position or the state of economic dependence of a commercial partner to alter or terminate any agreement that gave rise to the underlying dominant position, including a merger agreement previously authorised by the FCA in the context of a merger review. This provision enables the FCA to undo a transaction or an agreement for abuse of dominance. The FCA has used this power on only one occasion. In the *Water Market* case,\textsuperscript{114} the FCA found that the Compagnie Générale des Eaux and the Lyonnaise des Eaux, which had created several joint ventures, were abusing their collective dominance by deciding not to compete against their joint ventures for certain calls for tenders. The FCA found that the termination of the joint ventures was necessary to remedy the behaviour and, ultimately, the Compagnie Générale des Eaux and the Lyonnaise des Eaux voluntarily terminated their joint venture agreements.

The FCA is also empowered to order structural remedies in case of abuse of dominance or of economic dependence in the retail sector (see Article L752-26 of the Commercial Code).

### iv  Commitments

As an alternative to sanctions and remedies, the FCA may also accept commitments offered by undertakings pursuant to Article L464-2 of the Commercial Code. The FCA can make such commitments binding in exchange for the closing of an investigation on the merits without making any finding of an infringement or imposing any sanction, provided the commitments are accepted before the FCA issues a statement of objections. The FCA uses the commitments procedure in order to intervene more quickly and avoid the administrative costs and legal constraints of establishing an abuse of dominance. The FCA issued one commitment decision in 2018, compared with five in 2017.

In *Satellite TV Decoders*,\textsuperscript{115} in response to the FCA’s competition concerns, GCP agreed to allow third-party decoder manufacturers to manufacture and distribute decoders compatible with GCP satellite programs, provided these decoders include a software access module called ‘myCanal’ (that users can download) designed, monitored and updated directly by GCP. The FCA notably considered that such commitments, which will apply until December 2021, answered GCP’s piracy concerns while providing an alternative offer to GCP decoders. Interestingly, GCP’s commitments go beyond the competition concerns formulated by the FCA, as they extend to non-linear satellite content, to the benefit of GCP’s subscribers.

\textsuperscript{112} See footnote 71.
\textsuperscript{113} See footnote 55.
\textsuperscript{114} See footnote 35.
\textsuperscript{115} See footnote 10.
VI PROCEDURE

The French Minister of the Economy, certain other public entities and any company may refer practices falling within the scope of Article L420-2 of the Commercial Code to the FCA. The FCA may also initiate investigations *ex officio* into alleged abuses of a dominant position. The FCA cannot investigate facts that took place more than five years prior to the investigation unless a procedural act interrupts this statute of limitations (see Article L462-7 of the Commercial Code). If the FCA considers that a complaint is unsubstantiated, it can issue a reasoned decision rejecting the complaint at a preliminary stage.

i Interim measures

Claimants may request interim relief. A request for interim relief must be filed concurrently with the action on the merits and lasts approximately six months. The FCA will order interim measures if the following cumulative criteria are met:

a the FCA has jurisdiction over the relevant practices on the merits;
b the alleged practices are susceptible of breaching competition rules; and
c the alleged practices may have serious and immediate effects on consumers, the sector or the interests of the plaintiff.

In practice, interim measures are ordered mainly in situations where the defendant’s actions threaten to foreclose a competitor from a market. The interim measure investigation is followed by a hearing and a decision whereby the FCA decides whether interim measures are justified and whether an investigation on the merits is required. The FCA generally issues a decision within one or two months of the hearing, although it sometimes issues its decision within a very short time frame (for instance, within one week of the hearing in the *Amadeus* case). The parties may appeal the interim measure decision before the Paris Court of Appeal within 10 days of the notification of the decision.

In both 2017 and 2018, the FCA did not grant any interim measures, while in 2016, the FCA ordered interim measures against Engie in the gas market to ensure that the price of some of its offers to business customers reflected its costs. The FCA considered that Engie’s practices could have serious and immediate anticompetitive effects on the sector and justified interim measures pending a decision on the merits.

More recently, in 2019, in *Amadeus*, the FCA considered that Google’s decision to suspend the accounts of paid phone directory services operator Amadeus and to refuse to display its ads on the Google Ads advertising platform (formerly known as AdWords) may amount – at the interim measure stage – to a sudden termination of its commercial relationship under conditions that are not objective, not transparent and discriminatory. In particular, the FCA noted:

a the absence of prior notice before any account suspension or clear indication in the suspension notices of the violations justifying such suspensions; and
b the fact that Google’s sales teams were involved in Amadeus’ advertising campaigns that were deemed non-compliant with the Google Ads rules.

116 See footnote 7.
117 FCA Decision No. 16-MC-01; see footnote 108.
118 See footnote 7.
The FCA found that the practices had a serious and immediate impact on Amadeus, which lost approximately 90 per cent of its revenues, and therefore justified granting interim measures pending a decision on the merits. The interim measures, however, go beyond the individual situation of Amadeus and extend more generally to all companies operating in the sector of paid phone directory services. Specifically, the FCA ordered that Google:

a. clarify the Google Ads rules applicable to this sector;
b. provide, save in exceptional circumstances, a prior warning referring to the clarified Google Ads rules and specifying the alleged violation before suspending an account;
c. organise face-to-face training on the content and scope of the clarified rules for Google's sales teams in charge of providing personalised support to companies operating in this sector; and
d. review manually the compliance of Amadeus’ ads with the clarified rules.

On appeal, the Paris Court of Appeal annulled the measure related to the sales teams’ training as it considered that it was not necessary to respond to the emergency situation but confirmed the other three measures.119

ii Investigation on the merits

If the FCA considers that a complaint is well grounded, it appoints case handlers to investigate the case. The case handlers have wide investigative powers and may conduct dawn raids if they are authorised to do so by a court, or request information from undertakings. They can also interview employees. The investigation period typically lasts from six months to three years (or sometimes more), until the case handler notifies the companies involved of its objections. The companies have two months to respond to the objections. This is followed by a second exchange of written briefs and a hearing. The exchange of written submissions generally lasts one to two years, until a hearing is scheduled.

iii Hearing

The parties are invited to a hearing before the FCA Board, where the case handlers provide an oral presentation of their observations. The parties may also present their observations orally.

iv Decision

The FCA generally issues a decision within three months of the hearing. It may find that the alleged practices are not established, or impose a fine on the undertakings and order remedies. The parties may appeal the decision before the Paris Court of Appeal within a month. Paris Court of Appeal’s rulings may in turn be challenged before the French Supreme Court, which only has jurisdiction over matters of law.

v Commitments

If the FCA intends to implement the commitment procedure as an alternative to an infringement procedure, the case handlers inform the undertakings of the FCA’s preliminary competition concerns at an early stage during the investigation (before a statement of objections has been issued) and invite them to offer commitments that adequately address

119 Paris Court of Appeal, 4 April 2019, Amadeus.
the identified concerns. Once the proposed commitments have been received, the case handlers carry out a market test, which is published on the FCA’s website, to ensure that the proposed commitments are considered adequate by the main stakeholders. The FCA may either accept or reject the commitments. The FCA may also require amendments. If the FCA finally considers that the commitments offered address its competition concerns, it makes the commitments binding in its final decision.

vi Settlement
The settlement procedure was recently modified by Law No. 2015-990 of 6 August 2015. Under the new regime, settling companies commit to not challenging the objections notified by the FCA and, in exchange, can negotiate a fine range with the investigation services. Companies may also offer behavioural commitments. The FCA board takes the ultimate decision but will comply with the fine range negotiated with the investigation services.

In December 2018, the FCA adopted its procedural notice on the new settlement procedure. While not containing any major change, the notice provides some welcome clarifications, notably concerning the possibility for companies to file written comments before the FCA board on the fining determinants and implement the settlement procedure in conjunction with the leniency procedure. The notice also reaffirms the FCA’s preference for cases in which all parties opt in to the procedure, thereby avoiding ‘hybrid’ scenarios. From the point of view of the FCA, the use of the settlement procedure enables companies to save procedural costs and to obtain a fine reduction (that can sometimes be substantial). In addition, the settlement procedure is likely to facilitate the adoption of shorter decisions in a shorter time frame than the ordinary procedure, and saves on resources consumed by any contentious appeals. However, the inability to negotiate the scope of the statement of objections received prior to settling remains at odds with the European Commission’s settlement process and significantly reduces the scope of the negotiations.

In Electronic Communications, although the new regime was not yet applicable, the FCA’s investigation service anticipated the reform of the settlement procedure and negotiated with Orange a €350 million cap on the fine in exchange for Orange’s commitment not to challenge the objections and to implement behavioural remedies. The FCA’s board eventually imposed the maximum fine on Orange.

In addition, the FCA has adopted two settlement decisions in abuse of dominance cases since the entry into force of the new settlement regime (before the publication of the settlement notice). In Petanque Balls, the FCA settled a fine of €320,000 with Obut, as well as receiving their commitment to implement an antitrust compliance programme. In Engie, Engie did not challenge the FCA’s objections, and the FCA imposed a €100 million fine following a settlement procedure.

120 See Notice of 2 March 2009 on the commitment procedure (engagements).
121 See Notice of 21 December 2018 on the settlement procedure. The FCA is bound by its provisions.
122 See footnote 88.
123 See footnote 86.
124 See footnote 54.
VII  PRIVATE ENFORCEMENT

Private enforcement claims may be brought under general tort law provisions (Article 1240 of the Civil Code) within five years of the day the victim becomes aware or should have become aware of the wrongdoing. Private enforcement claims require the defendant to prove a fault, a damage and a causal link between the two. Since the implementation into French law of the EU Damages Actions Directive, an FCA decision sanctioning anticompetitive practices creates an unrebuttable presumption before civil and commercial courts provided that all appeals against the FCA’s decision are exhausted. Establishing a fault is significantly more difficult in stand-alone actions. Proving the existence and the amount of the damage is also difficult in dominance cases, which explains why claimants often have to rely on expert economic and accounting reports. The principle of full compensation for the damage suffered applies (both material and non-material damage but there are no punitive damages).

Antitrust class actions have been available in France since 2014 under the following conditions:

a. the claim is a follow-on action after a sanction decision by the FCA or the European Commission;
b. the action is brought within five years of the final sanction decision (no longer subject to an appeal);
c. the claim is brought by a consumer association on behalf of consumers; and
d. consumers have opted in to join the class action.

Private enforcement has been limited in France, as there has not yet been any antitrust class action; the majority of cases are settled out of court; and there is no easy access to evidence for claimants who bear the burden of proof (although the implementation of the EU Damages Actions Directive under French law will be helpful for claimants). Further, although specific district courts and commercial courts have exclusive jurisdiction over antitrust claims, the judges are not specialised in antitrust matters, and often do not have independent means to assess the existence of dominance and the effects of the alleged abuses on the markets. Private claimants in France, therefore, essentially rely on decisions issued by the FCA.

For instance, in Outremer Telecom v. Orange, Outremer Telecom brought an action before the Paris Commercial Court based on a 2009 FCA decision. Outremer Telecom alleged that Orange’s abuses of its dominant position (and anticompetitive agreements) on the mobile telephone market in the Antilles and Guyana (French overseas territories) prevented it from expanding on this market. The Paris Commercial Court awarded Outremer Telecom €7.9 million to compensate for the damage resulting from Orange’s abusive loyalty rebates and excessive prices policy on off-net calls. However, the Paris Court of Appeal recently cut the damages granted to Outremer Telecom to €2.6 million after reviewing the calculation.

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125 Law No. 2016-1691 of 9 December 2016 (Article 148); Order No. 2017-303 of 9 March 2017 on damages actions relating to anticompetitive practices; and Decree No. 2017-305 of 9 March 2017 on damages actions relating to anticompetitive practices.
126 Paris Commercial Court, 16 March 2015.
of the damage estimate.\footnote{128} In December 2017, in \textit{Digicel v. Orange},\footnote{129} the Paris Commercial Court ruled on a separate follow-on damages action against Orange in relation to the same FCA decision. The Paris Commercial Court found that Digicel had been harmed by Orange’s abusive loyalty rebates and discounts applied on calls from fixed phones to Orange mobiles in the Caribbean overseas territories. In the ruling, the Court acknowledged that Orange’s practices had significant restrictive effects on Digicel’s development since its entry into the Caribbean market in 2000 and therefore awarded Digicel €180 million based on an expert calculation of lost revenues, plus 10.4 per cent interest per year starting from 2009, leading to a total of €346 million in damages to be paid by Orange and its affiliate, Orange Caraïbe. The judge, however, rejected Digicel’s claims in relation to Orange’s other infringements, having found that Orange’s exclusivity clauses with distributors and repairers did not have any impact on Digicel’s development, as the latter had deliberately chosen a single-brand distribution network and had decided to undertake the reparations in mainland France.

In addition, in \textit{Betclic v. PMU},\footnote{130} the Paris Court of First Instance ruled that a commitment decision that led the FCA to close the investigation on the merits without making a finding of infringement does not prevent ordinary courts from finding that the company having taken these commitments has engaged in abusive conduct, and noted that courts are free to rely on information contained in the commitment decision and use it as an indication or even \textit{prima facie} evidence of the anticompetitive nature of the practices. The Court clearly stated that a company cannot invoke a commitment procedure to claim that it did not commit a fault so as to avoid compensating victims for the damage they suffered. In practice, the Paris Court of First Instance relied on the FCA’s \textit{PMU} commitment decision\footnote{131} to find that PMU held a dominant position on the offline and online horse racing betting markets. The Court also relied on feedback during the market test when the PMU offered commitments in 2014 to find that the PMU had indeed abused its dominant position by pooling together its online and offline bets to gain an unfair competitive advantage offer. The Court ultimately decided to stay the proceedings, and ordered an expert to evaluate what could have been Betclic’s market share had the PMU not pooled together its online and offline bets to determine the amount of damages to award to Betclic. On appeal, the Paris Court of Appeal confirmed the judgment of the court of first instance and extended the expert’s mission.\footnote{132}

Purely stand-alone actions (not based on a previous FCA decision) are rare. Nevertheless, in \textit{Bottin Cartographes v. Google},\footnote{133} the Paris Commercial Court granted Bottin Cartographes €500,000 in damages in the first instance, based on a stand-alone claim alleging that Google implemented predatory prices by offering its Google Maps application programming interface (API) service, which enables third-party website operators to display a map on their website, free of charge. On appeal, however, the Paris Court of Appeal overruled the first instance decision and dismissed all the plaintiff’s claims.\footnote{134} The Court of Appeal decided to support its decision by asking the FCA for its opinion on the existence of a dominant position and

\begin{footnotesize}
\begin{itemize}
\item 128 Paris Court of Appeal, 10 May 2017, \textit{Outremer Telecom v. Orange}.
\item 129 Paris Commercial Court, 18 December 2017.
\item 130 Paris Court of First Instance, 22 February 2018.
\item 131 See footnote 52.
\item 132 Paris Court of Appeal, 12 September 2018, \textit{Betclic v. PMU}.
\item 133 Paris Commercial Court, 30 January 2012.
\item 134 Paris Court of Appeal, 25 November 2015, \textit{Bottin Cartographes v. Google}.
\end{itemize}
\end{footnotesize}
the question of predation. The FCA found that irrespective of Google’s market position, Google’s behaviour with regards to Google Maps API could not be deemed predatory because the economic analysis submitted to the FCA showed that Google always covered at least its average incremental costs, and in any event, there was no evidence of a predatory strategy, especially as there were a significant number of competitors in the market, many of them offering their products for free or on a ‘freemium’ basis, like Google. On the basis of the FCA’s opinion, the Court of Appeal found that Google’s behaviour could not be deemed abusive and dismissed all claims.

In SFR v. Orange, the Paris Commercial Court granted €51.4 million in damages against Orange following a stand-alone claim made by SFR. SFR claimed that Orange had implemented a margin-squeeze strategy by allowing secondary residence owners to suspend their landlines while they were away from their secondary residence. On this upstream market, Orange, however, refused to offer suspendable telephone access to telecom operators. The Commercial Court found that this practice constituted a margin squeeze because as a result, SFR was not in a position to propose to its downstream customers to have suspendable landline access. On appeal, however, the Paris Court of Appeal annulled the Paris Commercial Court’s judgment. The Court of Appeal found that the market for secondary residences was not a relevant product market because from the demand-side perspective, 90 per cent of secondary residence owners considered that the suspendable line was substitutable with other telephone lines; and from the supply-side, the data used by SFR to demonstrate the cost difference as compared with other telephone lines was not sufficiently reliable. In 2016, the French Supreme Court overturned the Court of Appeal’s ruling. The Supreme Court found that the Court of Appeal should have conducted a more detailed analysis on demand-side substitutability, notably by making a distinction between secondary residence owners that purchased a simple fixed line and those that purchased multi-service fixed lines and mobile lines. The Supreme Court also found that the Court of Appeal should have ignored the unreliability of the data on supply-side substitutability and should have discussed the relevance of the criteria used by SFR. The Supreme Court referred the case back to the appellate court. The Paris Court of Appeal ultimately awarded SFR €53 million in damages.

In purely stand-alone actions, claimants may be exposed to a risk of conviction for abusive proceedings. Very recently, the Paris Court of Appeal imposed a civil fine (€3,000) and damages (€20,000) on Avi Charente for abusive proceedings consisting of bringing a stand-alone action for abuse of dominance without having sufficient evidence to prove its claims. On the contrary, in another case, the Paris Court of Appeal reversed the judgment of the court of first instance, which had ordered Inforad to pay €60,000 in damages to Coyote for abusive proceedings, on the grounds that such an abuse requires an intention to harm, the proof of which was not provided in this case.

136 French Supreme Court, 12 April 2016, No. 14-26815.
137 Paris Commercial Court, 12 February 2014, SFR v. Orange.
138 Paris Court of Appeal, 4 October 2014, SFR v. Orange.
139 French Supreme Court, 12 April 2016, No. 14-26815.
140 Paris Court of Appeal, 8 June 2018, SFR v. Orange.
141 Paris Court of Appeal, 13 March 2019, Avi Charente v. Lactalis.
Private enforcement is expected to continue developing as the EU Damages Actions Directive is now implemented under French law.\(^{143}\)

**VIII FUTURE DEVELOPMENTS**

The FCA has shown increasing interest in the online advertising sector over the past few years. In particular, following an in-depth sector-specific investigation, the FCA published an opinion regarding the use of data in the online advertising sector in March 2018.\(^{144}\) In this Opinion, the FCA describes the dynamics and mechanisms of this sector and notes that online advertising has become the leading form of advertising in France. The FCA also considers that Google and Facebook are the two leaders of the online advertising sector and that their success is based on their ability to collect and process large volumes of information, while also noting that the two players have several significant competitive advantages, including a strong popularity among internet users, vertical integration and powerful targeting capabilities. The FCA furthermore lists a number of concerns that were brought to the FCA’s attention by the various stakeholders that participated in this investigation; in particular, concerning strategies involving bundling or tied sales, low prices and exclusivitites, discriminatory treatment practices, impediments to interoperability and restrictions on the possibilities to access and collect certain data. Given such concerns, the FCA has announced that its investigation services will examine the information collected during this investigation to determine whether it is necessary to initiate one (or more) investigations. More recently, in a press release of January 2019 announcing its priorities for 2019,\(^{145}\) the FCA confirmed that the digital sector, including the online advertising sector, will remain a priority for this year, and that it will, in particular, carefully analyse the use of data, as the German Federal Cartel Office did in the Facebook abuse of dominance case.\(^{146}\) In this regard, the interim measure decision of the FCA against Google in Amadeus,\(^{147}\) in early 2019, clearly shows that the FCA intends to take action quickly in this sector.

In June 2018, the FCA also launched a joint project on algorithms and their implications on competition with the German Federal Cartel Office that is planned to be completed in 2019 and that should result in a joint working paper analysing the challenges raised by algorithms (which can facilitate collusion but also increase the market power of companies that use them), and identifying conceptual approaches to meet these challenges.\(^{148}\)

\(^{143}\) Law No. 2016-1691 of 9 December 2016 (Article 148); Order No. 2017-303 of 9 March 2017 on damages actions relating to anticompetitive practices; and Decree No. 2017-305 of 9 March 2017 on damages actions relating to anticompetitive practices.

\(^{144}\) FCA Opinion No. 18-A-03 of 6 March 2018 concerning the use of data in the online advertising sector.


\(^{146}\) German Federal Cartel Office Decision No. B6-22/16.

\(^{147}\) See footnote 7.

Chapter 13

GERMANY

Stephan Barthelmess and Tobias Rump

I  INTRODUCTION

Under German competition law, unilateral conduct by an enterprise with market power is governed by Sections 18, 19 and 20 of the German Act against Restraints of Competition (ARC), which prohibit the abuse of a (single or collective) dominant position, and specific types of abusive behaviour by enterprises that have ‘relative’ market power in relation to small or medium-sized enterprises (as trading partners or competitors). Germany has thus used the possibility provided for under EU Regulation 1/2003 to enact national legislation on unilateral conduct that goes beyond the substance of the prohibition on the abuse of a dominant position laid down in Article 102 of the Treaty on the Functioning of the European Union (TFEU). Another distinct characteristic of German antitrust law on dominance is that there are (rebuttable) statutory market share-based presumptions of dominance.

Guidance on the application of the rules can be gathered from the case law of the German Federal Cartel Office (FCO) and the German courts, notably the Federal Court of Justice (FCJ). There is no formal general guidance on unilateral conduct available, apart from the FCO’s somewhat dated notice on below-cost pricing (which has been under review by the FCO for years now).

Guidance on the amount of fines for restrictive unilateral conduct can be gathered from the FCO’s guidelines on the setting of fines, which apply to all areas of German antitrust law.

No special rules apply in Germany to the public sector or state-owned enterprises. Section 130(1) of the ARC stipulates that the ARC will also apply to enterprises that are entirely or partially publicly owned or are managed or operated by public authorities.

Special rules apply to certain regulated industries, such as electricity, gas, telecommunications and post and railway. The Federal Network Agency monitors compliance with certain of these regulations in cooperation with the FCO.

II  YEAR IN REVIEW

The enforcement activity of the FCO in the abuse of dominance area over the past couple of years has continued to be quite limited in terms of actual decisions, as the FCO has issued only one single formal prohibition decision so far in 2019 and issued none in 2018. However,  

1 Stephan Barthelmess is a senior counsel and Tobias Rump is an associate at Cleary Gottlieb Steen & Hamilton LLP.
2 An English version of the ARC is available at www.gesetze-im-internet.de/englisch_gwb/index.html.
3 An English version of the guidelines is available at www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3.
despite the limited number of actual decisions, the FCO clearly continues its emphasis on the digital economy and, in particular, the online platforms in multi-sided markets. The FCO’s prohibition decision against Facebook marks another milestone in this regard, as the FCO – for the first time – based its analysis on whether the dominant company complied with the EU General Data Protection Regulation (GDPR), and ultimately imposed limitations on Facebook’s current practice of collecting and processing user data, and prohibited using the related terms of service.\(^4\) The Facebook decision further complements the FCO’s previous notable ‘online’ dominance cases, including its decision against CTS Eventim\(^5\) (recently confirmed by the Düsseldorf Court of Appeal),\(^6\) Google, and hotel booking platforms Booking.com\(^7\) and HRS.\(^8\) In addition, the FCO initiated proceedings against Amazon, investigating its terms and conditions and its behaviour with regard to the retailers on its German marketplace platform, amazon.de.\(^9\)

The FCO also rendered a settlement decision to complete its proceedings against the German Olympic Sports Confederation (DOSB) and the International Olympic Committee (IOC) regarding the advertising restrictions that they imposed on athletes (prohibiting athletes participating in the Olympic Games from using their person, name, picture or performance during the Olympic Games – and some days before and after – for advertising purposes). According to the FCO’s preliminary view, these restrictions constituted an abuse of the DOSB’s and the IOC’s dominant positions (as the athletes – who are performers at the games – do not profit directly from the very high advertising revenues generated by the official Olympic sponsors). After evaluating, and market testing, proposals by the DOSB and the IOC to reduce the scope of the restriction, the FCO and the two sports federations reached a settlement agreement.\(^10\) Under the sports federations’ new rules, athletes now have more freedom to engage in advertisement activities with their own sponsors during the duration of Olympic Games.

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\(^4\) See FCO decision of 7 February 2019; the case report and press release are available on the FCO’s website.
\(^5\) CTS Eventim – the operator of Germany’s largest ticketing system (acting as the intermediary between event organisers and ticket offices) – had required organisers of live events to distribute the tickets for their events exclusively via CTS Eventim’s ticketing system, while at the same time requiring ticket offices to source tickets only from the same system. In its decision, the FCO took account of CTS Eventim’s significant market share, but also applied the newly introduced criteria for the assessment of a company’s dominance on multi-sided platform markets under Section 18(3a) of the ARC (see FCO decision of 4 December 2017, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/04_12_2017_CTS_Exklusivit%C3%A4t.html?nn=3591568).
\(^6\) Düsseldorf Court of Appeal decision of 5 December 2018, Case VI-Kart 3/18 (V).
\(^8\) Most online cases were dealt with under Article 101 of the TFEU and its German equivalent, Section 1 of the ARC (prohibiting anticompetitive agreements). However, in the HRS hotel portal case, the FCO held that a best-price clause requested by HRS from hotels listed on its platform also violated Sections 19 and 20 of the ARC (abuse of dominance). Given the violation of Article 101 of the TFEU and Section 1 of the ARC, the Düsseldorf Court of Appeal ultimately left open whether the best-price clause also infringed Sections 19 and 20 of the ARC (judgment of 9 January 2015, Case VI-Kart 1/14 (V)).
In recent years, the FCO has carried out several sectoral investigations in industries with arguably oligopolistic structures in which it suspected structural problems. These sector inquiries were often followed by individual investigations against specific companies with respect to specific conduct.11

Recently, the FCO has focused on the internet and food retail sector, inter alia, launching a new sector inquiry in 2017 that examined the conduct of price comparison websites in the area of travel, insurance, financial services, telecommunication and energy, and published its final report on 11 April 2019.12 Since May 2011, the FCO has published a total of nine reports on investigations into different sectors,13 of which seven specifically deal with (possible) abuses of market power (district heating, milk, fuel retail, wholesale fuel, food retail, the sub-metering and billing of heating and water consumption, and cement and ready-mixed concrete). The following tables list the significant cases and decisions dealing with abuse of a dominant position adopted by the FCO in 2017, 2018 and 2019, and important ongoing proceedings.14

### 2018/2019 FCO decisions

<table>
<thead>
<tr>
<th>Sector</th>
<th>Company</th>
<th>Conduct</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Social networks</td>
<td>Facebook</td>
<td>Abuse by inappropriate collection and processing of Facebook users’ personal data in particular from third-party sources.</td>
<td>No fine; prohibition decision</td>
</tr>
<tr>
<td>Sports federations</td>
<td>IOC, DOSB</td>
<td>Exploitation of athletes (advertising restrictions)</td>
<td>No fine; case settled</td>
</tr>
</tbody>
</table>

In addition to the listed cases, the FCO initiated a preliminary investigation against Lufthansa. After the insolvency of Germany’s second biggest airline, Air Berlin, Lufthansa enjoyed a monopoly position for a few months on some German domestic flight routes. The FCO’s investigation showed that Lufthansa’s ticket prices on these routes had increased by an average of 25–30 per cent after Air Berlin’s exit from the market. However, as these increases were only of a temporary nature and prices returned to the previous level only a few months later, after easyJet’s entry into the market, the FCO did not open formal proceedings.15

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11 Arguably, this process limits the defence rights of companies subject to the subsequent antitrust proceedings, as they are obliged to respond to the sector inquiry without knowing the specific allegations that will be brought against them later on.


13 English summaries of some of the FCO’s sector inquiry reports are available at www.bundeskartellamt.de/EN/AboutUs/Publications/Sectorinquiries/sectorinquiries_node.html.

14 A comprehensive list of the FCO’s past dominance cases is available on its website in German only at www.bundeskartellamt.de/SiteGlobals/Forms/Suche/Entscheidungssuche_Formular.html?nn=3589936&cl2Categories_Format=Entscheidungen&gtp=3598628_list%253D2&cl2Categories_Arbeitsbereich=Misbrauchsaufsicht&docId=3590026.

### 2017 FCO decisions

<table>
<thead>
<tr>
<th>Sector</th>
<th>Company</th>
<th>Conduct</th>
<th>Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ticketing systems</td>
<td>CTS Eventim</td>
<td>Exclusivity agreements with ticket offices and event organisers</td>
<td>No fine; prohibition decision</td>
</tr>
<tr>
<td>Dairy products</td>
<td>Deutsche Milchkontor eG</td>
<td>Exclusive supply agreements for unpasteurised milk and ex post determination of milk prices</td>
<td>No fine, case closed*</td>
</tr>
<tr>
<td>Ticket sales</td>
<td>Deutscher Fußball-Bund</td>
<td>Bundling ticket sales for football matches (World Cup 2018 and, previously, the European football championship 2016) to members of the German Football Association (DFB) fan club</td>
<td>No fine; case closed†</td>
</tr>
<tr>
<td>District heating</td>
<td>Innogy</td>
<td>Excessive pricing</td>
<td>No fine; case settled</td>
</tr>
<tr>
<td>District heating</td>
<td>Danpower</td>
<td>Excessive pricing</td>
<td>No fine; case settled</td>
</tr>
<tr>
<td>Audiobooks</td>
<td>Audible/Amazon/Apple</td>
<td>Exclusive distribution agreement between Apple’s iTunes Store and Audible</td>
<td>No fine</td>
</tr>
</tbody>
</table>

* The FCO did not issue a settlement decision, but dropped its proceedings after Deutsche Milchkontor eG changed its supply conditions in reaction to the FCO’s investigation. See FCO press release of 9 January 2018, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemeldungen/2018/09_01_2018_Milch_Einstellung.html; jsessionid=21AEFFAD79B80B351D5BF508C17C14D2_2_cid362?nn=3591568.

† The FCO investigated the DFB for abusing its dominant position regarding the allocation of the German ticket quota for the 2018 World Cup (and previously for the European football championship 2016) because the DFB intended to sell tickets only to its own members who had to pay an annual membership fee of €40. While the FCO considered that this behaviour could be justified, at least in part, by security considerations (effectively preventing ticket sales to known hooligans), the DFB nonetheless committed to introduce a short-time membership at a reduced fee. Against this background, the FCO dropped its investigation.

In addition to the listed cases, where the FCO initiated proceedings, it further intervened against furniture retailer XXXLutz for requesting unjustified ‘wedding’ (post-merger) rebates, albeit without launching a formal investigation. The FCO dropped its proceedings after XXXLutz committed to stop demanding such rebates.16

### Ongoing cases

<table>
<thead>
<tr>
<th>Sector</th>
<th>Company</th>
<th>Conduct</th>
<th>Case opened</th>
</tr>
</thead>
<tbody>
<tr>
<td>Online sales platforms</td>
<td>Amazon</td>
<td>Potentially abusive conduct towards retailers using Amazon's market place.</td>
<td>29 November 2018</td>
</tr>
</tbody>
</table>

### MARKET DEFINITION AND MARKET POWER

There are two slightly different concepts of market power in German antitrust law. While the assessment of ‘absolute’ single or collective dominance typically requires a detailed market analysis (of market definition as well as of market power), the assessment of ‘relative’ market power focuses more on a comparison of market power between larger and small and medium-sized companies as trading partners or competitors. Generally, the FCO and the German courts continue to place considerable importance on market shares and have only slowly started to adopt the more sophisticated economic analyses used by the EU Commission.

i Market definition
In defining relevant product markets, the FCO primarily analyses the substitutability of goods and services from a demand-side perspective based on the intended use, characteristics and price of the relevant products. In some cases, the FCO also refers to the ‘small but significant and non-transitory increase in price’ test as an additional, but not the only or the principal, criterion for market definition. The concept of supply-side substitution (i.e., other manufacturers being able and willing to adjust their production within a short time and without significant cost) is also relevant under appropriate circumstances.

Demand-side substitutability is also the principal basis for defining the relevant geographic market. As under EU law, it comprises the area in which the enterprises concerned compete, in which the conditions of competition are sufficiently homogeneous, and that can be distinguished from neighbouring areas because of appreciably different competitive conditions.

In practice, ex post behavioural enforcement tends to take a somewhat narrower view on market definition than merger control, given that the perspective of specific customers or competitors potentially harmed by the conduct at issue can sometimes influence the assessment.

The German legislator has also clarified that a relevant market may be found even if the relevant services are rendered free of charge.

ii Dominance
As previously noted, German antitrust rules on unilateral conduct apply to companies in a position of single or joint dominance, and to companies enjoying ‘relative’ market power over small and medium-sized companies. Section 18 of the ARC defines single and collective dominance.

Single dominance
According to Section 18(1) of the ARC, single dominance exists if a company is without competitors, not exposed to significant competition or in a ‘superior market position’ as compared with its competitors (which can exist even if there is significant competition in the market). According to the FCO’s merger control guidelines (the principles of which can also be applied in the antitrust area), single dominance exists where the market power of an enterprise enables it to act without sufficient constraints from its competitors (i.e., a situation in which an enterprise is able to act to an appreciable extent independently of its competitors, customers, suppliers and, ultimately, the final consumers).

17 For example, FCO decision of 12 December 2003, Case B9-60211-Fa-91/03, ÖPNV-Hannover; decision of 2 July 2008, Case B2-359/07, Loose/Poelmeyer; FCJ decision of 4 March 2008, Case KVR 21/07, Soda-Club II.
18 For example, FCJ decision of 16 January 2007, Case KVR 12/06, National Geographic II. Specifically with respect to retail markets, the usual product range of a retailer may constitute a single market (portfolio market).
19 FCJ decision of 5 October 2004, Case KVR 14/03, Melitta/Schultink.
20 See recently introduced Section 18(2a) of the ARC.
21 FCO, Guidance on Substantive Merger Control of 29 March 2012, Paragraph 9. In its guidelines, the FCO refers to FCJ decision of 12 December 1978, Case KVR 6/77, Erdgas Schwaben; and ECJ decision of
Section 18(3) of the ARC lists the following criteria that may in particular be taken into account for the assessment of whether a company is in a ‘superior market position’:

*a* the enterprise’s market share;

*b* its financial resources;

*c* its access to input supplies or downstream markets;

*d* its affiliations with or links to other enterprises;

*e* legal or factual barriers to market entry;

*f* actual or potential competition by domestic or foreign enterprises;

*g* its ability to shift its supply or demand to other products; and

*h* the ability of the enterprise’s customers or suppliers to switch to other enterprises.

In practice, the FCO and the German courts tend to focus on whether an enterprise has sufficient market power to determine the most important business parameters. A somewhat static appraisal of market shares (both in absolute and relative – compared with competitors – terms) is still the most important factor. The rebuttable market share-based presumption pursuant to Section 18(4) of the ARC provides an important first indication of possible dominance where the market share of a company exceeds 40 per cent. While not impossible, it is often difficult in practice to rebut the presumption with economic arguments, especially in the case of high market shares substantially above the presumption threshold. This is notably because German law expressly stipulates that a dominant position can be based on a ‘superior’ market position, even if the company concerned faces significant competition from its rivals.

In line with the FCO’s recent focus on digital markets, the German legislator has introduced additional criteria for the assessment of market power in multi-sided markets and networks. According to Section 18(3a) of the ARC, in particular, the following criteria must be taken into account when assessing a company’s market position on multi-sided and network markets:

*a* direct and indirect network effects;

*b* the parallel use of more than one service and the difficulties faced by users in switching services;

*c* economies of scale in connection with network effects;

*d* the company’s access to data relevant for competition; and

*e* competitive pressure driven by innovation.

The FCO applied these additional criteria in its decisions against German ticketing system operator, CTS Eventim, and Facebook. In CTS Eventim, the FCO found that the ticket platform enjoyed a dominant position with regard to event organisers and ticket offices in the two-sided platform market for ticketing services in Germany. In Facebook, the FCO based its dominance analysis on the German market for social media networks; in particular, on three factors:

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Dominance may also (exceptionally) be found to exist if the market share remains below the presumption threshold.
direct network effects resulting from Facebook’s large number of users (creating a ‘lock-in effect’ for its users, as they would lose all their existing contacts if they switched to another social network – creating high entry barriers);

b indirect network effects that Facebook enjoys in relation to its advertisement customers (given the large number of Facebook users, advertisers cannot easily switch to another social network to reach as many users); and

c Facebook’s access to users’ personal data.

The new criteria will further play an important role in the FCO’s ongoing proceedings against Amazon. The investigation focuses on Amazon’s terms and conditions and its behaviour regarding the retailers on its German marketplace platform amazon.de. Reportedly, the FCO will pay particular attention to the indirect networking effects created by the role of Amazon’s marketplace as an intermediary between resellers and consumers (the marketplace’s benefit for retailers correlates directly with the number of customers using the platform and vice versa).

Collective dominance

According to Section 18(5) of the ARC, collective dominance exists where there is no substantial competition between the two or more largest companies in a market and where they jointly are not constrained sufficiently by competition from third parties. Pursuant to the FCO’s merger control guidelines, collective dominance is defined as a few companies in an oligopolistic setting engaging in tacit coordination or collusion with the result that they effectively do not compete with each other.23

Section 18(6) of the ARC also provides for market share-based legal presumptions for collective dominance. Thus, three or fewer companies are presumed to be collectively dominant if they have a market share of at least 50 per cent; and five or fewer companies are presumed to be collectively dominant if they have a market share of at least two-thirds. These presumptions are rebuttable, and the companies can show that substantial competition exists between them individually or that they are jointly sufficiently constrained by outsiders or customers.

The FCO and the German courts generally employ the criteria established by the EU General Court in Airtours v. Commission24 in determining collective dominance (albeit in a somewhat modified form).25 However, until a few years ago, there had not been a case where companies had been considered to be in a collective dominant position in the context of abuse proceedings.26

In June 2015, the FCJ dealt with the first case in which a possible abuse of a collective dominant position was at issue.27 While the lower Stuttgart District Court found that the defendant, a public broadcasting company, did not hold a single dominant position, as it did not – by itself – have a superior market position compared with the private broadcasting companies,28 it found the defendant to have a collective dominant position together with

23 FCO, Guidance on Substantive Merger Control of 29 March 2012, Paragraph 81.
25 For example, FCJ decision of 11 November 2008, Case KVR 60/07, E.ON/Stadtwerke Eschwege; decision of 20 April 2010, Case KVR 1/09, Phonak/GN Store.
26 In contrast, collective dominant positions were held to exist in several merger control cases.
27 Stuttgart Court of Appeals judgment of 21 November 2013, Case 2 U 46/13.
28 Stuttgart District Court judgment of 20 March 2013, Case 11 O 215/12.
the remaining public broadcasting companies, because there was no competition between
the public broadcasters because of their strong commonality of interests, and all public
broadcasting companies would – together – hold a superior market position compared with
the private broadcasting companies. The Court found that public broadcasting companies
had a ‘must-carry status’ as input providers for broadband cable providers, as turning to
private broadcasters only was not a viable alternative. On appeal, the Stuttgart Court of
Appeals left open whether the public broadcasting companies held a collective dominant
position because it considered that there had not been an abuse in any event. The FCJ, upon
further appeal, simply referred to the defendant’s must-carry status, and thus considered it
dominant on the market for input for cable television providers without elaborating on the
distinction between single and joint dominance.

‘Relative’ dominance
As noted above, going beyond the scope of Article 102 of the TFEU, the ARC prohibits
exclusionary (and discriminatory) conduct not only by companies that are dominant
in ‘absolute’ terms, but also by companies on which ‘small or medium-sized companies
depend’ as suppliers or purchasers of certain kinds of goods or commercial services, and by
companies enjoying ‘stronger market power in comparison to their small and medium-sized
competitors’. The prohibitions aim at protecting small and medium-sized companies against
anticompetitive conduct by their larger competitors or trading partners.

The prohibition on discrimination or unreasonable obstruction for ‘relatively’
dominant enterprises towards dependent companies is primarily designed to address buyer
power in the (food) retail trade. Thus, Section 20(1) Second Sentence of the ARC establishes
a presumption of dependency if a purchaser of goods frequently receives rebates or similar
bonuses from its suppliers that go beyond customary rebates. The protection of small and
medium-sized competitors against exclusionary conduct of competitors with ‘stronger
market power’ is also principally targeted at retail markets (food, petrol, etc.). An example of
prohibited exclusionary conduct is frequent pricing below cost. The ARC does not precisely
define the concept of small and medium-sized companies that enjoy protection under these
rules. The concept is generally understood to be turnover-related, but there are no specific
turnover ‘thresholds’, and the amounts can differ from industry to industry.

29 The term ‘superior market position’ is part of the legal definition of dominance pursuant to Section 18 of
the ARC and must not be confused with the term ‘stronger market power’ pursuant to Section 20 of the
ARC (see ‘Relative dominance’ subsection).
30 FCJ judgment of 16 June 2015, Case KZR 83/13, Paragraph 46; see also judgment of 16 June 2015,
Case KZR 3/14, Paragraph 45.
31 Section 20(1) of the ARC.
32 Section 20(3) of the ARC.
33 The FCJ recently passed an interesting judgment regarding the characterisation of retailers as small
or medium-sized companies in relation to suitcase manufacturer Rimowa; see FCJ judgment of
12 December 2017, Case KZR 50/15.
34 Section 20(3) of the ARC.
IV ABUSE

i Overview

Section 19(1) of the ARC contains a general prohibition of the abuse of a dominant position. Sections 19 and 20 of the ARC contain non-exhaustive examples of specific types of abusive conduct. Section 20(2) of the ARC extends the prohibition of exclusionary and discriminatory conduct to companies on which small or medium-sized companies depend, and Section 20(3) of the ARC prohibits exclusionary conduct by companies that enjoy superior market power compared with their small and medium-sized competitors.

The most significant specific types of abuse are discussed in subsections IV.ii to IV.iv.35 There are no per se abuses, as all relevant unilateral conduct may, at least in principle, be justified by means of a comprehensive analysis of all relevant circumstances and a balancing of the conflicting interests. As a practical matter, however, once the FCO has concluded that the type of conduct at issue is generally abusive, it will not conduct an in-depth economic effects analysis. Instead, it is – according to Section 20(4) of the ARC – up to the companies concerned to demonstrate an objective justification for their conduct (e.g., cost efficiencies as justification for rebates).

ii Exclusionary abuses

German antitrust law prohibits exclusionary conduct, including predatory pricing, and notably offers below cost. Section 20(3) of the ARC lays out how to calculate cost. The (somewhat dated) FCO notice on below-cost pricing provides further guidance.

Another form of exclusionary abuse is exclusive dealing, including strategies such as exclusivity or loyalty rebates. As a general rule, dominant companies may not grant rebates that create an incentive for customers to purchase their entire, or almost-entire, demand for the products or services at issue from the dominant enterprise.

In November 2015, the FCO initiated proceedings in this regard against Apple and Amazon’s subsidiary Audible.com. They had entered into an exclusive long-term agreement regarding Apple’s purchase of digital audiobooks from Audible for resale on the iTunes store.36 The FCO has meanwhile closed these proceedings.37

German antitrust law also prohibits leveraging a dominant position, such as through contractual or economic tying and bundling. Case law is scarce here, and the German practice is similar to the EU practice.

An abuse may also occur if a dominant enterprise refuses to grant another enterprise access to its networks or other infrastructure for a reasonable fee if it is impossible for the other enterprise, for legal or practical reasons, to be active on the upstream or downstream market as a competitor of the dominant enterprise (essential facility).38

35 In addition to the specific types of abuses listed below, other forms of abuse are possible. The FCJ, for instance, found that a public pension fund’s terms of service – which violated provisions on general terms and conditions under the German Civil Code – constituted an abuse of a dominant position (judgment in VBL Gegenwert II, 24 January 2017).
38 See, in particular, FCJ decision of 11 December 2012, Case KVR 7/12, Puttgarten/German ferry terminal for further details. The case was referred back and remains pending before the Düsseldorf Court of Appeal.
Upon referral from the Düsseldorf District Court, the European Court of Justice has specified certain perceived discrepancies between German case law and the position that the European Commission took on the conditions under which the holders of standard essential patents may seek an injunction against users of their standard essential patents without committing an abuse.

iii Discrimination

Section 19(2) No. 1 of the ARC prohibits discrimination (i.e., treating an undertaking, directly or indirectly, differently from other similar undertakings without objective justification).

After the German legislator introduced an ancillary copyright for news publishers in 2013, the collecting society VG Media (representing several German news publishers) adopted a new tariff for the use of news publishers’ online content and raised monetary claims against Google for the display by Google of small text excerpts (‘snippets’) from their websites. Google refused to pay, and announced it would discontinue the display of snippets from VG Media members unless they agreed to the display of their snippets without payment. VG Media filed a complaint with the FCO, arguing that Google abused its allegedly dominant position by refusing to pay for the display of snippets. The FCO informally rejected the complaint in August 2014, and issued a formal rejection decision in September 2015 holding that Google did not engage in discriminatory conduct. In particular, the FCO considered Google’s conduct justified by its interest to preserve its business model and to reduce the risk of liability for damages. These interests would outweigh those of VG Media.

iv Exploitative abuses

Section 19(2) No. 2 of the ARC prohibits exploitative abuses, notably ‘imposing prices or other trading conditions that differ from those likely to exist on a market with effective competition’. To determine whether prices are excessive, the FCO and the German courts follow the EU law approach of comparing the dominant company’s prices with prices charged on comparable markets with functioning competition, its competitors’ prices and the dominant company’s costs. The FCO followed this approach, for instance, in its proceedings against suppliers of district heating, where it compared the average revenues that several suppliers of district heating had generated throughout a certain period of time in different regions and found that the revenues of certain suppliers were significantly higher than those of suppliers in comparable markets. Based on this comparison, the FCO concluded, at least preliminarily, that these suppliers had engaged in excessive pricing. These proceedings were initiated based on the FCO’s earlier sector inquiry into the district heating sector in which the FCO had identified significant differences in revenues of district heating.

41 In most cases, the FCO adopted commitment decisions (and in some cases, the FCO closed the proceedings without a decision, as it did not find its initial suspicions confirmed by the results of its investigations) in which the FCO was able to leave several legal questions ultimately open.
42 The FCO found, in particular, that this conduct not only had negative effects on the suppliers, but also on smaller competing retailers from whom the suppliers might try to recover the rebates (waterbed effect). See FCO decision of 13 February 2017, Case B8-30/13, Paragraph 28 et seq., innogy; and decision of
Another typical exploitative abuse scenario concerns the request by powerful buyers that their suppliers grant ‘wedding rebates’ following the merger of the buyer with other retailers. For example, the FCO intervened against furniture retailer XXXLutz for requesting unjustified wedding rebates (XXXLutz asked suppliers to retroactively grant discounts to purchases that Möbel Buhl had made before it had been acquired by XXXLutz) from its suppliers. The FCO did not launch a formal investigation, but closed the file after XXXLutz committed to stop demanding such rebates.\footnote{FCO press release of 11 January 2018, available at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/11_01_2018_Moebel_Hochzeitsrabatte.html.}

An exploitative abuse may not only concern pricing, but also the use of certain contractual terms and conditions by a dominant company can be exploitative under Section 19(1) or 19(2) No. 2 of the ARC.\footnote{The FCJ considered it abusive under Section 19(1) of the ARC if a dominant enterprise invoked terms and conditions that are invalid under civil law. Such conduct is, in particular, abusive if the clause in question had only been accepted because of the company’s dominance; see FCJ judgment of 24 January 2017, Case KZR 47/14, VBL Gegenwert II, Paragraph 35.} In its recent Facebook decision, the FCO relied on this theory of harm. Specifically, the FCO found Facebook’s terms and conditions exploitative because they violated European and German data protection rules.\footnote{See FCO decision of 6 February 2019; a non-confidential version is available in German only at www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html?nn=3591286.} In the FCO’s view, a key objective of European data protection law is to protect the fundamental right of informational self-determination and, hence, users’ control over how and for what purposes private networks, such as Facebook, use their personal data. The FCO found that Facebook’s terms and conditions provided it with access to vast amounts of personal user data, as users were practically unable to reject Facebook’s data collection if they wanted to join and access its network (under Facebook’s terms of service, users could only join the social network if they also agreed to Facebook collecting and matching user data obtained from sources other than their core platform, including not only other Facebook-owned platforms, but also third-party websites). In addition, users lacked viable alternatives to Facebook’s private network because of Facebook’s dominant market position. In the FCO’s view, users’ consent to Facebook’s data collection could not be considered as freely given – which is the key requirement for the consent’s validity under the GDPR. The FCO therefore imposed limitations on Facebook’s current practice of collecting and processing user data, and prohibited the use of the relevant terms of service.

\section{Remedies and Sanctions}

\subsection{Sanctions}

Persons or entities that participated in an infringement of antitrust law or violated an FCO decision can be fined within the framework of an administrative offence procedure. German antitrust law is different from EU law in this respect, insofar as the FCO in principle needs...
to identify one or more individuals (who will likely also be fined, albeit more moderate amounts) who have committed the infringement and then attribute their behaviour to the legal entity they represented in order to also impose a fine on that entity.

**Parental liability**
As a consequence, it has been difficult for the FCO to fine a parent company for infringements committed by employees of its subsidiaries, as it needed to find either that employees of the parent company were involved in the misconduct or that parent company employees neglected their supervisory duties. However, Section 81, Paragraphs 3a–e, introduced by the German legislator as part of the most recent ARC amendment, now establishes a principle of parental liability that is – in effect – similar to EU competition law, as it introduces strict liability for controlling group companies. Accordingly, the FCO may now hold a parent company (jointly and severally) liable for fines that were imposed because of a subsidiary’s infringement even if the parent company did not participate in the infringement or violate any supervisory duties with respect to the subsidiary.46

**Legal successor liability**
According to Section 30(2a) of the Administrative Offences Act, legal successor entities (i.e., entities resulting from corporate transformations) are liable for their predecessor’s fines. This regulation was introduced in 2013 to close an important enforcement gap under the previous rules.47 In addition, the German legislator more recently also introduced a provision to the ARC regarding legal successors in order to close the remaining ‘sausage gap’.48 According to Section 81a of the ARC, cartel fines may now be imposed on an enterprise taking over the business of an enterprise that committed an infringement, provided that the infringing enterprise has ceased to exist and the purchaser continues the business.

**Maximum fine**
The maximum fines amount to €1 million for an individual and 10 per cent of the consolidated group turnover for a legal entity.49

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46 Several German commentators have severely criticised this new rule. They argue that the new rule violates the constitutional principle of fault, as a legal entity may be held liable without any culpable behaviour of its own or of its bodies.

47 Under the old rules, liability for fines was, in principle, limited to the specific legal entity that had committed the infringement and did not extend to new legal entities resulting from corporate transformations, such as corporate mergers. This gap had been used by several companies to avoid fines through corporate restructurings. However, according to the FCJ’s case law, a legal successor can also be held liable under the old rules (which remain applicable to conduct that occurred prior to the change in law) if – from an economic perspective – the legal successor’s assets were (nearly) identical to those of the legal entity that committed the infringement. In this context, the Düsseldorf Court of Appeal confirmed a fine imposed by the FCO on a German coffee roaster (judgment of 10 February 2014, Case V-4 Kart 5/11 (OWi)).

48 German sausage producer Tönnies had effectively used remaining legal loopholes to avoid fines for its participation in a cartel concerning sausages by conducting internal restructuring measures.

49 Section 81(4) of the ARC.
In June 2013, the FCO published its current fining guidelines. Contrary to the previous guidelines, which were fairly similar to the European Commission’s 2006 guidelines, the new guidelines deviate significantly from the Commission’s guidelines.

According to the current guidelines, the maximum fine of 10 per cent of a company’s turnover should not be considered a cap limiting a fine that could otherwise be higher (as is the case under EU law), but should, rather, be considered the upper limit of the fining scale, which should, therefore, be applied only in cases of the most extreme hardcore infringements.

Pursuant to the fining guidelines, the FCO first determines the basic amount of the fine, which is 10 per cent of the group’s relevant turnover achieved with the products or services related to the infringement for the period during which the infringement was ongoing. In a second step, this initial amount is multiplied, depending on the size of the group, by a factor of between two and six, or even higher in cases where the group’s turnover exceeds €100 billion. The resulting basic amount may then be adjusted in a third step for mitigating or aggravating circumstances.

To date, the FCO has imposed fines applying the new guidelines in several cartel proceedings as well as in proceedings concerning vertical infringements. In addition, the FCO also based a (relatively small) fine in a dominance case concerning a producer of carbon dioxide cartridges for soda water preparation on the new guidelines. The FCO has stated that the new guidelines would also apply to infringements that took place prior to the adoption of the new guidelines.

Collecting benefits of infringement

German administrative offence law allows the FCO to also collect proceeds derived from an infringement, either in separate administrative proceedings or by determining a fine that reflects such proceeds (in which case, the total fine may exceed the maximum of 10 per cent of a company’s turnover).

ii Behavioural remedies

Sections 32 to 34 of the ARC allow for behavioural remedies. Thus, the FCO may impose all measures necessary to bring an infringement effectively to an end and that are proportionate to the infringement. This includes the right to impose measures that require action by the infringer. Section 32a of the ARC allows the FCO to impose interim measures in cases of urgency if there is a risk of serious and irreparable damage to competition. Such measures should, however, not last longer than one year.

50 According to the previous guidelines, the FCO first determined a basic amount of the fine, taking into account the gravity, as well as the duration, of the infringement, and then adjusted the basic amount by a deterrence factor, reflecting aggravating and mitigating circumstances.

51 This was, in particular, because of a decision of the FCJ (judgment of 26 February 2013, Case KRB 20/12, Zementkartell). See footnote 3 regarding the current FCO fining guidelines.


For instance, the FCO has ordered hotel online booking platforms HRS\(^{54}\) and Booking.com\(^{55}\) to delete best-price clauses from their contracts with hotel partners.

### Structural remedies

Section 32(2) of the ARC provides for the possibility of structural remedies, including divestitures (unbundling) of companies; however, structural remedies are subject to a strict proportionality test and may only be applied where behavioural remedies would be insufficient to remedy the infringement. To date, the FCO has not imposed any structural remedies in abuse cases.

**VI PROCEDURE**

In administrative proceedings, the FCO carries out investigations to decide whether to issue a prohibition decision and, if appropriate, a fine. Such decisions can be taken simultaneously or consecutively, and both are subject to judicial review of the facts and the law by the Düsseldorf Court of Appeal. The Court’s decisions can be further appealed – on points of law only – to the FCJ. In practice, the courts indeed carry out an independent review of the cases brought before them. While they often side with the FCO, it is by no means rare that FCO decisions are overturned based on factual or legal errors of the FCO.

#### i Commencement of investigations and investigative powers

The FCO may commence investigations *ex officio* or, and in practice more frequently, following complaints of third parties (e.g., competitors, customers or suppliers).\(^{56}\) The FCO may carry out informal discussions or send informal questionnaires. It can also take formal measures, such as making information requests or, subject to a prior court order, conducting surprise inspections (dawn raids), in the course of which it can seize documents and electronic files.

#### ii Right to be heard

During all stages of an investigation, the enterprises investigated have the right to be heard. The FCO will usually serve a statement of objections before it issues a decision to which the company concerned may respond. The party concerned also has the right of access to the file, including digitally stored data and media.

#### iii Guidance

There is no formal procedure for obtaining guidance on individual cases, but the FCO is open to informal contacts and may provide informal guidance in this context.


\(^{56}\) There is no formal complaint procedure, however, which means, notably, that complainants do not have a legal remedy against a rejection of their complaint.
iv Settlements

The FCO often ends proceedings by adopting commitment decisions; that is, by declaring remedies offered by the party concerned as binding. In light of the increasing importance of such settlements in German antitrust proceedings over the past few years, the FCO published a guidance paper on its settlement practice in 2013. Settlements have frequently been reached in hardcore cartel and vertical restraints cases (resale price maintenance, online impediments). In its guidance paper, the FCO notes that there is no regulatory framework for settlements, but that its power to conclude settlements derives from its discretion to pursue cases. A party to an investigation has no right to a settlement, but can of course suggest it to the FCO. A settlement does not require parties to commit not to appeal any fining decision included in the settlement; however, there are no cases where an enterprise would have actually appealed an administrative fine on which it had previously settled.

v Cooperation with other authorities

Cooperation between the FCO, the other national competition authorities and the European Commission takes place via the European Competition Network (ECN). This cooperation may involve exchanging information about cases and decisions, exchanging evidence and mutually assisting each other with investigations. The FCO has set up an internal coordination unit to represent the authority within the ECN. The FCO is also an active member of the International Competition Network (ICN), and the FCO’s president has chaired the ICN’s Steering Group since 2013.

VII PRIVATE ENFORCEMENT

Section 33 of the ARC provides an express legal basis for damage claims based on infringements of antitrust law. Following a significant increase in cartel-related follow-on damage litigation over recent years, damage actions or other types of litigation (e.g., requesting the termination of discriminatory conduct, access to a network or infrastructure) based on alleged restrictive unilateral conduct have also become fairly frequent. Unlike cartel damage cases, these actions often do not follow an investigation and decision by the FCO (or other competition authorities), but are brought on a stand-alone basis.

German law currently does not provide for class actions seeking damages. A practical way to consolidate damages claims of various victims of anticompetitive behaviour is

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57 See, for instance, the FCO’s recent commitment decisions regarding several operators of district heating networks that were alleged to have abused a dominant market position by charging excessive prices: decision of 13 February 2017, Case B8-30/13, innogy; decision of 13 February 2017, Case B8-31/13, Dąsydler; and decision of 15 October 2015, Case B8-34/13, Stadtwerke Leipzig. The FCO’s press releases regarding these cases are available at www.bundeskartellamt.de/SharedDocs/ Meldung/EN/Pressemitteilungen/2017/14_02_2017_Fernw%2C%3A4rme.html?nn=3591568; and www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/16_10_2015_Stadtwerke_ Leipzig.html?nn=3591568.

58 The guidance paper is available in German at www.bundeskartellamt.de/SharedDocs/Publikation/DE/ Merkbl%C3%A4ttet/Merkblatt-Settlement.pdf?__blob=publicationFile&v=2. In contrast to the EU settlement programme, under German law, settlements can also be concluded in cases other than those involving cartels, including dominance cases.

59 In December 2014, the EU Directive on Antitrust Damages Actions (2014/104/EU) came into effect. Member States had to implement the Directive in their national law by the end of 2016. In Germany, the Directive was implemented by the most recent amendment to the ARC.
to assign the claims to one party or institution, which then brings the lawsuit. In a case in which claims had been assigned to the company Cartel Damages Claims (CDC), the Düsseldorf District Court dismissed CDC’s collective damages claims against various German cement manufacturers, holding that the assignments of the claims to CDC for the purpose of enforcing them in court were null and void in violation of public policy. Under German procedural rules, the defeated party in a court case has to pay the court fees and must reimburse the winning side for its legal costs. As CDC’s special purpose vehicle for the enforcement of the claims was only minimally funded, it would not have been able to cover such costs had it lost the case. The fact that CDC did not bear any of the risks of losing the case was considered a violation of public policy. The Düsseldorf Court of Appeals affirmed the judgment. However, if properly funded, a company to which damage claims were assigned should be able to bring consolidated lawsuits. Of course, the decision means that entities bringing such claims must assume considerable financial risk (or have the assignors of the claims share such risk), which reduces the attractiveness of the scheme. To limit this financial risk, the ARC provides for a capped value of the claims resulting in limited fees (see Section 89a(3) of the ARC).

In addition, consumer associations may bring actions on behalf of consumers, but only for injunctions, not for damages. Where a company has derived benefits from abusive or predatory conduct, the FCO may, in principle, seek to collect such benefits on behalf of the state, or, if the FCO has not sought such benefits, consumer associations may do so (private damage claims and fines imposed by the FCO already reducing such benefits are taken into account). In practice, however, such actions are very rare.

In the context of follow-on suits, German courts are legally bound by any (final) decision of the European Commission, the FCO or any other national competition authority in an EU Member State finding an infringement of EU antitrust law. The binding effect is, however, limited to the determination of the antitrust infringement, so causation and the amount of damages need to be established subject to the normal rules on the burden of proof in German court proceedings.

VIII FUTURE DEVELOPMENTS

As in recent years, both the FCO and the German legislator continue to focus on digital markets. This trend is set to continue.

According to FCO president, Andreas Mundt, the FCO intends to preserve a leading role among competition authorities with respect to the internet economy and e-commerce sector. Having identified ‘big data’ as an important source of market power, the FCO’s recent proceedings against Google, Facebook and Amazon will likely not be the end of this trend. As also evidenced by the sector inquiry on the conduct of price comparison websites, the FCO is particularly intrigued by the market power of (online) platforms in multi-sided markets.

60 Düsseldorf District Court judgment of 17 December 2013, Case 37 O 200/09, CDC.
61 Düsseldorf Court of Appeals judgment of 18 February 2015, Case VI U 3/14; CDC has not further appealed this decision.
62 In Germany, the court and legal fees in civil proceedings are determined based on the value of the claim.
63 Section 33b of the ARC (formerly, Section 33(4) of the ARC, changed by the recent amendment to the ARC).
64 Munich Court of Appeals judgment of 21 February 2013, Case U 5006/11 Kart; and Berlin District Court judgment of 6 August 2013, Case 16 O 193/11 Kart.
As the FCO is taking great interest in the combination of (direct or indirect) network effects, large amounts of personal data, and the gatekeeper function of online platforms for evolving markets, several additional dominance proceedings can be expected in the future. Another indicator of the FCO’s continued interest in this regard is the project on algorithms and their implications for competition, including interdependencies between algorithms and market power, that the FCO launched in June 2018 in cooperation with the French Competition Authority.\(^{65}\)

Given that the German legislator recently expanded the FCO’s competences in the area of consumer protection, the FCO may also be expected to conduct sector inquiries if there is evidence of sustained, significant and repeated violations against consumer protection law in an industry.\(^{66}\) On that basis, the FCO launched its first sector inquiry in December 2017, focusing on the conduct of price comparison websites in the area of travel, insurance, financial services, telecommunications and energy, and published its final report in April 2019. In addition, the FCO can now act as \textit{amicus curiae} in court proceedings that concern such violations.\(^{67}\)

In addition, the FCO and the Federal Network Agency published a draft guidance paper on the control of abusive practices with respect to electricity generation in March 2019. According to Mundt, the FCO aims to explain its basic approach to the assessment of abusive practices by electricity producers with a mind to provide them with a higher level of legal certainty.\(^{68}\) The two authorities requested comments on their draft by 20 May 2019, but have not stated when they expect to issue the final guidelines. The FCO can also be expected to take another stab at updating its notice on below-cost pricing to reflect the most recent amendment of the ARC in this regard.

The German government and legislator continue to review the ARC; in particular, assessing whether it still allows effective enforcement against abuse of market power in light of the increasing digitalisation and importance of globally active digital players. Thus, in September 2018, the German Federal Ministry for Economic Affairs and Energy (FME) issued an expert report that outlined several potential amendments to the ARC’s rules on the abuse of dominance.\(^{69}\)

The experts’ report, inter alia, recommends the facilitation of intervention by the FCO or courts in digital markets with strong positive network effects. Under the proposal, an intervention would be possible prior to a company achieving an undue degree of market power in order to prevent a ‘tipping’ of the market into a monopoly that would be difficult to reverse thereafter. For this purpose, the experts propose the introduction of a new rule prohibiting unilateral conduct by platform providers in close oligopolies that could induce tipping and is not justified on grounds of competition on the merits (e.g., by obstructing multi-homing or switching for users). In light of online platforms’ increasing importance as information intermediaries and central players in the digital economy, the experts further recommend the introduction of the concept of intermediation (platform) power as an

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\(^{65}\) See FCO press release of 19 June 2018.
\(^{66}\) Section 32e(5) of the ARC.
\(^{67}\) Section 90(6) of the ARC.
independent, third form of market power in the ARC. The experts also recommend the expansion of the application of the rules on the protection against exclusionary conduct for companies with superior market power over small and medium-sized enterprises.\textsuperscript{70} As relevant dependencies in the digital economy can also arise for large firms, protection should be granted beyond small and medium-sized companies.

The FME is currently assessing the expert report’s results and recommendations. In September 2018, it also appointed an expert commission (the Competition Law 4.0 Commission) with the task of providing practical recommendations for the revision of German and European competition law.\textsuperscript{71} While the expert commission plans to provide its results in autumn 2019, actual legislative changes are not expected before 2020.

\begin{itemize}
\item \textsuperscript{70} Section 20(3) of the ARC.
\item \textsuperscript{71} See FME press release of 20 September 2018.
\end{itemize}
I INTRODUCTION

The conduct of dominant enterprises is regulated by Section 4 of the Indian Competition Act 2002, as amended (the Act). Section 4 prohibits the abuse of a dominant position by an enterprise or group. Notably, an abuse of a dominant position is prohibited, not dominance itself or the creation of dominance. The Act regulates the conduct of both private and public sector (state-owned) enterprises as well as departments of the government that engage in non-sovereign functions, across all sectors of the Indian economy.

From 20 May 2009, the date Section 4 entered into effect, the Competition Commission of India (the Commission) has enjoyed exclusive jurisdiction for enforcement of Section 4. Section 60 of the Act provides that the Act will have effect notwithstanding any inconsistent provision of any other law currently in force. In addition, Section 62 clarifies that the Act will operate in addition to the other laws currently in force.

Under the Act, the Commission has wide powers of investigation and enforcement. For conducting investigations into alleged anticompetitive conduct, the Commission is assisted by the office of the Director General (DG). Appeals from the Commission’s orders are filed with the National Company Law Appellate Tribunal (the Tribunal). The Supreme Court of India is the final appellate authority for all matters under the Act. Recently, the total strength of the Commission was reduced from seven members (comprising one chairperson and six members) to four members (comprising one chairperson and three members). In September 2018, the central government set up a committee to review the Act in view of the changing business environment and to suggest any amendments, if necessary.

Since no formal policy statements in respect of the application of Section 4 have been made by the Commission to date, the Commission’s decisions continue to provide the only guidance. In Google, for example, in respect of findings relating to the design of Google’s search engine results page (SERP), the Commission’s assessment shows a pro-innovation stand. While noting that regulatory intervention in the technology markets must be carefully tailored so as not to stifle innovation, the Commission has shown a hitherto unprecedented, self-imposed, regulatory reluctance in interfering with search design.

1 Anand S Pathak is the managing partner at P&A Law Offices.
2 Case No. 7/2012, In Re: Matrimony.com Limited v. Google LLC and Others; Case No. 30/2012, In Re: Consumer Unity and Trust Society (CUTS) v. Google LLC and Others.
II YEAR IN REVIEW

During the 2018–2019 period, the Commission issued eight decisions under Section 4 of the Act: All India Chess Federation (AICF),3 Google, Ghaziabad Development Authority (GDA),4 DLF Limited (DLF),5 Esaote SPA (Esaote),6 Public Works Department, Government of Haryana (PWD),7 South Asia LPG Company (SALPG)8 and Indian Sugar Mills Association (ISMA).9 The Commission found infringements in five of these eight cases: AICF, Google, GDA, Esaote and SALPG. The most significant among these is the Commission’s Google decision, where the Commission penalised Google for abusing its dominant position in the online general web search and web search advertising services markets in India, by using its search designs to influence search results in a discriminatory manner and entering into intermediation agreements that restrict competition, in contravention of the provisions of Section 4(2)(a)(i), 4(2)(c) and 4(2)(e) of the Act. In the other cases (i.e., PWD, DLF and ISMA), the Commission found no violation of Section 4 of the Act.

In another nine cases involving claims of abuse of dominance, the Commission adopted a prima facie view under Section 26(1) of the Act, directing the DG to investigate complaints under Section 4 of the Act. Some of the important cases in which the Commission has directed investigations are: Intel Corporation10 (in the server processor market in India), Board of Control for Cricket in India11 (in the organisation of private professional league cricket market in India), Oil and Natural Gas Corporation Limited12 (in the supply of offshore support vessels for exploration and production of natural gas in India) and Ministry of Railways, Union of India13 (in the supply of railway services in India). The Commission has, at the prima facie stage, also rejected more than 30 complaints alleging abuse of dominance, including against players operating in technology-driven markets, such as ANI Technologies (Ola Cabs) and Uber14 (online taxi booking aggregators).

In OLA and Uber, however, the Commission, while rejecting the need for an investigation, acknowledged that common investor ownership may amount to control that could cause potential harm to competition in concentrated markets through coordinated decisions of competing firms having common investor ownership. In addition, common ownership of firms with related and competing commercial interests may increase the risk of exchange of sensitive information, which may facilitate price-collusion or restrict capacity and volumes. In the Commission’s view, an institutional investor, despite holding ‘passive’

3 Case No. 79/2011, In Re: Hemant Sharma and Others v. All India Chess Federation.
4 Case No. 86/2016, In Re: Satyendra Singh v. Ghaziabad Development Authority.
5 Case No. 73/2013, In Re: Amit Mittal v. DLF Limited and others; Case No. 84/2014, In Re: Vijay Kapoor v. DLF Limited and others.
7 Case No. 70/2014, In Re: Rajat Verma v. Public Works (B&R) Department, Government of Haryana and others.
11 Case No. 91/2013, In Re: Pan India Infraprojects Private Limited v. Board of Control for Cricket in India.
12 Case No. 1/2018, In Re: Indian National Shipowners’ Association v. Oil and Natural Gas Corporation Limited.
13 Case No. 30/2018, In Re: Meet Shah and another v. Union of India, Ministry of Railways and another.
14 Case No. 25-28/2017, In Re: Meru Travel Solutions Private Limited v. ANI Technologies Private Limited and others.
investments, may affect the competitive dynamics of the market, and common shareholdings could affect incentives to compete or incentivise collusive behaviour. Nevertheless, allegations of collusion must be based on evidence to warrant an investigation.

The Commission also rejected complaints in the real estate market: Vatika, Uttar Pradesh Housing and Development Board and Merlin Developers, and in the credit rating market: TransUnion CIBIL. And in the e-commerce sector, the Commission rejected complaints filed by an industry association representing online sellers alleging abusive conduct by online marketplaces, such as Amazon and Flipkart.

The Commission ordered the closure of two cases after issuance of the investigation report by the DG: Vishal Gupta and GAIL. In Vishal Gupta, the Commission noted that Mr Vishal Gupta (informant) was aggrieved that his company, Shyam Garments (SGL), which operated a Google AdWords account, was suspended as a result of Google trying to unilaterally promote its own remote tech-support service, ‘Google Helpout’. Following an investigation, the Commission noted that platforms and users are free to agree upon the terms and policies that will govern their relationship, including enforcement mechanisms. Google’s AdWords policies clearly defined minimum standards of use for its advertising platform to protect the vulnerable end-users. The Commission found that Google was prompted to review its advertisement to check compliance with the user safety policy and other relevant policies pursuant to the alerts, triggers and warnings from the Federal Trade Commission and other antitrust regulators. The Commission concluded that suspension of the AdWords account operated by SGL had been undertaken pursuant to multiple violations of Google’s policies, which were duly communicated via email to the advertisers, and were not to promote its own tech support services. Google had successfully demonstrated that it followed a fair, legitimate process, using clear, accessible and pro-consumer policies and, therefore, did not infringe the Act.

In GAIL, the Commission noted that six separate complaints were filed against GAIL alleging that GAIL imposed unfair terms and conditions under the gas sale agreement (GSA) for procurement of re-gasified liquefied natural gas (RLNG). Following the DG’s investigation and report, the Commission observed that long-term RLNG contracts were fairly common in the energy sector. These contracts were not inherently anticompetitive because the informants were at liberty to enter into short-term contracts, but instead chose to enter into long-term RLNG contracts on account of certain commercial advantages (such as assured and steady supply, and insulation from price volatility). The Commission also scrutinised the ‘take or pay’ liability clause contained in the GSA, which required the buyer to pay for the contracted quantity of gas for the year even if the buyer did not procure the entire quantity in that year. Nevertheless, the buyer could demand, at a later point of time, a proportionate refund for the excess gas not used by it. Therefore, the GAIL Ltd’s claim under this “take or pay” commitment was upheld.

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17 Case No. 50/2017, In Re: Cambridge Residents Welfare Association and others v. Merlin Developers and others.
18 Case No. 36/2018, In Re: M. Venugopal Reddy v. TransUnion CIBIL Limited and another.
19 Case No. 20/2018, In Re: All India Online Vendors Association v. Flipkart India Limited and another.
20 Case No. 6/2016, In Re: Vishal Gupta v. Google LLC and others; Case No. 46/2016, Albion InfoTel Limited v. Google LLC and others.
21 Case No. 16-20/2016, In Re: Rico Auto Industries Limited and Anr v. GAIL (India) Limited; Case No. 45/2016, Omex Auto Limited v. GAIL (India) Limited; Case No. 02/2017, Omex Auto Limited v. GAIL (India) Limited; Case No. 59/2017, Rico Auto Industries Limited v. GAIL (India) Limited; Case No. 62/2017, Rico Castings Limited v. GAIL (India) Limited; Case No. 63/2017, Rathi Bars Limited v. GAIL (India) Limited.
time during the contract period, any shortfall in the quantity not procured from GAIL. The Commission noted that, despite there being ‘under-drawals’ of gas by the informants, GAIL continued to supply to them without invoking the take or pay liability clause. In fact, GAIL did not invoke the take or pay liability clause as long as the price of gas in the spot market was higher than the price specified in the GSA. The Commission noted that GAIL demanded the differential from the informants only when the spot market prices fell below the contracted price under the GSA or if GAIL was unable to sell the under-drawn gas in the spot market. The Commission also took into account similar obligations that GAIL had with the upstream supplier and, based on all of these findings, concluded that GAIL’s actions were directed at mitigating the losses that could have accrued to GAIL from under-drawals by the informants, and did not raise any competition concerns.

The Commission also closed the inquiry into the conduct of AFI, the apex body controlling and managing athletic events in India, after receiving a reference from the Department of Sports, Ministry of Youth Affairs and Sports regarding possible contravention of the Act. The Commission noted that AFI’s internal memorandum, which mandated ‘organisers to seek its permission before organising any marathon/road race at national and international level and cautioned state units/officials/athletes and individuals to not encourage unauthorised marathons or become part of such marathons’, was not actually implemented by AFI. In the absence of any implementation, the Commission concluded that there was no contravention of the Act.

In the period 2018–2019, following the merger of the Competition Appellate Tribunal with the Tribunal, the Tribunal has not rendered any notable decisions relating to Section 4. This is largely attributable to the caseload burden relating to company law matters and matters under the Insolvency and Bankruptcy Code 2016, all of which fall within the jurisdiction of the Tribunal, in addition to competition law appeals from the Commission’s orders.

III MARKET DEFINITION AND MARKET POWER

Market definition and market power remain the starting point of every competition law assessment for determining dominance and the abuse of dominance by an enterprise.

i Relevant market

The Act defines ‘relevant product market’ as a market comprising all those products or services that are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. The notion of ‘relevant geographic market’ is defined in the Act as a market comprising an area in which the conditions of competition for the supply of goods or provision of services or the demand for goods or services are distinctly homogeneous and can be distinguished from the conditions prevailing in the neighbouring areas. The notion ‘relevant market’ is defined by the Act as a market that may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both markets. In Section 19, the Act also identifies factors that the Commission must take into account in defining the relevant market.

22 Reference Case No. 01/2015, In Re: Department of Sports, Ministry of Youth Affairs and Sports v. Athletics Federation of India.
In *Google*, the Commission defined two relevant product markets: the market for online general web search services and the market for online search advertising services. The Commission noted that online general web search services constitutes a distinct relevant product market, which is not substitutable for the direct search option, which requires the users to type the URL of a website in the internet browser. This is because users may not be aware of URLs of all websites that offer the information they are searching for. Search engines, therefore, become the first port of call for a user looking for information online. Accordingly, general web search services cannot be equated with direct search services.

In *Google*, the Commission also noted that online search advertising services constitute a distinct market. First, online and offline advertising services are not comparable because:

- online advertising is not substitutable with advertising in newspapers, radio or television for advertisers seeking to target user groups having limited internet access;
- advertising rates are much lower for online advertising; and
- online advertising allows the users to accurately monitor the effectiveness of the advertisement in terms of actual views.

Second, search and non-search advertising are different because:

- search advertising is used for demand fulfilment and non-search advertising is used for creating brand awareness; and
- search and non-search advertising have different pricing mechanisms (search advertising is priced based on cost-per-click and non-search advertising is priced based on cost-per-thousand impressions).

With respect to the relevant geographic market, the Commission concluded that the relevant geographic market for online general web search services and online search advertising services are national; that is, the national territory of India.

In *SALPG*, the Commission found that SALPG was the sole player offering LPG terminalling services at Visakhapatnam Port, and these services offered by SALPG in Visakhapatnam were not available to consumers operating in adjacent ports, such as Haldia and Ennore. The Commission, therefore, defined the relevant market as the ‘market for upstream terminalling services at Visakhapatnam Port’.

The market definitions adopted by the Commission in cases relating to the real estate sector continue to remain unpredictable, muddled and inconsistent. In contrast with the earlier *DLF* cases, where the Commission first characterised residential apartments priced at 2 billion rupees (approximately) as high-end apartments and then defined the relevant product market as high-end apartments, the Commission adopted an objective and price-neutral approach for defining the relevant market in the latest case involving DLF. In the most recent *DLF* case, where the residential apartments under scrutiny were priced in the range of 4 to 6 million rupees, the Commission defined the relevant market as the market for the ‘provision of services for development/sale of residential apartments in Gurgaon’ without any reference to the cost price of an apartment. However, in *GDA*, the Commission appears to have reverted to its earlier reasoning and once again has identified the relevant market by reference to the pricing of apartments, and defined the relevant market as low-cost residential flats under affordable housing schemes for economically weaker sections.

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23 See footnote 5.
In *AICF*, the Commission identified two relevant markets; that is, the market for the organisation of professional chess tournaments and events, and the market for services of chess players, to assess whether AICF imposed unfair conditions to limit or restrict chess players from actively participating in chess tournaments not authorised by AICF. In this case, the Commission relied on its findings in the *Dhananj Pillay* case,\(^{24}\) to note that the product market needs to be analysed from the perspective of the ultimate viewers of sport events (i.e., the end consumers), who influence the popularity of the sport, which, in turn, determines the value proposition of the commercials associated with different sports. In addition, a sports federation requires the services of players, officials, etc. for staging an event that necessarily implies that the sports federations are consumers of the services offered by the players, officials and others. The Commission also noted that AICF hires the services of chess players for organising chess events, which makes it a consumer of chess player services, and AICF cannot substitute the services provided by chess players with any other service. Similarly, from an intended-use perspective, chess, in particular, may not be regarded as substitutable with other forms of general entertainment or sports.

In *Esaote*, the Italian company Esaote, which operates in the provision of medical diagnostics systems (specifically MRI machines) market, the Commission noted that dedicated standing/tilting MRI machines (G-Scan MRI machines) manufactured by Esaote are distinct from conventional MRI machines, based on physical characteristics and intended use. The Commission then proceeded to define the market as the ‘market for dedicated standing/tilting MRI machines in India’.

These 2018 decisions demonstrate that the Commission has continued to define markets narrowly in abuse cases, which naturally facilitates an easier finding of dominance.

### ii Dominance

In assessing dominance and market power in the relevant market, the Commission is required by Section 19 of the Act to assess dominance in the context of a broad range of non-exhaustive factors, including market share, size and resources of the enterprise, size and importance of the competitors, vertical integration, entry barriers and dependence of consumers on the allegedly dominant enterprise. The role and importance of each of these factors varies depending upon the facts of each case and the alleged theory of harm, but in its decisions, the Commission will assess dominance of the allegedly dominant enterprise under each of the Section 19 factors. Generally, market share and the size and resources of the enterprise will be the most important criteria in the Commission’s assessment of dominance.

In *Google*, despite acknowledging that, in high technology markets (often characterised by network effects), innovation is the key and the market shares of the players are typically transient, the Commission found Google to be dominant in both the relevant markets (i.e., the markets for online general web search services in India and online search advertising services in India). Google’s consistently high market shares and other technical and structural advantages were relied upon by the Commission to arrive at this conclusion.

In *AICF*, the Commission concluded that AICF’s dominance was the result of a number of factors, including its regulatory powers, control over infrastructure, control over players, and its ability to regulate and control the conduct and governance of all chess events in India.

In *DLF*, despite adopting a different market definition from the position taken in the earlier cases involving the same company, the Commission separately assessed DLF’s dominance in the market for residential apartments in Gurgaon because of the changed market situation. The Commission noted that, due to the presence of multiple developers that accounted for 90 per cent of the total projects, DLF was no longer dominant in the relevant market. It is notable that several of these developers are new entrants, which casts doubts on the Commission’s earlier assessment of barriers to entry.

In the case involving state-owned builders and developers (*GDA*), the Commission noted that GDA had gained absolute control over the sale and development of residential, institutional or commercial plots (as the case may be) because of the statutory framework in place and the financial backing of the concerned state government. No competitor in the market could match the size and structure of these authorities.

In *SALPG*, the Commission found that SALPG was the only player offering terminalling services at Visakhapatnam Port and, therefore, enjoyed a 100 per cent market share in the relevant market identified by the Commission. Due to high entry barriers arising from the need for significant financial investment and a long gestation period, and the fact that consumers could not use the terminalling services being offered at the Haldia and Ennore ports, the Commission concluded that SALPG enjoyed an undisputed position of dominance in the relevant market.

In *Esaote*, the Commission found that the consumers (i.e., hospitals and diagnostic clinics), are entirely dependent on Esaote’s G-Scan MRI machines for diagnosis of joint-related ailments, and Esaote remains the sole manufacturer and supplier of G-Scan MRI machines in India. The Commission also found that Esaote was not constrained by any other viable substitute to G-Scan MRI machines, which allowed it to operate independently of competitive forces and, consequently, affect consumers in its favour. Based on these findings, the Commission concluded that Esaote commands a virtual monopoly in the ‘market for dedicated standing/tilting MRI machines in India’.

While the Commission’s decision in *DLF* (the latest order) is an improvement over its prior orders against the company, the inconsistency in the definition of markets and the assessment of dominance in the Indian real estate sector is likely to continue until the Supreme Court renders its judgment in the *DLF* case that has been pending in the Court for a long time. The Competition Commission of India’s (CCI) earlier decision in *DLF* has, itself, arguably been the reason for DLF suffering commercially and losing its relative leading position. The *DLF* string of cases also highlights how delays in dealing with competition matters in the appeal process frequently result in injury to the appellant company in terms of market perception and the deposit of fines, even in cases where the appellant company may be strong on the merits of the case. The Commission’s decision in *Esaote* demonstrates its inclination to define relevant markets narrowly to facilitate a finding of dominance.

**IV ABUSE**

**i Overview**

Under Section 4(2) of the Act, an enterprise (or a group) abuses its dominant position if it: 

a. directly or indirectly imposes unfair or discriminatory conditions in the purchase or sale of goods or services or price in purchase or sale (including predatory price) of goods or services (exclusion: discriminatory conditions or prices that may be adopted to meet competition);
India

Section 4(2) of the Act appears to contain an exhaustive list of conduct that may constitute abuse of dominance, unlike Article 102 of the Treaty on the Functioning of the European Union (TFEU). The list of ‘abuses’ in Section 4(2) is sufficiently broad and could cover most exploitative and exclusionary conduct that could be characterised as an abuse of dominance. Section 4(2)(c), in particular, which prohibits any conduct by a dominant enterprise resulting in ‘denial of market access in any manner’, is frequently used by complainants or informants to cover exclusive dealing, refusal to supply and other theories of anticompetitive harm that do not explicitly fall within any of the other categories in Section 4(2).

It is notable that, unlike Article 102 of the TFEU as interpreted by the EU courts, the Act does not provide for objective justifications as defences to the anticompetitive conduct of dominant enterprises. Under the Act, the only defence recognised for abusive conduct of a dominant enterprise is the ‘meeting competition’ defence. To date, the Commission has not provided any published guidance, including in its decisions, on the scope of this defence.

ii Exploitative abuses

In Google, while assessing Google’s conduct, the Commission placed emphasis on the special responsibilities and obligations of dominant enterprises in digital markets. Digital markets are often characterised by network effects and are capable of creating virtual hegemony of players with strong market positions (due to the ‘winner takes all’ phenomenon). While acknowledging that network effects promote innovation, the Commission observed that ‘... it cannot be disputed that network effects can raise switching costs for users and barriers to entry for potential competitors. As a consequence, market entries become less likely and users switch less frequently to other suppliers, which has a market power enhancing effect’. The Commission stated that Google, being the gateway to the internet for a vast majority of internet users due to its dominance in the online web search market, is under an obligation to discharge its special responsibility. The Commission also stated that Google’s ‘special responsibility’ is critical in ensuring not only the fairness of the online web search and search advertising markets, but also the fairness of all online markets, given that these are primarily accessed through search engines. The Commission found the following conduct of Google abusive:

a Ranking of universal results: prior to 2010, these were pre-determined to appear at the first, fourth or 10th position on the SERP and were not generated based on their relevance. The Commission found that this practice of Google was unfair to users and was in contravention of the provisions of Section 4(2)(a)(i) of the Act. However, since Google had modified its practice from October 2010 onwards, thus ensuring that the
search results were displayed on a free-floating basis, the Commission did not issue any cease-and-desist order and only directed Google to desist from engaging in such practices in the future.

b Prominent display of commercial flight unit: the Commission found the prominent display and placement of Google’s commercial flight unit, with links, on the SERP, which led the users of search services to Google’s specialised search options and services (Google Flight), to be an infringement of Section 4(2)(a)(i) of the Act. Through its search design, Google had not only placed its commercial flight unit at a prominent position on the SERP, it had also allocated disproportionate space to such units to the disadvantage of non-Google website verticals trying to gain market access.

c Prohibitions under the negotiated search intermediation agreements: prohibitions on the publishers under the negotiated search intermediation agreements were found to be an unfair imposition under Section 4(2)(a)(i) of the Act, restricting the choice of these partners and preventing them from using the search services provided by competing search engines.

In *Coal India*, the Commission, following the Competition Appellate Tribunal’s directions, conducted fresh hearings and passed orders against Coal India. Notably, the Competition Appellate Tribunal had also assessed the Commission’s findings against Coal India in a case concerning the e-auction scheme. Both the Commission (in the recent orders) and the Competition Appellate Tribunal have found that Coal India abused its dominant position by taking advantage of being the lone producer and supplier of coal in India, which is the most important raw material for power generation. The Commission found the terms and conditions imposed by Coal India through the fuel supply agreements, particularly those relating to the grading of coal, sampling process, sampling and supply of ungraded coal and force majeure, to be unfair. The Competition Appellate Tribunal found that the conditions in the e-auction schemes were onerous and one-sided.

In *GDA*, the Commission noted that the conduct of GDA in arbitrarily raising the prices of low-cost residential apartments (under affordable housing schemes for economically weaker sections) from the initial price of the apartments without any enabling provision (either in the brochure or allotment letter) on the pretext of miscalculation of cost of the project (as well as increase in cost over the years due to other extraneous factors) can only be explained by an abuse of its dominance.

In *Esaote*, the Commission found that despite entering into an agreement for supplying new G-Scan MRI machines, Esaote chose to supply G-Scan MRI machines that were already in its possession for over a year. The G-Scan MRI machines supplied by Esaote broke down frequently and remained unused at the installed sites, namely Hargovind Enclave and Apollo Hospital, for 58 per cent and 76.1 per cent of the time, respectively. The Commission also noted that Esaote imposed unfair prices and conditions in terms of its dealings by supplying a lower-priced opaque cage in place of a ‘see-through, perforated radio-frequency cage’; or by refusing to supply the European Conformity-approved head coils, as agreed by the parties. Upon a review of the purchase order placed with Esaote, the Commission also noted that the company had tried to impose arbitrary charges to fulfil its obligations under the contract on the basis of a selective reading of the purchase order. Esaote’s overall conduct was found to be in contravention of Section 4 of the Act.

The past year saw a continuation of the unfortunate trend of the Commission continuing to focus more on exploitative abuse cases rather than exclusionary abuse cases, highlighting
the fact that complainants (informants) prefer the faster proceedings and decision process of the CCI over the protracted breach of contract civil proceedings in a court of law, and the Commission is willing to entertain such allegations with alacrity. For example, the *Esaote* matter appears to be a purely contractual dispute between two parties regarding terms of delivery and supply and yet, the Commission expended significant time and resources on this case.

### iii Exclusionary abuses

In *Google*, the Commission found a clause in the negotiated search intermediation agreements, which required the publishers not to implement search technologies on their sites that are the ‘same or substantially similar’ to that of Google as restrictive of competition. The Commission also found that Google prevented partners, with whom it entered into negotiated search agreements, from implementing search services from a competitor providing similar or substantially similar search services. In addition, the Commission found that by restricting websites from partnering with competing search services, Google denied its competitors access to the search business and further marginalised them. These restrictions were found to be a *de facto* imposition of online search exclusivity in contravention of Section 4(2)(c) of the Act. The Commission took into account the effects of the exclusivity clauses of the negotiated intermediation agreements in light of the network effects in the online search and search advertising markets and Google’s dominance in these markets. Therefore, although the number of intermediation agreements entered into with Indian partners was not substantial and the term of such agreements varied between two and three years, the Commission found that the exclusivity clauses created conditions for extending and preserving Google’s dominance in search intermediation in perpetuity. Based on the evidence contained in the DG’s report, the Commission held that Google leveraged its dominance in the online general web search market to impose restrictive conditions in the negotiated search intermediation agreements in contravention of Section 4(2)(e) of the Act.

In *Vishal Gupta*, however, the Commission dismissed an allegation against Google for suspension of the AdWords account operated by SGL for multiple violations of Google’s policies, which were duly communicated via email to the advertisers. The Commission noted that Google’s policies were accessible and pro-consumer and, therefore, did not infringe the Act.

In *SALPG*, the Commission found that SALPG was denying East India Petroleum Company access to its LPG terminal infrastructure at Visakhapatnam Port, which was deemed to be an essential facility by the Commission. SALPG submitted that it had certain safety and technical feasibility concerns. Rejecting SALPG arguments, the Commission stated that the justifications advanced by SALPG ignore the inefficiencies resulting from SALPG’s conduct and the resulting foreclosure of competition. The Commission then concluded that the infrastructure operated by SALPG was indispensable and denial of the infrastructure amounted to an infringement of Section 4 of the Act.

In *AICF*, the Commission found that the restrictions imposed by AICF prevented chess players from participating in any tournaments not recognised by AICF. The evidence on record clearly established that AICF created hurdles for competing chess organisers (i.e., Chess Association of India) in the organisation of chess tournaments, as well as prevented chess players, who participated in these non-authorised tournaments, from playing in other chess tournaments. The Commission also noted that, in the absence of any guidelines governing the authorisation or sanctioning of chess tournaments by AICF, AICF could exercise absolute
discretion in treating any tournament as unauthorised. In addition, the removal of ELO ratings (for chess players) as a consequence of participating in an unauthorised tournament without offering any opportunity of being heard was also found to be unjustified. The Commission then concluded that AICF had not been able to demonstrate how such a blanket ban was necessary to preserve the integrity and promotion of the sport.

V REMEDIES AND SANCTIONS

Pending final determination of a case by the Commission, the Commission may issue interim orders restraining the parties from engaging in anticompetitive activities during the course of investigation.

If an enterprise or group is found to have abused its dominant position, in terms of Section 27 of the Act, the Commission may impose fines of up to 10 per cent of the enterprise’s or group’s average turnover for the preceding three financial years. Keeping in view the principles of proportionality, while deciding the amount of penalty, the Commission takes into account the aggravating or mitigating factors based on the facts and circumstances of each case. In addition, the Commission may pass a cease-and-desist order together with any other orders or directions as the Commission may deem fit. The Commission has not yet issued any guidelines on penalties.

The Supreme Court has clarified that, for determining the amount of penalty, the Commission must take into account the relevant turnover generated from products and services affected by the infringing conduct, as opposed to total turnover, which was considered by the Commission for the purposes of levying penalties prior to the Supreme Court clarification. The Supreme Court noted that any penal law imposing punishment is made for the general good of society and emphasised the principle of proportionality, which requires that the penalties imposed must not exceed what is appropriate and necessary for attaining the objective pursued.

During the 2017–2018 period, the Commission found infringements of Section 4 of the Act by five enterprises: Google, Esaote, AICF, SALPG and GDA. In Google, after considering the aggravating and mitigating factors, the Commission imposed a monetary penalty of 1.35 billion rupees (5 per cent of the average annual revenues generated from Google’s India operations in the financial years 2013, 2014 and 2015). Interestingly, the Commission noted that the concept of ‘relevant’ turnover cannot be applied to a technology platform, such as Google, in the same manner as for a conventional multi-product firm. This is because ‘... [in] a two-sided market, the search side is free whereas the other side is monetised through advertisements. ...’ Therefore, although Google’s revenues from its various business segments were taken into account, the Commission ultimately considered a sum total of the revenues generated by Google’s India operations for calculating the fine. The Commission also imposed certain remedial measures.

In Esaote, AICF and SALPG, the Commission imposed a penalty of 0.93 million rupees (10 per cent of the average annual turnover for the three preceding financial years), 0.69 million rupees (2 per cent of the average annual turnover for the three preceding financial years) and 192.07 million rupees (10 per cent of the average annual turnover for the three preceding financial years), respectively, and also issued certain cease-and-desist orders (in Esaote and AICF) and directions (in SALPG). In GDA, the Commission imposed a penalty of 10.06 million rupees (5 per cent of the average annual turnover for the three preceding financial years), and also passed certain cease-and-desist orders.
The Commission is empowered to proceed against company officials under the provisions of Section 48 of the Act. The High Court of Delhi, in exercise of concurrent writ jurisdiction, has recently clarified that the Commission can simultaneously proceed against the company for infringing the Act, and company officials under Section 48 of the Act.

VI  PROCEDURE

i  Proceedings before the Commission

The Act provides the procedure for filing of the information (i.e., the complaint), the investigation process, inquiry by the Commission and the procedure for appeal.

Any person may file a complaint with the Commission, in the prescribed format together with requisite fees, alleging contravention of the provisions of the Act. The informant (i.e., the complainant) may also file an application with the Commission for interim measures by describing the harm that would be caused if no interim protection is granted. Once the information is filed, the Commission, as far as possible, is required to record its opinion on the existence of a prima facie case within 60 days of the filing of the information. If the Commission is of the opinion that there exists a prima facie case, the Commission may direct the DG to conduct an investigation into the alleged anticompetitive conduct and submit its report within the time specified by the Commission.

Upon completion of the investigation, a non-confidential version of the DG’s report is provided to the informant and a confidential version of the report is provided to the enterprises under investigation. The parties are then directed to file their respective comments or objections to the report within the time limit specified by the Commission. Thereafter, the Commission schedules the case for hearing the parties – both the informant and the enterprises that allegedly infringed Section 4. The hearing is sometimes attended by a representative of the DG, but the DG is not present to defend the investigation report in all cases. Rather, in a case where the report finds an infringement of Section 4, the Commission relies on the informant to provide its submissions and, where the DG’s report is favourable to the informant, to defend the DG’s report. Where the report finds no infringement of Section 4, the Commission invites only the informant for a hearing before rejecting the information or complaint. The Commission is not obligated to accept the DG’s report, and there have been cases where the Commission has disagreed with the findings of the DG and rejected the report.

ii  Appellate procedure

An appeal against the final order of the Commission may be made to the Tribunal within 60 days of the date of receipt of the final order by the party. An appeal against the order of the Tribunal may be made to the Supreme Court of India within 60 days of the date of receipt of the Tribunal’s order.

Interim measures are available to parties before the Commission, the Tribunal and the Supreme Court of India. Frequently, parties also file writ petitions before the high courts if they believe that principles of natural justice are being violated or their legitimate legal rights are being ignored by the Commission.

VII PRIVATE ENFORCEMENT

Although the Act does not provide for private enforcement, it does allow a successful informant or any other person affected by the findings of the Commission, to make an application before the Tribunal for compensation from the dominant enterprise based on the findings of the Commission or the orders of the Tribunal.

VIII FUTURE DEVELOPMENTS

i Principles of natural justice

The Competition Appellate Tribunal and the High Court of Delhi (in exercise of concurrent writ jurisdiction) have been very critical of the Commission for procedural irregularities and have clarified some of the important rules of procedure. For example, an order of the Commission must be signed by those members of the Commission who have heard the parties. As a result, any order of the Commission signed by a member who has not attended the hearing will be set aside. Also, a party (being investigated) must be provided with all the materials and evidence that are being used against it. The affected parties must also be given notice if the Commission decides to differ from the findings recorded by the DG in the investigation report. In addition, the right to conduct cross-examinations has been recognised.

On the question of the DG’s investigative powers, the Supreme Court has clarified that it is well within the DG’s powers to expand the scope of investigation and has noted that the Commission’s order directing the investigation, in terms of Section 26(1) of the Act, is merely the starting point for the DG.

ii Dawn raid powers

For conducting investigations into anticompetitive practices, the DG’s office has been conferred with wide-ranging investigative powers for collecting evidence, including the powers of a civil court under the Indian Code of Civil Procedure 1908. The DG is also vested with the power to use dawn raids or unannounced search and seizures to inquire into allegations of anticompetitive conduct (including abuse of dominance), and the parties being raided have an obligation to cooperate during the search. Dawn raids may also be carried out by any person appointed by the DG in this regard. While conducting the raid, the DG, or any person authorised by him or her for this purpose, has been granted the power to enter any premises, conduct a search at the premises and seize books, papers and electronic media that he or she considers necessary for the purpose of the investigation. These raids generally occur without any warning and are usually conducted at times when least expected, often at the crack of dawn and may even occur over a weekend. The search and seizure operations are conducted in a covert manner leaving no scope for the party under investigation to scuttle the search in any manner or to ‘sanitise’ the records. If a company has several offices, it is possible that simultaneous raids will be conducted at more than one office. Dawn raids are regarded as an effective tool for inquiry into anticompetitive practices and are authorised by the Chief Metropolitan Magistrate, New Delhi, through a warrant.

These dawn raid powers have been used sparingly and, thus far, there have been three instances of dawn raids in India, one of which relates to an abuse of dominance enquiry and the other two matters relate to cartel investigations. In the raid relating to the abuse of
dominance matter, the Supreme Court has recently clarified that an authorisation for search alone would not be sufficient for purposes of the investigation; the authorisation must extend to both search and seizure.

iii Overlapping jurisdiction

In the Ericsson writ petition, the High Court of Delhi upheld the Commission’s jurisdiction to examine issues covered by the Act, and held that areas covered under the Act do not fall within the domain of the patent enforcement authorities under the Indian Patents Act 1971. This decision is presently under appeal before a division bench of two judges in the High Court of Delhi.

In the Jio writ petition, the High Court of Bombay held that, in matters relating to the telecoms sector, regulated, controlled and developed by the authorities under the Telegraph Act and the Telecom Regulatory Authority of India Act (TRAI Act), the Commission must await the decision of the telecoms sector authorities because the telecoms sector authorities were best placed to decide the jurisdictional facts before them. This decision of the High Court of Bombay was challenged by the Commission before the Supreme Court. The Supreme Court noted that, while the Commission was entrusted with the duty to enforce the Act against several types of anticompetitive practices that may have an adverse effect on competition, the Telecom Regulatory Authority of India (TRAI) was assigned the role of overseeing the growth of the telecommunications infrastructure by ensuring technical compatibility and effective inter-relationship between different service providers. The Supreme Court then upheld the judgment of the Bombay High Court and held that, since the matter related to the telecoms sector, which is regulated by the TRAI Act, it would be appropriate for TRAI (the market regulator) in the first instance to decide on the jurisdictional aspects. Subsequently, if the findings of TRAI prima facie indicate that the provisions of the Act have been contravened, the Commission’s jurisdiction may be invoked to investigate the matter. On the facts of the Jio case, the outcome was non-controversial, and it remains to be seen whether this approach will apply in all cases of overlapping jurisdiction where the sector is regulated by a sectoral regulator. This approach raises several practical difficulties, such as the possibility of the matter before the sector regulator pending for several years with further appeals to the courts. Would the Commission then have to wait until the matter before the sector regulator is finally decided by the Supreme Court (which could take several years) before the Commission can intervene?

Following this case, the Commission arrived at a similar conclusion in NSE,26 where the Commission, while dealing with the issue of co-location, stated that the case was under adjudication by the Securities Exchange Board of India (SEBI) as a result of a whistle-blower letter to SEBI alleging that NSE gave preferential access to a few high-frequency traders and brokers in respect of the exchange’s trading platform. The Commission closed the file after concluding that SEBI was investigating issues similar to those alleged by the informant. The Commission noted that, while discriminatory and abusive conduct which falls foul of the provisions of the Act falls within the jurisdiction of the Commission and can be independently examined by the Commission based on cogent facts and evidence …., the allegations against the [NSE] are yet to be established in an

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appropriate proceeding and also there is not sufficient information and data before the Commission about the role attributable to [NSE], in the provision of discriminatory co-location services qua certain trading members, as alleged in the Information to arrive at a prima facie view. Thus, it may not be apposite for the Commission to delve into the allegations contained in the Information at present.

iv Constitutionality of certain provisions of the Act

Recently, the High Court of Delhi struck down the provisions of Section 22(3) of the Act (but not the proviso that provides for a quorum of three members for meetings of the Commission).27 Section 22(3) of the Act provides that a decision must be taken by a majority of the members of the Commission, present and voting, and in the event of equality of votes, the chairperson would have a second or casting vote. The Court observed that the second or casting vote in an adjudicatory process is anathema to the rule of law and principle of collegiality. The Court upheld the remaining provisions of the Act, while directing the Commission to issue guidelines in respect of several matters to ensure procedural fairness and respect for the rules of natural justice, including the principle that 'one who hears must decide'.

27 WP (C) 11467/2018, CM Appl 44376-44378/2018, Mahindra Electric Mobility Limited and Another v. Competition Commission of India and Others.
I  INTRODUCTION

Abuse of dominance within the Italian market, or in a substantial part of it, is prohibited by Article 3 of the Competition Act, which closely resembles Article 102 of the Treaty on the Functioning of the European Union (TFEU). Article 3 does not provide a definition of abuse, but lists examples of abusive conduct.

According to Article 1(2) of the Competition Act and Article 3(1) of Regulation (EC) No. 1/2003, if the Italian Competition Authority (ICA) applies Article 3 to abuses that affect intra-EU trade, it must also apply Article 102 TFEU. Furthermore, pursuant to Article 1(4) of the Competition Act, Article 3 must be interpreted in accordance with well-established EU principles.

The ICA has not issued formal guidance on abuses of dominance. However, the Commission Guidance on exclusionary abuses (Guidance) may provide useful indications on the interpretation of Article 3.

Article 3 also applies to public firms and to those in which the state is the majority shareholder. Pursuant to Article 8 of the Competition Act, antitrust rules do not apply to firms entrusted with the supply of services of general economic interest or holding a legal monopoly, insofar as this is indispensable to perform the specific tasks assigned to them.
II YEAR IN REVIEW

In 2018, the ICA closed seven investigations regarding abuse of dominance. In four cases, it found an infringement and imposed a fine. In one case, it accepted commitments offered by the dominant firm and closed the proceedings without establishing the alleged infringement. In two cases, the ICA eventually closed proceedings without finding an infringement (an abusive practice and a failure to comply with behavioural measures imposed by a previous decision, respectively). Furthermore, in two other cases, the ICA adopted interim measures in the context of a pending investigation. At the beginning of 2019, the ICA issued three additional decisions, regarding the compliance with behavioural measures imposed by a previous decision, the possible adoption of interim measures, and the acceptance of commitments offered by the firm under investigation, respectively.

In 2018, the Regional Administrative Tribunal of Latium (TAR) upheld a decision adopted by the ICA in 2017. In addition, the Council of State dismissed an application for revision of a judgment, on the ground that it did not meet the conditions for admissibility, and upheld a judgment delivered by the TAR in 2012, which had annulled a decision adopted by the ICA in 1999.

The abuse cases in the period under review concerned many different practices, including excessive pricing and unfair trading terms, margin squeeze, refusal to deal, tying, exclusive dealing and discriminatory practices.

In February 2018, the ICA imposed a fine of more than €29 million on the shippers Moby and Compagnia Italiana di Navigazione (CIN) for having abused their dominant position on three transport routes between mainland Italy and Sardinia. According to the ICA, Moby and CIN implemented a complex and aggressive anticompetitive practice aimed at hindering the growth of competitors. In particular, the two firms imposed unjustified economic and commercial penalties, and retaliated against logistics companies that also used competitors’ transport services. Furthermore, they granted more favourable conditions

### References


14 Council of State, 17 April 2018, No. 2312.

15 Council of State, 13 November 2018, No. 6355.


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to logistics companies that had remained loyal to Moby and CIN. The ICA concluded that Moby and CIN’s strategy had limited entry and growth of competitors on the routes concerned, therefore also harming consumers of the transported goods.

In March 2018, the ICA accepted the commitments offered by Società per l’Aeroporto Civile di Bergamo (Sacbo) and Levorato Marcevaggi in proceedings concerning alleged abusive conduct carried out in the markets for the storage of airport fuel and the on-board provision of aviation fuel. Sacbo was the sole manager of Bergamo Airport, holding a legal monopoly in the management of the airport infrastructure. Levorato Marcevaggi had sole control of the only fuel storage in Bergamo Airport and was also the only firm active in the provision of on-board aviation fuel, thereby being dominant in these markets.

According to the ICA’s preliminary findings:

a Sacbo had adopted a complex abusive strategy aimed at foreclosing competition in the market for the on-board provision of aviation fuel, by reserving both the exclusive management of the storage and the on-board fuel provision to Levorato Marcevaggi (rectius, to JV Orio, a company initially participated in by Sacbo and subsequently acquired by Levorato Marcevaggi); and

b Levorato Marcevaggi (and, previously, JV Orio) had repeatedly refused to grant competitors access to the fuel storage, with a view to preserving its dominant position in the downstream market for the on-board provision of aviation fuel.

To remove the ICA’s concerns, Sacbo and Levorato Marcevaggi offered a set of commitments aimed at opening the market for the on-board provision of aviation fuel to competition (e.g., by committing to build a loading bay outside the fuel storage, which would be freely accessible by all companies interested in providing on-board aviation fuel services in Bergamo Airport) and at ensuring some competition in the market for aircraft fuel storage (e.g., by issuing a public tender for the sub-concession of the management of the fuel storage and – in the meantime – by applying regulated tariffs for access to the storage).

In June 2018, the ICA closed an investigation for possible non-compliance into the Aspen group, by concluding that the drug maker had actually complied with a 2016 decision ordering the firm, inter alia, to define ‘non-unfair prices’ for the drugs concerned by an alleged abuse.

The ICA had first opened proceedings against Aspen in 2014, in order to ascertain whether the company was charging excessive prices for certain anti-cancer medicines subject to reimbursement by the public health system. In 2016, the ICA imposed a €5.2 million fine on Aspen for having inflated the drugs’ prices by up to 1500 per cent, through an aggressive negotiation strategy with the Italian Medicines Agency (AIFA), and ordered Aspen to carry out all necessary initiatives to define non-unfair prices for the anti-cancer drugs.

In the investigation concerning the possible failure to comply with the 2016 infringement decision, the ICA found that the new prices for the anti-cancer drugs provided for by an agreement entered into by Aspen and AIFA in April 2018 (which were meant to apply retroactively from the date of the 2016 decision) were fair and non-excessive, as they were up to around 80 per cent lower than those contested by the above-mentioned ICA decision.

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In September 2018, the ICA imposed a symbolic fine of €1,000 on the Italian authors’ and publishers’ association (SIAE) for an alleged abuse of dominance.\textsuperscript{20}

SIAE is a collective management organisation (CMO) within the meaning of Directive 2014/26/EU, established for the collective management of copyrighted works (e.g., musical, cinematographic and theatre works) on behalf of the rights holders, which are its members. In particular, SIAE operates in the management and intermediation of copyrighted works, by granting authorisations to use copyrighted works, collecting rights revenues and distributing them to the rights holders. In Italy, until 2017, SIAE held a legal monopoly in the management of all copyrighted works of Italian authors or of foreign authors published in Italy for the first time. However, the authors had the option of directly managing their copyright without SIAE’s intermediation. Moreover, some activities were not covered by the monopoly, such as the issuing of licences and the management of copyright for online works, as well as the management of copyright and related rights on behalf of foreign collective associations with respect to foreign works not published in Italy for the first time. Following the implementation in Italy of Directive 2014/26/EU, rights holders are entitled to entrust the management of their rights either to a CMO of their choice (irrespective of the Member State of nationality, residence or establishment of either the CMO or the right holder) or to independent management entities, which differ from the former, inter alia, because they are not owned or controlled by rights holders.

The ICA found that SIAE was dominant in the markets for the management of copyrighted works, not only in those covered by legal monopoly until 2017, but also in those that were already (at least in theory) open to competition.

According to the ICA, from 2012 SIAE carried out a complex abusive strategy aimed at foreclosing rivals from the markets open to competition and to prevent rights holders from directly managing their own rights, with a view to preserving its monopoly and extending it beyond its scope. In particular, SIAE allegedly carried out the following practices:

\begin{itemize}
  \item[a] tying of different management services through the clauses of the management contracts entered into with authors, in order to force them to also entrust SIAE with management activities not covered by the legal monopoly;
  \item[b] systematically attempting to also manage works on behalf of authors who did not authorise it, even where such authors had already expressed the will to directly manage their own rights (e.g., by obliging its members to entrust SIAE with the management of works even when co-authors were not members of SIAE or were associated with other collecting organisations);
  \item[c] foreclosing competitors from the markets for the licensing of rights to TV broadcasters, through several practices aimed at discouraging TV broadcasters from also using works not included in SIAE’s database (e.g., by setting forth ‘flat’ rates based on the TV broadcasters’ revenues, regardless of whether they were linked to the use of SIAE’s or other collecting organisations’ works); and
  \item[d] foreclosing competitors from markets for the copyright management of foreign works or works on behalf of foreign collecting organisations, through an unlawful extension of the exclusive rights to the management of works by foreign authors in Italy.
\end{itemize}

\textsuperscript{20} Decision of 25 September 2018, No. 27359, A508, SIAE/Servizi intermediazione diritti d’autore.
However, in light of the special characteristics of SIAE’s position, the complexity of the markets involved and the novelty of the case, the ICA deemed it appropriate to levy only a symbolic fine.

In November 2018, the ICA adopted interim measures with regards to Società Cooperativa Taxi Torino (Taxi Torino), the firm managing the radio taxi services in Turin, in the context of an investigation for a possible abuse of dominant position in the market for taxi demand management services in Turin.21 The ICA opened the investigation following a complaint by MyTaxi, a company that manages a mobile app aimed at connecting taxi drivers and consumers. MyTaxi’s complaint concerned a clause of Taxi Torino’s by-laws, which imposed a non-compete obligation on taxi drivers participating in Taxi Torino’s network. The ICA found that the clause had been introduced in Taxi Torino’s by-laws right before the launch of MyTaxi’s app in Turin, and that it had led to the exclusion of several taxi drivers from Taxi Torino’s network. According to the ICA, the clause hindered entry by open platforms (such as the MyTaxi app) on the relevant market, and was neither indispensable for the functioning of Taxi Torino’s network nor proportionate. Furthermore, the ICA held that the conditions required for the adoption of interim measures were met, given that:

a. there was prima facie evidence of an infringement and of its effect on competition; and

b. the practice gave rise to a risk of serious and irreparable damage to competition, as the non-competition clauses applied to around 90 per cent of taxi drivers active in Turin, and an increasing number of drivers had already discontinued the use of the MyTaxi app.

In light of these circumstances, the ICA ordered Taxi Torino, by way of interim measures, to cease the application of the non-compete clause pending a final decision on the alleged abuse.

In December 2018, the ICA took a strong stance on the liberalisation of electricity markets in Italy, by adopting decisions in three parallel cases concerning possible abuses of dominant position in certain local markets for the retail supply of electricity by three companies active in the distribution and sale of electricity in Italy (i.e., Enel, Acea and A2A).22 The ICA closed the proceedings against A2A without finding any infringement, as the evidence gathered during the investigation did not support its initial allegations, whereas it imposed fines of over €93 million on Enel and €16 million on Acea.

In the local markets in which Enel and Acea manage the distribution of electricity, they are also entrusted with providing an enhanced protection service (EPS), either directly (in the case of Acea) or through a subsidiary (in the case of Enel). The EPS is a regulated service, reserved to domestic clients and small businesses that do not opt for offers at market prices, under which electricity is supplied at a tariff set by the sector regulator. In Italy, the EPS was

21 Decision of 29 November 2018, No. 27434, A521, Attività di intermediazione della domanda di servizi taxi nel comune di Torino. In the other 2018 decision regarding the adoption of interim measures (decision of 21 March 2018, No. 27094, A516, Gara affidamento servizi TPL Bolzano), the ICA did not adopt interim measures, as certain initiatives implemented by the firm under investigation following the opening of the proceedings had removed the periculum in mora.

initially scheduled to end in July 2019, following full liberalisation of the electricity market, but the deadline was recently postponed to 2020. In addition, Enel and Acea are also active in the retail supply of electricity at market prices (once again, the former through a subsidiary).

The ICA concluded that Enel and Acea were each dominant in the local markets for the retail supply of electricity in which they provided the EPS (which corresponded to the areas in which they held an electricity distribution concession).

According to the ICA, by leveraging on assets owned because of their nature as vertically integrated operators (i.e., active in both the distribution and the retail supply of electricity), Enel and Acea engaged – between January 2012 and May 2017, and between 2014 and 2017, respectively – in practices capable of excluding competitors active in the deregulated market, with a view to unlawfully favouring their own operations on the latter. In the ICA’s view, the incumbents’ conduct had the ultimate objective of inducing their EPS customers to switch to their own supply offers at market prices, in order to avoid losing those customers to competitors following the full liberalisation of the market.

A central element of the ICA’s objections was the alleged abusive use by the dominant firms of certain strategic and non-replicable assets (i.e., the lists of customers’ contact details collected by Enel and Acea mainly among their EPS customers). According to the ICA, the incumbents used these lists to address targeted offers of deregulated services to EPS customers, thereby gaining an unlawful advantage over its competitors in the deregulated market.

In the case of Enel, the lists were offered to all operators active in the deregulated market, but were ultimately purchased only by Enel’s subsidiary active in such market (Enel Energia). Moreover, both Enel and Acea collected the customers’ consent to being contacted for commercial purposes in a way that, in the ICA’s view, was discriminatory towards competitors: in the case of Enel, because the customers were left the choice to grant their consent exclusively to the Enel group (thus excluding third parties); in the case of Acea, because the customers’ consent was collected only in favour of the Acea group. With respect to the Acea group, the ICA also contested an alleged exchange of strategic information on customers between the company in charge of electricity distribution (Areti) and the company in charge of the retail sale of electricity regarding the competitive scenario in the relevant local market.

In both cases, the ICA stated that the use of the lists of contact details of EPS customers was capable of excluding competitors active only in the deregulated market and, accordingly, it was not necessary to provide evidence of the effects of the conduct.

In the first three months of 2019, the ICA adopted three additional decisions. In February 2019, the ICA closed an investigation concerning the possible failure to comply with a 2017 infringement decision by Poste Italiane (PI), the incumbent in the postal sector in Italy, without finding any infringement.23

In an infringement decision issued in 2017, the ICA had imposed a fine of around €20 million on PI for alleged anticompetitive practices, and ordered PI to desist immediately from the contested conduct and to refrain from carrying out analogous practices in the future.24 According to the ICA, PI was dominant in the market for bulk mail services, and continued to be the only operator covering the entire national territory, including extra-urban areas. In contrast, competitors had more limited territorial coverage and needed to purchase bulk mail services from PI to cover certain extra-urban areas. In the ICA’s view, starting from

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24 Decision of 13 December 2017, No. 26900, A493, Poste italiane/Prezzi recapito.
2014, PI squeezed competitors’ margins in extra-urban areas by providing rivals only with the basic bulk mail service in the intermediate market, and offering a value-added service (the certified date delivery service called Posta Time) at lower prices to business customers in the downstream market. In addition, competitors could not replicate PI’s technical conditions, as the certified date delivery service was superior to the basic bulk mail service made available to competitors by the incumbent. Furthermore, PI entered into exclusive dealing agreements and offered selective and retroactive loyalty discounts and rebates to customers that purchased all their bulk mail requirements, or a substantial part of them, from the dominant company.

In the investigation concerning PI’s possible failure to comply with the 2017 infringement decision, the ICA concluded that the incumbent had not committed any violation. In particular, the ICA found that PI had offered competitors a value-added service equivalent to Posta Time, extending its coverage to geographic areas in which it is the only operator. Moreover, it had modified contracts with customers (e.g., by eliminating the clauses providing for exclusivity and retroactive loyalty rebates).

In March 2019, in the context of proceedings initiated against TicketOne, the ICA adopted a decision finding that the conditions for imposing interim measures were not met. In September 2018, the ICA had initiated an investigation concerning a possible abuse of dominant position by TicketOne in the market for ticketing services for live music events. According to the ICA’s initial views, by imposing on the main promoters (which manage artists and issue tickets for music events) exclusivity obligations in relation to the provision of ticketing services for live music events, TicketOne had carried out an abusive strategy aimed at excluding competing ticketing platforms. The contested strategy had allegedly consolidated the de facto exclusivity already enjoyed by TicketOne in the online distribution channel, and had also extended the exclusivity to the offline channel, as well as to additional promoters. In January 2018, the ICA extended the proceedings to additional practices allegedly aimed at strengthening the exclusivity clauses (e.g., systematically refusing to derogate from the exclusivity clauses, as well as boycotting and retaliating measures against an operator active in the provision of ticketing services and the promotion of events (ZED)). With the same decision, the ICA opened sub-proceedings to evaluate whether the conditions for the granting of interim measures were met in the case at hand, in particular with respect to the alleged boycott and retaliation against ZED. However, the ICA did not find evidence that the conduct at issue could jeopardise the continuation of ZED’s activities pending the investigation on the merits of the case.

In the same month, the ICA accepted the commitments offered by Monte Titoli SpA, a subsidiary of Borsa Italiana active in the post-trading sector, to address the ICA’s concerns that Monte Titoli may have abused its dominant position in the securities trading settlement market to squeeze competitors’ margins in the custody services market.

Monte Titoli holds a monopoly in Italy’s post-trade settlement market, given that, in its capacity as the central security depository issuer (CSD) (i.e., the entity where all the securities in Italy are stored), it is the only company that is allowed to complete the settlement of the securities. Therefore, companies active in the auxiliary market for security custody services must purchase settlement services from Monte Titoli. Furthermore, Monte Titoli is also active in the downstream market for secondary settlement services and other auxiliary services, together with the custodians.

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According to the ICA’s preliminary concerns, Monte Titoli charged its customers €0.50 per transaction for its settlement and custody services combined, while it charged competing custody providers a price ranging from €0.47 to €0.48 for its settlement services. This conduct could have left competitors with a margin that did not allow them to replicate Monte Titoli’s retail offers. Moreover, the ICA was concerned that Monte Titoli could have applied more favourable settlement commissions to foreign CSDs than to national custodians.

In order to address the ICA’s concerns, Monte Titoli committed to:

- use the same pricing structure for all its customers;
- provide Consob (the authority responsible for regulating the Italian securities market) and the Bank of Italy with detailed information on the total costs for the provision of services to different categories of customers;
- discontinue the rebates offered to its new customers; and
- establish, within one month of the acceptance of Monte Titoli’s commitments (i.e., earlier than required by the law), the users’ committee envisaged by the CSD Regulation (a body having the task of issuing a reasoned opinion on CSD pricing structures).

In 2018, Italian administrative courts adopted some important rulings in abuse cases.

In April 2018, the Council of State dismissed an application lodged by Cantieri del Mediterraneo (CAMED) for the revision of a ruling delivered by another chamber of the Council of State, which had upheld an ICA’s decision fining CAMED for abuse of dominant position.27

CAMED was the long-time holder of a concession for the management of dry docks in the Port of Naples, and operated at the same time as provider of boats maintenance and repair services. In 2009, the ICA found that CAMED had abused its dominant position in the market for the rental of dry docks, by failing to provide information on the availability of dry docks to other maintenance and repair providers operating in the Neapolitan port.28

As a consequence, according to the ICA, CAMED had denied competitors a key element to compete effectively for the acquisition of maintenance contracts, in light of the essential and non-duplicable nature of the infrastructure.

Both the TAR and the Council of State upheld the ICA’s findings on the merits.29 CAMED lodged an application for revision of the Council of State’s judgment, alleging that the latter contained several gross and manifest factual errors. The Council of State dismissed CAMED’s application for revision as inadmissible. According to the Council of State, CAMED’s application failed to meet the strict conditions justifying a revision of a judgment (i.e., the existence of gross, manifest and unmistakable errors in the reasoning, leading to a mistaken perception of the facts as emerging from the case file). Ultimately, in the Council of State’s view, CAMED sought to call into question the previous judge’s legal analysis and conclusions, which are not subject to any additional review on the merits.

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27 Council of State, 17 April 2018, No. 2312.
In May 2018, the TAR upheld the ICA’s decision to impose a fine of over €60 million on Unilever Italia for an alleged abuse of dominant position in the market for impulse ice cream.\(^{30}\)

In a decision issued in 2017, the ICA found that Unilever had implemented a complex strategy aimed at forcing or encouraging ice cream retailers (mainly cafes) to commercialise just one brand of impulse ice cream in their premises, through:

- exclusive dealing and freezer exclusivity clauses;
- loyalty-inducing contractual terms, such as retroactive target and bundled discounts and rebates; and
- other commercial initiatives, such as a strict monitoring policy to ensure compliance with the loyalty-inducing strategy, including through payments to trade associations to monitor their members’ compliance with the loyalty-inducing strategy, and pressure on retailers to induce them to buy Unilever’s least successful products.

The ICA held that Unilever’s practices had foreclosure effects and limited the choices available to consumers by making it more difficult to find ice creams offered by Unilever’s competitors available for sale.

On appeal, the TAR dismissed Unilever’s arguments regarding alleged errors in the definition of the relevant market and the assessment of Unilever’s dominant position. According to Unilever, the contested conduct had allegedly been carried out in the downstream markets for the wholesale and retail distribution of ice cream, not in the upstream market for the production and sale of this product, where Unilever is active. Accordingly, Unilever argued that it could not be held accountable for the conduct of its ‘concessionaires’ (i.e., wholesale distributors) with regards to retailers, and that the ICA should not have taken into account the concessionaires’ market share to conclude that Unilever was dominant. The TAR upheld the ICA’s view that Unilever and its concessionaires form a single complex entity for the purpose of applying competition law. In particular, the TAR noted that the concessionaires distribute Unilever’s products based on indefinite-term and bilaterally exclusive agreements, providing for active sales bans and non-compete obligations. Unilever provided concessionaires with freezing cabinets and other merchandising materials. Moreover, for each concessionaire, Unilever unilaterally defined (and monitored the implementation of) an ‘operational plan’ providing for sales targets, minimum purchase requirements, volume rebates and final price listings. The TAR also shared the ICA’s view that an ad hoc report, produced by Unilever after surveying its concessionaires to demonstrate their autonomous decision-making capacity, could not have evidentiary value. According to the TAR, assuming that the concessionaires were aware of the survey’s context, they could not feel free to make statements capable of harming Unilever. Accordingly, the TAR concluded that the concessionaires had an ‘extremely reduced decision-making capacity’ and implemented Unilever’s commercial policy.

Furthermore, the TAR dismissed Unilever’s claim that the ICA should have considered the actual effects of Unilever’s conduct before concluding that it was anticompetitive. In its plea, Unilever made express reference to the Intel case,\(^{31}\) and argued that the ICA should have applied the as-efficient competitor (AEC) test provided for by the Guidance and used in

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31 Case C-413/14 P, Intel, ECLI:EU:C:2017:632.
The TAR held that the ICA’s analysis was exempt from criticism and complied with case law of the Council of State, according to which it is sufficient that the conduct has ‘merely potential’ anticompetitive effects to violate Article 102 of the TFEU.

More specifically, the TAR noted that the principles established by the European Court of Justice (ECJ) in the Intel case did not apply in the Unilever case, as the loyalty discounts and rebates granted by Unilever were part of a broader exclusionary strategy, also encompassing exclusive dealing obligations, which were as such exclusionary, while the Intel case was only about rebates.

As to the AEC test, the TAR held that the ECJ in Intel did not lay down the principle that the AEC test is always necessary to find an infringement. According to the TAR, the general rule is that the AEC test does not constitute a necessary condition for a finding that a rebate scheme is abusive under Article 102 of the TFEU, and that the ‘anticompetitive effect of a rebate scheme . . . must be probable’ to fall within the scope of that provision. According to the TAR, Unilever’s conduct constituted a typical case of exclusionary abuse and the dominant firm had not substantiated its alleged pro-competitive effects. In light of the above, the TAR concluded that Unilever’s other arguments (including that competitors could replicate its rebates, and that Algida products were not ‘must haves’) were irrelevant.

In November 2018, the Council of State dismissed an appeal lodged by the ICA, thus putting an end to a lengthy judicial dispute involving the natural gas transport and distribution markets.

In 1999, the ICA imposed a severe fine on Snam (which at that time was the owner of the gas transport network, as well as the main player in the primary and secondary markets for the importation, transportation and distribution of gas in Italy) for abusing its dominant position on two markets:

- the market for the transport of natural gas through the national gas pipeline network; and
- the market for the primary distribution of natural gas (i.e., the distribution to factories, power plants and municipalities’ distribution networks).

In particular, the ICA found that the following practices implemented by Snam amounted to an abuse:

- the refusal to grant private gas producers, as per a request received from AMI (the Italian association representing the oil and mining industry), access to its national natural gas pipeline network for transporting their natural gas, including for purposes other than those provided by Law No. 9 of 1991 (namely, electricity-generation and in-house consumption);
- the rejection of AMI’s request to revise the charges agreed in 1994 for the transport of nationally produced natural gas; and
- the request to control the end use of the natural gas transported on behalf of the gas company Edison.

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32 Council of State, 13 November 2018, No. 6355.
In the ICA’s view, access to Snam’s national gas pipeline network was essential for private gas producers to transport their gas and compete with Snam in the post-primary distribution network. Accordingly, Snam’s refusal to grant actual and potential competitors access to its gas pipeline network amounted to an abuse of dominant position.

In 2012, the TAR annulled the ICA’s decision. In essence, the TAR held that – by objecting to Snam’s refusal to grant access to its network to all interested private gas operators – the ICA had ultimately sought to impose on Snam a full and absolute liberalisation of access to its gas pipeline network. However, the relevant EU (and national) sector legislation in place at the time provided for a gradual liberalisation of the gas sector. As a consequence, by obliging Snam to grant unconditional access to its network to all interested parties, the ICA had overstepped the boundaries of its competences, by impinging on the regulatory framework of the gas sector.

On appeal, the Council of State dismissed the ICA’s argument that its finding of abuse did not result in overstepping its competences, as it had no impact on the sector regulatory framework. According to the Council of State, the ICA’s decision had actually impinged on the relevant regulatory framework, which provided for a slow and gradual liberalisation of the gas sector. Accordingly, the Council of State fully confirmed the first instance ruling.

In 2018, the Italian civil courts also dealt with a number of abuse of dominance cases that address some aspects of damages actions, including the assessment of the relevant market, burden of proof and limitation period.

In February 2018, the Tribunal of Milan rejected damages claims filed by Eutelia and Fallimento Voiceplus for an alleged abuse of dominance committed by Telecom Italia in the market for value-added services offered through non-geographical numbers (NGNs). Eutelia and Voiceplus were telecommunications operators authorised to use NGNs to provide clients with value-added services (e.g., televoting services). Telecom (and other fixed and mobile telecommunications operators) provided customers with the call origination services needed to use the value-added services offered by NGN operators. The provision of NGN services was based on a system of double invoicing: the firm providing call origination services charged customers for the value-added services, and transferred the amount paid to NGN operators after deducting a fee. Eutelia and Voiceplus claimed before the Tribunal of Milan that, as of 2005, Telecom had refused to transfer to them the amount paid by certain customers, or to charge some customers for the value-added services provided by Eutelia and Voiceplus, by alleging unproven frauds and anomalies in traffic data concerning their customers.

The Tribunal of Milan held that the claimants had not proved to the required legal standard that Telecom was dominant in a properly defined relevant market. In particular, the Tribunal observed that call origination and invoicing services could be provided not only by Telecom, but also by other fixed and mobile telecommunications players, which enabled NGN operators to supply their services to a significant number of customers without the intermediation of Telecom. The Tribunal also stated that the claimants had not provided sufficient evidence of the alleged discriminatory practices, as the available evidence demonstrated that Telecom had adopted the same course of action in the case of possible frauds and anomalies in traffic data concerning not only the claimants’ clients, but also its

34 TAR, 3 September 2012, No. 7481.
35 Tribunal of Milan, 13 February 2018, No. 1560.
own customers. Furthermore, Telecom would not have had any economic interest in limiting the traffic of NGN firms, which resulted in additional revenues for the incumbent, as Telecom was entitled to a fee for value-added services.

Between February and July 2018, the Tribunal of Milan issued three judgments on follow-on damages actions brought by cargo ground-handling service providers against the company managing the Milan Malpensa and Linate airports, Società Esercizi Aeroportuali (SEA).36

The claims were all based on a 2008 ICA decision, according to which, between 2002 and 2008, SEA had abused its dominant position (deriving from exclusive management licences until 2041 for both airports) by charging unfair and excessive prices for the provision of airport facilities to operators active in the supply of cargo handling services. In particular, the ICA found that the fees charged by SEA for sub-letting airport space and infrastructure to cargo handlers were significantly higher than those determined for these purposes by the Italian Civil Aviation Authority (ENAC).

In February 2018, the Tribunal of Milan partially upheld the damage claim lodged against SEA by ITR Handling, a provider of ground-handling services for cargo air carriers. Since 2000, ITR Handling held a sub-concession from Malpensa Airport for the use of office space necessary to provide its services. In its action, ITR Handling claimed that, between 2002 and 2009, SEA had imposed fees for the sub-letting of office space that were significantly and unreasonably higher than those determined by ENAC.

The Tribunal dismissed all the arguments put forth by SEA, by heavily relying on the findings of the ICA in its 2008 infringement decision. Accordingly, the Tribunal concluded that SEA’s conduct violated not only competition rules (and, as such, resulted in SEA’s non-contractual liability towards ITR Handling), but also the sub-concession contract between SEA and ITR Handling and the general duties of loyalty and fairness in pre-contractual negotiations.

However, the Tribunal also found that part of the claim was time-barred, as it concerned payments made between 2002 and 2009, more than five years before the initiation of the judicial proceedings in 2015 (according to the Tribunal, in this case, the five-year limitation period started in December 2006, when the ICA opened proceedings against SEA). According to the Tribunal, the start of the limitation period is linked to the moment when the company became aware of the harm, or it can be assumed that it was adequately informed of the damage, rather than the moment when a final judgment confirmed the infringement.

In March 2018, the Tribunal of Milan partially upheld damage claims lodged against SEA by Brussels Airlines, American Airlines and Aegean Airlines. Interestingly, the three plaintiffs had not participated in the proceedings before the ICA that led to the adoption of the 2008 infringement decision. However, the Tribunal stated that they could still benefit from the evidentiary value of the ICA’s findings, as they directly carried out part of the ground-handling services related to their flights (e.g., administrative assistance and assistance to passengers). As a consequence, they fell within the group of operators that could sub-let airport office space at the regulated fees predetermined by ENAC.

While holding that part of the non-contractual claim was time-barred, the Tribunal also held that the damage claims based on the contracts between the three plaintiffs and SEA were not time-barred. In this respect, the Tribunal held that the excessive sub-concession charges provided for by the contracts with SEA were void, as they were incompatible with mandatory

rules. As a consequence, the excessive charges agreed by the parties were automatically substituted by those set by ENAC, and the plaintiffs were entitled to the recovery of the wrongly paid sums.

Finally, in July 2018, the Tribunal of Milan partially upheld the damage claim brought against SEA by Schenker. In this case, the Tribunal adopted a pragmatic approach to the issue of whether Schenker qualified as cargo handler (and was hence entitled to benefit from ENAC’s regulated sub-concession charges). In the Tribunal’s view, what matters is the nature of the airport activity carried out: if the latter makes it necessary to use airport office space (as in the case of Schenker, which carried out cargo customs assistance), the operator in question is entitled to sub-let airport office space at regulated prices.

In April 2018, the Italian Supreme Court issued an order setting aside a judgment of the Court of Appeal of Venice for failure to carry out a proper assessment of the relevant market in a case of alleged abuse of dominant position. The Court of Appeal had dismissed an action brought by a private funeral services provider against the Municipality of Rovigo and a funeral services company participated by the Municipality, on the ground that the plaintiff had failed to adequately identify the relevant market. The Supreme Court held that, by limiting itself to dismiss the plaintiff’s allegations regarding the definition of the relevant market and the existence of a dominant position, the Court of Appeal misapplied Article 3 of the Competition Act, on the basis of which any finding of abusive conduct (or lack thereof) must be preceded by an in-depth assessment of the relevant market, in order to define both its product and geographic dimension.

III MARKET DEFINITION AND MARKET POWER

The first step in abuse of dominance cases is the definition of the relevant product and geographical market. The ICA’s general approach to market definition is consistent with the Commission’s practice (in particular, the ICA typically focuses on demand-side and supply-side substitutability). Similarly, the ICA follows the EU notion of dominance.

Market shares are a key factor in the assessment of dominance. Market shares exceeding 40 per cent are normally considered an indication of dominance. However, firms holding market shares lower than 40 per cent may also be dominant if the remaining part of the market is composed of small competitors. The stability of market shares is also important, but the fact that the market share is decreasing does not necessarily preclude a finding of

37 Supreme Court, 18 April 2018, No. 9579.
38 See, for example, Supreme Court, 18 April 2018, No. 9579.
39 See, for example, decision of 28 June 2011, No. 22558, A415, Sapec Agro/Bayer-Helm.
40 See, for example, decision of 17 December 1998, No. 6697, A 209, Goriziane/Fiat Ferroviarria.
41 See, for example, decisions of 7 December 1999, No. 7804, A224, Pepsi Foods and Beverages International-IBG Sud/Coca-Cola Italia; 14 June 2000, No. 8386, A274, Stream/Telepiù; and 10 April 1992, No. 453, A13, Marinzulich/Tirrenia.
42 See, for example, decision of 7 December 1999, No. 7804, A224, Pepsi Foods and Beverages International-IBG Sud/Coca-Cola Italia; TAR, 23 September 2008, No. 8481.
43 See, for example, decision of 27 November 2003, No. 12634, A333, Enel Trade-Clienti Idonei.
44 See, for example, decision of 30 June 2010, No. 21297, A383, Mercato del cartongesso.
In the assessment of dominance, the ICA and national courts may consider a number of additional factors that give the firm concerned a competitive advantage or raise barriers to entry.

A dominant position may be held by one or more firms. In accordance with EU case law, collective dominance may be based not only on structural or contractual links between the companies concerned, but also on the economic interdependence among firms active in an oligopolistic market.46

Abuse of economic dependence in a contractual relationship with a single customer or supplier (relative dominance) is prohibited by Article 9 of Law No. 192/1998. This provision aims at protecting the interests of weak parties in contractual relationships. When a contested conduct affects competition on the market, the ICA may exercise its investigative and fining powers under the Competition Act, and it may apply both Article 9 of Law No. 192/1998 and Article 3 of the Competition Act.47

IV ABUSE

i Overview

A dominant firm violates Article 3 only if it commits an abuse. Dominance itself is not an offence.

Dominant firms have a special responsibility not to impair undistorted competition in the relevant market.48 As a consequence, conduct that would normally be lawful may be considered anticompetitive if engaged in by a dominant firm.

Article 3 applies to both anticompetitive conduct aimed at excluding competitors (exclusionary abuses) and the exploitation of dominant firms’ market power (exploitative abuses).

The list of abuses provided in Article 3 of the Competition Act is not exhaustive, and the ICA has often fined sui generis anticompetitive practices. The crucial challenge is to identify the practices that pose unacceptable competitive dangers. In this respect, the ICA has traditionally adopted a case-by-case approach, which does not seem to reflect a coherent theoretical framework.

Behaviour is considered unlawful if it may hinder the (limited) level of competition still existing in the market or the development of that competition. To establish an abuse, it is sufficient to demonstrate a potential prejudice to competition. It is not necessary to prove that the conduct had actual anticompetitive effects.49

45 See, for example, decision of 9 February 1995, No. 2793, A76, Tekal/Italcementi.
46 See decision of 3 August 2007, No. 17131, A357, Tele2/Tim-Vodafone-Wind.
47 Pursuant to Article 9, Paragraph 3 bis, of Law No. 192/1998, in the case of widespread and repeated violations of the rules on payment terms provided for by Legislative Decree No. 231/2002, in contractual relationships with firms (in particular small and medium-sized undertakings), an abuse may be found even in the absence of economic dependence. See decision of 23 November 2016, No. 26251, RP1, Hera-affidamenti gruppi misura gas/termini di pagamento.
Abuse is an objective concept. An anticompetitive intent is not a prerequisite for a finding of abuse.\(^{50}\) However, the existence of an exclusionary intent may play an important role in the assessment of an alleged abuse, in particular when the contested conduct is part of a plan aimed at eliminating competitors.\(^{51}\) An exclusionary intent may also justify a finding of abuse when the dominant firm exercises a right in an objectionable manner to pursue an objective different from that for which the right was granted in the first place.\(^{52}\)

A conduct does not infringe Article 3 if it is objectively justified. This may be the case, in particular, if the conduct is objectively necessary to protect the dominant firm's or third parties' legitimate interests or leads to a cost reduction.\(^{53}\)

**ii Exclusionary abuses**

**Exclusionary pricing**

The ICA issued its first decision on predatory pricing in 1995 in *Tekal/Italcementi.*\(^{54}\) In accordance with EU case law,\(^{55}\) the ICA held that prices below the average variable cost (AVC) must be presumed unlawful, while prices between AVC and the average total cost (ATC) are unlawful if they are part of an anticompetitive plan. The contested conduct was considered abusive even though it was not proven that the dominant firm was able to recoup the losses incurred by selling at below-cost prices. The ICA's view is consistent with the principles established by the ECJ,\(^{56}\) and contrasts with US case law, which requires the proof of a reasonable likelihood of recouping the losses suffered by selling below cost.\(^{57}\)

In *Caronte,*\(^{58}\) the ICA used different cost benchmarks. Instead of relying on the AVC and ATC, the ICA focused on the short-run average incremental cost (SRAIC) and long-run average incremental cost (LRAIC). According to the decision, prices below SRAIC must be presumed exclusionary, while prices at least equal to SRAIC, but below LRAIC, are unlawful if they are part of an anticompetitive plan. However, a few years later, in *Mercato del calcestruzzo cellulare autoclavato,* the ICA made reference to average avoidable cost (which was considered equal to the AVC) and the ATC.\(^{59}\)

More recently, in *TNT/Poste Italiane,*\(^{60}\) the ICA used the LRAIC benchmark in the analysis of the pricing policies of the incumbent in the postal sector. However, the ICA adopted a strict approach in calculating the LRAIC. The latter was considered essentially

\(^{50}\) See, for example, Council of State, 19 July 2002, No. 4001.


\(^{60}\) Decision of 14 December 2011, No. 23065, A413, *TNT Post Italia/Poste Italiane.*
equal to the average operating cost reported by regulatory accounts, which typically also include a share of common costs. The decision was annulled by the TAR, whose judgment was upheld by the Council of State. In a few cases, the ICA and national courts have held that even above-cost prices offered to strategic customers (selective discounts) may be abusive. This may be the case, in particular, if they are part of a broader exclusionary strategy implemented through different abusive practices, or the dominant firm uses privileged information that it holds because of its status of incumbent and vertically integrated operator but that is not available to rivals, to implement win-back or retention policies. Furthermore, according to the ICA and the TAR, a discount may be *per se* abusive, regardless of the relationship between price and cost, if it is the result of a privilege exclusively conferred on the dominant firm by sector-specific rules incompatible with EU rules.

A vertically integrated firm active in the supply of an input and a final product may infringe competition rules if it sets its upstream or downstream prices so as to squeeze competitors’ margins. For instance, in Telecom, the ICA held that the Italian incumbent in the electronic communications sector abused its dominant position by charging competitors more than it charged its commercial divisions for the relevant inputs, thus reducing rivals’ margins and excluding equally efficient firms. A price squeeze may also be the result of discounts offered to retail customers.

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62 Council of State, 6 May 2014, No. 2302. The Council of State held that the analysis of LRAIC was erroneous in several respects: (1) the predation analysis should have been carried out *ex ante*, on the basis of data and information available when the firm set its prices, and not *ex post*, on the basis of regulatory costs; (2) the ICA had not taken into account the increase in regulatory costs because of universal service obligations; (3) the ICA had assessed the profitability of the service over the first year and a half of activity without considering that initial losses in the launch of a new product may be inevitable; and (4) the ICA had wrongfully identified the incremental costs borne for the supply of the services concerned by allocating to these services resources used mainly for other services.  
68 See, for example, decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by the TAR, 8 May 2014, No. 4801, which was upheld by Council of State, 15 May 2015, No. 2479. See also decision of 15 July 2015, No. 25561, A473, *Fornitura acido colico*, concerning both an increase in the upstream price and selective discounts in the downstream market.
Exclusive dealing

Exclusive dealing obligations may constitute an abuse under Article 3 when the conduct may significantly foreclose access to the market. In Diritti calcistici,⁶⁹ the ICA found that Mediaset, the main Italian TV operator, violated Article 102 of the TFEU on the market for the sale of TV advertising lots. In 2004, Mediaset concluded with the major Italian soccer clubs various contracts concerning the broadcasting rights of their home matches for the 2004 to 2007 seasons. Moreover, Mediaset negotiated with the same clubs exclusive pre-emption rights for the broadcasting of their matches through all platforms from 2007 to 2016. Through exclusivity, ‘English clauses’ and pre-emption rights, Mediaset rendered the relevant TV content de facto unavailable for a long period for its competitors.

The ICA may also find an abuse even when a dominant firm imposes de facto exclusivity through the threat of retaliation and other measures,⁷⁰ or uses contractual clauses that lead to an exclusive commercial relationship,⁷¹ especially within the framework of a broader exclusionary strategy that includes other practices aimed at limiting competitors’ access to suppliers, distribution channels or customers.

The ICA has also held that loyalty discounts and rebates, conditioned upon the customer obtaining all or most of its requirements from a dominant supplier, or reaching a given target, may infringe competition rules, because they tend to eliminate or restrict purchasers’ freedom to choose their supply sources, thus hindering rivals’ access to the market or development.⁷² The loyalty-inducing effect is stronger when loyalty discounts are applied retroactively to all units purchased during a given reference period.

Furthermore, according to the ICA, loyalty discounts may be anticompetitive because they imply discrimination between customers.⁷³

The treatment of loyalty discounts is consistent with the traditional formalistic approach of the EU institutions. The ICA does not consider it necessary to apply a price-cost test to establish whether a loyalty discount scheme is capable of excluding an AEC, especially when the contested conduct is part of a broader exclusionary strategy.⁷⁴

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⁷⁰ See, for example, decision of 25 July 2017, No. 26704, A499, Asicurazioni agricole/Comportamenti escludenti Codipra.
⁷¹ See decision of 31 October 2017, No. 26822, A484, Unilever/Distribuzione gelati (confirmed by TAR, 31 May 2018, No. 6080), concerning, inter alia, a commitment to provide retailers with freezer cabinets without any charge, on the condition that retailers would not stock competitors’ ice creams in the freezer (freezer exclusivity).
⁷⁴ See decisions of 13 December 2017, No. 26900, A493, Poste italiane/Prezzi recapito; 31 October 2017, No. 26822, A484, Unilever/Distribuzione gelati; TAR, 31 May 2018, No. 6080.
**Leveraging**

Article 3(d) of the Competition Act prohibits firms in a dominant position in the market for a particular product or service (the tying product or service) from conditioning the sale of that product or service upon the purchase of another (the tied product or service). Tying may also be obtained through price incentives such as, in particular, bundled discounts and rebates. For instance, in *Albacom Servizio Executive*, the ICA found that the incumbent in the telecommunications sector infringed Article 3 by making certain rebates on the price of a monopolised service conditional upon attaining certain traffic volumes in a liberalised service. In *SIAE*, the ICA held that the collective management organisation holding a legal monopoly had abused its dominant position by imposing on the authors it represented contractual clauses tying the provision of copyright management services covered by the legal monopoly to other management services open to competition.

**Refusal to deal**

Refusal to deal may amount to an abuse when it may substantially weaken competition in the market where the dominant firm operates or in a different market and is not objectively justified. Refusal to deal encompasses a considerable range of practices, including the refusal to supply products or services, to provide information and to grant access to an essential facility. Practices such as refusal to begin negotiations, refusal to renew a contract or unilateral termination of a contract may be considered instances of refusal to deal. The imposition of onerous conditions by a dominant firm, dilatory strategies and other forms of constructive refusal to deal might have the same effect as an outright refusal to deal. Differences in the processes for the management of requests for services submitted by internal divisions and by competitors may amount to a constructive refusal to deal if they entail more complexity and, possibly, higher costs for competitors.

The ICA defines the notion of essential facility in accordance with principles established by EU case law. Intellectual property rights and information required to carry out an economic activity may also be considered essential facilities.

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77 See, for example, decision of 14 March 2018, No. 27089, A507, *Servizio rifornimento carburante avio*.

78 See decision of 6 November 1997, No. 5446, A129, *Infocamere/Cerved*. A refusal to deal by a dominant firm is abusive only if it is capable of having a significant impact on the market. Evidence of a single refusal to supply may not be sufficient to find an abuse. See TAR, 21 February 2001, No. 1371.

79 See decision of 25 July 2012, No. 23770, A436, *Avenaaway-Ostacoli all’accesso nel mercato dei servizi di trasporto ferroviario passeggeri*. However, the decision was annulled by the TAR, 27 March 2014, No. 3398, according to which the ICA had erroneously held that the administrative procedures initiated by the dominant firm were merely dilatory.

80 See decision of 9 May 2013, No. 24339, A428, *Wind-Fastweb/Condotte Telecom Italia*, confirmed by TAR, 8 May 2014, No. 4801, which was upheld by Council of State, 15 May 2015, No. 2479.

81 See id.

82 See, for example, decision of 25 February 1999, No. 6926, A221, *Snam-Tariffe di Vettoriamento*.

83 See, for example, decisions of 8 February 2006, No. 15175, *Glaxo-Principi attivi*; 15 June 2005, No. 14388, A364, *Merek-Principi attivi*; TAR, 3 March 2006, No. 341; Court of Milan, 4 June 2013,
The ICA has applied the principles on refusal to deal and essential facilities in a number of cases, especially in liberalised sectors. In its decision practice, the ICA has made extensive reference to EU competition law principles. However, it has often adopted a broad and flexible interpretation of the requirements set by the ECJ’s case law.

A refusal to deal is not abusive if it is objectively justified. This may be the case, for instance, when the dominant firm does not have enough capacity to satisfy third parties’ demand, the customer is insolvent or does not respect the contractual terms, or the firm requesting access does not meet the technical or security requirements needed to access an infrastructure.

In principle, lack of capacity on a facility (capacity saturation) should constitute an objective justification. In exceptional circumstances, however, a dominant firm may be obliged to invest in the development of the facility. Indeed, in Eni-TTPC, the ICA held that the interruption of the expansion of a pipeline used for the international transport of gas and the termination of the ‘ship or pay’ agreements entered into by the firm managing the facility – a dominant firm’s subsidiary – with independent shippers amounted to an abuse of dominant position. The ICA did not apply the essential facility doctrine since alternative infrastructures could be used to transport gas into Italy, and the dominant firm was not under an obligation to invest in the development of the pipeline. Nonetheless, the ICA held that the interruption of the expansion was abusive due to the interference of the mother company in the subsidiary’s investment decisions. In a similar case, the Commission adopted a different approach, as it explicitly relied on the essential facility doctrine. In particular, the Commission held that the different infrastructures used to transport gas into Italy, taken as a whole, constituted a single essential facility, and stated that the incumbent may have an obligation to invest in the development of an infrastructure if a system operator not vertically integrated in the sale of gas would do so.

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85 See, for example, decision of 15 June 2005, No. 14388, A364, Merck-Principi attivi; TAR, 3 March 2006, No. 341.

86 See, for example, decision of 2 March 1995, No. 2854, A61, De Montis Catering Roma/Aeroporti di Roma.

87 However, the ICA has normally rejected the defence in the light of the specific facts of the case: see, for example, decisions of 25 February 1999, No. 6926, A221, Suarm-Tariffe di Vettoriamento; 6 June 1996, No. 3953, A107, Fina Italiana/Compagnia Italpetroli; 2 March 1995, No. 2854, A61, De Montis Catering Roma/Aeroporti di Roma.


89 Commission decision of 29 September 2010, Case COMP/39.315, ENI.
iii Discrimination

Article 3(c) prohibits dominant firms from applying dissimilar conditions to equivalent transactions, thus placing a trading party at a competitive disadvantage. Charging different prices may be abusive only if it is not economically justifiable. For instance, charging lower prices to customers that purchase a larger amount of products, based on objective parameters, may be justified.

In many cases, the ICA has fined dominant firms for having favoured their subsidiaries or commercial divisions active in downstream markets to the detriment of competitors by granting preferential access to certain resources or applying discriminatory conditions. Non-price discrimination may also amount to an abuse of dominance. Furthermore, discriminatory practices may be prohibited when they aim at penalising customers that also deal with other operators in order to prevent the entry or limit the growth of competitors.

iv Exploitative abuses

A firm may abuse its dominant position if it directly or indirectly imposes unfair selling or purchasing prices. To establish an exploitative abuse, it may be necessary to engage in an in-depth cost analysis aimed at verifying whether the difference between the costs actually incurred and the price actually charged is excessive. If this analysis cannot be carried out or is inconclusive, the ICA may compare the prices imposed by the dominant firm with those

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90 For instance, in Alitalia, the ICA held that Alitalia's incentive schemes for travel agents were discriminatory because, in some cases, different commissions were granted to travel agents for reaching similar sales targets. Thus, the agreements placed some travel agents at a competitive disadvantage without an acceptable justification. See decision of 27 June 2001, No. 9693, A291, Assoviaggi/Alitalia. See also, inter alia, decisions of 17 March 1993, No. 1017, A11, IBAR/Aeropori Roma; 10 April 1992, No. 452, A4, Ancic/Cerved.

91 Court of Appeal of Milan, 7 November 2017.


95 See, for example, decision of 28 February 2018, No. 27503, A487, Compagnia Italiana di Navigazione – Trasporto marittimo delle merci da/per la Sardegna.

charged by the same firm or competitors for the same product or service in other markets\textsuperscript{97} or in the past.\textsuperscript{98} In some cases, the ICA applied both the aforementioned tests in the assessment of prices charged by the dominant firm.\textsuperscript{99}

In 2016, in \textit{Aspen}, the ICA applied a two-stage test to determine whether the prices charged by the dominant firm were excessive and unfair: first, it considered the disproportion between prices and costs; then it took into account a number of additional factors that confirmed the unfairness of the prices (including the historical prices for the products concerned, the lack of economic justifications for the price increases, the absence of any non-economic benefits for final users, the nature of the products, the characteristics of the dominant firm and the harm caused by the practice).\textsuperscript{100}

In some cases, the ICA has fined a dominant company for having charged prices remunerating activities or services that were not rendered.\textsuperscript{101} In these cases, prices were considered by definition unfair. Article 3 also prohibits the direct or indirect imposition of unfair non-price trading conditions.\textsuperscript{102}

V REMEDIES AND SANCTIONS

i Sanctions

Pursuant to Article 15 of the Competition Act, the ICA may impose on firms fines of up to 10 per cent of their total turnover. However, fines actually imposed by the ICA are normally significantly lower than the above-mentioned cap.

In setting the amount of the fine, the ICA normally applies the principles set out by the Commission guidelines.\textsuperscript{103}

If a firm fails to comply with an order to cease an abusive conduct, the ICA may impose a fine of up to 10 per cent of the firm’s total turnover. If the original infringement decision imposed a fine, the new sanction is at least twice the previous fine up to 10 per cent of the turnover. If a firm repeatedly violates an order of the ICA, the latter may suspend the firm’s activities for up to 30 days.

\textsuperscript{97} In that case, it is for the dominant firm to justify the price differential by showing objective differences between the situation in the markets concerned. See, for example, decision of 25 February 1999, No. 6926, A221, \textit{Snam-Tariffe di Vettoriamento}. See also decision of 28 July 1995, No. 3195, A48, \textit{SILR/SIAE}.

\textsuperscript{98} See, for example, decision of 4 May 2017, No. 26562, A498A, \textit{Enel – Prezzi servizi di disacciaimento area Brindisi}.

\textsuperscript{99} See, for example, decisions of 15 November 2001, No. 10115, A306, \textit{Alitalia/Venaldi}; 10 April 1992, No. 452, A4, \textit{Ancic/Cerved}.

\textsuperscript{100} Decision of 29 September 2016, No. 26185, A480, \textit{Aspen-Incremento prezzi farmaci}, upheld by TAR, 26 July 2017, No. 8948.

\textsuperscript{101} See, for example, decision of 23 May 2002, No. 10763, A299, \textit{International mail express/Poste Italiane}.

\textsuperscript{102} Examples of unfair trading conditions include the imposition of a contractual clause that prohibits customers from reselling products bought from a supplier (decision of 10 April 1992, No. 452, A4, \textit{Ancic/Cerved}), the refusal by a dominant firm providing toll payment services to reimburse cards not used, or only partially used, after their expiry (decision of 26 July 2007, No. 17069, A382, \textit{Autostrade/Carta prepagata Viacard}), and the request of payment of unpaid bills of former customers as a condition to enter into new agreements for the supply of electricity or communications services (decisions of 10 October 2007, No. 17481, A390, \textit{Enel Distribuzione/Attivazione subordinata a pagamento morosità pregresse}; 21 August 2008, No. 18692, A398, \textit{Telecom-Morosità pregresse}).

\textsuperscript{103} See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, 2006 OJ (C 210) 2.
ii Behavioural remedies

Pursuant to Article 15(1) of the Competition Act, if the ICA finds a violation of antitrust rules, it orders the companies concerned to put an end to the infringement. The ICA typically asks the companies involved to desist immediately from the anticompetitive conduct, to enact positive measures to restore conditions of effective competition in the affected markets within a certain time-limit, and to report on its progress.

According to Article 14 bis of the Competition Act, in urgent cases, where there is a risk of serious and irreparable damage to competition and a cursory examination of the facts reveals the existence of an infringement, the ICA may order interim measures on its own motion.104

iii Structural remedies

The Competition Act does not expressly empower the ICA to impose structural remedies. As a matter of principle, however, the administrative courts’ case law seems to leave the door open to the imposition of structural remedies in competition law cases, subject to a strict proportionality requirement.105

VI PROCEDURE

The ICA may start proceedings after assessing the information at its disposal or brought to its attention by third parties, such as public authorities, consumer associations and competitors. The ICA may also start antitrust proceedings following a general sector investigation. Antitrust investigations are often triggered by third-party concerns, but this is not always the case.

The decision to start proceedings, which is published in the ICA’s Bulletin and on its website, contains the essential elements of an alleged infringement. The ICA serves the decision upon the parties concerned (i.e., the parties whose conduct is at issue and third parties who submitted complaints or reports). The decision to start proceedings is sometimes served upon the firm under investigation during an unannounced inspection.

Companies under investigation have the right to:

a be heard by the ICA within the time limit indicated in the decision to open proceedings;
b obtain a final oral hearing before the end of the investigation;
c submit briefs and documents; and
d access the case file.

Within 30 days of publication of the decision to start proceedings in the Bulletin, interested third parties (individuals, consumer associations, competitors, or other bodies whose interests might be directly and immediately harmed by the alleged infringement or any measures adopted as a result of the investigation) may request to participate in the proceedings. Complainants and interveners may access the case file and submit briefs and documents. In addition, they may be heard by the ICA officials and be allowed to participate in the final oral hearing, if the latter is requested by the firms under investigation.

104 See, for example, decision of 29 November 2018, No. 27434, A521, Attività di intermediazione della domanda di servizi taxi nel comune di Torino.
Following the opening of the proceedings, the ICA can exercise extensive investigative powers, such as the power to:

- require specific documents or information;
- carry out unannounced inspections at business premises (as opposed to residential premises);
- interview companies’ legal representatives;
- image computer hard drives by using forensic IT tools;
- require explanations about any documents or information supplied by the company concerned; and
- secure premises overnight by seal.

The ICA may impose fines on firms that fail to provide the information or exhibit the documents requested or, intentionally or negligently, supply incorrect or misleading information.

The Italian legal system does not provide for special rules on legal privilege in antitrust proceedings. In its decision practice, the ICA generally follows the principles and criteria established by EU case law.

Pursuant to Article 22 of Regulation (EC) No. 1/2003, the ICA may seek the assistance of other national competition authorities to carry out investigative activity in their jurisdiction on its behalf.

In urgent cases, the ICA may order interim measures, which cannot be renewed or extended. If the addressee of the interim measures does not comply with the decision, the ICA may impose a fine of up to 3 per cent of the annual turnover.

Investigations may last for several months and often more than one year. When the ICA considers that it has acquired sufficient evidence, it issues a statement of objections (SO) by which it notifies the companies concerned and any complainants of its objections at least 30 days before the closing date of the investigation. The SO contains an extensive elaboration of the reasons underlying the ICA’s assessment of the case.

If the companies being investigated request to be heard by the ICA, a final hearing takes place, typically on the date of closure of the investigation. After the final hearing, the ICA issues a decision. If the ICA finds that the contested conduct is abusive, it orders that the infringement be put an end within a given time limit. If the infringement is serious, the ICA can impose a fine.

Under Article 14 ter of the Competition Act, firms may offer commitments aimed at removing the ICA’s competition concerns within three months from the opening of proceedings. After assessing the suitability of such commitments, including by means of a market test, the ICA may make them binding on the firms concerned and close the proceedings without ascertaining any infringement or imposing a fine. Commitment decisions have become a frequently used enforcement tool.

The ICA’s decisions are subject to judicial review by the TAR. The parties may file an appeal within 60 days of receipt of the notifications of the decision. The parties can ask the TAR for a stay of execution of the ICA’s decision. Hearings for interim measures are usually granted within a short time after the filing of a notice of appeal. A hearing on the merits of a case usually takes place within one year of the filing of an appeal. If the appeal is denied, the party may appeal to the Council of State.
The ICA’s decisions are subject to full judicial review with respect to the imposition of fines. Accordingly, administrative courts may also change the amount of the fine. However, they cannot increase the fine, since this would violate the *non ultra petita* rule.\(^\text{106}\)

In principle, the judicial review of substantive findings is limited to a control of legality. Accordingly, courts must assess whether the ICA based its conclusions on accurately stated facts and supported its decision on adequate and coherent grounds.\(^\text{107}\) The administrative courts have clarified that the judicial review of substantive findings is strong, effective and penetrating, and also covers the economic analysis carried out by the ICA.\(^\text{108}\) However, when complex assessments carried out by the ICA remain questionable, the administrative court cannot substitute its own assessment for that of the ICA.\(^\text{109}\) The limits of judicial reviews of antitrust decisions were confirmed by Article 7(1) of Legislative Decree of 19 January 2017, No. 3 (Legislative Decree 3/2017), implementing Directive No. 2014/104/EU on actions for antitrust damages.\(^\text{110}\)

In *Menarini*, in light of the judicial review actually exerted by the administrative courts, the European Court of Human Rights held that the Italian administrative enforcement system is compatible with the right to full and effective access to an independent and impartial tribunal established by Article 6(1) of the European Convention on Human Rights (ECHR).\(^\text{111}\)

**VII PRIVATE ENFORCEMENT**

Victims of abusive conduct may bring private antitrust actions before the competent Italian civil courts to ask for compensation, declarations of nullity, restitution or injunctive relief.

Damages for breach of antitrust rules may be claimed by victims of anticompetitive conduct pursuant to Article 2043 of the Italian Civil Code, according to which ‘any act committed with either intent or fault causing an unjustified injury to another person obliges the person who has committed the act to compensate the damages’. The Italian Supreme Court has clarified that consumers also have standing to bring damages actions in tort for breach of the Competition Act.\(^\text{112}\)

A collective action system has been recently introduced in the Italian legal system.\(^\text{113}\) Pursuant to Article 140 *bis* of the Consumer Code, in cases of anticompetitive practices affecting a number of consumers or users, any of them has standing to file a class action with the competent court. At the end of the first hearing, the court decides whether the conditions

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\(^{106}\) See Council of State, 2 March 2009, No. 1190.

\(^{107}\) See Council of State, 19 July 2002, No. 4001 and, more recently, TAR, 10 March 2003, No. 1790.

\(^{108}\) See, for example, Council of State, 6 May 2014, No. 2302; 20 February 2008, No. 597; 8 February 2007, No. 515.

\(^{109}\) See, for example, Council of State, 6 May 2014, No. 2302; 24 September 2012, No. 5067.


\(^{111}\) ECHR, Case No. 43509/08, *A Menarini Diagnostics/Italy*.

\(^{112}\) Supreme Court, 4 February 2005, No. 2207.

\(^{113}\) See Article 140 *bis* of Legislative Decree No. 206/2005 (Consumer Code). The collective action is applicable only with respect to infringements committed after 15 August 2009.
for the certification of the class action are met. If the class action is admitted, a notice about the lawsuit is published, and all consumers or users who claim to have a right homogeneous to that for which the class has been established can join it. The opt-in declaration must be filed with the register of the competent court within a certain time. Consumers and users who opt in do not assume the role of parties to the proceedings, and thus do not have procedural powers. If the court eventually finds that the class action is well founded, it orders the defendant to pay a certain sum to each member of the class or, alternatively, establishes the criteria on the basis of which these sums must be calculated.

In addition, pursuant to Articles 139 and 140 of the Italian Consumer Code, consumer associations registered with the Ministry for Productive Activities have standing to request cease-and-desist orders against certain practices that may harm consumer interests, and appropriate measures for correcting or eliminating the detrimental effects thereof.

Damages are limited to the plaintiff’s actual losses (i.e., ‘out-of-pocket’ losses plus loss of profits). Punitive or exemplary damages are not available in the Italian legal system. Plaintiffs can only claim damages that they actually incurred. Where a precise amount cannot be determined, the court may also calculate damages on an equity basis.

The calculation of damages based on loss of income is especially difficult when the injured company could not enter the market due to abusive conduct. In Telesystem, the Court commissioned an expert report on losses suffered by a potential first mover into the sector for leased-lines services, which failed to enter this new market because of the dominant firm’s refusal to grant access to certain essential facilities. The damage liquidation was based, inter alia, on the advantage that the plaintiff would have had as first entrant into the sector for leased-lines services. However, the Court also considered that, in a free market economy, monopoly rent, such as that of a first mover, tends to be neutralised by competition within a certain time frame.

Contractual clauses amounting to an abuse of dominant position may be found void. In Avir, the Court of Appeal of Milan stated that the clauses provided for by a gas supply agreement, which imposed an excessive price, were void because they were incompatible with Article 3(a) of the Competition Act, and granted restitution of the abusive overcharge paid by the customer.

As a matter of principle, civil courts do not have the power to permanently enjoin a defendant from repeating an anticompetitive conduct in their final judgments, unless the antitrust violations are also qualified as unfair competition acts pursuant to Article 2598 of the Italian Civil Code.

A plaintiff may obtain interim remedies, including temporary injunctions and any other remedy that the court may deem appropriate to preserve the plaintiff’s rights until a final judgment is issued. To this end, the claimant must provide sufficient factual and legal grounds to establish a prima facie case, as well as the risk of imminent and irreparable damage.

114 A collective action can be rejected by a court for a number of reasons. For instance, it can be dismissed when the consumer or user concerned has interests conflicting with those of the proposed class or does not seem to be able to adequately protect the class’s interests.

115 Individuals can decide not to join the class and file a separate lawsuit on their own.

116 Court of Appeal of Naples, 28 June 2007, No. 2513.


In some cases, the Italian Supreme Court has stated that findings contained in an ICA decision constitute privileged evidence, from which a court may legitimately infer the existence of the alleged infringement, damage and causal link. In principle, the presumption is rebuttable. However, the nature of privileged evidence of the ICA’s findings prevents defendants from arguing against the very same facts and grounds that the ICA relied upon to find a violation of antitrust rules.\(^\text{119}\) In a judgment delivered in 2014, the Supreme Court stated that, in principle, the ICA’s findings are not binding on civil courts and there is no legal category of privileged evidence distinct from that of legal proof.\(^\text{120}\) Nonetheless, the Court confirmed that the findings contained in an ICA decision have ‘high evidentiary value’ in proceedings before civil courts.\(^\text{121}\) According to lower courts, commitment decisions may also have evidentiary value, as they imply at least that an abuse was considered likely on the basis of an investigation carried out by the ICA.\(^\text{122}\)

As to stand-alone private actions, the Supreme Court stated that, in light of the information asymmetry between claimants and defendants and the complexity of antitrust cases, civil courts should not adopt a strict application of the burden-of-proof principle.\(^\text{123}\) To ensure an effective application of competition rules in private actions for damages, national courts should use the procedural tools available under Italian law (such as orders to submit documents, requests for information from administrative authorities and expert opinions) to acquire and evaluate data and information useful for establishing the alleged anticompetitive conduct.


Inter alia, the Decree strengthens the rules on disclosure of evidence. Upon motivated request, national courts can order the parties to civil proceedings or third parties to disclose relevant evidence in their possession. Courts have to specifically indicate the evidence to be disclosed and, in the case of confidential information, they must adopt the necessary measures to protect it (e.g., by redacting sensitive information). If a piece of evidence cannot be produced by the parties or any third party, courts can order the exhibition of the documents in the case file of a national competition authority – apart from leniency statements and settlement submissions – provided that certain conditions are met.

\(^{119}\) Supreme Court, 20 June 2011, No. 13486. As a consequence, the defendant can rebut, for instance, the presumption of a causal link by alleging and proving different and specific factors, which were ex se capable of causing the damage or contributed to its causation, but it cannot rely on factors already examined and dismissed by the ICA. See Supreme Court, 10 May 2011, No. 10211; Court of Appeal of Milan, 2 January 2017.

\(^{120}\) Supreme Court, 28 May 2014, No. 11904.

\(^{121}\) In the case at hand, the Court held that the ICA decision was sufficient to prove the alleged infringement, its capability to harm customers and the existence of damage to customers in general. In a few cases, lower courts have departed from the findings of the ICA’s infringement decision: see, for example, Tribunal of Rome, 26 July 2017, No. 12806, holding that the dominant firm had not committed an abuse, also in light of certain developments subsequent to the ICA decision.

\(^{122}\) Tribunal of Milan, 28 July 2015, No. 9109.

\(^{123}\) Supreme Court, 4 June 2015, No. 11564; see also Supreme Court, 1 April 2016, No. 6366.
According to the Decree, ICA decisions and administrative court definitive judgments constitute legal proof of antitrust infringements. Nevertheless, a claimant still has to prove the other requirements for civil liability, including the causal link between the conduct and the damage. Decisions of competition authorities and courts of other Member States constitute evidence that may be considered by the national courts together with other available evidence.

Damages claims based on antitrust infringements are time-barred after five years. However, the limitation period is stayed during ICA proceedings, and for an additional year from the moment the infringement decision becomes final or the proceedings otherwise terminate.

The Decree confirms the principle that victims of antitrust infringements are entitled to full compensation, but overcompensation should be avoided. The alleged infringer may claim that the claimant has passed on all or part of the overcharge to its customers (passing-on defence). In this case, the burden of proof lies with the defendant, which may also ask for a judicial order of disclosure of evidence from the claimant or third parties.

The parties to a cartel are jointly and severally liable for the damage caused, but this principle does not apply when the cartelist is a small or medium-sized enterprise; or the cartelist received full immunity in the context of leniency applications.

The Decree attributes exclusive competence over actions for antitrust damages to the specialised business divisions of the courts of Milan, Rome and Naples, which are competent for Northern, Central and Southern Italy, respectively.

**VIII FUTURE DEVELOPMENTS**

The effects-based approach to abuse of dominance cases does not seem to have established itself in Italian decision practice and case law. ICA and national court decisions frequently rely on certain traditional statements of EU case law, which reflect the formalistic and structural approach adopted in the past. They usually consider it sufficient to show that the contested conduct tends to restrict competition or is capable of having anticompetitive effects, without carrying out a comprehensive economic assessment of the impact of the practice. This approach seems to be confirmed by the recent *Unilever* and *Poste* cases on loyalty discounts and rebates,124 in which the ICA (and the TAR in the appeal against the *Unilever* decision) did not consider it necessary to carry out a price-cost analysis aimed at establishing the risk of exclusion of equally efficient competitors, despite the guidance in the *Intel* judgment of the ECJ.125

The transition towards an effects-based approach would require a stronger and more penetrating judicial review by administrative courts. The approach of the administrative courts in the review of antitrust decisions still seems erratic. In some cases, such as *TNT/Poste Italiane*, they engaged in an in-depth review of the decision, also taking into account grounds of appeal raising complex economic issues. In other cases, however, such as the above-mentioned *Unilever* judgment, the administrative courts seemed to limit themselves to reiterating the ICA's views, also through extensive references to the contested decision, or have simply overlooked some of the arguments put forward by the parties, without providing adequate explanations as to why they should have been dismissed. A more stringent judicial

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review of antitrust decisions is necessary not only to foster the transition towards an effects-based approach but also to guarantee full compliance with the fundamental right of access to an independent and impartial tribunal established by Article 6(1) of the ECHR, as interpreted by the European Court of Human Rights in Menarini.126

Unfortunately, Legislative Decree 3/2017, implementing Directive 2014/104/EU, confirmed that the judicial review of antitrust decisions does not extend to complex assessments carried out by the ICA when these assessments are disputable. The entry into force of the binding effect of the ICA’s findings of infringement in private damages actions, pursuant to Article 7 of Legislative Decree 3/2017, will probably increase the tension between antitrust proceedings and the protection of fundamental rights. The Tribunal of Rome’s judgment in Pfizer in 2017 (which refused to find an infringement already found by the ICA and confirmed by the Council of State) confirms that, in some cases, the civil courts may have valid reasons to depart from the position taken by an antitrust authority (including the need to take into account new events and factual evidence).127 The binding effect of antitrust decisions in damages actions is difficult to reconcile with the protection of fundamental rights if findings of infringements are not subject to full and unlimited review by an independent court (including with regard to complex economic assessments).

Many cases decided by the ICA and national courts in the past few years have concerned highly regulated sectors. The interaction between competition law and sector-specific regulation seems to give rise to an increasing risk of conflicts of jurisdiction and interferences between different authorities. In some cases, the application of competition rules has led to the imposition of obligations incompatible with sector-specific rules, which has often been criticised by the administrative courts. A recent example is the Snam judgment, in which the Council of State criticised the ICA for having overstepped the boundaries of its competences, by impinging on the regulatory framework of the gas sector and by seeking to impose an outright liberalisation of the sector despite the gradual approach adopted by EU and national legislation.

In other cases, the application of competition rules seemed to supplement sector-specific regulation by imposing additional and stricter obligations (e.g., in the recent Enel and Acea cases, where the ICA found that – on the verge of the full liberalisation of the electricity sector – the incumbents had a special responsibility to ensure that they would not jeopardise the liberalisation process). The use of competition law to impose additional and stricter obligations on firms already subject to pervasive sector-specific regulation also raises delicate issues as to the interference and overlapping between the two sets of rules.

The Wind-Fastweb/Condotte Telecom Italia case is a notable example of the risk of conflicts and inconsistencies between the two sets of rules. Access regulation in the electronic communications sector in Italy (and many other states) was traditionally based on the equivalence of output principle, according to which access services offered by the incumbent to alternative operators must be comparable to the services it provides to its retail division in terms of functionality and price, but they may be provided through different systems and processes. By contrast, in its 2015 ruling,128 the Council of State seemed to consider that differences in supply processes (provided for by sector regulation) are problematic in themselves, because they inevitably entail a different treatment of external and internal

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126 Judgment of 27 September 2011, A Menarini Diagnostics SRL v. Italy, application No. 43509/08.
127 Tribunal of Rome, 26 July 2017, No. 12806.
requests for access services. To reduce the risk of further antitrust proceedings and damages actions, in 2016 the incumbent introduced a new equivalence model based on the use of the same systems and processes for external and internal requests. Thus, antitrust intervention eventually resulted in a radical shift in the regulatory model, which went beyond the remedies imposed by sector-specific regulation.

In the past few years, the ICA and Italian courts have also shown more activism in the assessment of new types of abuse. Some decisions belong to the controversial line of cases concerning the misuse of rights and legitimate interests arising from sector-specific rules through the initiation of administrative or judicial proceedings aimed at obstructing competitors’ activity. In Pfizer, the Council of State clarified that this type of abuse – which has been inspired by EU case law – is:

\[
\text{nothing but the specification of the broader category of abuse of right, whose precondition is the existence of a right which is used artificially, for a purpose which is incoherent with that for which that right is granted: in the case at issue, the exclusion of competitors from the market.}
\]

Even the exercise of contractual rights, such as the right to termination of a contract, has been considered abusive on the ground that it was strategically exercised with the sole purpose of excluding a competitor.

The misuse of rights and legitimate interests lies at the boundary of antitrust liability. An abusive exercise of a right or legitimate interest may be found when the contested conduct is characterised by an additional element that is intrinsically objectionable, such as the provision of false or misleading information to a regulatory authority, or when it is part of a broader exclusionary strategy also implemented through other anticompetitive practices. The distinction between legitimate exercise and abuse of right becomes much more complex, however, when a dominant firm merely exercises its rights in administrative or judicial proceedings to (artificially) protect its position and interests.

The ICA and administrative courts have often emphasised a dominant firm’s alleged exclusionary intent, which seems to be a crucial factor in the assessment of the alleged abuse; however, the distinction between abuse and legitimate exercise of right should not be based merely on the dominant firm’s intent. Reference to the dominant firm’s exclusionary intent opens the door to considerable uncertainty, and to a high margin of appreciation in the assessment of corporate statements, internal documents and commercial choices. In addition, a firm’s intent is not in itself sufficient to distinguish legitimate from anticompetitive conduct. Indeed, the aim pursued by any firm competing on the market is, in a sense, to prevail against, and eventually to exclude, its competitors. Moreover, in many cases, the rationale behind the rules invoked by the dominant firm is just to exclude or limit competition from

129 In particular, in AstraZeneca, the Commission and the General Court held that the firm concerned had abused its dominant position by obtaining a supplementary protection certificate on the basis of misleading information and representations provided to the competent authorities. See Case C-457/10 P, AstraZeneca v. Commission, ECLI:EU:C:2012:770.

130 Council of State, 12 February 2014, No. 693.


132 See, for example, decision of 3 September 2015, No. 25035, A476, Conai-Gestione rifiuti da imballaggi in plastica.

133 Council of State, 12 February 2014, No. 693. See also, inter alia, Council of State, 8 April 2014, No.1673.
other players. This is the case, for instance, with the rules granting and protecting intellectual property rights, as well as those allowing competitors to access a facility or to carry out an economic activity only within certain limits and under certain conditions. 134

The judgments delivered by the TAR in Arenaways in 2014 and by the Tribunal of Rome in Pfizer in 2017 seem to confirm that, as a general rule, firms may not be deprived of the chance to exercise their rights and legitimate interests, even though this may negatively affect competitors’ access to the market; however, the boundaries between legitimate exercise and abuse of right remain unclear and need to be clarified by the competent authorities in the future.

As to the enforcement policy, in the past few years the ICA has adopted a more rigorous approach in the assessment of commitments offered by parties. In the past, the ICA often used the commitment procedure to exercise lato sensu regulatory functions by negotiating and making legally binding measures aimed at improving the competitive conditions or at benefiting consumers, even in the absence of a clear and direct link between the commitments and the competitive concerns identified by the ICA. From the introduction of commitments procedures, in 2006 to December 2010, the ICA made extensive use of commitment decisions, which represented around 85 per cent of decisions concluding abuse of dominance cases (28 out of 33), but this trend reversed a few years ago, also due to some rulings by the administrative courts, which have constrained the ICA’s discretion in commitment procedures. In the period from 2011 to 2014, the ICA issued commitment decisions in only slightly more than 30 per cent of investigations concerning abuses of dominance. 135

In 2015 and 2016, commitment decisions represented the majority of abuse of dominance cases closed by the ICA (two out of three cases each year). However, in 2017, the ICA issued commitment decisions in four out of 10 cases, while in 2018, the ratio was only one out of seven cases. In 2019, so far, the ICA has adopted one commitment decision out of two cases.

Compared to past practice, the ICA now seems to pay more attention to the nexus between the competitive concerns and the commitments offered by the parties. Furthermore, the fact that lower courts tend to consider that commitment decisions may also have evidentiary value may reduce the incentive of firms to offer voluntary remedies. 136 Nonetheless, negotiated enforcement continues to play a very important role in antitrust decision-making practice. This may have both positive and negative effects. Commitment decisions may reduce risks for firms, and enable the ICA to address more rapidly the issues raised by potentially anticompetitive practices. On the other hand, an extensive use of commitment decisions may negatively affect the development of case law on abuse of dominance, as these decisions do not contain a complete and detailed analysis of the alleged infringement, and the robustness of their reasoning and interpretative choices is normally not tested before courts.

134 A narrower interpretation of the concept of abuse of dominance is necessary, in particular, in cases concerning the exercise of fundamental rights enshrined in the EU Charter of Fundamental Rights or Member States’ constitutional traditions, such as the right of access to justice.
135 Two out of six, three out of nine, one out of five and one out of two, respectively.
136 Tribunal of Milan, 28 July 2015, No. 9109.
I INTRODUCTION

i Characteristics of the regulations on private monopolisation and unfair business practices

The Japanese regulations on dominance and monopolies come in two forms: prohibition on private monopolisation and prohibition on unfair business practices.2

Private monopolisation

The concept of ‘private monopolisation’ is derived from Article 2 of the US Sherman Act, and was enacted at the time of the establishment of the Antimonopoly Act (AMA) in 1947, which is based on US judicial precedents on monopolisation. Two types of conduct are prescribed – ‘exclusionary conduct’ and ‘controlling conduct’, with ‘controlling conduct’ being unique to Japanese competition law. There are also regulations on such conduct being committed by multiple enterprises simultaneously, although there are few actual examples of this. Private monopolisation is defined in the provisions of the AMA as follows:

The term ‘private monopolisation’ as used in this Act means such business activities by which any enterprise, individually or by combination, in conspiracy with other enterprises, or by any other manner, excludes or controls the business activities of other enterprises, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.3

In actual practice, the provisions against controlling-type conduct are rarely applied, and five of the six private monopolisation cases that have taken place since 2000 have been exclusionary-type cases. While the title ‘private monopolisation’ is used, there is in fact no need for the subject of the relevant conduct to be a private company, so nowadays this expression is essentially meaningless. There is also no requirement for the subject of the conduct to be monopolising the market in the economic sense of the term (that is, having only one seller or one buyer).

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1 Yusuke Kashiwagi is a partner at Koike & Kashiwagi Law Office.
2 While the Japan Fair Trade Commission (JFTC) translates the Japanese term fukōsei na torihiki hōhō as ‘unfair trade practices’, the term ‘business’ suits the reality of what is being referred to, and accordingly this translation is used in the chapter.
3 AMA, Article 2, Paragraph 5. While ‘any particular field of trade’ is the JFTC’s English translation, this has the same meaning as the term ‘relevant market’, which is generally used globally.
Unfair business practices

While ‘unfair business practice’ means a conduct that has a likelihood of impeding fair competition, and is derived from Article 5 of the US Federal Trade Commission Act, a notable feature of the provisions on such practices is that they prescribe various types of conduct. Essentially, while an unfair business practice is the same as private monopolisation in that the AMA regulates against anticompetitive conduct impeding the function of competition in the relevant market, it differs from private monopolisation in that the AMA also prohibits unfair business practices that have a ‘likelihood’ of having such an effect. There are debates over what constitutes such a likelihood, as described below.

Market share

While with private monopolisation there are no provisions imposing requirements on a company’s market share, under the Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act enacted by the JFTC (Private Monopolisation Guidelines), companies with a share of roughly over 50 per cent are subject to the regulations, and in actual cases to which private monopolisation has applied, the share of companies in the relevant market has been high.

For instance, from a general overview of cases since 2000, we see examples including a share of approximately 85 per cent in NIPRO, 70 per cent and above in NTT East (NTT’s share of fibre-optic lines in the east Japan region), 72 per cent in USEN Corporation (up from 68 per cent owing to an implementation of exclusionary conduct), 89 per cent in Intel (up from 76 per cent, again owing to the implementation of exclusionary conduct) and approximately 99 per cent in JASRAC (managing operator for music copyright). These cases are described in more detail in Sections II and IV.

In this way, all cases of private monopolisation since 2000 have identified exclusionary conduct by companies with a market share of over 50 per cent as a violation of the prohibitions thereon. However, even companies that do not have a market share of 50 per cent or more are regulated by the rules against unfair business practices.

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4 Conduct is designated as unfair business practices by the AMA or the JFTC (AMA, Article 2, Paragraph 9, Items 1–6; JFTC General Designations (GD), Paragraphs 1–16). The JFTC is authorised to designate additional prohibited practices by the AMA and there are two types of JFTC designations; one is a general designation, which is applicable across sectors; the other is a specific designation, which is applied to a specific sector. Three specific designations, applicable to newspapers, freight transportation and retail businesses, are enacted currently.

5 A likelihood of impeding fair competition was theoretically categorised as three ‘forms’ in the 1982 AMA study group report: (1) lessening free competition; (2) use of unfair methods of competition; or (3) infringing the foundation of free competition. Form 1 is a core impediment, since it has essentially the same meaning as impeding the function of competition in the relevant market; form 2 relates to a substantially special act of the AMA (the Act against unjustifiable premiums and misleading representations, which is enforced by the Consumer Affairs Agency. The Consumer Affairs Agency and the JFTC sometimes cooperate in handling misleading cases); and form 3 only relates to abuse of superior bargaining position (exploitative abuse). Additionally, the JFTC considers that the use of unfair methods of competition (form 2) must be prevalent to find a likelihood of impeding fair competition.


7 JFTC hearing decision, 5 June 2006.

8 Supreme Court judgment, 17 December 2010.

9 JFTC recommendation decision, 13 October 2004.

10 JFTC recommendation decision, 13 April 2005.
Exclusionary conduct and controlling conduct

In recent years, there have been a series of important Supreme Court judgments concerning exclusionary conduct, in which the concept of ‘excluding the business activities of other enterprises’ was defined as ‘causing a clear obstruction to the business activities of a competitor, or significantly making it difficult for a competitor to enter the market, in each case through practices of an artificial nature that deviate from normal competitive methods’.11 While this definition has become generally accepted, views are divided when it comes to the actual finding of exclusionary conduct. However, there is no disputing the fact that there is no need for a company to completely expel a competitor from the market, or to bar it completely from entering it, for such conduct to be considered exclusionary. In addition, in the same judgment, a ‘substantial restraint of competition’ is defined as ‘creating, maintaining or strengthening market power’, and so is consistent with actual practice to date.

On the other hand, controlling conduct is generally defined (albeit not in a Supreme Court judgment) as ‘conduct which imposes restrictions on another enterprise’s decision-making concerning their business activities, and so causes them to comply with one’s own wishes’.

Other matters

While a company that creates market power is essentially free to raise prices, discriminatory price raises, etc., of a kind that prevent competitors from entering the market may be caught by the regulations on private monopolisation.

There are provisions that enable measures to be taken where a market is in a situation whereby it is monopolised by a large company;12 to remove such a situation; however, these have not actually been used in practice, and it is extremely unlikely that they will be in the future, either.

ii Relationship between private monopolisation and unfair business practices

It might be difficult for readers in countries that do not have a system of dual regulations to understand the relationship between private monopolisation and unfair business practices. While the enactment of regulations on unfair business practices was (as previously mentioned) influenced by the US Federal Trade Commission Act,13 the AMA is distinct from this Act in that it has provisions on a diverse range of different types of conduct, such as:

- concerted refusal to supply;14
- discriminatory price;15
- unjust low prices;16
- resale price maintenance (RPM);17 and
- abuse of superior bargaining position.18

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11 Judgment of the Supreme Court in the NTT East case: Supreme Court decision, 17 December 2010, Minshu Vol. 64, No. 8, p. 2,067.
12 AMA, Article 8-4.
13 Although in Japan, the only enforcing body is the JFTC.
14 AMA, Article 2(9)(i); GD, Paragraph 1.
15 AMA, Article 2(9)(ii); GD, Paragraph 3.
16 AMA, Article 2(9)(iii); GD, Paragraph 6.
17 AMA, Article 2(9)(iv).
18 AMA, Article 2(9)(v); GD, Paragraph 13.
Except for RPM, the conducts above are dually regulated in the AMA and JFTC General Designations (GD), with slight differences between the regulations. The main types of conduct, dealt with only in the GD and often applied by the JFTC, are as follows:

a) refusal to deal;\(^{20}\)
b) tie-in sales;\(^{21}\)
c) trading on exclusive terms;\(^{22}\)
d) trading on restrictive terms;\(^{23}\) and
e) interferences with a competitor’s transaction.\(^{24}\)

The major difference from private monopolisation is in the extent to which there is an anticompetitive effect on the market, and for private monopolisation to be realised, there must be a ‘substantial restraint of competition’ in the ‘relevant market’.

On the other hand, it is enough for there to be a ‘likelihood of impeding fair competition’ for unfair business practices. The question of to what extent a ‘likelihood’ there should be to satisfy this requirement is, in some cases, the most contested issue. While it also depends on the case in question, the JFTC often sets a low bar in cases to ensure that it wins, while on the other hand companies tend to set a high bar in a way that is substantially the same as a ‘substantial restraint of competition’.

On this point, while the JFTC ruled in the administrative hearing decision for the Microsoft case\(^{25}\) that ‘the quantitative or substantive effect on competition of the relevant conduct should be determined on a case-by-case basis’, this became the largest point of argument in the actual case.

In many cases, if private monopolisation applies, it will also constitute one of the types of unfair business practice. On the other hand, the relationship between them is such that conduct does not necessarily constitute private monopolisation just because it is an unfair business practice.

**II YEAR IN REVIEW**

As the JFTC has tended to enforce the regulations on private monopolisation in waves, it is worth looking back at previous events to understand the current situation in Japan. There were no such cases between 1972 and 1996, and prior to 1972, there were only a few. During this period, conduct that met the requirements for private monopolisation was regulated as an unfair business practice, as they were generally understood to be at the time, for which the evidential burden was low.

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\(^{19}\) For example, ‘unjust low price’ is defined in Article 2(9)(iii) of the AMA as follows: ‘without justifiable grounds, continuously supplying goods or services at a price far below the cost incurred to supply them, thereby tending to cause difficulties to the business activities of other enterprises.’ On the other hand, it is defined in Paragraph 6 of the GD as follows: ‘in addition to any act falling under the provisions of Article 2, Paragraph (9), Item (iii) of the Act, unjustly supplying goods or services for a low consideration, thereby tending to cause difficulties to the business activities of other entrepreneurs.’

\(^{20}\) GD, Paragraph 2.

\(^{21}\) GD, Paragraph 10.

\(^{22}\) GD, Paragraph 11.

\(^{23}\) GD, Paragraph 12.

\(^{24}\) GD, Paragraph 14.

\(^{25}\) 16 September 2008.
From 1996 to 2009, private monopolisation was actively enforced, with one case a year on average. However, the JFTC lost the JASRAC case. JASRAC, which was the monopolistic managing operator for music copyright in Japan, was initially determined by the JFTC in 2009\textsuperscript{26} to have committed a violation of private monopolisation by adopting a blanket collection method for broadcaster licensing fees, whereby it charged a fee by applying its prescribed rate to broadcasters' broadcasting business revenue as a comprehensive licence for all music managed by JASRAC, regardless of the number of times that music was actually used.

JASRAC contested the cease-and-desist order in the hearing procedure\textsuperscript{27} held by the JFTC, which resulted in the JFTC taking the highly unusual step of revoking its own cease-and-desist order of violation.\textsuperscript{28}

While it seemed the matter would then be concluded, an action for revocation of administrative disposition was subsequently brought against the JFTC by JASRAC's competitor, e-License, which claimed that it was excluded by JASRAC. The Tokyo High Court and the Supreme Court both determined that exclusionary conduct had taken place, and the case was referred back to the JFTC.\textsuperscript{29}

In 2016, the case finally came to a close, with the withdrawal of JASRAC's petition for redress, and during the period from 2009 to 2016, shackled as it was by its ongoing conflict with JASRAC, the JFTC did not expose any cases of private monopolisation, with the exception of one small and local case of a controlling-type private monopolisation. However, in recent years, the JFTC has become more active again. It has exposed a string of cases that are fascinating from a competition law standpoint, each described later.

On 12 December 2017, the Supreme Court, albeit in an international cartel case, indicated that even where cartel agreements are reached outside Japan, the AMA will apply where these infringe Japan's free competitive economic order. Although this is self-evident in actual practice, it makes sense that this was made explicitly clear, and it is surmised that this is also applicable to private monopolisation and unfair business practices.

On 15 March 2018, according to press reports, the JFTC conducted an on-site inspection (dawn raid) of Amazon Japan's offices on suspicion of the unfair business practice, 'abuse of superior bargaining position'. It seems that the investigation will look into Amazon Japan's conduct in demanding that its supplier companies pay the cost of a discount provided to consumers as a form of support money.

On 22 May 2018, according to press reports, the JFTC conducted an on-site inspection of Mainami Kuko Service, a company providing aviation refuelling services, on suspicion of private monopolisation (of the exclusionary type). It seems that the investigation will

\textsuperscript{26} JFTC case-and-desist order, 27 February 2009.
\textsuperscript{27} The practice of which has since been abolished.
\textsuperscript{28} JFTC hearing decision, 12 June 2012.
\textsuperscript{29} Supreme Court decision, 28 April 2015, Minshu, Vol. 69, No. 3, p. 518. The ruling was as follows: A collection method which does not take into account the amount of broadcast usage when calculating broadcasting licence fees will cause the overall amount of music usage fees borne by broadcasters to increase where they are paying music usage fees to other managing operators. Accordingly, coupled with the fact that the broadcasting usage of music is essentially interchangeable in nature, this has the effect of suppressing the usage by broadcasters of music which is managed by other managing operators, and when one takes into account that the scope of such suppression extends to almost all broadcasters, and that the continuation period thereof extends over a considerably long period of time, one should say that this method clearly has the effect of making it difficult for other managing operators to enter this market.
look into Mainami’s conduct of allegedly trying to restrict the entry of competitors into the market by asking airlines it has long-term partnerships with not to use refuelling facilities provided by competitors.

On 13 June 2018, according to press reports, the JFTC conducted an on-site inspection of Nihon Medi-Physics Co, a dominant company providing cancer examination test drugs for positron emission tomography, which is effective in early detection of cancer, on suspicion of private monopolisation (of the exclusionary type). Nihon Medi-Physics Co is suspected of disrupting the entry of new entrants into the market by putting pressure on the administration developer and manufacture not to use competitors’ test drugs.

On 11 July 2018, the JFTC announced it closed the investigation against Apple on the suspected violation of the AMA regarding its agreement with mobile operators. See Section IV.

On 30 December 2018, in accordance with the enactment of the Act on the Development of Related Legislation Following the Conclusion of the Trans-Pacific Partnership Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, a scheme to resolve suspected violations against the AMA voluntarily by consent between the JFTC and the enterprise (commitment procedures) has been introduced into the AMA. See Section V.

On 12 March 2019, the cabinet passed the bill to amend the AMA, which aimed to incorporate the partially discretionary leniency system, which exempts or reduces the surcharge based on the degree of cooperation of the leniency applicant and abolishes the upper limit of the number for leniency applicants, which is currently limited to five (after dawn raids, this is limited to three). These amendments are very important, but apply only to cartels and bid riggings, not to unilateral conduct.

On 15 March 2019, after hearing procedures that took almost 10 years, the JFTC revoked its own ‘cease-and-desist order’ of violation against Qualcomm, which was issued in 2009. This was a highly unusual step, as in the JASRAC case mentioned above. On 28 September 2009, Qualcomm was determined by the JFTC to have committed violation of unfair business practices (trading on restrictive terms) by forcing a ‘royalty-free clause’ and ‘non-assertion provisions clause’ to mobile terminal manufacturers in the licence agreements of code-division multiple access (CDMA) intellectual property rights it owned. The JFTC evaluated in its ‘cease-and-desist order’ in 2009, that the manufacturers would, as a result of these clauses, lose the desire to research and develop technologies related to CDMA, etc., and, accordingly, their positions would be weakened; while on the other hand, Qualcomm would strengthen its position. However, the JFTC hearing examiner ruled that the clauses had a property similar to cross-licence agreements, and finally found that the claimants had failed to show evidence to support the existence of violation. The JFTC commissioners approved the hearing decision.

On 10 April 2019, according to press reports, the JFTC conducted on-site inspections of Rakten Travel Co, Booking.com Japan and Expedia Japan, companies providing online hotel booking websites, on suspicion of unfair business practices (forcing most-favoured nation (MFN) clauses on hotels).

On 10 April 2019, according to press reports, Amazon Japan made public that it would withdraw its measure of service point reduction system returning to consumers over 1 per cent of the purchase amount of all items at the seller’s expense. After Amazon Japan initially made this measure public in February 2019, the JFTC started investigations on suspicion of abuse of superior bargaining position.
III MARKET DEFINITION AND MARKET POWER

i Market definition

A market is defined in terms of its product scope and geographical scope. However, markets are sometimes defined very narrowly when compared to merger control, such as in terms of specific areas, services or customers.

The most noteworthy case regarding market definition is NTT East. The JFTC defined the market somewhat narrowly as ‘FTTH [fibre to the home] services for detached residential properties in the East Japan region’. While the company naturally countered that the market should be defined as the broadband services market (including asymmetric digital subscriber line (ADSL) services), the Supreme Court affirmed the JFTC’s decision.30

Markets have been defined as:

a the field of supply for glass tubes in the West Japan region for which the consumers are ampoule processing companies with headquarters in the same region and the suppliers are NIPRO and processing companies’, in the later NIPRO case;

b the ‘transmission of music to retail shops in Japan’ in the USEN Corporation case;

c the market for the sale of CPUs to computer manufacturers in Japan’ in the Intel case;

and
d the Molybdenum-99 market in Japan’ in the Nordion case.

There is also debate as to whether market definition is required for unfair business practices, and the JFTC’s position is to define markets as necessary on a case-by-case basis. That is to say, its basic position is that this is not necessary. However, in Microsoft, the JFTC did not shy away from defining the market, but instead defined it as the computer audiovisual technology trading market. Even for unfair business practices, it is not possible to consider the anticompetitive effect if the market is not defined, and so there are many situations where companies and the JFTC contest the point.

ii Market power

As mentioned previously, under the Private Monopolisation Guidelines a company is required to have a share of over 50 per cent in the relevant market for private monopolisation to apply.

Private monopolisation is established where such companies ‘create, maintain or strengthen their market power’ through either exclusionary conduct or controlling conduct. There are many cases where private monopolisation is committed by companies that already have market power, and in doing so maintain or strengthen that power. While in this sense it is rare for such companies to create market power, there are cases where, for instance, an enterprise that already has market power in another market uses that position to create new market power in another separate market; that is to say it makes use of its leverage.

In the case of unfair business practices, there is no need for the company committing the conduct to have market power, and it is enough for them to have a strong position

30 The Court stated that:
given it is clear that there actually existed consumers who prefer FTTH services in terms of the communications side, etc., regardless of the price difference with other broadband services such as ADSL, and so it can be understood that for such persons there was almost no demand substitutability as regards other broadband services, so the FTTH services market can be assessed independently as being the ‘relevant market’ for the purposes of Article 2, Paragraph 5 of the AMA.

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within that market. The Guidelines Concerning Distribution Systems and Business Practices under the Antimonopoly Act\(^{31}\) contain safe harbour provisions whereby an enterprise is not considered to have a strong position where it has a share of 20 per cent or less in respect of some types of conduct. Whether the safe harbour provisions apply varies depending on the type of conduct that is alleged to be an unfair business practice, and the aforementioned Guidelines should be consulted accordingly.

For instance, safe harbour provisions are not available in the case of restrictions on resale prices or abuse of a superior bargaining position, and so may be violated even where the JFTC considers the company in question to have a market share of only 10 per cent. Further, the market share is dependent on the market definition, so it is important to be mindful of the fact that a company’s relative market share will increase where the market is narrowly defined.

IV ABUSE

While conduct constituting private monopolisation may be either exclusionary conduct or controlling conduct, the former is at the heart of such conduct, and one should also be mindful of the following: it is highly likely that the JFTC makes its decisions regarding private monopolisation not only by paying attention to the anticompetitive nature of each such conduct, but also by considering overall the strength and weakness of factors such as: (1) the company’s power in the market; (2) the anticompetitive nature of the conduct in question; and (3) the effect on the relevant market, as well as the causal relationship between the three, and further, taking into account the existence or absence of any pro-competitive effects, and the extent thereof.

For point (1), the JFTC takes into account not only the company’s market share itself, but also the characteristics of the market, the difference in share between the company and the player ranking second in the market, and, where necessary, the extent of excess profits, the existence of potential new entrants, brand strength and so on.

Concerning point (2), while the Supreme Court has proposed ‘practices of an artificial nature which deviate from methods of normal competition’, this can simply be taken to mean anticompetitiveness. The extent of the anticompetitive nature of a conduct can be taken instead to mean the extent of the deviation from normal competition based on price and quality, that is to say from competition on the merits of the relevant products or services.

The effect on the relevant market (point (3)) refers to effects such as competitors failing to enter or being delayed in entering a market, withdrawing therefrom, experiencing fluctuations in their share, or increases or decreases in customer trading.

Because points (1) to (3) act on each other, if an anticompetitive effect is quantitatively assessed and given a numerical value, the anticompetitive effect is likely determined not through a summing up of such values, but by multiplying them and subtracting any pro-competitive effects instead. Once this is understood, the following examples become easier to comprehend.

In the Private Monopolisation Guidelines, four typical examples of exclusionary conduct constituting private monopolisation are given:

\[ a \] predatory pricing;

\[ b \] exclusive dealing;

\[ c \] exclusive refusal to deal;

\[ d \] tying arrangements.

While this is a simple way to classify such conduct, a much more broad and diverse range of types of conduct can be given. Additionally, the following classification of conduct is based on the JFTC’s law applied to actual cases; however, this is fluid, and dependent on the details of each case. In many cases, if private monopolisation applies, this also constitutes a type of unfair business practice. However, the converse is not true.

i  **Exclusionary conduct (private monopolisation)**

**Predatory pricing**

According to the Private Monopolisation Guidelines, a price is highly likely to constitute exclusionary conduct where it is lower than the ‘costs required to supply the product’, which is a similar concept to average variable costs. On the other hand, where the price is lower than the total costs required to supply a product, but greater than the ‘costs which does not arise if the product is not supplied’, and there are no special circumstances such as that the product is being supplied over a long period of time and in high volume, there is a low possibility of such pricing constituting exclusionary conduct.

The **USEN Corporation** case is a typical example of this. USEN Corporation, which had a market-leading share in cable music broadcasting to retail offices (68 per cent, rising to 72 per cent as a result of exclusionary conduct), lowered the monthly listening fee that it charged to customers of its largest rival, Cansystem (26 per cent, decreasing to 20 per cent as a result of USEN’s exclusionary conduct) as a condition of the customers switching to use its own service, and also extended its promotional campaign to those customers (whereby those monthly fees were made free) from the standard three months to six, and so was determined to have engaged in exclusionary conduct.

**Margin squeeze**

Margin squeeze means conduct whereby a company that does business in both an upstream market and a downstream market tries to bring the price of an upstream product close to that of a downstream product. In some cases, it is regulated as a refusal to deal.

The Supreme Court’s judgment in **NTT East** is a typical example of this. When providing new communication services using fibre optics to detached residential properties, NTT East, which owns more than 70 per cent of the fibre-optic lines in the east Japan region, provided users with such communication services under a system whereby one person used a single fibre-optic line (central wire direct connection system). However, the fact that the usage fee for this was less than the connection fee for other communications providers, when using the same central wire direct connection system, was treated as them being excluded. While the monthly usage fee was ¥5,800, the monthly connection fee was ¥6,328.

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32 See footnote 9.
33 The Supreme Court ruled as follows:

> in the case of the conduct concerned, NTT East directly provided subscriber fibre optic equipment installed by it to its subscribers, and at the same time, when providing this equipment to other telecommunications providers with which it competed for connection purposes, made use of its position as effectively the sole supplier in the equipment connectivity market for subscriber fibre optics to set and present them with connectivity terms and conditions which those providers could not accept as reasonable in economic terms. This unilateral and one-sided
Exclusive dealing

In Nordion, the Canadian company Nordion, that held the majority of global production volume and a large part of the sales for Molybdenum 99 (a substance used in radiation therapy) and 100 per cent of the market share in Japan, required its Japanese business partners to purchase all of the products they required from it over the course of 10 years, and accordingly, was found to have excluded its competitors.34 This is an exclusive purchasing obligation, which is one type of exclusive dealing.

Rebates

The Private Monopolisation Guidelines attempt to draw a line under whether conduct is illegal by listing a diverse range of factors, including loyalty rebates, but are unsuccessful in doing so. As such, analysis of exclusionary conduct is at a developing stage, whereby factors such as the discount aspect of rebates and pro-competitive effects are also taken into account.

A representative example of this is Intel.35 Intel, which has a larger share of the market for central processing units (CPUs) installed in computers (rising from 76 to 89 per cent as a result of exclusionary conduct), provided its business partner computer manufacturers with rebates, etcetera, on the condition that they would use Intel CPUs for 90 to 100 per cent of their computers, and would not use CPUs from Intel’s competitor, AMD (with a share of 22 per cent falling to 10 per cent as a result of Intel’s exclusionary conduct), for those computers that had a high production volume. Intel’s conduct in causing them not to adopt the CPUs of its competitor was deemed to be exclusionary.

Mixed conduct

There are some situations in which various different types of exclusionary conduct are mixed together, or combine to form a consecutive series.

NIPRO36 is a typical example of mixed conduct. In this case, NAIGAI Group, a business partner of NIPRO that produces and sells glass tubes for use in ampoules (and has a share of 85 per cent), began dealing in non-Japanese made glass tubes, which were competitor products to NIPRO’s. To restrain the expansion of NAIGAI’s dealing in such glass tubes, and with the intention of imposing sanctions on it, NIPRO raised the sale price for glass tubes to NAIGAI Group only (price discrimination); refused to accept orders placed by NAIGAI Group (refusal to deal); and required NAIGAI Group alone to provide security or to settle invoices with cash payments (abuse of superior bargaining position).

The JFTC decided that exclusionary conduct had taken place after taking into account a series of conduct by NIPRO over some four years. While NIPRO was the first case of private monopolisation in which the JFTC’s findings were contested, it also alleged in the course of the hearing as a preliminary claim that NIPRO’s same series of conduct also constituted unfair business practices.37

34 Nordion, JFTC recommendation decision, 3 September 1998.
35 See footnote 10.
36 See footnote 7.
37 Trading subject to restrictive conditions, GD, Paragraph 12.
As NAIGAI Group had not decreased its dealings in imported glass tubes despite such course of conduct, NIPRO was able to exclude the imported tubes, but only slightly, and accordingly, the JFTC added an allegation of unfair business practices, which have a low evidential burden and for which it is sufficient to show that there was a ‘likelihood of impeding fair competition’. Finally, the JFTC returned to its claim of private monopolisation and won its case.

**Hokkaido Shimbun** is also an interesting example of a mixed conduct case. The *Hokkaido Shimbun* newspaper covered the entire Hokkaido area, and had a dominant position even within newspaper sales in the Hakodate region (which is located within the Hokkaido area). Given that *Hakodate Shimbun* was established in the same region with the aim of publishing an evening paper, *Hokkaido Shimbun* both filed a trademark on title lettering that the new market entrant, *Hakodate Shimbun* newspaper, was likely to use, and also greatly reduced its newspaper advertising fees in the same region and put pressure on the press agency not to broadcast news to *Hakodate Shimbun*. It further demanded that the TV stations would not broadcast its commercials. This conduct was treated as *Hakodate Shimbun* being excluded.

Other examples of mixed conduct are outlined below. While these types of conduct are difficult to typify under the Private Monopolisation Guidelines, they are clear examples of exclusionary conduct.

In **Japan Medical Foods Association**, the Association, which exclusively carried out inspection work on medical food products (that is, it had a share of 100 per cent) through the public inspections system, colluded with Nisshin Healthcare Food Service Co, Ltd, a primary seller of food products for medical use, to construct a production and sale system that made it clearly difficult for new players to enter the market, such as requiring registration for medical food products and certification for production plants, and so was deemed to have excluded new market participants from producing and selling medical food products.39

In **Pachinko machine production patent pool**, 10 pachinko machine producers that held key patents on the manufacturing of such machines (and together held approximately 90 per cent of the pachinko machine market), and that had gathered their patents together and were managing them as a patent ‘pool’, were deemed to have committed exclusionary conduct for not granting new participants licence rights to those patents.40

In **Paramount Bed**, Paramount Bed placed pressure on the person at the Tokyo metropolitan government in charge of placing orders for medical-use beds (Paramount had an almost 100 per cent share of this market) to enable delivery only of beds for which Paramount Bed had utility model rights, so that competing providers could not supply other beds, and accordingly was found to have committed exclusionary conduct.41

### ii Controlling conduct (private monopolisation)

There are few cases concerning controlling-type conduct; nor are there any guidelines thereon from the JFTC. An example that constitutes controlling is a company using a given investment in another company to restrict its sales areas against its wishes, and to prohibit the

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38 JFTC recommendation decision, 28 February 2000.
39 Japan Medical Foods Association, JFTC recommendation decision, 8 May 1996.
40 Pachinko machine production patent pool, JFTC recommendation decision, 6 August 1997.
41 Paramount Bed, JFTC recommendation decision, 3 September 1998.

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establishment of new factories. Also, while there are very few examples of this (just five cases to date), cases such as the Japan Medical Foods case and the Paramount Bed case involved both exclusionary conduct and controlling conduct. Since the Toyo Seikan case, there has been only one case of controlling conduct alone – the 2015 Fukui Agricultural Cooperative case.

While Fukui Agricultural Cooperative is a controlling-type case, the scale thereof was small and it was extremely local in nature.

iii Unfair business practices

Price discrimination

In Hokkaido Electric Power, the company set different fees for returning consumers that were higher than those for new consumers, and accordingly the JFTC issued a warning on suspicion of price discrimination.

While Japanese electric power companies once tended to dominate certain areas for long periods of time, the regulations were gradually eased to accommodate new market entrants. In particular, in recent years a liberalisation of retail electricity has begun, starting with the super-high voltage field (such as for large-scale power plants), then office buildings, and finally low-voltage family retail electricity as of April 2016, with the result that the Japanese electricity retail market has become completely liberalised. The case of Hokkaido Electric Power can be positioned as occurring in the midst of the retail electricity market’s shift to a competitive market.

The JFTC has made it clear to the energy industry (such as electricity and gas) that it will proactively investigate the situation going forward.

Tying

Microsoft Japan licensed its word processing software, Word, to computer manufacturers together with Excel (the spreadsheet software for which it has the leading market share) at the same time as licensing the latter, and accordingly was deemed to have engaged in ‘tying’. Following this, Ichitaro, competitor word processing software, suffered a notable reduction in its market share.

Non-assertion provisions clause

The Microsoft case is a typical example of this. Microsoft US was found to have created an anticompetitive effect in the computer audiovisual technology market by including in its contracts for licensing Windows (its core software for PCs), original equipment manufacturer (OEM) sales provisions whereby the OEM providers entering into those contracts promised not to sue Microsoft or other OEM providers for breaches of patent infringement by Windows (non-assertion provisions), and so this conduct was found to constitute trading subject to restrictive conditions.

42 Toyo Seikan, JFTC recommendation decision, 18 September 1972.
43 16 January 2015.
44 JFTC warning, 30 June 2017.
45 GD, Paragraph 10; JFTC recommendation decision, 14 December 1998.
46 GD, Paragraph 12; JFTC hearing decision, 16 September 2008.
In the decision, it was determined that the non-assertion provisions were extremely unreasonable given that it enabled the OEM providers’ worldwide patents to be incorporated into the Windows series for free, and accordingly that there was a high probability of OEM providers losing the desire to research and develop new computer audiovisual technology. In addition, given that the OEM providers and Microsoft are competitors in the computer audiovisual technology market, the OEM providers would, as a result of the non-assertion provisions, lose the desire to research and develop computer audiovisual technology if they had such powerful technology in their possession, and accordingly, their position would be weakened, while on the other hand, Microsoft could rapidly and widely distribute its computer audiovisual technology on a global scale by installing it within the Windows series.

Accordingly, it was determined that the non-assertion provisions had a likelihood of excluding competition in the computer audiovisual market, or causing it to stagnate, and so there was a high probability of an anticompetitive effect being extended to that market.

Breach of fair, reasonable and non-discriminatory terms

One-Blue, LLC manages and operates the patent pool for the standard essential patents for Blu-ray disc standards. Despite declaring that it would license these under fair, reasonable and non-discriminatory (FRAND) conditions, it did not reach an agreement with Imation Corporation, which wished to receive a licence under the FRAND conditions, and furthermore told its business partners that the Blu-ray discs produced and sold by Imation would infringe One-Blue, LLC’s patent rights. Accordingly, this conduct was determined to constitute unfair interference with a competitor’s transactions.47

Most-favoured nation clause

Amazon Japan was found to have included in its seller display contracts for Amazon Marketplace (its electronic shopping mall) an MFN clause that required sellers to set prices and terms and conditions for products sold by them on Amazon Marketplace at whichever were the most favourable prices and terms and conditions of the same product as sold by other sales routes, and accordingly was investigated by the JFTC on suspicion of trading subject to restrictive conditions.48 However, as Amazon Japan made a petition to the effect that it would take voluntary measures itself, and those measures, including deleting MFN clauses from the contracts and not introducing the clauses in new contracts, dispelled the suspicion, the JFTC broke off its investigation.49 It could be said that Amazon took commitment procedures in advance. In March 2018, the JFTC raided Amazon Japan on suspicion of abusing superior bargaining power, which is discussed in Section II. The case is ongoing.

Unfair interference with a competitor’s transactions

DeNA is an online game platform that uses mobile phone and social network services (SNS), was ranked top in sales of SNS game software and was also in hot pursuit of its rival,

47 GD, Paragraph 14; JFTC press release, 18 November 2016.
48 GD, Paragraph 12.
49 JFTC press release, 1 June 2017.
Gree. DeNA planned to disrupt SNS game developers from providing software to Gree by eliminating their links to the DeNA platform when they provided software to Gree. DeNA was determined to have engaged in unfair interference with a competitor’s transactions.\(^{50}\)

**Exploitative abuse (abuse of superior bargaining position)**

The provisions on unfair business practices contain prohibitions on abuse of superior bargaining position that are unique to Japan. One aspect to these provisions is the traditional Japanese industrial policy of protecting small and medium-sized companies, and, while they are somewhat hard to understand in terms of pure competition law theory, the JFTC makes frequent use of these provisions, therefore making them a key part of the regulations against unfair business practices.\(^{51}\) It is enough for a company to have a superior bargaining position relative to its suppliers, and there is neither any need for the relevant company to have market power nor to have a strong position in the relevant market. Of course, if such elements exist, the possibility of the company being targeted by the JFTC will increase.

As such, the company is an important trading partner for suppliers; if they have a relationship with such company whereby they must accept any demand made by the company, no matter how unreasonable, the company in question will be deemed to have a superior bargaining position. Theoretically, the key factor in finding a superior bargaining position is the degree of dependence by the supplier on the transaction with the company, and the degree of dependence is generally evaluated by dividing the supplier’s volume of sales to the company by the supplier’s total amount of sales. However, in practice, the JFTC often finds dependency, even if the ratio is less than 5 per cent.

The rules primarily regulate against large companies, such as mass electronics retailers, supermarkets, department stores, home and convenience stores, demanding cooperation fees from their suppliers, requiring them to dispatch their employees on secondment without charge, and returning products or reducing payments therefor without due cause.

However, there are no restrictions on the types of industry that may be targeted, and in the past, there have also been cases where banks were investigated. In *Mitsui Sumitomo Bank*, the JFTC found that Mitsui Sumitomo Bank forcing borrowers to purchase financial products was unlawful.\(^{52}\)

**Apple case**

The JFTC has been investigating Apple Inc (Apple), the ultimate parent company of Apple Japan GK (Apple Japan), in accordance with the provisions of the AMA,\(^{53}\) since October 2016.

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\(^{50}\) JFTC cease-and desist order, 9 June 2011.

\(^{51}\) The regulation on abuse of superior bargaining position is also implemented by the Subcontract Act, the special act of the AMA. The Act applies to subcontract transactions related to the commission of manufacturing, repairing or making information-based products or providing services and only where the capital falls under the criteria in the Act. When the JFTC find a violation of the Subcontract Act, it firstly issues a recommendation. If the company does not comply, the JFTC issues a cease-and-desist order after evaluating the conduct in light of abuse of superior bargaining position.

\(^{52}\) JFTC recommendation decision, 26 December 2005.

\(^{53}\) The suspected violation of trading on restrictive terms, GD, Paragraph 12.
Apple Japan has, based on its agreements with NTT Docomo KK, KDDI KK and SoftBank
KK\(^54\) (collectively, three mobile network operators (3 MNOs)), been suspected of restricting
the business activities of 3 MNOs regarding the following:

\begin{enumerate}
\item quantities of iPhones that 3 MNOs order from Apple Japan;
\item telecommunication service plans that 3 MNOs offer iPhone users;
\item iPhones that users traded in to 3 MNOs; and
\item subsidies that 3 MNOs and others offer users purchasing iPhones.
\end{enumerate}

During the investigation, Apple reported to the JFTC that it would amend a part of the
agreements. The JFTC reviewed these amendments. Consequently, on 11 July 2018, the
JFTC decided to close the investigation, concluding that the amendments would eliminate
the suspicion of the violation mentioned above. The JFTC’s evaluations are as follows.\(^55\)

Apple Japan concluded iPhone agreements with, and sold iPhones to, 3 MNOs. The iPhone agreements include provisions regarding 3 MNOs’ purchase and sale of
iPhone products, iPhone service and support provided to users purchasing iPhones, and
telecommunication services provided to users purchasing iPhones. The JFTC investigated the
following provisions in the iPhone agreements.

\textit{Provisions regarding iPhone order quantities}

It was seen that Apple Japan obligating an MNO to order a specific order quantity of iPhones
could be a problem under the AMA if, for example, it reduces the sales opportunities of other
smartphone makers. However, considering the fact that a specific order quantity was not set
out in the iPhone agreements except for during a limited time period and a stipulated order
quantity did not appear to oblige an MNO to order the quantity, as well as other facts, it was
not recognised that Apple Japan restricted an MNO’s business activities.

Apple reported to the JFTC that, when concluding a new iPhone agreement with the
MNO, it would stipulate that an order quantity would be a target for the MNO and that a
failure to meet an order quantity would not be a breach of contract.

\textit{Provisions regarding iPhone plans}

It was seen that Apple Japan obligating an MNO to offer an iPhone plan only could be
a problem under the AMA if, for example, it lessens competition on service plans among
MNOs. However, considering the fact that it was possible for other service plans to be offered
under the iPhone agreements and a stipulated iPhone plan had not been offered, as well as
other facts, it was not recognised that Apple Japan restricted an MNO’s business activities.

Apple reported to the JFTC that it would amend the iPhone agreements and abolish
the provisions regarding iPhone plans.

\textit{Provisions regarding traded-in iPhones}

It was seen that Apple Japan restricting an MNO of its sales of traded-in iPhones within
Japan could be a problem under the AMA, if, for example, it maintains or enhances the

\(^54\) In Japan, the possession of smartphones is increasing trend, with over 60 per cent of consumers owning
a smartphone. The number of smartphone shipments exceeds 30 million units per year, out of which the
recent share of iPhones shipped by Apple Japan is approximately 50 per cent. SoftBank, KDDI and NTT
Docomo launched the sales of iPhones in July 2008, October 2011 and September 2013, respectively.

status of Apple Japan in the smartphone market, or it maintains the sales prices of iPhones, by promoting Apple Japan’s sales of iPhones. Also, it is concerned that such restriction could hinder competition between MNOs and mobile network virtual operators, which offer telecommunication services to users who possess used handsets or that sell used handsets. However, considering the fact that the provisions regarding traded-in iPhones only defined the purpose of use within Japan of traded-in iPhones for one of the 3 MNOs, as well as other facts, it was not recognised that Apple Japan restricted the domestic distribution of traded-in iPhones.

**Provisions on subsidy**

Subsidies provided to users purchasing smartphones is considered to lessen the substantial costs to users in purchasing smartphones and to have promoted the wide use of smartphones. However, Apple Japan obligating an MNO to provide a certain amount of subsidy could be a problem under the AMA if, for example, it lessens competition among mobile telecommunication businesses through the smooth offering of low-price and diverse service plans, by constraining the price reduction of telecommunication services and the price combination of smartphones and telecommunication services under the current situation where MNOs bundle smartphones and telecommunication services to many users.

Apple proposed, to the JFTC, to amend the iPhone agreements with 3 MNOs so that they may offer (even if users purchasing iPhones subscribed to a term contract), service plans without subsidies (alternate plans), on the condition that 3 MNOs provide clear, fair and informed choices to users in their selection of either service plans with subsidies (standard plans) or alternate plans and other conditions. Apple agreed on such amendments with 3 MNOs and then reported them to the JFTC.

Even after the implementation of the above amendments, 3 MNOs’ obligation to provide subsidies to users purchasing iPhones will still partly remain. However, it will become possible for 3 MNOs to offer alternate plans to users, which will not breach the iPhone agreements with Apple Japan. However, as long as 3 MNOs’ sales promotion activities of alternate plans are not hindered, it is considered that such marketing will provide users with the optimal service plan choice, promoting competition among telecommunication businesses. Considering these points, it is recognised that the amendments will eliminate the suspicion of the violation of the AMA.

V **PROCEDURE**

i **Overview**

Investigations conducted by the JFTC consist of either an on-site investigation (dawn raid) or an order to report. While an on-site investigation is the method normally employed where there is strong suspicion of a violation, in recent years some investigations have been commenced through an order to report instead. Although at the time of commencing an investigation the JFTC gives a written notice of the suspected facts, it is common for the JFTC to describe both grounds for private monopolisation and unfair business practices, thereby investigating with the aim of finding both and proving at least one of the two, and for the applicable law to be determined mid-way through an investigation or indeed at the end thereof.

When the JFTC reaches a firm position, it will send the enterprise in question a draft of the measures to be taken, and provide the enterprise with an opportunity to refuse the
allegations and view or copy evidence held by the JFTC. Formal measures, cease-and-desist orders, are then issued once this process is completed. The JFTC have broad discretion to order types of measures, which include an enterprise's resolution not to repeat the same violation, informing its customers of the violation, implementing a compliance programme, etc.\(^{56}\)

Even where the violation has already been extinguished, the JFTC may, where it deems particularly necessary, order the enterprise, for a period of five years after the extinguishment thereof, to take such measures as are required to ensure that the relevant conduct is removed, such as disseminating notices to the effect that the offending conduct is no longer taking place.\(^{57}\) While there is debate over whether the JFTC can order enterprises to take structural measures such as a company split, there has been no case so far of such an order being given. Where the enterprise in question objects to measures, it may dispute them through an action for revocation of administrative order made to the Tokyo District Court.

When the JFTC cannot prove a violation, it may issue informal administrative measures in the form of a warning or alert. The JFTC also can conduct sector or industry inquiries, most of which are done with the company’s voluntary cooperation. However, the JFTC have the power to order any person to appear before the JFTC, or require them to submit necessary reports, information, materials or documents for their inquiries. This power was used in 2017 in an inquiry on liquid natural gas.

The revision of the AMA in 2005 led to administrative surcharges also being levied for controlling a private monopolisation. The JFTC does not have discretion over the amount thereof, but rather surcharges are charged at a maximum of 10 per cent of the consolidated annual sales affected by the conduct for the past three years.\(^{58}\) Further, with the 2009 revision of the AMA, administrative surcharges came to be imposed on exclusionary private monopolisation as well. These are charged at a maximum of 6 per cent of the consolidated annual sales affected by the conduct for the past three years.\(^{59}\) However, to date there has been no case of an administrative surcharge being levied for private monopolisation. In addition, while criminal charges are also prescribed in respect of private monopolisation, there is no example of these having actually been imposed.

With the 2009 revision of the AMA, administrative surcharges also came to be imposed for certain types of unfair business practices (certain types enacted only in the AMA, not in the GD). The basic rate for these is 3 per cent (but 1 per cent in the case of abuse of superior bargaining position). Administrative surcharges have only been imposed for unfair business practices in the case of abuses of a superior bargaining position. While such surcharges are imposed in respect of the first instance of the conduct in violation of the prohibition on abuse of superior bargaining position, for other unfair business practices they are imposed in respect of the second instance of the offending conduct where it is repeated, within 10 years of its first violation.

In addition to this formal enforcement, the JFTC may advise on business plans when consulted by the parties. This consultation system plays a very important role in practice.\(^{60}\)

\(^{56}\) The JFTC may plead to the Tokyo High Court for an emergency interim order when immediate action is necessary. The most recent plea was made in 2004.

\(^{57}\) Article 7, Paragraph 2 of the AMA.

\(^{58}\) Article 7-2, Paragraph 2 of the AMA.

\(^{59}\) Article 7-2, Paragraph 4 of the AMA.

Commitment procedures

The purpose of commitment procedures is to ensure the transparency of the application, as well as predictability for businesses, of the law related to commitment procedures by clarifying the policies concerning commitment procedures as much as possible.

Subjects of commitment procedures

The JFTC applies commitment procedures to the suspected violation when the JFTC recognises that it is necessary for promotion of free and fair competition. On the other hand, the following cases are not subject to commitment procedures: (1) suspected violations, such as bid rigging or price-fixing cartels (hardcore cartels); (2) cases in which an enterprise has violated the same provisions within a 10-year period; and (3) cases recognised as constituting vicious and serious suspected violations that are considered to deserve a criminal sanction.

Commitment measures

In order to ensure the restoration of competition order or that the act will not be repeated in the future, the commitment measures shall satisfy the following requirements: (1) they are sufficient for excluding the suspected violation or to confirm that the suspected violation has been excluded; and (2) they are expected to be reliably conducted.

Typical examples of commitment measures are cessation of the suspected violation, confirmation that it has ceased, notification to trading partners and others or publicising information to users and others, development of a compliance programme, amendments of contracts, transfer of business, etc., recovery of monetary value provided by trading partners and others and reporting on the state of implementation.

Other key points

Public comments

If the JFTC finds that it needs to invite opinions of third parties for commitment plans, it requests public comments regarding an overview of such.

Public announcements

After the approval of a commitment plan, the JFTC shall publicly announce a summary of the approved commitment plan, a summary of the suspected violation and other matters as necessary.

Exercise of investigatory authority after migration to commitment procedures

After the issuance of a notification of commitment procedures, the JFTC shall not, in principle, conduct any investigation, such as an on-site inspection, report order or seeking testimony of the notified enterprise.
VI PRIVATE ENFORCEMENT

i Claims for damages

A person who suffers damage as a result of private monopolisation or unfair business practices may make a claim for compensation against the offending person pursuant to Article 25 of the AMA or Article 709 of the Civil Code. In Japan, there is no system of punitive compensation for damages or triple damages, so it will only ever be possible to claim the actual amount of loss suffered.

Claims for compensation made pursuant to Article 25 of the AMA cannot be made unless the JFTC’s order has been finalised, and in the first instance, the Tokyo District Court has exclusive jurisdiction. Negligence is not required to establish liability, so the party engaging in the relevant conduct cannot avoid liability on the basis that it did not act wilfully or negligently.

On the other hand, claims for compensation made pursuant to Article 709 of the Civil Code are made based on unlawful conduct in general, and so a claim can be made regardless of whether the JFTC has made an order or not.

These two rights of claim are separate from each other, and while it is in practice unusual, it is lawful to both bring a lawsuit pursuant to Article 25 of the AMA and at the same time another pursuant to Article 709 of the Civil Code, and provided the statute of limitations has not taken effect, it is also lawful for a claimant to bring a lawsuit pursuant to Article 25 of the AMA after losing a lawsuit brought under Article 709 of the Civil Code. While the limitation period is three years in either case, the starting point for calculating that period for lawsuits brought under Article 25 of the AMA is from the time at which the JFTC’s order is finalised, whereas for lawsuits brought under Article 709 of the Civil Code, it is ‘the point in time at which the loss and the party causing that loss are known’.

While at first sight, lawsuits brought pursuant to Article 25 of the AMA, which do not require negligence to establish liability, may seem more advantageous to the affected party, these claims are restricted to violating conduct that is identified by the JFTC, and accordingly it may not necessarily be advantageous to the affected party, inter alia, where the actual violating conduct lasts longer than as identified by the JFTC. For this reason, when one excludes cases that have been statute-barred, affected parties, as often as not, choose to make a claim for compensation pursuant to Article 709 of the Civil Code.

ii Claims for injunction

Injunction lawsuits by private persons were first introduced in 2001. In Article 24 of the AMA, it is prescribed that a person whose interests are harmed owing to unfair business practices, or that are at risk of being harmed thereby, and who clearly suffers loss as a result thereof or is likely to do so, may make a claim against the enterprise or trade association that is harming or at risk of harming its interests to have that infringement stopped or prevented. This system means that the party claiming does not have to wait for the JFTC to take enforcement measures, but can make an injunction claim in its own capacity as

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61 Article 26, Paragraph 1 of the AMA.
62 Article 85-2 of the AMA.
63 Article 25, Paragraph 2 of the AMA.
64 Article 26, Paragraph 2 of the AMA.
65 Article 724 of the Civil Code.
the harmed party. In the case of private monopolisation, the harmed party is not specified, and while this is a flaw of the legal system, as mentioned previously, in many cases private monopolisation also constitutes one of the forms of unfair business practices, so if one adjusts the legal configuration, it is in practice possible for a party harmed by private monopolisation to make an injunction claim.

While many lawsuits have been brought since the introduction of the system, there were, for a long time, no successful cases brought by claimants, with the first such case occurring 10 years after the system was introduced.

This was a case in which an enterprise that had an extremely powerful position in the dry ice market (the leading player with a share of 49 per cent) slandered its competitors to the effect that they were breaching their non-compete obligations, or repeatedly made allegations to stir up its exaggerated claim that they were not reliable suppliers, and in doing so weakened their position in the dry ice market, or tried to prevent them from entering the market altogether. In this case, it was deemed that there was ‘a likelihood of impeding fair competition’.66

Following this was a case of a successful claim in the taxi industry.67

Situations where a person’s interests are ‘clearly harmed’ include ‘situations where damage arises due to conduct in violation of the Antimonopoly Act that is difficult to recover from, or where financial compensation is insufficient to remedy the situation, such as where the relevant enterprise is at risk of being expelled from the market or is being prevented from entering it as a new participant’.68

Going forward, it is expected that private court actions will become more common.

VII FUTURE DEVELOPMENTS

Following the adoption of the commitment procedure system, after lengthy discussions, in December 2018, more flexibility for resolving cases through negotiation with the JFTC has become available. Private monopolisation and unfair business practices are subject to the commitment procedure, although cartels and bid rigging are not within the scope of the commitment.

Additionally, the term of chairman Kazuyuki Sugimoto, which was renewed in March 2018, will expire in September 2020, and it is foreseen that the JFTC will make a dash for big cases before this date.

66 Tokyo District Court judgment. 30 March 2011.
I INTRODUCTION

The Kenyan competition regulatory regime is governed by the Competition Act (the Act) as amended by the Competition (Amendment) Act No. 49 of 2016, which amended the Act with effect from 13 January 2017. The Act’s primary purposes are to promote and safeguard competition in the national economy, protect consumers from unfair and misleading market conduct, and establish and provide for the powers and functions of the Competition Authority of Kenya (CAK) and the Competition Tribunal. The amendments that came into force in 2017 granted the CAK increased investigative powers and increased powers to issue sanctions for non-compliance.

Kenya is also subject to the following regional competition law regimes: the East African Community (EAC) Competition Act, 2006, enacted by the EAC; and the Common Market for Eastern and Southern Africa (COMESA) Competition Commission Competition Regulations enforced by the COMESA Competition Commission.

To help market participants understand the CAK’s mandate and the factors that it will take into consideration when exercising its powers, the CAK has issued the following guidelines, the titles of which reflect their primary purpose:

a Balancing Public Interest Guidelines;
b Guidelines on the Control of Unwarranted Concentration of Economic Power;
c Guidelines on Relevant Market Definition;
d Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices under the Competition Act;
e Consolidated Guidelines on Substantive Assessment of Mergers under the Competition Act;
f Guidelines on Engaging with Consumer Organisations;
g Guidelines on Consumer Protection;
h Leniency Programme Guidelines; and
i Public Interests Test In Merger Determinations Guidelines.

II YEAR IN REVIEW

Pursuant to the Competition Amendment Act, which came into force in January 2017, the CAK has the right to require any person to provide information to it in respect of any sector inquiry it undertakes. As a result, persons who are not the subject of an investigation
are required to provide any information requested by the CAK at their own cost. The Competition Amendment Act also introduced the concept of abuse of buyer power. Buyer power has been defined as:

\[
\text{influence exerted by an undertaking . . . in the position of a Purchaser . . . To obtain from a supplier more favourable terms, or to impose a long term opportunity cost including harm or withheld benefit which if carried out, would be significantly disproportionate to any resulting long term cost to the undertaking.}
\]

This amendment catches retailers and wholesalers, particularly retailers such as supermarkets that are likely, by the nature of their business, to have ‘buyer power’.

In addition, the CAK now has the ability to fine undertakings up to 10 per cent of their gross annual turnover for the preceding year where such undertakings have engaged in abuse of dominance or abuse of buyer power. This is an additional penalty to the existing sanction of a maximum fine of 10 million Kenya shillings or up to five years’ imprisonment, or both, for engaging in restrictive trade practices under the Act. The fine of up to 10 per cent of turnover is restricted to Kenyan turnover.

With respect to mergers, the Competition Amendment Act gives the CAK the ability to fine undertakings up to 10 per cent of their gross annual turnover for the preceding year or to a fine not exceeding 10 million Kenya shillings or to imprisonment for a term not exceeding five years, or to both where such undertakings have either provided materially incorrect or misleading information, or have failed to adhere to conditions imposed on a merger approval. The CAK follows up on compliance with merger conditions annually, so it is important for companies to ensure ongoing compliance.

The CAK’s latest annual report, for the financial year 2017/2018, reveals its increased enforcement of the provisions on merger control, restrictive trade practices and consumer welfare in the country.

In this report, the CAK considered a total of 150 merger notifications, out of which 148 were finalised. Out of these, 55.3 per cent had an international dimension mainly involving private equity funds and 44.7 per cent were local. The merger notifications were mainly from the manufacturing, real estate, distribution, investment, services, advertising and agriculture sectors. In making its evaluation of mergers, the CAK’s mandate is to consider whether a proposed merger is likely to prevent or lessen competition or create or strengthen a dominant position. The CAK continues to focus on public interest concerns in its analysis of mergers with particular emphasis being placed on the termination of employees. The Public Interests Test In Merger Determinations Guidelines are cognisant of the need to enhance and sustain employment of both human and capital resources through supporting: measures to ensure no substantial job losses occur as a result of mergers, and that the effects on employment are mitigated in the short run; the salvaging of failing and dormant undertakings; and encouraging mergers of media undertakings that will enhance the production of local content and programmes, and support youth employment.\(^2\)

A notable merger transaction determined by the CAK depicting the CAK’s evaluation of the impact of mergers on the public interest and competition is the transaction involving Total Kenya and Gulf Africa Petroleum Company (GAPCO). The CAK approved the merger

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but imposed a condition preventing Total Kenya from terminating any of the GAPCO employees and a condition requiring Total Kenya to strike out what were deemed to be anticompetitive clauses in its agreements with dealers.

The CAK also increasingly imposed penalties on parties for implementation of mergers without prior approval; for example, imposing a fine of 15 million Kenya shillings on Bluejay (Betway) Company Limited for implementing a merger without the CAK’s approval.³

The CAK investigated 15 restrictive trade practices cases, 13 of which were finalised, with the rest at various stages of investigation at the close of the reporting period. During the financial year 2017/2018, 11 exemption applications were received and evaluated. Seven exemption applications were evaluated in the air transport, agriculture, retail and professional services sectors, and the CAK granted three and rejected four applications that did not meet the threshold of generating overriding benefits to the public.⁴

The CAK mainly focused its investigations in the advertising and market research segment, accounting for 32 per cent of the investigations, which was attributable to the activities of trade associations in the sector. The manufacturing sector recorded the second highest number of investigations, at 27 per cent.

An exemption application submitted by WoW Beverages Ltd, a Kenyan company importing premium beverages, including wines, spirits and sparkling water, was rejected by the CAK. WoW Beverages sought to enter into exclusive distributorship agreements with seven international suppliers and filed an exemption application with the CAK on the basis that the agreements would, inter alia, protect local consumers from defective products and guarantee accountability when such products enter the Kenyan market, thus ensuring that compromised or adulterated products do not enter the market. The application was rejected for failure to meet the threshold for the grant of exemption with the CAK, arguing that parallel imports through legal channels are likely to bring more benefits to Kenyan customers. The CAK noted that the company failed to demonstrate that the grant of exemption would generate public benefits that outweigh lessening of competition.

III MARKET DEFINITION AND MARKET POWER

i Dominance

According to the Act, dominance can be attained either by way of market share or market power. Market power is defined as the power of a firm to control prices, to exclude competition or to behave, to an appreciable extent, independently of its competitors, customers or suppliers.

Section 23(1) of the Act defines a dominant undertaking as an undertaking that produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description that are produced, supplied or distributed in Kenya or any substantial part thereof; or that provides or otherwise controls not less than half of the services that are rendered in Kenya or any substantial part thereof.

Section 23(2) of the Act provides that:

*notwithstanding subsection (1), an undertaking shall also be deemed to be dominant for the purposes of this Act where the undertaking—*

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(a) though not dominant, controls at least forty per cent but not more than fifty per cent of the market share unless it can show that it does not have market power; or
(b) controls less than forty per cent of the market share but has market power.\(^5\)

Section 4(2) sets out the additional factors to be considered in determining dominance to include the importation of goods or the supply of services by persons not resident or carrying on business in Kenya; and the economic circumstances of the relevant market, including the market shares of persons supplying or acquiring goods or services in the market, the ability of those persons to expand their market shares and the potential for new entry into the market.

To provide further clarity to market participants, the CAK has published its Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices (RTP Guidelines), which detail the factors the CAK will consider when determining if an undertaking is dominant. These include:

- potential and actual competition;
- barriers to entry into the market;
- the degree to which countervailing market powers can impact an undertaking’s ability to exercise its power in a market;
- product differentiation;
- the stability of market shares; and
- the ability of an undertaking to act independently of its customers and competitors.\(^6\)

### ii Collective dominance or relative dominance

The Act does not provide for collective or relative dominance, but collective actions by undertakings may be captured under the prohibited restrictive trade practices. There are also specific provisions relating to the arrangements trade associations may have under the Act.

### iii Market definition

Section 4(1)(c) defines the term ‘market’ as a market in Kenya or a substantial part of Kenya, and refers to the range of reasonable possibilities for substitution in supply and demand between particular kinds of goods or services and between suppliers or acquirers of those goods and services.

The Competition Authority Guidelines on Relevant Market Definition (Market Definition Guidelines) take an economics-based approach in defining the relevant market. A market, for competition law purposes, has two dimensions: product market and geographical market.\(^7\)

A product market ‘constitutes all the goods and/or services which are regarded as reasonably interchangeable or substitutable by the consumers, by reason of the products’ characteristics, their prices and their intended use’.\(^8\) On the other hand, a geographical market is ‘the area within which undertakings concerned are involved in the supply and demand of

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\(^5\) The Finance Act 2014 broadened the definition of a dominant undertaking by inserting subsection 23(2).

\(^6\) Consolidated Guidelines on Substantive Assessment of Restrictive Trade Practices under the Competition Act, p. 25.


\(^8\) Guidelines for Market Definition (No. 14), Paragraph 8.
goods or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas’.9

The Market Definition Guidelines provide for a demand-side substitution approach and a supply-side substitution approach in defining a product market; however, demand substitutability is the key factor considered in market definition. The demand-side substitution approach seeks to identify the alternative products that consumers may turn to when there is an increase in the price of a particular product. The supply-side substitution approach seeks to identify whether undertakings would start supplying a new product were prices to rise.10

The Market Definition Guidelines give a practical example of the application of the demand-side approach in the alcoholic beverages (wines) sector to determine whether different flavours of wines belong to the same market. The question to determine would be whether consumers of flavour ‘A’ would switch to other flavours in the event of a permanent price increase of 5 to 10 per cent. All other flavours to which a sufficient number of consumers would switch, to the extent that the price increase for flavour ‘A’ would no longer be profitable owing to resulting loss of sales, would form part of the same market.

IV ABUSE

i Overview

The Act does not offer a specific definition of ‘abuse’, but lists instances where abuse may be seen to have occurred. The list of instances set out is not exhaustive. The Act provides that abuse of a dominant position includes:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;
- applying dissimilar conditions to equivalent transactions with other trading parties;
- making the conclusion of contracts subject to acceptance by other parties of supplementary conditions that by their nature or according to commercial usage have no connection with the subject matter of the contracts; and
- abuse of an intellectual property right.11

We note that the Act makes reference to abuse by dominant undertakings only. Therefore, not every undertaking found to have been involved in one of the above instances will be deemed to have committed an abuse unless the undertaking is dominant in the relevant market. Conversely, the CAK has confirmed that being dominant is not illegal per se – rather, it is the abuse of a dominant position with which they are concerned. The RTP Guidelines provide that the CAK bears the burden of proof. Further, the RTP Guidelines categorise abuse of dominance into two categories: exploitative and exclusionary abuses.

These provisions of the Act have not been subject to judicial interpretation, and the CAK has not published its decisions in sufficient detail to create a body of case law that would

9 ibid., Paragraph 9.
10 ibid., Paragraph 21.
11 Competition Act, Section 24(2)(e), Part III C.
give market participants significant guidance on the interpretation of the relevant provisions. As things stand, the Act has supplied the CAK and the courts with a guideline as opposed to an exhaustive list of abuses, monopolisation, monopoly maintenance or illegal unilateral conduct. Additionally, the CAK and the courts will recognise ‘sui generis abuses’ that would be applicable under the general rules of international law as well as any treaty or convention that Kenya has ratified. This would include conventions and treaties against discrimination as well as unfair economic practices under international law.

**Restrictive trade practices**

Under the Act, practices such as price-fixing, limitations on sales and production, restrictions on advertising, the exclusion of competitors from the market and the entry into agreements that would otherwise assign distributors to specific regions are deemed to be restrictive trade practices. The CAK continues to focus on enforcement against businesses and undertakings engaging in restrictive trade practices, cartel behaviour and abuse of dominance. The CAK has conducted sector-specific investigations and dawn raids, and has imposed penalties on parties found to be engaged in restrictive trade practices.

The Act makes it an offence for undertakings to engage in restrictive trade practices, providing that ‘agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, are prohibited, unless they are exempt in accordance with the provisions of Section D of this Part’.

The restrictive trade practices provisions apply to any agreement, decision or restrictive practice that:

- **a** directly or indirectly fixes purchase or selling prices or any other trading conditions;
- **b** divides markets by allocating customers, suppliers, areas, or specific types of goods or services;
- **c** involves collusive tendering;
- **d** involves a practice of minimum resale price maintenance;
- **e** limits or controls production, market outlets or access, technical development or investment;
- **f** applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- **g** makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions that by their nature or according to commercial usage have no connection with the subject of the contracts;
- **h** amounts to the use of an intellectual property right in a manner that goes beyond the limits of fair, reasonable and non-discriminatory use; or
- **i** otherwise prevents, distorts or restricts competition.

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12 This is pursuant to Article 2(5) and (6) of the Constitution of Kenya, 2010.
13 One such example is the Treaty Establishing the Common Market for Eastern and Southern Africa to advance the economic integration of Eastern and Southern Africa adopted on 5 November 1993, which Kenya ratified on 8 December 1994. The treaty sets out various principles, including accountability, economic justice and popular participation in the development, recognition and observance of the rule of law.
14 Competition Act, Section 21(1), Part III A.
15 Competition Act, Section 21(3), Part III A.
The types of agreements, decisions or concerted practices that may be deemed restrictive trade practices are similar to those deemed abusive by undertakings in a dominant position. The key distinction between a restrictive trade practice and an abuse of a dominant position is that the test for a restrictive trade practice looks at the object or effect of the contract, thus arguably utilising an effects-based test and not making such arrangements a per se breach of the relevant sections of the Act.

In addition, the CAK has emphasised under the RTP Guidelines that the CAK considers that the words ‘object’ and ‘effect’ are disjunctive. Hence, while the burden of proving that a restrictive trade practice has occurred falls on the CAK, the CAK need only prove one element of the test.

**ii Exclusionary abuses**

As noted above, the Act prohibits conduct by a dominant undertaking that directly or indirectly imposes unfair purchase or selling prices or other unfair trading conditions. It also prohibits undertakings from restricting production, market access and development through predatory practices. These prohibitions also appear in the restrictive trade practices provisions. The restrictive trade practices provisions make it clear that such practices apply to both horizontal and vertical arrangements, whereas the latter forms of agreement are generally excluded in Western jurisdictions from being considered anticompetitive by regulators.

The CAK published Exemption Guidelines for Horizontal Practices in 2012, which provide guidance regarding the grounds on which the CAK may exempt an agreement that is anticompetitive. The exclusions will be generally based on compelling public policy reasons, which include demonstrating that the agreement maintains or promotes exports or improves production, distribution of goods or services, or will produce technical or economic progress.

**Predatory pricing and price-fixing**

This offence is captured under both the provisions on abuse of a dominant position and restrictive trade practices. Both prohibit an undertaking from directly or indirectly imposing unfair purchase or selling prices, or fixing the purchase price in a manner that restricts or prevents competition.\(^{16}\)

There is, unfortunately, scant case law on predatory pricing. One of the few cases in this regard was decided in 2012. It arose from a complaint made by Telkom Kenya Limited (Telkom) (which is the sole landline telephone services provider in Kenya) against Airtel Kenya (Airtel) and Essar Telekom Kenya (Essar) (both mobile phone providers). Telkom alleged that the off-net calling rates of Airtel and Essar were predatory as they were below cost. The CAK conducted an investigation into the matter and found that the allegations were not substantiated.\(^{17}\) Unfortunately, the reported decision is only a summary, and does not provide significant detail on the analysis of the facts and evidence presented.

However, the CAK has ordered the abolition of pacts fixing advertising prices, with several advertising companies having been flagged for price-fixing, with the segment topping the number of restrictive trade practice investigations in the CAK’s 2017/2018 Annual Report.

\(^{16}\) Competition Act, Sections 21(3)(a) and 24(2)(a).

\(^{17}\) Competition Authority of Kenya Annual Report 2012/2013, p. 49.
Exclusive dealing and leveraging
In relation to other forms of exclusionary abuses such as loyalty rebates, exclusivity contracts and price tying, the Act prohibits such arrangements under various provisions. For example, Section 21(3)(g) in relation to restrictive trade practices and Section 24(2)(d) both state that if an undertaking makes the conclusion of a contract subject to acceptance by other parties of supplementary conditions that by their nature or according to commercial usage have no connection with the subject-matter of the contracts, then this will be deemed anticompetitive.

We would emphasise that if the offence is in relation to abuse then the test that must first be met is in relation to dominance, while for restrictive trade practices, the Act requires the practice to have the object or effect of reducing competition.

Refusal to deal
The Act prohibits abuse of intellectual property rights, which would arguably include the refusal to grant a licence, but this provision has yet to be tested in the Kenyan courts. The CAK instituted an investigation into Multi-choice (a leading video entertainment and internet company) regarding whether Multi-choice engaged in abuses of dominance through content exclusivity relating to vertical agreements, which are prohibited under Section 21 of the Act. Upon conclusion of the investigation, the CAK issued Multi-choice with notice of its proposed decision.18

iii Discrimination
The Act prohibits discriminatory conduct by a dominant undertaking, including any agreement or concerted practice that applies dissimilar conditions to equivalent transactions with other trading parties.19 In a case involving the Kenya Association of Travel Agents (KATA) and the International Air Transport Association (IATA), the KATA complained that the IATA was engaging in discriminatory behaviour and refusing to deal with it with regard to default insurance. The CAK investigated the matter, found the allegations to be true and issued a cease-and-desist order.20

iv Exploitative abuses
Exploitative abuses are generally prohibited under the restrictive trade practices provisions of the Act. An investigation into major oil marketers based on the allegation that such marketers were engaging in limiting or controlling production, market outlets access, technical development and investment was closed because of a lack of evidence. However, given the CAK’s recent use of dawn raids as a means of obtaining information, future investigations may be more likely to unearth evidence that could lead to prosecutions or fines.

19 Competition Act, Sections 21(3)(f) and 24(2)(c).
V REMEDIES AND SANCTIONS

i Sanctions

For most breaches, the Act contains two main potential sanctions: fines and prison sentences. For an abuse of dominance or an offence relating to restrictive trade practices, fines can be up to 10 million Kenya shillings, and potential imprisonment can be up to five years. As mentioned above, the CAK may also impose a financial penalty of up to 10 per cent of the immediately preceding year’s gross annual turnover in Kenya of the undertaking in question.

The CAK is further empowered, where it finds that an undertaking has violated any provisions of the Act (including abuse of dominance) after investigations, to:

a) restrain the undertaking or undertakings from further engaging in the conduct;

b) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;

c) impose a financial penalty; or

d) grant any other appropriate relief.

The Act does not set out any factors that may be considered in adjusting fines and sentences upward or downward.

ii Behavioural remedies

The Act limits application of interim measures to instances where there is a violation of a prohibited restrictive trade practice. There is no rationale given for this limitation, and it is arguable that this could have been a drafting oversight.

The CAK is empowered to grant interim relief where it believes, on reasonable grounds, that it is necessary to act as a matter of urgency for the purpose of preventing serious and irreparable damage to any person or category of persons or protecting the public interest pending conclusion of investigation.21

iii Structural remedies

The Act provides for structural remedies only where there is an ‘unwarranted concentration of economic power’, which is defined as the existence of cross-directorship between two distinct undertakings or companies producing substantially similar goods or services, and whose combined market share is more than 40 per cent.

The CAK is under an obligation to keep the structure of the production and distribution of goods and services in Kenya under review in order to determine where concentrations of economic power exist under which the detrimental impact on the economy outweighs the efficiency advantages of integration in production or distribution. This has been seen in the report produced on the sugar industry.22

Where the CAK finds that a person holds an unwarranted concentration of economic power in any sector, it may order such person to dispose of such portion of its interests in the production, distribution or supply of services as it deems necessary to remove the unwarranted concentration; however, no order should be issued that has the effect of

21 Competition Act, Section 37(1).

subdividing a manufacturing facility whose degree of physical integration is such that the
introduction of independent management units controlling different components reduces its
efficiency and substantially raises production costs per unit of output.23 We are not aware of
any case to which the CAK has applied this provision.

VI    PROCEDURE

i    Investigations
Section 31 of the Act empowers the CAK to initiate investigations into any conduct or
proposed conduct that is alleged to constitute or may constitute an infringement of the
prohibitions relating to an abuse of dominance, on its own motion or upon receipt of
information or a complaint from any person, including a government agency. During 2017
and 2018, the CAK continued to increase the number of officers dealing with investigations
among its staff. The CAK continues to recruit for several positions in its buyer power division,
having advertised positions in the division indicating its intention to focus on regulating
buyer power.

We expect an increase in reported investigations during the course of 2019, as the CAK
continues to be bolder in its use of its powers to investigate, and in light of the publication of
the Leniency Programme Guidelines.

Upon conclusion of an investigation, if the CAK proposes to make a decision that
there has been an abuse of dominance, it is required to give a written notice of the proposed
decision to each undertaking that may be affected by the decision. The notice should contain
the following: the reasons for the proposed decision and the details of any relief that the CAK
may consider imposing. The notice should further inform each undertaking that it may make
written representations to the CAK and indicate whether it requires an opportunity to make
oral representations.

Pursuant to the Competition Amendment Act, the CAK can now make a proposed
decision and invite written and oral representations in relation to restrictive trade practices.

Unfortunately, these notices are not published, and therefore there is limited guidance
for practitioners on how the CAK may view any particular commercial arrangement. This
issue has been raised by stakeholders to the CAK, which is considering whether to change
its position.

ii    Settlement
The CAK may, at any time during and after an investigation into an alleged infringement of
the prohibitions of the Act, enter into an agreement of settlement with the undertaking or
undertakings concerned. The agreement may include an award of damages to the complainant
and any amount proposed to be imposed as a pecuniary penalty.

iii    Appeals
A person aggrieved by a determination of the CAK may appeal to the Competition Tribunal.
Following the promulgation of the Competition (Tribunal) Rules and the swearing in of the

23    Competition Act, Section 52(4).
members of the Tribunal in 2017, the Tribunal is now receiving such appeals. Under the provisions of the Act, an aggrieved party has to appeal to the Tribunal within 30 days of the CAK’s decision.24

iv Leniency
The Act at Section 89A states that an undertaking will qualify for a leniency programme if it voluntarily discloses the existence of an agreement or practice that violates the Act and cooperates with the CAK in the investigations. Such undertaking may not be subject to all or part of a fine that could be imposed under the Act.

The CAK has, through a Gazette Notice of 19 May 2017 publishing the Leniency Programme Guidelines, introduced a competition leniency regime that applies to restrictive trade practices. These guidelines set out the principles and conditions that shall govern the processing and granting of leniency.

The CAK has recently announced that it is offering penalty waivers to firms that self-report cartel behaviour to it and provide evidence against other members involved in cartel behaviour. The CAK also announced that companies willing to work with the authority are expected to provide direct evidence and to proactively cooperate in bringing successful enforcement action in return for full or partial immunity.

VII PRIVATE ENFORCEMENT
The Act confers the power of investigation and enforcement on the CAK, and does not empower the CAK to delegate the function. Consequently, no private right of action exists at this time. A person with a grievance must file a complaint to the CAK, which will then investigate the matter.

VIII FUTURE DEVELOPMENTS
The CAK is expected to increase its focus on restrictive trade practices and cartels in 2019. In mid-2016, the COMESA Competition Commission (CCC) issued draft guidelines on the enforcement of restrictive business practices and the abuse of dominance, and has begun to similarly focus on cartels and investigations into restrictive trade practices. In 2018, the CCC launched investigations into FIFA’s refusal to allow Egypt’s state television broadcaster to air the 2018 FIFA World Cup matches.

The CAK and the CCC signed a memorandum of understanding that provides that the two authorities will share information in respect of investigations that concern the other regulator’s jurisdiction.

The East African Competition Authority, which covers Kenya, became operational in 2018; however, its focus is currently on investigating firms and trade associations engaged in malpractices and exploitation of consumers through price-fixing. The Authority is also undertaking sector studies on the competitiveness of the regional economy; however, no cases have been decided yet. One of the challenges the Authority faces is the overlap with the existing Tanzanian and Kenyan regulators, as well as with the COMESA Competition Commission.

24 Competition Act, Section 40(1).
During the 2018 financial year, the CAK published the following rules and guidelines:

- the Merger Threshold Rules;
- the Block Exemption Guidelines;
- the Consolidated Guidelines on the Substantive Assessment of Mergers;
- the Competition General Rules;
- the Abuse of Buyer Power Rules;
- the Search and Seizure Guidelines; and
- the Consumer Protection Guidelines.

These rules and guidelines are still in draft form and are undergoing stakeholder review and deliberation. It is anticipated that these are likely to come into effect once they are finalised. The intention of the rules and guidelines is to boost transparency and accountability. Further, the regulations are expected to lower the cost of doing business in the country. Small and medium-sized enterprises will particularly benefit from the new rules, since undertakings with a combined turnover of up to 500 million Kenya shillings will not have to go through the vigorous process of merger analysis.25

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I INTRODUCTION

The Competition Act 2010 (the CA 2010), which came into force on 1 January 2012, is a cross-sectoral legislation (subject to certain exceptions) that aims to promote and protect the process of competition in the interests of consumers. The CA 2010 applies to any commercial activity both within and outside Malaysia (if the commercial activity has an effect on competition in any market in Malaysia). The CA 2010 presently sets out prohibitions on anticompetitive agreements (horizontal and vertical agreements) and abuse of dominant position. Section 10 of the CA 2010 prohibits enterprises from engaging, independently or collectively, in conduct that amounts to an abuse of dominance in a relevant market.

The CA 2010 does not provide for merger control powers. The absence of merger control powers deprives the enforcement agency and the government of a more direct influence over changes in market structures that may be adverse to competition.

The Malaysian Competition Commission (MyCC) is the enforcer of the CA 2010. To date, the MyCC has issued seven guidelines to act as reference to the public on how the MyCC interprets the CA 2010:

- a Guidelines on Complaints Procedures;
- b Guidelines on Market Definition;
- c Guidelines on Anti-competitive Agreements;
- d Guidelines on Abuse of Dominant Position (Guidelines on Abuse of Dominance);
- e Guidelines on Financial Penalties;
- f Guidelines on Leniency Regime; and

Several sectors have been given carve-outs from the CA 2010 (set out in the First Schedule therein) as sector laws provide for competition rules.

1 Shanthi Kandiah is a partner at SK Chambers. She was assisted in writing this chapter by Denishia Rajendran, Nimraat Kaur and Henin Tong.
2 Section 3(3) read together with the First Schedule, and Section 13(1) read together with the Second Schedule, of the CA 2010.
Similar guidelines on market definition and abuse of dominance were issued by the Malaysian Communications and Multimedia Commission (MCMC), the Malaysian Aviation Commission (MAVCOM) and the Energy Commission (EC).

The Gas Supply Act 1993 (GSA 1993) was amended to facilitate the third-party access network, which aims to provide easy access to new players into the gas market by substantially changing the licensing requirements of the gas supply chain.

In 2013, an amendment was made to exclude commercial activities undertaken under the Petroleum Development Act 1974 (PDA 1974) and Petroleum Development Regulations 1974 insofar as the activities are directly in connection with the activities of exploring, exploiting, winning and obtaining petroleum, whether onshore or offshore of Malaysia. The PDA 1974 grants exclusive rights to the national petroleum corporation, PETRONAS, which is, in effect, a statutory monopoly. All of PETRONAS’ downstream activities or concessions granted by PETRONAS to third parties remain liable to be sanctioned under the CA 2010 or the Energy Commission Act 2001 (ECA 2001) (for matters falling within the scope of the ECA 2001) where it is found to be anticompetitive.

II YEAR IN REVIEW

Perhaps the most significant impediment to a robust anti-monopoly policy is the absence of merger control provisions in the CA 2010. Based on news reports, it is understood that the MyCC has begun the process of seeking legislative amendments to include new provisions on mergers and acquisitions into law. There are some positive signs that anti-monopoly competition policy will gain traction in years to come:

On 20 June 2018, the Communications and Multimedia Minister announced that fixed broadband prices were expected to drop by at least 25 per cent by year-end, following the implementation of the Mandatory Standard on Access Pricing, which requires that infrastructure providers give access to their networks at regulated prices. It is reported that government intervention has resulted in a reduction of more than 30 per cent in broadband prices for entry-level packages.

In August 2018, Parliament considered breaking the monopoly on sugar imports to reduce the price of this commodity.

In April 2019, a joint committee, chaired by the Economic Affairs Minister, was reported to be investigating companies holding a possible monopolistic position in their respective markets (Padiberas Nasional Berhad, Puspakom Sdn Berhad, Pharmaniaga Berhad and My EG Services Bhd (MyEG)) as part of the government’s initiative to liberalise the relevant industries and promote competition in business.
Based on news reports dated 3 April 2019, the Minister of Domestic Trade and Consumer Affairs (MDTCA) cited three factors in assessing monopolies: whether policies allowing these monopolies are still relevant; their investment size; and the economic impact of possibly dismantling them.

In terms of enforcement action by the MyCC, there has only been one abuse of dominance infringement finding to date and one proposed decision (set out in the table below). The cases are nevertheless noteworthy in that they demonstrate the MyCC’s committed enforcement efforts against government-installed monopoly concessionaires.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Fines levied or proposed</th>
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<tr>
<td>Insurance (My EG)(^3)</td>
<td>MyCC</td>
<td>Section 10(2)(d)(iii) of the CA 2010: imposing different conditions in equivalent transactions in the purchase of mandatory insurances for the renewal of temporary work permits for foreign workers</td>
<td>Financial penalty of 2,272,200 ringgit and a directive to cease and desist its infringing conduct</td>
</tr>
<tr>
<td>Trade facilitation (Dagang Net Technologies Sdn Bhd (Dagang Net))</td>
<td>MyCC</td>
<td>Section 10(2)(c) of the CA 2010: monopoly provider of trade facilitation services under the national single window by refusing to supply electronic mailboxes to end users of the customs operating system</td>
<td>Proposed financial penalty of 17,397,695.30 ringgit and a directive to cease and desist its infringing conduct</td>
</tr>
</tbody>
</table>

**III MARKET DEFINITION AND MARKET POWER**

Section 2 of the CA 2010 defines ‘market’ as a market in or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services. Defining a ‘relevant market’ means identifying all the close substitutes for the product under investigation.

Section 10 of the CA 2010 does not prohibit an enterprise from being dominant in a relevant market so long as the enterprise does not abuse its dominant position.

The MyCC adopts a two-stage test in determining if an enterprise has infringed Section 10 of the CA 2010:

a. whether the enterprise being complained about is dominant in a relevant market in Malaysia; and

b. if the enterprise is dominant, whether the enterprise is abusing that dominant position.

A ‘dominant position’ is defined as a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms without effective constraint from competitors or potential competitors.\(^4\)

In general, the MyCC will consider a market share of above 60 per cent to be indicative of dominance. However, the fact that the market share of any enterprise is above or below any particular level shall not in itself be conclusive of dominance.

The Guidelines on Abuse of Dominance clearly point out that dominance is not simply a conduct by a single enterprise, but can also include conduct of enterprises exercising significant market power together (i.e., ‘collective dominance’).\(^5\) The MyCC will look at

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\(^{3}\) Case No. MyCC (ED) 700-1/1/2/2015, 24 June 2016.

\(^{4}\) Section 2 of the CA 2010.

\(^{5}\) Guidelines on Abuse of Dominance, Paragraph 2.23.
each case on its merits but, in general, an infringement finding may be made if two or more separate enterprises, which have significant market power, act similarly in a market and that conduct excludes equally efficient competitors.6

In assessing whether an enterprise is dominant, first the relevant market must be defined in accordance with the MyCC’s Guidelines on Market Definition. This involves determining both:

\[\begin{align*}
a & \text{ the relevant product market; and} \\
b & \text{ the relevant geographic market.}
\end{align*}\]

In identifying the relevant market, the MyCC has said that it will employ the hypothetical monopolist test (HMT), and will rely on economic evidence in defining the relevant market, such as:

\[\begin{align*}
a & \text{ market research surveys; and} \\
b & \text{ interviews with:} \\
& \text{ • industry associations;} \\
& \text{ • the initial complainant;} \\
& \text{ • competitors; and} \\
& \text{ • customers.}
\end{align*}\]

In practice, we have not seen significant evidence of an economic approach as the only infringement finding for abuse of dominance made by the MyCC involved a monopoly concessionaire.

**Aviation service sector**

Apart from issuing the Guidelines on Abuse of Dominant Position, the MAVCOM has also issued the Aviation Service Market Definition, which adopts the same principles applied by the MyCC in defining a market.

**Communications and multimedia sector**

In its Guideline on Dominant Position in a Communications Market, the MCMC outlines the general approach in identifying whether a licensee is dominant. This includes defining the boundaries of the relevant communications market and determining whether the licensee is in a dominant position in the relevant market.

The MCMC’s approach to market definition is similar to the MyCC’s in that it applies the HMT in identifying the relevant market. The Communications and Multimedia Act 1998 (CMA 1998) empowers the MCMC to pre-define markets for purposes of making a determination of dominance under Section 137 of the CMA 1998. There are currently 26 pre-determined markets, according to the ‘Market Definition Analysis – Definition of Communications Market in Malaysia’ dated 24 September 2014. The finding of a market does not pre-empt a finding of dominance, and instead, it identifies the boundaries of the field of rivalry that exists in the communications sector. In some markets, effective competitive

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constraints may exist and no dominance finding will need to be made. In other markets, effective competitive constraints may be dormant or inhibited and a finding of dominance may be made.\(^7\)

When analysing market share data, the MCMC will consider the current market share of the licensee against market shares of its competitors and the changes in the licensees’ market shares over time. A market share of more than 40 per cent will be considered a high market share. However, this does not preclude a licensee with a market share of less than 40 per cent from being found to be dominant if it is not subject to effective competitive constraints.\(^8\)

The MCMC will consider certain key factors in determining whether a licensee is in a dominant position in the market. The non-exhaustive list is as follows: \(^9\)

- the structure of the market and the nature of competition in that market, including market shares;
- barriers to entry and expansion;
- the countervailing power of buyers; and
- the nature and effectiveness of economic regulation (if any).

**Gas supply sector**

The Guidelines on Competition for the Malaysian Gas Market in relation to Market Definition, Anti-Competitive Agreements and Abuse of Dominant Position (the Gas Market Guidelines) issued pursuant to Section 37C of the GSA 1993 employs the MyCC’s approach of applying the HMT in identifying the relevant market. The EC considers a market share of above 60 per cent as a strong indication of a dominant position in the relevant market and it is unlikely that an entity will be individually dominant if its market share is below 40 per cent.\(^10\) However, market share is said to not be the sole indicator of dominance.

### IV ABUSE

#### i Overview

Malaysian law recognises the same categories of abuse (i.e., exclusionary and exploitative abuses) as the European Union. Section 10(2) of the CA 2010 provides a non-exhaustive list of what an abuse of a dominant position may include:

- directly or indirectly imposing an unfair purchase or selling price or other unfair trading condition on any supplier or customer;
- limiting or controlling production, market outlets or market access, technical or technological development or investment, to the prejudice of consumers;
- refusing to supply to a particular enterprise or group or category of enterprises;
- applying different conditions to equivalent transactions with other trading parties;
- making the conclusion of contract subject to acceptance by other parties of supplementary conditions that have no connection with the subject matter of the contract;
- predatory behaviour towards competitors; and

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\(^7\) Market Definition Analysis – Definition of Communications Market in Malaysia, Paragraph 6.2.
\(^8\) MCMC Guideline on Dominant Position, Paragraph 4.17(a).
\(^9\) MCMC Guideline on Dominant Position, Paragraph 4.6.
\(^10\) The Gas Market Guidelines, Paragraph 5.3(c)(i).
buying up a scarce supply of intermediate goods or resources required by a competitor, in circumstances where the enterprise in a dominant position does not have a reasonable commercial justification.

The CA 2010 does not prohibit an enterprise in a dominant position from taking any step that has a reasonable commercial justification or represents a reasonable commercial response to the market entry or market conduct of a competitor. The MyCC adopts an ‘effects-based’ approach when assessing a potential abuse of dominance.

**ii Exclusionary abuses**

The MyCC assesses exclusionary conduct in terms of its impact on the competitive process and not its effects on competitors. Exclusionary conduct includes predatory pricing, price discrimination, exclusive dealings, loyalty rebates and discounts, refusal to supply and share essential facilities, buying up scarce intermediate goods or resources and bundling and tying.

By adopting an effects-based approach, the MyCC ensures that conduct that benefits consumers will not be prohibited and therefore ensuring that enterprises have the incentives to compete on merits. In assessing whether the effect of an exclusionary conduct is an abuse, the MyCC will use two tests for assessing anticompetitive effects:

- whether the conduct adversely affects consumers; and
- whether the conduct excludes a competitor that is just as efficient as the dominant enterprise.

In July 2018, Dagang Net was provisionally found to have infringed Section 10(2)(c) of the CA 2010 for allegedly abusing its position as a monopoly provider of trade facilitation services under the national single window by refusing to supply electronic mailboxes to end users of the customs operating system. Dagang Net was also provisionally found to have imposed an exclusivity clause on its business partners that would have had the effect of distorting competition in the provision of trade facilitation services under the national single window, thereby creating a barrier to entry. The MyCC imposed a proposed financial penalty of 17,397,695.30 ringgit, as well as a directive on Dagang Net to cease and desist its infringing conduct and any future conduct that may disrupt competition. The directors and senior management of Dagang Net and its related companies were required to undergo a competition law compliance programme within three months of the issuance of the proposed decision.

The MyCC, in its non-infringement finding against Megasteel Sdn Bhd, initially provisionally found that Megasteel had abused its dominant position in the hot rolled coil (HRC) market by charging or imposing a price for its HRC that amounts to a margin squeeze that has an actual or potential effect of constraining the ability of reasonable efficient competitors in the downstream cold rolled coil market. Upon the submission of Megasteel’s oral and written representations, the MyCC found that, while Megasteel was a dominant in the upstream market for HRC, it had not abused its dominance.

The MyCC made a non-infringement finding in the Pangsapuri Perdana case, where a complaint was made to the MyCC alleging that there was a monopoly of renovation contracts

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11 Section 10(3) of the CA 2010.
12 Guidelines on Abuse of Dominance, Paragraph 3.9.
by a single contractor at the Pangsapuri Perdana apartment building. The alleged abuse was in relation to an exclusivity given to the contractor. The investigations revealed that this was not the case and the owners of Pangsapuri Perdana were free to appoint any contractor to carry out renovation works.

iii Discrimination

An abuse of dominant position includes applying different conditions to equivalent transactions with other trading parties to an extent that may:

a. discourage new market entry or expansion or investment by an existing competitor;

b. force from the market or seriously damage an existing competitor that is as efficient as the dominant enterprise; or

c. harm competition in any market in which the dominant enterprise is participating or in any upstream or downstream market.\(^{15}\)

An example of MyCC investigating a dominant player that has engaged in discriminatory conduct is the MyEG case. MyEG is an electronic government (e-government) service that enables employers to renew insurances for foreign and domestic workers. MyEG, via its subsidiary, is also engaged in the sale and purchase of insurance as an insurance agent. For renewals to be approved, employees must upload mandatory insurance policies through MyEG’s e-government service. However, renewals of insurance policies purchased from other insurers were not approved as fast as renewal policies purchased from MyEG. The MyCC found that, as a dominant concessionaire, MyEG is obliged to grant equal access of its facilities and promote competition in the downstream market. MyEG’s conduct of imposing different conditions on equivalent transactions in the purchase of mandatory insurances for the renewal of insurance policies for foreign workers constituted an abuse of dominance as per Section 10(2)(d) of the CA 2010.

MyEG appealed against the MyCC’s decision. However, the Competition Appeal Tribunal (CAT) upheld the MyCC’s decision and, on 22 January 2019, the High Court dismissed MyEG’s judicial review application upholding both the MyCC and the CAT’s findings of infringement. At the time of writing, MyEG had also filed for an appeal to the Court of Appeal against the MyCC and CAT’s findings and against the penalty imposed by the MyCC.

iv Exploitative abuses

Exploitative conduct, such as excessive pricing, may result from structural conditions in the market. For example, where there are high barriers of market entry, a dominant enterprise may set high prices to exploit customers. This type of conduct typically occurs where the enterprise is a sole concessionaire and would be able to abuse its dominance by imposing an unfair purchase or selling price to exploit suppliers or customers. The MyCC is only concerned with excessive pricing where there is no likelihood that market forces will reduce dominance in a market.

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\(^{15}\) Section 10(2)(d) of the CA 2010.
V REMEDIES AND SANCTIONS

Section 40 of the CA 2010 empowers the MyCC to impose a number of remedial actions against an enterprise that has infringed Section 10 of the CA 2010 by:

a requiring that the infringement be ceased immediately;
b specifying steps to be taken by the infringing enterprise to bring the infringement to an end;
c imposing a financial penalty; or
d giving any other direction that the MyCC deems appropriate.

These remedies are also available under the GSA 1993 and the Malaysian Aviation Commission Act 2015 (MACA 2015).

i Sanctions

The MyCC may impose a financial penalty of up to 10 per cent of the infringing enterprise’s worldwide turnover for the duration of the infringement period. In MyEG’s case, the total financial penalty imposed by the MyCC was 2,272,200 ringgit. The financial penalty was inclusive of the penalty imposed during the infringement period and a daily penalty for MyEG’s ongoing infringement for failure to adhere to the directions imposed in the MyCC’s proposed decision to provide an efficient gateway for all its competitors at the downstream market.

In relation to the Dagang Net case, the MyCC proposed to impose a financial penalty of 17,397,695.30 ringgit. The provisional financial penalty is, however, subject to the final decision by the MyCC. If an infringement finding is made against Dagang Net, the MyCC would be imposing the highest financial penalty for an abuse of dominance case in Malaysia.

In determining the total financial penalty imposed against an infringing enterprise, the MyCC may have regard to the following factors:

a seriousness (gravity) or impact of the infringement;
b duration of the infringement;
c turnover of the market involved;
d degree of fault (negligence or intention);
e recidivism;
f the role of the enterprise in the infringement;
g aggravating and mitigating factors;
h existence of a compliance programme; and
i level of financial penalties imposed in similar cases.

ii Behavioural remedies

Where an investigation has been initiated but not completed, the MyCC may impose interim measures if it has reasonable grounds to believe the infringement occurred, and considers the interim measures necessary as a matter of urgency to prevent serious damage or protect the public interest. Interim measures are only available for ex officio investigations and not where an investigation is initiated pursuant to a complaint made to the MyCC. Such measures

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16 Section 40(4) of the CA 2010.
17 Guidelines on Financial Penalties, Paragraph 3.2.
18 Section 35(1) and (2) of the CA 2010.
include directing an infringing enterprise to desist from any suspected infringement. While the MyCC has imposed interim measures in cartel cases, it has yet to issue any interim measures in cases of abuse of dominance.

**Communications and multimedia sector**

The MCMC may direct a licensee in a dominant position to cease conduct that has or may have the effect of substantially lessening competition, or to implement appropriate remedies. Licensees or any person who contravenes the competition provisions under the CMA 1998 may be subject to criminal penalties of up to 500,000 ringgit or a term of imprisonment of up to five years, or both.

**Aviation service sector**

In addition to imposing financial penalties against enterprises for anticompetitive practices under the MACA 2015, the MAVCOM can impose financial penalties of up to 1 million ringgit against an individual and up to 5 per cent of an enterprise’s annual turnover for the preceding financial year for non-compliance of guidelines issued under the MACA 2015.

### Structural remedies

Structural remedies are not available for infringements under the CA 2010.

## VI PROCEDURE

The MyCC may initiate investigations:

- through an *ex officio* investigation;\(^{21}\)
- under the direction of the MDTCA to investigate any suspected infringement under the CA 2010;\(^ {22}\) or
- upon receipt of a complaint.\(^ {23}\)

These procedures are also available under the GSA 1993.

The procedural stages of an investigation once initiated are as follows:

- An *ex officio* investigation may only be launched if the MyCC has ‘reason to suspect’ that an enterprise has infringed or is infringing Section 10 of the CA 2010.
- If an investigation is initiated pursuant to a complaint, the MyCC may first make inquiries on the complainant to decide whether the matter should be investigated. If a complaint comes from an anonymous source, the MyCC may open an *ex officio* investigation instead.
- The MyCC will then proceed with an information-gathering process, which enables the MyCC to request the production of information or a statement of parties in relation to the requested information.\(^ {24}\) The MyCC also has the power to conduct a raid with or

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19 Section 139 of the CMA 1998.
20 Section 65(4) of the MACA 2015.
21 Section 14(1) of the CA 2010.
22 Section 14(2) of the CA 2010.
23 Section 15 of the CA 2010.
24 Section 18(1) and (2) of the CA 2010.
without a warrant on any premises (i.e., dawn raids). A raid can only be conducted without a warrant if the MyCC has ‘reasonable cause to believe’ that the investigation would be adversely affected owing to the delay in obtaining a search warrant.

d An enterprise can make a legally binding undertaking to the MyCC. If the MyCC accepts an undertaking, the MyCC shall close the investigation without making any finding of infringement and shall not impose a penalty on the enterprise.

e If the MyCC decides to make an infringement finding, it will first issue a proposed decision against the enterprise, which is essentially a written notice detailing the reasons for the proposed decision and any provisional penalties or remedial actions. It will also inform the enterprise concerned of the period in which the enterprise may submit a written representation and for the enterprise to indicate whether it wishes to make oral representations before the panel of members of the MyCC.

f The MyCC will then proceed to decide whether to make an infringement or non-infringement finding. Final decisions are usually published on the MyCC official website.

g An aggrieved party may appeal against an infringement finding to the CAT. Parties aggrieved by the CAT’s findings may make a judicial review application to the High Court. The MyEG case was the first abuse of dominance case to have been judicially reviewed by the High Court, which upheld the decisions of both the CAT and the MyCC in making an infringement finding.

In relation to interim measures, the MyCC will first issue a written notice to the relevant enterprise and permit the enterprise to make written representations within seven days of the date of the written notice. The notice should indicate the nature and reasons for the direction that the MyCC proposes to give.

The MyCC does not offer guidance or a review process to enterprises in regards to the interpretation and application of competition laws. Enterprises that require such guidance would have to seek independent legal advice. In the Competition Act 2010 – Compliance Guidelines, the MyCC recommends Malaysian businesses to review all existing arrangements and practices to ensure compliance with the CA 2010 and to implement a competition law compliance programme.

**Aviation service sector**

When MAVCOM’s investigation powers have been invoked, an authorised officer can issue a compliance order if satisfied of an infringement or likely infringement. The compliance order can require a person to refrain from conduct in contravention of MACA 2015 or to

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25 Sections 25 and 26 of the CA 2010.
26 Section 26 of the CA 2010.
27 Section 43 of the CA 2010.
28 Section 36 of the CA 2010.
29 Section 35(4) of the CA 2010.
30 Section 85(1) of the MACA 2015.
take actions required in order to comply with MACA 2015.\textsuperscript{31} The MAVCOM may make a finding of infringement notifying the infringing enterprise of the same within 14 days of making an infringement finding.\textsuperscript{32}

\textit{Communications and multimedia sector}

The MCMC can conduct an investigation on any matter under the CMA 1998, either upon the direction of the Minister for the MCMC or if the MCMC has grounds to believe that a civil or criminal offence will be committed.\textsuperscript{33} The MCMC may also conduct an investigation pursuant to a complaint received.\textsuperscript{34}

\textit{Appeals}

Parties aggrieved by decisions of the MCMC or the EC may appeal to the respective appeal tribunal. The CMA 1998 also provides for an aggrieved party to further apply for judicial review if the party is dissatisfied with the decision of the appeal tribunal. The MACA 2015 only enables an aggrieved party to bring an appeal directly to the High Court.

\textbf{VII PRIVATE ENFORCEMENT}

Any person who suffers loss or damage directly as a result of an infringement of any prohibition under the CA 2010 can initiate an action for relief in civil proceedings against any infringing enterprise.\textsuperscript{35} There is no requirement for the MyCC to make an infringement finding before a civil action may be initiated. The MACA 2015 and the GSA 1993 also provide for the right of private action.

While the CA 2010 does not specify whether collective actions are available in civil proceedings, such actions, commonly known as representative actions, are available.\textsuperscript{36} The civil courts have the jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality. In assessing the amount of damages to be awarded, a party claiming for special damages (where the amount of damages is quantifiable) would have to prove that the sum being claimed was reasonably incurred. If the party is claiming for general damages (where the amount may not be quantifiable), the court will assess the amount to be awarded.

While there does not appear to be a large number of cases actioned through the courts, there are cases where the civil courts were open to making declaratory orders if an enterprise infringed the CA 2010. In \textit{Fantasy Ruby Sdn Bhd v. Padiberas Nasional Bhd},\textsuperscript{37} the defendant sought a declaration of illegality from the court on the basis that an agreement was null, void and unenforceable owing to a breach of the CA 2010. However, owing to the lack of evidence in proving that the plaintiff had abused its dominance, the court did not make a declaration of illegality.

\begin{itemize}
  \item \textsuperscript{31} Section 85(3) of the MACA 2015.
  \item \textsuperscript{32} Section 59(2) of the MACA 2015.
  \item \textsuperscript{33} Section 68 of the CMA 1998.
  \item \textsuperscript{34} Section 69 of the CMA 1998.
  \item \textsuperscript{35} Section 64(1) of the CA 2010.
  \item \textsuperscript{36} Order 15, Rule 12 of the Rules of Court.
  \item \textsuperscript{37} [2018] 11 MLJ 618.
\end{itemize}
In *Honda Giken Kogyo Kabushiki Kaisha v. Dnc Asiatic Holdings Sdn Bhd & Ors and another suit*, a counterclaim was filed by the defendant for a declaratory order under the CA 2010 for unlawful interference with trade. The plaintiff initiated an action for copyright infringement as the defendant distributed motorcycles that were based on the model created by the plaintiff’s employee. In its counterclaim, the defendant claimed that the plaintiff’s action in enforcing its copyright prevented ‘legitimate competition’. However, the court dismissed the defendant’s counterclaim on the basis that the plaintiff would suffer unjust and unfair competition if its competitors were free to copy its copyright-protected works under the guise of the CA 2010.

Contingency fee or conditional fee arrangements are prohibited; however, advocates and solicitors can enter into an agreement on the amount of legal costs in respect of contentious business pursuant to Section 116 of the Legal Profession Act 1976.

**VIII  FUTURE DEVELOPMENTS**

The actions taken by the government so far are in line with its election agenda, which is to re-examine monopolies to make sure goods and services are fairly priced, ensure that competition policy framework is robust and ensure that government-linked corporations operate in sectors that suffer from market failure instead of competing against private companies. In light of the agenda to curb monopolistic activity, the MyCC may place emphasis on preventing large conglomerates’ abuse of economic power and guaranteeing fair competition opportunities for small to medium-sized enterprises. The MyCC’s enforcement of abuse of dominance cases will continue to be bolstered by important wins for the MyCC, such as the *MyEG* case.

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38 [2017] MLJU 1575.
39 Section 112 of the Legal Profession Act 1976.
I INTRODUCTION

i Legal framework

In the Netherlands, the statutory framework with respect to abuse of dominance consists of two articles in the Dutch Competition Act (DCA). The prohibition on abuse of dominance is laid down in Article 24 of the DCA, which has been modelled after Article 102 of the Treaty on the Functioning of the European Union (TFEU). Article 25 of the DCA provides for the possibility of an exemption from the application of Article 24 of the DCA in respect of undertakings entrusted with the operation of services of general economic interest (insofar as the application of Article 24 of the DCA would obstruct such operation), and thus substantively resembles Article 106(2) of the TFEU.2

The legislature expressly intended for the decision practice of the European Commission (Commission) and the case law of the EU courts to govern the application of Articles 24 and 25 of the DCA.3 Further, the legislature has indicated that the DCA should be neither more nor less lenient than the EU competition rules.4

The examples of such abuses that are listed in Article 102 of the TFEU are not listed in Article 24 of the DCA, but can be found almost verbatim in the explanatory memorandum to the DCA.5

Insofar as public or state-owned enterprises operate as ‘undertakings’ within the meaning of the DCA, they are bound by the same rules as private enterprises.6 As of 1 July 2012, the DCA has been supplemented with certain special rules applicable to public enterprises, but these do not specifically relate to abuse of dominance.7

Finally, there is special regulation comprising rules on market power in respect of the telecommunications sector (telephone and internet services), the electricity and gas sectors, and public services such as water supply, waste disposal, and public transport.8

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1 Bart de Rijke is a partner at De Brauw Blackstone Westbroek NV.
2 Although such an exemption has to be applied for and granted by the ACM to take effect under Article 25 of the DCA.
3 Explanatory Memorandum to the Dutch Competition Act, No. 24707, p. 71.
4 ibid.
5 ibid.
6 See, for example, the decision of the Dutch Competition Authority, the NMa, of 12 September 2002 in case No. 2493 (Vereniging Eigen Huis v. Gemeente Amsterdam), in which the municipality of Amsterdam was held to be an undertaking insofar as it was involved in the sale of land.
7 ‘NMa to monitor market law and government’, see www.acm.nl/nl/publicaties/publicatie/10776/NMa-start-toezicht-Wet-Markt-en-Overheid/. A transitional exemption period of two years applies with respect to activities already started at the moment this legislation came into force.
the postal sector and the transportation sector. These regimes are all supervised by the Authority for Consumers and Markets (ACM) as well. For the healthcare sector, pursuant to the Healthcare Market Regulation Act, the Dutch Healthcare Authority is tasked with supervision of healthcare companies with ‘significant market power’. A bill to transfer this supervisory task to the ACM is currently pending.

ii Enforcement practice and policy

The Netherlands ranks among the countries with the lowest number of abuse of dominance interventions (i.e., decisions by the national competition authority establishing an infringement). That is the conclusion of a study by economic research organisation SEO, commissioned by the Dutch Ministry of Economic Affairs and presented in 2012 (SEO study). In the study period from 2005 to 2009, only one out of 18 investigations relating to abuse of a dominant position resulted in an intervention, and that intervention was eventually overturned in a court review.

The aforementioned study sought to explain the relatively low enforcement rate of abuse of dominance cases in the Netherlands, but failed to arrive at any conclusive observations; however, it is probably linked to the prioritisation policy of the ACM, and its predecessor, the NMa, before that, in combination with the ACM’s historically strong focus on cartel enforcement. The ACM is not obliged to investigate every suspected infringement or complaint: it sets its priorities on the basis of economic significance, consumer interest, severity of the infringement and likely efficiency of an intervention. Demonstrating harm is generally less expensive in the case of a cartel than it is for an abuse case, as the latter would normally require an analysis as to the (potential) effects on competition, and is thus likely to involve higher levels of resources. Moreover, as the ACM has pointed out itself in an official reaction to the SEO study, because of the leniency programme (which is not applicable to unilateral conduct), cartel cases are generally easier to prove than abuse cases. When its resources have to be allocated between cartels and an abuse of dominance case, the ACM,

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8 The Health-care Market Regulation Act is available (in Dutch) at www.nza.nl/regelgeving/wetgeving/wmg.
9 Amendment of the Healthcare Market Regulation Act and other laws in connection with adjustments to tariff and performance regulation and market surveillance in the field of healthcare, Parliamentary paper 34445.
10 The study is available (in English) at www.seo.nl/uploads/media/2011-63_An_international_comparison_of_the_abuse-of-dominance.pdf.
11 Case No. 3353, decision of the NMa of 6 March 2008; and the decision of the Trade and Industry Appeals Tribunal of 7 October 2010, AWB 07/596, LjN: BN9947 (CR-Delta).
12 The study mentions that the following hypotheses could not be proven: (1) differences in the tools and resources available to the five competition authorities and their deterrent effects; (2) whether Dutch firms have violated the abuse of dominance provision to a lesser extent, as compared to other jurisdictions; and (3) the explanation that the NMa chose to intervene in few abuse of dominance cases in the period studied, or resolved a relatively high number of cases informally.
13 The ACM is the result of a 2013 merger of three previously independent authorities: the Dutch competition authority, the NMa, the postal and telecoms authority and the consumer authority.
15 Reaction of the ACM to the SEO study, available (in Dutch) at www.eerstekamer.nl/overig/20121123/brief_van_de_nma/document.
therefore, apparently prefers to pursue the former. Finally, the ACM has suggested that the relatively elaborate special regulation in respect of sectors operated by former state monopolies has rendered the generic abuse of dominance framework less relevant in the Netherlands.16

The case law in the Netherlands has been too fragmented to be able to deduce any clear trends apart from a high standard of proof for the claimant, which is often not met in civil litigation cases. Both the ACM and the courts in the Netherlands try to adhere closely to the Commission's and EU courts’ application of the concept of abuse of dominance, and have been following the Commission's lead in emphasising the importance of an effects-based analysis and attaching great value to economic evidence in abuse cases.

II YEAR IN REVIEW

As previously explained, there are generally very few abuse of dominance interventions in the Netherlands. In 2018, the ACM took no decisions on abuse. It rejected a few complaints regarding an alleged abuse of dominance, mostly based on prioritisation. The Dutch competition authority started two procedures against possible abuses.

In 2018, the ACM carried out a market study on app stores, and researched the ability of Apple and Google, as owners of the app store platforms, to influence the supply of apps. The market study resulted in the opening of a formal investigation into Apple at the beginning of 2019. The ACM received complaints during the market study about Apple favouring its own apps over those of external app providers, especially those providing Dutch news apps.

Further, the ACM opened a case against pharmaceutical company Laediant in 2018. It had received a complaint about the allegedly excessive price of Laediant’s medicine, chenodeoxycholic acid, which is a drug used against the rare autosomal recessive lipid storage disease cerebrotendinous xanthomatosis.

There is also generally very little private enforcement of the prohibition on abuse of dominance in the Netherlands. The above-mentioned SEO study, for example, found that there have been only 42 court cases that featured a claim of abuse of dominance in the five-year study period of 2005 to 2009 (claims that, in most cases, only served as an ancillary argument), none of which led to an actual finding of infringement of the abuse of dominance prohibition.17 This trend has not changed in the past 10 years. In 2018, most private enforcement cases concerned the refusal to supply, often after a contractual relationship of supply.

III MARKET DEFINITION AND MARKET POWER

In the Netherlands, the concepts of market definition and market power are applied in a manner that is substantially similar to the approach of the Commission and the EU courts; therefore, see the European Union chapter for more detailed information on European practice.

16 ibid., Paragraph 3.
17 SEO study, p. 15.
Market definition
As to market definition, the ACM and the courts tend to follow the principles embodied in the Commission’s Notice on the definition of the relevant market and the standard jurisprudence of the EU courts.  

Market power
The definition of dominance is provided in Article 1(i) of the DCA and is modelled on the definition commonly applied in the EU, and as coined by the European Court of Justice (ECJ) in the United Brands case:

*a position of one or more undertakings which enables them to prevent effective competition being maintained on the Dutch market or a part thereof, by giving them the power to behave to an appreciable extent independently of their competitors, their suppliers, their customers or end-users.*

The methodologies and standards of proof employed in practice in determining whether a market position fits this definition of dominance also closely follow European practice. Market shares are considered an important indicator, although not decisive on their own. Additional factors have been taken into account, such as the existence of intellectual property rights, the level of concentration of the market and barriers to entry. In its 2017 ruling, the District Court of Amsterdam relied on the advice of three appointed experts for its conclusion that online real estate platform Funda held a dominant position on the online housing market in the Netherlands. According to the experts, the combination of Funda’s strong position and the significant entry barriers to the Dutch online housing market enabled Funda to behave independently.

The ACM and the courts will normally also look for contraindications, such as countervailing power, when determining dominance.

IV ABUSE
i Overview
As with the concepts of market definition and market power, the ACM and the courts tend to closely follow the case law of the Commission and EU courts on the concept of abuse. There are no substantive areas in which Dutch practice may be said to clearly deviate from European practice. Still, over the years, some noteworthy decisions have been handed down with respect to the various types of abuse within the abuse of dominance spectrum itemised below.

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19 European Court of Justice 14 February 1978, Case C-27/76 (United Brands v. Commission).
20 This also follows from the Explanatory Memorandum to the Dutch Competition Act, No. 24 707, p. 25.
Exclusionary abuses

Exclusionary pricing

The ACM concluded its first predatory pricing case in a tender procedure in 2017 with the imposition of a €41 million fine on Dutch Railways (NS) for abuse of dominance in a regional tender process. According to the ACM, NS wanted to prevent its competitors from winning the tender at all costs, as the tender process served as a pilot for further decentralisation of the main railway network. NS was found to have abused its dominant position on the main railway network in two ways. First by submitting a loss-making bid for a public transport contract in the Dutch province of Limburg, and second, by a combination of exclusionary conduct (see below for details). In respect of the exclusionary pricing, instead of an *ex post* comparison of actual costs and actual revenue, the ACM had to use an *ex ante* approach to determine predation because the case related to a bid for a concession that was ultimately not awarded to NS. The ACM compared NS’s internal rate of return (IRR) when performing the concession with its weighted average costs of capital (WACC), and concluded that the IRR would be lower than the WACC. As a result, the concession’s expected revenue would be insufficient to recover the anticipated costs. According to the ACM, this made it impossible for as-efficient competitors to match or outbid the NS bid without incurring loss.

The Sandd case provides another good example of the ACM’s policy views with respect to exclusionary (predatory) pricing. In May 2012, the ACM confirmed its 2009 decision that formerly public postal service monopolist PostNL (formerly TNT Post) did not abuse its position on the Dutch postal service market, thereby rejecting a complaint by PostNL’s competitor Sandd. Sandd had claimed, inter alia, that the ‘free’ use of PostNL’s network by its ‘price fighting’ subsidiary Netwerk VSP distorted competition on the Dutch postal (addressed mail) market. Sandd argued that the predation assessment should consist in comparing Netwerk VSP’s prices and costs, whereby the remuneration paid by Netwerk VSP for the use of PostNL’s network should be considered costs of Netwerk VSP. The ACM rejected that argument, as it held that PostNL constituted an ‘economic unit’ with its subsidiary. Given that the average prices charged for the addressed mail service of Netwerk VSP was above the long-run average incremental costs (LRAIC) of PostNL (including Netwerk VSP) the ACM concluded – in line with the Commission’s guidance on abusive exclusionary conduct – that there was no evidence of abusive pricing, and rejected Sandd’s complaint. The District Court of Rotterdam upheld the ACM’s decision in administrative appeal. The Court dismissed Sandd’s argument that the LRAIC was not an appropriate test to determine abuse in the postal market, as it is based on a comparison with an ‘equally efficient competitor’. Sandd argued that new entrants to the postal market obviously cannot operate as efficiently as the former monopolist. However, the Court considered that the ACM was right to make such a comparison, as otherwise a less efficient competitor would be able to force a dominant company to raise its prices to the detriment of the end user merely because it is less efficient.

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22 Case No. 16.0691.31, decision of the ACM of 22 May 2017.
23 NS has appealed the decision before the Rotterdam District Court.
24 Case No. 6207, decision of the NMa of 21 May 2012.
Exclusive dealing

Loyalty rebates

In the CR-Delta case, the ACM held, inter alia, that certain rebates granted by the (dominant) Dutch ‘cattle improvement cooperative’ on its insemination services were of a loyalty-inducing nature and, therefore, anticompetitive. This view was later confirmed by the District Court of Rotterdam. However, the Trade and Industry Appeals Tribunal (CBb), the highest administrative court in cases on appeal of decisions from the ACM, ruled (in 2010) that despite the obvious loyalty-inducing aim of the rebates, the ACM should have examined whether the rebates were capable of having anticompetitive effects before concluding that the rebates were illegal (referring to the Tomra jurisprudence of the ECJ). According to the CBb, the rebates were not capable of having such effects, as the rebates only accounted for a very small (merely ‘symbolic’) part of the total costs. Moreover, according to the CBb, competitors were able to (profitably) match the prices charged by CR-Delta, which according to the CBb clearly indicates the absence of any exclusionary effects of the rebates. For these reasons, the CBb overturned the decision of the ACM.

Other exclusionary acts

In early 2011, the ACM ruled that GasTerra, a Dutch company active in the trade and supply of natural gas, had used supply conditions in its contracts with energy distributors in the Netherlands that discouraged these distributors from combining their offer with gas obtained from other wholesale suppliers, thereby impeding the creation of competition in the wholesale gas market. However, on administrative appeal, the ACM became convinced that the lack of differentiation on the distributors’ side was attributable to a number of other factors as well. For example, after the market had been liberalised, it simply took quite a while before alternatives to GasTerra’s products and services became available. In addition, there may have been practical and legal obstacles to the introduction of contracts that would offer energy companies more freedom. The ACM therefore arrived at the conclusion that it could not be established that GasTerra had abused its dominant position.

Leveraging

Over the past 15 years, the ACM has performed only two in-depth investigations focused on alleged tying. In one of those cases, KPN, the former state monopolist in telecommunications, filed a complaint against four major cable television companies for alleged abuse of their (regional) dominant position by, inter alia, tying their analogue packages to their digital packages. The ACM dismissed the complaint because it found that the analogue and digital packages were part of one and the same market, and therefore there could be no case of tying.
Refusal to deal

On the subject of refusal to deal, *NVM v. HPC* confirms that the Dutch courts closely follow the *Bronner* criteria in their assessment of such cases. In June 2012, the Amsterdam Court of Appeal handed down a decision in a case between the Dutch Association of Real Estate Agents (NVM) and the (bankruptcy trustee of) software company HPC. HPC submitted that the NVM had illegally refused access to technical specifications necessary for third-party software packages to interface with a widely used software system supplied by the NVM. The Court first considered that the case law of the EU courts should be ‘guiding’ in applying Article 24 of the DCA. It then proceeded to assess the cumulative criteria of *Bronner* to determine whether the alleged (constructive) refusal to deal should be held abusive. It ruled that HPC had not been able to convincingly demonstrate that all competition had been eliminated by the NVM’s alleged refusal; and that having access to the specifications was the only way of building a market presence in view of, inter alia, the fact that HPC had been active on the market with a market share of about 20 per cent. It therefore rejected the abuse of dominance claim. The Dutch Supreme Court upheld the Court of Appeal’s ruling and, referring to EU case law, rejected the plaintiff’s argument that not all competition will need to be eliminated for it to constitute abuse. According to the Supreme Court, the Court of Appeal rightly deduced that competition by HPC, and thus competition on the market, was not completely eliminated by the NVM’s behaviour, given HPC’s 20 per cent market share.

On the subject of refusal to license, there is an interesting body of case law in which different Dutch courts have applied the relevant EU concepts differently. It concerns a long-standing dispute between the largest Dutch daily, *De Telegraaf*, and the National Broadcasting Organisation (NOS) together with the public broadcasting organisations that the NOS represents. *De Telegraaf* claimed, in a complaint to the ACM in 2001, that the refusal of the broadcasters to provide *De Telegraaf* with television programming schedules for use in a weekly television guide amounted to an abuse of a dominant position. The ACM sided with *De Telegraaf*, and the decision was subsequently confirmed by the District Court of Rotterdam.

In the parallel civil (summary) proceedings initiated by NOS and public broadcasters against *De Telegraaf* and relating to the same subject matter, the courts, all the way up to the Supreme Court, arrived at the same conclusion: they found that NOS abused its dominant position by refusing to supply the programming schedules. With respect to the argument raised by the broadcasters before the Supreme Court that the Court of Appeals had not properly considered whether the weekly guide of *De Telegraaf* would satisfy the ‘new product’ criterion of the *Magill* case, the Supreme Court responded that the Court of Appeals had done enough by establishing that there would be a certain demand for the *De Telegraaf* weekly guide.

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30 European Court of Justice 26 November 1998, Case C-7/97 (*Bronner*).
31 Decision of the Amsterdam Court of Appeals of 12 June 2012, Case No. 200.018.917, LjN: BX0460.
33 Case No. 501.o119, decision of the NMa of 3 October 2001 and decision of the District Court of Rotterdam of 22 June 2000, Case No. VMEDED 00/0903-SIMO; VMEDED 00/1187-SIMO, LjN: ZF1130.
35 Decision of the Supreme Court of 6 June 2003, C01/183HR, LjN: AF5100, Paragraph 3.11.
However, after this Supreme Court decision in the civil suit, the CBb overturned the ACM’s decision and the District Court’s ruling in the administrative proceedings. With reference to, in particular, the criteria set out in the *IMS Health* decision that had just been handed down by the ECJ, it held that *De Telegraaf*’s weekly television guide should not be considered a ‘new product’ (there were already weekly television guides on the market, published by various broadcasting organisations), and that the refusal by NOS therefore did not prevent the introduction of a ‘new product’. The preliminary relief judge of the District Court of Amsterdam arrived at a similar conclusion in a similar case in 2005, between commercial broadcaster SBS and publisher Quote Media.

Perhaps the different rulings of the CBb and the Supreme Court in the case of *De Telegraaf v. NOS* could be explained by the fact that, unlike in the *Magill* case, the ‘new product’ criterion was clearly presented as a cumulative criterion in *IMS Health*, which was issued only after the Supreme Court’s decision. However, it still remains doubtful whether, in view of *Magill* alone, the Supreme Court was right to endorse the lack of a more specific assessment of the new product criterion by the Court of Appeals and consider it satisfied by referring to the existence of a demand for the product.

In the 2017 case against the Dutch Railways, the ACM not only decided that NS was guilty of predatory pricing, but also of exclusionary measures aimed at putting competitors at a disadvantage. The conduct consisted of providing delayed and incomplete responses to competitors’ access requests to certain services and facilities owned by NS, using confidential information obtained from a former director of one of its competitors and passing on that confidential information about its competitors to its subsidiary, which participated in the tender process.

### iii Discrimination

In March 2018, the District Court of Amsterdam dismissed the claim by real estate association VBO that online real estate platform Funda provided preferential treatment to real estate association NVM, co-founder and indirect shareholder of Funda, in terms of, inter alia, costs and ranking on its website. The District Court first underlined that applying dissimilar conditions to equivalent transactions with other trading parties only qualifies as abuse if it thereby places them at a competitive disadvantage. As a result, for conduct to qualify as abuse there must be a finding not only that the dominant company’s conduct is discriminatory, but also that the dominant company’s conduct tends, having regard to the whole of the circumstances of a case, to lead to a distortion of competition between business partners. In this context it is particularly necessary to examine whether the discrimination is likely to have a negative effect on the ability of trading partners that are disfavoured to exert competitive pressure on trading partners that are favoured. The District Court found that VBO had failed to demonstrate that the discrimination tended to distort its competitive position. As a result, the Court concluded that it could not be established that Funda had abused its dominant position.

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36 European Court of Justice 29 April 2004, Case C-418/01 (*IMS Health*).
37 Decision of the Trade and Industry Appeal Tribunal of 15 July 2004, AWB 03/132, LJN: AQ1727 (*NOS v. NMa*).
38 Decision of the President of the District Court of Amsterdam of 28 July 2005, Case No. 317128/ KG 05-1040 P; LJN: AU0253 (*SBS v. Quote Media*).
39 NS has appealed the decision before the Rotterdam District Court.
In May 2012, the CBb confirmed an earlier dismissal by the ACM of a complaint by Fresh FM, a Dutch radio broadcaster, against Buma, the Dutch collecting society for composers and music publishers. Fresh FM claimed that Buma had abused its dominant position by discriminating between regional commercial radio broadcasters and other broadcasters in terms of tariffs charged, as well as by charging excessively high tariffs to these commercial regional broadcasters. The ACM provisionally investigated the potential exclusionary effects of the alleged discriminatory pricing. It concluded that Buma clearly had no incentive to exclude Fresh FM or any commercial stations from the market, as these parties operated as Buma’s customers (just as much as other broadcasters). The ACM also investigated whether the tariffs were potentially excessive. Based on an international price comparison it decided that they were not. The ACM thus rejected Fresh FM’s complaint, and reconfirmed its dismissal in administrative appeal. On ultimate appeal to the court, the CBb upheld the ACM’s decision, as – in short – Fresh FM had not submitted (sufficient) evidence contradicting the ACM’s findings. The CBb emphasised that to consider a certain behaviour abusive, while it is not necessary to demonstrate actual effects, the claimant at least needs to show that the targeted conduct tends to restrict competition or that the conduct is capable of having that effect. Fresh FM had not done this. This approach, which is consistent with the *Tomra* jurisprudence of the General Court and the European Court of Justice, had already been propagated by the CBb in its decision in the *CR-Delta* case in 2010.

**iv Exploitative abuses**

The most high-profile investigation of the ACM involving, inter alia, excessive pricing has been the *Interpay* case. In this case, the ACM investigated whether Interpay had abused its dominant position on the market for network services for PIN transactions in the Netherlands by charging excessive tariffs to its customers (retailers). Interpay was the only supplier on that market.

To determine whether Interpay’s conditions were excessive, the ACM proceeded to assess Interpay’s ‘return on invested capital’ between 1998 and 2001. It compared this return to a benchmark return on Interpay’s equity and borrowed capital. The ACM concluded that the return made by Interpay between 1998 and 2001 was five to seven times higher than the calculated benchmark return. According to the ACM, this result was disproportionate. The ACM therefore concluded that the tariffs employed by Interpay amounted to an abuse of a dominant position.

In administrative review, the banks (the shareholders in Interpay) heavily challenged the calculation method of the ACM, supported by economists. One of the main arguments was that the ACM had failed to appreciate the fact that the banks had been investing in the

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41 Case No. 3295, Decision of the NMa of 10 May 2007 (78), and decision on appeal of the NMa of 2 April 2008 (133).
42 General Court of the EU 9 September 2010, Case T-155/06 (*Tomra v. Commission*); European Court of Justice 19 April 2012, Case C-549/10P (*Tomra v. Commission*).
43 See footnote 27.
44 Case No. 2910, decision of the NMa of 28 April 2004 (700).
45 ibid., Paragraphs 145, 202, 219–221.
‘PIN project’ for many years prior to the period that the ACM had used for its return on investment calculation. Accordingly, the ACM had failed to take into account a large amount of costs (that would have substantially lowered the calculated return on investment).46

Further, the banks argued that by only basing its judgment on the return comparison, the ACM fell short of the requirements pursuant to EU (case) law, which prescribes that while an international price comparison is not required, in any event there has to be a direct assessment of the level of the prices itself.47

The ACM’s standing advisory committee in review proceedings agreed with the banks on these points. Subsequently, the ACM, in its decision in administrative review, referencing that it was ‘too much work and too expensive to carry out the research for further investigation’, withdrew the part of the fine that was based on abuse of dominance.48

In December 2014, the ACM closed its investigation into possible abuse of dominance by pharmaceutical manufacturer AstraZeneca. In December 2011, the ACM sent a statement of objections to AstraZeneca, suspecting it of having abused a dominant position by charging considerably higher prices for its heartburn drug Nexium sold for use outside hospitals (extramural) than when sold inside hospitals (intramural). As a result of the ‘hospital-influence effect’—patients tend to continue using the same drug that they have been administered by their hospitals, and physicians are inclined to prescribe the same drug—AstraZeneca allegedly faced little competition with regard to patients that had first been put on Nexium while hospitalised, and could thus offset the losses incurred by offering Nexium to hospitals at a deep discount with higher extramural prices. The ACM concluded, however, that AstraZeneca had not violated the prohibition on abuse of dominance because it could not be sufficiently determined that AstraZeneca had indeed held a dominant position. In its decision, the ACM distinguished an intramural market and an extramural market consisting of users who, as a result of the hospital-influence effects, should be considered captive to Nexium. AstraZeneca did not have a dominant position on the intramural market since it held a market share of less than 40 per cent. Regarding the extramural market, AstraZeneca’s arguments regarding substitution, therapeutic effectiveness and switching behaviour had raised reasonable doubts as to whether a group of Nexium users would indeed be bound to Nexium through the hospital-influence effect on such a scale that, with regard to this group, AstraZeneca was able to behave independently of its competitors. In April 2014, the ACM published a commitment decision relating to a possible abuse of a dominant position.

In February 2018, the Rotterdam District Court ruled on excessive pricing in a private enforcement case against Videma.49 Videma is a collecting society that issues licences for TV transmission in hotels, hospitals, pubs, healthcare institutions, etc. As a collecting society it has a dominant position.50 Hospitals had to pay royalties to Videma for TV transmission within the hospitals and claimed that the royalties were excessively high, and, therefore, abusive. The Court appointed copyrights experts of the Consumer Complaints Boards as expert witnesses to answer questions relating to the royalty rates. A reliable international

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46 Case No. 2910, decision on appeal of the NMa of 21 December 2005 (864), Paragraphs 10, 12.
47 ibid.
50 Often, collecting societies have a (de facto) monopoly in their respective geographical area; see European Court of Justice, 19 April 2018, Case C-525/16 (MEO – Serviços de Comunicações e Multimédia SA v. Autoridade da Concorrência).
benchmark was not available, since in many EU Member States, hospitals do not pay royalties for TV transmission, and, in countries where royalties were paid, the bundle and number of TV channels were not comparable. The experts concluded that the royalties had increased excessively and that Videma was not able to give an objective justification for the increase. Therefore, the Court held that Videma abused its dominant position and referred the case to a follow-up proceeding for the determination of damages.

V REMEDIES AND SANCTIONS

The DCA and the laws underlying the various sectoral regimes supervised by the ACM comprise the basis for the ACM to issue fines for infringements of the rules set out in the respective acts, including Article 24 DCA. The fines are administrative, and not criminal, in nature, although the procedural rules that have been applicable to the imposition of fines since 1 July 2009 do take into account the fact that administrative fines are considered a ‘criminal charge’ in the meaning of Article 6 of the European Convention on Human Rights.

In addition to the statutory law, the ACM relies on a policy rule concerning the determination of fines: the 2014 ACM Fining Policy Rule issued by the Ministry of Economic Affairs. The fine calculation method applicable to infringements of the cartel prohibition and the abuse of dominance prohibition that follows from these guidelines resembles the EU approach (as laid down in the fining guidelines of the Commission) in several respects, but not entirely. According to the Fining Policy Rule, the basic fine is calculated as a percentage (of zero to 50 per cent) of a company’s turnover during the last full year of the infringement multiplied by the number of years and months the infringement lasted. In setting the fine, the ACM will take account of aggravating or mitigating factors. Fines may reach up to a maximum of €900,000 or, if greater, 10 per cent of the worldwide annual turnover of the undertaking concerned.

The ACM may impose an order subject to periodic penalty payments; for example, when undertakings fail to cooperate during the investigation process. Such an order may also be imposed in the form of a structural measure, as referred to in Article 7 of Regulation 1/2003, if that measure is proportionate to the violation committed and is necessary to actually end the violation.

The ACM can also fine individuals up to €900,000. Such fines can be imposed if it is established that these persons have expressly ordered the abuse to be committed or, alternatively, have failed to take adequate preventive measures, and by doing so deliberately accepted the risk that the abuse would be committed.

51 See Act establishing the Authority for Consumers and Market (2012/2013, Nos. 1 and 2, 33 186).
52 These rules, laid down in the General Administrative Law Act, comprise the ‘right to remain silent’ and the ne bis in idem principle.
54 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210, 1 September 2006.
55 Dutch Competition Act, Articles 56 and 58a.
56 ACM Policy Guidelines Administrative Fines, pp. 4 and 5.
VI  PROCEDURE

i  Investigation and sanctioning phase
The ACM may examine infringements of Article 24 ex officio or on the basis of a complaint. The ACM will apply its prioritisation policy in deciding whether to pursue a case (see Section I).

There is no fixed time limit for an investigation. It may take months, but will usually take longer. The investigation is carried out by a case team at the ACM Competition Directorate. If an infringement is established and it is subsequently decided to pursue the case, a report will be issued. This type of document is similar to a statement of objections. The addressed undertaking (and other interested parties, such as complainants) will have the opportunity to present its views on the allegations in the report, in writing and at an oral hearing. The legal department of the ACM presides at the oral hearing. The department acts partly as an internal review body ‘independent’ of the case team of the Competition Directorate. It has no involvement with the investigation and the drafting of the report, and is tasked with the preparation of the decision subsequent to the oral hearing. Ultimately, however, the board of the ACM decides whether to issue a (fining) decision.

The stage from the launch of the investigation until the issuance of a decision (establishing an infringement) can take a long time in the Netherlands. The duration is rarely less than a year.

ii  Appeal
Decisions of the ACM may first be submitted to administrative review before an ‘independent’ administrative review committee (administrative review), which will render an opinion to the ACM. The subsequent (renewed) decision of the ACM may be appealed to the District Court of Rotterdam. Ultimate appeal lies with the CBb. Parties may agree with the ACM to directly appeal the ACM’s decision before the District Court so that there is no need to follow the administrative review procedure.

Because of the elaborate appeal procedure in the Netherlands, as described above, it often takes a very long time (i.e., more than three years) from the date of a decision of the ACM until the date of a decision of the appellate court, the CBb.

iii  Informal guidance
There are no formal procedures for obtaining guidance on individual cases. It is possible to informally sound out the opinion of the ACM (e.g., in a meeting). Sometimes the ACM publishes such guidance in an informal guidance letter. To date, these have been limited to merger control cases and cases relating to the possible application of individual exemptions of the cartel prohibition. It is not inconceivable that the ACM will also hand out an informal guidance letter in abuse cases.

57 Article 59 of the DCA in combination with the rules laid down in Chapter 5 of the General Administrative Law Act.
VII PRIVATE ENFORCEMENT

Third parties can base an action for damages or injunctions before the civil courts directly on Article 24 of the DCA (as with Article 102 of the TFEU). So far, there is no specific regime for enforcement of national competition law infringements. The Dutch Act implementing the EU Damages Directive entered into force on 10 February 2017, and only applies to cases where there is a breach of EU competition law.

A consultation on a bill to also apply these provisions to civil damages actions in cases solely featuring infringements of domestic competition law was closed in November 2017. For now, general Dutch tort law applies to such actions. Pursuant to Dutch tort law, claimed damages can only be compensatory in nature: there is no such thing as punitive or ‘treble’ damages in the Netherlands.

The EMS v. Equens ruling by the District Court of Central Netherlands is one of the rare cases in which damages were actually awarded for an infringement of the prohibition on abuse of dominance. In this case, the District Court of Central Netherlands ruled that Equens abused its dominant position in the market for network services for credit card transactions by making it more difficult for customers to switch to acquirers other than its own subsidiary, PaySquare. The case was brought before the court by European Merchant Services (EMS), a customer of Equens and a competitor of PaySquare. The Court first established the dominance of Equens on the market for network services for payment transactions by considering that customers could not easily switch networks, since 70 per cent of the payment terminals used by customers were based on a protocol managed by Equens. The Court subsequently ruled that Equens had abused its dominant position by introducing a ‘queue procedure’, pursuant to which customers could only switch to another acquirer with PaySquare’s assistance. PaySquare would subsequently use the time it would take to disconnect the customer’s payment terminal to make a counter offer, and as a result, the switch was often prevented or delayed. The Court thereupon ruled, however, that Equens would have to pay EMS only €77,000 in damages, based on lost profits.

Private enforcement of Article 24 of the DCA is attempted relatively frequently in the Netherlands, but these attempts are mostly unsuccessful. Claimants often fail to meet the evidentiary thresholds. As explained above, Dutch courts tend to follow EU practice and

58 For example, in KPN v. NL.tree (22 March 2006), the District Court of The Hague ordered KPN to withdraw internet access offers to educational institutions that were deemed to be predatory and to amount to a price squeeze. The Court also ordered KPN to desist from making abusive offers in the future.


61 Draft regulation: Bill on amendment of the Competition Act in relation to market and government, merger control and private enforcement.

62 Decision by the Court of Central Netherlands of 10 July 2013, ECLI:NL:RBMNE:2013:3245.

63 Decision by the Court of Central Netherlands of 30 December 2013, ECLI:NL:RBMNE:2013:7536.
trends, and therefore attach considerable weight to economic evidence. Claimants only rarely make the effort of building a convincing economic narrative to support a claim of abuse of dominance.

VIII FUTURE DEVELOPMENTS
The ACM has stated that the price of prescription drugs is a key priority for 2019. Further, as with many competition authorities, the ACM focuses on online markets from different perspectives.

The ACM will therefore likely be focusing on potential excessive pricing in the pharmaceuticals sector and on potential unfair trading practices and other abuse types in the online sector in the near future, and enforcement rates in these areas may increase as a result.
Chapter 20

RUSSIA

*Maxim Boulba and Maria Ermolaeva*

I INTRODUCTION

Federal Law No. 135-FZ on Protection of Competition dated 26 July 2006 (the Competition Law) is the main statute applicable to the behaviour of dominant undertakings. Article 5 of the Competition Law contains the definition of dominance, while Article 10 prohibits its abuse. Special rules can be found in Federal Law No. 147-FZ on Natural Monopolies dated 17 August 1995, and in industry-specific legislation, such as Federal Law No. 35-FZ on Electric Power Industry dated 26 March 2003 and Federal Law No. 126-FZ on Communication dated 7 July 2003. Decrees of the government are adopted in furtherance of the statutory provisions; these mainly govern non-discriminatory access to certain markets, goods, services or infrastructure. The Russian competition authority, the Federal Antimonopoly Service (FAS), is in charge of the investigation and enforcement of dominance rules. In addition, the FAS has issued several regulations and guidelines relating to, for instance, market definition, determination of monopolistically high and low prices, assessment of business practices of dominant market players, application of Article 10 of the Competition Law and collective dominance.

II YEAR IN REVIEW

While abuse of dominance is one of the enforcement priorities of the FAS, the overall number of cases relating to abuse of dominance is generally declining. This reduction is mostly owing to amendments to the Competition Law that introduced a revised definition of abuse of dominance and a widespread use of warnings.

Traditionally, the authority pays particular attention to certain industries of ‘social importance’: electrical energy and infrastructure (and, more generally, natural monopolies); life sciences; oil and gas; telecommunications; and transportation. Having looked into the activities of Google, Microsoft and Apple, the FAS continues to scrutinise the practices of IT and digital companies. The correlation between intellectual property (IP) and abuse of dominance remains a topical issue in Russia.

In the recent, highly publicised *Google* case,² the FAS considered Google a dominant undertaking in the market of ‘pre-installed app stores on Android OS’ to be circulated

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1 Maxim Boulba is a partner and Maria Ermolaeva is an associate at CMS Russia.
2 Decision of the FAS No. AD/54066/15: decision and binding order in Case No. 1-14-21/00-11-15.
in Russia. Google provided the manufacturers of mobile devices with Google Play for pre-installation on Android OS mobile devices. In this respect, the following actions of Google were viewed as abusive by the FAS:

- mandatory and exclusive pre-installation of other Google apps and services together with Google Play;
- mandatory and exclusive pre-installation of Google’s search engine together with Google Play;
- mandatory placement of pre-installed apps on the screens of mobile devices (specific screen placement); and
- the imposition of prohibitions (or economic incentives) on manufacturers preventing them from dealing with Google’s competitors and pre-installing their products on Android mobile devices.

In its decision, the FAS issued a binding order prescribing Google to complete actions aimed at terminating the violation and restoring competition in the market, including by way of modifying all existing contractual arrangements with its partners, and informing customers of the possibility of deactivating the pre-installed Google apps and search engine, and installing alternative competing apps, as well as changing the placement of the app icons on the screen. The decision was challenged by Google; however, after unsuccessful appeals, the company decided to enter into a settlement agreement with the FAS, pay a significant fine of 438 million roubles and comply with the requirements of the authority.

EVRAZ, a steel making and mining company, was found to have fixed monopolistically high prices in the market of solid-rolled wheels. 3

Finally, the issues of potential dominance and its implications were also considered by the FAS in its merger control review of the notorious Bayer/Monsanto deal (eventually the FAS, among other things, prescribed Bayer to transfer certain technologies (molecular selection of specific crops) to Russian recipients and provide non-discriminatory access to their digital farming platform following the commercial launch of products in Russia).

III MARKET DEFINITION AND MARKET POWER

Further to Article 5 of the Competition Law, dominance is defined as the position of an undertaking or a group of undertakings allowing them to have a decisive influence on the general terms of circulation of goods on a relevant market, eliminate other entities from the relevant market or impede other entities’ access to this market. Market share of an undertaking is the cornerstone in the assessment of a dominant position.

The dominance standard is primarily economic. The associated test is discussed in detail in the FAS Guidelines on Application of Article 10 of the Competition Law issued on 7 June 2017. In the meantime, the approach of the authority regarding market definition, which is the essential part of the analysis, is outlined in the FAS Regulations No. 220 on Procedure for Assessment of Competition on the Market dated 28 April 2010 and in the FAS Guidelines No. 17 dated 10 April 2019. Market analysis under the Regulations is necessary in antitrust cases involving abuse of dominance. Since the rules provided for in the Regulations are often rather broad, the FAS often enjoys considerable discretion in defining markets.

3 Decision of the FAS No. 05/84859/17: decision in Case No. 1-10-22/00-05-16.
As part of the market assessment, the FAS generally conducts its own analysis of an industry, existing suppliers and customers, and specifics of the business. The FAS prepares a questionnaire that covers potential interchangeability of the goods in question, and distributes it to the market players in order to collect information from the inside. Initially, the temporal boundaries are defined. One year (or the period during which the market exists, if it is less than a year), including the time when an infringement took place, constitutes a minimum period of time relevant for the market analysis.

The definition of the relevant product market, which is based on the concept of interchangeability, may turn out to be a rather sensitive issue. The geographical boundaries of a market are normally defined as the territory of the Russian Federation or its regions and municipalities. To assess the geographic boundaries of the market, the FAS identifies the territory within which it is feasible for a customer, from a business and technical perspective, to buy similar products. Other factors that are taken into account by the authority include information on the region, pricing structures and differences in prices throughout the Russian territory, and the structure of goods flow.

The Competition Law applies to both dominant sellers and buyers (naturally, some of the prohibitions are only relevant for dominant suppliers); in certain instances, arguments concerning buyer power are taken into account by the FAS.

As to the market share thresholds, the general rule is that a company is deemed to be dominant if it has a market share of over 50 per cent unless the FAS determines otherwise (presumption of dominance). Under such circumstances, an undertaking is entitled to provide evidence to the contrary suggesting that it does not exercise monopoly power; however, such claims are hardly ever successful.

Further, dominance may be established where a company has a market share of less than 50 per cent. If an undertaking’s market share is between 35 and 50 per cent, it can be considered as a dominant entity should the FAS manage to prove it so on the basis of such criteria as:

a. the relative stability of its market share;
b. its correlation with the market shares of competitors;
c. accessibility of the market to new competitors (barriers to market entry); and
d. other factors characteristic of the market.

An undertaking with a market share of less than 35 per cent can be viewed as dominant only in a situation of collective dominance or if the thresholds provided for in industry-specific legislation apply.

Special dominance rules are established in respect of:

a. telecommunications (a service provider with a market share exceeding 25 per cent is considered as a dominant firm);
b. river and sea port service providers (a share of more than 20 per cent within a port);
c. electrical energy (as a general rule, if an entity’s share of capacity of the generating facilities or share of the generated electrical energy within the boundaries of the free power transfer zone exceed 20 per cent; or if the share of electrical energy or capacity, or both (bought or consumed) within the boundaries of the free power transfer zone exceeds 20 per cent); and
**Russia**

\[d\] financial organisations: a financial organisation is dominant if its market share is more than 10 per cent of the only (financial) market in the Russian Federation, or if more than 20 per cent if its products circulate on other markets; and if, within a considerable period of time, its market share has been increasing or always exceeds the above threshold.

The Competition Law rules on unilateral conduct deal with collective dominance. For an undertaking to be considered collectively dominant, the following criteria shall be met:

- the aggregate market share of no more than three market players exceeds 50 per cent; or the aggregate market share of no more than five market players exceeds 70 per cent, while the market share of each undertaking concerned exceeds 8 per cent. Further, their market share must remain stable within an extended period of time (of more than a year);
- there are barriers to market entry for competitors;
- the relevant goods cannot be substituted by other products;
- an increase in prices does not result in a corresponding decrease in demand; and
- the information on the prices and terms of distribution and sale of goods is publicly available.

The situations of collective dominance are dealt with in the FAS Presidium Guidelines No. 15. The highest fines in FAS history (several billion roubles) were imposed on major Russian oil companies that abused their position of collective dominance in the form of discrimination.

Finally, an undertaking with a revenue of below 400 million roubles cannot be declared dominant if certain conditions set forth by the Competition Law are met (this exemption is mainly relevant for small and medium-sized enterprises rather than undertakings that have substantial market power).

**IV ABUSE**

**i Overview**

Dominance of a market is, in itself, not an infringement. Under Article 10 of the Competition Law, abuse of dominance is defined through its consequences as acts or omissions of a dominant undertaking that result or may result in the prevention, restriction or elimination of competition; or the infringement of rights of other undertakings in a field of business activities or an unlimited number of consumers; or both (effects-based approach).

The Competition Law provides for a non-exhaustive list of types of unilateral conduct that amount to abuse of dominance and are prohibited \textit{per se} (i.e., there is no need for the FAS to establish a conduct’s adverse effect on competition as such):

- fixing or maintaining monopolistically high or low prices;
- withdrawal of products from circulation if this results in an increase in prices;
- imposing unfavourable contractual terms (or contractual terms unrelated to the subject matter of an agreement) on a counterparty;
- reducing or terminating the production of goods, works or services without an economic or technological justification;
- refusal to deal with certain customers without an economic or technological justification;
- establishing different prices for the same product without an economic or technological justification;
g. fixing high or low prices for financial services without any substantiation (for financial institutions);

h. establishing discriminatory conditions;

i. creating barriers to market entry or exit for other undertakings;

j. failure to comply with the regulatory requirements as to pricing; and

k. manipulation of prices on the wholesale or retail markets, or both, for electrical energy (capacity).

The FAS is required to prove that an undertaking is a dominant entity and that it has been involved in abusive conduct caught by Article 10. As to the available defences, an undertaking may contest the assessment of its market position as dominant and, as occurs frequently, claim that its behaviour was part of an ordinary business strategy (i.e., competition on the merits), and can be substantiated by commercial and technological reasons. Still, in many cases, the success of these arguments is far from obvious.

More importantly, by statute, an undertaking may provide evidence suggesting that its conduct is admissible only in relation to certain types of abuse (reduction or termination of production, establishing discriminatory conditions and creating barriers to market entry). In particular, potentially abusive conduct may be admissible if it:

a. does not eliminate competition on the market;

b. does not impose limitations on third parties; or

c. results in production improvement, technological progress or increased competitive performance of Russian products, or creates benefits for consumers.

ii. Exclusionary abuses

Exclusionary pricing

Exclusionary pricing practices, such as predation, fall under the prohibition on establishing monopolistically low prices. There are two main criteria for a price to be qualified as monopolistically low: it is below the necessary production and distribution costs, as well as the profit; and it is below the price that was formed under competitive conditions in a market with a comparable composition of suppliers and customers and conditions of goods circulation. Margin squeeze is not specifically mentioned in the Competition Law, but this type of abusive behaviour can be viewed as creating barriers to market entry (and fixing monopolistically low prices, as in the case of predatory pricing).

Exclusive dealing

Exclusive dealing practices are caught by the prohibitions of Article 10 of the Competition Law if they result in market foreclosure by creating barriers to market entry or refusal to deal with other market players. Loyalty rebates are not prohibited per se, but should always be treated with caution by dominant undertakings, as rebates are usually viewed by the FAS as price components. Establishing such rebates may be considered as abuse of dominance in the form of discrimination or establishing different prices for the same products.

Leveraging

Leveraging practices, including tying and bundling, are prohibited under the Competition Law and are not uncommon in the FAS’ practice. For example, the FAS has looked into such practices in relation to the electrical power industry and insurance. Tying and bundling essentially lead to the imposition of unfavourable terms (terms that are not relevant for the
subject matter of the agreement) on a counterparty. There are no uniform criteria, so the FAS usually analyses the economic nature of the parties’ arrangement to establish, among other things, whether the customer was duly informed and aware of its options.

**Refusal to deal**

Unjustified refusal to deal is among the most common types of abuse in the FAS’ practice (in particular, in the pharmaceutical industry). Special rules apply to natural monopolists and dominant undertakings with a market share of more than 70 per cent to ensure access to certain products and infrastructure. Currently, refusal to license does not expressly fall foul of the Competition Law requirements. Owing to the IP-related exemption, the prohibitions of Article 10 as to abuse of dominance do not apply to the exercise of IP rights, but the relevant legal framework may change in the near future. The overall abolition of this exemption and the subsequent introduction of such mechanisms as compulsory licensing are being considered.

Dominant market players cannot refuse to enter into a contract with certain customers without a reasonable commercial or technological justification (should it be possible to manufacture or supply such products). The following shall be confirmed by the FAS to establish the violation:

- a customer contacted a dominant undertaking and sent a corresponding request;
- a dominant undertaking refused to deal or supply (such a refusal can take different forms; it can be indirect or implied (e.g., by delaying responses or ignoring negotiations));
- a dominant undertaking can (objectively) procure the production or supply of the products; and
- a dominant undertaking does not have any proper commercial or technological grounds to substantiate its refusal to deal.

When reviewing cases on abusive refusal to deal by a dominant undertaking, the FAS has also looked into the potential interplay between the antitrust and anticorruption concerns. According to the FAS, refusal to enter into an agreement with a potential distributor should be based on established facts and decisions of the competent bodies rather than any informal sources (mass media, online publications, phone calls, private investigators, etc.). The FAS is of the opinion that a Russian counterparty is supposed to act in compliance with Russian law, which does not provide for an obligation to undergo a compliance check essentially relating to foreign anticorruption laws (this requirement can also amount to exploitative abuse).

The ability to present evidence and build a well-grounded position is of the utmost importance in such cases. The FAS decides on a case-by-case basis whether there are valid reasons for a dominant undertaking not to deal with a particular distributor. In certain instances, the impracticality and unprofitability of cooperation for a dominant entity were found to be proper and sufficient grounds.

**iii Discrimination**

All forms of discrimination, including discriminatory pricing and other issues relating to interactions with counterparties, are prohibited for dominant entities. Thus, customers in the same position should be offered comparable deals, and customers not in the same position should be differentiated on an objective basis according to their divergent circumstances. FAS and court practice suggests that the same pricing policy shall be applied to all counterparties, whether they are part of the same group or not.
As suggested by the FAS’ practice, the basic principle here is the following: while the ‘freedom of contract’ concept still applies, prices and rebates offered by a dominant undertaking shall be substantiated (i.e., based on transparent, objective, clear and well-grounded criteria), and at the same time shall not be discriminatory (e.g., they shall not be drastically different in comparable situations).

Additional rules preventing discrimination can be found in sector-specific legislation, such as Federal Law No. 381-FZ on Fundamentals of State Regulation of Trading Activities in the Russian Federation dated 28 December 2009, which governs relationships between retail food chains and their suppliers and specifically prohibits discrimination (and other forms of abuse).

iv  Exploitative abuses
Prohibitions of Article 10 of the Competition Law apply to exploitative abuses. Excessive pricing is assessed in the same way as predatory pricing in terms of the Competition Law provisions preventing dominant undertakings from establishing monopolistically high and low prices. In most cases, other types of exploitative abuse are qualified as imposing unfavourable and excessive terms on counterparties.

V  REMEDIES AND SANCTIONS
i  Sanctions
The most common penalties imposed on a dominant undertaking as a result of its abusive conduct are administrative fines of up to 1 million roubles (if the infringement does not result in an adverse effect on competition) or turnover fines of up to 15 per cent of the company’s turnover in the market concerned for the preceding year. Company officials may be held liable (and be fined up to 50,000 roubles or disqualified for up to three years). The FAS can only impose administrative fines on offenders; disqualification (a prohibition to hold certain posts or carry out certain activities) can be applied only by a court.

Both mitigating circumstances (e.g., an offender stopped a violation, contributed to an investigation or took certain steps to remedy a violation) and aggravating circumstances (e.g., an offender refused to stop a violation or repeated a violation, or a prohibited practice resulted in damage exceeding 1 million roubles or allowed a dominant firm to generate profit of over 5 million roubles) stipulated in the Code on Administrative Offences are taken into account for the purposes of a fine’s calculation and possible reduction.

Alternatively, the FAS is entitled to issue an order requiring an infringer to transfer to the state budget all revenue received as a result of an antitrust violation. It is expressly prohibited to resort to administrative liability (as discussed above) if an offender complied with such an order and transferred the prescribed amount to the budget.

ii  Behavioural remedies
Behavioural remedies are clearly preferred by the FAS and are frequently used in practice. The FAS is authorised to issue orders aimed at putting an end to a violation. This is a binding instruction, further to which the undertaking may be obliged to stop its abusive conduct, enter into (amend or terminate) contracts or take other measures to restore competition. Such orders normally describe in detail what actions are expected from a dominant undertaking. Thus, both positive and negative obligations may be imposed on an infringing entity.
In certain instances (particular types of abuse of dominance), the FAS is required to issue a warning (i.e., a specific request to terminate anticompetitive behaviour). If a dominant entity complies with the requirements contained therein within the timeline set forth in the warning, formal proceedings cannot be initiated. Similarly, in this case, a company cannot be held liable for an antitrust violation (i.e., no fines shall be imposed).

This (relatively new) procedure allows the infringing party to deal with the antitrust risks in a relatively straightforward manner; however, it still requires compliance with the terms of a warning. Practically speaking, the number of such cases is rising, so fewer infringements are resulting in investigations. A dominant undertaking will be expected to act, as prescribed in the warning (i.e., enter into an agreement, supply products or ensure a level playing field among its distributors), which may be challenging in practice. In cases of non-compliance, the proceedings continue, and a formal ‘case’ is initiated.

For completeness, in the most extreme cases, the FAS has a right to invalidate agreements (or certain clauses thereof) through court proceedings.

### Structural remedies

In accordance with Article 38 of the Competition Law, the FAS may initiate court proceedings aimed at splitting up a dominant undertaking that is engaged in systematic (more than twice in three years) abuse of its dominant position. However, the FAS has never exercised this right and applied structural remedies to dominant entities.

### VI PROCEDURE

The FAS investigates antitrust violations and determines whether an undertaking holds a dominant position. The FAS investigates and reviews cases of abuse of dominance, conducts inspections and imposes sanctions on offenders. Its officials have a right to access and inspect premises, offices and documents of a legal entity, request and review any documents and information, and interview those involved.

The FAS initiates investigations within its powers and on its own initiative. Information on alleged abuse can be obtained by the authority from different sources, including data from other state bodies, complaints of individuals and legal entities, publications in the media and the results of its own inspections. A commission composed of FAS officials is set up to review a case once initiated. Dominant undertakings and interested parties may participate in the hearings of the above commission, present evidence and give further clarifications.

Cases are supposed to be reviewed within three months, but this initial term may be extended further for up to six months. On average, cases on abuse of dominance are resolved within six months, while in more complex, high-profile cases, the authority may exceed the above time frame, which is not preclusive, and conduct an in-depth analysis that may easily take more than one year.

The Competition Law does not provide for mechanisms such as early resolution. Settlement procedures are not available at the stages of an FAS investigation and a review of the case. An amicable settlement agreement can be entered into with the FAS when a decision of the FAS is appealed in court. A settlement agreement must be approved by the court and is binding on the parties (the dominant entity and the FAS). The settlement implies that the offender is required to acknowledge the violation, while the FAS agrees to reduce the
fine. Additional behavioural commitments may be imposed on the dominant firm. From a practical perspective, settlement agreements are viewed as something extraordinary, and are often entered into in high-profile cases (e.g., Google).

FAS decisions can be appealed to the commercial courts within three months of the date of the decision on abuse of dominance. It is possible to appeal decisions of the regional offices of the FAS to the FAS Presidium (within one month of a decision being issued). This internal appeal is allowed in situations where a decision of the regional office is not in line with the FAS’ practice and the uniform application of the Competition Law by the authority. If an appeal is filed with the FAS Presidium, then further appeal to court is still allowed, but only within one month. Dominant undertakings usually prefer to challenge FAS decisions; however, FAS decisions stand in courts in the absolute majority (more than 90 per cent) of cases.

VII PRIVATE ENFORCEMENT

Although a private right of action is possible under Russian law, and there have been several successful actions brought by private claimants following abuse by a dominant undertaking, for the time being, private antitrust enforcement does not play a large role. A private action may be initiated before the court by any person whose rights and interests have been violated by an antitrust infringement. General procedural rules apply to the review of private antitrust actions and their funding: legal costs (stamp duty and, within reasonable limits, legal fees) may be recovered from the defeated party.

By way of illustration, a private claimant may seek to have access to the infrastructure of a dominant entity or to enter into a contract with it. Further, actual damages and lost profits can be claimed. For example, in 2015, a dominant pharmaceutical company (Teva Pharmaceutical Industries) was ordered to pay around 408 million roubles in damages (lost profit) to its distributor for refusal to supply.4

Difficulties relating to the calculation of damages (in particular, lost profit) and associated high standards of proof traditionally adhered to by the Russian courts are among the major problems preventing the development of private antitrust actions. There is a clear preference for government enforcement by the FAS; market players are generally reluctant to opt for private enforcement. The FAS is adamant about changing the existing situation: its Guidelines on Proof and Calculation of Damages Resulting from Antitrust Violations shed some light on certain aspects of private litigation.

To recover damages, a plaintiff is supposed to prove a violation of the Competition Law, the existence of damage (including the amount), and the cause-and-effect relationship between the violation and the inflicted damage. Naturally, an FAS decision establishing a violation is instrumental during the court proceedings, but it does not lower the burden of proof imposed on the plaintiff (as to the amount of damage and the cause–effect relationship). While an FAS decision serves as evidence, the FAS in any case urges future plaintiffs to be more active in collecting and presenting evidence in the course of private antitrust proceedings.

Collective (class) actions are not available for antitrust matters. The FAS acknowledges this problem: some time ago, a proposal to introduce such actions was elaborated, but

was not eventually enacted. Key market players were strongly opposed to this idea, as its implementation would have opened the floodgates for multiple proceedings. Nonetheless, the FAS is willing to return to the introduction of collective antitrust actions in the near future.

VIII FUTURE DEVELOPMENTS

Further amendments to the Competition Law are to be expected in the near future: they may cover such topics as correlation between IP and antitrust regulations, antitrust compliance and issues relating to the digital economy. Currently, the prohibitions on abuse of dominance do not apply to conduct associated with the exercise of exclusive rights to IP. Still, fairly recent cases support the FAS’ outlook on the interplay between IP and antitrust (dominance): as long as rights holders can benefit from the existing exemption, there is room for abusive conduct (according to the FAS, IP rights should not create any benefits in terms of the circulation of products in the market).

The FAS tends to view the above immunity as obsolete; it seeks to exert control over unilateral conduct and contractual arrangements in the area of IP, and to look into existing practices in terms of their compliance with the Competition Law (in particular, in relation to the pharmaceutical industry). Similarly, the FAS remains a proponent of compulsory licensing and liberalisation of parallel imports, claiming that such reforms will ensure a level playing field. Although this initiative is strongly criticised by many practitioners and will require further regulation, there is a strong drive by the FAS to see these changes implemented.

Finally, the FAS seeks to elaborate its approach as to the effect of pricing algorithms, digital platforms and, more generally, use of big data on the market position and associated practices.
Chapter 21

SINGAPORE

Daren Shiau, Elsa Chen, Scott Clements and Neha Georgie

I INTRODUCTION

Competition law in Singapore is governed by the Competition Act (Chapter 50B) (the Act), and is enforced by the Competition and Consumer Commission of Singapore (CCCS). Section 47 of the Act, which came into force on 1 January 2006, prohibits any conduct on the part of one or more undertakings, which is an abuse of a dominant position, in any market in Singapore (the Section 47 Prohibition). The CCCS has issued the CCCS Guidelines on the Section 47 Prohibition 2016 (the Section 47 Guidelines), which sets out further details on its administrative approach to the enforcement of the Section 47 Prohibition.

Potentially abusive conduct will fall for consideration under Section 47 of the Act, where it has (or could potentially have) an effect on any market within Singapore. The Section 47 Prohibition requires a dual finding that the undertaking in question holds a dominant position within a relevant market, and that it has engaged in conduct that constitutes an abuse of that position.

Undertakings in this context includes individuals operating as sole proprietorships, as well as companies, partnerships, cooperatives, societies, business chambers, trade associations and non-profit making organisations, regardless of legal and ownership status (foreign or local, government or non-government) and the way in which they are financed. Section 33(4) of the Act provides for agreements entered into or any conduct on the part of the Singapore government, statutory bodies or any person acting on their behalf, to be exempted.

An illustrative list of conduct that could be considered abusive includes:

a predatory behaviour towards competitors;
b limiting production, markets or technical development to the prejudice of consumers;
c applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
d making the conclusion of contracts subject to acceptance 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.4

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1 Daren Shiau, Elsa Chen and Scott Clements are partners and Neha Georgie is an economist at Allen & Gledhill LLP.
4 As set out in Section 47(2) of the Act.
The Section 47 Guidelines state that the Section 47 Prohibition can apply to undertakings in a dominant position outside Singapore that engage in conduct that amounts to an abuse of a dominant position within any market in Singapore.

With reference to the application of the Section 47 Prohibition to state-owned enterprises, the position was considered within SISTIC. In SISTIC, the undertaking subject to the investigation was 65 per cent owned by the Singapore Sports Council and 35 per cent indirectly owned by the-then Ministry of Information, Communications and the Arts. Ultimately, the CCCS determined that the exclusion provided within Section 33(4) of the Act was not applicable to SISTIC because, inter alia:

- SISTIC was not part of the government or a statutory body in itself;
- the contractual terms and conditions under the agreements to which the investigation related were commercial in nature; and
- SISTIC was not acting on behalf of the government or a statutory body in relation to the commercial arrangements to which the investigation related.

By operation of the Third Schedule to the Act, the Section 47 Prohibition does not apply to undertakings entrusted with the operation of services of general economic interest, conduct required for compliance with laws, conduct necessary for reasons of public policy, conduct giving other regulatory authorities jurisdiction and conduct resulting in a merger. The following specified activities are also excluded from the Section 47 Prohibition:

- the supply of ordinary letter and postcard services by a person licensed and regulated under the Postal Services Act;
- the supply of piped potable water;
- the supply of wastewater management services, including the collection, treatment and disposal of wastewater;
- the supply of scheduled bus services by any person licensed and regulated under the Public Transport Council Act;
- the supply of rail services by any person licensed and regulated under the Rapid Transit Systems Act;
- cargo terminal operations carried out by a person licensed and regulated under the Maritime and Port Authority of Singapore Act; and
- conduct that relates to the clearing and exchanging of articles undertaken by the Automated Clearing House established under the Banking (Clearing House) Regulations or any related activities of the Singapore Clearing House Association.

The Section 47 Prohibition also does not apply to any agreement or conduct that relates to any goods or services to the extent to which any other written law or code of practice issued under any written law relating to competition gives another regulatory authority jurisdiction in the matter. This effectively includes conduct that is subject to:

- the Telecom Competition Code, enforced by the Infocomm Media Development Authority (IMDA);
- the Media Market Conduct Code, enforced by the IMDA;
- competition provisions under the Electricity Act, enforced by the Energy Market Authority (EMA);

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5 Case CCS/600/008/07, abuse of a dominant position by SISTIC.com Pte Ltd, 4 June 2010.
6 As set out in Paragraph 5 of the Third Schedule to the Act.
d competition provisions under the Gas Act, enforced by the EMA; and
e the Airport Competition Code 2009, enforced by the Civil Aviation Authority of Singapore.7

II YEAR IN REVIEW

During 2018, the CCCS publicly disclosed details of one investigation related to an abuse of dominance, relating to an alleged refusal to supply lift spare parts.8 The CCCS’s concerns centred on the act of lift companies (or distributors) not providing proprietary, essential lift parts to third-party lift maintenance contractors. The CCCS’s position was that this conduct could prevent other lift maintenance contractors from effectively competing for contracts to maintain and service lifts of that brand.

In a press release issued by the CCCS on 28 March 2018, the CCCS stated that two lift companies (BNF Engineering (S) Pte Ltd and C&W Services Operations Pte Ltd) each separately proposed voluntary commitments to the CCCS. These commitments were accepted and resulted in the CCCS ceasing its investigation. The voluntary commitments involved the undertakings committing to sell lift spare parts of their relevant brands on a fair, reasonable and non-discriminatory basis, subject to certain terms and conditions. The CCCS considered that these commitments fully addressed its competition concerns in relation to these brands. Meanwhile, the CCCS noted that it would continue with its investigations of other third-party lift maintenance contractors. Commitment proposals from two further lift part suppliers were disclosed by the CCCS for public consultation in January 2019, and the cases remain pending.

The approach of the CCCS in closing its investigation upon receipt of acceptable commitments has been typical of the authority with regard to abuse of dominance investigations since 2013. In the period 2013 to 2015, the CCCS closed three other investigations following the acceptance of commitments, all of which related to exclusivity agreements and potentially anticompetitive terms within supply agreements.

The CCCS also raised concerns in relation to exclusivity:
a in a market inquiry into car parts concluded in 2017.9 The CCCS noted that the practice of car dealers requiring customers to service or repair their cars exclusively at the respective dealers’ authorised workshops, to retain the validity of their car warranties, restricted the ability of independent workshops to compete; and
b in relation to its investigation into a complaint that an online food delivery provider had entered into exclusive arrangements with certain restaurants.10 The CCCS eventually concluded that, at the time of its investigation, the exclusive agreements had not harmed competition and the industry was competitive.

Significant decisions of the CCCS issued in 2018

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
</tr>
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<tbody>
<tr>
<td>Maintenance</td>
<td>CCCS</td>
<td>Alleged refusals to supply lift spare parts for the maintenance of lifts by BNF Engineering (S) Pte Ltd and C&amp;W Services Operations Pte Ltd. Investigation closed upon receipt of acceptable voluntary commitments</td>
<td>July 2016</td>
</tr>
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</table>

Currently active cases (as at June 2019)

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<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maintenance</td>
<td>CCCS</td>
<td>Alleged refusals to supply lift spare parts for the maintenance of lifts (involving, inter alia, Chevalier Singapore Holdings Pte Ltd and Fujitec Singapore Corporation Ltd). Proposed commitments currently subject to ongoing review</td>
<td>July 2016</td>
</tr>
</tbody>
</table>

III MARKET DEFINITION AND MARKET POWER

The concept of dominance in Singapore is considered equivalent to an undertaking having substantial market power. Substantial market power, in turn, arises where an undertaking does not face sufficiently strong competitive pressure and can be thought of as the ability to profitably sustain prices above competitive levels, or to restrict output or quality below competitive levels.11

The first step in the assessment of whether an undertaking holds a dominant position is for the CCCS to consider the relevant market. In doing this, the CCCS adopts the use of a hypothetical monopolist test to define markets conceptually. The test aims to identify products that buyers consider substitutable and then identify undertakings that can supply the focal product and its substitutes. In practical terms, the CCCS considers a number of demand-side considerations (including switching costs, patterns in price changes, own or cross-price elasticities and product characteristics, among other factors) and supply-side considerations (including the ease of supply-side substitution, evidence of existing capacity and buyer preferences, among other factors). The CCCS will also consider its own earlier decided cases (if any are relevant to the case at hand) and market definition assessments in overseas jurisdictions (where these may be relevant in light of the unique market circumstances in, and appropriate market definition for, Singapore).

Turning to the assessment of market power within the relevant market, once defined, the Section 47 Guidelines state that there are no market-share thresholds for determining dominance under the Section 47 Prohibition. Notwithstanding this, the Section 47 Guidelines also note that, as a starting point, the CCCS will generally consider a market share in excess of 60 per cent as a likely indication that an undertaking is dominant in the relevant market. However, the Section 47 Guidelines include a caveat that dominance can be established at lower market shares, depending on an assessment of all relevant factors. Moving from this starting point, the CCCS will conduct a detailed assessment of:

a Existing competitors: the CCCS assesses the competitors to whom buyers might switch if the alleged dominant undertaking sustained prices above competitive levels. Due consideration is also given to the positions of other undertakings operating in the same market and how market shares have changed over time. The CCCS also includes

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11 As set out in Paragraph 3.3 of the Section 47 Guidelines.
in its assessment factors such as barriers to expansion, the degree of innovation, product differentiation, the responsiveness of buyers to price increases and the price responsiveness of competitors.

b Potential competitors: the CCCS notes that entry barriers are important in assessing the degree of competitive constraint posed by potential competition, which will in turn inform the assessment of whether an undertaking would have the ability to profitably sustain prices above competitive levels. In the Section 47 Guidelines, the CCCS indicates that such assessments require consideration of sunk costs, access to key inputs and distribution outlets, regulation, economies of scale, network effects and potential exclusionary behaviour by incumbents.

c Other factors, such as powerful buyers and economic regulation: the CCCS considers that a buyer’s bargaining strength is affected by the buyer’s knowledge of alternative supply sources, opportunities to self-sponsor or establish a procurement auction or competitive tenders, as well as whether the buyer is important to the seller. These factors again may influence whether an undertaking is effectively in a position to exercise market power.

Ultimately, the CCCS’s consideration of whether a dominant position is held will require an objective assessment of all of the above criteria (and any other relevant facts and circumstances).

The Section 47 Prohibition also extends to abuses of collective dominant positions, which may be held when two or more legally independent undertakings present themselves or act together in a particular market as a collective entity. The CCCS considers that undertakings holding a collective dominant position are able to act largely independently of their competitors, customers and consumers. The CCCS will consider whether there are factors linking the undertakings together in its assessment. Once the CCCS establishes that the collective entity holds a dominant position, it will assess whether there has been an abuse of the collective dominant position.

### IV ABUSE

i Overview

The test for abusive conduct was set out by the Singapore Competition Appeal Board (CAB) in its hearing of the appeal arising from SISTIC. Specifically, the CAB held that ‘an abuse will be established where a competition authority demonstrates that a practice has, or [is] likely to have, an adverse effect on the process of competition’. In making this assessment, the CCCS conducts an economic effects-based assessment that will generally be centred on the degree to which the conduct in question forecloses (or has the potential to foreclose) the competitors of the dominant undertaking from being able to compete effectively in the relevant market. At present, there are no types of arrangements or conduct that are considered to constitute abusive conduct on a per se, or restriction by object, basis.

Where an undertaking can advance an objective commercial justification for its conduct, this will be taken into account in the CCCS’s assessment, and may constitute a defence. However, the dominant undertaking is still required to demonstrate that it has behaved in a proportionate manner and should not take more restrictive measures than necessary.
With respect to intellectual property rights, legitimate exercise of these, even by a dominant undertaking, will not generally be regarded as an abuse. The CCCS cautions that the way in which an intellectual property right is exercised may give rise to concerns in relation to infringing the Section 47 Prohibition if, for instance, it is used to leverage market power.

ii Exclusionary abuses
It is clear that exclusionary conduct is the primary conduct that the CCCS will investigate as potentially amounting to an abuse of dominance. To date, exclusive contracting by dominant undertakings has been a common feature in the cases pursued by the CCCS. However, the Section 47 Guidelines contemplate that the following types of conduct potentially amount to an abuse of dominance, depending on all the facts and circumstances:

- predatory behaviour;
- loyalty-inducing discounts or rebates;
- price discrimination;
- margin squeeze;
- refusal to supply access to an essential facility or good; and
- exclusive contracting.

The above list is not exhaustive, and the CCCS would not be restricted from finding an abuse that arises from any other form of exclusionary conduct.

iii Discrimination
Discrimination is not identified in the Section 47 Guidelines as an abusive practice in and of itself, but instead could constitute an abuse insofar as it results in an exclusionary or foreclosure effect. For example, a dominant undertaking providing discriminatory access pricing to an essential facility (favouring its own affiliates in a downstream market) could give rise to foreclosure concerns that may amount to abusive conduct.

iv Exploitative abuses
The Section 47 Guidelines are silent as to whether exploitative abuses can constitute the abuse of a dominant position. However, it is noteworthy that the Section 47 Prohibition makes no reference to unfair prices or unfair trading conditions (unlike Article 102 of the Treaty on the Functioning of the European Union on which the Section 47 Prohibition was modelled). In other words, references to unfair prices and trading terms were specifically removed (and replaced instead with an explicit reference to ‘predatory behaviour towards competitors’) when the Section 47 Prohibition was drafted.

It is also noteworthy that the CCCS has not publicly pursued any Section 47 cases involving purely exploitative conduct, and has also previously made public statements that it is not within the CCCS’s purview to oversee or regulate prices.

V REMEDIES AND SANCTIONS

i Sanctions
Where the CCCS has determined that the Section 47 Prohibition has been infringed, it has the ability to issue such directions as it considers appropriate to bring the infringement to an end, or to remedy, mitigate or eliminate any adverse effects of such infringement, and
to prevent the recurrence of such infringement. Such directions can include prohibitory conduct remedies, affirmative conduct remedies, structural remedies or financial penalties, or a combination of these.

The CCCS calculates financial penalties in accordance with the CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016, which specify an approach taking into consideration the relevant turnover of the undertaking, the seriousness of the infringement, the duration of the infringement and mitigating or aggravating factors. The ultimate financial penalty imposed may not exceed 10 per cent of the turnover of the business of an undertaking in Singapore, for each year of infringement, up to a maximum period of three years.

ii Behavioural remedies

During an investigation, where the CCCS has reasonable grounds for suspecting that the Section 47 Prohibition has been infringed, and where the CCCS considers that it is necessary for it to act as a matter of urgency for the purpose of preventing serious, irreparable damage to a particular person or category of persons, or protecting the public interest, it may issue interim directions. While the nature of such directions are not specified within the Act explicitly, the CCCS would have the broad discretion to issue interim behavioural directions similar to those that can be imposed upon an infringement finding, such as directions to an undertaking to, inter alia:

a modify or cease its conduct;
b enter such legally enforceable agreements as may be specified by the CCCS and designed to prevent or lessen the anticompetitive effects that have arisen; and
c provide a performance bond, guarantee or other form of security on such terms and conditions as the CCCS may determine.

iii Structural remedies

Where an infringement of the Section 47 Prohibition is found, the CCCS has the ability to issue directions requiring structural changes, such as the disposal of such operations, assets or shares of the undertaking in such a manner as may be specified by the CCCS.

VI PROCEDURE

The CCCS has the power to conduct an investigation if there are reasonable grounds for suspecting that the Section 47 Prohibition has been infringed. Such investigations are often triggered by third-party complaints, through completion of the complaint form available on the CCCS website. Thereafter, the CCCS typically seeks to gather information through the use of requests for information, or through dawn raids.

Section 63 of the Competition Act enables the CCCS to require that parties provide information in connection with the investigation. The information request is served on the

12 As set out in Section 69 of the Act.
14 As set out in Section 67 of the Act.
15 As set out in Section 62 of the Act.
relevant parties by way of a written notice. The CCCS typically issues multiple requests for information, with specified deadlines for providing responses, in the course of an investigation. In terms of dawn raids, the CCCS has the power to enter into any premises to carry out investigations, with or without warrants. On the premises, the CCCS has the power to require the production of documents relevant to the investigation, an explanation of such documents and take steps to preserve documents, among other things.

During the course of an investigation, the investigated parties have the right to consult legal advisers. In the case of a dawn raid, the CCCS investigating officers are able to exercise judgement, to the extent that they consider it reasonable, to allow the investigated party’s legal advisers to arrive at the premises within a stipulated time period.

As mentioned above, the CCCS has the power to impose interim measures where it has not completed, but has commenced, its investigation and considers it necessary to act urgently. The CCCS has not imposed interim directions in any public case involving a suspected breach of the Section 47 Prohibition to date, but has done so in respect of investigations relating to suspected breaches of other prohibitions.

The CCCS generally cooperates with agencies in other jurisdictions on cases of an international nature. Historically, the CCCS has done so for cross-border cartel and merger cases in particular. Given the Singapore-centric nature of the abuse of dominance cases published by the CCCS so far, it is less likely that it has consulted other agencies on these specific cases. Nonetheless, should multi-jurisdictional abuse of dominance cases arise, the CCCS could be expected to follow its general consultative approach.

Thus far, investigations into infringements of the Section 47 Prohibition have most often been informally settled through the CCCS accepting voluntary commitments offered by the parties under investigation. The CCCS typically conducts a public consultation on the proposed commitments, to seek feedback on whether the likely proposed commitments will address the identified competitive harm, and any other feedback.

The CCCS does not have an indicative timeline for concluding its investigations into suspected breaches of the Section 47 Prohibition, unlike its indicative timelines for the assessment of notified mergers. Notwithstanding this, in December 2016, the CCCS introduced a ‘fast track’ procedure for investigations into infringements of the Section 47 Prohibition in the CCCS Practice Statement on the Fast Track Procedure for Section 34 and Section 47 Cases. Under this procedure, parties that admit liability for infringing the Section 47 Prohibition can be eligible for a reduction in financial penalties to which they might otherwise be subject. The CCCS has indicated that it will use its discretion as to whether or not a case may benefit from this procedure, on the basis of factors including the predicted margin for argument and extent to which facts may be contested. Should the CCCS determine that the case is suitable for this procedure, it will initiate the process by engaging the parties, inviting them to respond within two weeks on whether they are interested in the offer. The parties are still able to appeal the final decision made by the CCCS should they accept the offer.

While there is no obligation on parties to notify the CCCS of conduct that may amount to an abuse of dominance, parties can apply to the CCCS for a notification for guidance or decision. The guidance provided by the CCCS may indicate whether the conduct in


17 As set out in Sections 51 to 53 of the Act.
question would likely infringe the Section 47 Prohibition. In the case of a decision, the CCCS indicates whether the conduct has infringed the Section 47 Prohibition. A difference between guidance and a decision is that a decision cannot be reopened on the basis of a complaint by a third party.

Pursuant to Sections 71 and 72 of the Act, a decision of the CCCS finding an infringement of the Section 47 Prohibition, or a decision to impose interim measures, may be appealed to the CAB. The CAB may impose, revoke or vary a direction as long as the direction is one that the CCCS could have given. The decision by the CAB may be further appealed to the High Court and then to the Court of Appeal (but such subsequent appeals are limited to points of law, or appeals related specifically to the quantum of the financial penalty imposed).

The only appeal brought to the CAB for an abuse of dominance case to date in Singapore was SISTIC.com Pte Ltd’s appeal of the SISTIC case in 2010. After hearing the appeal, the CAB issued its decision in 2012 upholding the CCCS’s finding of liability, but at the same time ordering a reduction in the penalty imposed (from S$989,000 levied by the CCCS to S$769,000). This reduction was ordered on the basis that:

a. the CAB disagreed with the CCCS’s assessment that the involvement of the directors or members of senior management in the matter ought to be an aggravating factor;
b. the CAB determined that SISTIC did entertain genuine uncertainty with regard to whether its conduct constituted an infringement, and accordingly disagreed with the CCCS’s decision to aggregate the assessed penalty on the basis that the infringement had been committed ‘intentionally, not just negligently’; and
c. the CAB considered that an additional mitigating discount ought to be applied on the basis that SISTIC cooperated with the CCCS, and due to SISTIC’s genuine uncertainty with regard to the legality of the conduct in question.

Further details on the CCCS’s powers of investigation and enforcement are set out within the CCCS Guidelines on the Powers of Investigation in Competition Cases 2016, and within the CCCS Guidelines on Enforcement of Competition Cases 2016.

VII PRIVATE ENFORCEMENT

The right of private action for general competition law infringements in Singapore is set out in Section 86 of the Act. Unlike in jurisdictions such as the United States and Australia, the right of private action in Singapore exists by way of a follow-on claim, which precludes

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independent stand-alone action by claimants. Specifically, the right of private action only arises upon the issuance of a final determination that an undertaking has infringed the Section 47 Prohibition.21

As a matter of procedure, a final determination of infringement of the Act refers to an infringement decision of the CCCS, the CAB, Singapore High Court or Singapore Court of Appeal that is not subject to any right of further appeal. Private actions must be brought within two years of the final determination of the CCCS, the CAB, Singapore High Court or Singapore Court of Appeal (as the case may be).

Section 86 of the Act requires the claimant to have suffered loss or damage directly as a result of an infringement. While currently untested in the courts, the term ‘directly’ is generally understood to limit claims to direct purchasers (rather than end-purchasers, where there is an intermediate purchaser or purchasers).

In dealing with any private action claims, the court has the ability to grant relief by way of injunction or declaration, damages or such other relief as the court thinks fit.22 It is untested in Singapore whether damages claims would be compensatory, restitutionary or punitive (or could incorporate considerations of each).

At present, only representative proceedings are permissible in Singapore (rather than other forms of collective litigation, such as class actions), and such representative actions require the permission of the court to be brought. Generally, third-party funding of litigation is not prohibited outside the scope of international arbitration matters (or to a limited degree in insolvency cases).

To date, there have not been any private actions for damages initiated (either completed or pending) in Singapore as follow-on claims related to the breach of the Section 47 Prohibition.

VIII FUTURE DEVELOPMENTS

The CCCS, like authorities in many other jurisdictions, is taking an active interest in the implications of data issues on competition policy. For the CCCS, the interest in this area stems from a wider initiative in the Singapore government to adopt data analytics and data sharing.23 In an interview for the April 2018 edition of the Asia-Pacific Competition Update (a publication by the OECD/Korea Policy Centre), Toh Han Li, the chief executive of the CCCS noted that ‘with the rise of the digital economy, more sophisticated business models have emerged and CCCS is seeing an increase in the complexity of the cases handled’.24

The CCCS collaborated with the Intellectual Property Office of Singapore and the Personal Data Protection Commission (PDPC) to publish a paper on data as an engine for growth in 2017.25 In this paper, two issues with respect to market power in data-driven industries were considered. The first was whether data could be replicated reasonably by competitors; the second was whether the data could result in a significant competitive

21 As set out in Section 86(2)(a) of the Act.
22 As set out in Section 86(8) of the Act.
25 See footnote 23.
advantage. The paper noted that market power would generally be strengthened by network effects but could be weakened by multi-homing, ease of access, data substitutability and market dynamics. Types of abuse considered in this paper are discriminatory access (including through vertical integration), exclusive dealing and refusal to supply. The CCCS published a discussion paper on data portability, in conjunction with Singapore’s PDPC, in February 2019. A potential abuse of dominance issue that the CCCS has outlined in the paper is the refusal to supply data, where data may be considered an essential facility.

The CCCS’s recently expanded jurisdiction, as of April 2018, now includes consumer issues as enforced under the Consumer Protection (Fair Trading) Act. Accordingly, the CCCS is expected to focus on investigations in consumer-focused industries. In 2018, the CCCS stated that its sectors of interest then were transportation, logistics, hospitality and wholesale retail and trade. The CCCS may now be expected to narrow its focus to data-driven companies in these sectors or shift its focus to other industries in which data is an essential facility, focusing its assessment on the impacts on both competitors and consumers.


I INTRODUCTION

The statutory provision dealing with the behaviour of dominant firms is Article 9 (Prohibition of the Abuse of a Dominant Position) of the Slovenian Prevention of the Restriction of Competition Act (PRCA), which entered into force on 26 April 2008. Its main wording corresponds to Article 102(1) of the Treaty on the Functioning of the European Union (TFEU) and provides that ‘the abuse of a dominant position in the market by one or more undertakings in the territory of the Republic of Slovenia or in a substantial part of it shall be prohibited’. Article 9(4) of the PRCA also lists the same examples of infringements as Article 102(2) of the TFEU.

The Competition Protection Agency (CPA) is an independent administrative authority with powers to investigate abuse of dominance cases (in administrative proceedings) and impose fines of up to 10 per cent of the infringing companies’ worldwide turnover (in minor offence proceedings). The CPA has not adopted formal guidance on the way in which it applies Article 9 of the PRCA; nor has it adopted guidelines on the setting of fines for breaches of Slovenian antitrust law. Therefore, guidance on the application of the current rules can be gathered mostly from case law of the CPA and the Slovenian courts. The European Commission’s guidance on Article 102 of the TFEU, as well as the European Commission’s and European courts’ decisional practice, also provide useful information for the application of Article 9.

Article 9 of the PRCA applies to undertakings. The PRCA defines the concept of ‘undertaking’ as any entity that is engaged in economic activities, regardless of its legal and organisational form and ownership status. An ‘economic activity’ means any activity that is performed on the market for payment. Accordingly, state-owned enterprises, public entities and other legal entities subject to public law and performing economic activities are also

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1 Andrej Fatur is a senior partner and Helena Belina Djalil is an attorney-at-law and external expert at Fatur Menard Law Firm.

2 ZPOmK-1 (Official Gazette of the Republic of Slovenia No. 36/08), ZPOmK-1A (Official Gazette of the Republic of Slovenia No. 40/09), ZPOmK-1B (Official Gazette of the Republic of Slovenia No. 26/11), ZPOmK-1C (Official Gazette of the Republic of Slovenia No. 87/11), ZPOmK-1D (Official Gazette of the Republic of Slovenia No. 57/12), Act Amending the Courts Act (Official Gazette of the Republic of Slovenia No. 63/13), ZPOmK-1E (Official Gazette of the Republic of Slovenia No. 33/14), ZPOmK-1F (Official Gazette of the Republic of Slovenia No. 76/15) and ZPOmK-1G (Official Gazette of the Republic of Slovenia No. 23/17).
subject to the PRCA. An undertaking also means an association of undertakings that is not directly engaged in an economic activity but that affects or may affect the behaviour in the market of undertakings as defined above.

Under Slovenian competition law in the PRCA, no sectoral exemptions exist in terms of dominance. Article 9 of the PRCA applies to all undertakings, irrespective of the industry sector to which they belong.

II YEAR IN REVIEW

As regards administrative proceedings, in 2018, the CPA initiated no new cases in the area of abuse of dominance, at least according to publicly disclosed information. The CPA adopted no prohibition decisions in abuse of dominance cases in 2018, but it succeeded in closing one case (Renault Nissan Slovenija) by accepting commitments. The case related to the market for the provision of technical information and technical training needed by (authorised and independent) service shops of Renault motor vehicles.

Some other older cases are still open on which the CPA must take a decision. The IKO case was initiated in 2015 against IKO, the supplier of TV channels with sports content in Slovenia, for alleged abuse of its dominant position with regard to limiting and hindering access to sport TV channels by retail TV operators. A second case was opened in August 2016 and relates to e-commerce, where Panteon Group, a provider of services of inter-organisational business operations, allegedly refused access to certain electronic data exchange systems held by providers of electronic data exchange services and their users. There are still some pending cases that the courts have referred back to the CPA for re-examination. The first case, Mobitel/Telekom Slovenije (Itak Džabest), relates to the telecoms sector, with the alleged infringement of Article 9 of the PRCA and Article 102 of the TFEU in the retail mobile market. The second, Telekom Slovenije (ISDN/ADSL), also concerns the Slovenian national telecommunication incumbent, whose customers were forced to lease integrated services digital network (ISDN) connections to purchase asymmetric digital subscriber line (ADSL) broadband internet access, although they did not need it and it was not technically necessary.

As regards court reviews, the last relevant decision was adopted at the beginning of 2018, when the Administrative Court almost entirely upheld the CPA decision in another Telekom Slovenije (2015) case where the CPA held that the incumbent operator, Telekom Slovenije, abused its dominant position on the wholesale markets for broadband bitstream access and for access to physical network infrastructure by various individual conduct that jointly represent a single and continuous infringement of Article 102 of the TFEU and its equivalent in the PRCA.

3 CPA Decision No. 3062-26/2015-134 of 30 May 2018.
### III MARKET DEFINITION AND MARKET POWER

Article 9(2) of the PRCA defines ‘a dominant position’ as a position of an undertaking or several undertakings when they can, to a significant degree, act independently of competitors, clients or consumers. Such an approach follows the case law of the European courts.

The basic definition of a ‘relevant market’ is provided in Article 3 of the PRCA, which also reflects EU competition legislation and case law, and is the same as the one used for merger control purposes. A ‘relevant market’ means a market defined by the relevant product or service market and the relevant geographical market. The ‘relevant product or service market’ represents a market that, as a rule, comprises all products or services that are regarded as interchangeable or substitutable by the consumer or user given their characteristics, their prices or their intended use. In turn, ‘relevant geographic market’ is defined as a market that, as a rule, comprises an area in which competitors in the relevant product or service market compete in the sale or purchase of products or services, and an area in which the conditions of competition are sufficiently homogeneous and that can be distinguished from neighbouring areas because the competition conditions are substantially different. In determining the dominant position, the CPA takes into consideration, in particular:

- the market share;
- financial options;
- legal or actual entry barriers;
Article 9(5) of the PRCA defines the market-share threshold for dominance as follows: ‘An undertaking shall be deemed to have a dominant position on the market if its market-share within the market of the Republic of Slovenia exceeds a threshold of 40 per cent.’

Even though the market-share threshold creates a legal presumption, such a presumption may be rebutted, since market share is an important, although not crucial, indicator of dominance.

Article 9 covers collective dominance, although there are no details on the assessment of collective dominance prescribed in the PRCA except for its presumption when the collective market share reaches a threshold of 60 per cent on the relevant market.

Although economics play a key role in the application of the dominance provisions, there are only a few cases where economic expert witnesses as external experts have been used in proceedings before the CPA; the analytical procedure is mostly performed by CPA employees who have knowledge of economics. Nevertheless, economic analysis is becoming a crucial part of more complex dominance cases. Court reviews of the CPA’s administrative decisions in the abuse of the dominant position cases show that the CPA will have to strengthen its economic analysis. In the Mobitel (Itak Džabest) telecoms case, the Supreme Court (2013) annulled the CPA’s infringement decision since the CPA, inter alia, failed to establish and transparently present all the relevant elements on which its cost–price analysis was based. Moreover, in Geoplin (2015), the Administrative Court held that the CPA, inter alia, failed to carry out an economic analysis of factors that are necessary for defining the relevant market, and returned the case to the CPA for re-evaluation.

IV ABUSE

i Overview

Similar to EU competition law, abuse of a dominant position, as such, is not defined by the PRCA. The PRCA generally prohibits the abuse of a dominant position, and lists four typical examples of abusive behaviour:

- directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;
- limiting production, markets or technical development to the prejudice of consumers;
- applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; and
- making the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts.

The CPA’s case law is generally aligned with that of the EU, and it shows that abuse is still defined more in terms of the form of conduct, rather than in relation to the effects of specific conduct in the market and on consumers. It follows from the above list that the concept of

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Slovenia

abuse covers exploitative as well as exclusionary practices. An example of exploitative abuse of dominant position as set out by the PRCA is unfair pricing or trading conditions. Examples of exclusionary abuse of dominant position as set out by the PRCA include predatory pricing, discrimination, refusal to deal and tying. It must be noted that the list of forms of abuse in Article 9 is not exhaustive, so the CPA is not excluded from dealing with other types of abusive practices.

Similar to the EU competition law, there is no direct causality between the creation of a dominant position and its abuse under Slovenian competition law. To apply Article 9, the existence of a dominant position must first be established, but simply having a dominant position is not *per se* illegal. Although in most cases a causal link between dominance and abuse is obvious, an abuse may exist even if there is no causal link between the dominant position and the inspected conduct. Further, it is also possible that abusive conduct can take place in a market other than the market where the dominant position is established.

If abuse of a dominant position is established, it must be prohibited with no explicit exemptions. The PRCA does not provide an efficiency defence. Nevertheless, while the existence of the efficiency defence under Slovenian law has never been confirmed by the CPA, it is expected that its future case law will follow that of the EU. So far, the most common defence used by dominant undertakings has been that their conduct has been justified on objective grounds. In such cases, the CPA must assess whether the dominant undertaking has provided all necessary evidence to show that the conduct is indispensable and proportionate to the goal pursued by the undertaking.

ii Exclusionary abuses

**Exclusionary pricing**

In 2012, the CPA issued its decision in *Mobitel/Telekom Slovenije (Itak Džabest)*, finding that Telekom Slovenije (previously Mobitel) had been abusing its dominant position in the retail mobile telecommunications service market by offering the ‘Itak Džabest’ retail package to mobile phone users at unfair prices. The CPA established that Telekom Slovenije acted in a predatory manner by imposing its ‘Itak Džabest’ package at below-cost prices (lower than the costs incurred). With such prices, Telekom Slovenije gained new users and made it more difficult for other equally efficient competitors to gain new users and not suffer losses by doing so. The Supreme Court did not confirm the CPA’s decision, and returned the case to the CPA, which has reopened the administrative proceedings. The Court considered, inter alia, that the CPA failed to give reasons for the method that was used to calculate the incremental costs, and explicitly stated that a transparent calculation of negative margin per subscriber is crucial in cases such as this one where there is no clear and direct evidence of a ‘predation strategy’.

While accepting that the cost-price analysis is an element in deciding whether a price is predatory, the Supreme Court noted that also relevant is the effect of the introduction and sale of the contested package, which was likely to be the elimination of competitors, which (in the long run) harms consumers.

Price squeezes are not specifically mentioned in Article 9(4) of the PRCA. In principle, the CPA tends to follow the practice as developed under the Article 102 of the TFEU. The CPA dealt with an alleged abuse of dominant position by price squeeze in *Mobitel/Telekom Slovenije (Itak Džabest)* (2012) and *Telekom Slovenije* (2015). In both cases, the CPA ultimately decided to drop the price-squeeze part of the complaint, and ended the proceedings against Telekom Slovenije at the part regarding the possibility of creating margin-squeeze policy.
Exclusive dealing

Generally, rebates and discounts of dominant undertakings in exchange for ensuring business with customers are considered abuses of a dominant position. The CPA dealt with loyalty rebates in Pro Plus (2013).\(^{10}\) It established that a leading broadcasting and internet media company in Slovenia that is part of the multinational enterprise CME had abused its dominant position in the market for television advertising airtime by concluding exclusive dealing arrangements with advertisers, granting conditional rebates with loyalty-inducing effects and, in particular, granting high levels of discount as a reward for exclusivity. Concluding exclusive dealing arrangements with advertisers was also considered an abusive behaviour in Pro Plus. In particular, the CPA concluded that Pro Plus abused its dominant position by requiring individual advertisers to devote their advertising budgets exclusively to Pro Plus in return for granting rebates.

In the Gasilska oprema case (2010),\(^{11}\) the CPA established that Gasilska oprema, a wholesale company for fire extinguishers and related equipment, had a dominant position in the upstream market for the sale of new fire extinguishers. Although Gasilska oprema was not directly involved in after-sales services and maintenance of the fire extinguishers, the CPA held that it was indirectly present in the downstream market through its right to conclude contracts for after-sales services and maintenance of fire extinguishers with the trademark Pastor. The CPA decided that Gasilska oprema abused its dominant position by terminating the contract for after-sale services of Pastor-branded fire extinguishers concluded between the complainant and Gasilska oprema when the complainant obtained an authorisation to maintain a competitor’s fire extinguishers, as well as maintaining the contracts in force for the maintenance of the Pastor fire extinguishers, which were subject to abstention from selling competitors’ fire extinguishers and maintaining competing brands.

Leveraging

Article 9 of the PRCA prohibits ‘making the conclusion of contracts subject to acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts’. In a renewed case, Telekom Slovenije (ADSL/ISDN) (2013), establishing potential abuse of a dominant position regarding ISDN and ADSL tying, the CPA concluded that Telekom Slovenije had abused its dominant position on the interoperator broadband access market with bitstreaming via the copper-based network in Slovenia by making ADSL connections for internet providers conditional on the prior leasing of ISDN connections by end-users, although an ISDN connection was not needed or technically necessary.\(^{12}\)

In Geoplin (2015),\(^{13}\) the CPA held that Geoplin abused its dominant position in the market of gas supply to large industrial customers through prohibited contractual clauses


\(^{11}\) CPA Decision No. 306-93/2008-267 of 8 November 2010. See also Supreme Court Decision No. G 47/2010 of 11 June 2013.

\(^{12}\) The case is still pending (see Section II).

\(^{13}\) CPA Decision No. 306-43/2012-162 of 23 December 2014. See also Administrative Court Decision No. I U 203/2015 of 13 May 2015.
that caused industrial customers connected to the transmission network to be entirely tied to Geoplin. Following the re-examination of the case in the resumed procedure, the CPA finally accepted the proposed commitments in 2017.

**Refusal to deal**

An example of refusal to deal by a dominant undertaking without objectively justified reasons is *Luka Koper* (2009). An operator of the seaport of Koper refused, without justification, to allow its competitor access to the port, making it impossible for the competitor to perform towing and mooring activities. The CPA concluded that Luka Koper abused its dominant position by refusing such access, and doing so had the effect of excluding all competition on the markets for towing and mooring services in the port of Koper.

In the past, the CPA has dealt with cases of refusal to deal, and refusal of access to essential facilities as a similar form of abuse as refusal to deal, mainly in the telecommunications sector. In the case of abuse of a dominant position by Telekom Slovenije (2015), the CPA held that, on the market for access to the physical network infrastructure, Telekom refused alternative operators access to key infrastructure necessary for the equivalent operation in the retail market for fixed broadband services. It refused access to the optical local loop even in locations where copper loops were not available and it did not allow alternative operators to offer broadband bitstream access services to third-party operators on its unbundled local loops.

### iii Discrimination

Both price and non-price discrimination are included in the exemplary list of Article 9(4), and are described as ‘applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’. So far, the most frequently investigated types of abuse have been price and non-price discrimination.

For example, in *SAZAS* (2011), the CPA established that SAZAS, a Slovenian collective authors’ society, had established a non-transparent system that favoured certain authors, especially those who were included in the decision-making process concerning distribution of collected royalties, which led to discrimination among authors.

In *SODO* (2012), the CPA found that SODO, the electricity distribution system operator in Slovenia, had abused its dominant position in the market for the management of the electric energy distribution network by charging only some electric power producers for excessive electric energy received, thus applying discriminative conditions on undertakings.

In a case of abuse of dominant position by Telekom Slovenije (2015), the CPA also concluded that, as regards bitstream access, Telekom abused its dominance by not providing the wholesale ‘naked xDSL’ service to alternative operators, thereby preventing them from providing the xDSL service without the underlying telephone subscription to final customers. The CPA held that Telekom Slovenije, in the case of the provision of services to operators, applied dissimilar conditions to equivalent transactions, and placed alternative operators at a competitive disadvantage compared to Telekom’s retail division.

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iv Exploitative abuses

Exploitative prices or terms of supply are included in the list of Article 9(4) as examples of ‘directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions’. The CPA has not yet decided on any relevant excessive pricing case in practice.

In the recent court judgment in Telekom Slovenije (2015), the Administrative Court held that certain allegations in the CPA’s decision amounted to exploitative abuse. These allegations concerned, in particular, the CPA’s claim that Telekom Slovenije:

a made the provision of certain services conditional on use of its telephone connection, even though final users did not need it and it was not technically necessary, which, in the view of the CPA, represented a limitation on technical development to the prejudice of consumers; and

b made the conclusion of contracts subject to the acceptance of supplementary obligations that, by their nature or according to commercial usage, have no connection with the subject of their contracts.

The Administrative Court considered that, when assessing the existence of consumer harm in the context of exploitative abuse, it is necessary to determine what may constitute consumer harm, and that the CPA failed to demonstrate this. However, this does not apply to cases of exclusionary abuses where, according to the Administrative Court, the CPA is not obliged to determine specific consumer harm, to quantify the harm, or both.

V REMEDIES AND SANCTIONS

Article 9 expressly prohibits abusive practices and is directly applicable. The CPA may issue a decision establishing the existence of an infringement of Article 9 of the PRCA or Article 102 of the TFEU, or both, and require the undertaking concerned to bring such an infringement to an end. The CPA may, in addition, impose on the undertaking the obligation to take reasonable measures to bring an infringement and its consequences to an end (behavioural or structural remedies). When there is a possibility of infringement of Article 9 of the PRCA or Article 102 of the TFEU, or both, and in cases of urgency owing to the risk of serious and irreparable damage to the effectiveness of competition on the market, the CPA may impose interim measures. In the case of a breach of Article 9 of the PRCA or Article 102 of the TFEU, or both, the CPA is entitled to impose fines. In Slovenia, the leniency programme does not apply to undertakings involved in abuse of dominance cases.

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17 See footnote 6.
18 The Criminal Code contains, in Article 225, the criminal act ‘unlawful restriction of competition’, which incriminates abuses of a dominant position of one or more companies. However, although criminal sanctions are theoretically available, undertakings or individuals are not pursued in practice. Additionally, a business entity can also be held responsible for the same offence in accordance with the Liability of Legal Persons for Criminal Offences Act.
i Sanctions

In the case of a breach of Article 9 of the PRCA or Article 102 of the TFEU, or both, the CPA may, under Article 73 of the PRCA, impose a minor offence fine on a legal entity, entrepreneur or individual who performs an economic activity, of up to 10 per cent of its annual turnover in the preceding business year. A fine of between €5,000 and €30,000 can also be imposed on the responsible person within a legal entity or on an entrepreneur.

Under the Minor Offences Act, legal entities cannot be held solely responsible for offences, as the CPA needs to identify one or more individuals (offenders) who have committed the infringement, and then attribute their behaviour to the legal entity they represented and impose a fine on that entity. In Slovenian legislation, detailed guidelines on the method of setting fines in competition cases do not exist. When setting a fine, the CPA takes into account the provisions of the Minor Offences Act and, thus, all circumstances that may reduce or increase the sanction (mitigating and aggravating circumstances), such as:

- the level of the perpetrator's liability for a minor offence;
- the motives for committing it;
- the level of threat or violation of a protected good;
- the circumstances in which the minor offence was committed;
- the perpetrator's previous conduct;
- the perpetrator's personal circumstances; and
- the perpetrator's conduct after the minor offence was committed: in particular, whether he or she compensated for the damage.

The calculation of a fine imposed on a legal person or individual sole trader will take into account their economic strength and any previously imposed sanctions. When imposing a fine on the responsible person of a legal entity or entrepreneur, the calculation of the fine will also take into account the perpetrator's financial conditions, salary, other incomes, and property and family duties.

The Slovenian case law on imposing fines in abuse of dominance cases is still limited to a few cases that were concluded with the force of res judicata. The CPA's case law shows that it also takes into account the nature and gravity of the infringement, the market power of the undertaking, effects on the market, the geographical scope of the infringement and the duration of the infringement.

In addition, fines at the same level as for breaches of Article 9 of the PRCA or Article 102 of the TFEU, or both, can be imposed for failure to abide by imposed remedies, interim measures or commitment decisions.

ii Remedies

The CPA can also impose behavioural or structural remedies on an undertaking. According to Article 37 of the PRCA, the CPA may impose the obligation to take reasonable measures to bring an infringement and its consequences to an end on the undertaking, in particular through the disposal of the business or part of the undertaking's business, by:

- division of an undertaking or disposal of shares in undertakings;
- the transfer of industrial property rights and other rights;
- conclusion of its licence and other contracts that may be concluded in the course of operations between undertakings; or
- ensuring access to infrastructure.
VI PROCEDURE

The CPA has the power to enforce Article 9 of the PRCA and also Article 102 of the TFEU. The CPA conducts two types of proceedings: administrative proceedings, in which infringements of Article 9 of the PRCA and Article 102 of the TFEU are assessed and brought to an end, and minor offence proceedings, in which fines are levied.

Proceedings before the CPA are initiated only on the basis of information obtained by third parties (i.e., competitors or other market participants, public authorities or consumers) or information gathered by the CPA itself.

The CPA has extensive investigatory powers with regard to discovering abuses of a dominant position. It can issue requests for information and carry out inspections not only at the premises of undertakings against which a procedure has been initiated, but also at private residences.

An inspection of the premises of an undertaking against which a procedure has been initiated must be based on the consent of the undertaking or a reasoned written court order. If the latter is the case, the inspection must be carried out in the presence of two adults.

When conducting an inspection, authorised persons may enter and inspect the premises at the registered office of the undertaking and at other locations at which the undertaking itself or another authorised undertaking performs the activity and business for which there is the probability of an infringement of Article 9 of the PRCA or Article 102 of the TFEU. They may examine accounts and other documentation, irrespective of the medium on which they are stored. The authorised persons may ask any representative or member of staff of the undertaking to give an oral or written explanation of facts or documents relating to the subject matter and the purpose of the inspection, and then record it.

Subject to certain conditions, the CPA may also search the premises of an undertaking against which a procedure has not been initiated, and residential premises of members of the management or supervisory bodies or of the staff or other associates of the undertaking against which the procedure has been initiated.

Therefore, it is important that undertakings subject to investigations by the CPA, especially in the event of a dawn raid, are assisted by legal counsel as soon as possible. The CPA is not obliged to wait for the arrival of a lawyer, and is entitled to start an inspection without his or her presence.

The legal representatives and employees of the undertaking are obliged to cooperate with the authorised persons of the CPA. If the undertaking refuses to permit an authorised person entry to the premises, interferes with the person’s entry, denies access to accounts or other documentation, or obstructs or otherwise interferes with an inspection, the authorised persons have the right to enter the premises or to access such accounts and other documentation with the assistance of the police.

It is also important that undertakings give clear instructions to their employees not to destroy any documents or electronic data, or communicate with other undertakings about the inspection; otherwise, the undertaking risks incurring the penalty for obstruction. In the case of the obstruction of an inspection, the CPA may impose a penalty payment amounting

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19 Certain conditions include if there are reasonable grounds to suspect that business books and other documentation relating to the subject matter of an inspection are being kept at the mentioned premises. In this case, Article 33 of the PRCA provides that the CPA must obtain a court order to search the premises from a judge of the competent court in Ljubljana, and that during the inspection of the residential premises, two adult witnesses must be present.
to 1 per cent of an undertaking’s annual turnover in the preceding business year or, if it is
deemed that the inspection has not been obstructed by the undertaking, a penalty payment
amounting to €50,000 on an obstructing natural person.

An undertaking will be deemed as obstructing an inspection if the inspection is
obstructed by members of its management or supervisory bodies, its employees or even by
its external contractors.

Letters, notifications and other means of communication between the undertaking,
against which the procedure has been initiated, and its lawyer (privileged communications),
are excluded from inspection to the extent that such communications pertain to the
procedure in question. An undertaking or its lawyer may refuse to allow access to
information, claiming it to be privileged communication. If an authorised person considers
that such claim is evidently unfounded, the authorised person may seal the document
(or its copy) in an envelope signed by both the undertaking and its lawyer and send it
to the Administrative Court of the Republic of Slovenia. The Court then decides on the
justification of the claim for privileged communication within 15 days of the date of the
request being filed by the CPA.

It is also advisable to form a team of employees who accompany and communicate with
the authorised persons at the beginning of the inspection. Although the CPA usually obtains
copies of the original documents, it is crucial to make copies of all documents taken by the
CPA in order to prepare an effective defence.

A formal investigation of a specific case should last no more than two years after the
order for commencement of a procedure, and the CPA should adopt a decision in that time.
However, in practice there are no legal consequences if the CPA adopts its decision later. The
CPA normally comes to a decision without an oral hearing. The CPA official conducting
the procedure determines whether an oral hearing needs to take place to clarify or establish
essential facts.

In administrative proceedings, the CPA can, after investigation:

a issue a decision establishing the existence of an infringement of Article 9 of the PRCA
or Article 102 of the TFEU, and require the undertaking concerned to bring such an
infringement to an end;
b issue a decision making binding commitments proposed by the undertaking against
which the procedure has been initiated; or
c terminate the proceedings.

A judicial protection procedure may be initiated against decisions adopted by the CPA in
administrative proceedings. The parties may bring an action before the Administrative Court
within 30 days of service of the decision.

VII PRIVATE ENFORCEMENT

Affected parties (companies or consumers) can enforce Article 9 before the national courts,
although they do not have competence to prohibit abusive practices.

The PRCA provides that a person who has suffered harm caused by an infringement
of competition law has the right to compensation for harm under the general rules of the
law governing contractual obligations, unless otherwise provided by the PRCA. Since
the adoption of amendments in 2017, the PRCA contains some specific rules for private
enforcement. Private enforcement in Slovenia is mainly focused on damage claims, where
the general rules for damages apply. District courts are competent in civil disputes and can adjudicate on such claims. If the damage has been caused by the infringement of provisions of Article 9 of the PRCA or Article 102 of the TFEU, the court shall be bound by the final infringement decision of the CPA or the final infringement decision adopted in the judicial protection procedure against a CPA decision. If the existence of an infringement of competition law is found by a final decision of an authority of another Member State or a final decision of the court in another EU Member State, empowered by ordinary means of appeal to review decisions of an authority of another Member State, it is presumed that the infringers specified in the infringement decision acted unlawfully, whereby evidence to the contrary is admissible. The statute of limitations for compensation claims is suspended from the date when the competition authority (i.e., the CPA, the European Commission or an authority of another Member State) takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to one year after the infringement decision has become final or after the proceedings are otherwise concluded. The time elapsed before the suspension of the limitation period is included in the limitation period.

In the past, filing collective (class) actions was not possible under Slovenian law. However, courts were able to join actions if several actions have been lodged at the court with the same or similar factual and legal bases. In autumn 2017, a new Class Actions Act20 was adopted that, as of May 2018, allows collective actions for antitrust damages claims. Article 37(2) of the PRCA provides a legal basis for the CPA to order a dominant firm to grant access (to infrastructure or technology), supply goods or services, or conclude a contract. This provision does not apply to private suits before the national courts. Consequently, the national courts have the power to order a defendant to provide access to its infrastructure or network or other obligations only within the scope of the provisions of Article 133 of the Code of Obligations, which provide that at the request of an interested person, the court can order appropriate measures to prevent the occurrence of damage or alarm or to dispose of a source of danger, to be taken at the expense of the possessor thereof should the latter fail to do so.21

In practice, cases of private enforcement have tended to be rare, mostly because of difficulties in meeting the burden of proof in damage claims. The injured party must prove the existence of an unlawful damaging act, damage (existence and amount of loss) and causation. Nevertheless, in recent years, there has been an increase in the number of private suits before the national courts where market participants seek protection of their interests directly through damage claims.

VIII FUTURE DEVELOPMENTS

After changes to the PRCA resulting from the transposition of Directive 2014/104/EU on antitrust damages actions into national law, which came into force in May 2017, no further changes to competition legislation were made. However, there are important changes of competition legislation expected in the near future. At the beginning of 2019, the Ministry brought forward a legislative proposal to, inter alia, combine administrative and

20 Official Gazette of the Republic of Slovenia No. 55/17.
21 See, for example, Supreme Court decision in the telecommunications Case No. III Ips 98/2013 of 23 May 2014.
minor offence proceedings into one single proceedings. The proposed amendments to the PRCA introduce a system for sanctioning breaches of competition law that could finally be excluded from the general minor offence proceedings system, and is intended to be governed by specific rules laid down in the PRCA. At the time of writing, these amendments are still in the legislative process.
I INTRODUCTION

The key Spanish law provision regulating the abuse of a dominant position is Article 2 of the 2007 Spanish Competition Act (LDC). Article 2 is drafted in a similar way to Article 102 of the Treaty on the Functioning of the European Union (TFEU), the essential differences being:

a. the territorial reach of the prohibitions (while the LDC prohibits abuse of a dominant position ‘in all or part of the national market’, the TFEU forbids abuse of a dominant position ‘within the internal market or in a substantial part of it … in so far as it may affect trade between Member States’);

b. the inclusion of an additional example in the list of potentially abusive conduct (i.e., ‘[t]he unjustified refusal to satisfy the demands of purchase of products or provision of services’); and

c. the inclusion of Article 2(3) of the LDC, establishing that such prohibition also applies when dominance derives from the law.

Other key provisions include Articles 4 to 6 (legal exemptions, conduct of minor importance and findings of inapplicability), Chapters I and II of Title IV (antitrust procedure), Title V (sanctions) and Title VI of the LDC (private enforcement). Moreover, the Spanish Competition Rules (RDC) implement the LDC, regulating, notably, a number of procedural issues (e.g., investigation and interim measures). Furthermore, the National Markets and Competition Commission (NMCC) has adopted ‘soft law’ measures; in particular, Provisional Guidelines on the quantification of sanctions and Guidelines on the termination of infringement proceedings by means of commitments.

These rules apply to private and public undertakings alike. According to the LDC and in line with EU case law, the notion of ‘undertaking’ refers to any person or entity carrying out an economic activity, regardless of their legal statute and form of financing. Although, a priori, public institutions are not subject to these provisions when exercising...
public prerogatives, the NMCC has interpreted the notion of ‘economic activity’ widely, and even seems to have upheld the applicability of antitrust rules in a case where a public entity did not act as an economic operator, but merely facilitated the commission of an antitrust infringement.

II YEAR IN REVIEW

The NMCC did not adopt any fining decisions in 2018 for abuse of a dominant position. However, the NMCC did adopt a commitments decision in Mediapro Fútbol. In this case, the NMCC investigated whether Mediapro had discriminated against an over-the-top (OTT) provider of pay TV services by refusing to license its TV channels beIN Sports and beIN La Liga to such provider under wholesale terms and conditions similar to those offered to traditional pay TV operators such as Telefónica. The NMCC reached the preliminary conclusion that this may constitute an abuse of dominant position that could give rise to exclusionary effects on the downstream pay TV market, in particular in the OTT market segment. The NMCC terminated the proceedings after Mediapro committed to put an end to such discrimination.

The absence of fining decisions for abuse of a dominant position in 2018 is exceptional. Indeed, there has been significant enforcement in this field in recent years.

There are currently no pending abuse of dominant position cases before the NMCC.

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9 Case S/DC/0604/17, Mediapro Fútbol, 7 February 2018.

10 The NMCC imposed abuse of a dominant position fines reaching a total of: (1) €17.06 million in three fining decisions in 2017 (Case S/DC/0511/14, Renfe Operadora, 28 February 2017; Case S/DC/0557/15, Nokia, 8 June 2017; and Case S/DC/0580/16, Criadores de Caballos 2, 21 November 2017); (2) €638,770 in one fining decision in 2016 (Case S/DC/0540/14, Istobal, 30 June 2016); (3) €2.79 million in one fining decision in 2015 (Case S/0500/13, AGEDI/AIE Radio, 26 November 2015); (4) €12.62 million in four fining decisions in 2014 (Case S/0373/11, Correos 2, 21 January 2014; Case S/0446/12, Endesa Instalación, 10 July 2014; Case S/0345/11, Criadores de Caballos, 17 July 2014; and Case S/0460/13, SGAE-Conciertos, 6 November 2014); (5) €3.5 million in three fining decisions in 2013 (Case S/0341/11, Correos, 22 April 2013; Case S/0360/11, AGEDI, 26 August 2013; and Case SAMAD/12/10, Tanatorios Coslada, 4 October 2013); and (6) €162.4 million in six fining decisions in 2012 (including several key decisions, such as Case S/0207/09, Transporte Electrónica, 8 February 2012; Case S/0211/09, Endesa Instalación, 21 February 2012; and Case S/0248/10, Mensajes Cortos, 19 December 2012).
III MARKET DEFINITION AND MARKET POWER

The criteria used by the NMCC to define the relevant market are practically identical to those described in the Commission Notice on the definition of the relevant market and applied by the Commission in its decisional practice. In fact, according to well-settled decisional practice, the provisions of the Notice are fully applicable to Article 2 of the LDC cases.\(^{11}\) No formal provisions exist in Spanish law or in the ‘soft law’ regulating market definition. Although the NMCC is often not very detailed in justifying its specific choice of market definition, this tendency is changing, and its analysis is progressively becoming more sophisticated and grounded in economics.\(^{12}\)

Given the lack of a provision defining ‘dominant position’, this task has been carried out by the NMCC, which, since 1999, has interpreted this notion in line with EU case law. Indeed, in 1999 the NMCC established that such a position exists when an undertaking has a sufficient degree of economic power and independence in the market to enable it to modify prices or commercial conditions, or both, without taking account of the reactions of competitors or consumers.\(^{13}\) This definition has been repeated by the NMCC, with small variations, in its more recent decisions.\(^{14}\)

The specific criteria used by the NMCC to assess dominance are very similar to those used by the Commission. For instance, in Bacardí, it was stated that to establish dominance it is necessary to focus on both the structure of the undertaking concerned (resources and methods of production, methods of presentation, transport and sales, technology and vertical integration) and the competitive environment (number and strength of competitors, market shares and sales volumes, prices and barriers to entry).\(^{15}\) In McLane/Tabacalera, however, it was established that the Bacardí criteria constitute the basis of a ‘structural’ approach, and that account may also be taken of behavioural elements and of the relationship between clients and providers and the undertaking in question.\(^{16}\)

Finally, it is noteworthy that the NMCC interprets Article 2 of the LDC, which refers to ‘[a]ny abuse by one or more undertakings’, as empowering it to pursue the collective abuse of a dominant position.\(^{17}\)

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\(^{11}\) See, for example, Case 677/05, Distribuidoras Prensa Ciudad Real, 24 April 2006, p. 10.

\(^{12}\) See, for example, Mensajes Cortos, pp. 129–139 (see footnote 10).

\(^{13}\) See, for example, Case 441/98, Electra Avellana, 7 July 1999, p. 9.

\(^{14}\) See, for example, Case S/0157/09, EGEDA, 2 March 2012, p. 52; Case S/0220/10, SGAE, 3 July 2012, p. 37; Correos, p. 20 (see footnote 10); AGEDI, p. 41 (see footnote 10); AGEDI/AIE Radio, p. 48 (see footnote 10); Criadores de Caballos 2, p. 35 (see footnote 10).

\(^{15}\) Case R 362/99, Bacardí, 30 September 1999, p. 8.

\(^{16}\) Case 486/00, McLane/Tabacalera, 24 April 2002, pp. 20 and 21.

\(^{17}\) See, inter alia, Case 427/9, Electra Caldense, 19 February 1999, pp. 9 and 10; Case 535/07, Fonogramas, 9 December 2008, p. 24; Mensajes Cortos, pp. 155–165 (see footnote 10); Case S/DC/0602/16, Can Pack contra Ball, Remax y Crown, 21 December 2017, pp. 19 and 20.
The NMCC has also adopted the definition of ‘abuse’ developed by the EU courts in numerous decisions, such as in Retevisión/Telefónica.19 Furthermore, the Supreme Court (TS) has explicitly established that Article 2 of the LDC must be interpreted in light of the EU case law concerning Article 102 of the TFEU.20 It has also been confirmed that Article 2 of the LDC and Article 102 of the TFEU do not prohibit dominance in itself, but only the use of such a position to impose commercial conditions and to obtain advantages that the undertaking would not be able to obtain under normal competitive conditions.21

In line with Michelin I and subsequent abuse of a dominant position EU case law, the NMCC and the courts have held that dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition.22 As to the list of activities contained in Article 2 of the LDC, it is well established that it must be interpreted as being open-ended.23

Abuse of a dominant position has generally been described by the NMCC as constituting an objective concept:24 thus, a priori, intent should be irrelevant in determining whether conduct is abusive. However, traditionally intent has played a significant role in distinguishing between abusive conduct and competition on the merits. In fact, it has even been held on some occasions that intent is a necessary element that must be taken into account when assessing the lawfulness of allegedly anticompetitive behaviour.25 It is also noteworthy that the NMCC’s early decisional practice did not consider it necessary to prove actual anticompetitive effects to establish that conduct was abusive.26

In an attempt to clarify the conditions of the notion of ‘abuse’, in 2006, the TS established that the decisive element in identifying an abuse is not the intention of the dominant undertaking, but rather the objectively illegal nature of its conduct.27 It was stated, for instance, that the willingness to prevent an operator from entering the market may not be objectionable in itself if implemented through legitimate means. However, although such a statement places the emphasis on objective considerations, it does not definitively rule out the need to take intent into account.

In this context, it has been noted that even if this test does not formally require the proof of anticompetitive effects, in practice, it is very similar to an effects-based approach.28

19 Case 456/99, Retevisión/Telefónica, 8 March 2000, p. 28.
21 SGAE, p. 37 (see footnote 14).
22 See, for example, Case S/0003/07, E.On, 8 November 2011, p. 34; SGAE-Conciertos, pp. 30 and 31 (see footnote 10); Criadores de Caballos, pp. 28, 30, 32, 39, 41, 49, 59 and 61 (see footnote 10); Criadores de Caballos 2, p. 36 (see footnote 10). See also TS judgment in appeal 3042/2008, 10 February 2011, point of law 6.
23 TS judgment in appeal 4495/1998, point of law 7 (see footnote 20).
24 Retevisión/Telefónica, p. 28 (see footnote 19).
25 See, for example, Retevisión/Telefónica, p. 29 (see footnote 19).
It has been argued that today, Article 2 of the LDC leaves no room for per se abuses and, therefore, a given conduct may only be deemed contrary to such a provision if it is liable to give rise to anticompetitive effects, even if these effects do not actually materialise in a specific case. Recent NMCC decisions confirm this shift towards an effects-based approach. This said, the relevance of effects and intent in the assessment of potentially abusive conduct must logically be analysed by reference to the specific forms of abuse.

Finally, although the NMCC has often been criticised for not being sufficiently rigorous in its economic assessment of exclusionary practices, decisions such as Transporte Televisión suggest that the NMCC is increasingly willing to base its decisions on solid economic grounds and analysis.

i Exclusionary abuses

In its Altadis judgment on predatory pricing, drawing on the criteria set out in Akzo and Tetra Pak, the TS held that when prices are set below average variable costs, they are presumed to be abusive, while if they are set at a level above average variable costs but below average total costs, they are only deemed abusive if they constitute part of a strategy to exclude competitors. The TS concluded that the decisive element defining predation was the intention to eliminate a competitor. While in the former case such intention would be presumed, in the latter case it must be proven.

In Transporte Televisión, the NMCC fined Abertis Telecom for having abusively squeezed the margin between the wholesale prices at which access was granted to digital terrestrial television (DTT) transmission centres and the retail prices for DTT signal transport services. The NMCC held that Abertis had control over essential inputs and, after applying the ‘as-efficient competitor test’, concluded that such conduct constituted abuse of a dominant position, insofar as it hindered the entry of competitors in the DTT signal transport and distribution market. The NMCC noted that entry in the retail market was both technically viable and economically possible, and thus the lack of effective competitors could only be the result of the pricing policy adopted by Abertis.

The NMCC’s decisions in Llamadas Móviles, Correos 2 and Telefónica confirmed that the key test to determine whether a margin squeeze has taken place is the ‘as-efficient competitor test’.

30 See, for example, Transporte Televisión, pp. 135–139 (see footnote 10); Case S/0391/11, Llamadas Móviles, 6 March 2014, pp. 65–68; AGEDI/AIE Radio, pp. 73–76 (see footnote 10); Nokia, pp. 48–52 (see footnote 10).
32 See, for example, Transporte Televisión, pp. 77–92 and 118–135 (see footnote 10).
34 Transporte Televisión (see footnote 10).
test’. In *Llamadas Móviles*, the NMCC established that proving the existence of exclusionary anticompetitive effects is essential to conclude that a margin squeeze constitutes a violation of Article 2 of the LDC and Article 102 of the TFEU.\(^{36,37}\)

In its most recent margin squeeze case, *Nokia*, the NMCC fined Nokia for having abusively squeezed the margin between the wholesale prices for its support services for Global System for Mobile Communications-Railway (GSM-R) Nokia equipment and the retail prices for GSM-R network maintenance services. The NMCC held that Nokia’s support services were necessary to provide GSM-R network maintenance services downstream. The NMCC concluded that Nokia had abused its dominant position because the margins of an ‘as-efficient competitor’ would be negative and it was ‘likely’ that Nokia’s conduct had hindered competition.\(^{38}\)

The NMCC decision in *Iberia*\(^{39}\) constitutes a key precedent on loyalty rebates. This case concerned a target rebate scheme whereby travel agencies benefited from rebates only if their purchases had increased in comparison with their purchases in the previous year. These rebates were analysed in light of the criteria set out in *Hoffmann La Roche* and *Michelin* and were deemed to be abusive insofar as they gave rise to harm to consumers and competitors.

In *Unión Española de Explosivos*,\(^{40}\) the TS assessed exclusivity clauses in light of Article 2 of the LDC. The TS held that such clauses constituted part of a foreclosure strategy engaged in to prevent potential competition. It has been argued that while exclusivity clauses had been traditionally considered as per se abuses by the NMCC, this approach changed in *Airtel/Telefónica*, where the NMCC applied an effects-based approach to exclusivity,\(^{41}\) and as a result of the *de minimis* rule contained in Article 5 of the LDC.\(^{42}\)

As regards leveraging practices, in *BT/Telefónica*,\(^{43}\) the NMCC considered that Telefónica had unlawfully tied the renting of international circuits to that of national circuits, where competition was less intense, which had the effect of restricting potential competition. In recent years, the NMCC has imposed severe fines on several energy companies for having engaged in leveraging practices. For instance, in *Endesa Instalación*,\(^{44}\) this company was deemed to have taken advantage of its position in the distribution market to increase its market power on the neighbouring market for electrical installation work (i.e., by making use of information to which it had privileged access because of its status as a distributor, offering to carry out installation work for large customers).\(^{45}\)

\(^{35}\) *Llamadas Móviles*, p. 66 (see footnote 30); *Correos 2*, pp. 30, 31 and 36 (see footnote 10); Case S/0409/12, *Telefónica*, 29 October 2015, pp. 6 and 7.

\(^{36}\) *Llamadas Móviles*, pp. 65–68 (see footnote 30).


\(^{38}\) *Nokia*, pp. 44–52 (see footnote1 10).

\(^{39}\) Case 514/01, *Iberia*, 1 April 2002.

\(^{40}\) TS judgment in appeal 4699/2003, 4 April 2006.


\(^{45}\) See similarly Case S/0089/08, *Unión Fenosa Instalación*, 20 September 2011; Case 2795/07, *Hidrocantábrico Instalación*, 20 September 2011; *E.On* (see footnote 22).
Regarding refusal to deal, it has been noted that the NMCC has generally been more willing to consider such conduct abusive when the company requesting supply was already a client or competitor of the dominant undertaking and when such refusal constituted an absolute refusal to deal.\textsuperscript{46} In \textit{McLane/Tabacalera}, the NMCC concluded that by refusing to supply certain products, Tabacalera abused its dominant position since the products in question were indispensable to compete in the wholesale distribution market.\textsuperscript{47} Tabacalera was deemed to have attempted to foreclose potential competition to protect its position in the market, which had recently been liberalised. In an older case, \textit{Iasist/3M},\textsuperscript{48} a refusal to license case, the NMCC considered such conduct abusive despite the lack of indispensability, given the ‘excessive influence’ that this conduct could have on the competitive conditions of the market in which the complainant operated.

In \textit{Correos}, a more recent refusal-to-deal case, the NMCC fined Correos, the Spanish public postal services operator and owner of the public postal network, for ceasing to supply competitors with wholesale access services, and in particular, those related to the delivery of administrative notifications. The NMCC found that this conduct was abusive because access to the Correos network was necessary to effectively compete in the downstream market for the delivery of administrative notifications, this network could not be replicated and such conduct was not objectively justified.\textsuperscript{49}

\section*{ii Discrimination}

According to Article 2(2)(d) of the LDC, discriminatory pricing may be abusive if it unjustifiably places certain competitors at a disadvantage. In recent years, there has been a considerable amount of abuse of a dominant position enforcement in this field. For instance, in \textit{Mediapro}, the NMCC considered that by engaging in unjustified discrimination in licensing the use of broadcasting rights, Mediapro had hindered competition in the market for the resale of audiovisual broadcast rights of football matches and in the downstream television markets (especially pay TV).\textsuperscript{50} In \textit{Renfe Operadora}, the NMCC fined Renfe, the state-owned railway company in Spain, for imposing discriminatory commercial conditions on certain purchasers of its railway traction services for the transport of goods (e.g., only some purchasers were subject to cancellation penalties).\textsuperscript{51}

The NMCC has also focused on discrimination in several cases concerning collecting societies.\textsuperscript{52} For instance, in \textit{AGEDIAIE Radio}, the NMCC concluded that the remuneration system created by two collecting societies for the use of music by radio stations was in breach of Article 2 of the LDC and Article 102 of the TFEU, as it unjustifiably placed certain radio stations that were subject to higher fees at a competitive disadvantage.\textsuperscript{53}

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\textsuperscript{46} See footnote 42, p. 184.
\textsuperscript{47} \textit{McLane/Tabacalera}, p. 25 (see footnote 16).
\textsuperscript{48} Case 517/01, \textit{Iasist/3M}, 5 April 2002.
\textsuperscript{49} \textit{Correos}, pp. 21–36 (see footnote 10).
\textsuperscript{50} Case S/0153/09, \textit{Mediapro}, 17 March 2011.
\textsuperscript{51} \textit{Renfe Operadora}, pp. 64–68 (see footnote 10).
\textsuperscript{52} See Case 2785/07, \textit{AIE}, 23 February 2011; Case S/0297/10, \textit{AGEDIAIE}, 14 June 2012; \textit{SGAE} (see footnote 14); \textit{AGEDI} (see footnote 10); \textit{AGEDIAIE Radio} (see footnote 10).
\textsuperscript{53} \textit{AGEDIAIE Radio} (see footnote 10).
\end{footnotesize}
\end{flushright}
Exploitative abuses

Exploitative abuses are at the forefront of the NMCC’s enforcement priorities. This lies in stark contrast to the Commission’s quasi-exclusive focus on exclusionary abuses. By far the largest fine in recent years was levied on three telecommunications companies for excessive pricing.

In the past, a number of benchmarks have been used to determine whether prices are excessive (e.g., historical price data, production costs and costs in other competitive geographic markets). In recent cases, the NMCC has relied on a variety of benchmarks, such as, among others, those contained in regulatory prescriptions, price levels in other EU Member States and prices charged by the same undertaking to operators in other sectors.

In Mensajes Cortos, the NMCC concluded that three mobile network operators had priced termination services at an excessively high level, leading to higher retail prices for short message service (SMS) and multimedia messaging service (MMS) users. In reaching these conclusions, it was noted, inter alia, that prices of termination services had been high and stable over the relevant period, despite considerable traffic increase and cost reductions; and wholesale termination services prices for short messages in Spain were among the highest in Europe.

In Endesa Instalación, the NMCC laid out a non-exhaustive list of the structural market conditions under which excessive pricing is likely, and of the benchmarks that may be used to determine whether prices are excessive. As regards the former, the NMCC concluded that excessive pricing is likely when prices are set by a company that is in a monopoly or quasi-monopoly situation, and in markets characterised by the existence of high barriers to entry and relatively inelastic demand. As regards the latter, the NMCC concluded that prices may be deemed excessive by reference to the costs of the product or service, or to the prices of the product or service in a competitive situation, in other geographical markets or in a different time period.

In SGAE-Conciertos, the NMCC established that the fees charged by the SGAE, a collecting society, as consideration for the right to publicly play musical content subject to copyright in concerts in Spain, were excessive and thus in breach of Articles 2 of the LDC and 102 of the TFEU. The NMCC carried out an in-depth analysis of the rates charged by collecting societies in other EU Member States, and observed that the fees charged by the SGAE were significantly higher than the rates paid in 73 per cent of the EU Member States.

54 It has been argued that both the sheer number of abuse of a dominant position infringement decisions adopted by the Spanish authorities (nearly three times more than the Commission from 1992 to 2009) and the large proportion of exploitative abuses cases (34 out of 74) reflect the fact that Spanish abuse of a dominant position enforcement may be at a different stage of development from that of Commission Article 102 enforcement. See footnote 31, pp. 85–87.
55 Mensajes Cortos (see footnote 10). The NMCC imposed a fine of €119.96 million on Telefónica, Vodafone and Orange.
56 Case S/0211/09, Endesa Instalación, p. 51 (see footnote 10).
57 EGEDA, pp. 41–44 and 55–60 (see footnote 14); SGAE-Conciertos, pp. 17, 18 and 22–26 (see footnote 10).
58 EGEDA, pp. 41–44 and 55–60 (see footnote 14).
59 Mensajes Cortos, pp. 141–154 (see footnote 10).
60 Case S/0466/12, Endesa Instalación, pp. 25 and 26 (see footnote 10).
61 See also, for example, Case S/0501/13, Continental Automotive, 15 October 2015, p. 31.
States and in the United States.\textsuperscript{62} The NMCC concluded that such fees had an exploitative effect on concert promoters and could indirectly prejudice consumers by leading to higher ticket prices.\textsuperscript{63}

V REMEDIES AND SANCTIONS

i Sanctions

The key provisions concerning sanctions are Articles 61 to 70 of the LDC.

As a general rule, abuse of a dominant position is considered a serious infringement punishable with a fine of up to 5 per cent of the total turnover of the infringing undertaking in the immediately preceding business year. However, when abuse of a dominant position is committed by an undertaking operating in a recently liberalised market, and such an undertaking has a market share near monopoly or it enjoys special or exclusive rights, it will be considered a very serious infringement, and the NMCC may levy fines of up to 10 per cent of such turnover.

The aggravating and mitigating circumstances provided for in the LDC are very similar to those enshrined in the 2006 Commission Fining Guidelines. Certain differences, however, exist as regards the regulation of mitigating factors: the LDC explicitly provides that the NMCC may reduce a fine due to the adoption of actions intended to repair the damage; and according to the Fining Guidelines, the Commission may reduce a fine where the undertaking provides evidence that the infringement has been committed as a result of negligence and where the anticompetitive conduct has been authorised or encouraged by public authorities or legislation.

The NMCC may also impose fines of up to €60,000 on the legal representatives and managers of the infringing undertakings and periodic penalty payments (PPPs) of up to €12,000 per day under specific circumstances.

ii Behavioural remedies

The NMCC has often adopted behavioural remedies in abuse of a dominant position cases. For instance, in the SGAE case, the SGAE was ordered to withdraw a specific clause from its contracts that was deemed unfair and discriminatory.\textsuperscript{64} In AIE, this undertaking was given two months to proceed to the publishing of the decision and to send it to certain clients, under threat of PPPs.\textsuperscript{65} In Correos, this company was given two months to grant private postal operators access to its network.\textsuperscript{66}

Moreover, the NMCC may adopt interim measures, either \textit{ex officio} or at the request of one of the parties, at any moment throughout the proceedings. These measures may consist of cease-and-desist orders or orders imposing specific obligations to prevent potential damage; or securities to ensure the availability of funds to face future damages claims. The conditions for the adoption of interim measures are the existence of \textit{fumus boni iuris} and \textit{periculum in mora}.

\textsuperscript{62} \textit{SGAE-Conciertos}, pp. 17, 18 and 22–26 (see footnote 10).
\textsuperscript{63} \textit{SGAE-Conciertos}, pp. 25 and 26 (see footnote 10).
\textsuperscript{64} \textit{SGAE}, p. 49 (see footnote 14).
\textsuperscript{65} \textit{AIE}, pp. 42 and 43 (see footnote 52).
\textsuperscript{66} \textit{Correos}, p. 41 (see footnote 10).
iii Structural remedies
Structural remedies may only be imposed in the absence of equally effective behavioural remedies or when these remedies would be more onerous for the undertaking in question than the imposition of structural remedies. The NMCC has not yet imposed this type of remedy in its Article 2 of the LDC and Article 102 of the TFEU enforcement.

VI PROCEDURE
The NMCC abuse of a dominant position infringement proceedings are regulated in Chapters I and II, Title IV of the LDC, as well as in Chapters I and II, Title II of the RDC. These proceedings are divided into two phases, before two different bodies within the NMCC: the Competition Directorate (CD), in charge of the investigation of the case and of making proposals to the Council; and the Council of the NMCC (CNMCC), with adjudicatory functions and power to issue sanctions.

Proceedings may be initiated ex officio by the CD, on its own initiative or on that of the CNMCC; or by a complaint made by any natural or legal person. In practice, investigations are commonly triggered either way. Once the CD receives information concerning a potential infringement, it may conduct a preliminary investigation (prior to the opening of formal proceedings) to determine whether it may open such proceedings. As a result, the CD may carry out inspections. Although at this stage the parties’ procedural guarantees are limited, the NMCC must abide by fundamental rights standards (e.g., impossibility to access premises without consent or a court order) and must respect legal professional privilege. The CNMCC may then adopt a decision either dismissing a case or opening formal proceedings.

Once proceedings have been opened, interested parties will have the right to access the file. The CD may carry out two types of investigatory acts: inspections at the undertaking’s premises, means of transport or in the private homes of the companies’ managers and staff (with consent or judicial authorisation); and requests for information directed at any natural or legal person. If an undertaking fails to comply with its obligation to submit to an inspection, it may be subject to a fine of up to 1 per cent of its total turnover in the immediately preceding business year. Companies are also obliged to reply to requests for information, under threat of PPPs of up to €12,000 per day. All acts and decisions adopted by the CD may be subject to appeal before the CNMCC if they breach the parties’ rights of defence or give rise to irreparable damage.

Subsequently, the CD may issue a statement of objections. Interested parties have 15 days to reply to it and to submit relevant evidence. After carrying out all necessary investigatory acts, the CD may propose a draft decision, and interested parties may submit allegations and request that an oral hearing be held before the CNMCC. This puts an end to the first phase of the proceedings and marks the beginning of the second phase before the CNMCC.

The CNMCC may order the production of evidence as well as complementary measures to clarify certain issues. It may also hold a hearing upon request of the parties. The CNMCC then issues its final decision, which may be challenged within two months before the High Court of Spain (AN), which exercises full judicial review and may adopt interim measures such as, for instance, the suspension of the decision. The adoption of
interim measures, regulated in the Law on Contentious Administrative Jurisdiction,\(^{67}\) may be requested at any stage of the judicial proceedings. These measures may remain in force until a final non-appealable judgment is issued.

Alternatively, administrative proceedings may be terminated through the acceptance of commitments proposed by the parties before the end of the 15-day period to reply to the statement of objections. While the decision as to whether to begin a commitments procedure is the responsibility of the CD, it is the CNMCC who adopts the final decision accepting, rejecting or requesting new commitments. Commitment proceedings are regulated in the NMCC Guidelines on the termination of infringement proceedings by means of commitments.\(^{68}\)

As to the timing of proceedings, while the duration of the preliminary investigation is not subject to a statutory limit, formal proceedings may not last more than 18 months and the first phase may last no longer than 12 months.

Concerning international cooperation, it suffices to note that the NMCC and the courts are subject both to Chapter IV of Regulation 1/2003 on cooperation as well as to the Commission Notice on cooperation within the Network of Competition Authorities and the Commission Notice on the cooperation between the Commission and the courts of the EU Member States.

Although the LDC empowers the NMCC to issue findings of inapplicability with regard to conduct a priori falling under Article 2 of the LDC, these powers may only be exercised \textit{ex officio} and where the public interest so requires.

Finally, it is noteworthy that there are reasonable prospects for successfully appealing NMCC decisions before the Spanish courts.

As an example, in July 2015, the AN annulled the NMCC's margin squeeze decision in \textit{Correos 2}.\(^{69}\) In \textit{Correos 2}, the NMCC concluded that Correos, the Spanish public postal services operator and owner of the public postal network, had abused its dominant position by squeezing the margins of its competitors, thereby preventing them from providing postal services to a specific category of customers, that is, to 'large customers' whose yearly budget for postal services exceeds €100,000. Citing recent case law of the EU courts, such as Post \textit{Danmark}, the AN concluded that Correos could not be held to have breached Article 2 of the LDC or Article 102 of the TFEU, because the NMCC had not demonstrated that Correos' conduct had actually or potentially excluded its competitors from the market.


\(^{68}\) The NMCC has adopted several commitments decisions in Article 2 of the LDC or Article 102 of the TFEU cases in recent years. For instance, in \textit{Estudios de Mercado Industria Farmacéutica}, the NMCC investigated whether 'multiple supply' clauses contained in some of IMS' contracts with wholesale pharmaceutical distributors for the purchase of sales data were exclusionary and gave rise to abuse of a dominant position. Pursuant to these clauses, if a distributor decided to supply sales data to competitors of IMS, (1) IMS had to be notified in advance, (2) IMS could terminate its contract with the distributor, and, in cases where IMS were not to terminate its contract with the distributor, (3) the amounts paid by IMS to the distributor would be reduced by 40 or 60 per cent depending on the number of competitors the data was sold to (price reduction clause), and (4) the terms and conditions of supply to IMS could not be less favourable than those offered to IMS' competitors (most-favoured customer clause). The NMCC terminated the proceedings after IMS committed to eliminate clauses (1), (2) and (4) from its current and future contracts, and not to increase the percentages of the price reduction clause. See Case S/DC/0567/15, \textit{Estudios de Mercado Industria Farmacéutica}, 13 July 2017, pp. 10, 11 and 31–33.

\(^{69}\) AN judgment in appeal 118/2014, 1 July 2015.
The AN stressed that a finding of illegal margin squeeze requires proof of actual or at least potential exclusionary anticompetitive effects. The AN’s judgment was upheld on appeal by the Spanish TS in a judgment of February 2018.\textsuperscript{70}

Additionally, in September 2017, the AN annulled the NMCC’s decision in Mensajes Cortos, in which the NMCC imposed fines on Telefónica, Vodafone and Orange totalling approximately €120 million for excessive pricing in relation to SMS and MMS termination services.\textsuperscript{71} The AN concluded that the NMCC had not demonstrated that the three companies held a dominant position in the wholesale SMS and MMS termination services markets for each of their respective networks. The AN noted, in particular, that the NMCC’s market definition was based primarily on a report of CMT, the Spanish telecommunications authority, and that the NMCC had failed to carry out an ex novo analysis of the relevant markets based on updated economic data. The AN also outlined a series of inconsistencies in the NMCC’s assessment of dominance, and concluded that the NMCC had failed to assess the relevance of countervailing buyer power. The AN’s judgments were upheld on appeal by the Spanish TS in three judgments of December 2018 and January 2019.\textsuperscript{72}

\section*{VII PRIVATE ENFORCEMENT}

Although private enforcement in the form of actions for damages arising from abuse of a dominant position has traditionally been fairly limited, it is slowly becoming a reality, and more and more courts are ruling against competition law infringers and considering them to be civilly liable.\textsuperscript{73} In these cases, much controversy has arisen concerning the quantification of damages, especially that of lucrum cessans. In practice, damages have been calculated on the basis of a number of often case-specific considerations. To date, no final judgments have been issued in Spain awarding damages as a result of a collective action. However, Article 11 of the Code of Civil Procedure\textsuperscript{74} recognises the possibility for consumer protection organisations to bring collective actions in representation of these. This provision may be applicable by

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{70} TS judgment in appeal 2808/2015 (5 February 2018). In this judgment, the TS confirmed that Correos’ conduct was not in breach of Article 2 of the LDC or Article 102 of the TFEU because the NMCC had not demonstrated that it could give rise to actual or potential foreclosure effects – the TS noted that Correos’ main competitor had the ability to counter Correos’ attempt to squeeze its margins. See, in particular, TS judgment in appeal 2808/2015, above, point of law 3.
\item \textsuperscript{71} AN judgments in appeals 36/2013 (1 September 2017), 40/2013 (1 September 2017) and 41/2013 (4 September 2017).
\item \textsuperscript{72} TS judgments in appeals 5720/2017 (21 December 2018), 5618/2017 (8 January 2019) and 6552/2017 (20 December 2018). In these judgments, the TS concluded, in particular, that the AN’s judgments were consistent with the case law of the EU courts regarding the scope and intensity of judicial review, and that while the NMCC is entitled to take into account the reports of the Spanish telecommunications authority when defining the relevant markets, this does not exempt the NMCC from its obligation to conduct its own assessment of the relevant markets based on all the available data. See, in particular, TS judgment in appeal 5720/2017, above, point of law 3, TS judgment in appeal 5618/2017, above, point of law 3, and TS judgment in appeal 6552/2017, above, points of law 2 and 4.
\item \textsuperscript{73} See Ordóñez, D, ‘La reclamación ante los tribunales españoles de los daños sufridos en violación del Derecho europeo de la competencia’, Gaceta Jurídica de la Unión Europea y de la Competencia, January–February 2011, No. 19, p. 21.
\item \textsuperscript{74} Law 1/2000, 7 January.
\end{itemize}
\end{footnotesize}
analogy to other organisations or groups of individuals. As to the interplay between public and private enforcement, since 2007, the possibility of pursuing civil actions is no longer conditional upon the prior finalisation of the administrative procedure. However, the law does provide for the possibility of suspending the time limit to issue a judgment when the judge deems it necessary to have prior knowledge of the content of the administrative decision. Moreover, the NMCC has the power to provide information and submit observations during judicial proceedings. With regard to the effect of documents and statements made during the administrative proceedings, it has been noted that these should be interpreted in accordance with the general rules set out in the Code of Civil Procedure and may thus be used as evidence within the civil proceedings.

The new Title VI (Articles 71 to 81) of the LDC, in force since May 2017, transposes Directive 2014/104/EU into Spanish law. Article 71 of the LDC establishes that undertakings that have infringed Article 2 of the LDC or Article 102 of the TFEU are responsible for damages. Article 71(2)(b) extends the doctrine of parental liability to private damages actions, and Article 73 clarifies that when two or more undertakings infringe competition law through joint behaviour, they are jointly and severally liable for the harm caused. Article 72 of the LDC establishes that any victim of an infringement of Article 2 of the LDC or Article 102 of the TFEU has the right to claim full compensation for the harm caused before the civil courts, including for actual loss (damnum emergens) and for loss of profit (lucrum cessans), as well as interest. Articles 72 and 78 clarify that the right to obtain full compensation may not lead to overcompensation, whether by means of punitive, multiple or other types of damages, and that a victim’s compensation for actual loss must not exceed the overcharge borne by such victim. The burden of proof for the quantification of harm is on the plaintiff, who must bring an action for damages within a five-year period. Article 75 of the LDC establishes that a finding of a competition law infringement made in a final NMCC decision or judgment of the Spanish courts constitutes irrefutable evidence of an infringement for the purposes of an action for damages before the Spanish courts. If the national competition authority or the courts of another EU Member State have found a competition law infringement, there is a iuris tantum presumption that there has been an infringement for the purposes of an action for damages before the Spanish courts. Finally, Articles 77 and 81 regulate the effects of consensual dispute resolution.

VIII FUTURE DEVELOPMENTS

In 2013, the Spanish authorities merged a number of regulatory authorities, including the former National Competition Commission, into a single institution, the NMCC. The aim of this institutional reform was, primarily, to maximise economies of scale, attain synergies and reduce public expenditure. While such reform gave rise to a new institutional structure, it did not bring about any substantive changes to antitrust enforcement. In

December 2016, however, a proposal was tabled in the Spanish Parliament to divide the NMCC into two independent bodies, namely the Independent Markets Regulation Authority, which would be in charge of sector-specific market regulation; and the Independent Competition Authority, which would be in charge of competition law enforcement. The aim of this proposal was to guarantee the independence of and separation between the regulatory authority and the competition authority. In March 2017, the Ministry of Economy launched a public consultation process regarding the possible division of the NMCC into two independent bodies, namely the Independent Administrative Authority for the Supervision and Regulation of the Markets, and the Independent Administrative Authority for Competition. The Ministry of Economy stated that the aim of this proposal is to adapt the institutional architecture for competition law enforcement to international best practices, to strengthen the independence of the regulatory and competition authorities, and ultimately to improve governance. At this stage, it remains unclear whether or when such a reform will take place.

Additionally, as announced in its Action Plan for 2018, in 2018 the NMCC created an economic intelligence unit in order to strengthen its *ex officio* investigations of potentially anticompetitive conduct.

Finally, in its Action Plan for 2019, the NMCC announced, inter alia, that it intends to:

- adopt additional measures to strengthen the NMCC’s ability to detect potentially anticompetitive conduct *ex officio* (e.g., through the use of technology); and
- strengthen the NMCC’s supervision in specific sectors, including the banking, rail passenger transport, telecommunications and postal sectors.  

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78 See Plan de Actuación 2019 de la Comisión Nacional de los Mercados y la Competencia, pp. 14–16.
I INTRODUCTION

Chapter 2, Article 7 of the Swedish Competition Act\(^2\) prohibits the abuse of a dominant position. The provision reads as follows: ‘Any abuse by one or more undertakings of a dominant position on the market shall be prohibited.’

Such abuse may, in particular, consist in:

a directly or indirectly imposing unfair purchase or selling prices, or other unfair trading conditions;
b limiting production, markets or technical development to the prejudice of consumers;
c applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
d making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which by their nature or according to commercial usage, have no connection with the subject of such contracts.’

The Competition Act entered into force on 1 November 2008. The prohibition against the abuse of a dominant position has remained intact since it was introduced in the former Competition Act\(^3\) in 1993. It corresponds to Article 102 of the Treaty on the Functioning of the European Union (TFEU), which applies in parallel to the Swedish provision if the dominant position covers a substantial part of the internal market and the abuse may affect trade between EU Member States.

The Competition Act is enforced by the Swedish Competition Authority (SCA). Neither the legislator nor the SCA has issued any formal guidance on the interpretation of the prohibition. In practice, the SCA and the Swedish courts interpret Swedish and EU case law.

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1 Marcus Glader is a partner and Trine Osen Bergqvist is a specialist at Vinge.
3 The former Competition Act (1993:20).
II YEAR IN REVIEW

i Judgments from the Swedish courts

Last year, one judgment regarding abuse of a dominant position was delivered by the court of last instance (i.e., the Patent and Market Court of Appeal (PMCA)) and one by the Patent and Market Court (PMC), which is the court of first instance. Hearings in *Nasdaq* took place in the PMCA between 5 March and 11 April 2019, and the final judgment is still to be delivered.

**Swedish Match North Europe AB v. SCA**

The *Swedish Match* case stems from October 2012, when Swedish Match introduced a new system for shelf labels in its coolers for wet tobacco (snus). Swedish Match owned most of the snus coolers placed in the retailers’ stores but had agreed to let competing suppliers use parts of the shelf space to sell their competing brands. The new shelf label system forced the competitors to either follow a detailed shelf label template, or have their labels replaced by generic grey and white labels. According to Swedish Match, the system was introduced to make the increasingly disparate and gaudy labelling tidier and more uniform, but the SCA, relying on internal documents from Swedish Match, found that the purpose was to reduce the visibility of the price and restrict competition from low price competitors.

The PMC imposed fines amounting to 38 million Swedish kronor. On appeal, the PMCA upheld the finding that the shelf label system had the capacity to restrict competition but found that the system was objectively justified.

The conduct’s capability to restrict competition, which was one of the core questions in the case, was assessed rather briefly by the PMCA. The PMCA merely stated that the restricted marketing possibilities ‘may’ have effects on competition and that the shelf system was ‘thus’ capable of restricting competition. This part of the judgment is clearly questionable from an EU law perspective. In *Post Danmark II*, the Court of Justice of the European Union (CJEU) stated (in the context of rebates) that the anticompetitive effects of a conduct must be ‘likely’ or ‘probable’ in order for the conduct to fall within the scope of Article 102 TFEU.

The shelf system was, however, somewhat surprisingly deemed to be objectively justified. Traditionally, it has been quite difficult for dominant companies to show that an exclusionary conduct is objectively necessary, but the PMCA found that Swedish Match, as owner of the coolers, was entitled to require that the coolers were not used in a way that could constitute an infringement of the Tobacco Act.

**Svenska Förpacknings- och Tidningsinsamlingen AB v. SCA**

On 21 January 2019, the PMC upheld an order issued by the SCA against Svenska Förpacknings- och Tidningsinsamlingen AB (FTI) to recall a termination of an agreement with its competitor, TMResponsibilities (TMR).

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4 1 April 2018 to 31 March 2019.
5 Case PMT 1443-18, *SCA v Nasdaq AB et al*.
6 Case PMT 1988-17, *Swedish Match North Europe AB v. SCA*.
8 Case PMÄ 2741-18, *FTI AB v. SCA*. 

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Swedish rules on producer responsibility require producers to ensure that their packaging materials are collected and recycled. FTI and TMR offer producers the services needed to comply with this responsibility. In 2012, FTI agreed to give TMR access to its nationwide collection system for household packaging. When FTI terminated the agreement without stating reason in 2016, the SCA found that the termination constituted an abuse of a dominant position and ordered FTI to recall the termination.

The Court stated that the Bronner criteria are not strictly applicable when the refusal to supply concerns existing customers but noted that the criteria should still be relatively strict. In the absence of an anticompetitive strategy or a particularly improper behaviour, it would not be sufficient to show that the customer is no longer able to compete with the dominant. It would normally be necessary to show that the termination is capable of eliminating all effective competition in the relevant market. The PMC concluded that there were no actual or potential alternatives to FTI’s infrastructure and that the termination constituted an abuse of a dominant position.

FTI’s contention that the termination was objectively justified was rejected by the Court. FTI argued that the lack of control over the packages collected by TMR negatively affected its ability to apply high environmental standards, establish consumer confidence and protect its trademark; however, the Court concluded that it was not for the dominant company to decide general standards for customer information or general recycling goals. The Court also noted that there were no indications of disloyal or improper behaviour from TMR’s side.

The judgment has been appealed.

ii SCA cases

Last year, the SCA did not adopt any infringement decisions regarding abuse of a dominant position. One investigation of suspected loyalty rebates and exclusivity arrangements in the coffins industry was closed without the finding of an abuse.

Currently, the SCA has two active investigations; one against SJ regarding online advertisement and sale of train tickets and one against the city of Gothenburg regarding private app providers’ access to public car parks.

iii MARKET DEFINITION AND MARKET POWER

i Market definition

Neither the legislator nor the SCA have adopted guidelines on how to define the relevant market. In its decisions and judgments, the SCA and the courts regularly refer to EU case law and the Commission’s notice on the definition of the relevant market.

10 1 April 2018 to 31 March 2019.
12 31 March 2019.
15 See, for instance, the Market Court’s judgment in MD 2013:5, TeliaSonera v. SCA, 12 April 2013, p. 38; and the PMC’s judgments in Case PMT 16822-14, SCA v. Swedish Match North Europe, 8 February 2017.
The purpose of the market definition in abuse cases is to assess whether the undertaking in question has the possibility to prevent effective competition from being maintained on the market by giving it the power to behave to an appreciable extent independently of its competitors.\textsuperscript{16}

The small but significant and non-transitory increase in price (SSNIP) test has been accepted by the courts as an established method for defining the relevant market.\textsuperscript{17} A SSNIP test may, however, be misleading in cases regarding abuse of dominance if the test is based on a price that is already above the competitive level (the ‘cellophane fallacy’), or if the market is characterised by strong network effects.\textsuperscript{18} In practice, the assessment is based on a number of circumstances, including not only quantitative evidence of substitution, but also qualitative aspects such as the qualities of the products and their intended use.\textsuperscript{19} Market definitions in previous cases may provide guidance, but are not precedential.\textsuperscript{20}

\section*{ii Market power}

The term ‘dominant position’ is interpreted the same way as it is in Article 102 TFEU. As regards a definition of the term, the preparatory works to the previous Competition Act (preparatory works)\textsuperscript{21} refer to the judgment of the CJEU in \textit{United Brands}, in which a dominant position was defined as:

\begin{quote}
\textit{a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition from being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.}\textsuperscript{22}
\end{quote}

The term ‘dominant position’ includes both single and collective dominance.\textsuperscript{23}

The assessment of dominance is based on a number of circumstances that are not individually decisive. A company’s market shares are a natural starting point for the analysis. Market shares above certain thresholds may lead to presumptions of dominance.\textsuperscript{24}
Despite the existence of market share presumptions, the assessment of dominance is usually based on a full assessment of all the relevant facts in the case, including, in particular:

- barriers to entry and expansion;
- advantages (financial, technological, regulatory, historical, etc.);
- vertical integration;
- presence in neighbouring markets;
- whether the company is an unavoidable trading partner; and
- whether customers have counterweighing buyer power.

In two recent cases regarding abuse of a dominant position, the PMC has refrained from relying on a market share presumption, despite high market shares. The courts have also referred to the European Commission’s guidance paper on exclusionary abuses for further guidance on the term ‘dominant position’.

IV ABUSE

i Overview

The prohibition against the abuse of a dominant position does not define the term ‘abuse’; the type of abuses mentioned in the prohibition are only examples, and do not constitute an exhaustive list. For a definition of abuse, both the SCA and the Swedish courts regularly refer to the CJEU’s judgment in Hoffman-La Roche, in which an abuse was defined as:

> an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of markets where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

The prohibition covers both exclusionary and exploitative abuses.

Over the past decade, the enforcement of the prohibition has gradually shifted from being rather legalistic to being more effect-based. In 2016, the SCA adopted a new prioritisation policy for its enforcement, which states that the most important factor for prioritising cases is the potential harm to competition and consumers. It may also be noted that the PMC in a recent judgment questioned the existence of ‘naked restrictions’, that is, unilateral restrictions that are so harmful to competition that there is no need to show anticompetitive effects to establish an abuse.
Evidence of an anticompetitive strategy is not sufficient *per se* to establish an abuse, but in practice it seems to play a rather important role.\(^{30}\) The SCA has used evidence of anticompetitive intent to argue that conduct does not constitute competition on the merits,\(^{31}\) and that a dominant company has considered it likely that the conduct is capable of having anticompetitive effects.\(^{32}\) The PMC has taken evidence of anticompetitive intent into account in its assessment of a conduct’s effects on competition.\(^{33}\)

**ii Exclusionary abuses**

Although the prohibition covers both exclusionary and exploitative abuses, the SCA’s enforcement focuses on exclusionary abuses. The SCA’s enforcement policy states that the SCA prioritises unilateral conduct that is capable of excluding effective competition. When deciding whether conduct is sufficiently harmful to warrant an investigation, particular consideration is given to the share of the market affected by the conduct and, in cases where the foreclosure concerns an input, to what extent the input is essential to enable effective competition. When it comes to price-based conduct, the SCA considers whether the pricing is capable of foreclosing as efficient competitors.\(^{34}\) Therefore, although as-efficient competitor tests are not strictly necessary to establish an abuse, the SCA regularly performs such tests in cases regarding price-based abuse to decide whether an intervention is warranted.\(^{35}\)

**iii Exploitative abuses**

Exploitative abuses are covered by the prohibition. Cases regarding pure exploitative conduct are, however, rare, in particular in public enforcement. Following the adoption of the SCA’s new prioritisation policy in 2016, which does not even mention exploitative abuse, the SCA has not initiated any investigations or legal proceedings regarding pure exploitative conduct. Cases regarding exploitative abuse are more likely to occur in private litigation.\(^{36}\)

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\(^{30}\) In Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, several pages of the PMC’s judgment are devoted to the question of whether the conduct was based on an anticompetitive strategy.


\(^{32}\) ibid, p. 385 with further references.

\(^{33}\) See the PMC’s judgment in Case PMT 16822-14, *SCA v. Swedish Match North Europe AB*, 8 February 2017, p. 183.

\(^{34}\) See footnote 28.


\(^{36}\) The most recent example of a case regarding pure exploitative abuse is a case from 2011 concerning a ‘sign fee’ imposed by the airport operator Swedavia for pre-ordered taxis at Arlanda Airport. The fee was imposed on taxis that picked up customers in the arrival hall with a sign with the customer’s name on it. When the complaint was rejected by the SCA on priority grounds, the complainant brought successful private actions to the Market Court. In a judgment delivered on 23 November 2001, MD 2011:28, the Market Court found that there was no ‘necessary connection’ between the fee and the pre-ordered taxi traffic. Without considering whether the fee was excessive, the Court found that the fee was ‘unfair’ and thus abusive. Following the judgment, the SCA submitted a summons application with a request for fines. In its judgment delivered on 9 June 2016 in Case T 9131-13, the request was dismissed by Stockholm City Court. The Court agreed that the fee was anticompetitive, but found that it was objectively justified by capacity issues at the airport. The SCA chose not to appeal the judgment.
iv Discrimination

Like Article 102 TFEU, the Swedish provision prohibits the application of ‘dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage’. The prohibition applies not only to discriminatory prices, but also to other discriminatory terms. It covers discrimination of a dominant company’s competitors (first-line discrimination) as well as discrimination of its customers (second-line discrimination). The latter form of discrimination (sometimes referred to as pure discrimination) is less likely to lead to foreclosure of effective competition, and thus less likely to be prioritised by the SCA. Such cases are more likely to occur in private litigation.

V REMEDIES AND SANCTIONS

i Overview

The main remedies and sanctions against abuse of a dominant position are:

a administrative fines;

b fine orders;

c orders imposing obligations (under threat of a fine for default);

d commitment decisions;

e nullity; and

f damages.

ii Administrative fines

An undertaking that intentionally or negligently infringes the prohibition against abuse of a dominant position may be ordered to pay administrative fines. The SCA does not have the authority to impose fines itself, but the PMC may do so at the SCA’s request.

When determining the amount of the administrative fines, account shall be taken of the gravity and duration of the infringement, and possible aggravating or mitigating circumstances. The gravity is based primarily on the nature of the infringement, the size and significance of the market, and the infringement’s actual or potential impact on competition. The amount may be increased if there are aggravating circumstances (if the company has persuaded other companies to participate, or has played a leading role in the infringement) and reduced if there are mitigating circumstances (if the company’s participation has been limited). Besides circumstances referable to the infringement, particular account shall

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37 See footnote 28.
38 See, for instance, MD 2011:2, Stockholm Transfer Taxi in Stockholm AB v. Swedavia AB, 2 February 2011, concerning the alleged discriminatory allocation of taxi lanes at Arlanda Airport. When the complaint was rejected by the SCA on priority grounds, the complainant brought private actions in the Market Court. Considering that the taxi space outside Arlanda was limited, the Market Court agreed that Swedavia was obliged to ensure that the allocation of taxi lanes was neutral from a competition perspective, but it did not agree that the allocation was discriminatory. The Court found that the allocation was based on customer demand and that it did not lead to a competitive disadvantage for the complainant. Accordingly, the conduct did not constitute an abuse.
39 Chapter 3, Article 5 of the Competition Act.
40 Chapter 3, Article 8 of the Competition Act.
41 ibid.
42 Chapter 3, Articles 9–10 of the Competition Act.
be taken of the undertaking’s financial status, whether the undertaking has previously infringed any of the competition prohibitions and whether it has quickly discontinued the infringement.  

The SCA has published a memorandum describing its method of setting administrative fines. The purpose of the memorandum is to provide greater clarity on how the SCA interprets and applies the provisions on administrative fines in the Competition Act. The memorandum does not pre-empt the interpretations made by the courts.

The fines may not amount to more than 10 per cent of the undertaking’s total annual turnover. The highest fine ever imposed by final judgment in a Swedish case concerning abuse of dominance is 35 million Swedish kronor.

iii Fine order

Instead of bringing legal proceedings requesting administrative fines, the SCA may in some cases issue a fine order with the same effect as a legally binding judgment. Such orders may only be issued if the undertaking consents thereto and the SCA considers that the material circumstances regarding the infringement are clear. According to the preparatory works, fine orders should not be used in cases with legal questions of precedential interest.

The opportunity for the SCA to issue fine orders has only been used in a limited number of cases. To date, the SCA has not issued any fine orders in cases regarding abuse of a dominant position.

iv Orders imposing obligations

A company that abuses its dominant position may be ordered by the SCA to terminate the abuse. According to the preparatory works, such orders may not be more far-reaching than what is necessary to eliminate the anticompetitive effects of the infringement. The SCA may impose behavioural obligations, such as the obligation to end an agreement or stop a certain conduct, but it may not impose structural obligations.

If there are ‘particular grounds’, the SCA may issue an interim order for the period until a final decision is adopted. According to the preparatory works, interim measures should be taken in cases where the infringement is ‘more serious’ and may lead to ‘significant negative effects’ if the company is not ordered to terminate the conduct immediately. Account shall also be taken of the effects on the company addressed by the order.

A final or interim order to terminate an abuse may be imposed under threat of a fine for default.

43 Chapter 3, Article 11 of the Competition Act.
45 Chapter 3, Article 6 of the Competition Act.
46 MD 2013:5, TeliaSonera AB v. SCA, 12 April 2013.
47 Chapter 3, Articles 16–19 of the Competition Act.
49 Chapter 3, Article 1 of the Competition Act.
51 Chapter 3, Article 3 of the Competition Act.
53 Chapter 6, Article 1 of the Competition Act.
Commitment decision

If the undertaking investigated offers commitments, the SCA may adopt a commitment decision stating that there are no longer grounds for action. As long as the decision applies, the SCA may not issue orders imposing obligations regarding the conduct covered by the decision.

Special right to legal action

If the SCA decides not to investigate a complaint, or to end an investigation without issuing an order, undertakings affected by the conduct are entitled to institute private proceedings before the PMC, and to request that the court orders the company to end the abuse.

Nullity

An agreement that infringes the prohibition against abuse of a dominant position is considered null and void. This means that the agreement, or at least the infringing provisions thereof, cannot be enforced by a court.

Damages

An intentional or negligent abuse of a dominant position may lead to liability to pay damages.

PROCEDURE

Overview

The Swedish procedural rules differ significantly from the EU’s procedural rules and from those of other EU Member States. In particular, the decision-making powers of the SCA are less extensive than those of the European Commission and most other European competition authorities. As regards decisions to impose administrative fines, a pure judicial model applies, meaning that the first instance decision (both on substance and fines) is taken by the court. The SCA may take decisions requiring that an infringement be brought to an end, but if such orders are appealed, the courts are entitled to make a full review of the case.

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ii SCA investigations

SCA investigations are governed by the Competition Act and the Administrative Act.59 Subject to certain limitations set out in the Public Access to Information and Secrecy Act,60 a party to an investigation has extensive rights of access to files.

Most SCA investigations regarding abuse of a dominant position start with a tip-off or a complaint from a customer, supplier or competitor. Ex officio investigations occur, but are quite rare. The SCA does not investigate all tips and complaints that it receives: the process of selecting cases for investigation is described in the SCA’s Prioritisation Policy for Enforcement.61 If the SCA decides not to open an investigation, the case is closed with no further explanation other than a short reference to the Authority’s prioritisation policy. If the SCA decides to open an investigation, the case is allocated to the Market Abuse Unit, a specialised unit that handles cases regarding abuse of dominance, vertical restraints and competition neutrality.

The SCA has extensive investigative powers. It may order parties and third parties to provide information and documents, conduct interrogations and, upon prior authorisation from the PMC, conduct unannounced inspections at the premises of companies.62 Unlike the Commission, the SCA is, however, not entitled to impose sanctions for the submission of incorrect, incomplete or misleading information.

Before the SCA institutes proceedings with request for fines, the party must be given the opportunity to comment on the SCA’s draft summons application.63 The Competition Act contains no corresponding provision regarding orders to impose obligations, but the SCA has nonetheless developed a practice of communicating draft orders before adopting a final decision.

A party that receives a draft summons application or a draft order may request an oral hearing of the case. The main purpose of the oral hearing is to complete the party’s written submissions with oral comments and ensure that the SCA’s decision is well-supported.64

When the investigation is completed, the main findings and a proposed decision are presented to the Director General, who makes the final decision on whether to intervene or close the case.

The SCA does not have the opportunity to give negative clearance. Thus, when the SCA decides to close a case, the closing decision normally states that the SCA has not taken a final stand on whether the conduct constitutes an infringement.

The duration of the SCA’s investigations varies from case to case, depending on the complexity of the case and whether the investigation leads to the finding of an infringement. Investigations regarding abuse of dominance tend to take longer than investigations of other competition infringements. In cases that lead to the finding of an abuse, the investigation may take several years.65

60 The Public Access to Information and Secrecy Act (2009:400).
61 See footnote 28.
62 Chapter 5, Articles 1 and 3 of the Competition Act.
63 Chapter 3, Article 5 of the Competition Act.
64 The oral hearing is described on the SCA’s website (Swedish only), www.konkurrensverket.se/omossmeny/om-oss/konkurrensverkets-uppdrag/sa-arbetaer-vi/kevallitetsakring-av-beslut/muntligt-forfarande/.
65 From recent investigations leading to the finding of an abuse, it may be noted that the SCA’s investigation of FTT, Swedish Match and Nasdaq took approximately one and a half years, two and a half years and four and a half years, respectively.
iii Early resolutions and settlement procedures
The SCA does not have the possibility to make settlement agreements. If a party consents thereto, the SCA may issue a fine order with the same effect as a legally binding judgment, but the SCA is not entitled to grant reductions in the fines in return for such consent.

iv Appeals and judicial review
The right to appeal decisions adopted by the SCA is governed by Chapter 7, Article 1 of the Competition Act. Orders by the SCA to impose obligations may be appealed. Decisions not to investigate a case may not be appealed, but undertakings affected by the conduct may institute private proceedings and request that the court issues an order to end the conduct.66 Fine orders may, under certain circumstances, be set aside.67

As of 1 September 2016, the competent court in competition law cases is the PMC, a division of Stockholm District Court that is specialised in competition, patent and market law.68

Judgments and decisions by the PMC may be appealed to the PMCA, which is a division of Svea Court of Appeal. Leave to appeal is required. Decisions and judgments by the PMCA in competition cases may normally not be appealed. The PMCA may, however, allow the judgment to be appealed to the Supreme Court if the Supreme Court’s review is important from a precedential perspective.69 To date, this opportunity has only been used in cases concerning procedural rights.

The courts’ review is not limited to a legal review: both the PMC and the PMCA make a full review of the case.

The number of judgments regarding abuse of a dominant position delivered by the courts following the introduction of the new court system is too limited to make any general conclusions regarding the length of the court proceedings in these types of cases.70

66 Chapter 3, Article 2 of the Competition Act.
67 According to Chapter 3, Article 19 of the Competition Act, a fine order for which consent has been given shall upon appeal be set aside under the preconditions in Chapter 59, Section 6, First Paragraph of the Code of Judicial Procedure.
68 Chapter 8, Article 1 of the Competition Act.
70 Following the entry into force of the new court system, the PMC has delivered three judgments regarding abuse of a dominant position: Swedish Match (PMT 16822-14), 8 February 2017, Nasdaq (PMT 7000-15), 15 January 2018 and FTI (PMÅ 2741-18), 21 January 2019. In these cases, the proceedings in PMC lasted between one year (FTI) and two years and eight months (Nasdaq). The PMCA has delivered only one judgment regarding abuse of a dominant position. In Swedish Match (PMT 1988-17), in which a final judgment was delivered on 29 June 2018, the proceedings in PMCA lasted approximately one and a half years.
VII  PRIVATE ENFORCEMENT

A company that intentionally or negligently abuses a dominant position may be held liable to pay damages for the harm caused. The right to claim damages is governed by the Competition Damages Act,71 which implements the EU Directive on Competition Damages into Swedish law.72 When the Competition Damages Act entered into force on 27 December 2016, it replaced the previous provisions on competition damages in the Competition Act.

The liability covers compensation for actual loss, loss of profit and interest. The claimant has to demonstrate the existence of an abuse, the extent of the harm, and the existence of a causal link between the abuse and the harm. As opposed to cartels, abuse of a dominant position is not presumed to cause harm. Following the entry into force of the Competition Damages Act, final infringement decisions of the SCA or Swedish courts constitute full proof that an infringement has actually occurred.73

Collective actions are available and governed by the Swedish Group Proceedings Act,74 which is based on an opt-in system.

Last year,75 no judgments were handed down in cases regarding claims for damages based on abuse of a dominant position. One stand-alone case, which was rejected by the PMC in February 2018, has been appealed and is still pending.76

There are no general prohibitions against third-party funding of private litigation.

VIII  FUTURE DEVELOPMENTS

A key aspect for the future will be how abuse cases are assessed by the new courts in Sweden.77 Following the entry into force of the new court system on 1 September 2016, only one case on abuse of dominance has been finally decided. As described above, the SCA’s action against Swedish Match was ultimately rejected. Even outside the scope of Article 102, it is notable that the PMCA has sided with the defendants in all competition law cases it has heard. The final judgments in Nasdaq and FTI77 are therefore followed with great interest. Considering the complexity, time and extensive resources required to investigate cases regarding abuse of a dominant position, the outcome of these cases is likely to influence the SCAs future priorities

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71 The Competition Damages Act (2016:964).
73 The Competition Damages Act applies to infringements conducted and harm that arose after the Act entered into force on 27 December 2016.
75 1 April 2018 to 31 March 2019.
76 Judgment by the PMC in Case PMT 16599-15, Net at Once Sweden AB v. Göteborg Energi Gothnet AB, 2 February 2018. The case stems from 2009, when the city of Gothenburg procured data communication services. Gothnet, which owned fibre connections to many of the addresses specified in the procurement, charged its competitor Net at Once a wholesale access price that was higher than the price Gothnet offered in the tender. Net at Once argued that Gothnet had abused its dominant position by way of discrimination, margin squeeze or unfair trading conditions. The PMC rejected the claim. The Court concluded that the relevant wholesale market was broader than the fibre covered by the specific procurement, and Gothnet did not have a dominant position in this broader market.
77 The new court system is described in Section VI.
in this field. The high standards of proof in cases regarding administrative fines may make the SCA more inclined to focus its efforts on bringing ongoing infringements to an end, as it did in *FTI*, rather than bringing action with request for fines for historical infringements.
I INTRODUCTION

i General legal framework

In Switzerland, unilateral practices of dominant undertakings are regulated by the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act). Similar to Article 102 of the Treaty on the Functioning of the European Union (TFEU), Article 7 of the Cartel Act contains both a general clause (Paragraph 1) and a non-exhaustive list of examples of potentially abusive practices (Paragraph 2).

According to Article 7, Paragraph 1 of the Cartel Act, dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or if they disadvantage trading partners. Dominant undertakings are defined as one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market (Article 4, Paragraph 2 of the Cartel Act).

Article 7, Paragraph 2 of the Cartel Act further enumerates a (non-exhaustive) list of practices that can in particular be considered as unlawful, as follows:

- any refusal to deal (e.g., refusal to supply or to purchase goods);
- any discrimination between trading partners in relation to prices or other conditions of trade;
- any imposition of unfair prices or other unfair conditions of trade;
- any undercutting of prices or other conditions directed against a specific competitor (predatory pricing);
- any limitation of production, supply or technical development; or
- any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.

Article 7 of the Cartel Act has been conceived on the basis of Article 102 of the TFEU. As a result, although Article 7 of the Cartel Act constitutes independent Swiss law, the case law developed in the European Union in regard to Article 102 of the TFEU may serve as an interpretative source for the assessment of certain abusive practices. Nevertheless, there are several differences between EU and Swiss law in the context of abuse of dominance, mainly with regard to the sanctioning regime for abusive practices.

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1 Marcel Dietrich and Franz Hoffet are partners and Allegra Arnold is an associate at Homburger AG.
In addition to the Cartel Act, the Federal Price Surveillance Act of 20 December 1985, which aims at the avoidance of abusive pricing, may be relevant for dominant undertakings.

Finally, in the context of abusive pricing, the Federal Act against Unfair Competition of 19 December 1986 should be taken into consideration, in particular as regards dumping prices (Article 3, Paragraph 1, Letter f of the Unfair Competition Act).

ii Interplay between the Cartel Act and other statutory provisions
The interplay between the Cartel Act and other regulations is governed by Article 3 of the Cartel Act: according to Article 3, Paragraph 1 of the Cartel Act, statutory provisions that do not allow for competition in a certain market take precedence over the provisions of the Cartel Act. This is particularly the case for provisions that establish an official market or price system, as well as provisions that grant special rights to specific undertakings to enable them to fulfil public duties. In practice, such statutory provisions usually do not establish a fully comprehensive market or price system. The extent of the applicability of the Cartel Act thus needs to be assessed on a case-by-case basis.

Regarding intellectual property, the Cartel Act does not apply to effects on competition that result exclusively from the legislation governing intellectual property. However, import restrictions based on intellectual property rights are covered by the Cartel Act (in Article 3, Paragraph 2).

iii Sector-specific regulations
Special rules apply to certain industry sectors.

In the telecommunications sector, the Federal Telecommunications Act of 30 April 1997 provides for specific ex ante obligations for dominant telecommunication providers. In particular, providers of telecommunications services that have a dominant position in the market must provide access to their facilities and services to other providers in a transparent and non-discriminatory manner at cost-oriented prices. If the question of dominance in the market must be assessed, the Federal Office of Communications shall consult the Competition Commission (ComCo). The latter may publish its position. While bundling of services is as such permissible for dominant telecommunication providers, they must also offer the services included in the bundle individually.

In the radio and television sector, the Federal Radio and Television Act of 24 March 2006 lays down an obligation for dominant undertakings active in the radio and television market to provide the licensing and supervisory authorities, free of charge, with certain information. Moreover, the Act allows for measures to be taken if, as a result of its abuse of a dominant position, an undertaking has jeopardised diversity of opinion and programming.

In the electricity and postal sectors, specific regulations govern historic monopolist providers to ensure access to other suppliers.

Despite the special rules applicable to certain industry sectors, these rules do not preclude the application of the Cartel Act. Rather, sector-specific regulations shall be taken into account in the application of the Cartel Act. Exceptionally, sector-specific provisions effectively aiming at excluding competition may lead to the non-applicability of the Cartel Act.

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2 Federal Supreme Court, RPW/DPC 2011/3, p. 440, Mobilfunkterminierungspreise.
3 Federal Supreme Court, RPW/DPC 2015/1, p. 131, Hors-Liste Medikamente.
II YEAR IN REVIEW

The main case involving abuse of dominance behaviour published in Switzerland in 2018 concerns the area of cable television connections. In December 2017, the ComCo handed down its decision against Geneva-based television and radio network provider Naxoo, holding that the latter had abused its dominant position in the market for cable television connections in the geographic area of the city of Geneva (and certain surrounding communes). The ComCo found that Naxoo had abused its dominant position towards real estate owners, producers and third-party suppliers of television system connections, as well as end customers by, on the one hand, imposing unfair conditions of trade and, on the other hand, by hindering third-party suppliers in their respective downstream markets. Concerning the imposition of unfair trading conditions, the ComCo held that Naxoo, when physically connecting a property to the cable television network, ensured in its contract with the real estate owners that Naxoo could exclusively use the physical cable connection to the properties concerned. By doing so, Naxoo prevented real estate owners from using the physical cable connection to their properties by concluding contracts with third-party providers, in particular with satellite television providers. Correspondingly, third-party providers of other television connections (e.g., satellite television connections) were hindered in competing in their downstream market. In addition, the ComCo found that the third-party providers’ technical development was being limited. For the above-mentioned behaviour, the ComCo imposed a fine of approximately 3.6 million Swiss Francs upon Naxoo. However, the decision is not final as at the time of writing, since Naxoo filed an appeal before the Federal Administrative Court where the case is currently pending.

Further (potential) abuse of dominance cases published in 2018 were closed after a preliminary investigation by the Secretariat of the ComCo (Secretariat). No fines were imposed. Nevertheless, these cases are briefly discussed below.

In a preliminary investigation of the Secretariat against watch manufacturers Swatch Group, LVMH, Rolex, Richemont, Audemars Piguet and Breitling, the Secretariat examined the questions of whether the refusal by these watch manufacturers to supply spare parts to independent watch manufacturers could be problematic under Swiss competition law. After having performed a market enquiry on the functioning and the effects of the systems of aftersales services in place, the Secretariat found that these systems could be qualified as selective distribution systems since the aftersales service partners had to fulfil specific (qualitative) criteria to be admitted to the system. The Secretariat considered that such qualitative selective distribution systems did not lead to a significant restriction of competition. However, the Secretariat also noted that the assessment might be different for watch manufacturers having linked the supply of watches to the provision aftersales services. According to the Secretariat, such agreements may lead to a significant restriction of competition and it is unclear whether they could be justified on grounds of economic efficiency. Ultimately, the Secretariat closed the preliminary investigation without further consequences in August 2018. The fact that the EU Commission was investigating a similar case involving the same watch manufacturers presumably played an important role in the assessment by the Secretariat. In fact, the EU Commission found that the agreements concerning aftersales services were lawful and did not constitute an abuse of a dominant position since they were based on qualitative criteria that could be qualified as objective, proportionate and applied uniformly. In a similar context, in March 2018, the Federal Supreme Court handed down a landmark judgment in a case through which Swatch Group sought, as declaratory relief, confirmation from civil courts that it was
under no obligation to supply a British company with spare parts for watches.\(^4\) By way of background, Swatch Group terminated its supply agreement for spare parts with the British company in 2015, which caused the latter to threaten Swatch Group with court proceedings before the London courts to oblige Swatch Group to continue its supply agreement. In the meantime, Swatch Group had already introduced a court action in Switzerland aimed at having it confirmed that it was under no obligation to supply the British company concerned with spare parts. The proceedings in Switzerland were limited to the procedural question of the existence of a sufficient legal interest in bringing a negative declaratory action before the Swiss civil courts. While the first instance court held that Swatch Group was lacking such interest, the Federal Supreme Court, on appeal, overturned this decision as well as its previous practice and found that, at least in an international context, the interest of a party to seek negative declaratory relief before Swiss courts was given.

Another preliminary investigation of the Secretariat was in the automotive sector, and was directed against the car importer and wholesaler, AMAG. As a result of the preliminary investigation, the Secretariat found that AMAG privileged service partners that were also distribution partners, for aftersales services. In this regard, the Secretariat recommended that, in the future, AMAG should also cooperate with service partners that are not also distributors. Moreover, the Secretariat noted that AMAG had terminated several service and distribution agreements with independent repairers and distributors. However, the termination of these agreements was found to be compliant with Swiss competition law; in particular, with the Notice on vertical agreements in the area of motor vehicles. Since AMAG committed to implement the recommendations issued by the Secretariat, the preliminary investigation was closed without further consequences in October 2018.

Finally, in the mobile payment sector, the Secretariat intervened against Apple regarding the latter’s mobile payment app, Apple Pay. The Secretariat found that, on Apple’s iPhones and Apple Watches, there was a risk that Apple Pay was automatically activated when users tried to pay via the mobile payment app TWINT. Such activation by default was held to interrupt the payment process via TWINT. Following the Secretariat’s intervention, Apple committed to provide a technical solution to TWINT in order to suppress the automatic activation of Apple Pay when a payment process via TWINT is commenced. It may be suspected that the Secretariat’s intervention was based on a potential abuse of a dominant position by Apple. Following Apple’s commitment, the Secretariat closed its preliminary investigation against Apple without further consequences. In a similar context, in November 2018, the ComCo opened an investigation against several Swiss banks and credit card issuers based on a suspected boycott of Apple Pay and other international mobile payment solutions. The case is currently still ongoing.

### Significant decisions and cases in 2018

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<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Fine levied</th>
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<tbody>
<tr>
<td>Aftersales services for watches</td>
<td>ComCo</td>
<td>Preliminary investigation on the question of whether the refusal by certain watch manufacturers to supply spare parts to independent watch manufacturers or repairers could be problematic under Swiss competition law (potential illegal agreements or abuse of a dominant position by refusal to deal, or both)</td>
<td>None (preliminary investigation closed without further action)</td>
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\(^4\) Federal Supreme Court, decision of 14 March 2018, 144 III 175.
### Sector Investigating authority Conduct Fine levied

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<tr>
<td>Automotive</td>
<td>ComCo</td>
<td>Preliminary investigation on the question of whether the termination of several agreements with independent service providers and car distributors was lawful (potential abuse of a dominant position by refusal to deal) and on the question of whether a preferential treatment of service partners, which were also distribution partners, was admissible</td>
<td>None (preliminary investigation closed; recommendations issued by Secretariat of ComCo)</td>
</tr>
<tr>
<td>Mobile payment</td>
<td>ComCo</td>
<td>Preliminary investigation regarding the interference, on iPhones and Apple Watches, of Apple's mobile payment app Apple Pay with the payment process of another mobile payment app (TWINT)</td>
<td>None (voluntary change of conduct by Apple before any investigation was opened)</td>
</tr>
<tr>
<td>Internet, TV, telecommunication</td>
<td>ComCo</td>
<td>Abuse of a dominant position by Naxoo in the cable network connections market in the city of Geneva through inadequate terms of supply towards property owners, producers and third-party suppliers of network connections, as well as through obstructions of third-party suppliers in their own downstream markets</td>
<td>3.6 million Swiss francs</td>
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### ii Current cases

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<td>Suspected abuse of a dominant position by two natural gas network operators (Erdgas Zentralschweiz AG and ewl Energie Wasser Luzern Holding AG) by refusing to grant other (foreign) natural gas suppliers access to their network, thereby disabling them to reach certain end customers</td>
<td>January 2019</td>
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<tr>
<td>Online hotel booking platforms</td>
<td>Price Surveillance Authority</td>
<td>Suspected excessive commissions perceived by Booking.com in Switzerland</td>
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<td>Pay TV</td>
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<td>May 2017</td>
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### III MARKET DEFINITION AND MARKET POWER

#### i Definition of the relevant market

In abuse of dominance cases, the rules applicable in merger control cases are being used by analogy for the purpose of defining the relevant market. According to Article 11 of the Merger Control Ordinance of 17 June 1996, the relevant product market comprises those goods and services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other with regard to their characteristics and intended use. The relevant geographic market is defined as the area in which on the one hand consumers purchase and on the other suppliers sell the goods or services that constitute the relevant product market. This provision also serves as the basis for defining the relevant market in dominance cases. From a temporal perspective, it must be examined whether any goods or services that allow for substitution in terms of product and geography are available all year round or just for a certain period of time.

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5 RPW/DPC 2012/1, pp. 103 and 105, Vertrieb von Tickets im Hallenstadion.

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The Swiss authorities generally rely on the test of cross-price elasticity and the small but significant and non-transitory increase in price (SSNIP) test to determine the relevant product market. In the context of an abuse of dominance case, it needs to be assessed whether the allegedly disadvantaged opposite side of the market (i.e., the trading partners of the dominant undertaking) could switch to alternative offers from a product, geographic and temporal perspective. If there are reasonable alternative offers for the opposite side of the market, it is likely that the undertaking considered is not dominant on a certain market.

The ComCo has previously considered cases in which the market has incorrectly been defined too broadly due to the presence of already monopolistic prices (‘cellophane fallacy’).

ii Definition of dominance

According to Article 4, Paragraph 2 of the Cartel Act, an undertaking is dominant if it can to an appreciable extent behave independently of other market participants (competitors, suppliers or buyers). In the course of the amendment of the Cartel Act in 2003, the text in brackets defining other market participants was added. According to the Message of the Federal Council, the aim of this amendment is to ensure that authorities do not rely only upon market structure data to determine whether an undertaking is dominant, but also take into consideration the actual relations of dependence on the market. The ComCo has had the occasion to discuss the amended wording of Article 4, Paragraph 2 of the Cartel Act. It has generally confirmed the previous understanding of dominance (i.e., the capacity to behave independently on the market), but has, in addition, specified under which circumstances actual relations of dependence would also fall under Article 4, Paragraph 2 of the Cartel Act (and thus be subject to abuse of dominance rules). Based on the wording of Article 4, Paragraph 2 of the Cartel Act, market dominance may exist both on the supply as well as on the demand side.

There is no statutory threshold above which an undertaking must be considered as dominant under Swiss law. As a rule of thumb, market shares below 20 per cent are not considered to confer a dominant position to an undertaking. Market shares of between 20 and 40 per cent generally do not confer a dominant position to an undertaking, unless special circumstances are present. Market shares of 40 per cent and above are an indicator of dominance, unless there are special circumstances that allow denying such dominance.

In any event, market shares constitute mere indicators and are never in themselves sufficient proof of dominance. In practice, the ComCo performs an in-depth analysis of the market characteristics, such as the situation of competitors (current competition), the market entry barriers (potential competition) and the position of the other side of the market (countervailing market power). Such an analysis is made even in cases where the definition of the relevant market reveals market shares of 100 per cent. In accordance with the practice

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6 Federal Supreme Court, RPW/DPC 2013/1, p. 114, Publigroupe.
7 Regarding the substitutability of offer and demand, see RPW/DPC 1997/3, p. 364 ff, Migros/Globus and RPW/DPC 1998/3, p. 394 ff, Bell/SEG-Poulies.
8 See, for example, RPW/DPC 2015/1, p. 105, Valora Holding/LS Distribution Suisse.
9 See RPW 2005/1, p. 149 ff, CoopForte; RPW 2008/1, p. 129 ff, Migros/Denner.
10 See, for example, RPW/DPC 2003/1, p. 84, Plakatierung in der Stadt Luzern, in which case a market share above 50 per cent was considered as sufficient to confer dominance. In a more recent decision of the Federal Supreme Court, market shares above the 50 per cent threshold were considered as an indicator for market dominance (Federal Supreme Court, RPW/DPC 2013/1, p. 130, Publigroupe).
of the EU Commission, the ComCo assesses the competitive pressure and market position of the potentially dominant undertaking and its competitors. It also takes into consideration the competitive pressure due to the imminent expansion of already existing competitors or the imminent market entry of new suppliers. Finally, the ComCo assesses the competitive pressure due to the negotiating strength of the other side of the market (i.e., the countervailing buying power). In its more recent practice, the ComCo has analysed the competitive position of the opposite side of the market only in cases of collective dominance. In fact, the ComCo seems to consider that, although the disciplinary effect of countervailing buyer power may prevent abuses in individual cases, it does establish or re-establish the dynamic functions of effective competition.

Market dominance may only be achieved by ‘undertakings’. This corresponds to the personal scope of application of the Cartel Act. According to Article 2, Paragraph 1 bis of the Cartel Act, undertakings are all buyers or suppliers of goods and services active in commerce, regardless of their legal or organisational form. The concept of an undertaking follows an economic approach, based on the entrepreneurial activity of an entity. Therefore, it also covers undertakings governed by public law, as well as private commercial companies that are part of a public body (e.g., the federal government, cantons or communes). In the case of groups of companies, the entire group is considered as a single economic entity to the purpose of assessing market dominance.

Collective dominance

According to the definition of dominance contained in Article 4, Paragraph 2 of the Cartel Act, a dominant position may be held by one or more undertakings. Thus, collective dominance is also covered by the law. In 1998, the ComCo held for the first time that there was a case of collective dominance. Collective dominance requires two (duopoly) or several (oligopoly) undertakings deliberately adopting a parallel (i.e., collusive) behaviour. If the collusive element in the parallel behaviour is lacking, such behaviour is generally legal, as it constitutes the normal reaction of competitors to exogenous market developments.

In its decisional practice, the ComCo has developed several indicators taken into account in the assessment of potential collective dominance:

- high market concentration (the fewer companies are active in a certain market, the more likely it is for collusion to occur);
- similar and stable market shares;
- similar cost structures, as well as a personal and financial intertwining between competitors, and the resulting symmetry of interests;
- high market entry barriers;
- similarity of products offered (price remains the sole competitive factor); and
- most importantly, high market transparency.

Taking these indicators into consideration, it is necessary to perform an overall assessment of the competitive landscape on the relevant market as well as on the upstream and downstream markets thereof to determine whether the relevant market offers sufficient incentives for durable collective dominance.

12 Federal Supreme Court, BGE 137 II 199, c. 3.1.
13 RPW/DPC 1998/3, p. 400 ff, Bell/SEG-Poulets.
14 See, more recently and instead of many others, RPW/DPC 2008/4, p. 630 ff, Coop/Carrefour.
In the planned merger between France Télécom SA and Sunrise Communications SA, the ComCo applied the aforementioned criteria. It found that the envisaged merger between these two companies needed to be prohibited since the newly created entity would, together with Swisscom, have held a collectively dominant position in the mobile communications market and, in the absence of new competitors entering said market, would have had no incentive to compete by reducing its prices.

When assessing the planned merger between Switzerland’s two largest ticketing providers, Ticketcorner and Starticket, the ComCo considered potential collective dominance. However, in the case at issue, the ComCo did not find sufficient evidence for the existence of a collectively dominant position.

More recently, the ComCo investigated a potential collective dominance of Booking.com, Expedia and HRS in the market for hotel booking platforms. While it did not formally conclude that the undertakings concerned hold a single or joint dominant position, the ComCo did not rule out the existence of such dominant position, either.

IV Abuse

i Overview

The application of Article 7 of the Cartel Act requires three cumulative pre-conditions to be met: an undertaking is dominant on a certain market; through abusing this dominant position, this undertaking hinders other undertakings from starting or continuing to compete, or disadvantages trading partners; and there are no legitimate business reasons for the abusive behaviour of the dominant undertaking.

These pre-conditions need to be met even for the (non-exhaustive) list of examples of conduct that may be considered as abusive. In other words, the examples of Article 7, Paragraph 2 of the Cartel Act need to be applied in conjunction with its Paragraph 1. Article 7 of the Cartel Act covers both exclusionary and exploitative practices. The first mainly concern competitors while the second aim at harming commercial partners or consumers.

When assessing a potentially abusive behaviour, it is necessary to consider the specific circumstances of the case at hand. The Cartel Act does not contain any per se prohibitions. An assessment on a case-by-case basis is required, taking into consideration the specific market conditions. In particular, it needs to be analysed whether the conditions of a specific (contractual) relationship significantly diverge from those that could be expected in the context of effective competition. In practice, the authorities examine the competitive and anticompetitive effects of a certain conduct on the market, in particular when a conduct does not fall under one (or several) of the abuses listed in Article 7, Paragraph 2 of the Cartel Act, but is covered by the umbrella clause of Paragraph 1. The intent of an undertaking to abuse its dominant position is not a necessary requirement for an abusive behaviour to be considered as illegal. However, the presence of such intent facilitates the assessment of a certain competitive behaviour.

As mentioned, the enumeration of abuses contained in Article 7, Paragraph 2 of the Cartel Act is not exhaustive. Other types of conduct not covered by one of the examples listed

15 RPW/DPC 2010/3, p. 499, France Télécom/Sunrise Communications.
16 RPW/DPC 2018/3, pp. 672 and 673, Ticketcorner/Starticket.
17 RPW 2016/1, p. 67, Online-Buchungsplattformen für Hotels.
18 Federal Supreme Court, RPW/DPC 2013/1, p. 114, Publigroupe.
but meeting the pre-conditions enumerated in Article 7, Paragraph 1 of the Cartel Act fall into the scope of application of this umbrella clause. This is, for example, the case for margin squeeze behaviour.19

Abusive behaviour needs to be distinguished from competition on the merits. This distinction is particularly important to bear in mind when assessing the existence of legitimate business reasons for a certain behaviour. Even a dominant undertaking needs to be allowed to protect its own legitimate business interests by competing on the merits in order to maintain its leading market position. As a result, if a certain practice simply aims at improving the quality of a product (e.g., by requiring from suppliers the respect of a specific standard), such practice shall be considered legitimate even if it may eliminate certain suppliers or competitors.

ii Exclusionary abuses

Exclusionary abuses may take various forms, such as exclusionary pricing, exclusive dealing and refusal to deal or to license, as well as tying and bundling practices.

Refusal to deal

Refusal to deal is the first type of abusive conduct mentioned in the list of examples of Article 7, Paragraph 2, Letter a of the Cartel Act. This provision does not imply a general obligation to contract for dominant undertakings. According to the law, refusal to deal (e.g., refusal to supply or to purchase goods) is only unlawful if it has as its effect (or is likely to have as its effect) the anticompetitive foreclosure of the market and if it cannot be justified by legitimate business reasons (e.g., lack of quality of a certain supplier; precarious financial situation of a prospective franchisee). In particular, a refusal to deal is likely to be considered illegal if a dominant undertaking, by refusing to enter into a business relationship, intends to boycott its business partner or aims at forcing its business partner to behave in a certain way. Moreover, refusal to deal may, under certain circumstances, be considered unlawful if a dominant undertaking refuses to grant access to an essential facility. The concept of refusal to deal includes both the refusal to continue existing business relationships as well as the refusal to enter into new such relationships.

One of the first major cases in which the ComCo applied the ‘essential facilities doctrine’ concerned the refusal of an electricity distribution network company with a local monopoly to transport through its network the electricity from a third-party provider to a customer located in the monopolist’s territory.20 In another significant case, the ComCo fined SIX Group 7 million Swiss francs for refusing to supply interface information to other competitors and thus rendering their products incompatible with the SIX card payment terminals.21 In a decision of 2013, the ComCo accepted an amicable settlement between the Secretariat and Swatch Group, according to which the latter may gradually reduce the supply of third-party customers with mechanical watch movements.22 Swatch Group thereby committed to supply certain minimum amounts per year and to treat all customers equally.

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19 See, for example, RPW/DPC 2015/3, p. 561, Preispolitik Swisscom ADSL, in which the Federal Administrative Court imposed a heavy fine on Swisscom for its margin squeeze practices in the broadband internet sector (asymmetric digital subscriber line).
22 RPW/DPC 2014/1, p. 215 ff, Swatch Group Lieferstopp.
2016, the ComCo fined Swisscom approximately 72 million Swiss francs for having refused to supply certain competitors with broadcasts of live sports for their platforms and for having granted only partial access to a reduced range of sport contents to others. An appeal against the ComCo decision is currently pending.

As far as refusal to license is concerned, such refusal would generally not be considered as abusive if no standard essential patents are concerned. In fact, it is inherent to intellectual property (IP) rights that the holders of these rights enjoy some form of exclusivity, which will allow them to act independently on the market to a certain extent. Article 3, Paragraph 2 of the Cartel Act explicitly exempts the effects on competition that result exclusively from the legislation governing IP from its scope of application. It is only the modalities to exercise an IP right that may be considered abusive, namely if they go beyond the scope of protection conferred by the IP legislation (e.g., registration of patents for the sole purpose of blocking the technical development of competitors). However, the line is difficult to draw.

**Exclusive dealing**

Exclusive dealing practices are not enumerated in the list under Article 7, Paragraph 2 of the Cartel Act. They may fall under the umbrella clause of Article 7, Paragraph 1. In a 2016 decision, the Federal Administrative Court found likely abuses of the dominant positions held by the ticketing provider Ticketcorner and the operator of the event location Hallenstadion in Zurich through exclusive dealing practices. In fact, the operator of the event location imposed an obligation upon event organisers to sell at least 50 per cent (de facto resulting in 100 per cent) of all tickets for events in the Hallenstadion via Ticketcorner. The case is currently pending before the Federal Supreme Court.

**Rebates**

Discrimination between trading partners in relation to prices or other conditions of trade may be unlawful under the Cartel Act (Article 7, Paragraph 2, Letter b). Rebates can be considered as practices discriminating between trading partners, namely where only bigger customers above a certain turnover threshold may benefit from special (more favourable) agreements. In particular, fidelity rebates are illegal if they reward customers for procuring their entire demand from the same dominant undertaking, independently of the actual quantity procured. Such rebate systems are considered to impede the market entry of potential competitors since customers are reluctant to switch away from the dominant undertaking granting fidelity rebates. Target rebates are also illegal if they are granted under the condition that the customers achieve certain turnover targets set by the dominant undertaking. Their effect is considered to be comparable to the one of fidelity rebates. On the other hand, quantitative rebates based on cost efficiencies (e.g., economies of scale) are generally legitimate.

By a 2014 decision, the ComCo imposed a fine of approximately 1.9 million Swiss francs on the leading Swiss news agency Schweizerische Depeschenagentur (SDA) for offering

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23 RPW/DPC 2016/4, p. 920 ff, Sport im Pay-TV.
24 Federal Administrative Court, decision of 24 November 2016, B-3618/2013.
27 RPW/DPC 1998/4, pp. 675 and 676, Beschwerdeentscheid der REKO/WEF.

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exclusivity rebates (which were qualified as fidelity rebates) to a certain group of customers.\textsuperscript{28} The ComCo found that, by granting discounts of 20 per cent to customers who agreed to exclusively subscribe to SDA's news service (without also being subscribed to a competitor news service), SDA had abused its dominant position. In the absence of any legitimate business reasons, the exclusivity rebates were considered illegal.

**Predation**

According to the law, any undercutting of prices or other conditions directed against a specific competitor may be unlawful (Article 7, Paragraph 2, Letter d of the Cartel Act). Such pricing strategies are, however, only illegal if they aim at driving competitors out of the market or preventing new competitors from entering the market (predatory pricing).\textsuperscript{29} Typically, a dominant undertaking would, in a first step, undercut prices of competitors until they leave a certain market, and then in a second step re-increase its prices once the competitive pressure has been decreased (or eliminated). In general, the ComCo is likely to infer that prices under average variable costs are aimed at driving competitors out of the market or preventing new competitors to enter the market. In contrast, low price strategies pursued by a dominant undertaking in order to access new markets or to sell off outdated products are legitimate business practices that shall not be considered as unlawful.

The ComCo has investigated presumed predatory pricing strategies on different occasions\textsuperscript{30} without having issued any decisions. In its previous practice, the ComCo has, however, developed some guidance on the conditions under which a pricing practice is likely to be considered abusive:

\begin{itemize}
  \item[a] the price cutting strategy needs to be systematic and occur over a certain period of time;
  \item[b] it is aimed at one or several weaker (actual or potential) competitors;
  \item[c] there is no possibility to increase profits in the short term (as would be the case if outdated remaining stock was sold at low prices); and
  \item[d] the low prices may be re-increased at a later stage.
\end{itemize}

**Price or margin squeeze**

As a special form of price discrimination between trading partners (see Article 7, Paragraph 2, Letter b of the Cartel Act), price or margin squeezes may be considered an abuse of a dominant position. The ComCo defines price squeeze as a situation where a vertically integrated dominant undertaking sets its retail prices at a level that is so low compared to its wholesale prices that equally efficient competitors on the retail market, dependent on procuring a certain good or service from the dominant undertaking on the wholesale market, are not able to compete and make profits in the retail market.\textsuperscript{31}

In 2009, the ComCo fined the telecommunications provider Swisscom approximately 220 million Swiss francs for abuse of its dominant position in the market for broadband internet through margin or price squeeze behaviour.\textsuperscript{32} The ComCo found that, until the

\begin{itemize}
  \item[RPW/DPC 2014/4, p. 670 ff, Preispolitik und andere Verhaltensweisen der SDA.]
  \item[RPW/DPC 2004/4, p. 1,002, Cornér Banca SA v. Telekurs AG.]
  \item[RPW/DPC 2002/3, p. 431, Radio und TV-Markt St Gallen; RPW/DPC 2003/1, p. 62 ff, Espace Media/ Berner Zeitung v. Solothurner Zeitung.]
  \item[RPW/DPC 2010/1, p. 146 ff, Preispolitik Swisscom ADSL; RPW/DPC 2015/3, p. 636 ff, Sanktionsverfügung – Preispolitik Swisscom ADSL.]
  \item[RPW/DPC 2010/1, p. 116 ff, Preispolitik Swisscom ADSL.]
\end{itemize}
end of 2007, Swisscom, which also offered its asymmetric digital subscriber line (ADSL) broadband internet services to end customers on the retail market, charged its competitors such high prices on the wholesale market that those competitors were not able to profitably offer their services on the retail market. The abusive and anticompetitive behaviour was corroborated by the fact that Swisscom generated large profits on the wholesale market, whereas its subsidiary active on the retail market incurred losses. On appeal by Swisscom, the Federal Administrative Court confirmed the ComCo decision in its substance, but reduced the fine imposed to approximately 186 million Swiss francs.33 The case is currently pending before the Federal Supreme Court. More recently, the ComCo imposed a fine of approximately 7.9 million Swiss francs on Swisscom for a price squeeze (and other abusive practices) in the wide area network (WAN) sector.34 A WAN is a telecommunications or computer network that extends over a large geographical distance. In a public tender process organised by Swiss Post in 2008, Swisscom offered a price for its WAN services that was approximately 30 per cent below its next competitor’s price, the latter having to acquire prior facilities from Swisscom on a wholesale level before being able to offer its WAN services to Swiss Post. Swisscom’s wholesale price for the prior facilities allegedly was significantly above the price with which Swisscom won the public tender, which did not allow any competitor to compete on the retail market. An appeal against the ComCo decision is currently pending before the Federal Administrative Court.

**Tying and bundling**

According to the Cartel Act, any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services is unlawful (Article 7, Paragraph 2, Letter f of the Cartel Act). By such tying practices, a dominant undertaking aims at forcing its trading partners to procure unwanted goods or services in order to be able to procure the goods or services actually wanted. Trading partners are thus restricted in their freedom to take business decisions, whereas competitors are pushed out of the market. Tying practices may be legal if the tied good or service is a necessary prerequisite for the main good or service to be procured. There needs to be a factual link between the two items. Such factual link may exist for technical or safety reasons (e.g., if a licensor requires its licensee to procure certain raw materials for the production of the licensed product from the licensor, given the specific quality or characteristics of the raw materials needed). An indicator for the existence of a factual link between the main product or service and the tied one is the fact that they both belong to the same product markets. Conversely, if separate product markets exist, a factual link requiring tying of both products and services is unlikely.

The ComCo has investigated tying practices on several occasions, usually denying the finding of an abusive behaviour. In a 2002 case, for example, the Secretariat found that the Swiss national railway company, SBB, holding a dominant position in the main relevant market (but being non-dominant in the tied market), had abused its position through an illegal tying practice.35 In fact, a company called Lokoop requested an offer from SBB for the use of its railway system on certain routes to transport parcels. In addition, Lokoop requested a separate offer for various extra services at specific train stations (e.g., for the shunting of trains). In response to this request, SBB insisted on offering a bundle of services

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33 RPW/DPC 2015/3, p. 561 ff, Sanktionsverfügung – Preispolitik Swisscom ADSL.
34 RPW/DPC 2016/1, p. 128, Swisscom WAN-Anbindung.
35 RPW/DPC 2002/1, p. 72 ff, Lokoop v. SBB.
to Lokoop, which was considered unlawful by the Secretariat. Ultimately, the ComCo closed the investigation without a sanction since SBB agreed to abandon its allegedly abusive tying practice.

iii Discrimination

Under the Cartel Act, any discrimination between trading partners in relation to prices or other conditions of trade is considered unlawful (Article 7, Paragraph 2, Letter b of the Cartel Act). As mentioned above, discriminatory practices may appear in different forms, such as loyalty or target rebates granted or accessible only to customers achieving a certain turnover threshold, as well as margin or price squeezes. The term ‘in relation to other conditions of trade’ used by the law is to be interpreted broadly. It covers any contractual provisions entailing an economic advantage or disadvantage (e.g., in regard to discounts or payment terms). However, the prohibition to discriminate between trading partners does not imply a general obligation of equal treatment. Unequal treatment shall be considered unproblematic as long as it can objectively be justified (e.g., quantity rebates, justified by corresponding economies of scale).

iv Exploitative abuses

The imposition of unfair prices or other unfair conditions of trade is considered unlawful (Article 7, Paragraph 2, Letter c of the Cartel Act). To determine if a price is ‘unfair’, it is necessary to examine the market value of the product or service offered and the ability of the dominant undertaking to behave independently in setting its prices. This ability is likely to be a given if customers lack alternatives. The imposition of unfair prices (implying an element of coercion) by a dominant undertaking is thus facilitated. It is unclear whether, under Swiss law, it is necessary to prove the ‘imposition’ as a coercive element under Article 7, Paragraph 2, Letter c of the Cartel Act, or whether it is sufficient to prove the existence of a causal link between the dominant position and the unfair prices.36

The prohibition on imposing unfair prices does not imply an obligation to set fair prices. Neither does this prohibition aim at protecting customers from paying unduly high prices. Rather, this provision shall promote effective competition and ensure that prices are the result of an interplay between offer and demand. In this context, the ComCo considers that the Federal Price Surveillance Act of 20 December 1985, which aims at the avoidance of abusive pricing, may be applied in parallel.37

In a decision of 2007, the ComCo imposed a record fine of approximately 333 million Swiss francs on Swisscom as it considered its termination rates in the mobile network sector as unfair.38 However, the decision was annulled by the Federal Administrative

36 In a decision of 2011, the Federal Supreme Court found that, contrary to EU law, the ‘imposition’ as coercive element was a separate requirement under Swiss law that needed to be established (Federal Supreme Court, decision of 11 April 2011, BGE 137 II 199, c. 4, Terminierung Mobilfunk). However, in a more recent case, the Federal Supreme Court amended its previous statement by holding that the Swiss Cartel Act was strongly geared towards EU competition law and that, therefore, the case law under Article 102 TFEU needed to be taken into account (Federal Supreme Court, decision of 29 June 2012, BGE 139 I 72, c. 8.2.3, Publigroupe).
37 RPW/DPC 2016/1, p. 190, Swisscom WAN-Anbindung.

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Court and the annulment confirmed by the Federal Supreme Court. The latter considered that, due to the regulatory framework applicable in the telecommunications sector, Swisscom could not exert any coercion on its trading partners. More recently, the ComCo also fined Swisscom for imposing unfair prices on its competitors when offering its WAN connection services on a wholesale level.

V REMEDIES AND SANCTIONS

i Sanctions

An undertaking abusing its dominant position risks a fine of up to 10 per cent of the turnover that it achieved in Switzerland in the preceding three financial years (Article 49a, Paragraph 1 of the Cartel Act). The amount of the fine is dependent on the duration and severity of the unlawful behaviour, taking into account the likely profit that resulted from it. For the calculation of the turnover, all reductions such as discounts, rebates, VAT and other consumption taxes as well as other taxes directly related to turnover shall be deducted from the amounts derived by the undertakings concerned from the sale of products and the provision of services within the ordinary business activities of the undertakings concerned (Article 4, Paragraph 1 of the Merger Control Ordinance of 17 June 1996, which is applicable by analogy).

The calculation method for fines is regulated in detail by the Cartel Act Sanctions Ordinance of 12 March 2004. The imposition of a fine is mandatory in the case of an established abuse of a dominant position. Contrary to the laws of other jurisdictions, the Swiss Cartel Act does not provide for sanctions that may be imposed on individuals acting on behalf of an undertaking having abused its dominant position (unless the individual itself qualifies as an undertaking in the sense of the Cartel Act).

The largest fine imposed by the ComCo so far, amounting to 333 million Swiss francs, was cancelled by the Federal Administrative Court and subsequently also by the Federal Supreme Court upon appeal by Swisscom. Another fine of 220 million Swiss francs imposed on Swisscom for margin-squeeze behaviour in the ADSL market was ultimately reduced by the Federal Administrative Court to approximately 186 million Swiss francs. An appeal against this decision is currently pending before the Federal Supreme Court. For further examples of recent fines imposed, see above.

ii Behavioural remedies

Other than imposing a fine, the ComCo has a wide range of decision-making and remedial powers at its disposal. In particular, the ComCo may order injunctions (measures) to cease or desist from an unlawful practice (e.g., order that a contract be entered into in the case of an abusive refusal to deal) (Article 30, Paragraph 1 of the Cartel Act). The ComCo may also, under certain conditions, grant interim relief to terminate a certain abusive conduct or modify


40 RPW/DPC 2016/1, p. 128, Swisscom WAN-Anbindung.

41 RPW/DPC 2011/3, p. 440, Terminierungspreise im Mobilfunk.

42 RPW/DPC 2015/3, p. 561, Sanktionsverfügung – Preispolitik Swisscom ADSL.
specific business practices. In a recent case, however, the ComCo refused to grant interim relief requested by Swisscom in the context of an investigation opened against the largest cable network operator in Switzerland, UPC Schweiz GmbH. The latter is suspected of having abused of its dominant position by the (alleged) refusal to grant access to its ice hockey coverage, for which UPC held exclusive rights, to other competitors (including Swisscom). The ComCo rejected Swisscom’s request for interim measures on the grounds that such measures required, inter alia, that, in their absence, competition would suffer a disadvantage that could not easily be rectified. According to the ComCo, this requirement was not fulfilled in the case at hand since it seemed likely that Swisscom would remain active on the relevant market and be able to win back customers at the end of the investigation proceedings.

iii Structural remedies

In abuse of dominance cases, the Cartel Act does not explicitly provide for the possibility for the ComCo to order structural remedies.

VI PROCEDURE

Under the Cartel Act, the investigation procedure for (suspected) restraints of competition, including abuse of dominance cases, follows two stages: a preliminary investigation and an investigation. The Secretariat may open a preliminary investigation ex officio, at the request of undertakings involved or in response to a complaint from third parties (Article 26, Paragraph 1 of the Cartel Act). During this preliminary stage, the Secretariat usually gathers information by sending out questionnaires to the undertaking or undertakings concerned. It may also propose measures to eliminate or prevent restraints of competition (Article 26, Paragraph 2 of the Cartel Act). If the Secretariat concludes that there are indications of an unlawful restraint of competition, it shall, in consultation with a member of the presiding body of the ComCo, open an investigation (Article 27, Paragraph 1 of the Cartel Act). Such opening of an investigation is published in the Swiss Official Gazette of Commerce (Article 28 of the Cartel Act), as well as (generally) in a press release.

In the context of an investigation, the Secretariat has broad investigative powers. It may hear third parties as witnesses and require the parties to an investigation to give evidence (Article 42, Paragraph 1 of the Cartel Act). It may also perform searches (i.e., dawn raids) and seize evidence (Article 42, Paragraph 2 of the Cartel Act). The parties have an obligation to cooperate and a duty to provide information (Article 40 of the Cartel Act). In particular, they must provide the Secretariat with all the information required for the conduct of an investigation and produce the necessary documents. A limit to the obligation to cooperate is the legal principle nemo tenetur se ipsum accusare (right against self-incrimination). Non-compliance with the obligation to provide information or produce documents can entail an administrative fine of up to 100,000 Swiss francs (Article 52 of the Cartel Act).

43 There is no explicit provision in the Cartel Act allowing for the possibility to request interim relief. However, based on the general reference of Article 39 of the Cartel Act, the Administrative Procedure Act of 20 December 1968 is applicable, which contains such provision.
45 id. at p. 419.
46 RPW/DPC 2015/3, p. 590 ff, Sanktionsverfügung – Preispolitik Swisscom ADSL.
The Secretariat has published its best practices relied upon in investigations, in particular for searches, seizure of evidence and hearings, in an explanatory note of 6 January 2016 on selected instruments of investigation.47

During the investigation procedure, it is possible to reach an amicable settlement with the Secretariat (and approved by the latter) (Article 29 of the Cartel Act). Moreover, a leniency application may be filed if the undertaking concerned assists in the discovery and elimination of an unlawful restraint of competition (Article 49a, Paragraph 2 of the Cartel Act), which may allow for a full or a partial waiver of fines.

Further, recently, the Secretariat increasingly seems to use its preferred tool of market investigations in order to detect abuse of dominance cases.

VII PRIVATE ENFORCEMENT

The Cartel Act contains explicit provisions empowering civil courts to issue measures in the case of unlawful hindrance of competition. A person hindered by an unlawful restraint of competition from entering or competing in a certain market is entitled to request the elimination of or desistance from the hindrance; damages and satisfaction in accordance with the Swiss Code of Obligations; and surrender of unlawfully earned profits (Article 12, Paragraph 1 of the Cartel Act). Hindrances of competition include in particular the refusal to deal and discriminatory measures (Article 12, Paragraph 2 of the Cartel Act). Moreover, a plaintiff may request civil courts to rule that any contracts are null and void in whole or in part, or that the person responsible for the hindrance of competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (Article 13 of the Cartel Act).

To date, private enforcement against unlawful practices of dominant undertakings has not been a very successful tool in Switzerland. This is due to various reasons, namely procedural hurdles and an unfavourable standard of proof to claim damages. Nevertheless, in a few specific circumstances, civil court proceedings may be more favourable than administrative proceedings before the ComCo. For example, in cases of a refusal to deal (Article 7, Paragraph 2, Letter a of the Cartel Act), there may be situations in which only a civil court judgment can order a certain business relationship to be entered into in an enforceable way (e.g., order to grant access to a trade fair). Moreover, particularly for cases with a smaller economic significance, civil court proceedings may be preferable since civil courts are obliged to treat each case whereas the ComCo, guided by the discretionary principle, may decide not to consider a case of minor importance. As a result, the ComCo’s reluctance to take cases may mean that civil court proceedings are relatively frequent. In the car industry, for example, it may occur that a garage accredited for a certain brand of cars, whose accreditation is withdrawn, sues the general importer or the car manufacturer, or both, before the civil courts, claiming that there is a certain obligation to continue existing business relationships.

47 The explanatory note of 6 January 2016 from the Secretariat on selected instruments of investigation is available (in English) at www.weko.admin.ch/weko/en/home/documentation/communications.html.
48 RPW/DPC 1997/4, p. 626 ff, Teilnahme an einer Fachmesse (Handelgericht des Kt Aargau).
By way of example, in a 2013 decision, the Federal Supreme Court confirmed an order of a lower instance civil court that obliged a cooperative managing a cheese-maturing cellar to grant access to its maturing cellar to a cheese producer.  

VIII FUTURE DEVELOPMENTS

Following the rejection by the Swiss Parliament of the proposed revision of the Cartel Act, several individual reform proposals were filed. For example, the parliamentary initiative ‘Excessive import prices. End the Compulsory Procurement on the Domestic Market’ has been filed and admitted by the Commission for Economy. The initiative aims at introducing the concept of ‘relative market power’ (already known under German competition law) into the Swiss legislation. In a nutshell, this shall prevent foreign undertakings from abusing their relative market power by charging higher prices in Switzerland as compared to their prices abroad, subject to legitimate business reasons.

Moreover, in December 2017, the Fair Price Initiative (‘Stop the Swiss Island of High Prices – Pro Fair Import Prices’), which is a federal popular initiative, was filed and admitted. This initiative is also based on the introduction of the concept of ‘relative market power’ in Swiss law. It aims at ensuring fair prices for consumers in Switzerland, including non-discriminatory purchasing conditions for online sales. In October 2018, the Federal Council issued an indirect counterproposal to the popular initiative, which is currently being deliberated upon. The Federal Council is expected to submit a statement on the counterproposal to the parliament in summer 2019.

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49 Federal Supreme Court, decision of 23 May 2013, BGE 139 II 316, Etivaz.
I INTRODUCTION

The main legislation applying specifically to the behaviour of dominant firms is Article 6 of Law No. 4054 on the Protection of Competition (Law No. 4054). It provides that ‘any abuse on the part of one or more undertakings individually or through joint venture agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited’.

Pursuant to Article 6, the abusive exploitation of a dominant market position is prohibited in general. Therefore, the Article 6 prohibition applies only to dominant undertakings, and in a similar fashion to Article 102 of the Treaty on the Functioning of the European Union (TFEU), dominance itself is not prohibited: only the abuse of dominance is outlawed. Further, Article 6 does not penalise an undertaking that has captured a dominant share of the market because of superior performance.

Dominance provisions, as well as the other provisions of Law No. 4054, apply to all companies and individuals to the extent that they act as an ‘undertaking’ within the meaning of Law No. 4054. An undertaking is defined as a single integrated economic unit capable of acting independently in the market to produce, market or sell goods and services. Law No. 4054 therefore applies to individuals and corporations alike if they act as an undertaking. State-owned and state-affiliated entities also fall within the scope of the application of Article 6.2

Further, Law No. 4054 does not recognise any industry-specific abuses or defences; therefore, certain sectoral independent authorities have competence to regulate certain activities of dominant players in the relevant sectors. For instance, according to the secondary legislation issued by the Turkish Information and Telecommunication Technologies Authority, firms with a significant market share are prohibited from engaging in discriminatory behaviour among companies seeking access to their network, and unless justified, rejecting requests for access, interconnection or facility sharing. Similar restrictions and requirements are also applicable in the energy sector. The sector-specific rules and regulations bring about structural market remedies for the effective functioning of the free market. They do not imply any dominance-control mechanisms. The Turkish Competition Authority is the only regulatory body that investigates and condemns abuses of dominance.

On a different note, structural changes through which an undertaking attempts to establish dominance or strengthen its dominant position (for instance, in cases of acquisitions)

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1 Gönenç Gürkaynak is a founding partner at ELIG Gürkaynak Attorneys-at-Law.
2 See, for example, General Directorate of State Airports Authority, 15-36/559-182, 9 September 2015; Turkish Coal Enterprise, 04-66/949-227, 19 October 2004; Türk Telekom, 14-35/697-309, 24 September 2014.
are regulated by the merger control rules established under Article 7 of Law No. 4054. Nevertheless, a mere demonstration of post-transaction dominance in itself is not sufficient for enforcement under the Turkish merger control rules, but rather ‘a restriction of effective competition’ element is required to deem the relevant transaction as illegal and prohibited. Therefore, the principles laid down in merger decisions can also be applied to cases involving the abuse of dominance. For instance, in 2017, the Turkish Competition Board rejected the acquisition of Ulusoy Ro-Ro by UN Ro-Ro, as it concluded that the transaction would strengthen UN Ro-Ro’s dominant position in the market for Ro-Ro transport between Turkey and Europe; and that UN Ro-Ro would be in a dominant position in the market for port management concerning Ro-Ro ships upon consummation of the transaction, making the decision the third rejection decision issued by the Competition Board in its decisional history.3

On a separate note, mergers and acquisitions are normally caught by the merger control rules contained in Article 7 of Law No. 4054. However, there have been cases, albeit rarely, where the Competition Board found structural abuses through which dominant firms used joint venture agreements as a back-up tool to exclude competitors, which is prohibited under Article 6.4

II YEAR IN REVIEW

According to the Competition Authority’s statistics for 2018, the Competition Board rendered a decision in 46 pre-investigations or investigations, out of a total of 88, on the basis of allegations regarding violations of Article 4 of Law No. 4054, which prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices that have (or may have) as their object or effect the prevention, restriction or distortion of competition within a Turkish product or services market or a part thereof. Further, 23 finalised (including preliminary and full) investigations were carried out on the basis of allegations regarding violation of Article 6 of Law No. 4054, which prohibits any abuse on the part of one or more undertakings, individually or through joint agreements or practices, of a dominant position in a market for goods or services within the whole or part of the country. The Competition Board also decided on 19 investigations that have been initiated on the basis of both Article 4 and Article 6 concerns. Accordingly, it would be justified to state that cooperative offences, referring to both horizontal and vertical arrangements, continue to be the area of heaviest enforcement under Turkish competition law.5

Over the past few years, the Competition Board has shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuse of dominance.

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4 See, for example, Biryay, 00-26/292-162, 17 July 2000.
5 In 2017, the Competition Board decided on a total of 80 pre-investigations or investigations. Of these, 37 concerned violations of Article 4 of Law No. 4054, 29 concerned violations of Article 6 of Law No. 4054, 13 cases were evaluated from the aspect of both Articles 4 and 6 of Law No. 4054 and one case related to Articles 4, 6 and 7 of Law No. 4054.
With regards to cases on abuse of dominance, the Competition Board focused on cases where the focal point was the refusal to supply, conducting multiple pre-investigations and investigations.\(^6\)

With regards to the fight against cartels, the Competition Board levied an administrative monetary fine within an investigation launched against 13 financial institutions in 2017, including local and international banks, active in the corporate and commercial banking markets in Turkey. The main allegations concerned the exchange of competitively sensitive information on loan conditions (such as interest and maturity) regarding current loan agreements and other financial transactions. After 19 months of in-depth investigation, the Competition Board unanimously concluded that Bank of Tokyo-Mitsubishi UFJ Turkey AŞ (BTMU), ING Bank AŞ (ING) and the Royal Bank of Scotland Plc, Merkezi Edinburgh, İstanbul Merkez Şubesi (RBS) violated Article 4 of Law No. 4054 on Agreements, Concerted Practices and Decisions Limiting Competition. In this respect, the Competition Board imposed an administrative monetary fine on ING and RBS in the amount of 21.1 million lira and 66,400 lira, respectively, calculated on the basis of their annual turnover in the 2016 financial year. However, the Competition Board resolved that BTMU should not have an administrative monetary fine imposed upon it pursuant to its leniency application granting full immunity to BTMU while also relieving the other investigated undertakings from an administrative monetary fine.\(^7\)

The following table shows the Competition Board’s most recent landmark decisions regarding abuse of dominance.

<table>
<thead>
<tr>
<th>Company</th>
<th>Competition Board decision number and date</th>
<th>Summary of the case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Çiçek Sepeti İnternet Hizmetleri AŞ</td>
<td>No. 18-07/111-58, 8 March 2018</td>
<td>The Competition Board has concluded its preliminary investigation of Çiçek Sepeti, which is an online retailer active in the sale of flowers, edible flowers (Bonnyfood) and gifts (Bonnygift). The Competition Board cleared Çiçek Sepeti of charges laid out in a complaint with respect to applying predatory prices, spending significant amounts on advertising (and thus raising its rivals’ marketing costs) and initiating unfair lawsuits against its rivals.</td>
</tr>
<tr>
<td>Frito Lay Gıda San ve Tic AŞ</td>
<td>No. 18-19/329-163, 12 June 2018</td>
<td>The Competition Board decided not to initiate a full investigation towards Frito Lay for its behaviour in the ‘packaged chips’ market, which was described as a tight oligopoly. Frito Lay was assessed for abuse of dominance through <em>de facto</em> exclusivity and resale price maintenance (RPM) practices implemented through handheld terminals.</td>
</tr>
<tr>
<td>TTNET AŞ</td>
<td>No. 18-39/621-301, 17 October 2018</td>
<td>Another decision where the Competition Board did not initiate a full investigation is the preliminary investigation into exclusionary behaviour claims towards TTNet, which is active in the market of retail and wholesale sales of fixed broadband access services.</td>
</tr>
</tbody>
</table>

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High-profile investigations of the Competition Authority that are ongoing at the time of writing are provided in the table below.

<table>
<thead>
<tr>
<th>Investigated party</th>
<th>Alleged abuse of dominance activity</th>
<th>Date of initiation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Türk Telekomünikasyon AŞ</td>
<td>Abuse of dominance through exclusionary behaviour</td>
<td>3 March 2019</td>
</tr>
<tr>
<td>BP Petrolleri AŞ, OPET Petrolciulk AŞ, Petrol Ofisi AŞ ve Shell &amp; Turkey Petrol AŞ</td>
<td>Restricting competition</td>
<td>27 August 2018</td>
</tr>
<tr>
<td>Red Bull Gida Dağıtım ve Pazarlama Tic Ltd Şti</td>
<td>Restricting competition through de facto exclusivity and RPM practices</td>
<td>18 July 2018</td>
</tr>
<tr>
<td>Air Ekspres Dağıtım Taşımacılık Lojistik Hizmetleri ve Tic Ltd Şti, Aras Kargo Yurtiçi Yurtdışı Taşımacılık AŞ, Asilkar Lojistik Dağıtım İzi ve Dağıtım Tic Ltd Şti, MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık AŞ, Paket Taşımacılık Sistemleri ve Turizm Bilgisayar Ticaret AŞ, Solmaz Nakliyat ve Ticaret AŞ, STF Kargo Nakliyat Ticaret Ltd Şti, TNT International Express Taşımacılık Ticaret Ltd Şti, Ünsed Paket Servisi San ve Tic AŞ</td>
<td>Restricting competition through customer allocation</td>
<td>15 February 2018</td>
</tr>
<tr>
<td>Tırsan Kardan Sanayi ve Ticaret AŞ, Tiryakiler Yedek parça Sanayi ve Ticaret AŞ</td>
<td>Restricting competition by abuse of dominance</td>
<td>8 February 2018</td>
</tr>
<tr>
<td>Oncosem Onkolojik Sistemler San ve Tic AŞ, SanTek Sağlık Tıru{T} San ve Tic AŞ, Medizera İthalat ve İhracat AŞ, Onkosem Sağlık Ürünleri San ve Tic AŞ, Invotech Sağlık Teknolojileri Tic Ltd Şti, Korusol Grup Sağlık Hizmet İnşaat Taahhüt Makina Ternizlik San ve Tic Ltd Şti</td>
<td>Restricting competition by colluding in tenders for chemotherapy medication</td>
<td>18 January 2018</td>
</tr>
</tbody>
</table>

III MARKET DEFINITION AND MARKET POWER

The definition of dominance can be found in Article 3 of Law No. 4054, as ‘the power of one or more undertakings in a certain market to determine economic parameters such as price, output, supply and distribution independently from competitors and customers’. Enforcement trends show that the Competition Board is inclined to broaden the scope of application of the Article 6 prohibition by diluting the ‘independence from competitors and customers’ element of the definition to infer dominance even in cases where clear dependence or interdependence between either competitors or customers exists.8

When unilateral conduct is in question, dominance in a market is the primary condition for the application of the prohibition stipulated in Article 6. To establish a

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8 See, for example, Anadolu Cam, 04-76/1086-271, 1 December 2004; Warner Bros, 07-19/192-63, 8 March 2007.
dominant position, first the relevant market has to be defined, and second the market position has to be determined. The relevant product market includes all goods or services that are substitutable from a customer’s point of view. The Guideline on Market Definition considers demand-side substitution as the primary standpoint of the market definition. Therefore, the undertakings concerned have to be in a dominant position in the relevant markets, which are to be determined for every individual case and circumstance. Under Turkish competition law, the market share of an undertaking is the primary point for evaluating its position in the market. In theory, there is no market-share threshold above which an undertaking will be presumed to be dominant. On the other hand, subject to exceptions, an undertaking with a market share of 40 per cent is a likely candidate for dominance, whereas a firm with a market share of less than 25 per cent would not generally be considered dominant.

In assessing dominance, although the Competition Board considers a large market share as the most indicative factor of dominance, it also takes account of other factors, such as legal or economic barriers to entry, and the portfolio power and financial power of the incumbent firm. Therefore, domination of a given market cannot be solely defined on the basis of the market share held by an undertaking or other quantitative elements; other market conditions, as well as the overall structure of the relevant market, should also be assessed in detail.

Collective dominance is also covered by Article 6. On the other hand, precedents concerning collective dominance are not mature enough to allow for a clear inference of a set of minimum conditions under which collective dominance should be alleged. That said, the Competition Board has considered it necessary to establish an economic link for a finding of abuse of collective dominance.9

Being closely modelled on Article 102 of the TFEU, Article 6 of Law No. 4054 is theoretically designed to apply to unilateral conduct of dominant firms only. When unilateral conduct is in question, dominance in a market is a condition precedent to the application of the prohibition laid down in Article 6. In practice, however, indications show that the Competition Board is increasingly and alarmingly inclined to assume that purely unilateral conduct of a non-dominant firm in a vertical supply relationship could be interpreted as giving rise to an infringement of Article 4, which deals with restrictive agreements. With a novel interpretation, by way of asserting that a vertical relationship entails an implied consent on the part of the buyer, and that this allows Article 4 enforcement against a ‘discriminatory practice of even a non-dominant undertaking’ or ‘refusal to deal of even a non-dominant undertaking’ under Article 4, the Competition Board has in the past attempted to condemn unilateral conduct that should not normally be prohibited since it is not engaged in by a dominant firm.

Owing to this peculiar concept (i.e., Article 4 enforcement becoming a fall-back to Article 6 enforcement if the entity engaging in unilateral conduct is not dominant), certain unilateral conduct that can only be subject to Article 6 enforcement (i.e., as if the engaging entity were dominant) if it has been reviewed under Article 4 (restrictive agreement rules). The Booking.com and Trakya Cam decisions are the latest examples of this trend. In Booking.com,10 the Competition Board analysed whether Booking.com, which was found to be in a dominant position in the online accommodation reservation platform services market, lessened competition in the said market through the ‘best price guarantee’ practices in terms

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9 See, for example, Turkcell/Telsim, 03-40/432-186, 9 June 2003; Biryay, 00-26/292-162, 17 July 2000.
10 Booking.com, 17-01/12-4, 5 January 2017.
of the booking services they offer. Booking.com was fined for violation of Articles 4 and 6 of Law No. 4054. In Trakya Cam,\textsuperscript{11} the Competition Board assessed that Trakya Cam Sanayii AŞ \textit{de facto} implemented distribution agreements in 2016 that had been determined to be in violation of Articles 4 and 6 of Law No. 4054 through a Competition Board decision dated 2 December 2015,\textsuperscript{12} and revoked the individual exemption granted to Trakya Cam’s industrial customer purchasing agreement that it signed with its industrialist customers. Trakya Cam was fined 17,497,141.63 lira, and was ordered to provide 18 of its distributors with written notices stating the absence of regional exclusivity, and advising them that they may conduct sales activities throughout Turkey.

\section*{IV \textbf{ABUSE}}

\subsection*{\textit{i} Overview}

As mentioned above, the definition of abuse is not provided under Article 6. Although Article 6 does not define what constitutes ‘abuse’ \textit{per se}, it provides five examples of prohibited abusive behaviour, which forms a non-exhaustive list, and falls to some extent in line with Article 102 of the TFEU. These examples are as follows:

\begin{itemize}
\item [a] directly or indirectly preventing entry into the market or hindering competitor activity in the market;
\item [b] directly or indirectly engaging in discriminatory behaviour by applying dissimilar conditions to equivalent transactions with similar trading parties;
\item [c] making the conclusion of contracts subject to acceptance by the other parties of restrictions concerning resale conditions, such as:
\begin{itemize}
\item the purchase of other goods and services;
\item acceptance by intermediary purchasers of the display of other goods and services;
\item maintenance of a minimum resale price;
\end{itemize}
\item [d] distorting competition in other markets by taking advantage of financial, technological and commercial superiorities in the dominated market; and
\item [e] limiting production, markets or technical development to the prejudice of consumers.
\end{itemize}

Moreover, Article 2 of Law No. 4054 adopts an effects-based approach for identifying anticompetitive conduct, with the result that the determining factor in assessing whether a practice amounts to an abuse is the effect on the market, regardless of the type of the conduct at issue. Notably, the concept of abuse covers exploitative, exclusionary and discriminatory practices. Theoretically, a causal link must be shown between dominance and abuse. The Competition Board does not yet apply a stringent test of causality, and it has in the past inferred abuse from the same set of circumstantial evidence that was employed in demonstrating the existence of dominance. Further, abusive conduct on a market that is different from the market subject to a dominant position is also prohibited under Article 6.\textsuperscript{13} On the other hand, previous precedents show that the Competition Board is yet to review any allegation of other forms of abuse, such as:

\begin{itemize}
\item [12] No. 15-42/704-258.
\end{itemize}
a strategic capacity construction;
b predatory product design or product innovation;
c failure to pre-disclose new technology;
d predatory advertising; or
e excessive product differentiation.

ii Exclusionary abuses

Exclusionary pricing

Predatory pricing may amount to a form of abuse, as evidenced by many precedents of the Competition Board. That said, complaints on this basis are frequently dismissed by the Competition Authority owing to its welcome reluctance to micromanage pricing behaviour. High standards are usually observed for bringing forward predatory pricing claims. Nonetheless, in the UN Ro-Ro case, UN Ro-Ro was found to abuse its dominant position through predatory pricing and faced administrative monetary fines.

Further, in line with EU jurisprudence, price squeezes may amount to a form of abuse in Turkey, and recent precedents involved an imposition of monetary fines on the basis of price squeezing. The Competition Board is known to closely scrutinise price-squeezing allegations.

Exclusive dealing

Although exclusive dealing, non-compete provisions and single branding normally fall within the scope of Article 4 of Law No. 4054, which governs restrictive agreements, concerted practices and decisions of trade associations, such practices could also be raised within the context of Article 6.

On a separate note, Block Exemption Communiqué No. 2002/2 on Vertical Agreements no longer exempts exclusive vertical supply agreements of an undertaking holding a market share of above 40 per cent. Therefore, a dominant undertaking is an unlikely candidate to engage in non-compete provisions and single-branding arrangements.

Additionally, although Article 6 does not explicitly refer to rebate schemes as a specific form of abuse, rebate schemes may also be deemed to constitute a form of abusive behaviour. In Turkcell, the Competition Board condemned the defendant for abusing its dominance by, inter alia, applying rebate schemes to encourage the use of the Turkcell logo and refusing to offer rebates to buyers that work with its competitors. The Competition Board also condemned Doğan Yayın Holding for abusing its dominant position in the market for

15 UN Ro-Ro, 12-47/1412-474, 1 October 2012.
17 See, for example, Mey İçki, 14-21/410-178, 12 June 2014.
18 Turkcell, 09-60/1490-37, 23 December 2009.
advertisement spaces in the daily newspapers by applying loyalty-inducing rebate schemes.\textsuperscript{19}

In 2017, the Competition Board fined Luxottica for its activities in the wholesale of branded sunglasses by obstructing competitors’ activities through its rebate systems.\textsuperscript{20}

**Leveraging**

Tying and leveraging are among the specific forms of abuse listed in Article 6. The Competition Board has assessed many tying, bundling and leveraging allegations against dominant undertakings, and has ordered certain behavioural remedies against incumbent telephone and internet operators in some cases, to make them avoid tying and leveraging.\textsuperscript{21}

**Refusal to deal**

Refusal to deal and grant access to essential facilities are forms of abuse that are frequently brought before the Competition Authority, and there have been various decisions by the Competition Board concerning these matters.\textsuperscript{22}

iii **Discrimination**

Both price and non-price discrimination may amount to abusive conduct under Article 6. The Competition Board has in the past found incumbent undertakings to have infringed Article 6 by engaging in discriminatory behaviour concerning prices and other trade conditions.\textsuperscript{23}

iv **Exploitative abuses**

Exploitative prices or terms of supply may be deemed to be an infringement of Article 6, although the wording of the law does not contain a specific reference to this concept. The Competition Board has condemned excessive or exploitative pricing by dominant firms.\textsuperscript{24}

That said, complaints on this basis are frequently dismissed by the Competition Authority because of its above-mentioned reluctance to micromanage pricing behaviour.

V **REMEDIES AND SANCTIONS**

i **Sanctions**

The sanctions that can be imposed for abuses of dominance under Law No. 4054 are administrative in nature. In the case of a proven abuse of dominance, the incumbent undertakings concerned shall be (separately) subject to fines of up to 10 per cent of their Turkish turnover generated in the financial year preceding the date of the fining decision (if

\hspace{1cm} Doğan Holding, 11-18/341-103, 30 March 2011.
\hspace{1cm} Luxottica, 17-08/99-42, 23 February 2017.
\hspace{1cm} See, for example, TTNET-ADSL, 09-07/127-38, 18 February 2009; Türk Telekomünikasyon AŞ, 16-20/326-146, 9 June 2016.
\hspace{1cm} See, for example, POAS, 01-56/554-130, 20 November 2001; Eri Holding, 00-50/533-295, 21 December 2000; AK-Kim, 03-76/925-389, 12 April 2003; Çukurova Elektrik, 03-72/874-373, 10 November 2003; Congresium Ato, 16-35/604-269, 27 October 2016.
\hspace{1cm} See, for example, TTAŞ, 02-60/755-305, 2 October 2002; Türk Telekom/TTNet, 08-65/1055-411, 19 November 2008; MEDAŞ, 16-07/134-60, 2 March 2016; Türk Telekom, 16-20/326-146, 9 June 2016.
\hspace{1cm} See, for example, Tüpraş, 14-03/60-24, 17 January 2014; TTAŞ, 02-60/755-305, 2 October 2002; Belko, 01-17/150-39, 6 April 2001; Soca, 16-14/205-89, 20 April 2016 (the Competition Board did not initiate a full investigation in Soca).
this is not calculable, the turnover generated in the financial year nearest to the date of the 
fining decision will be taken into account). Employees or members of the executive bodies 
of the undertakings or association of undertakings, or both, that had a determining effect 
on the creation of the violation are also fined up to 5 per cent of the fine imposed on the 
undertaking or association of the undertaking. Following amendments in 2008, the new 
version of Law No. 4054 makes reference to Article 17 of the Law on Minor Offences to 
require the Competition Board, when determining the magnitude of a monetary fine, to take 
into consideration factors such as:

- the level of fault and amount of possible damage in the relevant market;
- the market power of the undertakings within the relevant market;
- the duration and recurrence of the infringement;
- the cooperation or driving role of the undertakings in the infringement;
- the financial power of the undertakings; and
- compliance with commitments.

Additionally, Article 56 of Law No. 4054 provides that agreements and decisions of trade 
associations that infringe Article 4 are invalid and unenforceable with all their consequences. 
The issue of whether the ‘null and void’ status applicable to agreements that fall foul of 
Article 4 may be interpreted to extend to cover contracts entered into by infringing dominant 
companies is a matter of ongoing controversy. However, contracts that give way to or serve 
as a vehicle for an abusive contract may be deemed invalid and unenforceable because of 
violation of Article 6.

The highest fine imposed to date in relation to abuse of a dominant position was in 
Tüpraş, where Tüpraş incurred an administrative fine of 412 million lira (equal to 1 per cent 
of the undertaking’s annual turnover for the relevant year).

In addition to monetary sanctions, the Competition Board is authorised to take all 
necessary measures to terminate infringements, to remove all de facto and legal consequences 
of every action that has been taken unlawfully, and to take all other necessary measures 
to restore the level of competition and status to the condition they were in before the 
infringement.

ii Behavioural and structural remedies

Law No. 4054 authorises the Competition Board to take interim measures until the final 
resolution on a matter in cases where there is a possibility of serious and irreparable damage.

Articles 9 and 27 of Law No. 4054 entitle the Competition Board to order structural 
or behavioural remedies (i.e., require undertakings to adhere to certain conducts, such 
as granting access, supplying goods or services, or concluding a contract). Failure by a 
dominant firm to meet the requirements so ordered by the Competition Board would lead 
to an investigation, which may result in a finding of infringement. The legislation does not 
explicitly empower the Competition Board to demand performance of a specific obligation 
through a court order.

VI PROCEDURE

The Competition Board is entitled to launch an investigation into an alleged abuse of dominance *ex officio* or in response to a complaint. In the event of a complaint, the Competition Board rejects the notice or complaint if it deems it not to be serious. Any notice or complaint is deemed rejected if the Competition Board remains silent for 60 days. The Competition Board decides to conduct a pre-investigation if it finds a notice or complaint to be serious. At this preliminary stage, unless there is a dawn raid, the undertakings concerned are not notified that they are under investigation. Dawn raids (unannounced on-site inspections) and other investigatory tools (e.g., formal information request letters) are used during this pre-investigation process. The preliminary report of the Competition Authority experts will be submitted to the Competition Board within 30 days of a pre-investigation decision being taken by the Competition Board. It will then decide within 10 days whether to launch a formal investigation. If the Competition Board decides to initiate an investigation, it will send a notice to the undertakings concerned within 15 days. The investigation will be completed within six months. If deemed necessary, this period may be extended, once only, for an additional period of up to six months, by the Competition Board.

The investigated undertakings have 30 calendar days as of the formal service of the notice to prepare and submit their first written defences. Subsequently, the main investigation report is issued by the Competition Authority. Once the main investigation report is served on the defendants, they have 30 calendar days to respond, extendable for a further 30 days (second written defence). The investigation committee will then have 15 days to prepare an opinion concerning the second written defence. The defending parties will have another 30 days to reply to the additional opinion (third written defence). When the parties’ responses to the additional opinion are served on the Competition Authority, the investigation process will be completed (the written phase of investigation involving claim or defence exchange will close with the submission of the third written defence). An oral hearing may be held *ex officio* or upon request by the parties. Oral hearings are held within at least 30 and at most 60 days following the completion of the investigation process under the provisions of Communiqué No. 2010/2 on Oral Hearings Before the Competition Board. The Competition Board will render its final decision within 15 calendar days of the hearing if an oral hearing is held, or within 30 calendar days of completion of the investigation process if no oral hearing is held. The appeal case must be brought within 60 calendar days of the official service of the reasoned decision. It usually takes around three to four months (from the announcement of the final decision) for the Competition Board to serve a reasoned decision on the counterparty.

The Competition Board may request all information it deems necessary from all public institutions and organisations, undertakings and trade associations. Officials of these bodies, undertakings and trade associations are obliged to provide the necessary information within the period fixed by the Competition Board. Failure to comply with a decision ordering the production of information may lead to the imposition of a turnover-based fine of 0.1 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2019 is 26,027 lira. Where incorrect or incomplete information has been provided in response to a request for information, the same penalty may be imposed. Recently, the Competition Board imposed
a monetary fine of 7,551,953.95 lira on Türk Telekom for providing false or misleading information or documents within an investigation conducted on Türk Telekom and TTNet to determine whether their pricing behaviour violated Article 6 of Law No. 4054.26

Article 15 of Law No. 4054 also authorises the Competition Board to conduct on-site investigations. Accordingly, the Competition Board can:

a. examine the books, paperwork and documents of undertakings and trade associations, and, if need be, take copies of the same;
b. request undertakings and trade associations to provide written or verbal explanations on specific topics; and
c. conduct on-site investigations with regard to any asset of an undertaking.

Law No. 4054 therefore provides broad authority to the Competition Authority on dawn raids. A judicial authorisation is obtained by the Competition Board only if the subject undertaking refuses to allow the dawn raid. Computer records, including deleted items, are fully examined by the experts of the Competition Authority.

Officials conducting an on-site investigation need to be in possession of a deed of authorisation from the Competition Board. The deed of authorisation must specify the subject matter and purpose of the investigation. The inspectors are not entitled to exercise their investigative powers (copying records, recording statements by company staff, etc.) in relation to matters that do not fall within the scope of the investigation (i.e., that which is written on the deed of authorisation). Refusal to grant Competition Authority staff access to business premises may lead to the imposition of a fixed fine of 0.5 per cent of the turnover generated in the financial year preceding the date of the fining decision (if this is not calculable, the turnover generated in the financial year nearest to the date of the fining decision will be taken into account). The minimum fine for 2019 is 26,027 lira. It may also lead to the imposition of a fine of 0.05 per cent of the turnover generated in the financial year preceding the date of the fining decision (or, as above, the turnover generated in the financial year nearest to the date of the fining decision) for each day of the violation. The Board has recently fined Mosaş Akıllı Ulaşım Sistemleri AŞ 89,650 lira for hindering on-site inspections.27

Final decisions of the Competition Board, including decisions on interim measures and fines, can be submitted to judicial review before the administrative courts by filing a lawsuit within 60 days of receipt by the concerned parties of the Competition Board’s reasoned decision. Filing an administrative action does not automatically stay the execution of the Competition Board’s decision (Article 27, Administrative Procedural Law).

After the recent legislative changes, administrative litigation cases (and private litigation cases) are now subject to judicial review before the newly established regional courts (appellate courts), creating a three-level appellate court system consisting of administrative courts, regional courts and the Council of State (the court of appeals for private cases). The regional courts will go through the case file both on procedural and substantive grounds, and investigate the case file and make their decision considering the merits of the case. The regional courts’ decisions will be considered as final in nature. A decision of a regional court will be subject to the Council of State’s review in exceptional circumstances, which are set forth in Article 46 of the Administrative Procedure Law. In such cases, a decision of a regional court will not be considered as a final decision, and the Council of State may decide to uphold or reverse the regional court’s decision. If a decision is reversed by the Council of State, it will

be returned to the deciding regional court, which will in turn issue a new decision that takes into account the Council of State’s decision. As the regional courts are only newly established, it is not yet known how long it will take for a regional court to finalise its review on a file. Accordingly, the Council of State’s review period (for a regional court’s decision) within the new system also needs to be tested before an estimated time frame can be provided.

Third parties can also challenge a Competition Board decision before the competent judicial tribunal, subject to the condition that they prove their legitimate interest.

VII  PRIVATE ENFORCEMENT

A dominance matter is primarily adjudicated by the Competition Board. Enforcement is also supplemented with private lawsuits. Article 57 et seq. of Law No. 4054 entitle any persons who are injured in their business or property by reason of anything forbidden in the antitrust laws to sue the violators to recover up to three times their personal damages plus litigation costs and legal fees. Therefore, Turkey is one of the few jurisdictions in which a treble damages clause exists in the law. In private suits, incumbent firms are adjudicated before regular courts. Because the treble damages clause allows litigants to obtain three times their losses as compensation, private antitrust litigations are increasingly making their presence felt in the Article 6 enforcement arena. Most courts wait for the decision of the Competition Board, and form their own decision based on that decision. The majority of private lawsuits in Turkish antitrust enforcement rely on allegations of refusal to supply.

VIII  FUTURE DEVELOPMENTS

During 2018, the Turkish Competition Authority has covered significant ground on harmonising the Turkish legislative framework in the field of competition law with EU legislation, and the year witnessed fundamental changes in important regulations and supporting guidelines. The most important development was that the Competition Authority completed its work on revising the Guidelines on Vertical Agreements, which were issued based on Communiqué No. 2002/2 on Vertical Agreements. It took approximately two years for the Competition Authority to finalise its work, and it published the updated version of the Guidelines on its official website on 30 March 2018. The amended Guidelines on Vertical Agreements include new provisions concerning internet sales and most-favoured customer clauses.

In 2018, the Competition Authority conducted several pre-investigations in relation to exclusive dealings, including into Mars Media and Frito Lay. Further, the Competition Board imposed a fine of 17,497,141.63 lira on Trakya Cam for violating Articles 4 and 6 of the Competition Law by implementing exclusive distribution agreements since 2016, which, according to a previous decision of the Competition Board, was in violation of the Competition Law.

30  Trakya Cam, 15-42/704-258, 2 December 2015.
31  Trakya Cam, 17-41/641-280, 14 December 2017.
Chapter 27

UNITED KINGDOM

Paul Gilbert and John Messent

I INTRODUCTION

For so long as the United Kingdom remains an EU Member State, and possibly for a transitional period after its withdrawal from the EU, the provisions of Article 102 of the Treaty on the Functioning of the European Union (Article 102) will continue to apply in the United Kingdom.2

The United Kingdom has also implemented national legislation that substantially mirrors the provisions of Article 102, contained in Chapter 2 of the Competition Act 1998 (the Act). Section 18 of the Act provides that, subject to limited exclusions: ‘any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom’ (the Chapter 2 prohibition). The UK competition authorities and courts are required to interpret the relevant provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission.3

Public enforcement of UK and EU competition law is carried out primarily by the Competition and Markets Authority (CMA).4 In addition to the CMA, the following sectoral regulators have the power to enforce competition law in their sectors.

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1 Paul Gilbert is counsel and John Messent is an associate at Cleary Gottlieb Steen & Hamilton LLP. They are grateful for the assistance of their colleague, Chloe Hassard.

2 On 25 November 2018, the UK and the EU concluded a withdrawal agreement setting out the terms of the UK’s departure from the EU and a political declaration on the framework for their future relationship, as provided for under Article 50(2) of the Treaty on the Functioning of the European Union (TFEU) (the Withdrawal Agreement). The Withdrawal Agreement would, if ratified, preserve the status quo regarding the application of Article 102 in the UK until at least 31 December 2020. See Section VIII for further details on the possible implications of the UK’s withdrawal from the EU.

3 Section 60 of the Act.

4 The CMA was created on 1 October 2013, and acquired its powers and responsibilities on 1 April 2014. It replaced two former public authorities: the Office of Fair Trading (OFT) and the Competition Commission (CC). The OFT had powers to enforce the prohibitions in Articles 101 and 102 of the TFEU and the equivalent UK prohibitions, as well as to carry out Phase I merger reviews and market studies. The CC was a reference body, carrying out Phase II merger reviews, market investigations and certain regulatory appeals. Where relevant, this chapter refers to the former OFT and CC.
<table>
<thead>
<tr>
<th>Regulator</th>
<th>Sector</th>
</tr>
</thead>
<tbody>
<tr>
<td>Civil Aviation Authority</td>
<td>Air traffic services and airport operation services in the UK</td>
</tr>
<tr>
<td>Financial Conduct Authority (FCA)</td>
<td>Financial services in the UK</td>
</tr>
<tr>
<td>Monitor (part of National Health Service (NHS) Improvement)</td>
<td>Healthcare services in England</td>
</tr>
<tr>
<td>Northern Ireland Authority for Utility Regulation</td>
<td>Gas, electricity, water and sewerage services in Northern Ireland</td>
</tr>
<tr>
<td>Office of Communications (Ofcom)</td>
<td>Electronic communications, broadcasting and postal services in the UK</td>
</tr>
<tr>
<td>Office of Gas and Electricity Markets (Ofgem)</td>
<td>Gas and electricity in Great Britain</td>
</tr>
<tr>
<td>Office of Rail and Road (ORR)</td>
<td>Railway services in Great Britain</td>
</tr>
<tr>
<td>Payment Systems Regulator (PSR)</td>
<td>Payment systems in the UK</td>
</tr>
<tr>
<td>Water Services Regulation Authority</td>
<td>Water and sewerage in England and Wales</td>
</tr>
</tbody>
</table>

* NHS Improvement, established in April 2016, is the operational name for the organisation that combines Monitor with several other NHS bodies. Monitor remains the statutory body for competition law purposes.
† In the telecommunications sector, Ofcom also has the power to oversee the BBC (from 3 April 2017, including its impact on fair and effective competition) and impose regulatory conditions on undertakings found to have ‘significant market power’. Significant market power is equivalent to the concept of dominance under EU and UK competition law.
‡ The PSR has been established as a separate body under the FCA, with its own managing director, board and budget.

The United Kingdom has also established a specialist competition court, the Competition Appeal Tribunal (CAT). Any person who is found to have infringed Article 102 or the Chapter 2 prohibition by the CMA or a regulator has a right of appeal to the CAT. The CAT can also hear follow-on damages claims in competition cases and, since October 2015, has had the power to hear stand-alone claims for damages or injunctive relief, or both. The civil courts can also hear competition claims, but may transfer cases to the CAT.

When enforcing Article 102 and the Chapter 2 prohibition, the CMA and regulators have regard to the European Commission’s ‘Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’. The CMA also has regard to its own substantive and procedural guidance (including previous Office of Fair Trading (OFT) guidance that the CMA has formally adopted). These include:

- ‘Abuse of a dominant position’, December 2004;
- ‘Assessment of market power’, December 2004; and

Separately, the CMA has the power to investigate markets as a whole, by carrying out market studies. At the end of a market study, the CMA can make recommendations to businesses and government, or initiate enforcement action under other statutory powers (including the Chapter 2 prohibition and Article 102). If the CMA has reasonable grounds for suspecting that a feature of a market is preventing, restricting or distorting competition, it can initiate a full market investigation. A market investigation can also be initiated by any of the concurrent regulators (listed above) or by the Secretary of State. Following a market investigation, the

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5 Section 46 of the Act.
6 2009/C 45/02.
7 The investigation procedures followed by the sectoral regulators differ in some respects from the CMA’s procedures.

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CMA has the power to tackle any features having an adverse effect on competition (including unilateral conduct features) by imposing a wide range of remedies. The identification of anticompetitive features in a market investigation is not a finding that market participants have infringed the law, and remedies are intended to be prospective rather than punitive.

II YEAR IN REVIEW

i Levels of public enforcement

The CMA has investigated relatively few dominance cases, albeit with a modest increase in activity over the past few years. Two main reasons are usually cited to explain the relative lack of enforcement by the CMA:

a cross-border cases affecting the United Kingdom often fall to be investigated by the European Commission, depriving the CMA of jurisdiction to investigate the same conduct in parallel (which is likely to change after the United Kingdom leaves the European Union); and

b cases involving natural monopolies generally fall to be investigated by the concurrent sectoral regulators. In addition to this, the CMA can investigate unilateral behaviour through market studies and investigations, which allow it to address perceived competition concerns in a market without the need for formal enforcement action.

Government reforms have sought to encourage greater use of competition law enforcement by the sectoral regulators in particular. These regulators have a duty to apply ex post competition law in preference to ex ante regulation where possible. The government has placed a responsibility on the CMA to monitor the work of sectoral regulators and, if appropriate, take enforcement action in their sectors. The CMA is also obliged to publish an annual report on the functioning of the concurrency regime as soon as practicable after the end of each financial year, and the Secretary of State retains a right to remove concurrent powers from sectoral regulators if they are not used.

In February 2016, the National Audit Office (NAO) published a critical report into the UK competition regime, which strongly encouraged the CMA and the concurrent sectoral regulators to find ways to increase levels of competition enforcement. CMA enforcement activity (in dominance cases and more generally) increased following the publication of the NAO report, including three dominance cases opened in the 12 months after the NAO’s report was published. In 2018, however, the CMA opened only one new dominance case, and all of its ongoing investigations are in the pharmaceutical sector. This relative lack of activity likely reflects: a focus on resolving cases opened during the flurry of activity immediately after the NAO report, and the diversion of CMA resources to deal with planning for a no-deal exit from the EU and proposals for reform, which are discussed in more detail in Section VIII.

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8 The fifth annual report was published on 10 April 2019. The CMA also published a ‘Baseline Report’ on concurrency on 1 April 2014.
ii Major developments in public enforcement

In 2018 and early 2019, the CMA and sectoral regulators issued one infringement decision and two statements of objection. The CMA also closed one case after finding no grounds for action. In the same period, the CAT overturned one CMA decision, remitting the matter to the CMA for further investigation, and made a Preliminary Reference to the Court of Justice of the European Union (CJEU) in the appeal of another CMA decision.

Infringement decisions, statements of objections and commitments decisions

Royal Mail

In August 2018, the Office of Communications (Ofcom) fined Royal Mail £50 million for unlawful discrimination against postal operators competing with Royal Mail in delivery services. Whistl (formerly TNT Post), the UK’s largest active bulk mail operator, used Royal Mail for final sorting and delivery of business mail to the parts of the UK where it did not have its own delivery operations. Whistl complained to Ofcom about contract changes notices (CCNs) issued by Royal Mail that outlined variations to its wholesale customers’ contracts that would come into effect in March 2014. Ofcom opened an investigation in April 2014, at which point Royal Mail suspended the CCNs.

In its decision, Ofcom found that Royal Mail’s planned price changes discriminated against wholesale customers for whom Royal Mail delivered only to areas in which they did not have their own delivery operations. Companies using Royal Mail to deliver mail to only some parts of the UK had to pay Royal Mail 0.25p more per letter than companies engaging Royal Mail to deliver to the whole of the UK.

Ofcom found that Royal Mail was not legitimately justified in such discrimination and that Royal Mail’s internal documents suggested that the CCNs were designed to limit delivery competition from its first and only significant competitor, Whistl. The price differential was found to have a material impact on the profitability of an end-to-end entrant, and to make entry and expansion in bulk mail delivery more difficult. It therefore constituted an abuse of Royal Mail’s position as a dominant provider of delivery services.

In October 2018, Royal Mail appealed Ofcom’s decision to the CAT. The main hearing has been listed for five weeks in June/July 2019.

Concordia

In January 2019, the CMA issued a supplementary statement of objections in relation to alleged excessive pricing by Advanz Pharma (formerly Concordia) of liothyronine tablets in the UK. The supplementary statement reduces the scope of the investigation to around eight years (two years shorter than in the statement of objections issued in November 2017) and reduces the allegation of price increase from 6,000 per cent to 1,605 per cent.

Auden Mckenzie and Waymade

In February 2019, the CMA issued a statement of objections to Auden Mckenzie and Waymade relating to the supply of hydrocortisone tablets in the UK. The CMA alleges that the parties entered into anticompetitive supply agreements from 2011 to 2015, and that Auden Mckenzie abused its dominant position by making monthly payments to Waymade not to enter the market during that period. The CMA is concerned that the UK National
Health Service (NHS) was denied a choice of suppliers, and potential savings from the increased competition. Hydrocortisone tablets are the primary treatment for people suffering from Addison’s disease.

**Conclusion of cases without adopting infringement or commitments decisions**

**Merck Sharp & Dohme Ltd**

In March 2019, the CMA closed its investigation of a discount scheme developed by Merck Sharp & Dohme Ltd (MSD) for its biologic infliximab drug, Remicade, finding no grounds for action. The CMA had opened its investigation in December 2015 and issued a statement of objections in May 2017. The CMA concluded that MSD’s volume-based discount scheme, introduced following the expiry of its patent for Remicade in early 2015, was not likely to limit competition from biosimilar infliximab products.

**Appeals**

**GlaxoSmithKline**

On 12 February 2016, the CMA found that a group of pharmaceutical companies, including GlaxoSmithKline (GSK), Alpharma Limited (Alpharma) and Generics (UK) Limited (GUK), had infringed the Chapter 1 prohibition and Article 101 of the Treaty on the Functioning of the European Union by entering into a series of agreements to delay generic entry of the drug paroxetine (a prescription-only anti-depressant) in the UK. The CMA also found that GSK’s conduct constituted an abuse of its dominant position in breach of the Chapter 2 prohibition. The CMA imposed fines totalling £44.9 million (€37.6 million on GSK, £5.8 million on GUK and its former parent, and £1.5 million on Alpharma and its successor companies).

GSK appealed the CMA’s decision on various grounds, including that the relevant market ought to have been the broader market for all selective serotonin reuptake inhibitors (SSRIs), rather than the narrower paroxetine molecule market. In March 2018, the CAT handed down an intermediate judgment, provisionally dismissing GSK’s argument that the CMA was wrong to conclude that GSK held a dominant position. The CAT nevertheless made a Preliminary Reference to the CJEU on this point and on the question of whether GSK abused its dominant position by entering into agreements of the type in question. In its Preliminary Reference application, the CMA accepts that GSK would not have held a dominant position if the relevant market comprised all SSRIs. The CAT proceedings have been stayed pending the CJEU’s preliminary ruling.

**Pfizer and Flynn**

In December 2016, Pfizer and Flynn were each found to have infringed the Chapter 2 prohibition and Article 102. The CMA concluded that Pfizer’s supply prices to Flynn, and Flynn’s selling prices, for phenytoin sodium capsules (an anti-epilepsy drug) were excessive and unfair.

Pfizer and Flynn appealed separately to the CAT, and both appeals were heard together in November 2017. Judgment was handed down in June 2018. The CAT upheld the CMA’s findings on market definition and dominance, but set aside the CMA’s conclusions on abuse. The CAT held that:

- the CMA erred in its reliance on a cost-plus approach, by which the CMA found that Pfizer’s and Flynn’s prices were excessive because they materially exceeded their respective costs and a reasonable rate of return;
b the CMA failed to properly assess the impact of meaningful comparators; and

c the CMA was mistaken in finding that there were no non-cost related factors that
would increase the value of the drug beyond the level identified by the CMA’s cost-plus
approach.

The CAT rejected Pfizer’s argument that, because of the vertical nature of its relationship with
Flynn and its distance from Flynn’s pricing, it could not be in breach of Article 102 in any event.9

In December 2018, the parties were given permission to appeal the CAT’s judgment
to the Court of Appeal.

iii Current abuse of dominance investigations

The CMA and sectoral regulators are currently investigating eight suspected abuse of
dominance cases, summarised in the table below.

<table>
<thead>
<tr>
<th>Sector</th>
<th>Investigating authority</th>
<th>Conduct</th>
<th>Case opened</th>
</tr>
</thead>
<tbody>
<tr>
<td>Energy</td>
<td>Ofgem</td>
<td>Suspected abuse of a dominant position by EPEX and its parent EEX</td>
<td>December 2018</td>
</tr>
<tr>
<td></td>
<td></td>
<td>in relation to wholesale trading activities, by failing to take steps</td>
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<td></td>
<td></td>
<td>required to enable rival, Nord Pool, to participate in certain electricity</td>
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<td></td>
<td>trading auctions between the UK and Irish energy markets. Ofgem</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>announced on 2 May 2019 that it was consulting on commitments</td>
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<tr>
<td></td>
<td></td>
<td>offered by EPEX</td>
<td></td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected abuse of dominant position by Auden McKenzie in relation</td>
<td>October 2018</td>
</tr>
<tr>
<td></td>
<td></td>
<td>to the supply of generic pharmaceuticals</td>
<td></td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected anticompetitive agreements and abuse of dominance in</td>
<td>October 2017</td>
</tr>
<tr>
<td></td>
<td></td>
<td>relation to the supply of generic pharmaceuticals</td>
<td></td>
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<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected anticompetitive agreements and abuse of dominance in</td>
<td>October 2017</td>
</tr>
<tr>
<td></td>
<td></td>
<td>relation to the supply of generic pharmaceuticals</td>
<td></td>
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<tr>
<td>Energy</td>
<td>Ofgem</td>
<td>Potential abuse of a dominant position by a company providing</td>
<td>August 2017</td>
</tr>
<tr>
<td></td>
<td></td>
<td>services to the energy industry</td>
<td></td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected unfair pricing in the supply of liothyronine tablets by</td>
<td>October 2016</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Concordia.</td>
<td></td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected abuse of dominance (inducement to delay entry) by</td>
<td>April 2016</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Actavis UK in relation to hydrocortisone tablets, as well as suspected</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>anticompetitive agreements between Concordia and Actavis UK</td>
<td></td>
</tr>
<tr>
<td>Pharmaceuticals</td>
<td>CMA</td>
<td>Suspected abuse of dominance (excessive pricing) by Actavis UK in</td>
<td>March 2016</td>
</tr>
<tr>
<td></td>
<td></td>
<td>relation to hydrocortisone tablets</td>
<td></td>
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</tbody>
</table>

iv Major developments in private actions in 2018

Unwired Planet v. Huawei

In April 2017, the High Court found that Unwired Planet had not abused its dominant
position by seeking an injunction against Huawei for infringing its standard-essential patents
(SEPs). Unwired Planet owns a portfolio of SEPs relating to mobile telephone technology;
Huawei is a manufacturer of mobile telephones. The SEPs were subject to commitments
given to the European Telecommunications Standards Institute to license on fair, reasonable,
and non-discriminatory (FRAND) terms. Huawei appealed on three grounds:

a the imposition of a global licence on terms set by a national court based on a national
finding of infringement could not be FRAND;

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9 For further analysis, see www.clearygottlieb.com/-/media/files/uk-competition-law-newsletters/19020803competitionnewsletterjanuary2019r1-pdf.pdf.
Huawei ought to have been offered different rates for its licence owing to the non-discrimination (ND) limb of FRAND (SEPs were licensed to another mobile telephone manufacturer for a lower price); and

Unwired Planet’s application for an injunction against Huawei without giving any notice of the infringement, providing reasons for the infringement or making any licensing offer, amounted to abuse of a dominant position. This abuse, Huawei argued, ought to have constituted a defence to the injunction brought by Unwired Planet.

In October 2018, the Court of Appeal dismissed the appeal. First, on global licensing, the Court of Appeal found that the judge at first instance, Birss J, was entitled to find that, in all the circumstances, only a global license would be FRAND. The Court of Appeal found that Birss J had erred in concluding that there was one FRAND rate for any given set of circumstances, as ‘the reality is that a number of sets of terms may all be fair and reasonable in a given set of circumstances’, but that this error had no material effect on the outcome. Second, the Court upheld Birss J’s approach with regard to the ND limb of FRAND, by which ‘a benchmark [FRAND] royalty is decided on which is then available to all-comers who are similarly situated’ and any discrimination could be addressed separately by competition law. The Court of Appeal did not accept Huawei’s argument that the ND limb of FRAND was a separately enforceable obligation with no need to show distortion of competition (the ‘hard-edged non-discrimination rule’). Third, the Court of Appeal agreed with Birss J that the CJEU had not laid down mandatory conditions in Huawei v. ZTE\(^{10}\) that must be satisfied before proceedings seeking injunctive relief could be issued, noting that the requirement under EU law to take account of all the circumstances ‘does not sit comfortably with the notion that the CJEU has laid down a set of prescriptive rules’.

The UK Supreme Court has granted Huawei permission to appeal the Court of Appeal’s judgment. The hearing is expected to take place in late 2019.

**Transport for London Travelcards**

In March 2019, the CAT announced that it had received two applications to commence collective proceedings on behalf of affected rail passengers holding Transport for London (TfL) zonal tickets (Travelcards). The applications allege that three UK train operators abused their positions of dominance. Both applications were made on a stand-alone basis; they do not benefit from a prior infringement decision binding the court.

The proceedings arise out of ‘boundary fares’, which are fares for travel to and from the outer boundaries of TfL’s rail zones, and allegations were that the rail companies failed to make boundary fares sufficiently available for sale or failed to ensure customers avoided paying for parts of their journeys twice. The proposed class of claimants consists of rail passengers who were effectively compelled to pay twice for the parts of their rail journeys that overlapped with the validity of their Travelcards. They are collectively represented by the applicant, Mr Justin Gutmann. The respondent rail companies are First MTR South Western Trains Limited, Stagecoach South Western Trains Limited and London and South Eastern Railway Limited. Case management conferences took place in April 2019.

Other cases before the CAT and the High Court are summarised below.

\(^{10}\) Case C-170/13, Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH (ECLI:EU:C:2015:477).
### III MARKET DEFINITION AND MARKET POWER

The assessment of market definition and market power in the United Kingdom is consistent with EU law. The UK competition authorities and courts are required to interpret the provisions of the Act consistently with EU competition law wherever possible, and to have regard to relevant decisions and statements of the European Commission.

One difference between EU and UK law is that under the Chapter 2 prohibition there is no need to show a cross-border effect, and no minimum market size threshold: a ‘dominant position’ refers to a dominant position in the United Kingdom or any part of the United Kingdom. This means that dominant positions can be found even for small suppliers in small markets.

### IV ABUSE

#### i Overview

The assessment of abuse in the United Kingdom is consistent with EU law. The UK competition authorities and courts are required to interpret the provisions of the Act consistently with EU competition law wherever possible and to have regard to relevant decisions and statements of the European Commission (although this is likely to change after the United Kingdom leaves the EU). There is no exhaustive list of abuses under Section 18 of the Act (the equivalent of...
Any conduct by a dominant undertaking that excludes competitors or exploits customers is potentially abusive, unless that conduct is objectively justified. Moreover, the High Court has held that conduct should be looked at ‘in the round’, rather than seeking to identify on a narrow basis whether conduct departs from ‘competition on the merits’.

ii Exclusionary abuses

Enforcement action in the United Kingdom has generally focused primarily on exclusionary abuses (although, more recently, the CMA has pursued a number of exploitative abuse cases relating to suspected excessive pricing).

The OFT decision in Gaviscon is notable in that it demonstrates the OFT’s (and, by extension, the CMA’s) willingness to grapple with novel abuses. The case concerned abusive behaviour by Reckitt Benckiser, which held a dominant position in the market for alginates and antacids. Reckitt Benckiser withdrew its Gaviscon Original product from sale to the NHS when the product no longer benefited from patent protection, even though it remained on sale ‘over the counter’. Reckitt Benckiser replaced Gaviscon Original with a similar product, Gaviscon Advance, which continued to benefit from patent protection. Because of the way the NHS computer system operated, the withdrawal of Gaviscon Original made it more difficult for doctors to prescribe alternative generic products as opposed to Gaviscon Advance. The OFT concluded that this action was expected to ‘hinder the development of generic competition’ to Gaviscon, thereby excluding competition from the market. Reckitt Benckiser entered into a settlement agreement with the OFT, agreeing not to challenge its decision and to pay a fine of £10.2 million.

In Cardiff Bus, the OFT investigated exclusionary behaviour preventing a competing bus company, 2 Travel, from establishing a rival service to the dominant incumbent. The case concerned both price and non-price predation. Cardiff Bus reacted to the launch of a rival ‘no-frills’ service by introducing its own no-frills service on the same routes, without a valid business case and running at a loss. In both Cardiff Bus and Gaviscon, the OFT uncovered evidence of anticompetitive intent.

The focus on exclusionary conduct is borne out by other recent investigations. For example, in addition to the cases mentioned in Section II:

a In December 2015, the Office of Rail and Road (ORR) closed an investigation into Freightliner on the basis of binding commitments. The ORR had investigated the terms of Freightliner’s agreements with customers for the provision of rail freight services between deep-sea container ports and inland destinations. The terms included exclusive purchasing obligations, minimum volume commitments and suspected loyalty-inducing rebates. Certain customers were also prevented from reselling capacity purchased under the contracts. Freightliner committed to remove or amend the provisions in its contracts to address the ORR’s concerns.

b In June 2015, the CMA closed an investigation into suspected loyalty-inducing rebates in the pharmaceutical sector, on the grounds of administrative priorities. The case was closed before any statement of objections was issued. The CMA nonetheless sent a warning letter to the relevant party, identifying potential concerns that may arise in the context of discounts and rebates.

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11 This point was underlined by the High Court in Purple Parking Limited v. Heathrow Airport Limited [2011] EWHC 987 (Ch).
In October 2014, Ofcom closed an investigation into a suspected margin squeeze by BT in relation to superfast broadband services, following a complaint by TalkTalk Telecom Group plc.

In September 2014, the CMA closed an investigation into suspected abuse of dominance by Epyx concerning the market for vehicle service, maintenance and repair platforms on the basis of binding commitments. The CMA had investigated whether Epyx’s contracts prevented customers from switching to competing suppliers.

In June 2014, the CMA closed an investigation into suspected abuse of dominance by Certas Energy UK Limited (previously GB Oils Limited) concerning the wholesale supply of road fuels in the Western Isles of Scotland on the basis of binding commitments. GB Oils had entered five-year exclusive contracts with filling stations, preventing them from sourcing fuel from other suppliers.

In 2011, the OFT issued a reasoned ‘no grounds for action’ decision in relation to Idexx Laboratories Limited, a supplier of in-clinic companion-animal diagnostic testing equipment. The OFT investigated whether Idexx had engaged in anticompetitive bundling and predatory pricing, concluding that there was insufficient evidence that Idexx’s conduct was likely to restrict or impair effective competition in the relevant markets.

In 2010, the OFT issued a similar ‘no grounds for action’ decision following an investigation of Flybe. The investigation followed a complaint that Flybe had engaged in predatory conduct that excluded a rival airline, Air Southwest, from certain routes. It was clear that Flybe had priced below its average avoidable costs of entry, but the OFT found that Flybe was itself a new entrant and that it was normal commercial practice for an airline in this position to operate at a loss. The situation could therefore be distinguished from the position of a dominant incumbent reacting to new entry.

iii Discrimination

Discrimination cases in the United Kingdom have also tended to focus on exclusionary conduct. For example, in 2006 the ORR found that English, Welsh and Scottish Railway (EWS) had engaged in abusive discriminatory conduct through the prices it charged for access to its coal haulage services. The ORR found that EWS had discriminated against Enron Coal and Steel Limited (ECSL), offering prices that excluded ECSL from bidding effectively for coal haulage contracts. More recently, in SSE, the Office of Gas and Electricity Markets (Ofgem) accepted binding commitments to address the provisional concern that an upstream supplier was offering discriminatory terms that favoured its own downstream business over those of competitors.

Similar concerns were considered by the Water Services Regulation Authority (Ofwat) in 2015 in Bristol Water and Anglian Water, and by Ofcom in 2018 in Royal Mail. In March 2015, Ofwat closed an investigation into Bristol Water on the basis of binding commitments. Bristol Water holds a local monopoly in the upstream market for the supply and maintenance of water infrastructure. Bristol Water is also active as a ‘self-lay’ contractor in a contestable downstream market, installing pipes that connect to the mains supply. Bristol Water was suspected of abusing its position in the upstream market by offering discriminatory terms to other self-lay contractors. The commitments require Bristol Water to ensure functional separation between its upstream and downstream services, and to ensure that its upstream business offers equivalent price and non-price terms to third-party contractors as offered to its own downstream business.
In December 2015, Ofwat closed an investigation into Anglian Water, finding no grounds for action. This followed a statement of objections issued in December 2011 and a supplementary statement of objections in April 2014. Anglian Water has a statutory monopoly for the provision of water and sewerage services in its region. Ofwat provisionally found that Anglian Water had implemented an illegal margin squeeze when pricing its upstream services to a rival, Independent Water Networks Limited (IWN), which was competing with Anglian Water for the contract to supply a new site with water and sewerage services. Ofwat eventually concluded that, as the site developer evaluated bids for water and sewerage services on a combined basis, it was unlikely that a margin squeeze applied to sewerage services alone would have made it materially more difficult for IWN to compete for the contract.

In August 2018, Ofcom fined Royal Mail £50 million for abusing its dominant position on the delivery services market. Ofcom found that Royal Mail’s proposed changes to prices charged for bulk mail delivery services – charging more to operators who used Royal Mail only for delivery to the areas in which they did not have their own delivery capabilities – amounted to unlawful price discrimination. The price difference was found to discourage entry into the downstream delivery market and to increase barriers to expansion for postal operators seeking to compete with Royal Mail.

In *Purple Parking*, the High Court found that Heathrow Airport had abused a dominant position by offering discriminatory terms of access to providers of valet parking services. Heanthrow permitted its own valet parking service access to its forecourts at Terminals 1 and 3, while requiring rival service providers (including Purple Parking) to relocate from the forecourts to the car parks. The High Court held that the forced relocation of rival providers placed them at a competitive disadvantage, and that this was sufficient to demonstrate abuse. The case is unusual in that there was no requirement to show that access to the forecourts was an essential facility or that competition would be eliminated entirely.

Similarly, in *Streetmap*, the High Court proceeded on the assumption that, at least in principle, a dominant undertaking might commit an abuse by promoting its own products or services in a separate market over those of a rival, provided the conduct had an appreciable effect on competition in the second (non-dominated) market and was not objectively justified. The Court did not specifically consider whether a dominant undertaking that was not an essential facility could be required to provide access to downstream rivals on equivalent terms to those offered to its own downstream business. This question was not necessary to decide the case on the facts, and arguably overlaps with questions currently being considered by the European Commission.

The Court went further in *ATS v. London Luton Airport Operations*. In this case, the Court concluded that a concession agreement granted to National Express by London Luton Airport Operations, that carved out easyBus from the exclusivity provisions, was discriminatory against other bus operators even though Luton Airport Operations (the upstream supplier) was not active in the downstream bus market. The *Luton Airport case* clarifies a question previously considered in *SEL-Imperial Ltd v. British Standards Institution*. In this case, the High Court considered an action for strike out by the British Standards

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15 *Arriva The Shires Ltd v. London Luton Airport Operations Ltd* [2014] EWHC 64 (Ch).
16 *SEL-Imperial Ltd v. The British Standards Institution* [2010] EWHC 854 (Ch).
Institution of an abuse of dominance claim concerning the certification of replacement vehicle parts. The High Court refused to strike out the claim because it was insufficiently clear at the time whether decisions affecting a market in which the alleged dominant undertaking was not active could constitute an abuse. The decision by the CJEU in MEO/GDA also confirmed that discrimination can be abusive even where the dominant firm is not active in the downstream market in which the discrimination is felt.  

### iv Exploitative abuses

While the focus of UK enforcement action has mostly been on exclusionary conduct, excessive pricing has been considered in a number of cases, including Napp Pharmaceutical Holdings Limited, Thames Water Utilities Ltd/Bath House and Albion Yard and Albion Water v. Ofwat. These cases have all considered the potential exclusionary effect of pricing behaviour. More recently, as noted above, the CMA fined Pfizer and Flynn Pharma for ‘pure’ excessive pricing (where there was no exclusionary effect) but now has to reconsider the case after it was remitted by the CAT. The CMA also has two ongoing investigations in suspected excessive pricing, and recently issued a supplementary statement of objections addressed to Advanz Pharma concerning suspected excessive pricing.

The Court of Appeal grappled with the concept of excessive pricing in 2007 in Attheraces Limited v. British Horseracing Board Limited. This case concerned the price at which the British Horseracing Board made available pre-race data to Attheraces for sale to overseas bookmakers. Attheraces claimed that the price charged was excessive, as well as discriminatory, amounting to a refusal to supply. Attheraces was successful at first instance, but its claim was overturned by the Court of Appeal. The Court of Appeal accepted that, in principle, prices were excessive if they significantly exceeded the economic value of the product. In assessing economic value, however, it was insufficient merely to show that prices exceeded costs by a reasonable amount, without having regard to the price customers (in this case, the overseas bookmakers) were prepared to pay. The Court also noted that there was little evidence of harm to ultimate consumers (the betting public) from the alleged excessive pricing.

### V REMEDIES AND SANCTIONS

#### i Sanctions

An undertaking that has abused a dominant position may be fined up to 10 per cent of its worldwide turnover in the last business year, calculated according to rules set out by Statutory Instrument. An undertaking may be fined only if its conduct was intentional or negligent (i.e., where the undertaking ought to have known that its conduct would result in a

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17 Case C-525/16, MEO/GDA.  
18 Napp Pharmaceutical Holdings Limited (CA98/2/2001), OFT decision of 30 March 2001.  
19 Thames Water Utilities Ltd/Bath House and Albion Yard (CA98/01/2003), Ofwat decision of 31 March 2003.  
restriction or distortion of competition). Any undertaking whose turnover does not exceed £50 million benefits from immunity from fines for infringing the Chapter 2 prohibition (but not Article 102), although immunity may be withdrawn on a prospective basis.

The CMA is obliged to publish guidance as to the appropriate amount of a penalty (which is subject to approval by the Secretary of State). The CMA (as well as concurrent regulators and the CAT) must have regard to that guidance when imposing penalties. The OFT published new guidance in September 2012, following a series of successful appeals against its fining decisions before the CAT. The guidance, which was updated by the CMA in April 2018, sets out a six-step approach to calculating fines:

- Calculation of a starting point by multiplying the undertaking’s turnover in the relevant market by a percentage of up to 30 per cent depending on the seriousness of the infringement (under its previous guidance, the maximum was 10 per cent);
- Adjustment for duration;
- Adjustment for aggravating and mitigating factors;
- Adjustment to achieve sufficient deterrence and to ensure proportionality;
- Adjustment to ensure the statutory cap (10 per cent of worldwide turnover) is not exceeded; and
- Adjustment to reflect any leniency or settlement discount or approval of a voluntary redress scheme.

The CMA’s guidance states that it will generally apply a starting point percentage of ‘between 21 and 30 per cent of relevant turnover’ when considering the most serious abuses of a dominant position. Seriousness will be assessed by reference to the nature and extent of the demand for that product, the structure and size of the market, the effect on competitors (and others), the need for deterrence and the damage caused to consumers.

ii Behavioural remedies

On reaching an infringement decision, the CMA (or regulator) may give any person such directions as it considers appropriate to bring the infringement of Article 102 or the Chapter 2 prohibition to an end. Directions may be enforced through the civil courts.

The CMA and regulators also have the power to impose interim measures. Interim measures may be imposed only where the authority has opened a formal investigation (and therefore has ‘reasonable suspicion’ of an infringement) and considers it necessary to impose interim measures as a matter of urgency for the purposes of preventing significant damage, or to protect the public interest.

The CMA is yet to impose interim measures, although it did consider and reject an application by Worldpay against Visa UK Limited in 2014. The OFT imposed interim

24 Section 40 of the Act.
25 Section 38(8) of the Act.
26 In connection with the OFT’s infringement decisions concerning: (1) bid-rigging arrangements in the construction sector; and (2) cartel behaviour by recruitment agencies.
27 CMA’s guidance as to the appropriate amount of a penalty, CMA73.
28 Sections 33 and 34 of the Act.
29 Section 35 of the Act.
30 See CMA press release of 27 March 2015.
measures only once (in 2006), and those measures were subsequently withdrawn. The legal threshold for the OFT to impose interim measures was one of ‘serious, irreparable damage’, whereas the CMA need only show the prospect of ‘significant damage’. This change in the legal threshold was intended to make it easier for the CMA to impose interim measures in future. Until now, parties seeking interim relief have generally found it more effective to apply to the courts.31

In its investigation of ATG Media’s supply of live online bidding services to auction houses, the CMA received an application under Section 35 of the Act for interim measures relating to allegedly exclusionary practices in respect of such services. The application was made in November 2016. In June 2017, however, shortly before the CMA was due to make a final decision on whether to impose interim measures, the CMA accepted an offer of commitments from ATG Media and closed its investigation. Dr Michael Grenfell, the CMA’s executive director for enforcement, referred to this case as ‘an example of how, when faced with an interim measures application in a fast-moving market, we were able to resolve the problem within just over six months’.32

There may be greater use of interim measures, particularly in the digital sector, in future. A 2018/19 Digital Competition Expert Panel inquiry into competition law in the digital sector, commissioned by the UK government and chaired by Professor Jason Furman, recommended more frequent and quicker use of interim measures. It identified interim measures as particularly appropriate in digital markets because cases in the digital sector ‘are likely to be complex but markets can move fast and tip to a winner before a final decision is reached’.33 Lord Tyrie, chairman of the CMA, also stated in a public letter to the Secretary of State for Business, Energy and Industrial Strategy that increased usage of interim measures ‘will be essential if the CMA is to respond to the challenges thrown up by rapidly changing markets, and to do so sufficiently quickly to prevent irreversible harm to consumer trust’.34

iii Structural remedies

The CMA and regulators have no power to impose structural remedies following a finding of abuse of dominance. It is nevertheless possible for a dominance investigation to be closed on the basis of structural commitments. This has happened on one occasion.

In January 2013, Ofwat accepted binding commitments from Severn Trent Water, the first time it had accepted commitments in a competition case. The investigation considered

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31 See, for example, Dahabshil Transfer Services Limited v. Barclays Bank plc and Harada Limited and Berkeley Credit And Guarantee Limited v. Barclays Bank plc [2013] EWHC 3379 (Ch). This case concerned an alleged abuse of dominance by Barclays, which withdrew certain money-servicing activities from the claimant. The High Court granted an interim injunction, subject to standard cross-undertakings in damages, requiring Barclays to continue providing the services to the claimant pending a full trial. See also Packet Media Ltd v. Telefonica UK Ltd [2015] EWHC 2235 (Ch). By contrast, interim relief was refused by the High Court in Bruce Baker v. The British Boxing Board of Control [2014] EWHC 2074 (QB).


whether Severn Trent Water was cross-subsidising its water analysis business, Severn Trent Laboratories, from its core regulated business. Specifically, Ofwat considered whether (as a result of cross-subsidisation) Severn Trent Laboratories was able to price below cost when competing for contracts with other providers of water analysis services. The commitments included the divestment of Severn Trent Laboratories. The decision to accept commitments in this case is notable not only because it included a structural divestment, but also because the decision to accept commitments departed from the published guidance, which states that commitments will not generally be accepted in serious abuse of dominance cases, such as predatory pricing.

In *Bristol Water* and SSE (see subsection IV.iii), Ofwat and Ofgem (respectively) accepted quasi-structural commitments under which the suppliers agreed to introduce functional separation between their upstream and downstream businesses.

The CMA also has the power to impose structural measures to address unilateral market power following a market investigation:

- **a** In 2014, following its *Private Healthcare* market investigation, the CMA decided that HCA should divest private hospitals in central London (although that decision was subsequently quashed by the CAT and, after further investigation, the CMA ultimately concluded in September 2016 that ordering a divestiture would be disproportionate).
- **b** In 2014, following a market investigation into aggregates, cement and ready mix concrete, the Competition Commission (CC) found that Hanson had exclusive rights to produce ground granulated blast-furnace slag (an input into cement) in Great Britain and forced it to divest one of its facilities to create competition.
- **c** In 2010, the CC required BAA plc (the owner of the largest UK airports) to divest two London airports and one Scottish airport, to improve competition in the relevant markets.

## VI PROCEEDURE

The UK enforcement procedure is similar in many respects to the procedure that applies at EU level (under Regulation 1/2003). The CMA (or concurrent regulator) investigates a suspected infringement and reaches an administrative decision in the first instance. That decision is then subject to appeal. The stages of a CMA investigation are as follows:

- **a** Investigations are usually triggered by complaints. This is not always the case, however, and the CMA is able to investigate on its own initiative. The OFT’s Gaviscon investigation, for example, began after evidence was submitted by a whistle-blower.
- **b** Before opening a formal investigation the CMA must be satisfied that it has ‘reasonable suspicion’ of an infringement. The CMA has no power to use formal investigation powers unless this legal threshold is met. Therefore, it typically carries out ‘informal’ information gathering in the first instance (including seeking further information from complainants).
- **c** As well as satisfying the legal threshold, the CMA must decide whether the case is an administrative priority, in accordance with its published Prioritisation Principles. The Prioritisation Principles are intended to ensure the CMA makes efficient use of its resources.

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35 Section 25 of the Act.
36 CMA16, April 2014.
resources when deciding which cases to pursue. The High Court has upheld the CMA's right to prioritise its cases in this way, and to close investigations on administrative grounds, even after considerable investigation has been carried out.37

d Once it has opened an investigation, the CMA will publish a short notice on its website indicating in broad terms the relevant sector and conduct under investigation. It does not usually name the parties to its investigations before a statement of objections is issued. In exceptional circumstances, the CMA can decide to publish the names of the parties in its initial public notice. Exceptional circumstances include instances where a party's involvement is already in the public domain, or where the CMA considers that the potential harm to consumers or other businesses from non-disclosure is sufficient to justify disclosure.

e Provided the legal threshold for opening a case is met, the CMA has wide powers to require the production of information. It may require the production of specified documents or information, ask individuals oral questions or carry out interviews with individuals. Individuals are required to answer the CMA's questions, subject to their privilege against self-incrimination, and failure to do so can result in civil sanctions. The CMA may also carry out unannounced visits of business or domestic premises (i.e., ‘dawn raids’). It may enter premises without a warrant, or it may enter and search premises with a warrant (which it can obtain from the CAT or the High Court).

f If the CMA is minded to reach an infringement decision against an undertaking, it must issue a statement of objections, setting out its case and the evidence it intends to rely on. The decision whether to issue a statement of objections must be taken by the case team's senior responsible officer. The CMA must also allow access to its case file when it issues a statement of objections. The CMA's file must contain all material relevant to the matters in the statement of objections (subject to certain redactions). Any party receiving a statement of objections has the right to submit written representations and to attend an oral hearing. The same process applies in relation to any proposed fine (i.e., the CMA will provide details of its proposed fine and allow the opportunity for written representations and an oral hearing).

g The CMA will consider entering into settlement discussions in any case where it considers that the evidential standard for giving notice of its proposed infringement decision is met.38 ‘Settlement’ is the process whereby a business under investigation is prepared to admit that it has breached competition law and confirms that it accepts that a streamlined administrative procedure will govern the remainder of the CMA's investigation of that business's conduct, in exchange for a reduction in financial penalty. Settlement discussions can be initiated either before or after the statement of objections is issued. The CMA retains broad discretion in determining which cases to settle, and this includes the discretion whether to explore interest in settlement discussions, whether to continue or withdraw from settlement discussions and whether to settle at all. Businesses do not have a right or an obligation to settle in a given case and may withdraw from settlement discussions at any time.

h Parties can offer commitments at any stage of an investigation, although the CMA encourages parties considering commitments to offer them before a statement of

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38 In the past, settlement was formally referred to as ‘early resolution’.
objections is issued. The commitments process is similar to the EU process under Article 9 of Regulation 1/2003. There is no obligation on parties to offer commitments.

Following parties’ written and oral representations, the CMA must decide whether to issue an infringement decision. This decision is taken on a collective basis by a three-member case decision group (CDG), which may include any senior CMA staff or board member or any member of the CMA panel. The senior responsible officer may not be a member of the CDG, to ensure that the final decision is taken by officials who were not involved in the decision to issue the statement of objections. The CMA may equally decide at this stage to issue a reasoned decision that it has no grounds for action.

Final decisions are published (in redacted form) on the CMA’s website. CMA infringement decisions are subject to full-merits appeal to the CAT, and subsequently to the civil appeal courts on points of law.

CMA investigations vary significantly in duration, and no statutory deadlines apply. Very broadly, a CMA investigation is likely to take around three years (from case-opening until decision), with the statement of objections being issued roughly halfway through that period.

During an investigation, disputes over procedural matters (such as deadlines for responding to information requests, or confidentiality redactions) that cannot be resolved with the case team itself may be referred to the CMA’s Procedural Officer. The Procedural Officer will review the party’s written application and relevant correspondence, and allow an opportunity for each side to present its views orally (which may be by telephone). The Procedural Officer will then issue a short, reasoned decision (within a target deadline of 10 working days), which is binding on the CMA. CMA procedural decisions are ultimately subject to judicial review by the civil courts.

As explained above, the CMA has the power to impose interim measures to prevent significant damage, or to protect the public interest. If the CMA is minded to impose interim measures, it must first give notice to the party in question and allow them the opportunity to make representations. Interim measures decisions are subject to appeal to the CAT.

The Consumer Rights Act 2015 also gives the CMA the power to certify voluntary compensation schemes following an infringement decision, intended to encourage firms to offer compensation without the need for victims to commence private litigation.

Outside an investigation, the CMA has the power to publish opinions on novel issues of competition law where it considers there is sufficient need for general guidance (e.g., because of their economic importance for consumers). The CMA has never published an opinion in relation to a question of abuse of dominance. The CMA is sometimes prepared to offer private, informal advice on an ad hoc basis, but only in exceptional cases and only where the matter in question would satisfy its case Prioritisation Principles. In contrast, the CMA does encourage potential complainants to approach it with possible complaints for discussion on an informal and confidential basis.

VII PRIVATE ENFORCEMENT

Two types of private action exist in the United Kingdom: follow-on actions and stand-alone actions.

A follow-on action is a damages action founded on an infringement decision by a UK competition authority or the European Commission. The court is bound by the findings
of infringement already made (as well as findings of fact in the infringement decision). The claimant is therefore required only to show loss and causation. In a stand-alone action, the claimant must prove that the defendant infringed competition law, as well as proving that the claimant suffered reasonably foreseeable loss. Since October 2015, stand-alone actions and follow-on actions can be brought before the CAT as well as the civil courts (the High Court of England and Wales, the High Court of Northern Ireland, or the Court of Session or Sheriff Court in Scotland).\(^{39}\) The civil courts and the CAT have wide jurisdiction to award damages and equitable remedies, including injunctive relief, specific performance and declarations of illegality.

In the past, private claims tended to gravitate towards the civil courts, and particularly the High Court of England and Wales, for a variety of reasons. The Consumer Rights Act 2015 aims to reverse this trend. Not only does the CAT now have the power to hear stand-alone actions and grant injunctive relief, it is also the only venue in which claimants can bring opt-out and opt-in collective actions (discussed below). Further, some cases before the CAT will qualify for fast-track review, capping the costs risk for claimants.\(^{40}\) The civil courts also have the power to transfer competition cases to the CAT. The CAT’s procedural rules and limitation periods are now generally aligned with those that apply to the civil courts, although some questions remain over how the new rules apply to claims relating to conduct predating October 2015. Taken together, these changes are intended to make the CAT the principal venue for competition cases in the United Kingdom.

There are four forms of collective action in the United Kingdom:

\(a\) Collective actions before the CAT: since October 2015, any representative of a class of persons may bring a collective action for damages before the CAT on an opt-out basis or an opt-in basis. In either case, the claimant must obtain permission from the CAT (a ‘collective proceedings order’) to continue with a claim on this basis, by showing that they are a suitable representative and that the claims in question are sufficiently similar to be brought in collective proceedings.

\(b\) Consumer actions by specified bodies: ‘specified bodies’ can bring follow-on damages actions before the CAT on behalf of consumers, on an opt-in basis. A specified body is a consumer organisation specified by the Secretary of State by statutory order. To date, only the Consumers’ Association (also known as ‘Which?’) has been designated a specified body. Which? has brought only one action under these provisions (concerning replica football kits, which was ultimately settled), and has publicly stated that it will not bring any further actions of this type.

\(c\) Group litigation orders: the High Court has the power to make a group litigation order combining claims that raise common or related issues. A group litigation order will also provide for the establishment of a group register of the claims forming the group. Judgment are binding on all parties on the group register.

\(d\) Representative actions: it is, in theory, possible for a claimant to bring an action in the High Court on behalf of all claimants with the same interest.\(^{41}\) Following a 2010 Court

\(^{39}\) Before October 2015, the CAT did not have jurisdiction to hear stand-alone actions.

\(^{40}\) See, for example, Socrates Training Limited v. The Law Society of England and Wales [2016] CAT 10, judgment (costs capping) of 21 June 2016.

\(^{41}\) Civil Procedure Rule 19.6.
of Appeal judgment, however, it seems unlikely that mass representative actions will be brought in competition cases under these provisions in future, and far more likely that representative claimants will seek to launch collective proceedings before the CAT.

Damages in competition claims are intended to be compensatory: they are intended to place the victim in the position he or she would have been in had the infringement not occurred. In exceptional circumstances, where compensatory damages would otherwise be an inadequate remedy, damages might be awarded on a restitutionary basis (i.e., accounting for the profits earned unjustly by the defendant). While the Court of Appeal has accepted in principle that restitutionary damages may apply, they have never been awarded in practice.

UK Regulations implementing the EU Damages Directive (described in more detail in the EU chapter) came into force on 9 March 2017. Although many of the provisions of the Damages Directive did not require amendment of the UK regime, and many changes relate primarily to cartel infringements, the Regulations contain several provisions that may have a bearing on UK claims for damages from abuse of dominance. For example, the Regulations:
  a. address the burden of proof with respect to the passing-on defence;
  b. suspend the limitation period while competition authority investigations or consensual dispute resolution processes are ongoing;
  c. exclude the award of exemplary damages reversing the principle established in the Cardiff Bus case that exemplary damages were possible in dominance cases where no administrative fine had been imposed;
  d. exempt small and medium-sized enterprises, as well as defendants that settle with the claimant, from the principle of joint and several liability; and
  e. amend rules on disclosure.

More generally, the UK has become a popular venue for private actions even where the claimant has a choice of jurisdiction. There are two principal reasons for this. First, the UK rules on disclosure of evidence are favourable to claimants (allowing access to evidence that might not be available in other jurisdictions). Second, costs are generally awarded on a loser-pays basis. A successful claimant is therefore likely to recover a significant proportion of his or her costs from the defendant.

43 Devenish Nutrition Ltd v. Sanofi-Aventis SA (France) & Ors [2008] EWCA Civ 1086.
44 The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 (No. 385).
45 See 2 Travel Group plc (in liquidation) v. Cardiff City Transport Services Limited [2012] CAT 19, judgment of 5 July 2012. In 2008, the OFT issued an infringement decision, finding that Cardiff City Transport Services Limited (trading as Cardiff Bus) had engaged in predatory behaviour in the supply of local bus services in the Cardiff area. No fine was imposed on Cardiff Bus, because its turnover fell below the statutory threshold for immunity from fines. However, a rival bus company, 2 Travel, which had exited the market (and was by now in liquidation), sought follow-on damages in the CAT under several heads. The CAT found that Cardiff Bus was liable for 2 Travel’s loss of profit of around £34,000 (plus interest), but that the other claimed losses had not been proven. The CAT nevertheless awarded exemplary damages of £60,000 (almost tripling the total damages awarded), on the basis that Cardiff Bus’s abusive conduct had been calculated to make a profit that was likely to exceed the compensation payable to the claimant.
Public funding is generally unavailable for competition law actions. Other funding options are available, however. In particular, parties may enter conditional fee agreements (CFAs) with lawyers. Under a CFA, the lawyer will be paid nothing if the case is lost but will be entitled to a success fee (i.e., an uplift) of up to 100 per cent for winning the case. Competition actions in the United Kingdom may also be funded through ‘after-the-event’ insurance or by professional funders, although, in most cases, any uplift or after-the-event insurance premium will not be recoverable from an unsuccessful defendant. Since April 2013, claimants have also been able to instruct lawyers in High Court actions under a damages-based agreement (DBA). Under a DBA, the lawyer is entitled to a percentage of the damages awarded to a successful claimant, but receives nothing if the claim is unsuccessful. DBAs are not permitted in opt-out collective proceedings before the CAT; however, in collective proceedings, the representative claimant’s lawyers or funder, or both, may be allowed a share of any unclaimed damages.

VIII FUTURE DEVELOPMENTS

The public enforcement and private litigation regimes in the United Kingdom have undergone considerable reform in recent years. While these reforms are significant from an institutional and procedural perspective, the substantive rules on dominance are unchanged. The reforms were intended to result in more competition law enforcement cases, especially in the regulated sectors, together with greater use of market investigations to tackle concerns about unilateral conduct and an increase in private litigation. The expected boost to public enforcement and private litigation (and collective actions in particular) has been slow to materialise, although CMA enforcement activity increased significantly following criticism by the National Audit Office in February 2016. There is reason to believe this growth in public enforcement will continue to gain momentum, although the past year has seen a greater focus on proceeding with existing cases and preparing for the UK’s withdrawal from the EU rather than opening new cases. Other future developments are likely to involve a greater focus on competition in the digital sector and broader changes to UK competition law enforcement after the UK leaves the EU.

i Competition in the digital sector


In his 2019 letter to the Secretary of State for Business, Energy and Industrial Strategy, Lord Tyrie urges government reform of competition policy, seeing it as an ‘opportunity to help shape the response to the challenges that many jurisdictions now face’.\footnote{See footnote 34, p. 3.} Several of the proposals could impact dominance investigations. To add bite to CMA information requests, for example, Lord Tyrie suggests implementation of a turnover-based fines regime for non-compliance with enforcement investigations. Where these investigations uncover
concerns, more frequent use of interim measures ‘will be essential if the CMA is to respond to the challenges thrown up by rapidly changing markets’. Lord Tyrie also proposes that the standard of review by the CAT (which he describes as ‘a more protracted and cumbersome appeal process than was originally intended for, and by, the CAT’) be lowered from full merits review, either to judicial review or to a new standard of review. This proposal has been met with almost universal opposition among legal practitioners and business. The letter also suggests imposing greater restrictions on the admissibility of new evidence and less emphasis on oral testimony in CAT appeals.

The House of Lords Select Committee on Communications has also published a report calling for rigorous enforcement in facilitating effective regulation of digital markets. The report describes online platforms as ‘gatekeepers’ for the internet, and states that ‘it is appropriate to put special obligations on these companies to ensure they act fairly’. There is no discussion of the specific substance of these obligations, however, only that they should be created in accordance with a number of principles and enforced by a regulator. Significantly, the report recommends the establishment of a new Digital Authority that would report directly to the Cabinet Office. This new entity would coordinate regulators in the digital world through a number of functions, including assessing existing regulation, recommending additional enforcement powers where necessary and assisting in the effective implementation of regulation.

Several of these suggestions are echoed in the report of the Digital Competition Expert Panel chaired by Professor Jason Furman. This report frames reform of competition policy as an opportunity for the UK to set an example and ‘to lead international action’. With respect to antitrust enforcement, two principal changes are proposed, both consistent with Lord Tyrie’s proposals: greater use of interim measures and adjustment of appeal standards. The ‘goal of the policy changes is not more or less enforcement but better enforcement’. The report notes the lengthy duration of abuse of dominance cases and the corresponding risk that companies operating in fast-moving digital markets may go out of business before cases are concluded. Recognising that ‘the powers are already sufficient in themselves’, the report first recommends greater use of interim measures. To facilitate this, the report proposes streamlining the CMA’s processes such that access to files in interim measures cases would be limited to documents that are ‘clearly relevant’ to the interim measure. The other recommendation is to change the standard of appeal to the CAT from full merits review to more a limited judicial review. When discussing this recommendation, the report also states that ‘significant changes to the appeal standard for antitrust cases would merit a change to the current CMA decision-making process to guarantee sufficient independence’.

In addition to reform of the current ex post framework, the Furman Report advocates greater emphasis on ex ante regulation. It recommends the creation of a Digital Markets Unit to, among other functions, create a code of conduct applicable to companies that are deemed

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50 ibid. p. 8.
51 ibid. p. 35.
53 See footnote 33, p. 16.
54 ibid. p. 84.
55 ibid. p. 104.
56 ibid. p. 105.
57 ibid. p. 108.
to hold ‘strategic market status’. The code would set out ‘acceptable norms of competitive conduct on how firms with strategic market status should act with regard to smaller firms and consumers’.58 The proposal to introduce more *ex ante* rules is broadly consistent with Lord Tyrie’s letter and the House of Lords Select Committee report, and could have a significant impact on the nature of UK competition enforcement in future, particularly in the digital sector.

### ii Implications of Brexit

Arguably the most significant future development in UK antitrust enforcement is likely to be the UK’s withdrawal from the EU. On 28 February 2018, the European Commission published a draft Withdrawal Agreement between the EU and the UK, setting out arrangements for the UK’s withdrawal from the EU, together with a political declaration about the shape of the future relationship between the UK and the EU. The Withdrawal Agreement envisages a transition period until 31 December 2020, during which EU competition law would continue to apply in the UK as it does today. It also commits the UK to maintaining a competition regime broadly in line with EU law under the provisions of the Ireland Protocol to the Withdrawal Agreement (commonly referred to as the ‘Northern Ireland backstop’) unless and until alternative arrangements are agreed. At the time of writing, the Withdrawal Agreement has not been ratified by the UK Parliament or the European Parliament, and remains subject to negotiation between the EU and the UK.

Although the terms of the UK’s post-Brexit relationship with the EU are yet to be agreed,59 likely implications for competition enforcement after any transition period include the following:

- EU competition law will no longer be directly applicable in the UK, although it would still apply to UK companies active in the EU;
- European Commission decisions relating to post-Brexit conduct are unlikely to extend to the UK;
- a European Commission investigation will no longer preclude the CMA from investigating the same conduct;
- the CMA, sectoral regulators, CAT and UK civil courts may have greater freedom to interpret UK competition law differently from equivalent EU competition law;
- the European Commission may no longer have the power to conduct dawn raids in the UK; and
- European Commission infringement decisions adopted post-Brexit will not necessarily be binding on the CAT and UK civil courts, including in follow-on damages claims.

The CMA leadership has spent much of 2017 and 2018 preparing for Brexit and positioning the UK’s withdrawal from the EU as an opportunity to step out of the Commission’s shadow and establish the CMA as a leading global agency. The CMA’s resources have also expanded to meet the demands of its expected post-Brexit responsibilities. The CMA obtained a modest

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58 ibid. p. 57.

59 Theresa May stated in March 2018 that there may need to be ongoing consistency between UK and EU competition law:  
*The next hard fact is this. If we want good access to each other’s markets, it has to be on fair terms. As with any trade agreement, we must accept the need for binding commitments – for example, we may choose to commit some areas of our regulations like state aid and competition to remaining in step with the EU’s.*
funding increase in the 2017 Autumn Budget, allowing it to expand its presence in Scotland ‘with ambitions to grow further’. The UK government also allocated the CMA an additional £20 million funding for the financial year 2019/2020, specifically to facilitate preparation for the UK’s exit from the EU.

Any post-Brexit changes to UK competition enforcement will present both challenges and opportunities – for business, for the CMA and sectoral regulators, and for the legal profession. There will inevitably have to be detailed amendments to UK statutes, secondary legislation and guidance, and the UK competition authorities may have to adjust their investigation and enforcement priorities to meet increased demands on their resources.
Chapter 28

UNITED STATES

Kenneth S Reinker, Daniel Culley and Morgan L Mulvenon

I INTRODUCTION

The US Supreme Court has emphasised that the opportunity to attain a monopoly and reap its benefits encourages investment and innovation. Thus, possessing and exercising monopoly power does not violate US antitrust law ‘unless it is accompanied by an element of anticompetitive conduct’.

Unlike the competition laws of many other jurisdictions, therefore, US antitrust law does not recognise claims for abuses of dominance that merely exploit existing monopoly power, such as claims for excessive pricing. This difference in focus is reflected throughout the standards adopted in US law, as discussed below.

The US antitrust statute specific to monopolies is Section 2 of the Sherman Act, 15 USC Section 2. It provides that ‘[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony’. US law recognises three separate violations that arise under this statute:

a monopolisation, which requires monopoly power and anticompetitive conduct that helps to obtain or maintain that power;
b attempted monopolisation, which requires a dangerous probability of achieving monopoly power, anticompetitive conduct that threatens to help achieve that power and a specific intent to monopolise; and
c conspiracy to monopolise, which requires a conspiracy, a specific intent to monopolise and an overt act in furtherance of that conspiracy.

The Sherman Act can be enforced in civil actions through injunctions brought by the US Department of Justice (DOJ) and through private litigation, as detailed below.

Other statutes also apply to the behaviour of monopolists. Most notable is Section 5 of the Federal Trade Commission (FTC) Act, 15 USC Section 45, which prohibits ‘unfair

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1 Kenneth S Reinker and Daniel Culley are partners and Morgan L Mulvenon was an associate at Cleary Gottlieb Steen & Hamilton LLP. Morgan L Mulvenon has since left the firm.
3 id.
4 id.
7 Criminal sanctions are also theoretically available in monopolisation cases. In practice, however, the DOJ typically pursues criminal sanctions – which include fines and imprisonment – only for horizontal cartels that engage in plainly illegal activity, such as price-fixing.
methods of competition’. The FTC Act reaches all conduct covered by the Sherman Act and probably reaches more broadly.\(^8\) It can be enforced solely by the FTC through civil action for injunctions and prospective cease-and-desist orders.\(^9\)

Many US states have analogous statutes that apply to monopolists. In addition, in certain industries, other regulations can also apply to and potentially limit monopolists.

II YEAR IN REVIEW

In the past year, the US Supreme Court issued a decision on two-sided ‘transaction’ platforms that likely will have implications for future monopolisation cases in multi-sided markets. The FTC had mixed success pursuing abuse-of-process cases. The FTC obtained a large monetary award in one case, while another decision potentially limited on procedural grounds the FTC’s ability to bring enforcement actions against past conduct. The FTC also continued its litigation against a semiconductor device manufacturer that allegedly raised its rivals’ costs and foreclosed them from key customers through its patent licensing practices. The DOJ, which does not currently have any pending monopolisation litigation, has suggested that it will be less aggressive in enforcing standard-essential patent licensing practices and in an amicus brief urged a relatively narrow standard for refusal-to-deal claims.

i US Supreme Court rules on two-sided platforms

In 2010, the DOJ and several states filed a lawsuit against credit card network American Express, under Section 1 of the Sherman Act,\(^10\) which prohibits anticompetitive agreements in restraint of trade. The case challenged ‘antisteering’ provisions in American Express’ contracts. The plaintiffs argued that these provisions – which prohibit merchants from encouraging customers to use other credit cards instead of American Express cards by, for example, stating that the merchant prefers Visa or MasterCard – insulated American Express from price competition and resulted in higher merchant fees.

In June 2018, the US Supreme Court ruled that the plaintiffs did not carry ‘their burden of proving that Amex’s antisteering provisions have anticompetitive effects’.\(^11\) In a 5-4 decision, the Supreme Court reasoned that American Express’ credit card network is a two-sided ‘transaction’ platform because it facilitates a single, simultaneous transaction between a merchant and a cardholder, and changes on one side of the platform can impact the other side of the platform. The Supreme Court ruled that the impacts on both sides of the market (merchants and cardholders) need to be considered when assessing how the antisteering provisions affect competition. The Supreme Court also determined that evidence showing that the antisteering provisions led to higher prices on the merchant side of the platform was insufficient to demonstrate anticompetitive effects without considering how that would affect the cardholder side of the platform and the impact on overall prices and output on the platform as a whole. For example, antisteering provisions could lead to increased usage of American Express cards that increase output on the platform or could be associated with increased cardholder benefits.

\(^9\) 15 USC Sections 45, 53(b).
\(^10\) 15 USC Section 1.
Although this particular case was not brought as a monopolisation lawsuit, it is likely to impact monopolisation cases brought against two-sided transaction platforms, which often are alleged to have monopoly power.

**ii The FTC wins sham litigation case at trial**

In 2014, the FTC brought a lawsuit against AbbVie alleging that it illegally maintained its monopoly in AndroGel, a topical testosterone replacement therapy. AbbVie had previously filed patent infringement lawsuits against two generic entrants, alleging that their use of certain ‘penetration enhancers’, which accelerate the drug’s delivery through the skin, infringed AbbVie’s patents. During the patent approval process, however, AbbVie had amended its patent application from initially covering all penetration enhancers to covering only one specific enhancer. The two generic entrants did not use the specific patented penetration enhancer.

In 2017, the court found that AbbVie’s patent litigation was objectively baseless and granted summary judgment on that issue. After a 2018 bench trial, the court also found that AbbVie had monopoly power and that its litigation was subjectively baseless. The court ordered US$448 million in disgorgement – the largest monetary award in a litigated FTC antitrust case. At the time of writing, this ruling was on appeal. The FTC is appealing both the court’s disgorgement award – arguing that AbbVie’s anticompetitive profits were even higher – as well as the earlier dismissal of other claims challenging an alleged ‘reverse payment’ made to generic entrants. AbbVie has said that it plans to appeal the sham litigation rulings.

**iii Federal court potentially limits FTC’s ability to challenge past conduct**

In 2017, the FTC filed a monopolisation lawsuit against Shire ViroPharma (Shire). According to the FTC, between 2006 and 2012, Shire inundated the Food and Drug Administration with repetitive and baseless filings intended to delay entry of generic competitors to Shire’s Vancocin capsules, which are used to treat a life-threatening gastrointestinal infection. The FTC sought a court order prohibiting Shire from engaging in similar conduct in the future.

In 2019, a federal appellate court ruled that the FTC did not have statutory authority to challenge Shire’s past conduct in federal court. The appellate judges found that the relevant provision of the FTC Act that authorises the FTC to seek injunctive relief in federal court, requires the FTC to make specific allegations showing that the defendant ‘is violating or is about to violate the law’ and that a ‘past violation and a likelihood of recurrence’ are insufficient. If the ruling is not overturned either by the Supreme Court or by en banc review by the full appellate court (as opposed to the panel that originally heard the case), it could significantly limit the FTC’s ability to bring enforcement actions in federal court, at least for conduct that wholly occurred in the past.

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13 15 USC Section 53(b).

United States

iv  The FTC continues standard-essential patent case, while DOJ becomes less aggressive on standard-essential patents

In May 2019, the District Court for the Northern District of California entered a judgment for the FTC in its suit against Qualcomm. The Court found that Qualcomm would only supply its modem chips to mobile phone manufacturers that agreed to a Qualcomm patent licence requiring the customer to pay royalties to Qualcomm even when using modem chips purchased from Qualcomm’s competitors. The Court held that this ‘no licence, no chips’ policy imposed an anticompetitive ‘tax’ on competing chips. The Court also held that Qualcomm refused to license its standard-essential patents to its competitors in contravention of its commitments to license its technology on fair, reasonable and non-discriminatory (FRAND) terms, and that this was an illegal refusal to deal. The Court further found that Qualcomm had entered de facto exclusive dealing arrangements with many original equipment manufacturers (OEMs) based on the conditioning of market development funds and technical support on their purchases of Qualcomm chips, and that Qualcomm had entered an express exclusive agreement with Apple. The Court entered an order mandating that, among other things, Qualcomm offer licences to its competitors and that it renegotiate its licences with OEMs without the threat of withholding its modem chips. Qualcomm has promised to appeal the decision to the Ninth Circuit, which was pending at the time of writing.

The DOJ, on the other hand, has expressed concerns that certain aspects of antitrust enforcement related to intellectual property have been too aggressive. For example, the DOJ Antitrust Division’s Assistant Attorney General Makan Delrahim has taken the position that antitrust law should not be used to ‘police FRAND commitments that patent holders unilaterally make to standard setting organisations’. The DOJ also formally withdrew from a 2013 policy statement that suggested that a standard-essential patent holder could harm competition by seeking an injunction against infringing uses of its technology. The DOJ has stated that it is working on a new statement that it believes would provide greater ‘clarity and predictability’ regarding a standard-essential patent holder’s ability to seek injunctive relief. Unusually, the DOJ also filed a letter in the FTC’s case against Qualcomm, urging the District Court to hold a hearing on remedies before the District Court entered an order, but the Court did not do so.

v  DOJ amicus brief supports relatively narrow standard for refusal-to-deal cases

In a private litigation between Comcast and Viamedia, the DOJ filed an amicus brief supporting a relatively narrow standard in refusal-to-deal cases. Viamedia, a cable television advertising management company, filed a monopolisation lawsuit against cable company Comcast, alleging that Comcast refused to work with Viamedia and instead required Viamedia’s customers to do business with Comcast’s own cable advertising representation service. The DOJ did not weigh in on the merits of the case, but argued that the appellate

18  See footnote 15.
court should hold that refusing to deal with a competitor is not anticompetitive ‘unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition’. Potential alternative standards of liability for monopolists facing refusal-to-deal cases include the ‘profit sacrifice’ test, which would impose antitrust liability when the monopolist’s refusal-to-deal results in a short-term loss.

III MARKET DEFINITION AND MARKET POWER

Monopoly power is a prerequisite to bringing a monopolisation claim. Monopoly power is the ability to control prices or exclude competition. It can be proven through direct evidence of actual price increases or the exclusion of rivals. More typically, however, courts infer monopoly power from the combination of high market shares and entry barriers. Higher market shares are more likely to support the inference of monopoly power, and typically shares below 50 per cent cannot support that inference. But even a very high share does not automatically establish monopoly power.

Monopoly power is not required for attempted monopolisation or conspiracy to monopolise claims. Attempted monopolisation instead requires only a ‘dangerous probability’ of achieving monopoly power, and thus can be sustained with a lesser showing of market power. A conspiracy to monopolise arguably requires no showing of market power at all, although cases alleging a conspiracy to monopolise in the absence of market power are relatively rare.

Inferring monopoly power requires measuring market shares, and thus requires defining a relevant market. Relevant markets have both product and geographic dimensions. Product markets are defined by looking at what products are reasonably interchangeable substitutes for one another. Geographic markets are defined by looking at what other geographies sellers operate in and buyers can turn to. One method that is often used to determine what products or geographies are in the market is to ask whether customers would substitute from one product or geography to another in response to a small price increase above competitive levels.

21 See, for example, Domed Stadium Hotel Inc v. Holiday Inn Inc, 732 F 2d 480, 489 (Fifth Circuit 1984) (‘Supreme Court cases, as well as cases from this court, suggest that absent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization.’).
22 US law does not recognise ‘relative dominance’ or ‘collective dominance’.
23 See, for example, Brown Shoe Co v. United States, 370 US 294, 325 (1962); DuPont, 351 US at 395.
IV  ABUSE

i  Overview

Monopolisation requires anticompetitive conduct that helps to obtain or maintain a
monopoly. Obtaining or maintaining a monopoly through other means, such as ‘superior
product, business acumen or historic accident’, is therefore not a violation.26

US courts and antitrust regulators have not established a definitive list of what conduct
can be anticompetitive; nor have they adopted clear standards for distinguishing between
pro-competitive and anticompetitive conduct. The DOJ did issue guidance on monopolisation
in 2008, but withdrew it in May 2009.27 The list below, although not exhaustive, discusses
the most important types of potential anticompetitive conduct that courts and regulators
have recognised could support a monopolisation claim.

ii  Exclusionary abuses

Exclusionary pricing

Predatory pricing is charging low prices to try to drive competitors from the market. Because
low prices are generally pro-competitive and beneficial to consumers, US law imposes rigorous
requirements to sustain a predatory pricing claim. Specifically, a plaintiff must prove that the
defendant’s prices are below cost, and that the defendant has a ‘dangerous probability’ of
recouping the losses that it incurs when charging below-cost prices by raising its prices above
competitive levels after driving competitors from the market.28 The US Supreme Court has
not specified the precise measure of cost that should be used in this analysis, although most
lower courts have required pricing below some measure of incremental cost.

A price squeeze or margin squeeze is when a firm that is active in upstream and
downstream markets charges high prices for the upstream input and low prices for the
downstream product. The potential antitrust concern is that a downstream competitor that is
not vertically integrated must therefore pay high prices for an input while charging low prices
to compete downstream. However, US law does not recognise price-squeeze claims without
either an upstream duty to deal with competitors or downstream predatory pricing.29

Exclusive dealing

Exclusive dealing can have many pro-competitive benefits, including encouraging investment
by reducing uncertainty about future sales, encouraging relationship-specific investments,
and encouraging better product promotion and related services. However, exclusive dealing
can also have anticompetitive effects when it forecloses rivals from the market and impairs
their competitiveness. Under US law, exclusive dealing cannot be anticompetitive unless
it forecloses a ‘substantial share’ of the relevant market.30 What counts as ‘substantial’ is
unsettled. Some courts have suggested that foreclosure of 30 per cent or less may suffice,

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26 See, for example, United States v. Grinnell Corp, 384 US 563, 570–71 (1966).
pricing claim based on price discrimination brought under the Robinson-Patman Act, 15 USC Section 13,
a plaintiff must prove a ‘reasonable prospect’ of recoupment. id., at 224.
while others have suggested that 40 to 50 per cent may be required.\textsuperscript{31} Courts have also suggested that the foreclosure required to sustain a claim may be somewhat lower where the defendant is a monopolist.\textsuperscript{32}

Loyalty conditions are when a seller charges customers one price if the customer purchases a certain percentage of its needs of a product from the seller and a higher price if the customer does not. Loyalty conditions can pro-competitively reduce costs, shift risk in volatile industries, or lead to efficient contracting such as by encouraging promotional or marketing efforts. However, like exclusive dealing, they can also foreclose rivals and impair their competitiveness. US law on loyalty discounts is unsettled. Some courts have applied a predatory pricing analysis, finding loyalty conditions to be potentially anticompetitive only when the resulting price is below cost.\textsuperscript{33} Other courts have applied an exclusivity analysis, finding loyalty conditions to be potentially anticompetitive whenever they foreclose a substantial share of the market.\textsuperscript{34} Some courts and regulators may also focus on the loyalty condition’s effect on the incremental price of a customer’s ‘contestable’ share that it would be willing to switch to the defendant’s rivals.\textsuperscript{35}

Most-favoured nation (MFN) clauses provide that a customer will receive pricing or other terms as good as those that the seller offers other customers.\textsuperscript{36} MFNs can pro-competitively help buyers obtain low prices and can help prevent opportunism when one party makes relationship-specific investments. However, MFNs can also anticompetitively limit competition by preventing new entrants from obtaining prices as low as they otherwise would have. US case law on MFNs is relatively undeveloped. However, antitrust regulators have pursued enforcement actions against MFNs, most often in healthcare.\textsuperscript{37}

\textbf{Tying}

Tying is when a supplier conditions its sale of one product (the tying product) on the customer purchasing another product (the tied product).\textsuperscript{38} Tying can be accomplished through an absolute refusal to sell the items separately, or through a price difference between the bundle and the separate items if the difference is sufficiently large that most or all customers would purchase the bundle. Tying can pro-competitively lower costs or increase the value of the items to customers, improve quality or protect goodwill, and efficiently meter consumption. On

\textsuperscript{31} Compare \textit{Twin City Sportsservice Inc v. Charles O Finley & Co Inc}, 676 F 2d 1291, 1298, 1304 (Ninth Circuit 1982) (finding substantial foreclosure where defendant ‘controlled 24 per cent’ of the market), with \textit{Stop & Shop Supermarket Co v. Blue Cross & Blue Shield of RI}, 373 F 3d 57, 68 (First Circuit 2004) (foreclosure is ‘unlikely to be of concern where they are less than 30 or 40 per cent’), with \textit{United States v. Microsoft Corp}, 253 F 3d 34, 70 (DC Cir 2001) (en banc) (‘roughly 40 per cent or 50 per cent share usually required’ for an unreasonable restraint of trade claim).

\textsuperscript{32} See \textit{Microsoft}, 253 F 3d at 70.

\textsuperscript{33} See, for example, \textit{Concord Boat Corp v. Brunswick Corp}, 207 F 3d 1039, 1060–62 (Eighth Circuit 2000).

\textsuperscript{34} See, for example, \textit{LePage’s Inc v. 3M}, 324 F 3d 141, 157–59 (Third Circuit 2003) (en banc).


\textsuperscript{36} For discussions of MFNs, see, for example, Baker, ‘Vertical Restraints with Horizontal Consequences: Competitive Effects of “Most-Favored-Customer” Clauses’, 64 Antitrust LJ 517 (1996); Salop & Scott Morton, ‘Developing an Administrable MFN Enforcement Policy’, 27(2) \textit{Antitrust Magazine} 15 (2013).

\textsuperscript{37} See, for example, \textit{Complaint, United States v. Blue Cross Blue Shield of Michigan}, No. 2:10-cv-14155-DPH-MKM (ED Mich 18 October 2010).

the other hand, tying may anticompetitively allow a company with monopoly power in the tying product to increase its market power in the tied product, help it protect its monopoly power in the tying product or otherwise increase its monopoly profits. A successful tying claim requires that the tying and tied items be separate products. Items are deemed separate products when customers want to buy them separately and when offering them separately is possible and efficient. Additionally, tying requires that the defendant have market power in the tying product. More recent cases have recognised the potential pro-competitive benefits of tying, although some older precedents could be read to suggest that pro-competitive justifications are inadmissible in a tying case. Proving that a substantial share of the relevant market is foreclosed is not a requirement for a tying claim.

Bundling is when a supplier charges one price if a customer purchases two or more products together, but charges a higher price when the products are purchased separately. Bundling can pro-competitively lower costs or increase the value of the products to customers, but raises similar potential anticompetitive concerns as tying. Bundling can also be combined with loyalty conditions, such that obtaining a lower price requires that the customer buy a certain share of its needs across multiple products from a particular company. Similar to loyalty conditions, US case law on bundling is unsettled. Some courts have ruled that bundling cannot be anticompetitive unless it results in prices that are below ‘an appropriate measure’ of cost. In applying this cost-based test, some courts have used a ‘discount attribution test’ that applies the entire price ‘discount’ across all bundled products to the standalone price of the competitive product, and then compares the resulting price to the cost of the competitive product. Other courts have instead found that bundling can be potentially anticompetitive whenever it forecloses a substantial share of the market.

Exclusionary product design – where a company designs its product in a way that makes it difficult for competitors to develop compatible or interoperable products – can raise similar concerns as tying. Although exclusionary product designs can in certain circumstances be actionable, antitrust laws encourage innovation, and US courts are generally reluctant to second-guess product design decisions. Unless the product design clearly has no benefits to customers, a court is relatively unlikely to sustain an exclusionary product design claim.

**Refusal to deal**

US law generally does not impose a duty to deal with competitors, because the possibility of obtaining monopoly power and the ability to exclude rivals encourages investment and innovation, and because setting the terms of dealing and monitoring would be administratively burdensome. However, in limited circumstances, a refusal to deal with rivals can be anticompetitive conduct. The cases where courts have found a duty to deal generally involve the defendant ceasing a prior, voluntary and profitable course of dealing with its rivals.

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42 See, for example, *Cascade Health Solutions v. PeaceHealth*, 515 F3d 883, 903 (Ninth Circuit 2008).
43 See id., at 906–08.
44 See, for example, *LePage’s Inc v. 3M*, 324 F 3d 141, 154–57 (Third Circuit 2003) (en banc).
46 See, for example, *Berkey Photo Inc v. Eastman Kodak Co*, 603 F 2d 263, 286–87 (Second Circuit 1979).
and the defendant dealing with rivals on different terms than with non-rivals (such as where the defendant refuses to sell a product to rivals that the defendant sells at retail). Even when other US regulations mandate dealing between competitors, US courts generally will not find an antitrust duty to deal.

### iii Discrimination

Discriminatory pricing occurs when a seller charges different customers different prices for the same product. Unless the pricing is predatory, price discrimination alone is not anticompetitive conduct. However, a separate statute called the Robinson-Patman Act, which is not specific to monopolists, prohibits discriminatory pricing in the sale of commodities where the effect may be to reduce downstream competition between customers. This aspect of the Robinson-Patman Act has been widely criticised, and enforcement of it is relatively rare. Although the statute requires an effect on competition, US courts typically infer that effect from the fact of differential pricing. Discriminatory pricing is not prohibited by the Robinson-Patman Act if the sale does not involve commodities; if the customers do not compete with one another downstream; or if the price differential is justified by differential costs, an effort to meet competitors’ pricing or changing conditions. The Robinson-Patman Act therefore does not prohibit price discrimination between final consumers, as they do not compete downstream.

### iv Exploitative abuses

As noted, exercising monopoly power is generally legal under US law. US law therefore does not in general recognise exploitative abuses.

### v Miscellaneous

A variety of other types of conduct can, in certain circumstances, support a monopolisation claim. A non-exhaustive list is discussed here.

Monopoly leveraging is using monopoly power in one market to gain an advantage in a second market. However, under US law, monopoly leveraging likely cannot support a monopolisation claim unless it involves some anticompetitive conduct (such as tying, exclusive dealing or a refusal to deal) and it helps the defendant obtain or maintain a monopoly in the second market (or creates a dangerous probability of doing so).

Monopolisation claims have been brought against patent holders for abusing standard-setting processes. Such claims might be brought where the patent holder induces a standard-setting organisation to adopt a standard that includes its patents but either deceptively promises to license the patents on FRAND terms and reneges or fails to disclose the existence of its patents in the first place. The concern is that such abuses may result in monopoly pricing that otherwise could have been avoided. Some courts have allowed such

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48 15 USC Section 13.
50 15 USC Section 13(a), (b).
51 See Trinko, 540 US at 415 n. 4.
Monopolisation claims can also be brought against companies that abuse government processes. For example, ‘sham’ litigation and other abuses of the litigation process can be monopolisation. Similarly, enforcing intellectual property rights obtained through fraud can be monopolisation. Other abuses of governmental processes are also possible.

‘Reverse payment’ settlements – that is, payments made by a branded drug manufacturer to a generic competitor as part of a patent settlement that can delay generic entry – can also be challenged as monopolisation in some situations. The FTC has pursued several enforcement actions against these types of settlements and there has also been active private litigation.

Additionally, in extreme cases, more general tortious conduct can support a monopolisation claim. For example, one US court allowed a monopolisation claim when a defendant removed its rival’s products and advertising from retail stores without permission.

Mergers that help obtain or maintain a monopoly can constitute monopolisation, although typically mergers are challenged under Section 7 of the Clayton Act, 15 USC Section 18, which prohibits mergers that ‘substantially … lessen competition’ or ‘tend to create a monopoly’.

V REMEDIES AND SANCTIONS

Available remedies in monopolisation cases include injunctive relief and monetary damages. Civil fines are not available.

Both the US antitrust regulators and private plaintiffs can seek injunctive relief, a court order that either requires the defendant to take certain actions or prohibits the defendant from taking certain actions. Injunctive relief has multiple purposes, including stopping the anticompetitive conduct, reversing its anticompetitive effects and denying the defendant the fruits of that conduct. Courts have broad discretion to frame appropriate injunctive relief to achieve these goals. Appropriate relief may include structural remedies (such as dissolving or splitting the defendant or requiring divestitures) or behavioural remedies (such as prohibiting the defendant from engaging in certain activities in the future or requiring that the defendant grant rivals access to certain property). Moreover, injunctive relief can include

54 See, for example, Professional Real Estate Investors Inc v. Columbia Pictures Industries Inc, 508 US 49, 60–61 (1993) (holding that sham litigation requires both objective and subjective baselessness); California Motor Transport Co v. Trucking Unlimited, 404 US 508 (1972) (allowing claims based on abuse of the litigation process through repetitive lawsuits).
56 See FTC v. Actavis, 133 S Ct 2223, 2227 (2013) (holding that reverse payment settlements ‘can sometimes violate the antitrust laws’).
57 See Conwood Co v. United States Tobacco Co, 290 F 3d 768, 783–84 (Sixth Circuit 2002).
58 As noted, criminal sanctions are theoretically available but not pursued in practice.
59 See, for example, United States v. United Shoe Mach Corp, 391 US 244, 250 (1968).
monetary equitable remedies such as disgorgement (an order requiring the defendant give up supra-competitive profits related to the antitrust violation) or restitution (an order requiring that the defendant compensate victims for their losses).

Private plaintiffs can seek monetary damages equal to three times their actual injury, plus litigation costs and reasonable attorneys’ fees, as detailed below.\textsuperscript{60} US and state governments also can seek treble damages for injury to their own business or property (as can foreign governments, although they are usually limited to single damages).\textsuperscript{61} In addition, a US state can bring a \textit{parens patriae} action seeking treble damages on behalf of its residents.\textsuperscript{62}

\section*{VI PROCEDURE}

Monopolisation enforcement principally occurs through government investigations by the US antitrust regulators, and court proceedings initiated by the US antitrust regulators, states or private plaintiffs.

Investigations by US antitrust regulators can start in a variety of ways, including the regulator’s own initiative, complaints from private parties or requests from other governmental actors (e.g., Congress). The DOJ and the FTC can work voluntarily with the target of the investigation and third parties, or can use compulsory process, including subpoenas and ‘civil investigative demands’, to obtain documents, written responses to questions and witness testimony.\textsuperscript{63} Entities subjected to a compulsory process often seek to negotiate the scope of the discovery and sometimes seek to quash it,\textsuperscript{64} although in practice doing so is relatively difficult, particularly for a target of an investigation. An investigation can be dropped at any time, and that decision is unreviewable by a court. An investigation can also be resolved through settlement at any time. The DOJ, as an agency of the US executive branch, must obtain court approval of its settlements, while the FTC, as an independent administrative agency, must approve settlements by majority vote of the FTC Commissioners.

An investigation can also lead to litigation. The DOJ must pursue litigation in federal court, following the procedures described below. The FTC, by contrast, has its own administrative courts, with somewhat different procedures, followed first by an appeal to the Commission itself and then an appeal to a federal appellate court. The FTC can also bring lawsuits in federal court seeking equitable relief but, as noted above, one recent case held that the FTC did not have authority to pursue equitable relief in federal court for conduct that was solely in the past.

Court proceedings in a monopolisation case are similar to court proceedings in other cases. US federal courts have exclusive jurisdiction to hear cases under the federal antitrust laws, although state courts can hear cases under state antitrust laws.\textsuperscript{65} Antitrust cases that seek monetary damages are generally tried before a jury, while antitrust cases that seek only injunctive relief are instead tried before a judge. A court case starts with the plaintiff filing a complaint laying out the allegations against the defendant. The defendant can move to dismiss a complaint on several grounds, most importantly that the allegations fail to state a plausible

\begin{itemize}
\item \textsuperscript{60} 15 USC Section 15.
\item \textsuperscript{61} 15 USC Section 15(b); 15a.
\item \textsuperscript{62} 15 USC Section 15c.
\item \textsuperscript{63} See 15 USC Sections 46, 49, 57b-1; 15 USC Sections 1311–1314.
\item \textsuperscript{64} See 15 USC Section 1314(b); 16 CFR 2.7(d).
\end{itemize}
claim. If the case proceeds, parties engage in potentially wide-ranging discovery, including
document production, written interrogatories, requests for admissions and depositions. After
discovery, a party may move for summary judgment on some or all issues if no genuine
dispute exists as to any material fact and, given the material facts, the party is entitled to
judgment as a matter of law. During and after a trial, parties can again move for judgment as
a matter of law. Adverse decisions can be appealed, although typically not until after a final
judgment. In general, the parties are free to settle at any time during this process.

Both the US antitrust regulators and private plaintiffs can also seek preliminary relief
prior to a full adjudication by moving for a temporary restraining order or preliminary
injunction to stop the challenged conduct. Preliminary relief can only be obtained from a
court. Whether preliminary relief is appropriate depends on balancing the likelihood each
party will succeed on the merits with the harm to the defendant from granting the preliminary
relief and the harm to the plaintiff and the public from not granting it. In general, preliminary
relief is unusual in a monopolisation case.

Further, the DOJ offers a business review process and the FTC offers an advisory opinion
process that may allow businesses to obtain guidance about the DOJ’s or the FTC’s present
enforcement intentions as to certain conduct. Businesses must submit a written request to
the DOJ or the FTC describing the conduct and provide documents and other information.
The DOJ or the FTC typically will consider only requests related to proposed conduct (and
thus typically will not consider requests related to conduct that is already ongoing), and they
can decline to issue guidance. If the DOJ or the FTC responds, the response and request are
made available publicly. The guidance is not legally binding, but in practice the DOJ and
the FTC are unlikely to pursue enforcement action against a requesting party that relies on it
(except in special circumstances, such as if the facts provided were inaccurate).

VII PRIVATE ENFORCEMENT

As explained above, private plaintiffs can and often do seek treble damages and injunctive
relief in monopolisation cases. Private actions can be brought by individual plaintiffs
or through an opt-out class action that adjudicates the claims of many similarly situated
plaintiffs in a single lawsuit. Class actions have additional procedural requirements that must
be satisfied. Often, antitrust actions are viewed as amenable to resolution on a class-wide
basis because many of the relevant issues will be market-wide and thus common to the class.
Still, procedural hurdles remain, including demonstrating that impact can be proven on a
common basis.

Typically, monopolisation suits are brought either by customers alleging that they
paid more because of the reduction in competition caused by the monopolisation or by
competitors alleging that they made less profit because their ability to compete was impaired.
In general, indirect purchasers cannot bring claims under US federal antitrust laws, although
many states allow indirect purchasers to bring claims under state antitrust laws.

66 See 16 CFR Sections 1.1–1.4; 28 CFR Section 50.6.
67 See Fed R Civ P 23.
To obtain damages, a private plaintiff must establish more than the antitrust violation itself; it must also show that it was injured, that the violation was a material cause of its injury, that its injury was sufficiently closely related to the violation and that its injury resulted from an anticompetitive effect of the violation. Finally, it must prove the amount of damages.

Conceptually, the appropriate measure of damages is the difference between the plaintiff’s position in the actual world and what its position would have been in the but-for world without the challenged conduct. Establishing what would have happened in the but-for world is often difficult, so courts typically require plaintiffs to prove damages only with reasonable certainty. Plaintiffs can do so by offering a rough approximation, and in practice, they typically compare the actual world to a baseline unaffected by the challenged conduct (e.g., the same market before the challenged conduct began or a similar market where the challenged conduct never occurred). Increasingly, damages are modelled using econometric techniques.

To obtain an injunction, by contrast, a private plaintiff must generally show that monetary damages would not be an adequate remedy because it cannot prove the amount of damages with reasonable certainty. The forms of injunctive relief discussed above (including behavioural and structural remedies) are in theory available to private plaintiffs.

Private enforcement also interacts with public enforcement. Private plaintiffs can encourage the government to open an investigation. If the government brings a public enforcement action and obtains a favourable judgment, that may benefit private plaintiffs by precluding the defendant from re-litigating certain issues in future private actions by providing prima facie evidence of a violation under the antitrust statutes or under more general procedural principles governing preclusion. In contrast, if the government chooses not to bring an action, or if it brings an action and loses, that does not prevent a future private action. A settlement likewise does not prevent a future private action and, if entered before testimony is obtained, also cannot be used as prima facie evidence of a violation. In addition, regardless of whether the government decides to bring an action, private plaintiffs can often benefit from the fruits of a government investigation, such as the discovery that the government obtains. The statute of limitations for private actions can also be suspended by a government action.

VIII FUTURE DEVELOPMENTS

At the time of writing, a monopolisation case was pending before the US Supreme Court involving a procedural question about whether particular plaintiffs have standing to bring an antitrust case. A group of iPhone users brought a proposed class action against Apple alleging that the company illegally maintained a monopoly in the distribution of iPhone apps by requiring app developers to sell exclusively through Apple’s App Store. The proposed class alleges that Apple used its monopoly to increase the percentage commission that it charged to app developers on app sales made through the App Store and thereby caused developers to raise app prices charged to consumers.

The proposed class contends that because they pay Apple directly for the apps, they are direct purchasers and have standing to bring the lawsuit. Apple, on the other hand, contends that the app developers set the prices charged to consumers and that they are the ones that pay the allegedly inflated commission to Apple.

69 See 15 USC Section 16(a).
ABOUT THE AUTHORS

ALLEGRA ARNOLD
*Homburger AG*

Allegra Arnold is a member of Homburger’s competition and regulatory practice team. She focuses on Swiss and European competition law; in particular, merger control law, as well as administrative and civil antitrust litigation. Further, she has expertise in the field of sports law, with particular expertise in doping law.

STEPHAN BARTHELMESS
*Cleary Gottlieb Steen & Hamilton LLP*

Stephan Barthelmess is a senior counsel based in the Cleary Gottlieb Steen & Hamilton LLP Brussels and Frankfurt offices, and a member of the Bars in Frankfurt am Main, New York and Brussels.

Mr Barthelmess’s practice focuses on European and German competition law, including administrative and civil litigation. He has published various articles, primarily in the field of antitrust law. He is a co-author of the Loewenheim commentary on European and German antitrust law (2016).

Mr Barthelmess joined Cleary Gottlieb Steen & Hamilton LLP in 1986 and became a partner in 1995. He has been resident in the New York, Brussels, Paris and Frankfurt offices. Mr Barthelmess received an LLM degree from the University of Michigan Law School in 1986 and obtained a doctorate in law (Dr iur) from the University of Erlangen-Nuremberg Law School in Germany in 1987. He also obtained a pre-diploma from the University of Erlangen-Nuremberg Business School in 1983. He passed his second state examination in the state of Bavaria in 1985 and the first state examination at the University of Erlangen-Nuremberg in 1982.

HELENA BELINA DJALIL
*Fatur Menard Law Firm*

Helena Belina Djalil has extensive experience in competition and corporate matters across various industries. In her professional career, she has worked in both the public and private sectors. Upon graduating from University of Ljubljana, she began her career as a trainee attorney, moving on to a consultancy firm where she was the head of the legal department and also advised clients on areas of corporate law, labour law, public procurement and intellectual property law, including in IT, consumer protection and e-commerce. She spent nearly five years at the Slovenian Competition Agency, where she gained a thorough knowledge and
understanding of competition law, policy and proceedings at national and EU level, with a primary focus on assessment of restrictive agreements, abuses of dominant position and concentrations between undertakings. She joined Fatur Menard Law Firm as an associate attorney in 2014. At the beginning of 2016, she became an independent attorney-at-law and continues to work with Fatur Menard Law Firm as an external expert, where she primarily deals with competition and corporate law.

MATTEO BERETTA

*Cleary Gottlieb Steen & Hamilton LLP*

Matteo Beretta is a partner at Cleary Gottlieb Steen & Hamilton LLP, based in the Milan office. His practice primarily focuses on European and antitrust law. He advises numerous major international companies with regard to merger control procedures, cartels, restrictive agreements and abuse of dominance matters. He regularly lectures at numerous conferences on competition matters, and has authored several articles in US and European legal journals.

Mr Beretta is distinguished as a leading competition and European law expert by *Chambers Europe*. He is also recommended for competition law by *The Legal 500 EMEA* and *Who's Who Legal*. In 2013, he was named the ‘Best Italian Competition Law Lawyer of the Year’ by Italian legal magazine *TopLegal*.

He graduated from the University of Milan in 1991 and obtained an LLM degree from the Institute for European Studies of l’Université Libre de Bruxelles in 1992, as well as an LLM from the New York University School of Law in 1999. He has been a member of the Bergamo Bar since 1995.

MAXIM BOULBA

*CMS Russia*

Maxim Boulba heads the competition group at CMS Russia and advises clients on competition law issues, such as merger control, as well as antitrust behavioural, regulatory matters and IP issues. Maxim has been practising competition law since 2000.

Maxim has handled a large number of difficult merger clearances in Russia and the other Commonwealth of Independent States (CIS) countries. As part of merger and acquisition transactions and corporate reorganisations, Maxim advises foreign investors on Russian merger control requirements, and obtains merger clearance in relation to the acquisition of companies and assets located in Russia and the CIS.

He has also successfully represented corporate clients in various administrative proceedings, inspections and dawn raids by the antitrust authorities, and has worked on projects related to antitrust compliance.

Maxim was chosen as one of the leading practitioners in Russia in the competition and antitrust sphere according to *Best Lawyers*, *Global Competition Review 100* and *Client Choice*, and has been ranked by *Chambers and Partners* and *Legal 500* legal directories since 2012.
FRÉDÉRIC DE BURE
*Cleary Gottlieb Steen & Hamilton LLP*

Frédéric de Bure is a partner based in the Paris office, and his practice focuses on EU and French competition law.

Mr de Bure has advised clients in complex merger control cases before the European Commission and the French Competition Authority. He has also represented clients in a number of international cartel and abuse of dominance investigations, including several recent investigations in the internet and pharmaceutical sectors. He has wide experience in litigation before the European courts and the French courts in private enforcement matters.

Mr de Bure teaches competition law at Sciences Po and Université Montpellier 1 (DJCE/DCI). He is co-author of the book *EU Competition Law – Abuse of Dominance under Article 102 TFEU* (Claeys & Casteels Publishing).

Mr de Bure joined the firm in 2003 and became partner in 2018. From 2003 to 2008, he was resident in the Brussels office. Mr de Bure graduated from the Institut d’études politiques de Paris in 1997 and received a master of science degree from the London School of Economics in 1999. He also received a law degree from the Université Paris 1 Pantheon-Sorbonne in 2002.

ELSA CHEN
*Allen & Gledhill LLP*

Elsa is co-head of the firm’s competition and antitrust practice. She regularly assists clients on complex antitrust matters, including merger control, global cartel and abuse of dominance investigations. She has also been involved in the drafting of antitrust legislation, codes, policies and regulatory frameworks for sectoral regimes in Singapore.

Elsa was recognised by *Who’s Who Legal Competition: Future Leaders – Economists* as ‘the top merger control practitioner in Singapore’ and ‘a leading name in the Singaporean market’, and for her ‘analytical and practical approach’. She was also named as one of the two most highly regarded economists cited in ‘North America and the rest of the world’, and as a future leader in this space, by the publication. Elsa has featured in the *Global Competition Review (GCR) ‘Global Elite: 100 Women’* and in multiple ‘Women in Antitrust’ peer-nominated surveys. She was also named among 10 global competition economists in *GCR’s Women in Antitrust 2016: Economists*.

A pioneer member of the Competition Commission of Singapore, now known as the Competition and Consumer Commission of Singapore (CCCS), Elsa has since assisted on the first abuse of dominance decision by the CCCS (*SISTIC*) as well as close to 90 per cent of complex CCCS merger reviews, including mergers in the digital space (*Grab/Uber, SEEK/JobStreet*) and transportation (*Siemens/Alstom, China CNR/CSR*), as well as on transactions including publishing, fast-moving consumer goods, semiconductors, building materials, pharmaceuticals and healthcare.
SCOTT CLEMENTS
*Allen & Gledhill LLP*

Scott is a competition law specialist, and his experience in Singapore spans nearly 12 years.

With extensive experience in relation to contentious and non-contentious competition law matters, he has been involved in a number of abuse of dominance related matters, and was involved in the appeal of the first ever abuse of dominance case in Singapore.

Recognised as a leading competition lawyer by *Chambers Asia-Pacific, The Legal 500 Asia Pacific* and *Who's Who Legal*, a client noted that Scott ‘brings out the perspective of a former competition regulator to the table, which is very valuable’, while another source singled him out for his ‘detailed understanding of economics in the market’ (*Chambers Asia-Pacific*). Scott was also named as one of Singapore’s 40 most influential lawyers aged 40 and under in 2015, by the *Singapore Business Review*.

Scott is qualified as an advocate and solicitor of Singapore, and a barrister and solicitor of the High Court of New Zealand.

CAMILA CORVALÁN
*Beccar Varela*

Camila Corvalán is based in Beccar Varela’s Buenos Aires office and practises in a broad range of antitrust matters, including investigations of anticompetitive conduct as well as merger and acquisition control. She is also involved in antitrust litigation cases before judicial courts.

Ms Corvalán received her college degree from the Catholic University of Argentina. She graduated with honours. Ms Corvalán took her graduate studies at the same university, and specialised in competition law in Madrid, Spain. She worked as an editor of the Argentine journal *El Derecho* in parallel with her office work. For the past few years, Camila has been committed to women’s empowerment and has spent many hours in various women’s organisations undertaking activities to promote gender and diversity. Camila is a member of the board of the Argentine Forum of Women Entrepreneurs.

DANIEL CULLEY
*Cleary Gottlieb Steen & Hamilton LLP*

Daniel Culley splits his time between Cleary Gottlieb Steen & Hamilton LLP’s Washington, DC and Brussels offices, and practises in a broad range of antitrust matters, including litigation, mergers, cartels and counselling across a wide number of industries.

Mr Culley received his JD, *magna cum laude*, Order of the Coif, from Georgetown University Law Center in 2008, and received his BS, *magna cum laude*, in international economics, from Georgetown University School of Foreign Service in 2005. He has written a number of articles on antitrust and competition law, with a particular focus on the application of antitrust and competition law to intellectual property and high-technology industries.
MARCEL DIETRICH

_Homburger AG_

Marcel Dietrich is the head of Homburger's competition and regulatory practice team. His practice focuses on Swiss and European competition and antitrust law, as well as on administrative law and regulated markets. He has extensive and long-standing experience in all areas of competition law, ranging from merger control to administrative and civil antitrust litigation.

He also advises on compliance matters and internal investigations. With regard to regulated markets, he specialises in energy, healthcare and pharma, media and telecommunication, infrastructure and transport, as well as in public procurement. His practice also includes contract, real estate and corporate law, as well as domestic and international litigation and arbitration.

He is a member of various national and international competition law associations. He is the chairman of the Zurich Bar Association’s committee on competition law. He regularly publishes and lectures on various subjects of competition law and administrative law, and is a co-editor and co-author of one of the leading textbooks on Swiss competition law.

MAURITS DOLMANS

_Cleary Gottlieb Steen & Hamilton LLP_

Maurits JFM Dolmans is a partner based in the London office of Cleary Gottlieb Steen & Hamilton LLP.

Mr Dolmans’ practice focuses on EU, UK and international competition law, as well as EU regulatory and EU intellectual property law. Mr Dolmans has extensive experience in the information technology, telecoms, media and entertainment sectors, as well as in the energy, medical devices, chemicals and manufacturing industries. He has appeared in proceedings before the EU Commission and the EU courts, national courts and national competition authorities of several Member States, and ICC and NAI arbitrations. Many of his competition cases involve abuse of dominance, licensing or refusals to license, European standardisation, access to networks, mergers, joint ventures and other transactions in the IT, telecoms and other areas, intellectual property arbitration and litigation, abuses of dominance and cartels. He has published widely in these areas.

Mr Dolmans’ public cases include the EU’s clearance of Google’s acquisition of Motorola, the UK OFT clearance of Google’s acquisition of Beatthatquote and Waze, the successful closure of a range of complaints against IBM for alleged abuse of dominance, representation of Google in a wide range of matters involving alleged abuse of dominance relating to patents, search services and advertising, and various antitrust cases against Microsoft.

Mr Dolmans is distinguished by Chambers’ guides on ‘the world’s leading lawyers’ and by other publications as a leading lawyer in the areas of competition, antitrust and communications.
BERNT ELSNER
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Bernt Elsner leads the Austrian team for EU competition law, public procurement law and public law. He is head of the global CMS public procurement group and a member of the managing team of the global CMS competition and EU practice groups. Bernt studied law at the University of Vienna and business administration at the Economic University of Vienna. He was a law clerk at the Austrian Constitutional Court and has over 20 years of experience as an attorney in Vienna and Brussels. Bernt has authored numerous books and articles. He is a well-known expert with specific experience on cross-border merger control matters, anticompetitive behaviour in tender procedures, antitrust damage and antitrust compliance.

MARIA ERMOLAEVA
CMS Russia
Maria Ermolaeva is an associate in the competition team of CMS Russia. Her practice focuses on competition law and IP issues.

Maria advises clients on a broad range of antimonopoly matters, such as anticompetitive agreements, concerted actions and distribution structuring, as well as obtaining merger clearances. Her experience also includes advising on general competition compliance and industry-specific anti-monopoly issues.

GIANLUCA FAELLA
Cleary Gottlieb Steen & Hamilton LLP
Gianluca Faella is a counsel at Cleary Gottlieb Steen & Hamilton LLP. His practice focuses on competition law, state aid and economic regulation (including electronic communications and media regulation). He advises leading companies in proceedings before competition and regulatory authorities and EU, administrative and civil courts concerning abuses of dominance, restrictive agreements, mergers, state aid and regulatory issues.

He is associate professor at the Università degli studi Link Campus University of Rome, where he teaches competition and intellectual property law and public comparative law, and adjunct professor at the LUISS Guido Carli University of Rome, where he teaches competition and high-tech markets and law and economics. He was also an adjunct professor at the University of Siena, the University of Bologna and the University of Naples Federico II, a research fellow at LUISS Guido Carli University (2008–2012) and a research scholar at the New York Law School (2005).

He obtained an LLM degree in competition law and economics at the Erasmus University Rotterdam in 2003, and a PhD in law and economics at LUISS Guido Carli University in 2005.

Mr Faella is the author of a book on discounting policies of dominant firms (Politiche di sconti delle imprese dominanti, Giappichelli, Turin, 2012), as well as several articles and essays on competition law, unfair competition, intellectual property and civil law. He has delivered speeches at several conferences and seminars in Italy and abroad.
ANDREJ FATUR

Fatur Menard Law Firm

Andrej Fatur is a senior partner, and has extensive international experience gained from studying and working in New York, London, Luxembourg and Amsterdam. He specialises in competition and corporate law. As an attorney, he has advised numerous leading domestic and foreign corporations on complex competition law issues, particularly on information and communication technology, pharmaceuticals and trade, as well as on the restructuring and regulation of the energy and pharmaceutical sectors. He is the author of numerous articles and papers, particularly in the field of competition law. In 2012, Hart Publishing published his book, *Information and Communication Technology Networks Industries and EU Competition Policy*. He was also a recipient of several prestigious international scholarships, such as the Fulbright Scholarship and the Chevening Scholarship. He regularly lectures at international seminars and conferences. Besides his legal practice in Slovenia, Dr Fatur is also a licensed attorney in New York. Since March 2012, he has also been a member of the supervisory board of Nova KBM dd, a Slovenian bank. He is listed by *Chambers and Partners* as one of the leading competition lawyers in Slovenia, and is notably praised for his excellent knowledge of EU competition law.

ARLAN GATES

Baker McKenzie LLP

Arlan Gates is a partner in Baker McKenzie’s global antitrust and competition practice group and heads the antitrust and competition team in Canada. His practice focuses on merger control and counselling in the areas of pricing, distribution and trade practices, abuse of dominance, competitor collaboration, marketing practices and misleading advertising. He has significant experience in the pharmaceuticals, health, food and consumer products sectors, as well as in technology, communications and other industries. He is based in the firm’s Toronto office and has also worked in the Sydney office.

NEHA GEORGIE

Allen & Gledhill LLP

Neha Georgie is an economist in the firm’s competition and antitrust practice. She is involved in providing economic analysis for competition law and antitrust matters, which includes global cartel investigations, abuse of dominance investigations, merger assessments and market studies.

Prior to joining Allen & Gledhill, Neha had both private and public sector experience in advising on competition matters at an economic consultancy firm in London and subsequently at the former Competition Commission of Singapore (now known as the Competition and Consumer Commission of Singapore). Her experience includes investigations before the former UK Office of Fair Trading and Competition Commission (now known as the UK Competition and Markets Authority).

Neha graduated from the University of Warwick with a BSc (Hons) in Economics in 2010. She also holds a post-graduate MSc in Economics from University College London. She joined Allen & Gledhill in 2016.
PAUL GILBERT
Cleary Gottlieb Steen & Hamilton LLP

Paul Gilbert is counsel based in the London office of Cleary Gottlieb.

Mr Gilbert’s practice focuses on EU and UK competition law, including merger control, anticompetitive agreements, abuse of dominance and sectoral regulation. He has represented clients before the European Commission, the UK Competition and Markets Authority (and its predecessors, the Office of Fair Trading and Competition Commission), as well as in litigation before the UK Competition Appeal Tribunal and Court of Appeal.

Mr Gilbert joined the firm in January 2011 and became counsel in January 2015. Before joining the firm, he was Deputy Director of Competition Policy at the UK Office of Fair Trading. Mr Gilbert graduated with first class honours from Trinity College, Oxford in 1997. He obtained postgraduate diplomas in law and legal practice from the College of Law in 2000 and 2001, both with distinction.

Mr Gilbert is a solicitor of the Senior Courts of England and Wales and a practising Irish solicitor.

MARCUS GLADER
Vinge

Marcus Glader specialises in competition law and is a partner in Vinge’s EU, competition and regulatory practice group. Marcus works with all types of EU and competition law matters, and focuses in particular on transactions, abuse of dominance issues and competition law litigation. Marcus has a wealth of international experience after several years in Brussels, including at the European Commission and a leading international firm, before managing Vinge’s Brussels office. He is ranked among the top five competition law specialists in Sweden. Marcus holds a doctor of laws from Lund University, and is a guest lecturer at Lund University and Stockholm University.

FRANCISCO ENRIQUE GONZÁLEZ-DÍAZ
Cleary Gottlieb Steen & Hamilton LLP

Francisco Enrique González-Díaz is a partner based in the Brussels office.

Mr González-Díaz’s practice focuses on European and Spanish competition law, including mergers and acquisitions, restrictive practices, abuse of dominance and state aid.

Mr González-Díaz has a law degree from the University of Granada (Spain), as well as LLM degrees from the Free University of Brussels (Belgium) and Harvard University (United States), and an economics and mathematics degree from the Open University (UK).

Prior to joining Cleary Gottlieb Steen & Hamilton LLP, Mr González-Díaz held a number of positions within European institutions. Between 1998 and 2003, he headed one of the enforcement units of the European Commission’s Merger Task Force, and led the European Commission in its review of a number of large and complex cases in a wide array of market sectors. Between 1996 and 1998, he clerked at the European Court in Luxembourg. From 1990 to 1996, he was a member of the European Commission’s Legal Service.

Mr González-Díaz has written extensively on EU law matters, particularly in the field of antitrust and competition law. He has recently authored and edited a book on abuse of dominance at the EU level. He was a lecturer in private international law at the University of Alicante from 1985 to 1989. He also serves on the advisory and editorial boards of a number of legal publications.
Mr González-Díaz is a member of the Bars in Madrid and Brussels. His native language is Spanish, and he is fluent in English and French.

**THOMAS GRAF**

*Cleary Gottlieb Steen & Hamilton LLP*

Thomas Graf is a partner at Cleary Gottlieb Steen & Hamilton LLP. Mr Graf’s practice focuses on EU competition law, regulatory affairs and intellectual property law. His experience includes work in a number of industries, including IT, pharmaceuticals, media, sports rights, energy and engineering.

**LACHLAN J GREEN**

*Jones Day*

Lachlan Green has worked for a number of private parties seeking regulatory approval from Australian regulators, including merger clearances before the Australian Competition and Consumer Commission. He has also gained experience providing advice to a number of multinational clients on Australia’s competition and consumer law frameworks.

**GÖNENÇ GÜRKAYNAK**

*ELIG Gürkaynak Attorneys-at-Law*

Mr Gönenc Gürkaynak is a founding partner of ELIG Gürkaynak Attorneys-at-Law, a leading law firm of 90 lawyers based in Istanbul, Turkey. Mr Gürkaynak graduated from Ankara University, Faculty of Law in 1997, and was called to the Istanbul Bar in 1998. Mr Gürkaynak received his LLM degree from Harvard Law School, and is qualified to practise in Istanbul, New York and Brussels, as well as in England and Wales, where he is currently a non-practising solicitor. Before founding ELIG Gürkaynak Attorneys-at-Law in 2005, Mr Gürkaynak worked as an attorney at the Istanbul, New York and Brussels offices of a global law firm for more than eight years.

Mr Gürkaynak heads the competition law and regulatory department of ELIG Gürkaynak Attorneys-at-Law, which currently consists of 45 lawyers. He has unparalleled experience in Turkish competition law counselling issues, with more than 20 years of competition law experience, starting with the establishment of the Turkish Competition Authority. Every year, Mr Gürkaynak represents multinational companies and large domestic clients in more than 35 written and oral defences in investigations of the Turkish Competition Authority, approximately 15 antitrust appeal cases in the high administrative court and over 85 merger clearances of the Turkish Competition Authority, in addition to coordinating various worldwide merger notifications, drafting non-compete agreements and clauses, and preparing hundreds of legal memoranda concerning a wide array of Turkish and EC competition law topics.

Mr Gürkaynak frequently speaks at conferences and symposia on competition law matters. He has published more than 150 articles in English and Turkish through various international and local publishers. Mr Gürkaynak also holds teaching positions at undergraduate and graduate levels at two universities, and gives lectures in other universities in Turkey.
BEN HOLLES DE PEYER
*Cleary Gottlieb Steen & Hamilton LLP*

Ben Holles de Peyer is an associate based in the Brussels office. Mr Holles de Peyer joined Cleary Gottlieb Steen & Hamilton LLP in 2012.

Mr Holles de Peyer’s practice focuses on EU and Spanish competition law. He has experience advising clients in a wide array of market sectors. Moreover, he has appeared before the EU courts in litigation involving data protection and abuse of dominant position.

Mr Holles de Peyer has a law degree and a political science degree from the Autonomous University of Madrid (Spain), as well as LLM degrees from the College of Europe (Belgium) and Harvard University (United States). He also participated in an international exchange programme at Sciences Po, Paris.

Mr Holles de Peyer is a member of the Bar in Madrid. His native languages are English, Spanish and Catalan, and he is fluent in French.

FRANZ HOFFET
*Homburger AG*

Franz Hoffet is a partner in Homburger’s competition and regulatory practice team. He has extensive experience in all areas of Swiss and European competition law, including domestic and multinational merger control, administrative and civil antitrust litigation. He has represented a wide range of companies and trade associations in proceedings before the Swiss competition authorities, the European Commission and in civil courts and arbitration proceedings.

He also advises clients on compliance matters of Swiss and European competition law. Other areas of practice include regulated markets; in particular, energy, healthcare and pharma, media and telecommunications, infrastructure and transport, and international trade and public procurement.

He is the chairman of the Swiss Bar Association’s committee on competition law and a number of international and national competition law associations. He regularly publishes and lectures on competition law topics and is the co-editor and co-author of a leading treatise on Swiss competition law.

VANESSA HORACECK
*CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH*

Vanessa Horaceck is an associate at CMS Reich-Rohrwig Hainz in Vienna. She specialises in European and Austrian competition law, as well as in public procurement law.

SHANTHI KANDIAH
*SK Chambers*

Shanthi Kandiah is the head of SK Chambers’ legal and regulatory advisers, specialising in competition law, telecommunications regulation, data protection and cybersecurity. Her competition law practice covers antitrust litigation, cartels and sectoral competition regimes, including merger control. She regularly advises many corporations in sectors such as media and telecommunications, aviation, fast-moving consumer goods, construction, pharmaceuticals and other service industries covering issues ranging from competitor collaborations, cartels, pricing and rebate policies, and compliance. Recently, she acted as coordinating counsel in
the largest enforcement action to date by the Malaysian Competition Commission involving fines exceeding 200 million ringgit. On mergers, her recent assignments include serving as local counsel on a multi-jurisdiction merger transaction led by a magic circle firm. She has also successfully advised on antitrust approval for acquisitions in the communications and multimedia sector. Shanthi has a master's degree in law and a postgraduate diploma in competition economics, both from King's College London.

**KITI KARVINEN**  
*Castrén & Snellman Attorneys Ltd*  
Kiti Karvinen is a senior associate in Castrén & Snellman’s competition and procurement practice. Ms Karvinen joined the practice at the beginning of 2015. Prior to joining the firm, she worked at another law firm for several years advising clients on a wide range of issues relating to competition law with particular focus on issues of dominant companies. In addition to her LLM degree from the University of Helsinki, she has completed a postgraduate diploma in EU competition law at King’s College London. Ms Karvinen specialises in antitrust and competition law. She advises clients in EU and Finnish competition law across a variety of business sectors.

**YUSUKE KASHIWAGI**  
*Koike & Kashiwagi Law Office*  
From 2004 to 2008, Mr Kashiwagi was chief investigator at the Investigation Bureau of the Japan Fair Trade Commission (JFTC), during which time he led the JFTC to victory in its fight against several companies in cases such as *NIPRO* (private monopolisation) and *Microsoft* (unfair business practices, non-assertion provisions). He has also reviewed other cases, such as the *Marine Hose* cartel case and the *Qualcomm* case. From 2007, he also served in the JFTC’s Merger and Acquisitions Division, was responsible for legal revisions of the prior notification system, drafted revised clauses for Chapter 4 of the Antimonopoly Act and conducted a review of *BHP Billiton/Rio Tinto*. Since 2008, he has obtained both maximum immunities and reductions of fines imposed by various countries on auto part cartels, been involved in numerous cases relating to international cartels, such as auto shipping cartels, and has also been involved in some highly complex merger control cases, as well as in numerous cases of private monopolisation and unfair business practices.

In 2018, Kashiwagi founded a new law firm, Koike & Kashiwagi Law Office.

**FRANÇOIS-GUILLAUME DE LICHTERVELDE**  
*Cleary Gottlieb Steen & Hamilton LLP*  
François-Guillaume de Lichtervelde is an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr de Lichtervelde’s practice focuses on EU and Belgian competition law. After completing an LLB and a BSc in business engineering at the Saint-Louis University of Brussels in 2013, Mr de Lichtervelde graduated from the Catholic University of Leuven in 2015 with a Master of Laws, spending one exchange semester at the Autonomous University of Madrid. He earned an LLM degree from the London School of Economics and Political Sciences in 2017. Mr de Lichtervelde is a member of the Brussels Bar. His native language is French, and he is fluent in English and Dutch, with a proficient knowledge of Spanish.
ANA PAULA MARTINEZ  
*Levy & Salomão Advogados*

Ana Paula Martinez is a partner at Levy & Salomão Advogados. Ms Martinez served in Brazil’s federal government from 2007 to 2010, where she was responsible for government antitrust investigations and enforcement actions. As part of her government service, she also served as the co-chair of the cartel subgroup of the International Competition Network (ICN), alongside the US Department of Justice, and represented Brazil before the OECD. Ms Martinez served as an antitrust adviser to UNCTAD, the World Bank and the government of Colombia, and is currently a non-governmental adviser to the ICN.

Before entering government, Ms Martinez was an associate with Cleary Gottlieb Steen & Hamilton LLP and Levy & Salomão Advogados. She is a frequent speaker at both Brazilian and international colloquiums. *Global Competition Review (GCR)* named her on its lists ‘Top Women in Antitrust’ and ‘40 under 40’. *Chambers and Partners, The Legal 500* and *Who’s Who Legal* have listed her among the world’s leading competition practitioners. In 2015, she was selected as one of the top five lawyers globally in merger clearance matters by *GCR*, and in 2014 and 2016, *GCR* awarded her ‘Lawyer of the Year – Under 40’. Ms Martinez is admitted to practise in New York and Brazil. She holds master of laws degrees from both Harvard Law School and the University of São Paulo (USP), and a PhD degree in criminal law from USP.

JOHN MESSENT  
*Cleary Gottlieb Steen & Hamilton LLP*

John Messent is an associate based in the London office of Cleary Gottlieb. Mr Messent’s practice focuses on EU and UK competition law, including merger control, anticompetitive agreements, abuse of dominance and sectoral regulation. He is a practising barrister and has represented clients before the European Commission and the UK Competition and Markets Authority, as well as in litigation.

Mr Messent joined the firm’s Brussels office in 2008, and moved to the London office in 2012. From October 2013, he spent six months on secondment in the policy department of the UK Office of Fair Trading, working on guidance documents to be published by the new Competition and Markets Authority (including guidance on mergers, Competition Act investigations and criminal cartel offence prosecutions).

HENRY MOSTYN  
*Cleary Gottlieb Steen & Hamilton LLP*

Henry Mostyn is an associate in the London office of Cleary Gottlieb Steen & Hamilton LLP, having joined the firm in 2012. He is a barrister of England and Wales. Mr Mostyn’s practice focuses on all aspects of EU competition law.

MORGAN L MULVENON  
*Cleary Gottlieb Steen & Hamilton LLP*

Morgan Mulvenon was an associate based in Cleary Gottlieb Steen & Hamilton LLP’s Washington, DC office, practising in a broad range of antitrust matters, including litigation, mergers and counselling, across a wide range of industries.
Ms Mulvenon received her JD, *magna cum laude*, Order of the Coif, from Georgetown University Law Center in 2012, where she was an executive editor for the *Georgetown Law Journal*, and received her AB, *magna cum laude*, in public policy studies and history from Duke University in 2009.

**JUSSI NIEMINEN**
*Castrén & Snellman Attorneys Ltd*

Jussi Nieminen is a partner in Castrén & Snellman's competition and procurement practice. Mr Nieminen specialises in competition law, state aid and procurement matters, as well as merger and acquisition transactions. He advises clients in all aspects of Finnish and EU competition and procurement law regimes. Mr Nieminen frequently represents major companies in competition law enforcement proceedings before authorities and courts. He also has extensive expertise in complex merger control filings, substantive analysis and multi-jurisdictional coordination, audits, strategic compliance work and complex commercial arrangements across a number of industries.

Prior to joining Castrén & Snellman in 2009, Mr Nieminen worked in the legal department of a multinational listed construction group. In addition to having completed his LLM degree at the University of Turku, he also studied at the University of Copenhagen in Denmark and has a postgraduate diploma in competition law economics from King’s College London.

**TRINE OSEN BERGQVIST**
*Vinge*

Trine Osen Bergqvist works as a specialist in Vinge’s EU, competition and regulatory practice group. Before joining Vinge in August 2017, she worked for many years at the Swedish Competition Authority, first as legal counsel in the Legal Department, and later as deputy head of the Market Abuse Unit, which investigates cases regarding abuse of a dominant position. She has many years of experience from working as a lawyer at Swedish and Norwegian law firms. Trine holds an LLM from the University of Bergen (1996) and a master’s degree from Stockholm University. She also holds postgraduate diplomas in competition law and economics of competition law from King’s College London. She is a member of the Swedish Bar and the Norwegian Bar.

**ANAND S PATHAK**
*P&A Law Offices*

Anand S Pathak practises in the areas of US, European and Indian mergers, acquisitions and joint ventures, and technology licensing, distribution and agency arrangements. He attended all of the European Council negotiation meetings leading to the adoption of the EU Merger Control Regulation and assisted in the drafting of the implementing regulations and guidelines issued by the European Commission. He has represented clients in European Commission proceedings, investigations and notifications of concentrations under EU competition laws, including Toyota, General Electric, Dresser Industries, Ingersoll-Rand, Pepsico Inc and Waste Management, and, more recently, Ranbaxy Laboratories Limited in a competition law proceeding before the European Commission in the *Lundbeck* case. He has represented several clients in proceedings before the Indian Competition Commission, the Competition Appellate Tribunal, the National Company Law Appellate Tribunal and
the Supreme Court of India, including Apple Inc, MCX-SX, Financial Technologies (India) Limited, Sony Pictures, Daiichi Sankyo, Eli Lilly, General Motors, Bull Machines, Ericsson, Amazon, Super Cassettes, members of the Tata Group and DLF Limited.

Mr Pathak has practised law for more than 25 years. Prior to joining P&A Law Offices, he was a lawyer in Brussels, Cleveland, New York and Palo Alto. He is admitted to practise law in India and the states of Ohio and California in the United States. He is a graduate of Cambridge University and Yale University and has worked at both the European Court of Justice and in the Competition Division of the Legal Service of the European Commission. He has received several awards for M&A and competition law, including ‘Best M&A Lawyer in India’ in 2008; ‘India M&A Legal Counsel of the Year’ in 2009; ‘India M&A Lawyer of the Year’ in 2011 and 2012; and ‘India Competition Lawyer of the Year’ each year from 2011 to 2018.

ROBERT PELIKÁN

_Wolf Theiss_

Robert Pelikán has extensive experience in corporate law, litigation, arbitration and all aspects of national (Czech and Slovak) and EU competition law, including merger control, antitrust, cartel investigations and abuse of dominant positions. In the course of his career, he regularly advises notable and prestigious clients, both from the Czech Republic and abroad, in high-profile complex cases, which has gained him an excellent reputation as one of the major local experts in these practice areas. Robert graduated from the Faculty of Law of Charles University in Prague, has worked at several prestigious law firms and joined Wolf Theiss in 2018, becoming partner in 2019. From 2015 to 2018, he served as the Minister of Justice of the Czech Republic and, since 2017, he has presided over the Legislative Council of the Czech government.

Robert has always been active in academia, and co-authored the Commentary to the Civil Code in 2014 and _Corporate Law_ in 2015. He also teaches corporate and competition law at the Faculty of Law of Charles University.

JAROMÍR PUMR

_Wolf Theiss_

Jaromír Pumr is a member of Wolf Theiss’ corporate, dispute resolution and competition practices. Before joining the company, he gained his experience as a governmental lawyer at the Law and Administration Department of the Czech Ministry of Education. He also worked as a legal trainee at two local law firms, specialising in intellectual property and dispute resolution law. Jaromír graduated from the Faculty of Law of Charles University in Prague in 2018. During his studies, his main focus was on corporate and IT law, as well as the law of regulated industries, including financial markets and network industries.

DOMINIC REBELO

_Anjarwalla & Khanna_

Dominic Rebelo is a partner at Anjarwalla & Khanna and co-heads the firm’s competition practice. He has wide-ranging experience in competition, corporate mergers and acquisitions, private equity, capital markets and natural resources. Prior to joining Anjarwalla & Khanna, he was a partner at Daly & Figgis Advocates.
Mr Rebelo has advised domestic, regional and international private and public listed companies on a variety of commercial transactions, including antitrust concerns, share acquisitions, privatisations and public listings. He has also assisted a variety of foreign investors in setting up operations in Kenya.

KENNETH S REINKER  
_Cleary Gottlieb Steen & Hamilton LLP_

Ken Reinker is based in Cleary Gottlieb Steen & Hamilton LLP’s Washington, DC office, and practises in a broad range of antitrust matters, including litigation, government investigations and merger review. His practice spans all industries and includes extensive experience in pharmaceuticals, medical devices and healthcare; high-technology industries; mass media; and financial institutions. He has particular expertise in the application of economics to complex legal matters and in working with economic experts, and, after law school and prior to joining the firm, he worked as an antitrust economist on cutting-edge litigation as executive director of Legal Economics LLC.

Mr Reinker received his JD, *magna cum laude*, from Harvard Law School in 2006, where he was on the Harvard Law Review, and received his BS, *magna cum laude*, in economics from Duke University in 2003. He clerked for the Honorable Michael Boudin of the US Court of Appeals for the First Circuit, and while in law school, taught antitrust economics at Harvard as a teaching fellow.

BART DE RIJKE  
_De Brauw Blackstone Westbroek NV_

Bart de Rijke divides his time between Amsterdam and Brussels. He specialises in EU and Dutch competition law. Bart has a special interest in technology-driven industries, building on his experience in representing high-tech companies in complex competition matters and his involvement in Europe-wide patent litigation involving substantial competition law issues. He has significant experience in acting as coordinating counsel in multi-jurisdictional merger filings and has established working relations with first-tier competition experts in all major jurisdictions. He has successfully litigated in abuse of dominance cases and regularly advises clients on related topics. His work includes advising and defending clients in cartel investigations by European and national regulators. He also regularly advises multinational clients on aspects of competition law in contractual relations, in particular involving IP rights.

TOBIAS RUMP  
_Cleary Gottlieb Steen & Hamilton LLP_

Tobias Rump is an associate based in the Cologne office of Cleary Gottlieb Steen & Hamilton LLP and a member of the Cologne Bar.

Mr Rump’s practice focuses on European and German competition law, including administrative litigation. Mr Rump joined Cleary Gottlieb Steen & Hamilton LLP in 2013. He passed his second state examination in the state of Berlin in 2013 and the first state examination at the University of Osnabrück in 2007.
DAREN SHIAU

*Allen & Gledhill LLP*

Daren Shiau, PBM, is a leading regional competition law specialist whose practice covers antitrust litigation, international cartels and merger control. He is co-head of the firm’s corporate and commercial department, and its competition and antitrust practice.

A pioneering competition law specialist in Singapore and Association of Southeast Asian Nations (ASEAN) with unparalleled antitrust experience in South East Asia, Daren has been cited as ‘the most highly nominated practitioner’, ‘Singapore’s top competition lawyer’, ‘a real expert according to rivals’, and one of the ‘finest lawyers in the region’ by *Who’s Who Legal*.

He has successfully advised on more than 70 per cent of Singapore’s merger control cases, acted for the successful amnesty applicant of Singapore’s first global cartel decision, the successful leniency applicant to its second global cartel decision, and defended parties in 100 per cent of Singapore’s international cartel decisions to date.

Daren has also worked on multiple landmark abuse of dominance cases, including the first appeal to the Competition Appeal Board.

A commissioned trainer of the high-level ASEAN Experts Group on Competition, Daren is a principal examiner on competition law for the Singapore Institute of Legal Education’s Foreign Practitioners Examinations, and the Singapore Bar Examinations. He is also Singapore’s first appointed non-governmental adviser at the International Competition Network.

PRUDENCE J SMITH

*Jones Day*

Prudence Smith is a highly experienced competition law practitioner who advises clients on a full range of competition regulatory law issues. She has extensive experience in merger clearance, cartel and anticompetitive conduct investigations and litigation, Australian Competition and Consumer Commission immunities, authorisations and notifications of contracts affecting competition.

ROBBERT SNELDERS

*Cleary Gottlieb Steen & Hamilton LLP*

Robbert Snelders is a partner in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Mr Snelders focuses his practice on EU competition law. He has extensive experience in EU and worldwide merger control proceedings, EU and international cartel and abuse of dominance investigations and litigation before national courts and the European courts in Luxembourg and arbitration proceedings. He is distinguished by *Chambers Global* as an antitrust practitioner in Belgium and by *Chambers Europe* as a European antitrust lawyer. A graduate from Leiden University (1990, highest honours), the College of Europe (1991, DAELS degree) and Harvard Law School (1992), Mr Snelders is a member of the Brussels Bar and the New York Bar. His native language is Dutch, and he is fluent in English and in French.
SONG YING
AnJie Law Firm

Song Ying is a partner at AnJie Law Firm. She graduated from the University of Bonn in Germany with a master’s degree in competition law. Ms Song has extensive experience in representing multinational and domestic clients in antitrust investigations, and has advised clients across a broad range of sectors, such as the internet, aviation, automobile, pharmaceuticals, electronics, telecommunications, energy, household electrical appliance, infant formula, food and semiconductor sectors. In addition, Ms Song has defended clients against competitors’ objections, as well as filed many concentration notifications with the Ministry of Commerce of the People’s Republic of China. She has also represented clients in several high-profile antitrust litigation cases in China. With an in-depth experience of Chinese antitrust enforcement, Ms Song has also assisted companies in antitrust compliance. She has also been involved in the drafting, advising, discussion and formulation of the supporting regulations of the Chinese Anti-Monopoly Law. Ms Song has been named as a recommended antitrust lawyer of the PRC by Chambers and Partners and The Legal 500 in 2017 and 2018.

GEORGI SPASOV
Spasov & Bratanov Lawyers’ Partnership

Georgi Spasov is the managing partner for Spasov & Bratanov and has been a member of the Bar since 1993. His areas of specialist knowledge acquired during his overseas research studies include: banking and finance law (London), securities exchange and regulation (Japan), European banking law (London) and EU law (The Hague). He has participated in most of the partnership’s sizeable projects in the areas of mergers and acquisitions, banking and securities markets, energy and infrastructure, competition law, litigation and arbitration. He taught commercial law at Sofia University ‘St Kliment Ohridski’, and is repeatedly mentioned, as well as personally recommended, as an eminent practitioner by the leading professional directories. He has performed various professional assignments in more than 20 jurisdictions and, in 2016, was appointed to both panels of the International Centre for Settlement of Investment Disputes by the Bulgarian government. Georgi leads the competition practice of the firm.

NUNA VAN BELLE
Cleary Gottlieb Steen & Hamilton LLP

Nuna Van Belle is an associate in the Brussels office of Cleary Gottlieb Steen & Hamilton LLP. Ms Van Belle’s practice focuses on EU and Belgian competition law. Ms Van Belle graduated with a double Master of Laws from Ghent University in 2013 and the University of Liège in 2014, spending one semester at the University of Surrey. Ms Van Belle earned an LLM degree from Harvard Law School in 2018. Ms Van Belle is a member of the Brussels Bar. Her native language is Dutch, and she is fluent in English and French.

EDWINA WARAMBO
Anjarwalla & Khanna

Edwina Warambo is a principal associate with the firm and focuses on the following areas of practice: competition, corporate mergers and acquisitions and employment. Edwina is a member of the Law Society of Kenya.
EVA WARDEN
*Baker McKenzie LLP*

Eva Warden is an associate in Baker McKenzie’s global antitrust and competition practice group. She practises mainly in the area of antitrust and competition law, including merger control and compliance advising and training in a variety of industries. She joined the firm’s Toronto office as a summer associate in 2011, and also works in the EU competition and trade practice group in the firm’s London office.

MATTHEW J WHITAKER
*Jones Day*

Matthew Whitaker has experience in a range of commercial matters across a broad spectrum of competition law issues in Australia, including in merger clearance and Australian Competition and Consumer Commission investigations in different industries. He has also worked on matters involving regulatory issues with other Australian regulators, including the Therapeutic Goods Administration, the Department of the Environment and Energy and the Department of Health, and has experience in disputes in both the Federal Court of Australia and the Supreme Court of New South Wales.

ANTOINE WINCKLER
*Cleary Gottlieb Steen & Hamilton LLP*

Antoine Winckler is a partner based in the Brussels office, and his practice focuses on European and French competition law. Mr Winckler has advised clients in numerous cartel, merger control and abuse of dominance cases.

Mr Winckler also has extensive experience in representing corporate clients and financial institutions, as well as governments and public entities, regarding EU state aid rules.

Mr Winckler regularly represents clients before the European Commission, the European courts in Luxembourg, the French Competition Authority and the Court of Appeal in Paris.

Mr Winckler joined the firm in 1985 and became a partner in 1992. Prior to joining Cleary Gottlieb Steen & Hamilton LLP, Mr Winckler was an administrative judge. He received law degrees from the Université de Nice Sophia Antipolis in 1984 and from the Institut d’études politiques de Paris in 1979. Mr Winckler graduated from the Ecole Normale Supérieure in 1976 and the French Ecole Nationale d’Administration in 1983.

Mr Winckler is a member of the Bars of Paris and Brussels, and he teaches EU and French competition law at the Law School of the Institut d’études politiques de Paris. He has written extensively about EU competition law matters.

STEPHANIE WU
*AnJie Law Firm*

Stephanie Wu is a partner in AnJie Law Firm’s Shanghai office. Stephanie specialises in antitrust and competition law, and advises on all aspects and phases of antimonopoly law, including compliance, investigations, merger notification, antitrust private litigation and fair competition review. Stephanie has extensive experience in advising both multinationals and Chinese companies on antimonopoly law issues pertaining to the compliance of companies’ daily operations and business practices in China, in particular regarding issues relating to,
inter alia, supply and distribution, horizontal cooperation, information exchange, sales and marketing and after sales. Stephanie has also advised clients on the formation of tailor-made antimonopoly law compliance systems and the formulating of responses to investigations and complaints, and has provided training and performed internal audits for clients. The clients Stephanie advises range from the medical device, chemicals and pharmaceuticals to electronics, motor vehicle and aviation sectors. Stephanie has authored many articles on various issues relating to China’s antimonopoly law in English and Chinese from a comparative law perspective.

KREMENA YANEVA-IVANOVA
Spasov & Bratanov Lawyers’ Partnership
Kremena Yaneva-Ivanova has been a member of the Bar since 2010, and has extensive professional experience in counselling large and medium-sized corporates on all aspects of antitrust and competition law, including on dawn raids and investigation defence, as well as in related litigation. Kremena has particular expertise in antitrust and merger control in the energy, utilities and media sectors. In 2017, Kremena was awarded a Master of Arts degree in EU competition law by King’s College London, for her dissertation titled ‘What Article 102 can do about tacit collusion’, which deals with one of the most complex and controversial antitrust issues. Kremena has authored two articles on exploitative abuses and co-authored the Bulgarian chapter on merger control in the 2014 International Financial Law Review with Georgi Spasov.

DIETER ZANDLER
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Dieter Zandler is a partner at CMS Reich-Rohrwig Hainz in Vienna. He specialises in European and Austrian antitrust law, representing international and Austrian clients especially in cartel (fine), antitrust damage, antitrust compliance, merger control and abuse of dominance proceedings before national competition authorities and courts, and the European Commission and EU courts. He has over 10 years of experience as a lawyer and holds a doctorate from the University of Salzburg, as well as a master’s of law from Central European University in Budapest. Prior to joining CMS, he clerked at the Austrian cartel court and was an intern with two well-known international law firms in Vienna. In 2011, he was seconded to the CMS EU law office in Brussels.

ZHAN HAO
AnJie Law Firm
Zhan Hao is the managing partner of AnJie Law Firm. He has obtained a PhD in law and conducted postdoctoral research on microeconomics. He has published several books on the Chinese Anti-Monopoly Law. In addition, Dr Zhan is an arbitrator for the China International Economic and Trade Arbitration Commission and the vice president of the International Committee of the All China Lawyers Association.

Dr Zhan has successfully defended clients in antitrust litigations in Chinese courts, conducted competition law training and provided antitrust analysis for a large number of companies, including Fortune 500 companies, listed companies and state-owned enterprises (SOEs).
Dr Zhan also has an abundance of experience in representing clients in antitrust investigations. For instance, he represented respondents in China’s first antitrust investigation into price cartels, obtaining suspension of the investigation.

Dr Zhan has assisted many multinational and SOEs in concentration antitrust filings in China, and to date he has secured approvals for all the transactions he has represented. He has served in multiple fields, including pharmaceuticals, automobile, energy, finance, machinery, electronics, textiles, aviation, high-tech and consumer goods.

He has been extensively involved in the drafting, advising, discussion and formulation of the Chinese Anti-Monopoly Law and its supporting regulations. In addition, Dr Zhan has been named as a recommended antitrust lawyer of the PRC by various international institutions, such as *Chambers and Partners*, *Who’s Who Legal*, *GCR* and *ALB*. 
Appendix 2

CONTRIBUTORS’ CONTACT DETAILS

ALLEN & GLEDHILL LLP
One Marina Boulevard, No. 28-00
Singapore 018989
Tel: +65 6890 7188
Fax: +65 6327 3800
daren.shiau@allenandgledhill.com
elsa.chen@allenandgledhill.com
scott.clements@allenandgledhill.com
neha.georgie@allenandgledhill.com
www.allenandgledhill.com/

ANJARWALLA & KHANNA
3rd Floor, The Oval
Junction of Ring Road Parklands & Jalaram Road Westlands
PO Box 200-00606
Sarit Centre
Nairobi
Kenya
Tel: +254 20 364 0000
djr@africalegalnetwork.com
cow@africalegalnetwork.com
www.africalegalnetwork.com

ANJIE LAW FIRM
19/F, Tower D1
Liangmaqiao Diplomatic Office Building
No. 19 Dongfangdonglu
Chaoyang District
Beijing 100600
China
Tel: +86 10 8567 5988
Fax: +86 10 8567 5999
zhanhao@anjielaw.com
songying@anjielaw.com
wuyuanyuan@anjielaw.com
www.anjielaw.com

BAKER MCKENZIE LLP
181 Bay Street, Suite 2100
Toronto
Ontario M5J 2T3
Canada
Tel: +1 416 863 1221
Fax: +1 416 863 6275
arlan.gates@bakermckenzie.com

100 New Bridge Street
London EC4V 6JA
United Kingdom
Tel: +44 20 7919 1660
Fax: +44 20 7919 1999
eva.warden@bakermckenzie.com
www.bakermckenzie.com
BECCAR VARELA
Edificio República
Tucumán 1, 3rd Floor
Buenos Aires C1049AAA
Argentina
Tel: +54 11 4379 6800
Fax: +54 11 4379 6860
ccorvalan@beccarvarela.com
https://beccarvarela.com

CASTRÉN & SNELLMAN
ATTORNEYS LTD
PO Box 233 (Eteläesplanadi 14)
00131 Helsinki
Finland
Tel: +358 20 7765 765
Fax: +358 20 7765 001
jussi.nieminen@castren.fi
kiti.karvinen@castren.fi
www.castren.fi

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Rue de la Loi 57
1040 Brussels
Belgium
Tel: +32 2 287 2000
Fax: +32 2 231 1661
br-reception@cgsh.com
rsnelders@cgsh.com
nvanbelle@cgsh.com
fdelichtervelde@cgsh.com
fgonzalez-diaz@cgsh.com
bholles@cgsh.com
tgraf@cgsh.com
awinckler@cgsh.com

12, rue de Tilsitt
75008 Paris
France
Tel: +33 1 40 74 6800
Fax: +33 1 40 74 6888
fdeburc@cgsh.com

Theodor-Heuss-Ring 9
50668 Cologne
Germany
Tel: +49 221 800 400
Fax: +49 221 800 401 99
trump@cgsh.com

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt
Germany
Tel: +49 69 971 030
Fax: +49 69 971 031 99
sbarthelmess@cgsh.com

Via San Paolo 7
20121 Milan
Italy
Tel: +39 02 72 6081
Fax: +39 02 86 98 4440
mberetta@cgsh.com

Piazza di Spagna 15
00187 Rome
Italy
Tel: +39 06 69 5221
Fax: +39 06 69 20 0665
gfaella@cgsh.com

2 London Wall Place
London EC2Y 5AU
United Kingdom
Tel: +44 20 7614 2200
Fax: +44 20 7600 1698
mdolmans@cgsh.com
pgilbert@cgsh.com
jmessent@cgsh.com
hmostyn@cgsh.com

2112 Pennsylvania Avenue, NW
Washington, DC 20037
United States
Tel: +1 202 974 1500
Fax: +1 202 974 1999
kreinker@cgsh.com
dculley@cgsh.com

www.cgsh.com
Contributors' Contact Details

**CMS**
CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH
Gauermannsgasse 2
1010 Vienna
Austria
Tel: +43 1 40443 0
Fax: +43 1 40443 9 0000
bernt.elsner@cms-rrh.com
dieter.zandler@cms-rrh.com
vanessa.horaceck@cms-rrh.com
www.cms.law/de/AUT

**FATUR MENARD LAW FIRM**
Dunajska cesta 22
1000 Ljubljana
Slovenia
Tel: +386 8 200 7348
Fax: +386 8 200 7349
andrej@fatur-menard.com
helena@fatur-menard.com
http://fatur-menard.com

**HOMBURGER AG**
Prime Tower
Hardstrasse 201
8005 Zürich
Switzerland
Tel: +41 43 222 1000
Fax: +41 43 222 1500
marcel.dietrich@homburger.ch
franz.hoffet@homburger.ch
allegra.arnold@homburger.ch
www.homburger.ch

**JONES DAY**
Aurora Place
Level 41, 88 Phillip Street
Sydney, NSW 2000
Australia
Tel: +612 8272 0500
prudencessmith@jonesday.com
mwhitaker@jonesday.com
lagreen@jonesday.com
www.jonesday.com

**KOIKE & KASHIWAGI LAW OFFICE**
Buyoo Building, 8th Floor
8–16, Nihonbashi 3-Chome Chuo-ku,
Tokyo 103-0027
Japan
Tel: +81 3 6910 3987
Fax: +81 3 6910 3988
ykashiwagi@ksogolaw.jp
https://ksogolaw.jp/

**DE BRAUW BLACKSTONE WESTBROEK NV**
Claude Debussylaan 80
1082 MD Amsterdam
Netherlands
Tel: +31 20 577 1771
Fax: +31 20 577 1775
bart.derijke@debrauw.com
www.debrauw.com

**ELIG GÜRKAYNAK ATTORNEYS-AT-LAW**
Çiçekbik Sokak No. 12
Yıldız Mahallesi
Beşiktas
34349 Istanbul
Turkey
Tel: +90 212 327 1724
Fax: +90 212 327 1725
gonenc.gurkaynak@elig.com
www.elig.com

**KOIKE & KASHIWAGI LAW OFFICE**
Buyoo Building, 8th Floor
8-16, Nihonbashi 3-Chome Chuo-ku,
Tokyo 103-0027
Japan
Tel: +81 3 6910 3987
Fax: +81 3 6910 3988
ykashiwagi@ksogolaw.jp
https://ksogolaw.jp/

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Contributors' Contact Details

LEVY & SALOMÃO ADVOGADOS
Av Brigadeiro Faria Lima 2601, 12th Floor
São Paulo 01452-924
Brazil
Tel: +55 11 3555 5059
Fax: +55 11 3555 5048
amartinez@levysalomao.com.br
www.levysalomao.com.br

P&A LAW OFFICES
1st Floor, Dr Gopal Das Bhavan
28 Barakhamba Road
New Delhi 110 001
India
Tel: +91 11 4139 3939
Fax: +91 11 2335 0416
apathak@palaw.in

SK CHAMBERS
9B Jalan Setiapuspa
Bukit Damansara
50490 Kuala Lumpur
Malaysia
Tel: +60 3 2011 6800
Fax: +60 3 2011 6801
sk@skchambers.co
www.skchambers.co

SPASOV & BRATANOV LAWYERS’ PARTNERSHIP
Floors 2/3, Office Centre Slavyanska
29A Slavyanska Street
1000 Sofia
Bulgaria
Tel: +359 2 980 1808
Fax: +359 2 980 2510
kremena.yaneva@sbn-law.com
georgi.spasov@sbn-law.com
www.sbn-law.com

VINGE
Stureplan 8
Box 1703
111 87 Stockholm
Sweden
Tel: +46 10 614 3000
marcus.glader@vinge.se
trine.osenbergqvist@vinge.se
www.vinge.se

WOLF THEISS
Pobřežní 12
186 00 Prague
Czech Republic
Tel: +420 234 765 111
Fax: +420 234 765 110
jaromir.pumr@wolftheiss.com
robert.pelikan@wolftheiss.com
www.wolftheiss.com
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